



**Cynulliad Cenedlaethol Cymru
The National Assembly for Wales**

**Y Pwyllgor Materion Cyfansoddiadol
The Constitutional Affairs Committee**

**Dydd Iau, 13 Ionawr 2010
Thursday, 13 January 2010**

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Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynnddi yn y pwyllgor. Yn ogystal, cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee. In addition, an English translation of Welsh speeches is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Alun Davies	Llafur Labour
William Graham	Ceidwadwyr Cymreig Welsh Conservatives
Rhodri Morgan	Llafur Labour
Janet Ryder	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)
Kirsty Williams	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

Eraill yn bresennol
Others in attendance

Leighton Andrews	Aelod Cynulliad, Llafur (Y Gweinidog dros Blant, Addysg a Dysgu Gydol Oes) Assembly Member, Labour (The Minister for Children, Education and Lifelong Learning)
Simon Morea	Cyfreithiwr, Llywodraeth Cynulliad Cymru Lawyer, Welsh Assembly Government
David Lloyd Thomas	Pennaeth Tîm Llywodraethu a Chyllido Ysgolion, Llywodraeth Cynulliad Cymru Head of School Governance and Revenue Funding Branch, Welsh Assembly Government

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

Stephen George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Gareth Howells	Cynghorydd Cyfreithiol Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Bethan Roberts	Cynghorydd Cyfreithiol Legal Adviser

Dechreuodd y cyfarfod am 9.29 a.m.
The meeting began at 9.29 a.m.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introduction, Apologies, Substitutions and Declarations of Interest

[1] **Janet Ryder:** Welcome to the first meeting this year of the Constitutional Affairs Committee. I remind Members that in an emergency, ushers will indicate the nearest safe exit, and that headsets are available for amplification and translation. I remind Members and officials to switch off all mobile devices completely. We have received no apologies, so we will go straight into the first piece of business.

9.30 a.m.

Offerynnau na fydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhifau 15.2 a 15.3 ac Offerynnau sy'n Agored i Gael eu Dirymu yn unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol)
Instruments in respect of which the Assembly is not Invited to Pay Special Attention under Standing Order Nos. 15.2 and 15.3 and Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (Negative Procedure)

[2] **Janet Ryder:** The first instrument is CA509, the Non-Domestic Rating Contributions (Wales) (Amendment) Regulations 2010.

[3] **Ms Roberts:** There is nothing to report on these regulations. They amend equivalent regulations from 1992. They merely add a new Schedule regarding the adult population to them.

[4] **Janet Ryder:** Are Members content? I see that you are.

[5] CA510 is the Sea Fish (Specified Area) (Prohibition of Fixed Engines) (Wales) Order 2010.

[6] **Mr Griffiths:** Nid yw'r Gorchymyn hwn yn newid y gyfraith mewn sylwedd. Mae Deddf Pysgodfeydd Eogiaid a Dŵr Croyw 1975 yn cael ei diddymu, felly mae angen ail-wneud y Gorchymyn hwn o dan ddeddfwriaeth wahanol. Felly, nid oes effaith gyfreithiol wahanol i hwn. Fodd bynnag, dylwn nodi fod y term Cymraeg 'offer gosod' yn well na'r term Saesneg '*fixed engines*' oherwydd nid ydynt o angenrheidrwydd yn bethau peirianyddol, dim ond yn offer pysgota sydd wedi ei glymu i waelod y môr.

Mr Griffiths: This Order does not change the law in substance. The Salmon and Freshwater Fisheries Act 1975 is being repealed, therefore this Order has to be remade under different legislation. So, this does not have a distinct legal effect. However, I should note that the Welsh term '*offer gosod*' is better than the English term '*fixed engine*' as they are not necessarily of a mechanical nature, just fishing equipment that is tied to the bottom of the sea.

[7] **Janet Ryder:** Diolch yn fawr. A yw pawb yn hapus? A oes gennych gwestiwn, Rhodri?

Janet Ryder: Thank you. Is everyone content? Do you have a question, Rhodri?

[8] **Rhodri Morgan:** They are not necessarily engines at all?

[9] **Mr Griffiths:** No.

[10] **William Graham:** They have been referred to as 'engines' since at least the sixteenth century. There are particular statutes covering fishing in the Severn, and they are Elizabethan.

[11] **Rhodri Morgan:** Would that include traps and the like?

[12] **William Graham:** Yes; for fishing rights, they are referred to as engines.

[13] **Rhodri Morgan:** I shall sprinkle that into the conversation at my next dinner party. [*Laughter.*]

[14] **Janet Ryder:** Is everyone content with that Order? I see that you are.

[15] The next is CA513, the Flavourings in Food (Wales) Regulations 2010.

[16] **Mr Griffiths:** Mae'r rheoliadau hyn yn gweithredu deddfwriaeth Ewrop ar y pwnc. Gwnaethpwyd y rheoliad Ewropeaidd yn 2008, ac felly mae'r rheoliad hwnnw yn uniongyrchol effeithiol yng Nghymru. Fodd bynnag, nid yw'r rheoliadau Ewropeaidd yn cynnwys darpariaethau gorfodi. Felly, yn y modd arferol gyda rheoliadau Ewropeaidd, mae offeryn statudol domestig yn delio â darpariaethau gorfodi fel y gwnânt hynny.

Mr Griffiths: These regulations implement European legislation on the subject. The European regulation was made in 2008, therefore that regulation is directly effective in Wales. However, the European regulations do not include enforcement provisions. Therefore, as per usual with European regulations, there is a domestic statutory instrument dealing with enforcement provisions so that they do.

[17] **Janet Ryder:** A yw pawb yn hapus â hynny? Gwelaf eich bod.

Janet Ryder: Is everyone content with that? I see that you are.

