



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

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol **The Constitutional and Legislative Affairs Committee**

Dydd Llun, 28 Ionawr 2013
Monday, 28 January 2013

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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir
trawsgripiad o'r cyfieithu ar y pryd.

The proceedings are reported in the language in which they were spoken in the committee. In
addition, a transcription of the simultaneous interpretation is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Mark Drakeford	Llafur (yn dirprwyo ar ran Julie James) Labour (substitute for Julie James)
William Graham	Ceidwadwyr Cymreig (yn dirprwyo ar ran Suzy Davies) Welsh Conservatives (substitute for Suzy Davies)
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
Simon Thomas	Plaid Cymru The Party of Wales

Eraill yn bresennol
Others in attendance

Mick Antoni	Aelod Cynulliad, Llafur (Yr Aelod sy'n gyfrifol am y Bil Adennill Costau Meddygol ar gyfer Clefydau Meddygol (Cymru)) Assembly Member, Labour (The Member in charge of the Recovery of Medical Costs for Asbestos (Wales) Bill)
Fiona Davies	Gwasanaethau Cyfreithiol, Llywodraeth Cymru Legal Services, Welsh Government
Vaughan Gething	Aelod Cynulliad, Llafur Assembly Member, Labour
Lesley Griffiths	Aelod Cynulliad, Llafur (Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol) Assembly Member, Labour (The Minister for Health and Social Services)
Mark Osland	Dirprwy Gyfarwyddwr Cyllid, Llywodraeth Cymru Deputy Director of Finance, Welsh Government
Lisa Salkeld	Gwasanaethau Cyfreithiol Legal Services

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

Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Ruth Hatton	Dirprwy Glerc Deputy Clerk
Owain Roberts	Y Gwasanaeth Ymchwil Research Service
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerk

Dechreuodd rhan gyhoeddus y cyfarfod am 3.05 p.m.
The public part of the meeting began at 3.05 p.m.

**Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datganiadau o Fuddiant
Introduction, Apologies, Substitutions and Declarations of Interest**

[1] **David Melding:** Good afternoon, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. We will start with apologies and substitutions. Julie James, Suzy Davies and Eluned Parrott have apologised for their absence. Mark Drakeford and William Graham are here as substitutes. I welcome you this afternoon; we are grateful for your time and the help that you will give with our work. I will make the usual housekeeping announcements. We do not expect a routine fire alarm, so if you hear the bell sound, please follow the instructions of the ushers. Please turn off all electronic equipment completely; even on silent, it can interfere with the broadcasting equipment. Proceedings are conducted through Welsh and English, and when Welsh is spoken there is a translation on channel 1. Channel 0 will amplify our proceedings, should you require amplification.

3.06 p.m.

**Offerynnau nad ydynt yn Cynnwys Materion i Gyflwyno Adroddiad arnynt o
dan Reolau Sefydlog Rhifau 21.2 neu 21.3
Instruments that Raise no Reporting Issues under Standing Orders Nos. 21.2 or
21.3**

[2] **David Melding:** The two instruments are listed for you. Do Members have any concerns? I see that you do not.

3.07 p.m.

**Gorchymynion a Wnaed o dan Ddeddf Cyrff Cyhoeddus 2011
Orders Made under the Public Bodies Act 2011**

[3] **David Melding:** This is CLA CM5, Consent Motion for Public Bodies (Abolition of Administrative Justice Tribunals Council) Order 2013, and there is a paper before you. Gwyn will give us an update, because the House of Commons committee has already looked at this, in relation to England, presumably, and they broke the 60-day rule

