Welsh Affairs Committee

Oral evidence: Pre-legislative scrutiny of the draft Wales Bill, HC 449
Wednesday 9 December 2015

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Watch the meeting

Members present: David T C Davies (Chair); Byron Davies; Dr James Davies; Carolyn Harris; Gerald Jones; Christina Rees; Antoinette Sandbach; Liz Saville Roberts; Craig Williams; Mr Mark Williams.

Questions 293-347

Examination of Witnesses

Witnesses: Rt Hon Stephen Crabb MP, Secretary of State, Geth Williams, Deputy Director, Constitution and Corporate Services, Wales Office, and Sue Olley, Legal Adviser, Wales Office, gave evidence.

Chair: Secretary of State for Wales, thank you very much indeed for coming along to give evidence on the Government of Wales Bill. We are starting a few minutes early because there is going to be a Division at 4 o’clock so we will have to break for that and there is quite a bit to get through. Thank you for coming along. Can I start off with Liz Saville Roberts, please?

Q293 Liz Saville Roberts: Our first question is—and I am sure that you have been watching our inquiry closely—what parts of the evidence have particularly made you reflect on your initial proposals. I would like to refer particularly to the conclusions of the Assembly’s cross-party Constitutional and Legislative Affairs Committee, which specified that you should not proceed with the Bill unless it is significantly amended, pause proceedings and either prepare a consolidating Bill with key parties or make six key amendments—all related to things that we will be bringing up later on but you can imagine their necessity and the Crown restrictions—before moving ahead. How do you respond to that, which basically sums up what we have heard from virtually all evidence here?

Stephen Crabb: If I go right back to the beginning of your question about what bit of the evidence has made me stop and think or sit up and listen, however you described it, the slightly bland but truthful answer is we have been watching it all very closely. I will be honest with you, I have been struck by the weight of evidence on some of the specific issues and how strong some of the opinions are that have been expressed. I would not at this stage start to single out any bits of evidence that have weighed more heavily on my mind than others, but we are looking at them all very carefully. You are aware that I was
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down at the Assembly’s Constitutional and Legislative Affairs Committee and we are
looking very carefully at their report.

In a sense, the pre-legislative scrutiny phase has done exactly what we intended it to do, exactly what we wanted it to do. We produced a draft Bill in the timescale that we had
determined. We had internally tested that within Whitehall, within the machinery of the
UK Government. We have put it out into the marketplace and that provides an opportunity
to hear evidence from not just the politicians who sit on committees like this one and the
one in the Assembly but also other organisations and individuals as well. What has been
really useful about the pre-legislative phase is that in a sense it has flushed out positions of
a lot of groups and individuals.

It does strike me that there are two essentially broad theological positions that have
emerged in all of this. One is that you recognise that Wales has two Governments. It has
the Welsh Government in Cardiff that we want to make primary law in the devolved areas,
in the competencies that it is responsible for, and it has the UK Government as well. Both
UK Government and Welsh Government are legitimate Governments for Wales and,
therefore, the discussion is about how you craft a piece of legislation that enables those
Governments to be clear about which Administration is responsible for which area of
policy, but also having effective mechanisms to regulate the interface of those
Governments to enable smooth and efficient governance for the benefit of the people of
Wales.

The other position, and that has been coming out very strongly in some of the evidence
and some of the rhetoric as well from some of the politicians in Cardiff, is that Wales now
has Welsh Government in Cardiff and, therefore, the legitimacy, the reach if you like, of
UK Government Ministers should recede. If you follow the logic of some of the rhetoric
of what has been said, you get to a place where you would believe that the reach of UK
Ministers should stop at Offa’s Dyke. It is what takes you to a position of characterising
UK Government as English Government, so the phrase “English veto on Welsh laws” is
all part of it. It gets you to a position where you say you do not need a necessity test; there
should not be any boundary in terms of the Welsh Assembly’s ability to change the
underlying principles of England and Wales laws. It takes you to a position where you say
there should not be any need for ministerial consents at all; the Welsh Government should
be able to legislate openly and freely, even if that means going across into areas that are
devolved.

My position I think is a very clear one. I am interested in crafting a piece of legislation that
does take devolution forward, gives new powers to Cardiff but also builds in really clear
mechanisms to ensure that the two Administrations are clear about who is responsible for
what and that there is an efficient way of those Governments giving permission and
enabling each other to make legislation fully that may for legitimate reasons need to cross
into each other’s devolved competence. That is where I am coming from and if you accept
that position the discussion becomes one of: are the mechanisms in this draft Bill the right
ones; how can they be improved? If that is not your position, if your position is from the
other angle then, of course, none of this is going to make sense because you would want to
see a piece of legislation that starts to unpick the single jurisdiction for England and
Wales, that wants to remove all of the mechanisms that recognise the legitimacy of the UK
Government.
Q294 Liz Saville Roberts: I am gratified by what you say about the degree of weight that you have given to the evidence that we have heard here and that you are reiterating the need for clarity. What we have heard time and again is what is on offer here does not clarify the situation; the opposite, if anything. In that case and given your emphasis on clarity, what will you be doing with the next version of this Bill to clarify the situation?

Stephen Crabb: Forgive me, Liz, I do not accept the position that this is somehow a less clear Bill than the existing legislation. Let us not forget the fact that the existing legislation is entirely silent on huge swathes of policy areas. It is not clear in other areas about which Administration is responsible for what. We are bringing an end to all of that, so for the very first time we are spelling out in pretty clear terms who is responsible for what in terms of broad policy architecture. If the point about clarity is about the mechanisms that we have built into the Bill, as I said a moment ago, to regulate how the two Governments interact and facilitate each other’s business, I am happy to look at whether the mechanisms in the Bill could be clearer, simpler, more straightforward. I am happy to have that discussion, but I do not accept as a starting point that this Bill somehow makes the current settlement less clear.

Q295 Carolyn Harris: Secretary of State, we all know about the Assembly’s CLA’s report last week and it is fair to say it was quite damning. They do not seem to be entirely clear—and again this would be where clarity comes in—that Wales still merits a lesser and much more complex form of devolution than either Scotland or Northern Ireland. Isn’t it fair to say that the only way to command consensus would be to go away and come back with a completely different Bill?

Stephen Crabb: On the complexity point, there is not a model of devolution—conferred, reserved, whatever model you might want to look at—that is not going to be more complicated for England and Wales than it is for other parts of the country. If you think about it, 50% of the population of Wales live within, what is it, 25 miles of the England-Wales border. The economic and social life of Wales is far more integrated into the rest of the Union than is the case for Scotland and Northern Ireland, just geographically, historically and culturally, all the other reasons that we well understand. Whatever set of arrangements we are going to come up with will by necessity be complicated.

If you think about how porous the border is, it is the reason why in this legislation we are trying to build in mechanisms to facilitate the Welsh Assembly and the Welsh Government being able to legislate that has an impact on England. For example, a live issue at the moment is should an education official from Wales have the power of entry into an English school to monitor the quality of education a Welsh child is getting in that establishment if, for example, maybe they are getting particular special needs education there? I raise that as an example because of the nature of how integrated Wales is with the rest of the Union.

We want Welsh Government to have that flexibility to make law that will at times need to impinge on England. We are not trying to stop that. If you go down the road of saying, “Let’s start the Bill again and let’s start with a single jurisdiction for Wales”, which is what quite a lot of the people who have been very vocal in giving evidence to the committees are saying, then you build in a pretty hard and deep Offa’s Dyke because then you say that Welsh law ends on the border. There is much more flexibility, if also with more complexity, in the way that we are doing it.
Q296 Carolyn Harris: Surely for the Bill to be successful there has to be some kind of consensus. The Committee says that it has failed your own tests, it is too complex and that it is rolling back the Assembly’s powers to move forward. Surely we should have more consensus to be able to make it a workable Bill.