[18] I am sorry, but I skipped over CA511 on the Marine and Coastal Access Act 2009 (Consequential Provisions) (Wales) (No. 2) Order 2010.

[19] **Ms Roberts:** This Order amends bye-laws 24 and 25 of the north western and north Wales sea fisheries committee due to a repeal of the Sea Fisheries Regulation Act 1966. There is nothing to report.

[20] **Janet Ryder:** Is everyone content? I see that you are. CA515 is the Civil Enforcement of Parking Contraventions (County of Pembrokeshire) Designation Order 2010.

[21] **Mr Griffiths:** Dyma'r diweddaraf mewn cyfres o Orchmynion o'r math hwn. Cofiwch inni gael rhai ynglŷn â Chaerdydd ychydig fisoedd yn ôl, ac yr wyf yn deall bod rhagor ar y gweill. Y cyfan y mae'r Gorchymyn hwn yn ei wneud yw trosglwyddo cyfrifoldeb am orfodi o'r heddlu i'r awdurdod lleol. Nid oes dim i'w nodi yn arbennig am y Gorchymyn hwn.

Mr Griffiths: This is the latest in a series of Orders of this nature. You will remember that we had some regarding Cardiff a few months ago, and I understand that there are more to come. All that this Order does is to transfer responsibility for enforcement from the police to the local authority. There is nothing in particular to note about this Order.

[22] **Janet Ryder:** Are Members content? I see that you are. CA516 is the Education (Reintegration Interview) (Wales) Regulations 2010.

[23] **Ms Roberts:** These regulations prescribe the circumstances in which a headteacher can request the parents of an excluded pupil to attend for an interview. That comes under the Education and Inspections Act 2006. There is nothing to report on that.

[24] **Janet Ryder:** Are Members content? I see that you are. CA517 is the Education (Parenting Contracts and Parenting Orders) (Wales) Regulations 2010.

[25] **Ms Roberts:** The regulations make provision for those Orders. They appear under parenting contracts and the Anti-social Behaviour Act 2003.

[26] **Janet Ryder:** Are Members content? I see that you are. CA518 is the Plant Health (Wales) (Amendment) (No. 2) Order 2010.

[27] **Ms Roberts:** This transposes commission decision 2010/380/EU as regards emergency measures to prevent the introduction to and spread within the European Union of a

pest called *Anoplophora chinensis*.

[28] **Janet Ryder:** We are very impressed with your pronunciation. Are Members content? I see that you are.

9.35 a.m.

Offerynnau y Caiff y Cynulliad ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhifau 15.2 ac/neu 15.3 ac Offerynnau sy'n Agored i Gael eu Dirymu yn unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol)
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[29] **Janet Ryder:** Gwyn will tell us about CA508, the Audit and Assessment Reports (Wales) Order 2010.

[30] **Mr Griffiths:** Adroddir ar y Gorchymyn hwn oherwydd ei fod wedi cael ei wneud yn Saesneg yn unig. Fel y gwyddoch, nid yw hynny'n arferol y dyddiau hyn, ond yn yr achos hwn, mae'r Gorchymyn wedi ei wneud ar y ffurf hon oherwydd bod y Gweinidog wedi penderfynu ei fod yn afresymol neu yn anymarferol i'w lunio ar ffurf ddwyieithog. Y rheswm arferol dros hynny yw bod y Gorchymyn yn hir ac yn gymhleth a byddai'n cymryd gormod o amser i'w gyfieithu. Cewch weld hyd y Gorchymyn yn yr achos hwn o'r daflen hon o bapur. Yn fwy trawiadol byth, cafwyd amser i gyfieithu'r llythyr i'r Llywydd sy'n esbonio bod y rheol 21 diwrnod wedi ei thorri, ac mae hwnnw'n cynnwys—gallwch weld hyd y peth—yr un eirfa, ac eithrio'r termau safonol mewn is-ddeddfwriaeth. Felly, euthum ati i gyfieithu hwn fy hun i weld faint o amser y byddai'n ei gymryd.

Mr Griffiths This Order is being reported upon because it has been made in English only. As you are aware, that is not usual these days, but in this particular case, the Order has been made in this way because the Minister has decided that it would be unreasonable or impractical to draft it bilingually. The usual reason for that is that the Order is long and complicated and it would take too long to translate it. You can see the length of the Order in this case on this sheet of paper. Even more strikingly, time was found to translate a letter to the Presiding Officer explaining that the 21-day rule has been breached, and it includes—you can see how long it is—the same wording, with the exception of the standard terminology used in subordinate legislation. As a result, I set about translating this myself to see how much time it would take.

[31] **Rhodri Morgan:** Dyna yw'r ateb o hyd: gwnewch ef eich hun.

Rhodri Morgan: That is always the answer: do it yourself.

[32] **Mr Griffiths:** Cymerodd 40 munud i mi ei gyfieithu, yn cynnwys y nodyn esboniadol, er nad oes gennyf fynediad i'r system cof cyfieithu na'r templed a ddefnyddir ym marc Cathays ar gyfer cyfieithu offerynnau statudol. Gallaf ddeall y gellir cael offerynnau y mae'n anymarferol eu cyfieithu mewn amser, ond ni fedraf dderbyn bod hwn yn un ohonynt. Ni allaf weld unrhyw reswm pam ei bod yn afresymol cyfieithu dogfen o'r fath.

Mr Griffiths: It took me 40 minutes to translate it, including the explanatory memorandum, despite having access to neither the translation memory system nor the template that is used in Cathays park to translate statutory instruments. I can understand that there may be instruments that it is impractical to translate in time, but I cannot accept that this is one of them. I can see no reason why it would be unreasonable to translate a document of this kind.

