



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

**Y Pwyllgor Is-ddeddfwriaeth
The Subordinate Legislation Committee**

**Dydd Llun , 6 Hydref 2008
Monday, 6 October 2008**

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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

Eleanor Burnham	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Alun Davies	Llafur Labour
Mark Isherwood	Ceidwadwyr Cymreig Welsh Conservatives
David Lloyd	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)
Joyce Watson	Llafur Labour

Eraill yn bresennol
Others in attendance

Keith Davies	Pennaeth Polisi Amgylcheddol, Cyngor Cefn Gwlad Cymru Head of Environment Policy, Countryside Council for Wales
Daran Hill	Cadeirydd, Materion Cyhoeddus Cymru Chair, Public Affairs Cymru
Darren Hughes	Is-gadeirydd, Materion Cyhoeddus Cymru Vice-chair, Public Affairs Cymru
Anne Meikle	Rheolwr Polisi ac Eiriolaeth, WWF Cymru (Cyswllt Amgylchedd Cymru) Policy and Advocacy Manager, WWF Cymru (Wales Environment Link)
Helen Miller	Rheolwr Polisi ac Ymgrychoedd, Gofal Arthritis yng Nghymru Policy and Campaigns Manager, Arthritis Care Cymru
Llinos Price	Uwch Swyddog Polisi, Cyngor Cefn Gwlad Cymru Senior Policy Officer, Countryside Council for Wales
Annie Smith	Swyddog Polisi Morol, RSPB Cymru (Cyswllt Amgylchedd Cymru) Marine Policy Officer, RSPB Cymru (Wales Environment Link)
Alan Trench	Cynghorydd Cyfansoddiadol, Cymru Yfory Constitutional Adviser, Tomorrow's Wales

Swyddogion Gwasanaeth Seneddol y Cynulliad yn bresennol
Assembly Parliamentary Service officials in attendance

Anna Daniel	Clerc Clerk
Gwyn Griffiths	Cynghorydd Cyfreithiol Legal Adviser
Joanest Jackson	Cynghorydd Cyfreithiol Cynorthwyol Assistant Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk

Dechreuodd y cyfarfod am 2.32 p.m.
The meeting began at 2.32 p.m.

Cyflwyniad, Ymddiheuriadau a Dirprwyon Introduction, Apologies and Substitutions

[1] **David Lloyd:** Croeso i Bwyllgor Is-ddeddfwriaeth Cynulliad Cenedlaethol Cymru. Croesawaf fy nghyd-Aelodau a'r swyddogion, ynghyd â'r cyhoedd sy'n pentyrru i'r oriel gyhoeddus. Croesawaf hefyd Alan Trench, sydd yn ymuno â ni drwy system fideogynadledda o Gaeredin.

David Lloyd: Welcome to the National Assembly for Wales's Subordinate Legislation Committee. I welcome my fellow Members and officials, along with the members of the public flooding into the gallery. I also welcome Alan Trench, who is joining us via video link from Edinburgh.

[2] **Mr Trench:** Hello and thank you, Chair.

[3] **David Lloyd:** Thank you, Alan; we will come to you after the business part of this meeting.

[4] Croeso hefyd i Eleanor Burnham sy'n ymuno â ni drwy gyfrwng y system fideogynadledda o Wrecsam.

I also welcome Eleanor Burnham, who is joining us by the medium of a video link from Wrexham.

[5] Os bydd argyfwng, bydd y tywyswyr yn ein harwain at yr allanfa agosaf. Gellir defnyddio'r clustffonau i gael cyfieithiad ar y pryd ac i addasu lefel y sain; nid oes darpariaeth o'r fath yng Nghaeredin nac yn Wrecsam. Gall y tywyswyr ddangos i'r cyhoedd sut i ddefnyddio'r clustffonau. Rhaid diffodd ffonau symudol yn llwyr. Mae cyfieithiad ar y pryd o'r Gymraeg i'r Saesneg ar gael ar sianel 1, a gellir clywed cyfraniadau yn yr iaith wreiddiol ar sianel 0.

In the event of an emergency, the ushers will lead us to the nearest exit. Headsets are available for interpretation and amplification; there is no such provision in Edinburgh or Wrexham. The ushers can explain to the public how the headsets work. All mobile phones must be switched off completely. Simultaneous translation from Welsh to English is available on channel 1, and contributions can be heard in the original language on channel 0.

[6] Nid wyf wedi derbyn ymddiheuriadau.

I have not received any apologies.

2.33 p.m.

Offerynnau ac Offerynnau Drafft na fydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reol Sefydlog Rhif 15.2 ac Offerynnau sy'n Agored i Gael eu Dirymu yn unol â Phenderfyniad gan y Cynulliad (Y Weithdrefn Negyddol)

Instruments and Draft Instruments in respect of which the Assembly is not Invited to Pay Special Attention under Standing Order No. 15.2 and Instruments subject to Annulment Pursuant to a Resolution of the Assembly (Negative Procedure)

[7] **David Lloyd:** Mae Joanest wedi bod yn craffu ar SLC197, SLC199, SLC202 ac SLC203. SLC197 yw'r Rheoliadau Iechyd Meddwl (Cymeradwyo Personau i fod yn Weithwyr Proffesiynol Iechyd Meddwl Cymeradwy) (Cymru) 2008; SLC199 yw'r Rheoliadau Iechyd Meddwl (Gwrthdrawiad Buddiannau) (Cymru) 2008; SLC202 yw'r

David Lloyd: Joanest has been scrutinising SLC197, SLC199, SLC202 and SLC203. SLC197 is the Mental Health (Approval of Persons to be Approved Mental Health Professionals) (Wales) Regulations 2008; SLC199 is the Mental Health (Conflicts of Interest) (Wales) Regulations 2008; SLC202 is the Common Agricultural Policy Single

Rheoliadau Cynllun Taliad Sengl a Chynlluniau Cymorth y Polisi Amaethyddol Cyffredin (Cymru) (Diwygio) 2008; ac SLC203 yw'r Rheoliadau Ardrethu Annomestig (Eiddo Heb ei Feddiannu) (Cymru) 2008. Mae Joanest wedi bod yn dra gweithgar. A oes gennych unrhyw beth i'w ychwanegu at yr adroddiadau sydd gerbron?

Payment and Support Schemes (Wales) (Amendment) Regulations 2008; and SLC203 is the Non-Domestic Rating (Unoccupied Property) (Wales) Regulations 2008. Joanest has been very busy. Do you have anything to add to the reports that we have before us?

[8] **Ms Jackson:** There is nothing to add to the reports, but I would just note that the two sets of mental health regulations are part of a raft of regulations that are now being made, following amendments to the Mental Health Act 1983. You will note, in the next item, that there are two sets of regulations referring to mental health being reported. On the four that you referred to, I have nothing to add.

[9] **David Lloyd:** Diolch yn fawr. A oes unrhyw sylw? Gwelaf fod pawb yn hapus.

David Lloyd: Thank you. Are there any comments? I see that everyone is happy.

2.35 p.m.

Offerynnau y bydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig Iddynt o dan Reolau Sefydlog Rhif 15.2 ac 15.3—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 Invited to Pay Special Attention under Standing Orders Nos. 15.2 and 15.3—Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (Negative Procedure)

[10] **David Lloyd:** Mae Joanest, fel y mae wedi crybwyll eisoes, wedi bod yn craffu ar SLC198, Rheoliadau Iechyd Meddwl (Eiriolwyr Annibynnol Iechyd Meddwl) (Cymru) 2008. Cymerwn y rheoliadau hynny'n gyntaf. Joanest, a oes gennych unrhyw sylwadau ar y rheiny?

David Lloyd: Joanest, as she has already said, has been scrutinising SLC198, the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008. We will take those regulations first. Joanest, do you have any comments to make on those?

[11] **Ms Jackson:** Yes. You note that these are reported under Standing Order Nos. 15.2 and 15.3. The Government's response in respect of both points is included in the papers that you have. Under Standing Order No. 15.2, I have drawn attention to some drafting errors, partly because there are a lot of references to the issuing of guidance and directions. You will note that the Government has accepted that point and is undertaking not to issue any guidance, but to amend the regulations when a national advocacy qualification is in place.

[12] As regards Standing Order No. 15.3, I considered that there was a potential gap in policy here, in that the regulations provide for a local health board to make certain arrangements for qualifying patients and it appeared, on the face of the regulations, that, where the patient was to be admitted to a hospital not within that local health board's area, that local health board would not be responsible. The intention of the policy is that all qualifying patients have somebody to make arrangements for them. Again, the Government does not accept this point and it has set out its reasons in the response that is before you: basically, the local health board in which the hospital is located will be responsible for making arrangements for the patient to have access to an independent mental health advocate.

[13] **David Lloyd:** A oes unrhyw sylw?

David Lloyd: Are there any comments?

[14] **Alun Davies:** I am a bit concerned about that second point that Joanest reported. I am sure that all of us are aware, from individual casework, that whenever there is a conflict about the provision of treatment it is usually of this nature: who is responsible for providing that treatment? For me, if there is any lack of clarity in the regulations, we should be referring them back to the Government and making a very clear statement. We could, very easily, be creating future difficulties for patients.