<p>[4] Mr Griffiths: Mae'r Gorchymyn hwn yn cael gwared ar gorff yn sector y llysoedd a thribiwnlysoedd. Mae memorandwm esboniadol gan Lywodraeth Cymru yn esbonio pwrpas ac effaith y Gorchymyn hwn. Rwy'n falch o allu dweud fy mod yn meddwl bod y memorandwm hwn cystal nad oedd diben i mi baratoi memorandwm ar wahân ar gyfer y pwyllgor. Felly, gan ein bod o dro i dro yn cwyno am ansawdd memoranda o'r fath, mae'n werth rhoi clod lle mae clod yn haeddiannol. Mae'r Gorchymyn yn syml iawn. Mae Llywodraeth Cymru, fel y gwelwch o'r memorandwm, yn gwneud trefniadau ar wahân ar gyfer Cymru. Felly, nid oes dim byd arbennig i'w nodi ynghylch y Gorchymyn hwn.</p>	<p>Mr Griffiths: This Order abolishes the Administrative Justice and Tribunals Council. There is an explanatory memorandum from the Welsh Government that explains the purpose and impact of this Order. I am pleased to say that I think that this memorandum is so comprehensive that there was no purpose in my preparing an alternative for the committee. As we often complain about the quality of such memoranda, it is worth giving praise where praise is due. The Order is quite straightforward. As you will see from the memorandum, the Welsh Government is making separate arrangements for Wales. Therefore, there is nothing particular to note about this Order.</p>
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[5] **David Melding:** Do Members have anything to raise? I see that you do not.

3.09 p.m.

**Tystiolaeth Mewn Perthynas â Bil Adennill Costau Meddygol ar gyfer Clefydau
Asbestos (Cymru)
Evidence in relation to the Recovery of Medical Costs for Asbestos Diseases
(Wales) Bill**

[6] **David Melding:** We will invite our witnesses in. Good afternoon, and welcome to this session on your Bill. We have asked you in as the Member in charge, and I am pleased to welcome Vaughan Gething here as well as Mick Antoniw, whom Vaughan will be supporting this afternoon, and the legal adviser, Lisa Salkeld.

[7] The work of this committee is to review legislation in terms of the use of the subordinate powers that it gives to Ministers, but also, sometimes, other broader constitutional points that may be appropriate. This session will be followed by a session with the Minister and we will be covering similar ground with her. Welcome; we will operate in a way that you will be well familiar with, as you know the work of the Assembly very well by now. A range of questions will go around and I will invite Members to ask supplementary questions as appropriate; it will be quite fluid potentially. Similarly, particularly with Vaughan, if you want catch my eye on anything, to add to the evidence or to any particular points, please do so. However, I am going to focus on Mick in the first instance, as it is his Bill.

[8] I will start us off, Mick. I suppose that the main question and the main issue that we start with is whether the Bill strikes a proper balance between what is on the face of the Bill and then what is left to subordinate legislation. Do you feel that that has been struck and could you outline your reasons for the balance that you have set?

[9] **Mick Antoniw:** In actual fact, the substance of the Bill is really almost in one section—section 2—which is about the purpose of it being it to recover medical costs. A large chunk of the Bill sets the framework for regulations and the actual implementation of the scheme. So, on the main principles of the Bill and what it aims to achieve and so on, I think that that is quite clear on the face of the Bill. Obviously, the implementation has quite a bit more detail, but this particular Bill has quite a lot of background structure to the way in which the system is going to operate. What it does is set the framework, but the final technical regulations for implementation are almost impossible to determine at this stage because they are dependent to some extent, if the Bill is passed, on the Government completing negotiations with the compensation recovery unit for implementation and on other Government-to-Government discussions or anything like that. So, on balance, although there is quite a lot of technical detail in there already, the technical administrative elements are effectively by negative resolution and the remaining bits, particularly where they are related to amounts of compensation, are by affirmative resolution.

[10] **David Melding:** In striking this balance, have you had any discussions with Ministers and officials in the Welsh Government as to their feeling about the amount that you are intending to leave in regulations?

[11] **Mick Antoniw:** We have managed to work very co-operatively with the Welsh Government. We started to initiate drafts of the Bill and it has been very helpful that the Welsh Government and its officials have co-operated quite considerably, to the extent that they have had meetings with the compensation recovery unit to establish that, yes, this would fit in, and everything sounds very positive on that side. I think that probably covers—

[12] **David Melding:** We will go into further detail in questions on specific regulations.

[13] **Mick Antoniw:** In terms of the framework as to how it might work, and with the assistance again of Paul Davies from the University of Glamorgan, what we have with the explanatory memorandum is a good explanation as to how it can be done cost effectively and so on. Also, Government officials are also very much on board that this is a practical way of proceeding.

[14] **David Melding:** Have you had any discussions with UK Ministers in terms of the Bill?