[33] **Rhodri Morgan:** Beth am dywydd garw? [*Chwerthin.*] **Rhodri Morgan:** What about inclement weather? [*Laughter.*]

[34] **Alun Davies:** Llongyfarchiadau i Gwyn am wneud gwaith y Llywodraeth drosti. Chwarae teg iddo. **Alun Davies:** I congratulate Gwyn for doing the Government's work on its behalf. Fair play to him.

[35] **Janet Ryder:** Should we write to the Minister requesting an explanation as to why this was not translated?

[36] **Rhodri Morgan:** It is a bit of a rum do.

[37] **Janet Ryder:** So, we will write to the Minister on that point and report it as a technical point. I see that Members are content with that action.

[38] We will move on to CA512, the Plant Health (Import Inspection Fees) (Wales) Regulations 2010. I always look with slight trepidation at plant health regulations now.

[39] **Ms Roberts:** These regulations revoke and remake the equivalent 2006 regulations, and they implement council directive 2000/29/EC, which requires member states to charge fees that will cover the costs of plant health checks in relation to plant products from third countries. These regulations have three reporting points. First, the Welsh text gives an incorrect date for when the regulations come into force. The English text is correct. Secondly, there is slight ambiguity about the order of one of the paragraphs, because it differs between the English text and the Welsh text. If there was any direct cross-referencing from one to the other, there could be a slight ambiguity. Thirdly, there is an incorrect reference to one of the regulations that the regulations state will be revoked.

[40] **Janet Ryder:** They state that they are going to be revoked?

[41] **Ms Roberts:** Yes; the Welsh text contains an incorrect title in respect of the regulations being revoked. In fairness, it is a small error. The English text contains the correct title, so you could decipher the correct title of the regulations that are being revoked from the English text. We have heard from the Government, which has stated that it will correct these upon publication. The legal advisers to the committee accept that form of rectification.

[42] **Janet Ryder:** So, the recommendation is to accept the corrections to come from the Government. Are Members happy with that? I see that you are.

9.39 a.m.

**Ystyried y Mesur Arfaethedig ynghylch Addysg (Cymru)—Sesiwn Dystiolaeth gyda Leighton Andrews AC, y Gweinidog dros Blant, Addysg a Dysgu Gydol Oes
Consideration of the Proposed Education (Wales) Measure—Evidence Session with the Minister for Children, Education and Lifelong Learning, Leighton Andrews AM**

[43] **Janet Ryder:** That brings us on to our next item. As we bring in the Minister, I remind Members that we put off the evidence-taking session until today, but after today's session, we will need to complete the report swiftly, because of the timescale.

9.40 a.m.

[44] Good morning, Minister, and welcome to the meeting. I think that this is your first

appearance before us as Minister for Children, Education and Lifelong Learning.

[45] **The Minister for Children, Education and Lifelong Learning (Leighton Andrews):** Yes, I think so.

[46] **Janet Ryder:** Could you first of all introduce yourself and your officers for the record?

[47] **Leighton Andrews:** I am Leighton Andrews, the Minister for Children, Education and Lifelong Learning, and I am accompanied by Simon Morea from the Assembly Government's legal services department, and David Lloyd Thomas, who is the head of school governance.

[48] **Janet Ryder:** Before we move to questions, is there anything that you would like to say?

[49] **Leighton Andrews:** No.

[50] **Janet Ryder:** I will ask the first question. In evidence that was sent to Legislation Committee No. 5, the Association of School and College Leaders Cymru said that any proposed regulations should be subject to the affirmative procedure. That is very much the business of this committee, and we would be very interested to hear your views on that.

[51] **Leighton Andrews:** I think that there is always a tendency for lobbying organisations to want most things to be done by the affirmative procedure, because they think that it will give them an opportunity to air views that are additional or novel. In practice, the powers in the proposed Measure are very similar to powers that we already have as a result of other law relating to federation and collaboration, which already require the negative procedure for the introduction of regulations. So, I do not agree with the view expressed by ASCL. In all cases where we propose the use of subordinate legislation, we have set out the substantive policy objective on the face of the proposed Measure. So, regulations that are made under the proposed Measure will need some technical or administrative detail. It is appropriate for that to be done in regulations, and the appropriate means for determining those is the negative procedure.

[52] **Janet Ryder:** We took evidence last year, just before Christmas, from Daniel Greenberg, who is an eminent lawyer. His advice to the committee was to always be wary of a Minister who says 'This is how we have always done it, so this is how we are doing it', which seems to be the reason that you are giving us today for taking the negative rather than the affirmative route.

[53] **Leighton Andrews:** No, I do not think that that is the case at all. I am saying simply that you need to beware of creating inconsistencies, as we have legislation that is similar in character on which we have adopted the negative procedure. It would be unwise to create an anomaly whereby we adopt the affirmative procedure for regulations in one aspect of issues to do with federation or collaboration, when we have adopted the negative procedure in others.

[54] **Janet Ryder:** Another piece of evidence was sent in by the Association of Teachers and Lecturers Cymru, which made it clear that it would expect full consultation on regulations made under the proposed Measure. Would that be your intention?

[55] **Leighton Andrews:** No.

[56] **Janet Ryder:** There would be no full consultation.

[57] **Leighton Andrews:** No.

[58] **Janet Ryder:** Is there an explanation for that?

[59] **Leighton Andrews:** Yes. In looking at different aspects of the proposed Measure we must bear in mind that some of them have already been the subject of extensive consultation. If you look at what we are proposing in respect of governance, for example, you will see that an extensive inquiry has already been conducted by the Enterprise and Learning Committee, resulting in a report with recommendations, which the Government has broadly accepted, and which has been the subject of discussion in the Assembly, where stakeholders were able to give evidence. There was then the legislative competence Order, of course, based on many of the issues that arose from that, and which went through the full Assembly procedure and in Parliament. We are now going through the process of consultation on the proposed Measure, where we will discuss issues in respect of governance again. So, there has been ample opportunity over the past two years for stakeholders to put forward their views on that aspect of legislation. It would simply be a cause of delay at a time when we need strong accountability in education, and I think that we should pursue this.

