

Bil Cymru Drafft: crynodeb o'r dystiolaeth

Cyflwyniad

Mae'r Bil yn cynnwys cynigion penodol y mae llawer o'r dystiolaeth a gafwyd amdanynt yn gadarnhaol, fel darparu yn ôl y gyfraith am gynulliad neu senedd ddatganoledig barhaol, cael gwared ar reolaethau diangen dros gyfansoddiad pwyllgorau mewnol y Cynulliad, dileu ymwneud gweinidogion y DU â thrafodion y Cynulliad, gan osod Confensiwn Sewel ar sail ddeddfwriaethol, a throsglwyddo pwerau yn ymwneud ag ynni, trafndiaeth a diwygio etholiadol.

Fodd bynnag, codwyd nifer o faterion sy'n peri pryder yn y dystiolaeth a chânt eu crynhoi isod.

Cymal 3 (gan gynnwys Atodlenni 7A a 7B)

Mae tystiolaeth ysgrifenedig yr **Ysgrifennydd Gwladol [DWB18]** yn nodi:

The current conferred powers model of devolution in Wales lacks clarity and is incomplete. Indeed, it is silent about many areas of policy such as defence, policing, the criminal justice system and employment. This lack of definition has proved to be a recipe for confusion and dispute, and there is widespread acceptance that it is fundamentally flawed.

The new reserved powers model provides the clarity the current model lacks. It lists the subjects which are reserved to the UK level. The Assembly can legislate in all other areas and in relation to subjects that are excepted from those reservations. It provides a clear boundary between reserved and devolved subjects. The Assembly will continue to legislate in devolved areas as it does now. The consent of UK Government Ministers would be needed if the Assembly wished to place functions on reserved bodies.

Nododd dystiolaeth Yr Athro Thomas Glyn Watkin [DWB1] fod rhestr hir o gymalau cadw ac nid oedd bob amser yn glir pam eu bod nhw yno. Mae'n dweud:

It is difficult to discern a rationale or any guiding principles for the reservations. The existence of a final 'Head N - Miscellaneous' would appear to confirm the absence of such a principled approach, as does its range from 'Equal Opportunities' and 'Inter-country Adoption' to activities connected with outer space or Antarctica, nuclear weapons, and 'School-teachers' pay and conditions'.

Dyweddodd fod hyn fel pe bai'n parhau â'r broblem o gaffael pwerau mewn modd cronrus ac felly cymhlethdod y setliad, a "It is also demonstrably the case that the proposed reservations remove competence from the Assembly". Ychwanegodd yr ymddengys mai'r nod yw adennill y tir a gollwyd yn nyfarniadau'r Goruchaf Lys.

Nododd dystiolaeth Y Llywydd [DWB5] :

There is a significant roll back of the Assembly's powers in the list of reservations. A large number of matters which are not exceptions from the Assembly's current competence have been made into reserved matters. This is a reversal of the Supreme Court judgement on the Agricultural Sector (Wales) Bill.

The fundamental organising principle for devolved settlements should be subsidiarity – the centre should reserve to itself only what cannot be effectively done at a devolved level.

Mae'r Prif Weinidog [DWB7] yn nodi bod y model pwerau cadw yn y Bil drafft yn ddim byd ond drych o'r model presennol - newid 'technegol'. Dylid ei seilio yn hytrach ar yr egwyddor o sybsidiaredd. Mae'n ychwanegu y dylai'r nifer o gymalau cadw gael eu lleihau'n sylweddol - mae llawer ohonynt nad ydynt yn briodol i'w cynnwys mewn Bil Cymru neu'n cwmpasu materion sy'n fwy addas i'r Cynulliad. Mae'r gwaith drafftio ar Atodlen 7A yn ddiffygiol gan ei fod weithiau yn cyfeirio at "Bwnc [Deddfau Seneddol penodol]" ac felly nid yw'n glir ar wyneb y Bil beth sy'n cael ei gadw.

Yn ei dystiolaeth mae **Archwilydd Cyffredinol Cymru [DWB9]** yn mynegi pryderon am baragraff 218 o'r Atodlen 7A newydd a pharagraff 8 o'r Atodlen 7B newydd a gynigir gan y Bil drafft. Ymddengys fod y rhain yn creu ansicrwydd ynghylch a yw cyrff cyhoeddus y gellid eu hystyried yn rhannau annatod o'r sector cyhoeddus yng Nghymru yn cael eu heithrio o'r diffiniad o "awdurdod cyhoeddus yng Nghymru". Mae angen eglurhad.

Mae tystiolaeth YourLegalEyes [DWB16] yn nodi:

This Bill [...] appears to replace the interpretation of the extent of the Assembly's legislative powers which was decided by the Supreme Court in the Byelaws and Agricultural Sector cases. The Bill seeks to do this by protecting the powers of the UK Government and by ring fencing them.

Mae Esgobion yr Eglwys yng Nghymru [DWB17] yn dweud bod y nifer fawr o gymalau cadw yn creu system ddigyswllt ac anhylaw a fydd yn anodd i'w deall. Bydd effaith gronnol y cymalau cadw yn arwain at golli cymhwysedd, gan danseilio refferendwm 2011.

Mae tystiolaeth Cymdeithas Ddysgedig Cymru [DWB22] yn nodi:

The lists of reservations in Schedule 7 appear excessive, particularly when compared to the list of reserved powers in the Scotland Act 1998 and with their 'relates to' legislative competence tests obscure and complicate what is presented as a clarification of powers and actually represent a reduction in the Assembly's powers. The mix of General Restrictions set out in Part 2 of this Schedule, some of which are general and some specific, taken with the exceptions and interpretation provisions within, are a recipe for confusion.