Stephen Crabb: Why do you believe that it rolls back the Assembly’s powers?

Carolyn Harris: I am only quoting what the committee has said.

Chair: Just to clarify this, the Welsh Affairs Select Committee is not saying anything as yet because we have not produced our report, but we have heard a lot of evidence.

Carolyn Harris: No, this is the Constitutional and Legal Affairs Committee.

Stephen Crabb: That is a phrase, Carolyn, that has been repeated a lot in the Welsh media but I have yet to meet anybody who can explain to me why a draft Bill that gives more powers to Welsh Government and the Welsh Assembly is somehow also at the same time reducing competency. The two things do not make sense.

Liz Saville Roberts: With respect, that is what we have heard from the lawyers at the Assembly and we have had interpretations going backwards and forwards. The fact that it is possible for evidently professional people to make such different interpretations does ring warning bells.

Chair: Let me bring in Antoinette Sandbach; perhaps you would like to tie this up. Then we will have to move on to another important section.

Q297 Antoinette Sandbach: Doesn’t this all arise out of the Supreme Court judgment in relation to the Agricultural Wages (Wales) Bill and the confusion caused by that judgment and effectively judicial rulemaking where waters were muddied around the 2006 Act and the lines in the sand, if you like, are being drawn in schedule 7 to the Act?

Stephen Crabb: Yes, that is a good question. I do not agree that the problem is caused by any of the Supreme Court judgments. The problems existed with the way that the existing legislation is written. That is what creates confusion. The Supreme Court cases and judgments are a by-product, a fruit of the fact that we have a very unclear, unstable devolution settlement for Wales. What Agricultural Wages (Wales) Bill did was drive a coach and horses right through the conferred powers model, which is what, when I became Secretary of State, made me sit down and think we have to start approaching this from a different way. I am on the record two years ago in the House of Commons as saying be careful what you wish for with the reserved powers model. It does not necessarily give you lots of extra simplicity. That Bill, as I said, did upend the existing arrangements and did focus our minds on the need to bring this specificity to the settlement, which is not there at the moment.

Q298 Chair: Minister, in your earlier answer you just stated, correctly I think, that the point of pre-legislative scrutiny is the opportunity to hear evidence about the potential Bill and how it might be improved. That is a fair summary of what you were saying. I think it would be fair for me to surmise that one of the key elements of the Bill is going to be the tax-raising powers, which is something we have not had any opportunity to scrutinise at all. Could I then ask you when it was decided that removing the need for a referendum on tax-raising powers
Stephen Crabb: Forgive me, Chairman, I do not agree necessarily that removing the income tax referendum element of what will be the final Bill will be a key part of it. It is a convenient vehicle, the Wales Bill that we are working on at the moment, to use to make this change to an existing Welsh Act, the 2014 Act. It is the 2014 Act that really delivers the fiscal powers. What we would be doing is using this current Bill as a vehicle for an amendment to that Act to remove the referendum requirement. It is an important issue, I am not understating that, but I do not accept in terms of the architecture of the Bill that it is a key element.

In terms of your substantive point about when the decision was made, very simply and very honestly the decision was made following discussions myself, the Chancellor and the Prime Minister had in the run-up to the autumn statement. The actual decision was made just before the autumn statement and announced by the Chancellor of the Exchequer.

Chair: Within, say, a week of the autumn statement taking place would you say or a couple of weeks?

Stephen Crabb: Well, it is not a wise thing for Ministers to start to reveal the detailed decision-making processes behind the scenes, but you should be aware and you will know from coverage in the Welsh media about this issue of does Wales really need an income tax referendum to deliver a power that is in an existing Act already and given that the whole devolution debate has moved on in leaps and bounds, that is something that I have spent quite a long time thinking about. At the time of the Royal Welsh Show, for example, back in July, both I and the Prime Minister were asked about this very question. We said very honestly we have an existing set of commitments but we are aware that there are different arguments, those voices who are saying that this is just an unnecessary impediment to doing something that gives better government for the people of Wales.

Q299 Chair: This is not a place to talk party politics, but it was a manifesto commitment that there would be a referendum.

Stephen Crabb: The key manifesto commitment in that part was to bring in a funding floor, for the first time a UK Government recognising that the way the Barnett formula operates for Wales is not ideal and doing something that no previous Government had either the courage or the will to do, which was to introduce a funding floor to protect Welsh long-term relative funding. That was the important manifesto commitment. We said that we wanted to do that hand in hand, with Welsh Government taking on a portion of income tax-raising power. Why do you want it to do that? Because you give responsibility and new accountability to Welsh Government. You create opportunity for better government in Wales when the Welsh Government as well as just being a big spending department has to justify its spending decisions to Welsh taxpayers.

Q300 Chair: How wide-ranging will these tax-raising powers be? Will the lockstep be removed?

Stephen Crabb: The lockstep has already gone. That was done with the previous 2014 Act. Why did the lockstep powers go? We are in danger of rehearsing arguments that we
had a year or so ago now. We removed that because they effectively rendered those income tax powers meaningless. The whole point of doing something like an element of fiscal devolution is because you want the powers to be used.

**Q301 Chair:** How wide-ranging will those powers be? Sorry, I know others want to ask questions so I will try to limit this. Will the Assembly have the power to slash the higher rate down to 10% if it wants to or up it to 80%? Will it be able to do virtually anything it wants within that field? Is it limited only by fiscal considerations or are there any legal considerations as well? Is there any point at which you as the Government would step in and say, “Hang on a minute, this has gone too far”?

**Stephen Crabb:** We are talking about a 10 pence chunk of income tax. We are not devolving the whole of income tax down to Wales. It is 10 pence in the pound, so you have a chunk of income tax that is being devolved down. Within that chunk, the Welsh Assembly will have the freedom to vary those bands as they see fit.

**Chair:** 10 pence either way on each of the three bands?

**Stephen Crabb:** No, they can vary as much as they want within that chunk of the overall 10 pence in the pound of income tax that we are devolving. What are the constraints on that? Economic constraints, political constraints, but we want Welsh Government to be operating with those same kind of constraints.

**Q302 Chair:** We could theoretically see either 80 pence in the pound or 10 pence in the pound, yes or no?

**Stephen Crabb:** I am not sure I agree, really.

**Geth Williams:** The key constraint will be the fact that 10 pence is being devolved. The political and policy choices for the Welsh Government will be to vary each band of income tax—

**Chair:** By 10 pence either way?

**Geth Williams:** Well, above or below. Materially, one could only imagine 1 or 2 pence being in consideration rather than 10 pence.

**Q303 Craig Williams:** Leaving some of that aside for a second in terms of the revenue and the taxation, what kind of capital powers will this give the Welsh Government for infrastructure given this is a revenue source they will be responsible for? Will that underwrite further borrowing the Assembly can do?

**Stephen Crabb:** They will be able to borrow more as a result of the devolution of tax. Regardless of if they choose to use those tax powers or not, even if you devolve down and they keep the bands as they are, so nothing effectively changes for Welsh income tax powers, that does release an extra chunk of borrowing power to Welsh Government because now they have their own revenue stream. That is something that you would expect as part and parcel of the package of fiscal powers an Administration would have. We would want them to use those capital borrowing powers to do good things for Welsh infrastructure. They have powers already to borrow for things such as the M4 relief road. We are waiting for some real progress on that.
Craig Williams: That is another clear move again in that responsibility. Instead of negotiating with Treasury on powers—the M4 is a good example—they will be able to invest in this infrastructure off their own bat.