[60] **Kirsty Williams:** Minister, your point that there has been a great deal of consultation to date is well made, but you will be aware that sections 6(3) and 6(4) of Part 1 would allow you to provide regulations that may modify the legislation. Those modifications would not necessarily have been subject to discussion previously. Would that be of concern to you—that you would be able to create new regulations that would not be subject to consultation but which may have far-reaching consequences for the functions of the collaborating education bodies?

[61] **Leighton Andrews:** I think that when we are talking about modifications, we are talking about modifications. We are not talking about creating, from first principles, new law as a result of the changes that we are making. I am sorry, but I did not catch the precise sections that you were referring to—

[62] **Kirsty Williams:** Sections 6(3) and 6(4).

[63] **Leighton Andrews:** These would simply be adjustments in respect of rules that already apply. We are not talking about fundamental changes. As I understand it, these sections are copied across from the existing Education and Inspections Act 2006 where, again, the negative procedure applies.

[64] **Kirsty Williams:** With all due respect, my point is that sections 6(3) and 6(4) would allow you, as Minister, quite rightly, to be able to make regulations that would modify any legislation relating to functions of the collaborating education bodies. It is right that you should have the power to make those regulations as Minister, but, previously, you said that you have no intention of going out to consultation on subsequent regulations because, you say, you have consulted to death. However, any modifications would be modifications not previously subject to consultation.

[65] **Leighton Andrews:** First, let us be clear about the sections. We are talking about sections that allow the modification of law. It is not about wholesale unfettered change. I am certainly not suggesting that we do this overnight by diktat. Clearly, we would discuss things over a period of time with interested organisations. However, as for going to a full-scale public consultation, no, that would not be my intention.

[66] **Janet Ryder:** Minister, do you think that that could be interpreted in a different way by any future Minister?

[67] **Leighton Andrews:** No, because, as I say, it is quite clear from the proposed Measure that we are talking about modifications. If you sought to use these sections in a more extreme way, the lawyers, internally, would have quite a lot to say about that.

[68] **Kirsty Williams:** Perhaps the committee could have a definition of what 'modification' means from the lawyers.

[69] **Janet Ryder:** Yes, from the Minister's lawyers—

[70] **Leighton Andrews:** We will be very happy to supply you with such a definition.

[71] **Janet Ryder:** That will be very useful. Are there any further questions on that section? I see that there are none, and so we will move on to the next set of questions from Rhodri.

[72] **Rhodri Morgan:** On the question of the balance between negative and affirmative procedures, does this relate in any way to whether the regulations under section 6 are intended to facilitate, which is to allow with a bit of help, or require, which is to demand, collaboration, and forcing it even when the parties may be mightily reluctant to do so?

[73] **Leighton Andrews:** What we are seeking to do through the proposed Measure is ensure that education bodies have a duty to consider collaboration. That is the intention behind the proposed Measure.

[74] **Rhodri Morgan:** So, it cannot be used to require collaboration.

[75] **Leighton Andrews:** We have powers that derive from local government legislation in respect of local government with regard to which there are specific conditions with which we could oblige collaboration. However, those are already in place. In effect, section 6 does not demand collaboration.

9.50 a.m.

[76] **Rhodri Morgan:** Referring to the modifications that came up two minutes ago, where you might make considerations in the future, if you fail to obtain, by facilitation, the collaboration that, in the post-PISA wake-up call scenario in which we are currently living, you are looking for in terms of the school improvement framework for accelerating school improvement, can one switch it from 'facilitate' to 'mandate'?

[77] **Leighton Andrews:** Within the proposed Measure, we are seeking to create a culture in which people actively think about collaboration. Therefore, we are seeking—

[78] **Rhodri Morgan:** If that is not enough in the long run to secure the acceleration of improvement, can you—subject to modification—switch this regulation from facilitation to making it mandatory?

[79] **Leighton Andrews:** No; the modifications would have to be in line with the intent of the proposed Measure. We could not go beyond that.

[80] **Rhodri Morgan:** Therefore, there is no power to mandate in this proposed Measure. The power to mandate collaboration comes from a previous piece of legislation.

[81] **Leighton Andrews:** In respect of local government, it comes from the Proposed Local Government (Wales) Measure. We have existing intervention powers under the

Education Act 1996, which we can use if bodies fail.

[82] **Rhodri Morgan:** That is for failing bodies.

[83] **Leighton Andrews:** That is right.

[84] **Rhodri Morgan:** That is different. In this case, you could use the Proposed Local Government (Wales) Measure to mandate a merger of two, four or however many education bodies, but you could not cross the local government incorporated further education college boundary, for instance, to get that sort of collaboration.

[85] **Leighton Andrews:** We are moving slightly into policy rather than discussing constitutional points, I think—

[86] **Rhodri Morgan:** I am only raising it because of this negative or affirmative procedural issue.

[87] **Leighton Andrews:** We are seeking to create a culture whereby people consider collaboration at an appropriate point, from time to time. In the case of local government, I would certainly expect them to do that in the context of their normal planning for school organisation arrangements. In the case of schools and FE institutions, I would expect them to do that in the context of their annual planning arrangements. If they then fail to demonstrate that they have looked at the issue of collaboration, we could bring in the Wales Audit Office or Estyn to look at whether they were effectively collaborating. On that basis, there would be measures open to us. However, in respect of this proposed Measure, I do not think that we are opening up anything new in this regard. We are strengthening the powers of local authorities in respect of federation, and we are opening up a change of culture in respect of a duty to consider collaboration.