[15] **Mick Antoniw:** I have sent the details and a copy of the Bill and the explanatory memorandum to the Secretary of State for Wales so that he is aware of the legislation. I am not aware of any response back from that, although I will follow that through.

[16] **David Melding:** Finally, in the first set of questions that I want to put to you, is the issue of competence. It is much more than a technical question in this instance because the Presiding Officer did write to us to say that, while it is considered to be within the Assembly's competence, it was a decision that had to be weighed very carefully. First, have you had any discussions on competence with the Welsh Government and Ministers?

3.15 p.m.

[17] **Mick Antoniw:** Yes. In the early stages, with competence being the issue, we focused on what we can or cannot do, and if we went down a particular road whether it would fit within competence. So, competence has been at the core of this. Subsequently, when we have had discussions with Government officials, we have had to satisfy them that what we are doing is within competence, and I think that we have done so and not had any negative feedback on that. Since then, the Presiding Officer's assessment is that it is within competence. Within the state of the constitutional relationship and legal relationship between the Welsh Government and the UK Government, there are always potential questions that can be asked. However, when you look at it in the round, and within the devolved health responsibility, you will find that this is very much focused within that. The function is very clearly within competence, and any other matters where question marks may be raised are more to do with the incidental consequence that is the implementation of the achievement of the main function.

[18] **David Melding:** Have you been able to have any discussions with the UK Government in terms of competence, and, if so, have any issues arisen?

[19] **Mick Antoniw:** No, I have not. With a Member Bill, it probably would not be normal. I imagine that it would go from a Government-to-Government point of view. So, the Welsh Government would, no doubt, have contacts at some stage. The fact that I have sent all the details to the Secretary of State for Wales probably satisfies that requirement.

[20] **David Melding:** Finally, the Presiding Officer's letter was circulated to you, together with a note on the legal advice, I think. I wonder whether you have been able to reflect on the legal advice and the issues of potential ambiguity that it raises. It seems to me that the most important one relates to this Bill seeking to bind the Crown, and whether that is within our competence. That seems to have been the issue that caused most need for thought, if I can put it as neutrally as possible.

[21] **Mick Antoniw:** The issue of binding the Crown is a sort of incidental consequence. It is not a function of this. I think that that is the point of view that is ultimately taken by the Presiding Officer. That fits very much within the decision in the bye-laws judgment.

[22] **David Melding:** Thank you. That is very clear. William Graham will now take us on to the next set of questions.

[23] **William Graham:** Mick, why do you think that Welsh Ministers need the power to amend the list of excepted payments?

[24] **Mick Antoniw:** I think that that is because some of the benefits systems may change the actual amounts that are involved in areas that are not devolved to us and over which we do not have any control. Where there are changes from time to time, the last thing that you want is for the Welsh Government to have to bring forward an affirmative resolution on every occasion. It is a matter of technical and administrative efficiency and convenience.

[25] **William Graham:** Why is the affirmative procedure required for regulations made under section 4(2), but the negative procedure is required for regulations made under section 4(3)?

[26] **Ms Salkeld:** Regulations made under section 4(2) actually take payments out of the excluded payments list in the Schedule, so it would thereby make them subject to the scheme and create an additional burden, whereas regulations made under section 4(3) would put types of payments into the Schedule, which would then mean that those payments—sorry. Regulations made under section 4(2) take them out of excluded payments so that they are no longer—

[27] **David Melding:** So, they could then attract payments in terms of compensating the NHS. And it is the other way around—

[28] **Ms Salkeld:** Yes; whereas there would be no burden the other way around.

[29] **David Melding:** I can see the logic.

[30] **William Graham:** Why do you consider it appropriate to deal with the application process for a certificate in subordinate legislation?

[31] **Mick Antoniw:** Perhaps Lisa might like to deal with that question.

[32] **Ms Salkeld:** I am sorry, but could you repeat the question?

[33] **William Graham:** Why is it appropriate to deal with the application process for a certificate in subordinate legislation?

[34] **Ms Salkeld:** It is purely an administrative matter. It is not something that would usually appear on the face of the Bill. It may run to many pages, to deal with the technical matters that are involved in an application process. As a purely administrative matter, it would be more usual to find it in regulations.

[35] **William Graham:** Why are regulations that are made under section 5 subject to the negative procedure?