[15] **Eleanor Burnham:** Yr wyf yn cytuno'n llwyr. Hoffwn ofyn pam mai'r weithdrefn negyddol sy'n cael ei defnyddio. **Eleanor Burnham:** I totally agree. I would like to ask why it is the negative procedure that is being used.

[16] **David Lloyd:** Joanest, you will have heard what Alun said about needing clear advice and also heard Eleanor asking about the negative procedure.

[17] **Ms Jackson:** I will deal with the procedural point first, because that is the easy one: it is what the Act provides for. The Government would have had no discretion in selecting the affirmative or negative procedure; it would be provided for under the Mental Health Act.

[18] **Eleanor Burnham:** Diolch. Mae gennyf broblemau clywed; mae'r sŵn yn mynd ac yn dod. **Eleanor Burnham:** Thank you. I am having difficulty in hearing you; the sound is coming and going.

[19] **David Lloyd:** Yr wyf yn siŵr y bydd pobl wedi clywed hynny yn awr ac yn edrych ar bethau, Eleanor. **David Lloyd:** I am sure that people will have heard that now and will look at things, Eleanor.

[20] **Eleanor Burnham:** Diolch, Gadeirydd. **Eleanor Burnham:** Thank you, Chair.

[21] **David Lloyd:** Beth am y pwynt ar bolisi y crybwyllodd Alun, Joanest? **David Lloyd:** Joanest, what about the point on policy that Alun mentioned?

[22] **Ms Jackson:** I suggest that you invite the Assembly to pay special attention to this, that you accept the report that we have put before you, and that you refer the regulations back to the Government for further consideration.

[23] **David Lloyd:** A yw pawb yn hapus? Gwelaf eich bod. Diolch yn fawr. Symudwn ymlaen yn awr at SLC200. Eto, Joanest sydd wedi bod yn craffu ar y rhain, y Rheoliadau Iechyd Meddwl (Ysbyty, Gwarcheidiaeth, Triniaeth Gymunedol a Chydsynio i Driniaeth) (Cymru) 2008. Joanest, a oes unrhyw sylw? **David Lloyd:** Is everyone happy? I see that you are. Thank you. We will now move on to SLC200. Again, it is Joanest who has been scrutinising the Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations 2008. Joanest, do you have any comment?

2.40 p.m.

[24] **Ms Jackson:** I reported these because the forms prescribed in the regulations are in English only. In its rather lengthy response, the Government basically says that the forms are for use by health professionals, and they may need to be completed to rather short timescales. They would not be given to patients, carers or nearest relatives. There is also the point that the forms may have to follow the patient to a hospital in England. The response is set out in full.

[25] **Alun Davies:** And a very poor response it is, too. My sense is that the Government has the responsibility to publish this information bilingually, and the reasoning given in the

Government's response could have been written in 1970. It is a pretty poor response, and we should reject it.

[26] **Joyce Watson:** I think that we need further clarification. Given that the Government of Wales Act 2006 states that everything should be issued bilingually, making this matter the exception to the rule would, surely, open the floodgates to other matters claiming exemption on the same grounds. I am not absolutely convinced that that is the way we should be going, and neither am I convinced that we have the powers to do so.

[27] **David Lloyd:** Joanest, you have heard Members' sentiments. Do you want to respond?

[28] **Ms Jackson:** I suggest that you state in your report that you do not accept the Government's response, and that you refer it back for further consideration.

[29] **David Lloyd:** We will do that along the lines suggested by Members.

2.42 p.m.

Ehangu'r Gwaith Craffu ar Is-ddeddfwriaeth: Ymchwiliad i'r Gwaith Craffu ar Is-ddeddfwriaeth a Phwerau Dirprwyedig
Enhancing the Scrutiny of Subordinate Legislation: Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers

[30] **David Lloyd:** The substantive item this afternoon is our inquiry. We are trying to link up with points north, and not just Wrexham, but Edinburgh as well. Edinburgh has a proud history with regard to the Welsh language, as the earliest written Welsh comes, surprisingly enough, from the Edinburgh court. So, there is a link between the Welsh language and Edinburgh, although, unhappily, not today. Alan, you will already be aware of the Subordinate Legislation Committee's inquiry into delegated powers and of how we are looking to enhance the committee's role, possibly, bearing in mind all sorts of strictures and restrictions that we may or may not be under.

[31] We have received your written evidence, and we have received a wealth of written evidence from many bodies. We shall be questioning other witnesses later on in a round-table manner here at the Assembly. At the moment, however, it is the turn of Alan Trench of Cymru Yfory—Tomorrow's Wales in Edinburgh. We have a series of prepared questions, and if it is all right with you, Alan, I will kick off with the first question.

[32] **Mr Trench:** Indeed. I am very pleased to be able to give evidence to the committee, doubly so to do so using such advanced technology. While it is regrettable that we do not have the facilities for simultaneous translation that we would have in Cardiff bay, it is nonetheless good that we can operate in such an imaginative way. My heartiest congratulations go to the Assembly for doing so.

[33] **David Lloyd:** Thank you for that, Alan.

[34] Let us move on to the first question. It is obvious, from your written contribution and several others, that, if we are to go down the possible route now open to this committee as a result of the latest Government of Wales Act 2006, this committee will, potentially, have a very broad remit. Opinions differ as to how many Westminster committees this committee's remit covers, but it is around five or six. How would you respond to this dilemma that we are one committee looking to expand our scrutiny role to other fields, including the proposals of the House of Lords Select Committee on the Merits of Statutory Instruments, which focuses

on potential gaps in provision and on where previous provisions have not fulfilled their stated intent? To put it in simple terms to kick things off, we are one committee now, how would you envisage that developing?

[35] **Mr Trench:** There are two things to say at the outset in response to that. The first is that it is necessary for the committee to decide how it wants to work and how it sees itself working within the Assembly's system of other committees. It is not merely necessary but positively right that Wales should find its own path to solving this problem. The fact that a particular approach is taken at Westminster does not constitute a recommendation or model. This is merely an example of the breadth of the remit that you have, and one would want to ensure that everyone in the Assembly is conscious of that. I suspect that that is not particularly an issue for members of the committee, but it may be an issue for people elsewhere, particularly the business managers.

[36] The second point is that any recommendation for change must be practicable within the Assembly's operational constraints, most notably the limited number of Assembly Members in total, and particularly the number available for backbench duties such as sitting on this committee. So, I suspect that it would not be practicable to have oodles of committees to take on this type of work.

[37] In the memorandum, I suggested two possible ways of approaching this. One would be to have a set of committees, one of which was technical and the other of which was less technical, and the other would be to have a set of committees where one was inward facing and the other was outward facing. Both options would involve having two committees or possibly one committee and a sub-committee that would formally be part of the main committee but, in reality, would not be. That is a question of organisational niceties that your clerks would be far better able to advise you on than I.

[38] The technical and non-technical approach is something that I canvassed very briefly in paragraph 21 of the memorandum. The idea would be that one committee would look at whether, for example, statutory provisions were within the scope of the powers that had been devolved to the Assembly—the precise nature and extent of the powers that were being conferred on Assembly Ministers in Assembly legislation and the like. The second committee would look at the broader constitutional issues presented by such legislation. I admit that there would be a degree of overlap between the two committees. That second committee would perhaps be more concerned with the nature of powers devolved by Westminster and ensuring that the Assembly was able to play an active part in taking charge of the overall package of powers that, under the arrangements set out in Part 3 of the Government of Wales Act 2006, are being conferred on the Assembly by legislative competence Orders or so-called framework powers.

2.50 p.m.

[39] The other approach would be to have a committee that looks inward and is concerned with all of the legislation that is made in Wales. It would therefore be responsible for looking at the division of powers between Assembly Ministers and the Assembly as a whole in Welsh primary legislation—in Assembly Measures. It may also be concerned with the working and accountability of Ministers. The other committee would be concerned with the outward issues, namely the acquisition of devolved powers from London. It might also want to look at other aspects of relations between devolved institutions in Wales and UK institutions in London. That might well lead it to look at non-legislative policy issues and, possibly, broader issues in due course, such as issues relating to a referendum on bringing Part 4 into force or possible changes to the financial settlement that would have constitutional and institutional implications, as well as purely financial ones.

[40] **David Lloyd:** Thank you very much, Alan, for that full answer. The next series of questions is from Alun Davies.

[41] **Alun Davies:** Thank you for the written evidence that you submitted to this inquiry. In paragraph two of that evidence, you say that:

[42] ‘It is well known that the formal obligations for UK Government departments to consult the Assembly Government during the process of framing and drafting legislation are often honoured with consultation that is late, sketchy, or both.’

[43] Can you outline to us what evidence you have to sustain that?

[44] **Mr Trench:** My evidence comes from—[*Inaudible.*]—an ongoing programme of interviews with officials in the Welsh Assembly Government and the UK Government and, occasionally with people at Westminster and the National Assembly. I have cited a couple of my academic pieces of work about this, one in the footnote and one elsewhere. I do not think that I can spell it out further than saying that there is quite a lot of academic work by me and others to support the statement about the difficult nature of that consultative process, which is not surprising, particularly given the nature of how Government works in Whitehall and how devolution has affected, or rather, not affected institutional arrangements in Whitehall.