[88] **Janet Ryder:** I accept what you are saying, Minister, but I hope that you will accept that it is this committee's job to scrutinise this piece of legislation from a legislative point of view. As I would see it, that is exactly what Rhodri Morgan has been doing: trying to find out—to go back to the initial question—whether the affirmative or the negative procedure is the correct one, how far modifications can be stretched, and how that may or may not be interpreted, not by you, but by any incoming Minister. One issue that this committee has noted time and again is that we tend to frame legislation for the present Minister. That is not necessarily the best way forward for legislation.

[89] **Leighton Andrews:** If it was framed for the present Minister it would be a lot tougher; but there we are. To answer that question in the context of the proposed Measure, the regulations that we are putting forward will provide detail about how bodies can collaborate. That is the whole point. It will provide examples of good practice. The guidance that we would then produce will also provide examples of good practice. Unless you can point me to it, I do not think that you could find anything in the sections on collaboration that really suggests that we could use these powers in the kind of dirigiste fashion that is being indicated.

[90] **Rhodri Morgan:** Let us explore this from the point of view of whether negative or affirmative is appropriate, with the realisation that these regulations were drafted pre-PISA wake-up call, but that we are now considering them and you, presumably, will be finalising them, in a post-PISA wake-up call climate.

[91] So, we then think of whether you and your successor Ministers may be saying to yourselves, 'Okay, we've got this explanatory memorandum that states that we consider that it may be appropriate to update the subject matter of subordinate legislation on a regular basis', and you or your successors may then say, 'We better get a move on in getting the most

effective procedure for accelerating school improvement. We now wish that it had been framed in a slightly more mandatory way than just facilitating collaboration'. In which case, you may say to yourselves, 'We should really have made this through the affirmative procedure, not the negative procedure'. Do you follow the logic of what I am saying?

[92] **Leighton Andrews:** I follow the logic of what you are saying, but I do not think that the proposed Measure would allow it.

[93] **Rhodri Morgan:** Even with the power to modify?

[94] **Leighton Andrews:** Yes, even with the power to modify.

[95] **Rhodri Morgan:** I will move on to the question of what is on the face of the proposed Measure. It is stated that the subject matter of the subordinate legislation is being left to the regulations. I will not go on about PISA anymore, but, given that school improvement is now a top priority for the whole of Wales, certainly for the education sector, should more be included on the face of the proposed Measure to indicate the priority to be given to this field of collaboration, with a view to school improvement?

[96] **Leighton Andrews:** I do not think that we need to put more in place than we already have done. We have set out the main principles relating to collaboration, and there is no element of compulsion here, so I am not sure that we really need to go into a lot more detail than we already have.

[97] **Rhodri Morgan:** However, and this is about the modification bit, does it rule it out through modification? Or should it rule it out, for that matter? What I am trying to get at is, the higher the priority that is given to collaboration between education bodies, it being seen as one of the missing links to secure accelerated school improvement, could that then be read into you or your successor Ministers perhaps wishing to move from facilitation to mandation?

[98] **Leighton Andrews:** If I needed to do that, I would probably need to look at other ways of undertaking that work, not at doing it through this proposed Measure. In that case, I would be looking to invoke issues to do with failure.

[99] **Rhodri Morgan:** Yes, but it seems to me that that is a different issue.

[100] **Leighton Andrews:** My main concerns in respect of collaboration are likely to be in the field of local government—although not exclusively, because, clearly, we have other ways of seeking to get people to collaborate, for example through some of the funding incentives that we have in the 14-19 area for particular institutions. However, in general terms, it is likely to be local government. The reality is that the legislation being adopted in the Proposed Local Government (Wales) Measure gives quite significant powers to the Minister for Social Justice and Local Government, with whom I have regular conversations about the importance of collaboration. The whole point of modification in legal terms, as I am advised, is that we cannot use that to change the intent of the proposed Measure.

[101] **Rhodri Morgan:** Okay. Finally, section 7 of the proposed Measure enables you to issue guidance. How much can you do to implement your more widely-held policy objectives of accelerating school improvement and so on, in relation to collaboration between education bodies, by way of guidance? Can you give us some examples of the kind of guidance that would be issued? How strong is that guidance likely to be and could it almost amount to a requirement to collaborate, even though you do not have the power to do it by mandatory means?

[102] **Leighton Andrews:** The guidance would be very much about the ways in which

people might seek to collaborate, based on experience and examples from elsewhere. So, we might, for example, set out case studies of real examples of collaboration that we regard positively. There may also be a need for guidance about some of the technical aspects of the proposed Measure. If you were to read the guidance that I anticipate that we might draft, I think that you would understand that it was written from the perspective of a desire to encourage collaboration.

10.00 a.m.

[103] **Janet Ryder:** Are you satisfied with those answers, Rhodri? I see that you are, so we will move on to Kirsty.

[104] **Kirsty Williams:** Further to that, the guidance that you were just talking about will not be subject to regulatory procedure and therefore legislative control by the National Assembly. Why do you believe that that is the appropriate way of dealing with this particular issue?

[105] **Leighton Andrews:** Regulations set down rules, while guidance sets down ways of carrying out activities in accordance with the rules, if you like. Guidance is a better format for giving people examples of where best practice has operated elsewhere, and it is the appropriate place to translate legal and technical terminology into day-to-day language.

[106] **Kirsty Williams:** That seems a perfectly reasonable distinction between the purpose of regulations and guidance. To move on to Part 2 of the proposed Measure, therefore, which relates to school governance, can you elaborate on how regulations will provide details of the scheme in relation to the federation of schools to realise the intent of the proposed Measure?