[36] **Mick Antoniw:** It is because, technically, it is administrative, and it is the most efficient way of proceeding.

[37] **William Graham:** Thank you very much.

[38] **David Melding:** Mark Drakeford has the next two questions.

[39] **Mark Drakeford:** Moving on to sections 6(1) and 6(2), regarding the same process of leaving to subordinate legislation the application process for a certificate, you have probably explained why you would do that. However, under section 6(2), the regulations are to be made subject to an affirmative procedure in the first instance, and, thereafter, subsequent regulations would only need the negative procedure. Could you explain why you decided on that differential approach?

[40] **Ms Salkeld:** In drafting, it mirrors the provisions that are in the Health and Social Care (Community Health and Standards) Act 2003, which deals with recoverable NHS costs where there has been an injury or an accident. That also provides for the first setting of the amount to be done by way of the affirmative procedure, and, thereafter, by the negative procedure. The first time that it is done is the important time, because it sets the benchmark; thereafter, Welsh Ministers may need flexibility to change it quickly, to respond to market forces, or to changes in other legislation. The negative procedure gives that flexibility.

[41] **David Melding:** But they could use it more comprehensively, could they not?

[42] **Ms Salkeld:** There is no limit on the amount in section 6(2), so, yes, they could.

[43] **David Melding:** Simon Thomas has the next questions.

[44] **Simon Thomas:** Hoffwn barhau â'r hyn yr ydym newydd ei drafod, sef y ffordd y mae'r broses yn cael ei gosod ar gyfer tystysgrif, a'r ffordd y mae'r rheoliadau yn cael eu gwneud o dan hynny. Felly, pam bod angen pellach ar gyfer adran 6(8) o'r Bil yn ei ffurf bresennol? Beth mae'r adran honno yn ei ychwanegu at y rhan hon o'r Bil, a beth yw ei phwrpas?

Simon Thomas: I wish to follow on from what we have just discussed, namely the way in which the process is set out for certificate, and the way in which regulations are made under that. Why, therefore, is there a further need for section 6(8) of the Bill in its current form? What does that section add to this part of the Bill, and what is its purpose?

[45] **Mick Antoniw:** The main issue with the certificates is that, ultimately, a precise arrangement has to be negotiated with the compensation recovery unit. I do not have a status with that, but, fortunately, the Welsh Government has commenced preliminary negotiations on that. However, I believe that the compensation recovery unit has said that this is indeed what it does, and that it is happy to proceed, but that, until the legislation is passed, and until we are able to put a precise business case to it, it cannot give us the final details. Furthermore, once you have entered into that system, from time to time, there will be changes and tweaks, which are dependent on other external factors. If we are asking the unit to be the main implementer of this, then we need the flexibility to be able, fairly efficiently and quickly, to make tweaks and adjustments to the system. That is why it is there. It would probably not be possible for us to include any more detail at this stage. I believe that we have got in as much as we possibly can at this stage, until we manage to move, hopefully—if the legislation is passed—onto the next stage, which is the final implementation stage.

[46] **Simon Thomas:** Deallaf y pwynt hwnnw, ond, os ydych yn rhoi'r cyfan at ei gilydd, mae sawl set o reoliadau yn y fan hon—ac nid ydym yn gwybod beth yw'r rheoliadau eto—sy'n gosod allan lefel y taliadau a sut mae taliadau wedi cael eu gweithio allan. Wedyn, o dan adran 6(8), mae hawl ychwanegol, bron, i'r iawndalwr i ddod yn ôl a dweud, 'Yr wyf eisiau mwy o fanylion am sut yr ydych wedi gweithio'r

Simon Thomas: I understand that point, but, if you put this all together, there are many sets of regulations here—and we do not know what the regulations will be yet—that set out the level of payments and how those payments have been worked out. Then, under section 6(8), there is an additional right, almost, for the compensator to come back and say, 'I want more details about how you have worked these payments out'. Is there a

taliadau hyn allan'. A oes perygl o ddryswch oherwydd bod lefelau gwahanol o reoliadau? Dyna sy'n fy mhoeni i ar hyn o bryd.

danger of confusion because there are different levels in the regulations? That is my concern at present.