Q304 Antoinette Sandbach: I am interested, Secretary of State, first because there was a promise made to the Welsh people when they voted for law-making powers in the referendum for the Assembly that there would be a further referendum on income tax powers. In an earlier answer you referred to the porousness of the English-Welsh border and the fact that the vast majority of the Welsh population lives within 25 miles of that border, which could mean that you could see tax flight, in effect, out of Wales of wealth creators—for example, if income tax rates were to increase by 10 pence in the pound above what they were on the English side of the border—and Welsh finances could be substantially worse if that was to happen.

Stephen Crabb: Yes, and you could invert that and say isn’t there an opportunity here to attract more high-value individuals, business leaders, entrepreneurs into Wales to create wealth in Wales? The levers work both ways. We could be having the same argument in principle about any of the powers that Welsh Government already has over health or education. It cuts both ways. It is all about making good choices in those policy areas. This portion of income tax is not really any different in that respect. All decisions by elected Governments have consequences and clearly if there are levers over these fiscal powers there will be consequences of how they choose to use those.

We are trying to change the nature of Welsh politics here. We do not have to accept things as they always have been and say that it will be like this forever more. We have GDP growth figures out today that, surprise, surprise, show Wales yet again at the bottom of the economic league table. My goodness, we should be focusing our minds on how we change that and putting pressure on politicians in Cardiff Bay to do their bit to use powers to change the nature of politics, change the economy in Wales.

Q305 Christina Rees: Secretary of State, you have spoken already about the clarity of the proposed legislation. Do you think it will bring a lasting settlement?

Stephen Crabb: Lasting in the sense that when we do this legislation, there will be no appetite on the part of the UK Government for quite some considerable time to do another major piece of Welsh legislation, so we need to do the work to get the legislation as fit and proper as we can so that it will last. Of course, it is always open to any Government in the future to revisit the settlement and say, “We want to change this or that or change the devolution boundary”. There is nothing I can do as Secretary of State for Wales in 2015 to stop a future Government saying, “We want to think again about that”. Hopefully, they will be driven by the electoral mandate they have. We have a clear mandate to deliver on the St David’s Day commitments, to deliver what was in our manifesto, which involves, yes, strengthening devolution through some new powers to Cardiff, but also clarifying devolution and making devolution fairer, which is where the whole issue of the funding floor kicks in. That was the package that we put out there before the election. It was in our manifesto commitment. It was very clear what the people of Wales were getting when this particular UK Government was formed. My commitment is to deliver that.

Q306 Liz Saville Roberts: We have had, if I understand correctly, four pieces of devolution legislation. We really do need something that lasts now, but at the same time I have to quote
Professor Thomas Glyn Watkin on this in relation to ministerial consents, “This Bill makes it far clearer than its predecessor in that it gives everyone clarity that the Welsh Government cannot do anything”. On top of that, we are trying to build a devolved powers settlement on the basis of conferred powers legislation, which is a bit like Lego on plasticine; they are two different things. Where are we going with this? We need something more cohesive—coherent is probably the word that I am looking for—than what we have here. I would greatly appreciate some indication from you as to the sort of changes that you intend to bring about in the next stage of legislation.

Stephen Crabb: Okay. There will be changes to the draft legislation. The whole purpose of having draft legislation is to do what it says on the tin; it is draft, it is there for discussion and debate. I am really looking forward to seeing this Committee’s report. I know the Constitutional and Legal Affairs Committee in the Assembly produced a number of conclusions. If I am absolutely honest, I was disappointed that there were not more specific recommendations from the CLA in the Assembly. I am hoping that this Committee can provide some more guidance and pointers on that.

To be very frank with you, Liz, I recognise that the necessity test has attracted a lot of controversy. There are people who are saying it is too ambiguous. There are other people who are saying it is too high a hurdle. I do not understand how it can be both ambiguous and too high, but I am happy to look again at that. I am pretty clear in my mind that you need some kind of boundary if you are reserving criminal and civil law as a reservation but still enabling Welsh Government to change the law to enable it to enforce its measures, and that is what we want it to do. But if you are reserving criminal and civil law, I am pretty clear you need some kind of boundary to essentially stop devolution of the law by the back door. That boundary is provided for in this draft Bill by the necessity test. If it is the opinion of this Committee that that necessity test is not going to work in the way that you want it to, have another look at this and here is a suggested alternative, I am all ears for that.

Q307 Liz Saville Roberts: With respect, I think the Assembly’s CLA Committee is very specific. It recommends the removal of the necessity test or its replacement by a test based on appropriateness. The second point—and I will not read them all—is a system for requiring Minister of the Crown consents that reflect the model in the Scotland Act 1998. There are very specific recommendations here, which either have to be addressed, adopted or refused.

Stephen Crabb: On ministerial consents, that is another issue that I am happy to look at again. I have discussed this with the First Minister. We have discussed pre-commencement Minister of the Crown functions, for example, and the consents regime around that. The overwhelming noise from some of the people in Cardiff Bay is that we should not have any consents at all. For me, that is a red line. If Welsh Government wants to bring in legislation that changes the functions of a UK Minister or confers or changes the functions of a reserved body, I just think it is entirely reasonable that the responsible UK Minister should be able to sign off on that in the same way that Welsh Government—sorry, Chairman, we will come back to the—

Q308 Chair: Minister, I know two others want to ask on this, but one of the thoughts that some of us have had is that if Government Departments are being very slow in turning consents around, why can’t they be told that they have an obligation to do it within a fixed
time period, like 90 days or something like that? That should be enough time and that would ease some of the problems, although that is not necessarily answering—

**Stephen Crabb:** That is a really good suggestion, Chair, if I might say. I have not thought all of this through, but I could see how there would be a need for some kind of concordat or memorandum of understanding to regulate the consenting function so that there are clear expectations on both sides of turnaround times, for example. I think that is a really good point.

**Stephen Crabb:** Can I pick up on one more point?

**Chair:** Yes.

**Stephen Crabb:** Liz made the point that it is pretty clear that this draft Bill will stop the Welsh Government from doing all kinds of things it currently does. I noticed one of her colleagues in the Assembly tweeting about organ donation last week. It was a historic moment, Wales having this piece of legislation. Whether you are for it or against it, you have to recognise that it is fairly historic. Your colleague was saying that this is an example of the kind of legislation that would not be possible under this draft Bill because of consenting. Actually, the existing legislation required UK Government consent and if this Bill that is in front of us was in law, exactly the same kind of consenting would be required. There is no difference. There is no way that this Bill is going to be impeding Welsh Government from doing lots of what it has already been doing.

**Q309 Carolyn Harris:** If I can associate myself with Liz’s remarks on the CLA Committee, I feel, too, that they were quite specific. The evidence that we have heard in the Committee in connection with the necessity test to my way has also been quite clear, that it is something that people do not think is going to work. Secretary of State, you have said you are listening. If you are listening, will you consider dropping the necessity test entirely?

**Stephen Crabb:** Well, if that is the recommendation of your Committee I will certainly listen very closely, but let us understand what the risks are. If you are saying there is no necessity test, you are saying, in effect, that even though criminal and civil law are reservations because we want to preserve the single jurisdiction for England and Wales, you are giving a wide measure of freedom for Welsh Government to change what we call the general application of criminal and civil law, so the underlying principle. On Things like habeas corpus, fundamental underlying precepts of English and Welsh law, you are saying that even though this is somehow reserved, nevertheless Welsh Government will have the ability to change that and rewire that. I do not know that that creates a particularly stable position. At the moment, I am more interested in looking at if there is any suitable alternatives to the necessity test, but if it is the conclusion of this Committee that we should knock it out altogether, then let me hear it.