Mae tystiolaeth Huw Williams [DWB24] yn nodi:

The UK Government's solution seems to have involved identifying the "silent subjects" and converting them into reservations, but without any supporting analysis of the consequences of this approach. Surely the boundaries within each "silent subject" should be drawn along logical lines that will achieve the "clear and lasting" settlement that the Secretary of State has referred to in his foreword to the Draft Wales Bill. Only a thorough analysis of the reservations will address the lingering effects of the "opportunistic" accretion of powers by the old Welsh Office.

The Explanatory Notes to the Draft Bill at paragraph 26 seems to confirm that the extent of the movement in legislative competence has been drawn solely along the lines delineated by Silk Part 2 and the subsequent political consensus of "St David's

Day agreement". Neither of these processes undertook (and perhaps were not well suited to) the detailed but necessary work of analysing a full list of potential reservations as is now before us to establish whether they create unnecessary, confusing or unintended constraints on the ability of the Welsh institutions to develop policy and to legislate in way that makes reference to Ministers of the Crown for consent or to the Supreme Court, a wholly exceptional event.

Nododd Dr Elin Royles [DWB29] fod y rhestr o gymalau cadw yn un hir: Mae Atodlen 5 o *Ddeddf yr Alban 1998* yn amlinellu cymalau cadw yn 18 tudalen o hyd ac mae Atodlenni 7A a 7B yn y Bil Cymru drafft â 41 tudalen. Mae cymhlethdod y setliad yn golygu bod dehongliad yn debygol o fod yn agored i ddehongliadau sy'n gwrthdaro ac o bosibl lefel uchel o anghydfod barnwrol.

Mae tystiolaeth y Gymdeithas Diwygio Etholiadol [DWB32] yn nodi:

On the surface at least, the list of reserved powers appears to be less led by clear rationale and principles, than a fairly ad-hoc list based on competing interests within the government machinery. This suggests that the judgement of what is devolved appears to have been made to simply reflect asymmetrical power relations between the Welsh and UK Governments. It is important that the devolved institutions are able to participate in the constitutional building process on an equal footing.

Mynegwyd pryderon ynghylch y nifer o gymalau cadw a cholli cymhwysedd mewn tystiolaeth arall a gafwyd, er enghraifft [DWB 27] **Aled Edwards** a [DWB 19] **Chwarae Teg**.

Un awdurdodaeth i Gymru a Lloegr

Mae tystiolaeth Yr Athro Thomas Glyn Watkin [DWB 1] yn dweud bod amddiffyn yr awdurdodaeth sengl trwy gyfyngu ar bwerau deddfwriaethol y Cynulliad yn anghywir o ystyried y mandad ar gyfer deddfwrfa ddatganoledig yng Nghymru. Mae angen i'r system gyfreithiol ddatblygu er mwyn darparu ar gyfer y strwythur ddeddfwriaethol newydd, er nad yw hynny o reidrwydd yn golygu awdurdodaeth ar wahân i Gymru. (para 35) Mae'n ymwreiddio'r farn bod deddfau a wneir yng Nghymru yn atodiad yn unig i'r deddfau cyffredinol ar gyfer Cymru a Lloegr.

Mae tystiolaeth ysgrifenedig Emyr Lewis yn nodi:

DWB 2[...] craidd y broblem yw nid yn gymaith awdurdodaeth (yn yr ystyr o ba lysoedd sydd yn clywed pa achosion) ond yn hytrach delio gyda'r wrtheb nad oes, fel mater o gyfraith, dim ond un cyfraith Cymru a Lloegr, ond bod y cyfreithiau sydd yn **gymwys** yng Nghymru ac y Lloegr wedi ymwahanu, nid yn unig oherwydd yr hyn y mae'r Cynulliad wedi ei wneud yng Nghymru, ond hefyd yr hyn y mae San Steffan wedi ei wneud mewn perthynas â Lloegr. Ymddengys i mi bod ceisio cynnal yr wrtheb hon, a cheisio adfer yr hyn y gellir ei weld, o un safbwynt, i fod yn dir a gollwyd, wrth wraidd llawer o'r cymhlethdod yn y Bil hwn.

Byddai cydnabod bod yna gyfraith Cymru ac (wrth gwrs) cyfraith Lloegr, sydd yn estyn i diriogaethau Cymru a Lloegr, yn fan cychwyn da. Fyddai hynny ddim yn gofyn o

anghenrhaid datganoli gweinyddu cyfiawnder yng Nghymru, na chreu syfdliadau Cymreig ar wahan

Dywedodd yr **Ysgrifennydd Gwladol** wrth y Pwyllgor:

We've committed to preserving the integrity of the England-and-Wales jurisdiction. Now, if you're going to do that, if you are going to preserve that single jurisdiction, you actually do need to build into legislation a way to give freedom to Welsh Government to be able to legislate and enforce its legislation, but also some kind of boundary that preserves the fundamental underpinnings of the single England-and-Wales jurisdiction. [trawsgrifiad heb ei gywiro]

Yn ei dystiolaeth mae **Prif Weinidog Cymru [DWB 7]** yn nodi bod Llywodraeth Cymru yn ystyried mai awdurdodaeth gyfreithiol i Gymru fyddai'r fframwaith cyfreithiol gorau a mwyaf effeithiol i weithredu'r pwerau cadw. Mae cadw awdurdodaeth Cymru a Lloegr yn cynyddu cymhlethdod y setliad. (para 11) Gallai creu awdurdodaeth wahanol (nid ar wahân) fod yn fesur dros dro.