[47] **Mick Antoniw:** Section 6(8) serves a particular purpose. Once someone is given a certificate and they are told, 'This is how much you are liable to repay to the Welsh Government in respect of NHS costs', that individual will then have a right to come back and say, 'This is what you are asking for, but you explain to me how it is broken down'. Any appeal or review process can only really work if someone knows on what basis the amount is being claimed. So, this is a very sensible section. It will give the person paying the money the right to check that the amounts are accurate and correct. It ties in very much with the subsequent section, where you might apply for a review or ultimately go on to an appeal.

[48] **Simon Thomas:** Dyna oedd fy nghwestiwn nesaf. Felly, rydych wedi paratoi, mae'r iawndalwr yn gallu canfod sut mae'r dystysgrif wedi'i weithio allan, ond mae hawl apelio yn y system hefyd. A ydych yn fodlon eich bod wedi cael y cydbwysedd iawn o ran yr hyn sydd ar wyneb y Bil ynglŷn â'r hawliad, yr amseru, y dull a'r ffordd y mae apelio'n digwydd? Rheoliadau negyddol sy'n delio â hyn i gyd. A ydych yn credu bod hynny'n rhoi digon o eglurder ar wyneb y Bil ynglŷn â'r broses? Byddai rhywun yn meddwl y byddai pobl yn chwilio am ryw esboniad o'r broses apelio ar wyneb y Bil yn y lle cyntaf, neu'r egwyddorion, o leiaf.

Simon Thomas: That was my next question. So, you have prepared, the compensator can find out how the certificate has been worked out, but there is also a right of appeal in the system. Are you satisfied that you have got the right balance in terms of what is on the face of the Bill relating to the claim, the timing, the method and the procedure of appeals? This is all dealt with through the negative procedure. Do you believe that that gives enough clarity about the process on the face of the Bill? One would think that people would be looking for some explanation of the appeals process on the face of the Bill in the first instance, or the principles, at least.

[49] **Mick Antoniw:** I think that it does, because it breaks it down into several stages. The first stage, which is where I would imagine the overwhelming majority of queries would come, is a review stage, where effectively, almost in correspondence, you are checking the mathematics, checking the calculation, and so on. The other stage, of course, is that if someone was not happy with that, then ultimately they would be entitled to go into the compensation recovery unit appeal structure. That structure is set in respect of all the work that the compensation recovery unit carries out. So, it is a structure that is already in existence. For the purpose of ensuring that we are not duplicating systems or incurring unnecessary administrative costs, that system, which is already in place, would be adopted. We would need to deal flexibly with any adjustments to that from time to time. We have given evidence to another committee that, if we applied the number of appeals to the 20,000 or so cases that go through the system every year, we could expect one or two appeals every 10 years or so.

[50] **Simon Thomas:** A yw'r rheoliadau o dan adran 6(8) i fod i gwrdd â gofynion apeliadau cyn bod angen apeliadau, bron? Ai dyna pwrpas cael rheoliadau? Rwy'n ceisio canfod pam fod eisiau sawl set o reoliadau ar wahân i ddelio â hyn.

Simon Thomas: Are the regulations under section 6(8) supposed to meet the requirements for appeals before appeals are actually needed? Is that the purpose of having regulations? I am trying to find out why several separate sets of regulations are needed to deal with this.

[51] **Mick Antoniw:** It is because section 6(8) is about ensuring that the individual, when they are given a certificate, can get all the information that they might require to consider either a review or, ultimately, an appeal.

[52] **Simon Thomas:** Pan ydych yn sôn am adolygiad—oherwydd bod hynny hefyd yn bosibl o dan adran 9(2)—pam rydych yn rhoi hynny mewn rheoliadau negyddol? A ydych yn hapus bod hynny'n ddigon eglur?

Simon Thomas: When you talk about a review—because that is also possible under section 9(2)—why have you put that into regulations under the negative procedure? Are you satisfied that it is sufficiently clear?

[53] **Mick Antoniw:** I am. In these circumstances, a review is essentially an arithmetical check. It is also a discretionary element for the Government. The prime example is probably when you are saying, 'I think you've got your figures wrong'. The Government then goes back and says, 'Oh yes, we have, you are right, we will amend the certificate'. That is why that is there. Section 6(8) gives the information for that, but if there were to be any more complicated issue—although in several decades of dealing with the CRU, I have never actually come across one—they would have the entitlement to all the information necessary to take that decision.