**Chair:** We will know soon.

**Q310 Mr Mark Williams:** The reservations is another aspect that I think the Committee alluded to and certainly I think this one will too. You yourself talked about the list of reservations being far too long when you gave evidence to the Assembly committee, to quote you, “We need to look and do some work on that together to try to bring that down. When I read through the list of reservations I can see for myself that there are things where I think,
you know, ‘For goodness’ sake, why is that being held back as reserved’.” It is a good quote; I am sure it was sincerely made. What do you have in mind? Can you tell the Committee any of your specifics? You have talked about this being a great opportunity to flesh things out and you have provoked a debate by the pre-legislative scrutiny that we are all engaged in. What kind of things do you have in mind specifically on reservations? We might have to wait for the answer or most of the answer.

Chair: Mark, that was a question later on but it was your question, so you carry on, yes.

Mr Mark Williams: I have deliberately done that, Mr Chairman, because it fits in with what we are asking the Secretary of State to reflect on and I think it is a really important part of this. That is why I have asked it now.

Chair: Fine, yes.

Stephen Crabb: Mark, you are right, I did say those words that you have attributed to me. You look at the list of reservations in the draft Bill and they are very long indeed. I get that; I understand that. I am not going to say at the moment what I think of the specific reservations. Again, I am looking for this Committee, if there are reservations that stick out that you think—

Q311 Mr Mark Williams: Given that a large number of those reservations originated from discussions that took place in Gwydyr House around the St David’s Day discussions and then subsequent agreement between four parties, I should ask, was that a failing in that system because we did not engage with Assembly colleagues earlier on to ascertain some of their views on that?

Stephen Crabb: I do not know that it was a failing that would have been rectified by involving Assembly Members earlier on because I remember from the discussions that we did have with the Assembly Members that none of them really got into the detail of what the list of reservations might be. All I would say on the reservations before we depart for the vote is I want to do some work to try to reduce those. I am really keen if there are specific recommendations that this Committee has, but let us be realistic. If you look at the Scotland Act, it is a pretty long list of reservations there. Go and count them: well over 100. What we should also not be doing is, by simplifying and shortening the list of reservations, ending up doing devolution by the back door. I am pretty clear we have to stick to what we have a mandate for and not start to throw it more—

Chair: We will return to this. We adjourn for 10 minutes or so.

Sitting suspended for a Division in the House.

On resuming-

Q312 Chair: One or two people are not back yet, but we were on the issue of reservations. Had you finished?

Mr Mark Williams: I was about to finish, Chair. I think the Secretary of State was answering my question after I had intimated that perhaps bringing in Assembly leaders and colleagues earlier on in the process might have avoided some of the concern about the extent
of the list of reservations, which do strike many of us as an incredibly cumbersome list and not contributing to the clarity that you are seeking.

**Stephen Crabb:** Having a long and specific list can help give you clarity. It is whether that list ends up being unwieldy in other terms.

Q313 **Mr Mark Williams:** Do you think it is unwieldy?

**Stephen Crabb:** The list is long.

**Chair:** Christina was going to ask a similar question to that, so I don’t know whether you would like to come in.

Q314 **Christina Rees:** I would just ask the Secretary of State that, considering the timetable, do you think the end of November is a bit late for consulting legal and academic experts on the draft Bill?

**Stephen Crabb:** I don’t think we are late. If we go back to the timetable that we had in mind, this process has been going on for a year or more already. We started this whole process in November last year, following the Scottish referendum and the work that the Smith Commission was doing and the decision that I took to dust off the Silk Commission report and look again at what we need to do to strengthen and sort some of the big devolution issues in Wales. So we have been at this for a year already. The preparation of the draft Bill took a considerable amount of time. We had the St David’s Day process, the inter-party discussions leading up to March before the election, so there has already been a considerable amount of time.

I wanted to build in a pre-legislative scrutiny phase to do exactly what is happening at the moment. As I said, you put out in the marketplace a draft Bill that people can get their teeth into and comment on, and that is what is happening. As part of that, we always said that we did not want to confine the consultation just to the committees of the House of Commons and the Assembly, important as you all are, but also to have a wider discussion with civil society, and that is what we have been doing as well. I have been doing a lot of one-to-one meetings with wider civil society that have not perhaps featured in some of the headlines, discussions with business organisations such as the CBI, IOD. We had a very productive meeting with the TUC where we touched on the devolution work we are trying to do and they signalled support of the broad aims but recognised it is perhaps not for them to comment on some of the specifics. It is the specifics that some of the other experts are coming out and being very vocal on.

We have had meetings with the legal community in Wales and there are big divisions within it about what we are trying to do. There are those who want to use this Bill as an opportunity to go down the road of a separate jurisdiction. We now see one of the key aims of Welsh Government is to carve out a separate jurisdiction. We have had a lot of pushback from particularly solicitors’ practices in Cardiff who say that being part of a single jurisdiction across England and Wales is a real strength for them. They punch well above their weight in doing legal business in England as well as in Wales and there is a lot of nervousness among aspects of the legal community about going down the road of a separate jurisdiction with all of the additional costs that that would involve. So it has been a really useful phase of consultation that we are in.
Chair: Gerald, did you want to come back on any of the reservations?

Q315 Gerald Jones: We have talked a fair bit about it but, fundamentally, do you agree that the guidance on identifying the reservations amounts to flipping the existing settlement?

Stephen Crabb: A politician’s answer, yes and no; yes, in the sense that what we have done is invert the current settlement but, no, in that we did not leave it as that. One of the huge faults of the current settlement is that it is silent on so many subjects. The settlement is not clear or specific about which Administration is responsible for which. So, no, it is not the case that we have just simply inverted it and left it as we have inverted it, but for the very first time we have got Whitehall and all the different Government Departments to sit down and spell out where the devolution boundary falls in their respective areas, taking into account the previous legislation and also taking into account Supreme Court rulings, and the model that we have worked up is based on that.

Q316 Gerald Jones: Some of the witnesses that have been here at the Committee have stated that the Wales Office lacks clout within Whitehall among other Departments. Why do you think that is the case? Do you think that is the case and could you comment on that?

Stephen Crabb: Over the last year or so, what have we done? We have landed a deal on electrification, £125 million of UK Government money we have secured for electrification of the valleys lines; we have landed a funding floor; we are taking forward a whole range of other things directly pushed from within the Wales Office. No, I would not agree that the Wales Office lacks clout at all. The reputation and standing of the Wales Office within Whitehall has never been higher since the devolution era began.

Q317 Carolyn Harris: Secretary of State, you mentioned Whitehall. Do you believe that Whitehall would prefer to have a separate jurisdiction?

Stephen Crabb: No. Whitehall’s view is driven by the view of the Government and the view of the Government is that a single joint jurisdiction across England and Wales, which has served the people of Wales and England very well for centuries, is still the right framework. We can have the discussion, and I am, about how we strengthen the delivery of a specific justice function within Wales, taking account of some of the distinctiveness that is emerging with divergence of Welsh law in a number of key areas. I think that is a valid question to pursue and I have had discussions with the Lord Chief Justice and the Lord Chancellor here about what we need to be doing to think about taking account of future changes as well to cater for some of the distinctiveness that will arise within Welsh law. I think there is a valid question around that, but we are committed to maintaining the single jurisdiction for all kinds of very good reasons.

Q318 Christina Rees: Just to clarify matters, Secretary of State, there would be a system of the same court structure throughout England and Wales, as is now, but a separate build-up of Welsh legislation that could be conducted in those courts?

Stephen Crabb: That legislation is building up, as you say. There is a growing volume of Welsh-specific law and in areas like tenant-landlord relations the law is now starting to diverge quite significantly between Wales and England. The volume of that specific and different law is tiny compared to the overwhelming volume of legislation that caters for England and Wales on a joint basis. If we went down the road of trying to now carve out a
separate jurisdiction, we would have to transpose all of that joint English-Welsh law into Welsh-specific law. It is a hugely costly exercise, not to mention then going down the road of setting up separate Welsh-specific courts and legal arrangements. As I said, for a lot of very good practical and policy reasons, that is not the position that we have taken.