[45] **Alun Davies:** On the weaknesses that you identify in terms of the devolution of powers to the Assembly, I agree with what you say in your paper about the responsibility and the role of the Assembly, as differentiated from the Assembly Government, in scrutinising overall powers and the transfer of powers. One thing that is conspicuous by its absence from your evidence is a role for MPs. My perspective is that it is primarily the role of MPs to scrutinise UK legislation thoroughly, including its impact on Wales, as they would scrutinise its impact on any other part of the UK.

[46] **Mr Trench:** That omission is because I was asked to give evidence to the Subordinate Legislation Committee of the National Assembly, not the Welsh Affairs Committee in the House of Commons or another committee at Westminster. If I were advising them, I would be happy to expatiate in great detail about the roles that Westminster MPs could play. It is something that I have given evidence about and written about too.

[47] The questions that are before you, as I understand it, are on how the committee works within the system in the National Assembly and the separation of powers between the devolved institutions in Cardiff. That is a different matter to that of the role of MPs. The role of MPs has significantly increased as a result of mechanisms put in place by the 2006 Act, which means that they are playing an active role, notably in relation to legislative competence Orders. They have historically played a limited role in primary legislation enacted at Westminster that relates to Wales. When I was at the constitution unit, we did a lot of work on this, and it is discussed in the chapter by Professor Keith Patchett in one of the books that I have mentioned in the footnotes to my evidence, *Devolution, Law Making and the Constitution*. Everything that I know and see suggests that that pattern remains. In one respect, the arrangements put in place by the 2006 Act make it worse, because, while the Welsh Affairs Committee in the House of Commons most notably is active in looking at powers that are devolved by legislative competence Orders, it is not very active in looking at the so-called framework powers that are similarly conferred on the National Assembly but are conferred by directly amending Schedule 5 to the 2006 Act rather than by going through the legislative competence Order process. It seems anomalous that one set of powers is subject, at least potentially, to very detailed scrutiny, and that the other is subject to very limited scrutiny. It is a matter for regret—and it is something that I have tried to persuade it to do something about—that the Welsh Affairs Committee has not chosen to put any procedures in place at its end to deal with that anomaly.

[48] **David Lloyd:** Thank you, Alan. That was a very good answer. Are you carrying on, Alun?

[49] **Alun Davies:** I would like to carry on, if I may. I accept what you say in response to that question, Mr Trench. The Welsh Affairs Committee has a specific role in terms of legislative competence Orders. Do you see it playing a similar role in looking at all aspects of UK Bills, such as the Marine Bill or the Planning Bill, and scrutinising elements of the legislation that are particularly relevant to Wales or its impacts in terms of the transference of functions or powers to Wales, or would you see that work being done by a committee of the National Assembly for Wales?

[50] **Mr Trench:** I think that it is for a committee of the National Assembly and for the National Assembly as a whole to decide what the National Assembly does, and it is for the Parliament at Westminster to decide what Parliament does. I can certainly see that there will be many good reasons why Parliament at Westminster should do that, but the fact of the matter is that, by and large, it has not. Part of the reason for that, I suspect, is that, by and large, the committee organisation at Westminster reflects the organisation of UK Government departments. Therefore, there is a Scottish Affairs Committee that shadows, in a sense, the Scotland Office, and there is a Welsh Affairs Committee that shadows the Wales Office, and the departmental select committees understandably shadow departments of state. The UK Government has—for reasons about which one should ask the Prime Minister, I suppose—consciously decided, rather than having done so by nurture, not to have a department for devolution or to put in place mechanisms within Government that take an overall synoptic view of devolution. That may be at least part of the reason why Westminster has not put in place overall mechanisms to look at devolution and its implications. We are left with a somewhat fragmented picture that means that Welsh matters fall within the remit of the Welsh Affairs Committee, and if it does not choose to engage with them, they are not looked at, and likewise for Scotland and indeed for England.

[51] **David Lloyd:** Are you happy with that, Alun, or do you have another burning issue to raise?

[52] **Alun Davies:** I am wondering what Mr Trench's view is. I understand the constitutional situation and the structures of Westminster. Do you think that the Welsh Affairs Committee should involve itself in, for example, the Marine Bill, or that there should be a structure in place for this committee to do that, or that an entirely new structure should be created that would focus on a Bill to examine the issues that you describe?

[53] **Mr Trench:** I am sorry to be unable to help you very much, Mr Davies. As I am not a member of your committee or of the Welsh Affairs Committee, it is not a matter for me to express a view about what it should do. I can try to explain what it does and what the implications are of doing or not doing particular things. However, it really is not a matter for me to express a view from the outside about what it should normatively do.

[54] **David Lloyd:** That is fine. We will now move on to Eleanor Burnham, who has the next couple of questions from sunny Wrexham.

[55] **Eleanor Burnham:** I have a slight difficulty: the sound is very loud from Scotland, but I can barely hear you in Cardiff. Therefore, I have to balance it all up, but I will do my best.

[56] Alan—and I hope that it is okay to call you Alan—I am particularly interested in the establishment of assents and the fact that the Assembly Government leaves the Assembly with, at best, a marginal role in the acquisition of devolved powers. You suggest that the

Assembly Government acts as a gatekeeper to the Assembly's powers; it is for the Welsh Ministers, the Welsh Assembly Government, to assign consent although the Assembly may not have been consulted. You also note that, in Scotland, where the functions need to be approved—and I am sure that I do not need to tell you that; I am just saying it because it reminds people who are listening—this is not just done by the Scottish Government but also by the Scottish Parliament, and that is known as the Sewel convention. What would your opinion be of Wales taking a similar approach to that taken in Scotland, or do you think that some other approach could be taken to improve the situation in Wales? I am sure that you will remind us what the Sewel convention does, because my understanding is that it is a double-positive whammy in respect of Scotland because it gets two bites of the cherry, so to speak.

3.00 p.m.

[57] **Mr Trench:** Sort of. The Sewel convention is obviously quite important, and has become more important in practice as its role has become clearer over time, but it still rests on rather a hazy and confusing foundation. The foundation is a statement that was made by Lord Sewel, then a Scottish Office Lord Minister, during the Second Reading debates in the Lords on the Scotland Act 1998. That is then given force in, I think, paragraph 13 of the memorandum of understanding between the UK Government and the devolved Governments, not between the devolved legislatures, which states that

[58] 'the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.'

[59] So, it relates to what happens within the remit of devolved matters.

[60] For practical purposes, that convention is operationalised by the devolution guidance notes, which are purely internal guidance notes issued by the Ministry of Justice in Whitehall. The devolution guidance note No. 10 for Scotland creates three categories—not one—where the assent of Holyrood is required. One category is where the UK Parliament proposes substantively to legislate regarding a devolved matter and relating to Scotland. The second is where the UK Parliament proposes to add to the overall remit of devolved functions as regards Scotland or to adjust the boundary between reserved and non-reserved matters, as they are called, under the arrangements in the Scotland Act 1998. The third is where it proposes to add executive functions to the powers of the Scottish Ministers, as well as the Scottish Parliament. In addition, I should note that the arrangements that are set out in the Scotland Act, which also create various ways to adjust the boundary between devolved and non-devolved matters—whether they are devolved for legislative purposes or executive purposes, or both—also require the assent of the Scottish Parliament in all cases. So it ends up that Scotland should not, under the Sewel convention, as given this broad meaning, have foisted on it any function that the Scottish Parliament has not assented to being devolved.

[61] The difficulty for Wales is that while legislative competence Orders require the approval of the National Assembly, the devolution of executive functions to the Welsh Ministers does not. You were talking earlier about an Order being made under the Mental Health Act 1983, and that Act is a good example of a piece of legislation where the Welsh Ministers chose, in their private negotiations with Whitehall, to have functions conferred on them for executive purposes, but not to have legislative functions conferred on the National Assembly. So, that boundary between executive and legislative functions remains in the hands of the Welsh Ministers, who can decide whether functions are going to be devolved in an executive or legislative way.

[62] The Sewel convention in a Welsh context also does not apply to functions that will be conferred on the National Assembly by direct amendment of Schedule 5—that is, the so-

called framework powers. So you can have a situation where the UK Parliament is considering legislation that confers legislative functions on the National Assembly, and, depending on the route by which those functions are being put on the table, the National Assembly may or may not have expressed a view about whether or not it should have those functions. I have no evidence that it has happened so far, but it certainly creates the possibility that functions could be devolved to Wales that Wales does not want and it would be impossible for the National Assembly to object to that.

[63] **Eleanor Burnham:** All the aficionados are having a wonderful afternoon. Thank you very much for that explicit reasoning.

[64] Following on from that, you argue that the present situation can lead to confusion about what functions are devolved and also makes it hard for the public to understand which functions are devolved to which institution, which is extremely important, particularly for us in north Wales. So, if it is possible, in a nutshell, can you tell us what should we do to improve understanding of the devolved functions? I know that they are not understood by many other than aficionados and, possibly, nerds.