[107] **Leighton Andrews:** We would expect the regulations to set out detail, in much the same way as the existing regulations for federation. You will recall that we already have regulations in place in respect of federation. In the proposed Measure, we are seeking to introduce a new power for local authorities in respect of regulation. So, the regulations will set out the processes for proposing federation, for the implementation of those and for dissolving federations. They will set out how a school might leave a federation or how additional schools could join an existing federation. The regulations would not allow the Ministers to compel federation.

[108] **Kirsty Williams:** That sounds dangerously like giving examples and ideas to local authorities about how those powers may be used. In answer to the previous question, you said that those kinds of issues were best left to guidance rather than regulation. Can you explain why, in answer to the previous question, you said it was appropriate to use guidance, but, in answer to this question, you say that regulation is appropriate?

[109] **Leighton Andrews:** What we are doing here is ensuring that there are common processes in place across Wales for making and forming federations and allowing people to leave federations. It would be unwise to have a situation in which different approaches to the making or dissolving of federations existed around Wales.

[110] **Kirsty Williams:** If I heard you correctly, you stated that the regulations made under these sections could not be used to compel local authorities to establish or dissolve federations. Am I correct?

[111] **Leighton Andrews:** I said that the regulations could not allow the Welsh Ministers to compel federation. Through the proposed Measure, local authorities are enabled to ensure that federation takes place.

[112] **Kirsty Williams:** Can you explain how those regulations would have to be amended to give the Welsh Ministers that power?

[113] **Leighton Andrews:** We would draw up the regulations in the normal way and they would be subject to the appropriate procedures in the Assembly.

[114] **Kirsty Williams:** What those procedures are is always the issue. I will move on to the explanatory memorandum—

[115] **Janet Ryder:** Did you want to come in on this section, Alun?

[116] **Alun Davies:** Section 16 does allow you to do that, does it not, Minister?

[117] **Leighton Andrews:** Section 16 allows that in respect of small schools, but that is on the face of the proposed Measure. It is not something that I could do through regulations.

[118] **Alun Davies:** So, you are taking a power to compel federation.

[119] **Leighton Andrews:** Yes, but the questions were about the making of regulations. Section 16 is an explicit power on the face of the proposed Measure.

[120] **Kirsty Williams:** The Minister is right; I was referring to sections 10 to 14 and section 18.

[121] The explanatory memorandum states that the regulations will need to be updated on a regular basis. Can you explain why that is?

[122] **Leighton Andrews:** That is principally because the policy for federation is relatively new. We have only had the existing regulations in place since last April, so what we are doing in the proposed Measure is setting out the policy goals and we will be filling in the detail through regulations. As federation becomes more common as a governance structure, which we anticipate that it will, we will probably be learning from experience, and the appropriate place for updating would be within regulations.

[123] **Kirsty Williams:** As was just pointed out by Alun, there is a difference between sections 10 to 14 and 18, where it is left to regulations, and section 16, where, as you have just said, it is explicitly stated on the face of the proposed Measure. Could you explain why that approach has been taken and why, in some sections, the detail has been left to regulations, but, in others, it is on the face of the proposed Measure?

[124] **Leighton Andrews:** Where you are proposing something as fundamental as the Welsh Ministers having the power to direct, that rightly requires debate within the Assembly, and therefore it should be on the face of the proposed Measure as a point of principle. That is, essentially, the reason.

[125] **Kirsty Williams:** Section 18(4) empowers the Welsh Ministers to issue regulations that modify legislation relating to different categories of school. Given the breadth of that power, why was it not considered appropriate to use the affirmative procedure?

[126] **Leighton Andrews:** There is precedent for this, Chair, and we believe that it has been relatively uncontroversial. The provision exists in the Education Act 2002, where the negative procedure applies, and we have moved it across. Secondly, it is not that broad a power, in fact; it is confined to the modification legislation. So, again, it cannot work against the overall intent of the proposed Measure.

[127] **Janet Ryder:** Are you content, Kirsty?

[128] **Kirsty Williams:** I will be content when I get a better understanding of ‘modification’.

[129] **Janet Ryder:** We look forward to that definition of ‘modification’. William, you have the next set of questions.

[130] **William Graham:** With regard to sections 15 and 16, taking section 15 first, could you elaborate on the purpose of taking the power to direct in respect of small schools?

[131] **Leighton Andrews:** It is a straightforward policy choice. We believe that there is real potential for federation in respect of small schools. It is about sharing resources, staff and expertise, and we think that the opportunities that federation can offer, particularly to smaller schools, are important. Therefore section 15 gives us the power to define a ‘small school’, and we are introducing the opportunity for local authorities to operate a streamlined federation process. I say at the outset that I would only envisage the section 16 power for Welsh Ministers being used on a very exceptional basis.

[132] **William Graham:** Could you give some indication of what is likely to be the definition of a small maintained school?

[133] **Leighton Andrews:** I do not want to do that at this point, in that this is an area where I would want to see more evidence myself. There will be a different approach to the question of what is a small school in an urban area and what it is in a rural area, for example, and, as we progress this, I would like to see input from stakeholders.

[134] **William Graham:** Is it not just a matter of policy?

[135] **Leighton Andrews:** There are various definitions in the system. In the past, the Audit Commission has looked at the area in question, and there have been a number of inquiries. A number of Assembly committees have looked at the size of small schools. If you were to define a ‘small school’ in the context of secondary education, it would mean one thing, and, in the context of primary education, it would mean another. We will also need to make some distinction between urban and rural areas in this regard.

[136] **Alun Davies:** I agree with the policy objective in creating this definition. I chaired one of those inquiries some years ago, and defining a ‘small school’ is a highly political issue that creates a great deal of debate in different communities. You have said that you will have input from stakeholders, and I welcome that. I also agree about the need for different definitions for urban and rural areas, given the different circumstances of different schools. Could you outline to us the process that you intend to follow—both the legislative process in terms of the input of the Assembly and the scrutiny available for Assembly Members should such a decision be taken? Could you also outline how you would enable the stakeholders that you referred to in your previous answer to have an input and what kind of consultation you foresee in relation to taking these decisions?