It is worth putting on the record now that in all of the discussions that we had that led up to the St David’s Day announcement, the official Opposition at the time, the Labour Party, was not calling for a separate jurisdiction either. If you had a Labour Government in Westminster now doing this legislation, they would not be delivering a separate jurisdiction for Wales. There was a very strong position on the part of ourselves and the official Opposition for maintaining the single jurisdiction across England and Wales. In fairness to Plaid Cymru, they have always been very clear in their difference of view on this and total respect to them for that. It is wrong now for the Welsh Labour Government to be trying to almost push us into a position with this legislation of delivering on a policy objective that their own party up here would not be signing off if they were in Government.

Chair: I am afraid the order of questions has got a little bit mixed up now but I think, Craig, you were going to ask something earlier.

Q319 Liz Saville Roberts: Just a very quick supplementary, Chairman. We have, effectively, a fuzzy model here and you were talking about reservations in some areas alongside those where there are powers. There seems to be almost a lack of principles or a rationale. We have not had a rationale as to why some things should be kept back and some things should be devolved. A particular area that they are interested in because it affects them is energy. Energy is to go up from 50 megawatts to 350 but the grid infrastructure and planning for the grid infrastructure is not considered in any shape or form. Policing was in Silk but it has not come through. Even the agenda and the landscape has changed for broadcasting as we speak. Surely we should be looking at these as significant in the Bill at this stage.

Stephen Crabb: I am not disagreeing with you and if we were starting from a blank sheet of paper and building up an entirely new devolution settlement for Wales, based on a principle of subsidiarity, which I think is what you are implying in your question, then maybe you would approach some of these questions in a different way. I also think we would be spending the next five years arguing about what that subsidiarity-based model would look like. We are dealing with the world as it is. We are dealing with the real world in what is hopefully a pragmatic and practical way, taking an existing settlement and trying to improve it and make it better and strengthen it. What were the three principles that I have approached this with? Strengthening the devolution settlement, clarifying it and making it fairer, which is where the fiscal side and the funding side comes in, and that is what we are trying to do.

If there are quirks in the list of reservations that clearly stick out as, “That looks odd. Why would you be holding that back, given that you have devolved other areas?” then let’s bring that out, make the case for that, for example things like street pedlars, which is one of the reservations in the list.

Craig Williams: I was going to mention that.
Stephen Crabb: It strikes me as very odd that we are holding that back as a reservation. That is just one example. Given that the role of local authorities has devolved very clearly in the settlement, I don’t know what the rationale would be for holding that back. I am inviting some views on all of this. On the specific question about energy, the 350 megawatt limit was a Silk recommendation. I have to say, the more I read Silk, the less rationale I see for some of Silk’s conclusions.

Q320 Liz Saville Roberts: That, of course, brings in the Swansea Bay lagoon but it would not bring in the other two major lagoons, which seems to be an anomaly for no good reason.

Stephen Crabb: This is an important point. As I said, I sought to dust down the Silk report and try to make something of it. That is why I put in place the St David’s Day process to try to get, for the first time, some political agreement on some of what Silk was saying. The Silk Commission did an excellent piece of work in many respects. The quality of the Silk report is patchy, if I am absolutely honest, and, as I say, it is not always clear to me, reading the Silk recommendations, why they have recommended certain things and not others. There will be another opportunity when the legislation goes through Parliament. We are getting two bites of the cherry—the pre-legislative scrutiny phase and when the legislation goes through—to argue about some of these specific points.

Q321 Liz Saville Roberts: Surely this is a fundamental point, because if Silk is the basis and then we have used political consensus, we are building something on very unstable foundations.

Stephen Crabb: I do not accept that we are building on unstable foundations. We are building on pieces of work that have been done. We are trying to bring a fresh pair of eyes and some fresh energy to this to improve the devolution settlement for Wales, and that is what we have a mandate to do.

Q322 Craig Williams: I think you can see that our Chairman is going to have a day in the life of you when we come to do our recommendations and I welcome the fact that he is going to test his diplomatic skills and you are going to take the recommendations seriously.

Coming back to the Constitutional and Legal Affairs Committee, in the fashion of all good committees I think it presents more problems than it does solutions and I hope we can do the reverse. To be fair to the Welsh Assembly’s Presiding Officer, she did give you a list of amendments to the draft Bill. When you gave evidence to the Constitutional and Legal Affairs Committee in November, I don’t think you were in a position where you could comment on those amendments and I wonder if we could tease out some more comments about the amendments now.

Stephen Crabb: What I want to do is look at her recommendations in the round with what other people are saying. If I came in here this evening and told you what I think right now of what the Presiding Officer said, she would love it. I am seeing her on Monday and she would give me a big pat and say, “Well done”, but that would make a mockery of the work you are doing. If we start making decisions and announcing them now, what is the point of this Committee producing its report. This is the Committee that has been imbued with the responsibility of doing the formal pre-legislative scrutiny. I am not attaching greater weight to different bits of evidence from the reports but I really do want to hear
what this Committee has to say about some of these really difficult issues. If this was easy it would all be very straightforward. The fact that there is lots of controversy and disagreement is because some of the issues that we are trying to work out are very difficult.

I will be absolutely frank with the Committee, drafting the elements around criminal and civil law was easily the most difficult part of the drafting exercise and working up the draft legislation, which is why I have said from the outset that I am not personally wedded to any of the specific drafting. If there are better ways of doing it and achieving the same policy aim, let’s do that. It is the principles and the broad aims that I am keen to preserve, but in terms of drafting and specific mechanisms I am keen to hear alternative ideas.

Chair: Mr Jones, I am not sure whether you felt your question 9 was answered or not earlier on. Feel free to ask again if you want to.

Q323 Gerald Jones: Yes, perhaps I can go into that a bit more in terms of the inter-government relations, because I think that is quite fundamental as well. For people in Wales to be best served I think there does need to be a strong working relationship and good communication between Welsh Government and UK Government. It certainly is felt that the disagreement between your office and the Welsh Government over the impact of the proposed Bill does show that the Bill is not going to give us the clarity that is desired. What do you feel about that?

Stephen Crabb: That is a very fair question and the point that you made right at the beginning about good inter-governmental working, regardless of which party is in power either end of the M4, is an important one. The strongest and most positive feedback that we have received in the Wales Office, and myself as Secretary of State in the time that I have been doing this job, from the business community or members of the public is always when we are seen to be doing something pragmatically in co-operation with Welsh Government. That is what the people in Wales and the business community want to see. They want to see the two Administrations getting their act together and being seen to deliver. Once you recognise that, you do recognise the importance of making sure that the interface between the Administrations within the devolution settlement is a smooth and effective one. This is why I keep coming back to the point that you do some mechanisms to regulate the interaction between the two Administrations. You need to be building it into the Bill, but outside of the Bill, outside of the legislation—and picking up on a point that the Chairman made earlier about the idea of some kind of concordat around ministerial consents—it is definitely something worth pursuing to ensure that there are clear timeframes and clear expectations that each Government could hold each other to account on.

There is a wider body of work that is going on, driven by the Cabinet Office, which it might be worth this Committee picking up on at some point, looking at how all of the devolution arrangements hang together and the inter-governmental working through the joint ministerial committees and so on.

Chair: We have to try to rattle through a few more questions so I may not be quite so generous with supplementaries for a minute or two. I understand you have to be away by 5.00 pm, Secretary of State. Is that correct? In which case, Antoinette Sandbach.
Antoinette Sandbach: Secretary of State, earlier you referred to the judgment in the Agricultural Wages (Wales) Bill effectively driving a coach and horses through the conferred powers model. Has there been an assumption that the silent areas that you referred to were effectively not devolved areas?