[65] **Mr Trench:** Indeed, and I would have to admit to being an aficionado, if not a nerd, in that respect. I was, on one occasion, described as a constitutional anorak by the former Secretary of State for Wales. [*Laughter.*]

[66] It is not easy to spell out what should be done about this, because although the scope of legislative powers is pretty clear, and is set out in Schedule 5, the first problem is that Schedule 5 itself is already becoming a confusing and unclear document. I have just one concrete suggestion to try to improve that at this point, which is to try to find a way of ensuring that the legislative powers conferred in Schedule 5 start to resemble more closely the ultimate model that has been set out in Schedule 7. Schedule 7 provides a clear, broad blueprint for the sorts of legislative powers that the National Assembly for Wales would enjoy, assuming that that would be supported in a referendum and Part 4 of the Act brought in. From the public's point of view, that is a much more comprehensible ordering of powers than Schedule 5, particularly given the way that Schedule 5 has developed—it is hedged with some precise powers, some broad ones, some exceptions, some reservations, and lots of definitions. As a lawyer, I find it pretty confusing. You have had detailed evidence from David Lambert and Marie Navarro of Cardiff Law School about the difficulties arising from that. It would be helpful to clarify Schedule 5 and make it a more straightforward document.

[67] That does not get around the second problem that I would identify, which is the relationship between executive and legislative devolution, and the broad ambit of executive powers that are devolved to the Welsh Assembly Government. Part of the answer to that has to be the exercise of greater scrutiny, accountability and vigilance by the National Assembly, to try to ensure that those powers become clearer, and that the Assembly Government is clearer about the nature of the powers that it has and exercises.

[68] **Eleanor Burnham:** That is a very comprehensive answer. May I ask a supplementary question?

[69] **David Lloyd:** If it is brief.

[70] **Eleanor Burnham:** In view of the fact that we have a commission that is taking evidence from around Wales, and acting as some kind of link between people like yourself and the public, what exactly should we be doing as Assembly Members to ensure that there is more clarity? The whole thing is extremely confusing for the public, who might soon be asked to vote in a referendum.

[71] **Mr Trench:** It is for Assembly Members to try to clarify the situation and make sure that these matters are clear. I am pleased to see that the Assembly has taken custody of Schedule 5, and the most up-to-date and definitive account of Schedule 5 is on the National Assembly for Wales's website. It is not on the Assembly Government website, as was suggested at an earlier stage in the process. Indeed, it is not on the Wales Office website, as was also suggested. The Wales Office website provides a link, I believe, to the National Assembly for Wales's website. It is a question of demonstrating the role of elected Assembly Members in holding the Executive to account as well as passing legislation.

[72] **David Lloyd:** Thank you. Alun has a small supplementary question on this before we move on to Joyce.

[73] **Alun Davies:** I want to ask Mr Trench to expand on the comments that he made about Schedule 5. Is it your contention that the LCOs that are being passed at the moment are too specific and too long? Would you prefer broader LCOs, covering policy areas, rather than precise definitions of the legislative powers to be made available to the Assembly?

[74] **Mr Trench:** If you go back to the White Paper that was issued in 2005, it suggested that what we now call LCOs could take a wide range of forms, but that they would predominantly be general rather than highly specific. What has come about—partly, I suspect, for very good practical reasons on the part of lawyers in the Assembly Government—has been something specific rather than something broad and general, and this is one of those instances where ensuring legal certainty and the Assembly Government seeking to ensure that the powers that the Assembly will be able to exercise are very clear and definitive has militated against ensuring clarity of expression in a way that the public can readily identify. That is a regrettable trade-off that lawyers in the public sector often have to make. I suspect that it has possibly gone too far.

3.10 p.m.

[75] **David Lloyd:** Thank you. You will be pleased to know that we have reached the last two questions. Joyce Watson will ask those questions.

[76] **Joyce Watson:** Good afternoon, Alan. We have already touched on the comments that you have made describing the consultation accompanying the process of framing and drafting UK legislation as 'late, sketchy or both', and there have been discussions about whether or not you can give evidence of that. My question is more specific. What processes would you like to see put in place to improve the situation that you describe in your paper?

[77] **Mr Trench:** I am not sure that I can answer that in a way that does not repeat what I have already said. The desirable outcome is to ensure greater ability for the National Assembly to scrutinise what goes into powers that are to be devolved to Wales and to ensure that the National Assembly is the overall custodian of legislation for Wales rather than the Assembly Government, to ensure that there is a legislative-focused model of devolution rather than an Executive-focused model. That comes out of long-standing and traditional principles of ensuring that Government is held democratically accountable. That leads us to having to think hard about the nature of the organisation of your committee and its relationship to other committees and to being conscious of the specific nature of legislation as a subject that needs to be scrutinised. It is easy to become highly concerned with substantive policy issues. I entirely understand that from your point of view as elected Members, as your electors are far more worried about what happens in health services, schools or in the environmental services that are available to them than about how the legislation is framed. How the legislation is framed and those sorts of arrangements are for those of us who admit, however reluctantly, to being aficionados, nerds or anoraks. Within the framework of the Assembly's institutions, space needs to be found to ensure that the legislative aspects are also considered, and that is

part of the process of ensuring the primacy of the elected National Assembly.

[78] **Joyce Watson:** Are there any other issues that you would like to raise that you feel have not already been covered in this meeting?

[79] **Mr Trench:** I do not think so. I hope that I have been able to assist the committee. The concern of Tomorrow's Wales—Cymru Yfory is to ensure that the Government of Wales is as clear and democratic as it can be and, in that context, to ensure the primacy of the National Assembly and of a Government accountable to that Assembly and to try to ensure that the danger of its being the other way around is not allowed to arise.

[80] **David Lloyd:** Thank you very much. That completes your evidence session, Mr Trench. I see that Eleanor is waving, but, unfortunately, Eleanor, we are out of time, so you can wave as much as you like.

[81] **Eleanor Burnham:** I am just waving goodbye to Alan.

[82] **David Lloyd:** I see. Thank you, Alan.

[83] **Mr Trench:** Thank you.

3.14 p.m.

**Sesiwn Dystiolaeth: Materion Cyhoeddus Cymru, Cyngor Cefn Gwlad Cymru,
Cyswllt Amgylchedd Cymru
Panel Evidence Session: Public Affairs Cymru, Countryside Council for Wales,
Wales Environment Link**

[84] **David Lloyd:** Croesawaf Daran Hill, Darren Hughes a Helen Miller o Materion Cyhoeddus Cymru, Llinos Price a Keith Davies o Gyngor Cefn Gwlad Cymru, ac Anne Meikle ac Annie Smith o Gyswllt Amgylchedd Cymru. **David Lloyd:** I welcome Daran Hill, Darren Hughes and Helen Miller of Public Affairs Cymru, Llinos Price and Keith Davies from the Countryside Council for Wales, and Anne Meikle and Annie Smith from Wales Environment Link.

[85] I extend a warm welcome to you all. We will run this as a panel session. There are 15 questions, if my memory serves me right, which have been planned and organised in a wonderfully cogent way so that we cover all the relevant points. So, 15 questions will come towards you as a panel. Feel free to answer, should you desire to, but do not feel impelled to answer should you have nothing to add that has not already been said. Either way, do not feel pressurised.

[86] I will kick off with the first question, bearing in mind that we still have Eleanor Burnham on the line, in Wrexham.

[87] **Eleanor Burnham:** I can still hear what is going on in the background in Edinburgh.

[88] **David Lloyd:** Right. I am sure that that will sort itself out in the fullness of time, Eleanor.

[89] I will move on to the first question for those assembled here. You will have noticed from the previous questions the broad possible remit of this committee under the Government of Wales Act 2006. We can do lots of things should we choose to do them and should it be possible, including scrutinising UK Bills, EU directives, and all of the rest of it. We can also

consider how the various policy objectives from Westminster have or have not fulfilled their objectives. Those are new possible tasks for this committee on top of the technical scrutiny of legislation, which has been happening since we started, as the former Legislation Committee, and as this one. Once again, we thank one and all for the excellent standard of written presentations that we have received. We note from the Countryside Council for Wales's paper a suggestion that consideration be given to extending the scrutiny time for more detailed consideration of the issues and to allow scope for further engagement with external stakeholders. Given the constraints on what the committee can accomplish, what do you all see as the optimal balance of scrutiny work covered by this committee? So, we are talking about balance, realism, and what can be done. Who wants to kick off? I see that shyness breaks out.

[90] **Ms Meikle:** I have never been shy, so why start now?

[91] There have been clear changes in the past 18 months, and some of those changes involve being given opportunities by Westminster because of how it has changed to doing more pre-legislative scrutiny and more draft Bills. One example for us was the Marine Bill, which is still ongoing after three years of various drafts and consultations. The Assembly's Sustainability Committee gave evidence to the Joint Committee on the Draft Marine Bill and made some recommendations, so what will happen now? How will you find out whether the committee took on board the recommendations that you made? Will you have to scrutinise the Bill when it is published in December? We have done a lot of work asking for further amendments to try to clarify those things that we do not think the powers are sufficient for. Had that work been done earlier, and had you become more engaged in the pre-legislative process, would it have enabled you to step away from the later stages of the scrutiny? I am not sure. It is a question for you, because it is a very new process.