3.30 p.m.

[54] **Simon Thomas:** To get all of that information, you will need the correct exchange of information across different organisations, which is again provided for in the proposed Bill. However, you do not state the nature of the information that should be shared. Do you have any concerns over whether that approach is strong enough, particularly when you might be sharing the information with other Crown bodies?

[55] **Mick Antoniw:** It is difficult to put that sort of detail on the face of a Bill. The sort of questions that will be asked will be: how many hospitals were you at; which hospitals were you at: when were you at the hospital; did you receive primary or secondary care; and did you receive care in Wales? If you were to try to translate this into the main legislation, you would probably add another three or four pages to it, with no greater clarity than you get from a section that basically says that you have a fairly broad, open and unrestricted entitlement to the necessary information.

[56] **Simon Thomas:** I understand the point. However, you mentioned in your reply that there are potential cross-border issues here as well. By not having this on the face of the Bill, are you concerned that this might lead to false claims, or claims where competence could be extended too far by regulation?

[57] **Mick Antoniw:** I do not think so. One thing that will have to be worked out technically is what the format will be when the compensation recovery unit writes out. Every claim that will be covered by this Bill will already be registered with it. If there is a personal injury claim and a civil settlement, it will have had to be registered with it anyway. So, it will know of any case that involves any such settlement being effected. The only question is what the formula would be to identify where costs have been incurred. There might have to be questions in there such as: where do you live, have you been treated, or have you been treated anywhere else and in more than one jurisdiction? That can be a relatively straightforward administrative system.

[58] **Vaughan Gething:** I agree. In reality, most cross-border services are going to involve England and Wales. This is not that difficult to deal with. In terms of going beyond competence, the reality is that these regulations extend only to Welsh NHS-funded treatment. So, I do not think that we are in danger of extending beyond the powers of the Assembly.

[59] **Simon Thomas:** Okay. I have a final question on this issue. I accept that point, but you have quite a complex system going on. Is it appropriate that that is being decided via the negative rather than affirmative resolution, which would give people more opportunity to see whether this is achieving what it is meant to achieve?

[60] **Mick Antoniw:** I think that it is. At this stage, it is impossible to tie down that procedure in much more detail. Secondly, it is essentially a very technical and administrative matter. Thousands of letters go out each year along very much the same lines. All that is happening is that the system is being tweaked in some way to ensure, if the case is an asbestos case that involves Welsh costs, that those are identified.

[61] **Ms Salkeld:** The regulations will come back before the committee to be scrutinised. They will be checked by the legal adviser before coming to the committee, and they could not be outside the competence that is given by this Bill anyway. So, they will not be able to stray further than what is allowed by this section.

[62] **Simon Thomas:** That is a fair point. If a question of competence remains, it relates to the Bill itself, not the regulations; I understand.

[63] **David Melding:** Given the importance of the certificate procedure, its review, and the possible appeals against certificates, why have you not followed the principle used with accepted payments or with the earlier regulation to which we referred—namely, that it is set up via the affirmative procedure and amendments are allowed via the negative procedure? It strikes me that the real guts of your Bill are here, with how this operates. Yet, you are not putting much detail on the face of the Bill, and you are then proposing that that detail be established via the negative procedure, even in the first instance. Do you think that that balance is right?

[64] **Mick Antoniw:** We have mirrored, as closely as possible, the 2003 Act. So, you will find that the drafting of this has mostly followed a particular line. We regarded the 2003 Act as a precedent. The affirmative side is significant in helping us to determine the amounts, caps and anything like that, but because so much of the remainder is very technical and administrative, the negative resolution is appropriate for efficiency and tweaking because it does not conflict with any of the substantive objectives of the Bill. So, it does not challenge the criteria of the Bill.

[65] **Vaughan Gething:** It is probably helpful to point out that the 2003 Act that we refer to is the Health and Social Care (Community Health and Standards) Act 2003. Part 3 of that extended the ability to recover NHS costs for all forms of personal injury, apart from disease cases. Previously, it was only in relation to road traffic accidents that NHS costs were recoverable against any party paying compensation, whether on a fault or no-fault basis.