Stephen Crabb: Yes, and let’s be upfront about that. Why were they silent in the first place? Why were these areas silent? It is because it was never assumed from the very start that they were even in play as a devolved area. That is why they are silent. The situation you have got to through the outcome of that Bill, the interpretation of which was if a silent subject is conjoined in some way to a devolved policy area then that brings it into play as a devolved area, is not the basis for a stable and clear settlement, which is why I made the remarks I did earlier. What we are doing is responding to that judgment, we are taking it into account. We are saying that we recognise that agricultural wages is now a devolved area, that was the judgment of the Supreme Court, but in drawing the devolution boundary we are not now saying this means that those silent subjects are now the other side of the devolution line. That was never an outcome of the agricultural wages decision and it was never the starting point of the will of Parliament that those silent subjects were in play as devolved areas.

Antoinette Sandbach: In terms of this Bill then, obviously there has been a lot of criticism about schedule 7 being too complex. Are you satisfied that there are not any silent areas now or if they are silent that effectively will mean that they are devolved?

Stephen Crabb: One of the challenges of drawing up the reserved powers model is future proofing it if you don’t know what areas of policy will exist in the future, which is why I think outer space is listed as a reservation. Who knows what is going to be going on up there in years to come. We have done really thorough and detailed work across Whitehall, and let’s recognise this for what it is. This has never been done before in the last 16 years. At no point when other previous pieces of legislation were being drafted did the whole of the Whitehall machinery have to sit down and get focused on thinking about devolution in Wales. It has required a lot of muscle to get the Whitehall machine thinking about Wales in a way that it has not done ever before. The work in the draft Bill is the fruit of that exercise. It does not mean it has to be the final point, it is not the final word. We can go back and challenge that. We talked about street pedlars a few moments ago and that is just one example. We can never be 100% sure that there are no gaps left in the arrangements but we have worked really damn hard to make sure that we bring clarity to the settlement.

Chair: I do think we had better move on to the next one. What I will do is, if we get through all the questions and we have five minutes at the end, then we can go back. Did you have any more on that, Antoinette? A very quick one, please.

Antoinette Sandbach: If you are saying you are disagreeing with some of the powers that are reserved, are you going to go back to Departments now and ask them to revisit that?

Chair: A quick yes or no to that, Minister.

Stephen Crabb: Well, yes, I would.

Byron Davies: On the issue of reservation of civil and criminal law, given that the Welsh Assembly would have to encroach into the reservation of criminal and civil law in
order to make its laws work, wouldn’t it be clearer, perhaps easier and more durable simply to drop these restrictions?

**Stephen Crabb**: Can I just put on the record, before I answer the question, congratulations to the honourable Member for the award that you won last night, not wanting to butter him up.

**Byron Davies**: Thank you.

**Stephen Crabb**: With that, maybe I can disagree with you profoundly because I think it is one of the great misrepresentations of this draft Bill that, in terms of the Welsh Government being able to make law and enforce law, it would mean an encroachment, to use your terms, into the reserved powers of the reservations of criminal and civil law. What we have done in this draft Bill, and I think it is pretty clear, is we have enabled, we have facilitated, we have carved out the ability for Welsh Government to enforce this legislation, to make law fully and not just to make minor tweaks to criminal and civil law but where it is necessary to change some of those underlying principles we were talking about earlier if it can satisfy the test of no greater than necessary. So I don’t accept the proposition whatsoever that for the Welsh Government to be able to make and enforce law involves some kind of illegitimate encroachment into it. We are providing that ability to make and enforce law in the same way that it does now. Sue is a thoroughbred legal expert. Would you agree with my characterisation of it?

**Sue Olley**: This relates to the test of ancillary. We fully recognise that the 2006 settlement set out the circumstances in which it could enforce beyond the boundaries of competence and we have reproduced that. We have added in “no greater effect than necessary” but the ancillary category is set out in the Bill and in the 2006 Act.

**Q328 Byron Davies**: If you reserve criminal and private law then the final arbiter would be the court and not the Welsh Assembly, so surely it isn’t right to delegate to judges political—

**Stephen Crabb**: Can I come in on that? Your point about not delegating to judges is a very strong one, which is why we are responding to the Supreme Court decision on the agricultural wages legislation by saying it is not up to judges to decide where the devolution boundary lies. It is the responsibility of elected politicians to spell that out to the people of Wales. You raise the concern that somehow we are making the devolution settlement more prone to legal challenge but you can never shut down that possibility completely. We make law in this place. There is always risk of judicial reviews and legal challenges on the legislation we make in Parliament and it should not be a starting point for our draft Bill that we should somehow insulate Welsh Government from legal challenge to the legislation. That is all part and parcel of a healthy democracy: the legislature, the Executive and the judiciary.

**Sue Olley**: There is the risk of litigation now. We don’t think the risk is any greater in our draft Bill.

**Q329 Dr James Davies**: If I could bring us back to the word “necessary” and the necessity test, only really because it came up so many times during the evidence sessions. It has been described by those giving evidence as subjective, ambiguous, very complex indeed, not a term that is well understood by lawyers and indicating a high standard of proof. I think you
have acknowledged that there may be an issue with it and you are willing to look at other possibilities. Are you able to expand on what alternatives you might be looking at?

**Stephen Crabb:** I am not able to satisfy your question by saying now what are the alternatives. The Presiding Officer in the Welsh Assembly has put forward some ideas. There are other ideas coming forward. I am really keen to get a steer from this Committee on what we do with the necessity test. I don’t agree with some of those characterisations and quotes that you mentioned. I do think the necessity test does mean something. It is taken out of the Scotland Act and, while it is true that the application of the necessity test has not been tested in the courts in the Scottish context, it has been a factor and a consideration in the way that the Scottish Government make legislation. So it has been used; it is being used; it does have meaning. I accept that the application of a necessity test in this draft Bill is different from the Scottish context because as well as applying to reserved areas, it now applies to civil law, criminal law and matters relating to England, so there are four places where the necessity test kicks in in the draft legislation. I am happy to look at that but I don’t accept that the necessity test is invented somehow out of thin air and it doesn’t have legal currency; it does.

**Q330 Dr James Davies:** If it were decided to continue with the necessity test, to implement that in the Act, do you agree with those who have said that it might lead to legislators in Cardiff Bay being slightly timid about coming forward with legislation, being concerned that they did not have the necessary rights to do so?

**Stephen Crabb:** No, I don’t accept that. What is the opposite of timid? Aggressive. There are some people who would characterise the way that Welsh Government has made legislation in recent years, seeking to step into reserved areas, as doing exactly that, imposing duties on the police for example, costs on the police. What we are trying to do is strike a healthy and moderate balance. We are not trying to restrict Welsh Government from making law fully in the devolved areas but we are also recognising that you do need some kind of safeguards to protect the integrity of a single legal jurisdiction for England and Wales. If the necessity test is considered not the right way to achieve that balance then let’s look at an alternative, but I do think you need something to keep the system in balance.

**Q331 Christina Rees:** Secretary of State, if the necessity test can be used in argument by anyone who is charged with a criminal offence that is created by the Welsh Assembly, aren’t the courts going to be clogged up with legal argument?