3.20 p.m.

[92] I am not sure whether there is a trade-off that might help in some way to save a little time later by putting more effort into getting the pre-legislative scrutiny right. We would agree with one of the points made by the countryside council in its paper, namely that we were not asked to give evidence to the Sustainability Committee as part of its scrutiny of the Bill; we gave evidence directly to the joint committee at Westminster. That is fine if your organisation is like the RSPB or like ours, which are UK-wide organisations and are used to working with Westminster. However, if it is not, and you are a Welsh member of civil society, how do you engage in this process? Who do you influence to make your point about how effective the legislation will be, whether it will give the right powers to Wales, or to raise concerns? So, there is a need for more pre-legislative scrutiny.

[93] I would raise the same issue about post-legislative scrutiny. The Marine Bill is again a good example because there is a Schedule at the end of that Bill outlining how Westminster believes it will do post-legislative scrutiny. However, there is no timetable for Wales, and no suggestion as to how Wales might do any post-legislative scrutiny, if at all. One question that we have debated—and I am not sure that we have an answer to it, but maybe you do—is to what extent is there a differentiation here between the roles of this committee, and those of the Sustainability Committee, the Rural Development Sub-committee, or whichever committee will be looking at the implementation of those powers and what is done with them? You may be better engaged in looking at whether that legislation is effective in the first place, and at whether it has all the powers, whether it plugs all the gaps, and whether you are sure that people will be fairly treated in Wales.

[94] **David Lloyd:** Excellent. That covers my next question as well. How do the representatives of Public Affairs Cymru feel about the balance of scrutiny covered by this committee?

[95] **Mr Hill:** Until now, no single Assembly committee has taken its obligation to scrutinise Measure-making powers in UK Bills seriously enough, and that gap needs to be filled. However, I would disagree with the evidence provided by Mr Trench earlier. He seemed to be implying that there was a gap in that scrutiny on a UK level, and that maybe the Welsh Affairs Select Committee might consider filling it. I disagree with that statement, because each one of those Bills has its own Bill committee in Parliament, and I am sure that that work is done. Whether it is done with a Wales focus is perhaps a different matter.

[96] Having said that, this is all part of the teething pains of the Assembly, turning from a body that had limited legislative powers to one that has fuller legislative powers. Moving into this third Assembly, compared with the first two, it strikes me that there has almost been a washing of hands in many parts of the Assembly as a body corporate. The onus is placed on you to deal with an exceptionally broad array of responsibilities across the legislative field. I am not suggesting for a moment that we go back to the situation that we used to be in, where too much non-controversial legislation took up Plenary time. However, as we reflect in our written evidence, the balance seems to have shifted completely in the other direction. Regarding merit scrutiny, whether yours is the only committee that should play a role in examining merit and the political arguments that are often attached to an issue is debatable.

[97] **David Lloyd:** Does anyone from the Countryside Council for Wales wish to come in on this point, given that we quoted you extensively at the start?

[98] **Mr Davies:** I ailadrodd, credaf ein bod i gyd yn sylweddoli ein bod mewn proses newydd, ac yr ydym i gyd yn dysgu wrth i hyn fynd yn ei flaen sut mae'r broses honno'n gweithio, a sut y gall rhywun wella'r broses. Mae gennyf ddau bwynt yn ychwanegol i'r hyn a nodwyd.

Mr Davies: To reiterate, I believe that we all realise that we are in a new process, and that we are all learning as things progress how that process works, and how one can improve the process. I have two additional points to those already noted.

[99] Yn gyntaf, mae'n bwysig bod Mesurau yn cael eu trafod yn gynnar yn y broses. Mae hynny'n rhoi cyfle i'w cryfhau ond hefyd i sicrhau bod cyfranogiad gan randdeiliaid ar draws pob sector. Mae hynny'n bwysig o safbwynt yr hyn a drafodwyd yn gynharach o ran deall rolau'r Llywodraeth a'r Cynulliad, ond hefyd y cydbwysedd rhwng deddfwriaeth Gymreig a deddfwriaeth y Deyrnas Unedig.

First, it is important that Measures are discussed early on in the process. That gives an opportunity to strengthen them, but also to ensure that there is participation from stakeholders across every sector. That is important from the point of view of what was discussed earlier, about understanding the roles of the Government and the Assembly, but also the balance between Welsh and UK legislation.

[100] Yr ail bwynt yw sut yr ydym yn integreiddio rôl a dyletswyddau pwyllgorau pwnc a'r pwyllgor hwn o ran craffu. Yng nghyd-destun adolygiad Beecham, mae'r integreiddio rhwng polisi a gweithredu yn allweddol ac mae rôl deddfwriaeth a chraffu ar ddeddfwriaeth yn allweddol. Mae'n bosibl bod lle i weld, yn enwedig gyda Mesurau pwysig, sut y gallwn integreiddio rôl pwyllgorau pwnc a phwyllgorau craffu i sicrhau bod cysylltiad rhwng y ddeddfwriaeth, y polisi, y gweithredu, a'r adnoddau o bosibl, fel bod pwyllgorau yn

The second point is how we integrate the role and duties of subject committees with those of this committee in scrutinising. In the context of the Beecham review, the integration of policy and implementation is crucial, as is the role of legislation and of legislative scrutiny. It is possible that there is scope to see, particularly with important Measures, whether we can integrate the role of subject committees and that of the scrutiny committee to ensure that there is a link between the legislation, the policy, its implementation, and perhaps resources, so

fwy trylwyr a thryloyw.

that committees are more transparent and thorough.

[101] **Alun Davies:** I agree very much with that. An issue raised in other sessions is that there is a sense that, unless scrutiny is carried out in Cardiff bay, it will not be carried out at all. There are 659 MPs to carry out the scrutiny of all legislation, which has already been pointed out this afternoon. I sometimes feel that there is not a sufficient emphasis on the work of Westminster as a legislator. My concern in debating and discussing this issue is that there is simply not the capacity in a 60-Member Assembly to provide double the level of scrutiny of legislation that is coming out of Westminster. That is what MPs are for. A principle has been established that we do not necessarily scrutinise legislation proposed by the UK Government. There is a sense that it is for them to do that and we should not to try to do it as well. We should recognise that.

[102] How do all of you sat around this table see this committee or, as Keith said, subject committees or others having a role that sits in tandem with that of Westminster committees? As Daran said, each standing committee examines a Bill and then the select committees scrutinise first the Executive, which develops the legislation, and then the legislation itself. What nature of relationship do you see us in Cardiff bay developing with our colleagues in Westminster?

[103] **Ms Smith:** I just want to follow up that point, because we are right to focus on the role of Westminster in scrutinising UK legislation, but one thing that the Wales Environment Link tried to highlight in our evidence was that there is a mismatch between that scrutiny and the benefits that accrue to Wales. The Marine Bill was scrutinised by a joint committee at Westminster, which spent 12 weeks gathering evidence from selected witnesses and so on. Although that committee did hear evidence from Wales, there was not a Wales focus to its scrutiny; the vast majority of the committee's recommendations were very much focused on UK Government institutions.

[104] There are a couple of examples that may help to illustrate the scrutiny deficit that is taking place in the powers given directly to Welsh Ministers in UK Bills. For example, in our evidence to the joint committee and directly to the Department for Environment, Food and Rural Affairs and the Welsh Assembly Government, as well as directly to AMs, the Wales Environment Link picked up the fact that the Bill, by establishing a delegated body to undertake many functions on behalf of the UK Government, provided the possibility of an appeals process for the new licensing system being introduced under the Marine Bill. That was a gap. There is no equivalent provision for a process in Wales.

3.30 p.m.

[105] That has been picked up, but not because of a Wales focus, but because the committee was dissatisfied with the way that the provisions were there for the Secretary of State. Our lobbying of DEFRA and the Welsh Assembly Government may have led to a realisation that that needs to be somehow addressed. It is impossible to say from the response that we have seen, but without a body focusing directly on what powers are made available to Wales and what the Welsh Ministers will be able to do, I think that there is a potential for things to fall through the net.

[106] An example of something that has not been taken forward by the committee is the new marine management organisation that is going to undertake functions on behalf of the UK Government. It has a duty to report annually and the Secretary of State then has a duty to lay the report of the marine management organisation before Parliament. One thing that we suggested in our evidence to DEFRA and the various committees was that we felt that that should be mirrored with a requirement for the Welsh Assembly Government to report to the

Assembly on an annual basis about how delivery of the marine management functions was happening. That has not been picked up by anyone. I feel that that is because there has not been a champion in the process, checking what we need in Wales and how to ensure that Wales will get all the benefits from the piece of legislation. Where that should sit is an interesting question and I suspect that it will require some work between the Assembly and Westminster. I think that the body that will ultimately have to hold the Welsh Minister to account for what she is doing should have a greater role in determining what powers she has and in specifying what powers she needs in the first place.