Mynegodd y Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol [DWB11] bryder y byddai'r model pwerau cadw yn anodd iawn i'w weithredu heb awdurdodaeth gyfreithiol wahanol i Gymru.

Mae'r Athro Laura McAllister a Dr Diana Stirbu [DWB15] yn datgan:

A major weakness of the Bill comes from the disproportionate focus on marrying the numerous reservations and powers with the status quo of the 'highly integrated border and the single jurisdiction with England', rather than on designing a bespoke model in itself. (t4)

Maent yn credu bod symud i awdurdodaeth ar wahân neu wahanol i Gymru yn anochel ac y dylai'r Bil gynorthwyo hyn, yn hytrach na'i rwystro.

Mae Cymdeithas Ddysgedig Cymru [DWB22] yn nodi:

The draft insists on a unified England and Wales jurisdiction and fails to recognise the practical existence of three bodies of law - those of England and Wales, those of England only, and those which apply only in Wales. This last category will grow as the National Assembly legislates. In the view of the Society, developments and Acts will determine how jurisdiction will evolve. It is unhelpful now to insist artificially on a unified system which is unnecessary and serves to fetter the powers of the Assembly.

Mae'r Gymdeithas Ddysgedig hefyd yn dweud ei fod yn "looks forward to consideration of two options; either that England and Wales should be a shared or joint jurisdiction within which the National Assembly has unfettered power to change the criminal and private law as it extends to Wales or a distinct Wales jurisdiction is created to sit within the current England and Wales legal institutional framework".

Mae Aled Edwards [DWB27] yn dweud:

Restrictions should not be imposed upon the Assembly in an outdated effort to provide 'a general level of protection for the unified legal system of England and Wales.' Since the law of England and Wales has not been completely unified for some time, the legal

system which administers it needs to develop so as to reflect that modern reality rather than restrict it. Three bodies of law already exist in Wales and England.

Y profion o angenrheidrwydd ac addasu cyfraith breifat a throseddol

Mae tystiolaeth ysgrifenedig yr **Ysgrifennydd Gwladol [DWB18]** yn nodi:

The Assembly will continue to be able to enforce its legislation by modifying the private law and criminal law, in the same way as it does now. The model recognises that the Assembly has a legitimate need to modify the law in respect of devolved matters in order to give full and proper effect to its legislation. It will continue, for example, to be able to create offences and impose penalties to enforce the laws that it makes.

Hefyd:

The no greater effect than necessary test is designed to address occasions where the Assembly seeks to enforce its laws by legislating in relation to England, the law on reserved matters and the general principles of private law and criminal law. The model enables the Assembly to modify the general principles of the private law and criminal law if that is needed to give effect to its laws. But we do not want to see those modifications lead to significant divergence in the fundamental legal landscape of England and Wales. Any modification of private law and criminal law should be proportionate to the devolved provision the Assembly is seeking to enforce. It is subject therefore to the no greater effect than necessary test: any modification must have no greater effect on the general application of the private law and criminal law than is necessary to give effect to the devolved provision. The test also applies when the Assembly enforces its laws by legislating in relation to England and where it modifies the law on reserved matters. We believe it is reasonable to set a limit on the extent to which the Assembly can legislate beyond Wales or change the law on reserved matters. The test has operated with no difficulty as part of the reserved powers model in Scotland since the start of devolution.

Mae tystiolaeth y **Prif Weinidog [DWB7]** yn nodi:

We have a number of concerns with the detail of Schedule 7B. At present, the National Assembly can modify the law of contract, common law and other areas of private law and criminal law wherever those modifications *relate to* a devolved subject. This might include, for instance, simplifying how contracts work in, or creating a criminal offence in relation to, areas of devolved life where that is appropriate to make Assembly legislation effective. **The draft Bill significantly curtails this ability, by limiting the National Assembly's power to modify the private law to provisions which are either 'necessary for a devolved purpose' or 'ancillary' to another provision within competence, and limiting the National Assembly's power to modify the criminal law solely to provisions which are ancillary to another provision within competence.** In both cases, the provisions are further prohibited from having any greater effect on 'the general application [whatever that might mean] of the private or criminal law' than is *necessary*. But preventing the Assembly from modifying the criminal law for a devolved purpose is too restrictive. **The choice about whether it is necessary, appropriate or expedient to modify the private or criminal law for a devolved purpose is one properly for the National Assembly, not for the courts,**

but this new limitation dramatically increases the likelihood of Assembly legislation being challenged in the courts.

Hefyd:

'Necessity' can mean different things in different contexts; this makes it very difficult to predict how the test will be interpreted by a court, and makes the settlement unstable, unclear, and, ripe for further legal challenge. Under these provisions decisions about how best to give effect to Welsh laws would therefore shift inexorably from elected Assembly Members, accountable to the electorate, to unelected judges.

Mae'r Llywydd [DWB5] yn mynegi pryderon am y cynnydd yn nifer y profion cymhwysedd a fyddai'n cynyddu cymhlethdod y setliad ac felly yn ei wneud yn llai ymarferol.

Mae cymhlethdod mewnol i'r profion hefyd ac maent yn cynnwys y term 'angenrheidrwydd' sy'n dwyn amrediad o ystyron yn y gyfraith, gan greu maes newydd o ansicrwydd cyfreithiol. Mae'r ffaith bod y profion a'r cymalau cadw yn gorgyffwrdd yn cynyddu'r cymhlethdod ymhellach.