10.10 a.m.

[137] **Leighton Andrews:** It is important to say that, for small schools, federation could be a positive option, because it could mean sharing a headteacher, among other things. The federation of governing bodies tends to lead to the sharing of other facilities, such as budgets, roles and so on. So, I want to say at the start that we would see this as something positive and a way of keeping some small schools open that might otherwise be subject to closure.

[138] We would expect to make an Order specifying an approach for a particular local authority that had many small schools and wished to pursue federation. So, we would help it to define 'small schools' and it would then be able to use a streamlined process in order to carry out the federation. However, before we made an Order, we would need to be satisfied that the local authority had considered carefully that federation was the best governance arrangement for those schools, that there was dialogue, and that it had thought about any exceptions that ought to be made.

[139] **Alun Davies:** What about the procedure that we would follow in the Assembly?

[140] **Leighton Andrews:** The procedure that we would follow would be the normal way of making an Order, which is the negative procedure.

[141] **Janet Ryder:** May I clarify that point? You will be working out the definition of a 'small school' as it relates to the specific area that is being considered. It is not your intention to come forward with a set definition of a rural small school and an urban small school.

[142] **Leighton Andrews:** I have not ruled that out, but that is a policy issue that we can pursue during the course of passage of the proposed Measure.

[143] **William Graham:** You have confirmed, Minister, that the effect of sections 15 and 16 is to empower Welsh Ministers to force small schools to enter into federation.

[144] **Leighton Andrews:** Yes.

[145] **William Graham:** Can you also confirm the assertion in the explanatory memorandum that in circumstances where Ministers issued a direction, there would be no requirement to consult the stakeholders of that school?

[146] **Leighton Andrews:** Yes, but I will repeat what I said at the outset: I would expect to use this power very rarely indeed.

[147] **Alun Davies:** Could you outline your rationale for taking the power to direct and compel federation?

[148] **Leighton Andrews:** We have to have a last-resort power in circumstances where it appears to us that, for whatever reasons, federation is not being considered appropriately. However, as I said, I would see it as a last-resort power.

[149] **Alun Davies:** It is read as being a last-resort power; I do not think that there could be a different analysis of that.

[150] With regard to your answer to the previous question on the procedure that you would follow in terms of definitions and so on, at present the negative procedure is used, but was any consideration given to making that an affirmative process? Why did you determine that it should be done through the negative procedure?

[151] **Leighton Andrews:** We have looked at all options as we have been drawing up the proposed Measure, but as I said, the power to direct would be a last resort. We normally operate on the basis of Orders being subject to the negative procedure, and I see no good reason to depart from that.

[152] **Alun Davies:** You are right to say that many Orders are subject to the negative procedure, but we agreed in our earlier exchange that this is quite a significant political issue that would rouse quite considerable debate. It may be that the affirmative procedure would

enable wider scrutiny and debate to take place.

[153] **Leighton Andrews:** It might, but I am not sure how healthy it would be. You have to decide what is the role of Ministers and what is the role of the legislature. There will be circumstances in which a Minister will have to make a difficult decision in the first instance and I am not certain that that decision should subsequently become the subject of party political jockeying around.

[154] **Alun Davies:** I do not think that anyone here would argue that you should not take the power—it is the supervision of the exercise of that power that is the matter under consideration. As someone who has represented a number of small schools over the last four years, I recognise the intensity of emotion around this issue. It may well be that using the affirmative procedure on this would enable some of those debates to take place, and it may even be a positive factor in terms of the decision itself.

[155] **Leighton Andrews:** What you are really talking about is the balance between local authorities with responsibility for education, the Minister and school governing bodies. Clear obligations are set in statute in respect of each of those groups. I accept that it is appropriate for it to ultimately come to the Assembly through the negative procedure. The danger if it came through the affirmative procedure is that you could potentially end up with a highly politicised argument around what ought to be a more technical judgment.

[156] **Rhodri Morgan:** Is there a procedure for writing into legislation the intent to use something as a last resort, or does it have to be taken on trust that that is what you have said to the committee and therefore that that is the correct interpretation?

[157] **Leighton Andrews:** That is a good question. I will defer to the lawyers on this.

[158] **Mr Morea:** As far as I am aware, there is no precedent where legislation has been written that a power can be used as a last resort.

[159] **Rhodri Morgan:** A power is a power and that is it.

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

[161] **Rhodri Morgan:** Gwyn, do you have any thoughts on this?

[162] **Mr Griffiths:** In this particular case, it says that Welsh Ministers ‘may direct’. It would be perfectly possible to insert ‘Welsh Ministers may in exceptional circumstances direct’.

[163] **Leighton Andrews:** I would be perfectly relaxed about that. Where that is appropriate, if the committee has views on that, we would be happy to hear them.

[164] **Alun Davies:** Moving on from section 16 to section 17, which allows Ministers to issue guidance to local authorities and governing bodies of maintained schools with regard to the exercise of their functions in relation to federation. We discussed this earlier with Kirsty. Could you give examples of the type of guidance that would be issued under this section and clarify why you have gone down the guidance route again, rather than the regulation route, which would be subject to some sort of legislative control?

[165] **Leighton Andrews:** The answer is similar to my previous one. We would cover a number of things within the guidance. For example, we have a number of federation pilots under way that are scheduled to report in September. I think that I discussed that with you at another committee yesterday. Within the guidance, we might want to incorporate studies of

the different federation pilots to give real examples of how federation is working. We could use the guidance to translate technical and legal terms into day-to-day language, which would be helpful.

[166] **Janet Ryder:** Finally, we will move on to sections 21, 22 and 23, which cover governor training and clerks to governing bodies. Can you explain how regulations made under sections 21, 22, and 23 will realise the intent of the proposed Measure?