[107] **Ms Meikle:** To follow on from that, I suppose that one of our concerns is that, taking the Marine Bill as an example, it is very difficult for anybody to scrutinise the Bill effectively, including MPs in Westminster, because it lacked detail for Wales. There seems to be quite a tendency for Bills to do that. The Marine Bill is a very thick document and the vast majority of it is full of detail for England, with lots of guidelines and supplementary guidance explaining what they intend to do with the powers and how they will be taken forward. There is also a regulatory impact assessment that says what it is going to cost. None of that information is in there for Wales. In a sense, you are asking Westminster MPs to scrutinise something when there is nothing there to help them do it. Some of that is a timing issue. I do not know if there is a way of taking it forward and I do not know how common it is across other pieces of legislation, but, for instance, one of the pieces that they could not possibly comment on was the reorganisation of fisheries management in Wales. There was a set of proposals in there and they, and we, were told quite early on by the Welsh Assembly Government that they were not going to apply in Wales. However, there was no alternative and there was no other information in there as to what they were going to do instead. How do you undertake effective scrutiny when there is no detail? That came along some weeks later and the consultation has happened since, but that will not appear until the draft Bill.

[108] **David Lloyd:** That leads neatly onto Mark's first of four questions.

[109] **Mark Isherwood:** Talking about the scrutiny of UK Bills, I will just follow up on that point, if I may.

[110] **David Lloyd:** It is the same point.

[111] **Mark Isherwood:** As with legislative competence Orders, perhaps it is a situation where Westminster should be scrutinising the principle of that legislative power coming to Welsh Ministers and the Assembly, but the detailed scrutiny should then follow here, once the legislation is brought forward. How would you comment on that?

[112] **Ms Meikle:** I can see the logic in that, but I do not see exactly how that is going to happen now. What is going to happen? There is another lack of transparency here, because so much of the negotiation on the amendments to the Bill will happen between the Minister or the Welsh Assembly Government and the appropriate departments. Until you see the draft Bill, you will have no idea what is in it or at what level scrutiny will be appropriate or not. What then? If you take that away to scrutinise it, it duplicates the work of Westminster. At the moment, we seem to be in some kind of halfway house, in which there is not enough detail for Westminster to do it, but neither is there a place in the process for you to do it.

[113] **David Lloyd:** So, what sort of processes do you foresee?

[114] **Mr Hill:** In our evidence, we highlighted the issue of the Planning Bill. We quoted from evidence provided by the Secretary of State for Wales when he appeared before Plenary last November, and we noted the fact that it took until February or March before any detail was pegged onto that in the form of Measure-making powers being conferred on the Assembly under that particular piece of legislation.

[115] One of the big issues is the nature of the communication between this institution and Westminster in tracking changes and noting the implications of Westminster legislation. I have only a very sketchy idea of how you do it at the moment, and I sometimes wonder whether the onus falls too heavily on you to keep an eye on processes at the Westminster level when, in fact, the onus might be better placed on clerks at Westminster to communicate more effectively with the National Assembly, either when additional Measure-making powers are conferred, or when Measure-making powers might change.

[116] When the most recent education Bill went through, I noticed that it started off with one particular matter being added to the Schedule 5, and somewhere down the line, it transmogrified into another one. I follow these processes relatively closely, but I did not spot the point at which that occurred—I am not saying that that should be the yardstick by which anything is judged, but, quite frankly, I would imagine that many people find themselves in the same situation, not least Assembly Members themselves who have an interest in a particular area of legislation. Unless you are tracking it line by line, meeting by meeting, how on earth are you to know when significant changes happen?

[117] **Mr Davies:** Nid wyf i na'r corff yr wyf yn gweithio iddo'n arbenigwyr cyfansoddiadol, ond un peth a all helpu fyddai sicrhau bod amserlenni San Steffan a'r Cynulliad yn siarad â'i gilydd o safbwynt blaengynllunio a rhaglenni gwaith. Drwy wneud hynny, gellid o bosibl sicrhau cyfathrebu ac integreiddio yn y cyfnodau allweddol a phriodol, yn lle ein bod yn ceisio dal i fyny â'r prosesau.

Mr Davies: Neither I nor the organisation that I work for are constitutional experts, but one thing that could help would be to ensure that Westminster and Assembly timetables talk to each other with regard to forward planning and work programmes. By doing that, it may be possible to ensure the necessary communication and integration during the critical and appropriate stages, instead of us trying to catch up with the processes.

[118] **Mark Isherwood:** Wales Environment Link, in your evidence you highlighted problems such as a lack of Assembly Government engagement with stakeholders and delays in the implementation of regulations that implement provisions of UK Bills because of limited resources at this end of the M4. Do you have any suggestions for improving the situation?

[119] **Ms Smith:** I made a point earlier about the potential benefit of post-legislative scrutiny being recognised at Westminster, and I think that that offers an important means of checking on progress that would give the Assembly the tools to enable it to meet its targets. I wonder whether it is difficult for the Assembly and its committees to undertake effective post-legislative scrutiny if there has not been the kind of pre-legislative focus on or input into the legislative process that fosters a proper understanding of what legislation needs to come out of the other end of a UK Act.

3.40 p.m.

[120] **Mark Isherwood:** Effectively, with greater maturity, we would be factoring in resources at the pre-legislative stage, rather than taking on powers that we cannot exercise because of resources.

[121] **Ms Smith:** That is a benefit that can come from the pre-legislative scrutiny stage, which is also quite new at Westminster. Consideration of resources at an earlier stage would probably be beneficial.

[122] **Mark Isherwood:** You also recommend formalising a procedure for committees to review the potential impacts of UK Bills at draft stage, taking evidence and inputting directly

into the Westminster pre-legislative process. How would you expand on that, and how would you apply your recommendations practically?

[123] **Ms Smith:** This is an evidence session for external stakeholders, but that did not happen for the Marine Bill, for instance—the only scrutiny was of the Minister. We felt that, had there been two evidence sessions—one to take evidence from other bodies, such as this session, and another session to scrutinise the Minister on how she was taking that forward—the committee might have been better informed to ask those questions of the Minister, and follow on from where she started, I suppose. It was interesting that, in order to speed up the process and make sure that they met with the Westminster timetable, they gave evidence directly to the Westminster joint committee, which was very interesting for us because, when we first talked about it, we were not sure that they could do that. However, from our perspective, having looked at the evidence at the Westminster end, I am not sure that your evidence was given more weight than anyone else's evidence, in the sense that it went in as a set of recommendations. It would be interesting to ask the Westminster committee whether or not it gave more weight to those recommendations than it did to, say, our evidence, or anyone else's evidence. It was not clear that, coming from the Assembly, it carried extra weight.

[124] **David Lloyd:** Possibly not. Alun, did you have a supplementary question on this issue?

[125] **Alun Davies:** Yes, but I am not sure that I want to ask that question. [*Laughter.*] I do not disagree with what you say, but there are 40 MPs from Wales to provide that function, so I do not understand—I have not yet heard—what role the National Assembly for Wales should be playing in scrutinising Westminster legislation. There are 40 elected people to represent Welsh constituencies to have that debate with you and other people on UK legislation. Our role in the Assembly is to do something different, and not to try to do the job of MPs as well as that of AMs. I was interested in something that Daran said earlier about the place of Wales in the Westminster legislative process. Are you suggesting that we need to have a Welsh legislative committee in Westminster that would work with the Assembly on particular Bills to look at the implications for Wales?

[126] **Mr Hill:** I was not necessarily suggesting that. On a personal level, I believe quite strongly that legislation, whether it is for Wales or other parts of the UK, should have a sufficient level of scrutiny at a Westminster level, including from Welsh MPs if they happen to be drawn onto the committees scrutinising that legislation. However, there is a clear deficiency at the moment in relation to Measure-making powers in UK Acts. Evidence has been given during this committee about the hoops that people must jump through in terms of scrutinising the powers that pass through LCOs. We should bear in mind that 70 to 80 per cent of the powers already exist and are functional—Schedule 5 powers do not come through the LCO process, but through UK Measure-making Bills. I am concerned that there is no clearly defined mechanism here to enable the Assembly to input into that particular process. I am not concerned about MPs' scrutiny of UK Bills.

[127] **Alun Davies:** You say that you are content with the scrutiny provided by MPs of the broad breadth of legislation, but how would you differentiate between that statement and saying that there is insufficient scrutiny of the framework powers, because it is the same process, surely?

[128] **Mr Hill:** It is the same process, and I am taking quite a judgmental position on this, but there is a difference between primary legislative powers and secondary legislative powers being conferred to us in Wales: primary legislative powers that will be exercised by the National Assembly, in which you would have a clear interest and, in the main, secondary legislative powers that are exercised by Ministers and that you scrutinise. The process for primary legislative powers is so new that it can perhaps be tweaked and improved. The

secondary legislative processes, in many ways, are set in stone. I may be at variance to colleagues from other organisations in that opinion.

[129] **Alun Davies:** Are you saying that we spend too much time worrying about LCOs and not enough time concerning ourselves with the powers that are transferred through Acts of Parliament? Is the balance correct?

[130] **Eleanor Burnham:** Chair, I have to go in about 10 minutes.