Mae'r cyfyngiadau newydd ar y Cynulliad yn addasu'r gyfraith breifat a throseddol yn 'gam yn ôl sylweddol iawn' (1.11). Mae angen addasu'r rhain er mwyn gorfodi rhwymedigaethau a gwneud hawliau yn effeithiol.

Mae dadansoddiad manwl o'r profion cymhwysedd yn cael eu cynnwys yn atodiad A o dystiolaeth y Llywydd. Mae newidiadau a awgrymwyd i baragraffau 3 a 4 o'r Atodlen 7B newydd yn cael eu darparu (atodiad B).

Mae'r Athro Thomas Glyn Watkin [DWB1] yn datgan:

[...] loss of competence results from the interplay of two factors. The first is the large number of reservations. The second is the use of the 'relates to' test to determine whether provisions fall foul of reservations. Whereas the 'relates to' test broadens the scope of the Assembly's legislative competence under the conferred-powers model, it narrows it under the reserved-powers model. The greater the number of reservations, the greater the narrowing achieved by the test. This also makes the task of those developing policy which may require legislation for its implementation all the more difficult. They will be asked to determine whether anything they wish to do may relate to any one or more of 200+ reserved matters, as opposed to being asked to determine that their proposals relate to any one conferred subject.

Mae'n dadlau ei bod yn ymddangos bod cyfyngiadau yn Atodlen 7B o ran gwneud addasiadau i'r gyfraith breifat a'r gyfraith droseddol yn erbyn yr hyn y pleidleisiodd pobl Cymru drosto yn refferendwm 2011 gan fod symud at bwerau deddfu llawn wedi dileu'r cyfyngiad hwn.

Hefyd:

The function of a legislature is to make laws. The function of legislation is to make modifications to the law. To propose that a legislature may not make modifications to the law strikes at the heart of the reason for its existence. Legislation makes modifications to the law as a means of giving effect to policies. The choice of means is part of the choice of policy. Currently, policy makers can choose to give effect to their policy objectives from a number of means, including the imposition of criminal

sanctions, the creation of civil (that is, private) law liability, or a variety of public law methods, such as licensing or regulation. The proposed restrictions would limit that choice. This reduces the Assembly's legislative competence.

Mae tystiolaeth ysgrifenedig Emyr Lewis [DWB2] yn nodi:

Mae fy mhryder yn ehangach na hynny. Mae'n deillio o'r ffaith y gellir codi'r cwestiwn a yw Deddf y Cynulliad oddi mewn i'w gymhwysedd deddfwriethol ai peidio oddi mewn i *unrhyw achos llys*, yn yr un modd â'r cwestiwn a yw Deddf Seneddol yn cyd-fynd â chyfraith y Gymuned Ewropeaidd neu Hawliau Confensiwn.

Mae hyn yn golygu ei bod hi'n bosibl, mewn unrhyw achos preifat neu droseddol, i herio hawliau, dyletswyddau, troseddau ayyb a grewyd gan ddeddf y Cynulliad. Mae'r profion newydd ym mharagraffau 3 a 4 yr Atodlen 7(B) newydd yn ymestyn yn sylweddoln y cyfle i herio dilysrwydd cyfreithiau. Does dim cyfyngiad amser ar hyn, felly gellir herio Deddf y Cynulliad er ei bod wedi bodoli ers blynyddoedd ac yn gweithio'n dda.

Nid y ffaith y gellir herio sydd yn fy mhryderu, ond y seiliau ar gyfer her, a'r effaith ymarferol.

Mewn achosion perthnasol yn ymwneud â chwestiynau o gyfraith breifat (e.e. achosion landlord a thenant) neu o gyfraith droseddol (e.e. erlyniad am drosedd a grewyd gan Ddeddf y Cynulliad) fe ofynir i lysoedd benderfynu nid yn unig a yw rhyw ddarpariaeth oddi mewn i gymhwysedd o ran ei phwnc, ond hefyd a yw'n bodloni'r profion yn Atodlen 7B para 3 neu 4.

Gan adael i'r naill ochr y cymhlethdod ychwanegol y mae'r paragraffau hyn yn ei greu (er enghraifft, beth yw ystyr "effect on the general application of" y gyfraith breifat neu'r gyfraith droseddol?), y pryder cyntaf yw y bydd Llys yn cael ei ofyn i benderfynu a yw'r ddeddfwriaeth yn bodloni'r profion, gan gynnwys y prawf "necessity". Felly, yr hyn fydd yn cyfri yw maentumiad Barnwyr a yw (er enghraifft) darpariaeth yn angenrheidiol (yn achos 7(B)(3)(a)) neu a yw ei effaith ar "general application" y gyfraith breifat neu'r gyfraith droseddol yn mynd y tu hwnt i'r hyn sydd ei angen (yn achos 7(B)(3)(b) a 7B(4)(b)). Daw hyn yn beryglus o agos at freinio asesiad barnwyr am faterion sydd yn rhai y dylai gwleidyddion etholedig fod yn eu gwneud. Mae "A yw hyn yn angenrheidiol?" ac "A ydym yn mynd ymhellach nag sydd yn angenrheidiol wrth greu'r drosedd hon? yn ymddangos i mi i fod yn gwestiynau y mae'n briodol i'r ddeddfwrfa eu hateb, nid y farnwriaeth.

Mae'r Pwyllgor Cyfrifon Cyhoeddus yn datgan:

The Committee noted the 10 proposed tests for competence found in clause 3 of the Bill and noted that, while some of these tests exist currently, there are others that are new, or elements of those tests that are new, that do not flow inevitably from a reserves powers model and which would constrain the Assembly more than at present - for example the 'new necessity tests' - which in essence roll back competence. The Committee is not content with this potential reduction in the Assembly's legislative competence.