[66] **David Melding:** If we check that out, we will not find that there is more detail on the face of it, because that would destroy your argument now. [*Laughter.*]

[67] **Mick Antoniw:** No.

[68] **David Melding:** We will check.

[69] **Mick Antoniw:** I wish you many enjoyable hours doing so. [*Laughter.*]

[70] We have been through it very carefully, and we started off looking very much at the 2003 Act as the precedent and base, and the completion of the Bill as drafted has incorporated it as far as is possible and practical to do so.

[71] **David Melding:** Precedents are useful to guide us, but they do not necessarily completely bind us. However, you have answered my question.

[72] **Mark Drakeford:** I will rehearse this with you. The mechanism of the Bill proposes

that the recovery of NHS costs is contingent upon the settling of a compensation claim, but a compensation claim may not be a single event. There might be interim payments, deferred payments, second payments and so on. Section 14 of the Bill allows Ministers to modify the operation of the Act if more than one payment is made. Could you tell us a little more about how you think that the possibility of a compensation claim not being settled in a single instance might impact on the recovery of NHS costs? Why have you left that to a negative resolution to be set in place, were that to occur?

[73] **Mick Antoniw:** The first thing is to set the scene as to what might happen during the course of a civil compensation claim. Interim payments may be made. There is provision, sometimes, for interim payments to trigger repayment at that particular stage. The Welsh Government may want to consider that by way of regulations. It may be as simple as to say, 'No, we will do it when the case finally concludes'. However, at the moment, in terms of the Government recovering benefits, when an interim payment is made and say, at the start of a case, an insurer says, 'We will pay so much as an interim payment now, and we will carry on working out the rest of the case', there would be a requirement at that stage to pay the benefits back to the Government up to that stage, and then to make a further payment at a later stage. That might not be appropriate in this case, because you will have a series of ongoing costs and so on. So, in terms of the administration of any scheme, you would probably want to avoid that.

[74] The other things that happen are that there are rather complex rules and provisions in respect of provisional damages and lump-sum payments. So, for example, it is possible for damages to be paid in instalments, particularly where there are things such as ongoing care involved, and where there are uncertainties about how long that might go on for. So, you could be having monthly or annual payments and so on. Again, that would be a matter, to some extent, to discuss with the CRU as to when is the best time to do it. It would probably be at the actual conclusion of the agreement. There are certain issues, such as this one, that can be quite complicated.

[75] The other thing is provisional damages. Provisional damages in a civil case are where, effectively, you are saying to someone who may have been diagnosed with pleural thickening that the compensator may have said, 'We will pay you so much for that on the grounds that you don't get any worse'. That is the judgment that will trigger the Government's entitlement to recover costs. However, that person, as part of that provisional damages settlement, may have the right to go back to court at a later stage if they develop another asbestos-related disease. That would be the equivalent of another judgment, and they would be entitled to go back to court at a later stage. All those things are periodically under review and periodically changed, either by practice directions or civil procedure rules et cetera. It is a question of deciding on the most efficient system, but also of having a system that can adapt and change quite flexibly every time there is a change in any other procedures that affect that. Does that answer the point?

[76] **Mark Drakeford:** Yes, it does. Since the Bill has a stop-the-clock mechanism in it, once the compensation issue is concluded, there are no more NHS costs that can be recovered beyond that point. Are you confident that the regulatory-making power given to Welsh Ministers under section 14 will avoid any perverse incentives for insurance companies to make a small, early, interim payment that stops the clock as far as NHS cost recovery is concerned?

[77] **Mick Antoniw:** The answer is 'yes', because under the existing 2003 Act and regulations that are in force there, an interim payment does not qualify as a settlement or judgement. We are clear about what the defining moment is when the trigger occurs.

[78] **Mark Drakeford:** Given the complexities that you outlined, is it sufficient that this is

left to be determined by the negative resolution procedure?

[79] **Mick Antoniw:** Yes, it is; for the same reasons of flexibility and efficiency, it does not have an impact on the objective. It is a question of practical and effective implementation.