[131] **David Lloyd:** That is fine. Carry on, Daran.

[132] **Mr Hill:** I do not want to sit in judgment, but if you were to look at a time and motion study in terms of outputs and where primary legislative powers have been conferred on the Assembly, and examine how little attention has been given at all levels to Measure-making powers, compared to LCOs, you would find that there is a great discrepancy between the two.

[133] **David Lloyd:** We have reached your questions, Eleanor, because I think the last one from Mark has already been covered.

[134] **Eleanor Burnham:** Unfortunately, my train will not wait. I have 10 minutes, so I will have to—

[135] **David Lloyd:** That is ample time. Keep it focused.

[136] **Eleanor Burnham:** I have an entirely different point of view from Alun. The sooner we get primary powers for Wales, the sooner we will cut through all this crap and streamline everything, so that we do not have these nuances and complications. Some witnesses have talked about an improvement in the way that policy objectives and legal implications are outlined through explanatory memoranda, for example, and some of you have also mentioned the current Welsh Assembly Government consultation on the code for regulatory impact assessments for subordinate legislation. In what way is the information currently supporting draft statutory instruments insufficient and how should it be improved? Forgive me, I cannot hear properly, because the link-up is not working well today, so if you have already answered this, I will move on to my other questions.

[137] **David Lloyd:** Who wants to take that on?

[138] **Eleanor Burnham:** Do not all rush at once.

[139] **David Lloyd:** It was the Countryside Council for Wales's point, so it is for you to come back on this, Llinos.

[140] **Ms Price:** Regulatory impact assessments are done for all statutory instruments, but I am not sure whether they are considered, particularly in relation to UK Bills, where UK Bills have been looked at by Assembly committees. That information is not provided as part of the scrutiny process. The regulatory impact assessment code is out for consultation currently, and it considers cross-cutting issues, such as sustainable development, which we think is very important. It also mentions assessing resource implications and so on; those issues are fundamental to the scrutiny process in the Assembly and, in addition, to considering the Assembly's budget. I do not think that that is being taken into account at the moment.

[141] **David Lloyd:** Are you happy with that, Eleanor, before you rush off to catch your train?

[142] **Eleanor Burnham:** My last question is on the fact that Public Affairs Cymru has been calling for clear presentations of matters for technical and merit scrutiny. In what way could these matters be clarified and who should take responsibility for achieving this?

[143] **David Lloyd:** That sounds like Public Affairs Cymru's boat.

[144] **Mr Hill:** There is a political element to merits scrutiny, which perhaps merits—forgive the pun—a different approach to technical scrutiny. From the way that the consultation paper outlined the direction in which the consultation is pointed, you might end up having to undertake both functions, which might, in the longer term, prove problematic for you in terms of timetabling and in terms of the necessary differentiation between both elements. It may be more appropriate that other arms of the Assembly scrutinise from a merits perspective, particularly in relation, perhaps, to post-legislative scrutiny. Some of the subject committees might take a bigger role in terms of that aspect.

3.50 p.m.

[145] **Ms Price:** On post-legislative scrutiny, as we have mentioned in our evidence, perhaps, in terms of capacity issues, the Law Commission could support the work of the committee because it already has a remit that covers England and Wales in looking at how legislation is implemented. It also looks at the issue of whether policy objectives are being implemented properly through legislation. I know that the Law Commission currently responds to Government requests, sometimes as a result of a committee inquiry, to look at a particular piece of legislation to see how effective it is. The UK Government has agreed that it should do this on a sort of three-year cycle; first, for the Government department responsible and then for Parliament. Therefore, there are resources that the committee can tap into given that there are existing capacity issues.

[146] **David Lloyd:** Thank you for that, Llinos. Do you have any other supplementary questions, Eleanor, before you, sadly, have to leave us?

[147] **Eleanor Burnham:** No, thank you, Chair.

[148] **David Lloyd:** Thank you, Eleanor, for your valuable contribution, as always. We will now move on to discuss European Union legislation. Joyce has the floor.

[149] **Joyce Watson:** According to Public Affairs Cymru:

[150] 'the use of transposition notes as provided in the Scottish Parliament offers an useful exercise in increasing transparency with regard to the implementation of European Union directives.'

[151] Will the panel explain what you wish to see in supporting explanatory memoranda or transposition notes, and who should be responsible for providing them, because we are back again to who does what and in what capacity?

[152] **Mr Hill:** As you referred to the evidence that we have put forward, I will grasp the bull by the horns first. I am sure that my colleagues will add to my comments if necessary. There is a reason why our evidence is so scant on this particular question; it is substantially shorter than the other comments and I will put my hand up and volunteer the fact that the evidence was mostly anecdotal. We have not looked in detail at transposition notes, but we understood that the Scottish Parliament has evolved a relatively sophisticated easy-to-follow system of mapping EU legislation and transposing it.

[153] In terms of whose responsibility that might be, I suppose that there might be three

answers, which might be three sets of answers by which you could define any sort of legislation mapping exercise. The first is whether there is an onus on the Government itself to produce a transposition note for transparency, openness and accessibility, the second is whether that is an appropriate function for the Members' Research Service to undertake as a matter of course, although there would need to be a considerable beefing-up of that particular division were it asked to undertake that new area of work, and the third is that—this is perhaps the element that is all too often forgotten—you are, after all, a political institution and in the scrutiny of any forms of legislation the political element is absolutely key in terms of merit and political relevance or otherwise. I suppose that I am spinning the question around to ask what political parties or the staff that serve politically-elected Members might do to help you as Members to be better notified perhaps of politically relevant pieces of EU legislation.

[154] **David Lloyd:** Okay. Darren, did you have a comment?

[155] **Mr Hughes:** I have nothing to add on that point, thank you.

[156] **David Lloyd:** Keith, did you have a comment?

[157] **Mr Davies:** Nid wyf yn gyfarwydd â manylion *transposition notes*, ond pan fydd rheoliadau a deddfwriaethau Ewropeaidd yn ymddangos, mae'n bwysig bod proses glir o sicrhau bod canllawiau priodol ar eu gweithredu yn cael eu paratoi a'u cytuno mewn da o bryd cyn i'r dyddiad swyddogol o'u rhoi ar waith ddod i rym.

Mr Davies: I am not familiar with the details of transposition notes, but when European regulations and legislation appear it is important that there should be a clear process of ensuring that appropriate guidelines on their implementation are prepared and agreed upon in good time prior to the official implementation date.

[158] Os nad yw hynny'n digwydd, gall y Llywodraeth fod mewn perygl o wynebu her cyfreithiol. Pe bai modd defnyddio *transposition notes* i osod proses o baratoi a llunio canllawiau cyn y dyddiad gweithredu, byddai hynny'n gam ymlaen.

If that does not happen, the Government could risk a judicial challenge. If there were a way to use transposition notes to establish a process of preparing and drawing up guidelines before the implementation date, that would be a step forward.

[159] **Ms Price:** It is probably worth the committee having a look at the Scottish European and External Relations Committee inquiry report into the transposition of European directives. Its recommendations include a call to the Scottish Government to set out a transposition plan that identifies a number of issues for the Parliament to take into account, such as a summary of any specific Scottish interests to be addressed in the transposition process, the Government's plans for consultation, the Government's plan for engagement with Parliament, and so on. It is probably worth having a look at that to see whether there are any recommendations that could be usefully copied here.

[160] **David Lloyd:** Diolch, Llinos. Joyce, your next question sort of overlaps on that, but carry on anyway.

[161] **Joyce Watson:** It does, but it perhaps goes after a little more detail. Considering that the National Assembly needs a procedure, as was mentioned in your paper, for flagging up legislation at a UK and the European level and to make it accessible to interested parties, have you identified any best practice within Governments or legislatures—and we have heard some evidence of that—that we could learn from to achieve this, or do you have any suggestions of ways that it could be achieved?

[162] **David Lloyd:** Llinos, you are big on European legislation.

[163] **Ms Price:** There is scope to further develop the Welsh Assembly Government website and the Assembly website on this front, because both have sections on legislation, but the way in which information is provided is slightly ad hoc. For example, they do not cover all pieces of UK legislation. I had a look this morning and there is no reference to the Marine Bill or the Climate Change Bill. A few of the subject committees have requested statements or papers on UK Bills or European legislation, but there should be a standard process to have those briefings available; it does not matter what the source is, as long as it is available to the public and to Assembly Members.

[164] **David Lloyd:** That is a good point. Darren?

[165] **Mr Hughes:** To elaborate on what Llinos has already raised, and to answer questions 13 and 11 in a way, to put it politely, some of the subject matter in statutory instruments could probably best be described as dry.

[166] **David Lloyd:** Perish the thought. [*Laughter.*]

[167] **Mr Hughes:** One issue for someone who works in communications—and it is something that Anne touched on earlier—is to ensure that the people affected by the statutory instrument or the legislation are informed early enough to be able to make a meaningful contribution. Other organisations have tried to maintain a website portal whereby you can register an interest in a particular subject, as a sort of working document. So, if you had an interest in big subject areas such as health or the environment, you can state, ‘Every time a statutory instrument comes forward relating to this subject, I feel that I have a meaningful contribution to make, so please could you inform me?’. So, hopefully, when anything comes forward on something such as the Marine Bill, people could register on the Assembly website, and when pieces of information come forward, they can make a meaningful contribution. As Alan said earlier, capacity is a massive issue for the Assembly and those of us who would like to help in the formulation of policy would be more than happy to do so if we knew it was happening.