Mae'r Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol [DWB11] yn pryderu am y profion cymhwysedd newydd a fyddai, pe cymhwysir hwy yn awr, yn cyfyngu ar allu'r Cynulliad i basio rhai o'r naw o Filiau y mae wedi'u hystyried.

Byddai cyfyngiad ar addasu cyfraith breifat yn lleihau cymhwysedd a chreu ansicrwydd a allai arwain at fwy o atgyfeiriadau at y Goruchaf Lys. e.e. mae cymhwysedd y Cynulliad yn aneglur mewn perthynas â *Deddf Cartrefi Symudol (Cymru) 2013* a *Bil Rhentu Cartrefi (Cymru)* o dan y Bil drafft.

Gallai cyfyngiad ar addasu cyfraith droseddol fod wedi effeithio ar y ddarpariaeth yn y *Ddeddf Tai (Cymru) 2014* a *Bil yr Amgylchedd Hanesyddol (Cymru)*. (t5) Gallai hyn arwain at heriau, neu basio “toothless’ and largely ineffectual laws in Wales”

Mae'r Pwyllgor Iechyd a Gofal Cymdeithasol [DWB13] yn pryderu am brofion angenrheidrwydd a chyfyngiadau o gwmpas cyfraith breifat a throseddol. Gallai cyfyngiadau ar gyfraith breifat effeithio ar ddeddfwriaeth y Cynulliad ar, er enghraifft, gontractau GIG ac asiantaethau gofal cymdeithasol.

Mae YourLegalEyes [DWB16] yn nodi:

the proposed necessity test is not a clear test as challenges on similar grounds in Scotland show that the judges have already been divided on its interpretation and application. (Martin v Miller and Imperial Tobacco cases). It is therefore my opinion that this extra test adds unnecessary additional complication to an already complicated system and it opens a new door to challenges of Welsh legislation in an unconstructive manner, once they have become Acts and have started to produce legal effect.

Mae Chwarae Teg [DWB 19] yn datgan y byddai'r profion angenrheidrwydd yn creu dryswch ac ansicrwydd ac yn tanseilio'r Cynulliad fel deddfwrfa Cymru a etholwyd yn ddemocrataidd.

Dywed Aled Edwards [DWB 27] na ddylid tanseilio rôl y Cynulliad fel corff deddfu sylfaenol trwy gyfyngu ar ei ddewisiadau priodol. Mae'r prawf angenrheidrwydd arfaethedig yn ddiangen ac yn tanseilio gwaith deddfu'r Cynulliad.

Cydsyniadau Gweinidog y Goron

Mae'r Ysgrifennydd Gwladol [DWB18] yn dweud:

I have read many incorrect and inaccurate comments about the new draft model in terms of the constraints it places on the Assembly in exercising its legislative competence. I would like to take this opportunity to put the record straight:

The Assembly will continue to be able to legislate in devolved areas without the need for any consent. The Assembly will be able to legislate in any area not specified as a reservation in Schedule 1 to the draft Bill and in those areas specified as exceptions to reservations. The Assembly will need the consent of UK Ministers to legislate about reserved bodies. It is surely right that UK Ministers consent when an Assembly Bill imposes functions on reserved bodies, just as Assembly consent is obtained when Parliament legislates in devolved areas.

Mae tystiolaeth y **Prif Weinidog [DWB7]** yn nodi:

The draft Bill significantly extends the requirement for Ministerial consents to Assembly legislation. UK Government consent would be required for the Assembly to be able to modify:

- any UK Minister function, even if it is within the Assembly's devolved competence. It is hard to see how this can be reconciled with the Secretary of State's aspiration for a clearer boundary between devolved and reserved spheres?
- any UK government department function, again even if within devolved competence,
- any function of a reserved authority (the definition of which is extremely wide: for example, it includes the water industry regulator, OfWAT, notwithstanding that the activities of this body are of fundamental importance to Wales).

The practical effect of these new consent requirements is that Assembly legislation will be vulnerable to delay, or worse still, frustration, by Whitehall. This is irreconcilable with the Secretary of State's expressed desire for "a settlement that fosters co-operation not conflict between either end of the M4", and for "Welsh laws to be decided by the people of Wales and their elected representatives."

Mae tystiolaeth y Llywydd [DWB5] yn datgan bod y Bil drafft yn ymestyn yr angen am gysyniadau gweinidog y goron mewn pum ffordd newydd a phellgyrhaeddol sy'n cwtogi'n sylweddol ar allu'r Cynulliad i ddeddfu heb gydsyniad gweinidog y DU. Mae dadansoddiad manwl wedi'i gynnwys yn atodiad A ei thystiolaeth, adran 5 a'r newidiadau a awgrymwyd i Atodlen 2 yn atodiad B.

Mae'r **Athro Thomas Glyn Watkin [DWB1]** yn datgan:

[...] In effect, the Assembly's legislative competence is determined by ministerial discretion rather than a clear rule of law, and it is clarity as to the Assembly's power to legislate that is needed for the settlement to be clear, not clarity as to when UK ministers have discretion. The exercise of such discretion could vary from time to time, from government to government, from minister to minister. The discretion is inimical to clarity regarding legislative competence.