**Stephen Crabb:** I don’t think so. Forgive me, Christina, I am going to ask Sue Olley to give a legal view on this.

**Sue Olley:** The risk of collateral challenge is available now to anybody charged with a criminal offence. They can seek to bring before the court a challenge to the power of the legislature to make that offence. We do not think that the risk is any higher with the draft Bill than that that exists currently. There is quite a lot of case law on collateral challenge and it is only available in restricted circumstances. I think this spectre that you are creating, or some commentators have created, that every time someone is charged with an offence created by an Assembly act they will cite this as a challenge to that is just not realistic.
Q332 Christina Rees: As a follow-up, would you consider introducing a procedure or limitation whereby it is only the respective Governments can make a challenge or maybe put a time limit on it?

Stephen Crabb: So, reducing the ability of citizens to bring a legal challenge on the Executive? I don’t know that that would work. If we come back to this place, we make law here and that law is subject to legal challenges when it is considered by people outside of this place that we have not made good law in accordance with the principles that should have been applied. I reiterate the point that it is not the purpose of our legislation to eliminate the risk of legal challenge in terms of Welsh policymaking. If the Welsh Assembly is to become a mature legislature, they need to live with the risk that comes with making law and the risk of legal challenge. I don’t know whether you want to flesh that out anymore.

Sue Olley: No.

Q333 Liz Saville Roberts: I think it is safe to say that every legal expert who has come before us has said that this is a problem and again the fact that there is such a variety of interpretations does indicate that it is problematic. There is a school of thought that says that reserving criminal and private law is simply to maintain unified jurisdiction rather than anything to do with the way that the Welsh Assembly operates. What is the motivation? What would you say to that sort of standpoint?

Stephen Crabb: That the reason for reserving civil and criminal law is to maintain a single jurisdiction? I would agree with that. That is why it is a reservation because we have decided not to devolve it. Those aspects are devolved in Scotland. As you know better than I do, Scotland has a legal tradition that goes back centuries. That is not the Welsh history. We have been part of a single jurisdiction across England and Wales that has served Wales well for centuries, which is exactly recognising that ourselves and Labour, as the official Opposition at the time when we did the St David’s Day discussions, were not entertaining the prospect of starting to unpick that single jurisdiction and go down the road of creating a separate jurisdiction. I know that Plaid Cymru came from a very different standpoint on that. I remember discussions with Elfyn Llwyd on that and you have always been very clear on that, but that is not what the policy is.

Q334 Liz Saville Roberts: In that case, the priority of the single jurisdiction is effectively hobbling the Welsh Assembly as a legitimate body.

Stephen Crabb: No, I don’t agree with that. We want Welsh Government and Welsh Assembly to be able to make law fully in those areas that it has competence for, those areas that are devolved to it. In the same way that they now have the ability and freedom to make law and enforce that law, they will have that ability in the future.

Chair: I think we are in danger of a political discussion, which would be fun but not what we are here for.

Q335 Carolyn Harris: The evidence we have received argues that the draft Bill extends the need for consent beyond the current requirement, for example to include functions arising after May 2011. Do you accept that and why do you require the final say?
Stephen Crabb: The draft Bill only extends consent in the sense that we now bring in reserved bodies. The existing legislation requires consent for changing functions of a Minister of the Crown, a UK Minister. There is an extension to reserved bodies. Why are we doing that? We are doing that because we are trying to achieve this clarity between what is reserved and what is devolved. If something is reserved it means that it is the responsibility of a UK Minister. One of the purposes of the legislation I am bringing forward is to try to bring that demarcation that is not there at the moment. You have had the situation, and I have mentioned this before in previous meetings of this Committee, where Welsh Government have been conferring costs and duties on Welsh police forces that are the responsibility of a UK Minister of the Crown. It surely can’t be right. I think as a point of entire reasonableness that if a UK Minister is responsible for something and there is a body that is accountable to the UK Minister, that if the Welsh Government want to change the functions of that reserved body, it should seek the consent of that UK Minister to that change.

I can understand where the people are coming from who say Welsh Government should be able to change the functions and impose duties and costs on reserved bodies in Wales. The people who argue that are the same people who say that with Welsh Government in Cardiff that is now legitimate, because it is the Welsh Government of Wales, and it is about pushing back the reach of Government Ministers across the other side of Offa’s Dyke. As I said right at the start, that is not my vision of how devolution should serve the people of Wales. Wales has two Governments—UK Government and Welsh Government—and the intent of this legislation is to get clarity about who is responsible for what and get some effective, efficient mechanisms to regulate how those two Governments interact. On the specific issue of consent, that is a feature of the current policy landscape anyway and in the vast majority of cases where consent is sought, consent is given.

Q336 Chair: Within what sort of timescale, Minister?

Stephen Crabb: That varies and it varies for different reasons. Sometimes it is the fault of the UK Government machine, I accept that, and there are specific examples where the turnaround has not been timely enough. There have been examples where we have had to go back and say, “In order to make a clear decision about this request for consent, we need more information, Welsh Government, about how these duties might operate, what these costs would be”. Then there might be a time lag on the part of the Welsh Government in returning that information. As I say, nobody is blameless in this and I come back to the suggestion you made, Chairman, about some sort of concordat or memorandum of understanding to regulate this. I think that would be useful.

Q337 Carolyn Harris: If I can come back and say that the Assembly identified a total of five consents that were now not required that would have been previously.

Stephen Crabb: The other way round, I think.

Carolyn Harris: It is the other way round.

Stephen Crabb: That might be the case because there is so much silence in the existing settlement and we are, as I say, starting to spell out for the very first time who is responsible for what. So it might be that there are areas now, because we have spelt them
out clearly as either reserved or devolved, where the consents regime kicks in. I don’t accept that somehow there is a kind of unacceptably large new requirement of consents. I don’t accept that for one moment. I think there is an issue around what we call—and forgive the jargon, Committee—pre-commencement Minister of the Crown functions that I am happy to go away and look at, but in terms of going forward I think consents have got to be part and parcel of effective governance of Wales. It cuts both ways. UK Government seek permission from the Welsh Government, Welsh Assembly, when we are making law here that cuts into devolved areas and I think it is an entirely reasonable point that that principle should work both ways.

Q338 Carolyn Harris: Even if it was incidental to an otherwise competent Assembly provision?

Stephen Crabb: I will bring Sue in on this. The incidental does not quite work in the same way in a reserved powers model.

Sue Olley: The power to make consequential incidental provision without consent is limited to those Minister of the Crown functions exercisable in devolved areas before 5 May 2011. It is right that that does not exist currently. That is quite a limited category of functions that, as the Secretary of State said, we are reviewing. Whether there should be a blanket consequential and incidental for the future is a separate issue because we hope to arrive at a position where we are talking about Ministers of the Crown exercising functions in reserved areas and Welsh Ministers exercising functions in devolved areas.

Q339 Mr Mark Williams: In the ultimate determination of those issues, how much are we dependent on ministerial discretion or a rules-based approach to the determination of the consents issue?

Stephen Crabb: I think I know where you are going. I have said previously that we need some rules underlying the devolution settlement. I made those remarks in response to some of the rhetoric expressed early on in the pre-legislative scrutiny phase that almost seemed to be suggest that the Welsh Government should be able to change the duties of reserved bodies or Minister of the Crown functions without any requirement of consent. If you listen to some of the noisy rhetoric at the start of this whole process, that was what they seemed to be saying, that we should be able to change functions of a reserved body without any recourse to UK Ministers, even though it is the UK Minister who is responsible for that body. That is why I said you do need some rules underpinning this.

On the point about ministerial discretion, or ministerial whim as other people have said, it does not actually work like that. When you are having to deal with one of these consents request there is a process you go through with the relevant UK Government Department to justify your decision. That decision is explained and backed up by a clear thought process and clear—

Mr Mark Williams: A caricature of you sitting at home with your red box, is there a tick or a cross, is not a—

Stephen Crabb: It is a lovely image, Mark, but it does not quite work like that.