[167] **Leighton Andrews:** What we are seeking to do in the proposed Measure and the regulations that will flow from it is to respond to the issues regarding governor training and clerking that were raised in the Enterprise and Learning Committee's report. In the regulations, we would set out the content and quality of governor and clerk training. We would seek to set out a national standard for Wales.

10.20 a.m.

[168] Currently, local authorities are required to provide training for governors to enable them to discharge their responsibilities, but they determine the topics on which training is offered. So, there is no consistent approach at present and our regulations will provide the basis for a comprehensive approach to that.

[169] **Janet Ryder:** Rhodri, I believe that you have one more question.

[170] **Rhodri Morgan:** I have a final supplementary question seeking clarification. What is the definition of the expression 'education body'? Does it include local education authorities, schools, federations of schools and incorporated further education colleges, or do any of those not fall within the definition of 'education body'?

[171] **Leighton Andrews:** I would refer you to Part 1 of the proposed Measure, where we define 'education body' as a local authority in Wales, a governing body of a maintained school, an FE corporation, a governing body of designated institutions that have been incorporated under the Learning and Skills Act 2000, and so on.

[172] **Rhodri Morgan:** So, a federation of schools is not an education body.

[173] **Leighton Andrews:** A federation of schools would be because it would be a governing body covering more than one maintained school.

[174] **Janet Ryder:** However, it is not necessarily named in the proposed Measure.

[175] **Leighton Andrews:** It is covered implicitly in section 1(b) under

[176] 'the governing body of a maintained school',

[177] because a federation's governing body would be a governing body of a maintained school, or more than one.

[178] **Janet Ryder:** Does anyone have any further questions? I see that you do not. Minister, do you have anything further that you would like to add?

[179] **Leighton Andrews:** No, thank you.

[180] **Janet Ryder:** Thank you for attending. We look forward to the definitions that you will send us, and we will see whether the two definitions agree with each other. Thank you for your time. That brings the evidence session to a close.

10.22 a.m.

Mesur Diwygio'r Heddlu a Chyfrifoldeb Cymdeithasol
The Police Reform and Social Responsibility Bill

[181] **Janet Ryder:** The Police Reform and Social Responsibility Bill is progressing through Westminster. Members have received a Members' research service brief on this piece of legislation, and you will remember that the main policy areas that are covered by the Bill are policing and licensing, neither of which is devolved to Wales, although some clauses provide for distinct arrangements for Wales, notably the provision for Assembly Members to be appointed by Welsh Ministers to each police and crime panel.

[182] I know that the Communities and Culture Committee has decided to carry out an inquiry into the policy thrust of the Bill. Our committee may wish to consider whether we should look at the Bill and perhaps invite the Minister to give evidence on its development. Policing is an area that touches on a number of devolved areas, and the evidence that has been given in Westminster has highlighted that policing may be going in a slightly different direction. It is not our job to look at the policy, but Members will remember that, when we have looked at Bills that have been developed in Westminster, there has been little, if any, consultation with the Government here on the impact that those Bills might have. It would be up to Members to consider whether they felt that it would be of use to discuss briefly with the Minister how a piece of legislation such as this is being developed in Westminster, what contact has been made between the two Governments, and what impact it might have on other devolved areas. Do Members have any comments or thoughts on this matter?

[183] **Alun Davies:** I think that we need to invite Carl Sargeant to committee; I thought that we had agreed before Christmas to do that.

[184] **Janet Ryder:** I think that we said that we would wait until we had received the Members' research service brief, but if Members are content, we will invite the Minister in.

[185] **Alun Davies:** We have to be clear about what we want to get out of that session. It is an appalling piece of legislation, quite frankly, but that is not a matter for us here. We need to be clear, in inviting the Minister here, about what the areas of debate and discussion will be and the areas that we wish to examine, to enable him to understand the role that he is playing in the committee's deliberations.

[186] **Rhodri Morgan:** You do not fancy standing to be the directly elected police and crime commissioner for Blaenau Gwent then.

[187] **Alun Davies:** I do not. I think that it is an appalling thing.

[188] **Mr George:** The specific thing that we would want to look at is the proposed provision for Assembly Members to be appointed by Welsh Ministers to police and crime panels, because that has a direct impact and it is an interesting constitutional development. The other thing is the more general point that Janet made about the consultation process involved in this particular Bill and whether it has any wider application.

[189] **Janet Ryder:** Are you content with that? I see that you are. We will arrange a date for the Minister to come in.

[190] **Mr George:** I should say that it seems unlikely that we will get the Minister in before March. We have approached his office.

[191] **Alun Davies:** It will be a quick report, then.

[192] **Janet Ryder:** It will be a quick report in March. That brings us to the end of this piece of business.

10.26 a.m.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[193] **Janet Ryder:** The next scheduled meeting is next Thursday morning. The only piece of business on that agenda at the moment is to agree the report that we will discuss in a minute in private session, following up the evidence that we have taken this morning. At that point, Members may want to consider how we will deal with that report, as that is the only piece of business on the agenda. So, we will decide at that point what we will do. If we can come to a report that we are content with and can agree upon in e-mail, we will take the step of not calling next week's committee meeting, but we will decide that in a minute and leave it open for now.

Cynnig Trefniadol Procedural Motion

[194] **Janet Ryder:** We will now go into private session, if any Member is prepared to move that we do so.

[195] **William Graham:** I move that

the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order No. 10.37.

[196] **Janet Ryder:** I see that the committee is in agreement.

Derbyniwyd y cynnig.

Motion agreed.

*Daeth rhan gyhoeddus y cyfarfod i ben am 10.27 a.m.
The public part of the meeting ended at 10.27 a.m.*