Mae Keith Bush QC [DWB 3] yn datgan bod y Bil Is-ddeddfau Llywodraeth Leol yn dangos peryglon y dull a ddefnyddir tuag at gydsyniadau gweinidogol yn y Bil drafft. Ni chafodd y cydsyniad ei wrthod oherwydd bod gan Lywodraeth y DU unrhyw wrthwynebiad i effaith y ddeddfwriaeth, ond oherwydd ei bod yn cynnwys darpariaeth a oedd yn ymddangos fel pe bai'n lleihau eu rheolaeth dros ddeddfwriaeth Cymru yn y dyfodol ar yr un pwnc. Byddai'r Bil drafft yn gwyrddroi penderfyniad y Goruchaf Lys ar y Bil hwnnw.

Mae Atodlen 7B, para. 8 yn ymestyn diogelu swyddogaethau Gweinidog y Goron drwy:

- gynnwys adrannau'r llywodraeth ac awdurdodau cyhoeddus eraill (ac eithrio awdurdodau cyhoeddus yng Nghymru);
- cael gwared ar y cyfyngiad swyddogaethau 'cyn dechrau';
- tynnu'r eithriad i'r cyfyngiad sydd ar hyn o bryd yn gymwys i ddarpariaethau sy'n "incidental to, or consequential on, any other provision contained in the Act of the Assembly".

Byddai'r effeithiau yn bellgyrhaeddol.

Un ateb yw i ddychwelyd i'r sefyllfa bresennol ond mae hyn yn wendid sylfaenol yn y setliad i Gymru - nid oes unrhyw beth yn cyfateb i *Ddeddf yr Alban 1998*. (Mae hanes datganoli yng Nghymru yn wahanol i'r Alban, ac mae Gweinidogion y DU yn parhau i arfer llawer o swyddogaethau statudol, gan gynnwys mewn meysydd datganoledig.)

Mae Adran 53 *Deddf yr Alban 1998* yn datganoli holl swyddogaethau cyn dechrau gweinidogion y Goron sy'n ymwneud â materion sydd wedi'u datganoli i weinidogion yr Alban. Byddai hwn yn ddull gwell i Gymru.

Dywedodd:

34. A number of undesirable consequences flow from the proposed inclusion of Schedule 7B paragraph 8:

- The opportunity to align devolved legislative competence with devolved executive functions will be missed;
- The Welsh model of devolution will continue to be unnecessarily complex and difficult to operate;
- Public understanding of the division between devolved and reserved powers will not be enhanced;
- Fundamental constitutional principles will continue to be undermined (and will, indeed, be further damaged) by the existence of a power for the UK executive (Government) to interfere in the affairs of the Welsh legislature (Assembly);
- Opportunities for unnecessary friction between Welsh institutions of government and UK ones will continue and may well be increased;
- The UK Government will be seen (contrary to its stated aims) to be rolling back the powers of devolved government in Wales rather than making them stronger and more effective;
- Wales will continue to be subject to devolution arrangements which, even within the narrower fields devolved to Wales, are significantly inferior to those that apply to Scotland;
- Calls for yet another Wales Bill in order to remove the anomalous treatment of Wales will be inevitable.

Mae'r Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol [DWB 11] yn pryderu am ehangu'r prawf mewn perthynas ag awdurdodau cadw a swyddogaethau gweinidog y goron. Byddai *Mesur Y Gymraeg (Cymru) 2011* yn cael ei effeithio. Darperir enghreifftiau eraill o Ddeddfau Cymru a fyddai angen cydsyniad arnynt bellach o dan gynigion y Bil drafft. Mae'r broses gydsyniad arfaethedig yn debygol o fod yn aneffeithlon a gallai oedi deddfwriaeth y Cynulliad.

Mae'r Pwyllgor Iechyd a Gofal Cymdeithasol [DWB 13] yn pryderu am gydsyniadau gweinidogol a allai fod wedi effeithio ar y darpariaethau yn y Bil Iechyd y Cyhoedd - gallai

fod wedi bod angen cydsyniad ar gyfer y rheini mewn darpariaethau 'gweithleoedd' awdurdodau cadw.

Mae'r Athro Laura McAllister a Dr Diana Stirbu [DWB 15] o'r farn bod Atodlen 7B paragraff 8 yn golygu gostyngiad mewn cymhwysedd. Dylai cyfrifoldebau gweithredol gweinidogion gyd-fynd â chymhwysedd deddfwriaethol y Cynulliad, fel y darperir yn a53 o *Ddeddf yr Alban 1998*.

Mae tystiolaeth Cymdeithas Ddysgedig Cymru [DWB22] yn nodi:

As drafted the Bill removes some of the Assembly's existing competences. Examples include teachers' pay and conditions, clawing back the Supreme Court's rulings on the scope of the Assembly's powers which the Court considered had been intended by Parliament, and expanding the current requirements for Minister of the Crown consents. These requirements are already more extensive than those which characterise Scotland's devolved settlement. Such an extension is constitutionally objectionable in that it greatly expands executive control over Wales's democratically elected legislature. It does this in two ways. Most obviously, it provides Whitehall with a direct veto power over National Assembly legislation. Not only that, but given that it is the Welsh Government who would be required to negotiate with Whitehall over these consents, it will also increase the power of the Welsh executive over the legislature in Cardiff Bay. The proposed system of Minister of the Crown consents will also create unnecessary delays and frustration in the process of enacting National Assembly legislation as well as, almost inevitably, generate conflict between devolved and central government. As an alternative, we propose the general devolution of Minister of the Crown consents with the retention of specific reservations for specified bodies. This would bring the situation in Wales into line with that pertaining in Scotland.