Q340 Mr Mark Williams: One of the witnesses we took evidence from, Professor Watkin, talked about the definition of reserved bodies or reserved authorities and that has been
criticised because the definition is too complex or unclear. In your sincere quest for clarity on this, is that an issue that needs to be addressed? Is that something you are hopefully going to position to address?

_Stephen Crabb:_ I am happy to look at that. It is almost the reverse of the point you made about reservations, isn’t it? If we do not try to draft a category like that on the face of the Bill, what is the alternative? The alternative is creating and defining a list of what those bodies are and then you are back in the position of lists again. I am happy to look at it but if we did not go down the road of trying to craft some definition on the face of the Bill, the alternative is to itemise all of the bodies.

_Q341 Mr Mark Williams:_ Just very quickly, doesn’t that go to the point Liz Saville Roberts made at the start about the analogy of Lego and plasticine and the two bits of this, the quest for the reserved powers model that we all want—I think most of us want, perhaps not—and the list of reservations? There is a bit of an inconsistency there. You are going to tell me there isn’t, I am sure.

_Stephen Crabb:_ I don’t think so. What are we talking about here? We are talking about some definitions and whether you create a definition in the Bill, which we felt was fairly straightforward. Welsh Government and others have said no. There is a suggestion that maybe we should itemise those bodies and that would make it very clear but then you are back into the—

_Q342 Mr Mark Williams:_ I must resist the temptation of straying into other questions but I just think—

_Chair:_ We have come towards the end, so this is a moment when you could stray towards another question if you want to.

_Mr Mark Williams:_ I won’t, other than to say that I think the point Liz made, and I agree with, the plasticine and Lego analogy, is a broader issue than just the definition of the reserved authorities.

_Stephen Crabb:_ I disagree with Mark. Whether you are talking about conferred or reserved, if you are trying to spell out who is responsible for what, you either come up with definitions or you come up with lists, I think. I don’t accept that there is a fusing together of half man-half beast or plasticine and Lego or whatever analogy you want to use.

_Chair:_ You can do Lego and plasticine. My son has managed it.

_Q343 Antoinette Sandbach:_ I was interested in your observations on the Constitutional and Legislative Affairs Committee report. They have asked, in effect, for a look at areas, a definition of areas and a common theme of principles and a more overarching narrative around the Bill. We have had some evidence that the Bill should be more like the Scotland Act. What role did the Scotland Act play in your thinking?

_Stephen Crabb:_ We took the Scotland Act and the reserved powers model within it as our starting point, recognising that you are talking about two very different devolution contexts. The primary difference, and so much of what we have talked about this
afternoon comes back to this point, is that the legal system is devolved in the Scottish context and it is not devolved in this context. It was not a policy objective of ours or the official Opposition to devolve the legal system and create a separate jurisdiction. If that is your starting point and you are using the Scottish model as a starting point as well, you are then having to craft something that is quite Wales-specific. You are having to get into the area of real deep, dark complexity around how you reserve civil and criminal law while at the same time not impeding Welsh Government from making law fully and effectively in those areas that are devolved. As I said in a moment of very frank honesty, that was the most difficult part of writing this legislation, which is why I am really keen to hear some ideas about how you reserve civil and criminal law while at the same time enabling the Welsh Government to make and enforce its law effectively. This is where the necessity test kicks in.

We have used the Scotland Act as a model and the necessity test is lifted out of the Scotland Act and I explained earlier how we have used it differently in the Wales Act. I hope that answers your question.

Q344 Antoinette Sandbach: We had a lot of criticism also that the St David’s Day agreement was the lowest common denominator in terms of agreement between the parties and what was reflected in that agreement. What do you say to that?

Stephen Crabb: I don’t accept the terminology. We are miles ahead of where we were a few years ago in thinking about devolution in Wales. The three particular strands I wanted to take forward, which I set out a year ago, are around clarifying devolution but also strengthening it with additional powers that make sense, powers for a purpose, if you want to call it that, but really tackling the fiscal side as well, bringing in financial security long term through the funding floor linked to movement on income tax to deliver more accountable government in Wales. That is a coherent package that we are taking forward that I do not think can be caricatured as the lowest common denominator.

What the St David’s Day process did do is provide a forum for each of the parties to signal where there was buy-in to a particular Silk recommendation or one of the Smith recommendations that we were looking at in relation to Wales. We said it is up to the other parties. If they wanted to go above and beyond where the consensus lay in terms of its offer to the people of Wales, they were free to do that in their manifestos. I would just make this point and it is not to be too party political but those parties who did do that and put out a much clearer, stronger, more specific offer of more powers, more separation for Wales, did not do particularly well in Wales at the election.

Q345 Liz Saville Roberts: It is a party political standpoint, but there was also sheer workability, putting party political standpoints to the side, and that is something, as a lowest common denominator, we could all agree upon.

When you first appeared or when you last appeared before us, you mentioned that there was a scheduled parliamentary slot for this piece of legislation. There has been a lot of water under the bridge. There is general talk and you have indicated that there will be quite considerable changes along the way and that we, as a Committee, have a role to play in that as well. Do you perceive, given that there has been criticism about a rushed timetable, that this doesn’t necessarily have to be tied to a parliamentary slot, that this could be moved ahead to create a clear and workable piece of legislation that will stand the test of time?
Stephen Crabb: It is not being rushed. As I explained earlier, we have already taken a considerable amount of time getting to this point. We have pretty much all of next year while this Bill will be going through the parliamentary process to reflect and make changes even during its parliamentary passage and we have the remainder of this pre-legislative scrutiny phase. So I think there is plenty of time in the system to be making the kind of changes to improve the Bill that might be necessary. Already through this pre-legislative scrutiny phase we are getting a clear idea of where the areas of change need to be. We have spent a lot of time this afternoon talking about the necessity test and I have said we are very keen to look at that. We have talked about reservations and what we can do to make that shorter or simpler and clarify that, and we have talked about consents. You have three quite meaty things where we have food for thought already and I am really keen in those three areas, Mr Chairman, for this Committee to make some very solid recommendations.

Q346 Chair: Before you go, I want to go back to the one area that I am a bit concerned over, which is tax. I just want to clarify this with you. As things stand, as you say, 10 pence is going to be devolved, effectively. It is a bit complicated to explain this, isn’t it, but basically the Welsh Assembly will be expected to raise, let’s say, 10 pence on the basic rate of tax but they would have the opportunity if they wanted to to raise income tax by much more than 10 pence in the pound, wouldn’t they? I am not suggesting for one moment any party would do this but theoretically, if the proposals go through in the way described, there would be nothing to stop the Assembly from bringing in an 80% or even 90% level of tax on the basic income. There would be nothing to stop them legally, would there?

Stephen Crabb: Are you asking me is there the potential for Welsh Government to do crazy, outlandish things?

Chair: Yes.

Stephen Crabb: You could ask that question of any of the devolved policy areas anyway.

Q347 Chair: I appreciate that but I am just asking you to put it on the record that they could if they wanted to. I am not saying that they would. I don’t believe that they would, but I am just saying that they could if they wanted to. They could raise income tax to 80 pence or 90 pence in the pound if they wanted to. There would be nothing legally to stop them, would there?

Stephen Crabb: There would be no legal restraint on whatever figure they arrive at.

Geth Williams: Perhaps we could write on this point. There was a lot of debate in the Wales Bill that becomes the Wales Act 2014 and perhaps we could summarise some of that in a note to the Committee.

Chair: That would be helpful, but I just wanted to get that. Some people are saying that Wales could be turned into the Monaco of Britain but others might worry that it could end up being the North Korea of Britain if things went in the other direction. Anyway, I think we have had you in front of us for a long time, so thank you very much indeed, Secretary of State, and to Mr Williams and Ms Olley, for giving us such exhaustive evidence.