[168] **David Lloyd:** And if we knew it was happening. [*Laughter.*]

4.00 p.m.

[169] **Alun Davies:** I would agree with the description of secondary legislation as dry. I want to raise a point regarding the statutory instruments and secondary legislation that we deal with and the turnaround time—in terms of the time and the resources available to us to deal with them. A number of pieces of written evidence have mentioned that 8.30 a.m. on a Tuesday is a poor time to meet, and frankly, I think that Members would all agree on that.

[170] **David Lloyd:** Sometimes it is 8.15 a.m..

[171] **Alun Davies:** Without exception, those of you who have followed this committee’s work over the last year will have heard us discuss the timing of our meetings, and that is one of the reasons that we are now meeting on a Monday—in order to make the meeting more accessible. However, the other point that you make in your evidence is that you want to see more space for meaningful consultation and new means and mechanisms of supporting that. I do not disagree at all with the principle or the vision behind that, but how could you make that happen? The reason that I ask is because we often have a turnaround period of weeks, possibly a month at most. The information is very detailed but can be made public—I would be surprised if it were not made public via the website anyway. So, there is already a means for putting views across, both to the Government, which owns the legislation, and then to ourselves, who scrutinise it. Those are two different roles. You mentioned the Marine Bill, but that is a Government Bill—it is up to the Government how to consult on it. It is not a

matter for us; it does not become relevant to us until it is proposed and published. How do you see that increased consultation happening in practice?

[172] **Mr Hughes:** The Chair mentioned earlier that it is difficult to give Assembly Members much notice of the legislation that is coming forward to them. It is a difficult nut to crack, and I do not think that I particularly have the answer but, looking into the subject in preparation for today, I was struck by one issue around UK Government Bills that include Measure-making powers for the Assembly. During the early development of such Bills, there does not seem to be a formal reporting arrangement to seek the views of those who will be involved in implementing the Measures that follow. It might be helpful if there was such a formal mechanism during the development of UK legislation for seeking the views of this place early in the process. That might help and give us, the external bodies, more time to be able to influence things.

[173] **Alun Davies:** I do not disagree with you. If you look at the agenda for today, you can see that we mostly deal with the implementation of legislation, giving legal identity to policies that have already been identified, and we do that in a mechanistic fashion. We have a role in scrutinising Ministers on their proposals, and we have done so. However, I still do not understand how the process would work. I do not disagree with your objective—I think that everyone around the table would agree with it—but I do not see how it would be made to work.

[174] **Mr Hill:** It might involve the use of networks in disseminating information. I am thinking particularly of Wales Environment Link; there might be an opportunity, with any relevant environmental legislation, to have just one portal that you pass it to at the earliest point. I recognise that there is sometimes a rapid turnaround on these things, but that might be a way of sending information down the wire. There are networks of various professionals and professional groups within Public Affairs Cymru. The Wales Council for Voluntary Action has, for example, a very well-developed health and social network, so you would only need to make contact with the person in the WCVA who services that network to disseminate the legislation. I cannot promise that you would get feedback even half the time, but it might be less complex than issuing legislation to a consultation list of 20 or 30 people. It could be that you would just press a button to get information out to groups of stakeholders relatively quickly.

[175] **Alun Davies:** That is a good way of operating, and it should happen. However, I do not believe that we should introduce a two-tier citizenship. Everyone should have the same right to access the same information. I would be quite happy to follow that process in addition to ensuring that everybody, no matter where they are or what their role is, has access to that information. I would be very concerned if the Assembly was outward-facing only to a number of self-selected interest groups. We have a democratic duty—without trying to sound too pompous—to ensure that everybody accesses that information.

[176] **Mr Hill:** I accept that point but you must recognise the perspective from which we come as an organisation.

[177] On the nature of the websites available, there is a massive difference between the National Assembly for Wales's website, which is functional and driven by business—of which legislation is a clearly discernable part—and the Welsh Assembly Government's website, which is not functionally driven in the same way; it seeks to engage on a much broader level, legislation is not particularly identifiable, and the site is not updated as regularly as the Assembly's. I urge Members to consider Welsh Legislation Online and how it can be harnessed and brought within—bearing in mind the fact that the National Assembly for Wales and the Welsh Assembly Government, as I understand it, pay towards the cost of that facility—and how it might be more fully utilised as an appropriate portal that would be

open to everyone.

[178] **David Lloyd:** That answers Alun's question 20. I will now turn to the other Darren.

[179] **Mr Hughes:** I will add a little to what Daran has said. I agree entirely with Alun's point about not wanting to create a two-tier system or first and second-class citizens—or however you want to describe it. I am sure that Members involved in the voluntary sector will say that one of the most difficult things of all is to ensure that you are hearing from private citizens as individuals rather than just the views of organisations that are put forward. Daran made a point about the development of websites that would allow private individuals to say that they are interested in a particular subject so that you would not just be relying on networks of organisations with a particular interest in the subject. The use of websites would enable individual citizens to give you their input relatively quickly.

[180] **David Lloyd:** Joyce has question 19. I do not think that we have covered that yet. We are coming towards the end now, you will be pleased to know.

[181] **Joyce Watson:** Wales Environment Link and the Countryside Council for Wales suggest a weakness in the way in which EU legislation is tailored to Wales's needs. Why do you think that that is the case? Following on from that, assuming that that is the case, how do you propose that the situation might be improved?

[182] **Ms Price:** I do not think that we said that there was a weakness in the process. We said in our evidence that there is a difference between the extents to which European directives are tailored specifically for Wales and for England. I think that that is an issue of capacity in certain circumstances rather than any lack of will on the Welsh Assembly Government's part to take its own approach. We were simply saying that the extent to which differences are applied varies. I will leave Wales Environment Link to deal with the other question.

[183] **Mr Davies:** We had a discussion on the role of transposition notes, which are potentially a useful mechanism to bridge the gap between what happens at the European level and what happens in Wales.

[184] **David Lloyd:** We are out of time. Do any of the panel members feel that we have not covered any issue in sufficient detail? Wales Environment Link has not really had a chance to comment on much of the European stuff or on communications with the Subordinate Legislation Committee. Are you happy bunnies?

[185] **Ms Meikle:** I always like to leave people with something controversial. We share your concerns, because we have to double up our resources in looking at what happens in Westminster as well as here. I would like to flag up the fact that the Westminster Joint Committee on the Draft Marine Bill flagged up that it is concerned that there is the potential for a legislative vacuum between Westminster and here.

4.10 p.m.

[186] If that committee is flagging it up and saying that it does not feel that it is necessarily able to scrutinise and ensure that that is happening well, then it is a serious issue that we all need to look at. You may well be right that the answer is to do with encouraging the Welsh Assembly Government to line up its timetables so that it can input more effectively the information that Westminster MPs need, but I think that it is a serious issue if the committee is flagging that up in its response to the consultation.

[187] **Ms Smith:** I would like to add a last comment to that. I recognise your comments and

certainly accept the role of MPs in scrutinising this legislation, but if the Welsh Ministers' role is to negotiate the powers that are coming through a UK Bill—executive powers in the case of the Marine Bill—but the MPs scrutinising the Bill do not have access to the Welsh Minister or are unable to ask her any questions about the way in which she intends to use the powers, there is a gap in the pre-legislative scrutiny that means that Wales does not benefit from it in the same way.

[188] **Alun Davies:** Many interesting points have been raised, and there is a lot of food for thought. After this meeting, could we look at the Marine Bill and the Planning Bill as examples of how this process functions, or does not function, so that we might learn some lessons from them as case studies?

[189] **David Lloyd:** That is a good suggestion, and it is receiving assent all round. We will certainly look to introduce that. Are there any issues that you would like to raise before we wind up what has been an excellent evidence session? I see that there are not. I thank our distinguished panel. The transcript of our debate this afternoon will be sent to you by the clerk for correction before being finalised. Furthermore, this committee will take evidence from the Law Society and the Counsel General at future meetings with the aim of discussing the draft report on this review and its recommendations before the end of the autumn term. I am in no doubt that you will be informed by whatever website you want to access at the time. Thank you very much indeed.

4.12 p.m.

Unrhyw Fater Arall Any Other Business

[190] **David Lloyd:** Is there any other business? I see that there is not and that everyone is happy.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[191] **David Lloyd:** The date of the next meeting is Tuesday, 14 October. It is a routine Tuesday meeting, which is scheduled to start at 8.45 a.m., which is late for this committee. We will have a lie-in that morning.

[192] Diolch yn fawr am eich presenoldeb, Thank you very much for your attendance
a diolch am y cyfieithu. and thank you for the translation.

[193] The meeting is now closed.

*Daeth y cyfarfod i ben am 4.13 p.m.
The meeting ended at 4.13 p.m.*