Mae tystiolaeth YourLegalEyes [DWB16] yn nodi:

DWB 16 While I fully understand that as a matter of balance of interests or fairness, there should be a UK equivalent to the Legislative Consent Motion when Wales legislate in reserved matters, the current draft Bill does not offer satisfactory arrangements. First there is the question of constitutional balance: in my opinion it should be for the legislatures to consent to the other legislature legislating in their sphere of competence. This could be included in the Draft Wales Bill. The Bill could require the Secretary of State to prepare and lay before Parliament a Legislative Consent Memorandum as do the Welsh Ministers under the current Sewel Convention. This represent the ideal constitutional scenario and this would seem to solve all the problems of the need or not for a necessity test, the effect on reserved bodies etc. While this seems nearly impossible in the UK constitutional tradition, amendments to the Draft Bill are in my opinion necessary.

17. The Draft Bill needs to be amended to include procedural guarantees and in particular ensure transparency and expediency.

18. As the draft Bill stands there is no transparent procedure by which the opinions of Whitehall are known or discussed before a decision as to whether consent should be given. This contrasts the transparent procedure relating to Legislative Consent Motions

for which there is a published Memorandum and a debate taking place in the Assembly.

19. If the consenting powers of the Secretary of State were to remain then there should be a public procedure, statutory grounds for refusal, a statutory presumption of consent and most importantly there should be a statutory deadline to avoid unnecessary blockages of Welsh Bills.

20. I also note that the requirements for consents have expanded quite importantly in the draft Bill.

21. It was understandable why, under GOWA 2006, Ministerial consents were required for Assembly legislative amendments to pre-referendum ministerial functions within devolved areas, (Para. 1(1) Part 2 General restrictions of Schedule 7 of the 2006 Act). Provision was then being made for a transition from the pre-devolution world to the devolved era. However, I do not understand the rationale in the draft Bill for extending the application of the restriction to all Ministerial including for the future.

Hefyd dylai'r Bil drafft ddarparu ar gyfer trosglwyddo yn awtomatig yr holl bwerau gweithredol o dan y meysydd sydd wedi'u datganoli i Lywodraeth Cymru, fel sy'n wir yn yr Alban.

Roedd llawer o'r dystiolaeth yn mynegi pryderon tebyg am y darpariaethau Cydsyniad Gweinidogol.

Cymalau cadw cyffredinol a phenodol

Mae'r Prif Weinidog [DWB 7] yn credu y dylai pwerau ychwanegol gael eu rhoi i Gymru ynghylch masnachfreintiau rheilffyrdd, arwyddion ffyrdd, peiriannau hapchwarae, fel a nodwyd yn argymhellion Comisiwn Smith. Dylai pwerau eraill gynnwys trwyddedu alcohol a'r Ardoll Seilwaith Cymunedol a chymhwysedd gweithredol am gynlluniau sifil wrth gefn.

Mae tystiolaeth **Pwyllgor Cyllid y Cynulliad [DWB6]** yn nodi:

We think this confusion over a Welsh public authority is particularly relevant to some aspects of the Finance Committee work, in relation to the WAO/Auditor General for Wales and the Public Services Ombudsman for Wales (PSOW) as it is not possible to categorically state that the WAO and/or the Auditor General and the PSOW are or are not "Welsh public authorities".

If the definition applies and they are not "Welsh public authorities" there will a loss of competence e.g. to confer, remove or modify their functions, as they will be either be reserved or be beyond the scope of the Assembly's powers in the absence of consent from a UK Government Minister under paragraph 8(1) of Schedule 7B as they exercise some functions otherwise than only in relation to Wales and/or have a number of functions which relate to reserved matters.

We think this uncertainty could be overcome by expressly providing for the Auditor General for Wales, the WAO and the PSOW to be expressly stated to as "Welsh public authorities".

Mynegwyd pryder hefyd gan y **Pwyllgor Cyfrifon Cyhoeddus [DWB8]** ynghylch y diffiniad o awdurdodau cyhoeddus Cymru (Cymal 218 o Atodlen 7A) yn y Bil drafft:

These provisions appear to present scope for discussion as to whether public bodies that could be considered integral parts of the Welsh public sector are excluded from the definition of 'Welsh public authority'. Such an exclusion would seem to arise in the case of bodies with general or supplementary powers that are not confined to 'only in relation to Wales' and examples include local health boards and the Wales Audit Office powers under the provision of services under section 19 of the Public Audit (Wales) Act 2013. The Committee feels that clarity would be desirable on this point.

Cyflwynodd **Cadeirydd y Pwyllgor Menter a Busnes [DWB10]** ohebiaeth i'r Ysgrifennydd Gwladol fel tystiolaeth lle y dywedodd:

In our committee discussion, a room full of experienced legislators struggled to understand what the bill does and what it is seeking to do. For those who are not used to reading and drafting laws, it is – in its present form – very difficult to understand. Clarity and workability are important principles when it comes to legislation, and I am sure that more can be done in this regard.

Roedd y llythyr hefyd yn gofyn am fwy o eglurder ynghylch cymalau cadw penodol, yn benodol rhai cymalau cadw yr ymddengys eu bod yn cyfyngu cymhwysedd mewn perthynas â Datblygu Economaidd.

Y Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol [DWB11]: Mae enghreifftiau o broblemau gyda chymalau cadw penodol sy'n dod o fewn cylch gwaith y Pwyllgor wedi'u nodi yn atodiad A ei dystiolaeth ysgrifenedig, yn cynnwys lle y byddai'r rhain wedi cael effaith ar Ffiliau/Deddfau'r Cynulliad. Mae'r rhain yn cynnwys mewnfudo, trosedd, trefn gyhoeddus a phlisma, ymddygiad gwrthgymdeithasol, eitemau peryglus, camddefnyddio neu ddelio cyffuriau a sylweddau seicoweithredol, adloniant ac ati, elusennau a chodi arian, iechyd a diogelwch, y cyfryngau, diwylliant a chwaraeon, taliadau tir lleol, a chyfle cyfartal.

Pryder penodol y **Pwyllgor Iechyd a Gofal Cymdeithasol [DWB13]** yw'r cymal cadw ynghylch gwerthu a chyflenwi alcohol y mae'n dweud sy'n fater iechyd difrifol, a'r ffordd orau i fynd i'r afael ag ef yw ar lefel leol.

Mae cymal cadw 149 (rheoleiddio gweithwyr iechyd proffesiynol) yn cynnwys darpariaeth gyffredinol a allai gynnwys gweithwyr gofal cymdeithasol. Mae angen eglurhad.

Mae cymal cadw 154 (hawliau a dyletswyddau cyflogaeth) yn amhriodol a gallai, er enghraifft, atal y Cynulliad rhag deddfu yn y maes hwn ar gyfer y sector gofal cymdeithasol.

Mae'r Comisiwn Cydraddoldeb a Hawliau Dynol [DWB 31] yn datgan yr ymddengys fod Bil drafft Cymru yn cael gwared ar gymhwysedd y Cynulliad ar gyfle cyfartal - caiff ei ddiffinio fel cymal cadw, gydag ychydig o eithriadau aneglur. Mae'n dweud bod hwn yn gam yn ôl a fyddai'n niweidio diogelu a hyrwyddo cydraddoldeb a hawliau dynol yng Nghymru. Dylai Bil Cymru drafft sicrhau bod cymhwysedd y Cynulliad Cenedlaethol

mewn perthynas â chydraddoldeb a hawliau dynol yn cael ei gynnal o leiaf, a, lle y bo modd, ei wella.

Goblygiadau ar gyfer y Gymraeg

Mae nifer o ddarnau o dystiolaeth yn codi peth ansicrwydd o ran cymhwysedd y Cynulliad i ddeddfu ar faterion sy'n ymwneud â'r iaith Gymraeg. Mae Comisiynydd y Gymraeg ei hun yn dweud:

Schedule 7A of the draft Wales Bill lists issues that have been reserved ('reserved matters'). One of these is 'equal opportunities' (Schedule 7A, Section N1). 'Equal opportunities' in that Section of the draft Bill are defined as follows

“Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions, but not including language. [Commissioner's emphasis].

It is possible that the words which have been highlighted in the last sentence of the clause have been included as the Welsh language is a devolved issue and to avoid impacting on this. I believe there is a need to consider whether this clause could have other, unintentional implications. For example, is it possible that this clause could prevent the UK Government from taking steps to stop, abolish or regulate discrimination against individuals based on the grounds that they speak Welsh or another language? Also, could defining 'equal opportunities' in this way in legislation, thus excluding language from the definition, have any implications with regard to the definition of 'equal opportunities' in other laws, or other contexts or more generally? I believe that we need to think carefully when scrutinizing this draft Bill about how it excludes the Welsh language from the definition of 'equal opportunities'.]

Fodd bynnag, mae tystiolaeth ysgrifenedig yr **Ysgrifennydd Gwladol [DWB18]** yn nodi:

The Assembly will continue to be able to legislate on the Welsh language. The reservations listed in Schedule 1 to the draft Bill do not prevent the Assembly from legislating on the Welsh language. In particular, the equal opportunities reservation specifically excludes language from the definition of equal opportunities.

Mae'r Athro Thomas Glyn Watkin [DWB1] yn datgan:

The essential problem is that Welsh language competence cuts across other subjects, and therefore may be more liable to being frustrated by the reserved-powers model than many other devolved subjects. The application of the 'relates to' test, as opposed to the 'falls within' test, for what would previously have been exceptions but would now be reserved matters may be particularly problematic here.

Dywed Keith Bush QC [DWB3] na fyddai'r Cynulliad yn gallu deddfu “without the consent of the UK Government so as to impose duties relating to devolved matters on government departments and other UK public authorities”. Dywedodd:

Provisions such as those in the *Welsh Language (Wales) Measure 2011*, which provide for Standards of service through the medium of Welsh to be imposed on public authorities, whether devolved or not, would in future require the consent of the UK Government.

Mae tystiolaeth Cymdeithas Ddysgedig Cymru [DWB22] yn nodi:

The power of the National Assembly to legislate on matters affecting the Welsh language is obviously right. Yet because this competence cuts across reserved areas, the outcome in the draft bill would be a diminution of powers and a potential recipe for confusion and conflict.

Mae tystiolaeth Cymdeithas yr Iaith Gymraeg [DWB25] yn nodi:

We would like to emphasise once more that the above are initial observations on the draft Bill. However, following our first reading of the draft Bill, we believe that the proposed legislation will, at the very least, create significant uncertainty as to the Assembly's powers to legislate in relation to the Welsh language. Indeed, we believe it to be likely that the Assembly will have less legislative powers in terms of the Welsh language under the settlement outlined in the draft Bill.

Therefore, we are firmly opposed to passing the Bill in its current form. The effort needed in ensuring the future of the Welsh language as a significant and thriving language in Wales requires a significant freedom for its national legislature to make laws across a range of issues, without the fetters of a lack of clarity and unnecessary restrictions on its ability to act.