[80] **Simon Thomas:** You made an important point there about certain points of principle regarding where you can and cannot stop the clock. However, my reading of your Bill is that that is all left to regulation and the negative procedure. Has any consideration been given to putting that on the face of the Bill or, via affirmative regulations, having a little more clarity around that?

[81] **Mick Antoniw:** The Bill is fairly clear about when compensation payments are made—which I think goes on into section 3 as well—or when settlements are reached.

[82] **Simon Thomas:** There is interdependency between the Bill and its regulations and other procedures and practices, such as those of civil courts. In this committee, we are trying to look at when it is appropriate to use the affirmative procedure or the negative procedure, or to put it on the face of the Bill. Is there not a danger that we could lose sight of the principle of these rather complex layers of regulations that you have set out for us in the last 40 minutes? Is there any validity in stepping back and considering whether something should be said here?

[83] **Mick Antoniw:** I do not think so; you could have put it into either. I do not think that it would be necessary to go into the affirmative procedure, because section 3 is clear not only on the diseases, but on what is meant by payment and compensation. That is defined in section 3. That is pretty clear cut. The remainder of what you are asking about relates to the nuances of putting this into practice with the regulations themselves and the fact that the regulations may need to be adjusted or changed periodically.

[84] **Simon Thomas:** Therefore, are you are content that the principle included on the face of the Bill is sufficient and that you do not need to add to that?

[85] **Mick Antoniw:** I do not think that it is necessary.

[86] **Vaughan Gething:** No, I do not think that it is necessary either.

[87] **Mark Drakeford:** Section 15 imposes liability on insurers but subsection (4) permits Welsh Ministers to limit that liability by regulation. Why do Ministers need that power? Under the circumstances that you are about to describe, is allowing them to use those powers via the negative procedure adequate?

[88] **Mick Antoniw:** In the 2003 Act, relating to road traffic, there is a cap. There is no cap on the face of the Bill here, although there is reference to a cap in the explanatory memorandum. The purpose of that is to give the power to the Welsh Government to determine what the cap should be and its purpose is to give power to the Welsh Government to determine what that cap will be. The purpose of having a cap is the desirability of giving a degree of certainty to the insurance industry in terms of it managing its potential liabilities in the future.

3.45 p.m.

[89] **Mark Drakeford:** Thank you. I have one final question. In section 3 of the Bill, there are no delegated powers to Ministers but, as you know, we in the Health and Social Care Committee have rehearsed with you the argument that the Bill at the moment excludes costs to the NHS—including primary and community settings—from being recovered through this

Bill. We have explored with you, in order to futureproof the Bill against the time when more services are moved out of secondary care and into the primary and community setting, that Welsh Ministers ought not to have the power by regulation to extend the scope of settings at which costs might be recovered. Is that something to which you are likely to give any consideration? If the scope of the Bill were increased in that way, ought that to be a power that Welsh Ministers should exercise only on the basis of an affirmative resolution?

[90] **Vaughan Gething:** This follows the 2003 Act scheme, where primary care is not recoverable. The explanatory memorandum and the papers produced by Paul Davies set out that, of those mesothelioma victims' files that were examined, approximately 1% to 5% of actual costs are in primary care at present. In his explanation to the Health and Social Care Committee, he said that when you think about the overall tariff, it is adequate to cover those current primary care costs.

[91] I know that a number of witnesses in the health committee said that, as a matter of principle, they would like to see primary care costs being recoverable. I think that we have set out that, in terms of administrative efficiency, at this time, it would not make sense to require people to look at primary care costs, because you would spend more administering that recovery than you would actually recover. In terms of your point about futureproofing, we have an open mind. Section 3(6)(a) is the section that states that primary care costs are excluded. We have an open mind and will consider it. Mick will deal with your question about affirmative or negative procedures.

[92] **Mick Antoniw:** If it was the view that there should be provision in the Bill so that, if, in future, there was a change to the way in which medical treatment was provided and it shifted more in one direction than the other, then I have no real difficulty with that, one way or the other. If it were to be done, I would have thought that it would need to be on an affirmative resolution, because you would be asking the Assembly to consider quite a substantial change. You would want to guarantee and be certain that it was for the better and that, ultimately, it would recover more than what was already in existence.

[93] **Vaughan Gething:** We would have to think about the tariff system that we envisage using and how that would work if we are going to consider primary care cost recovery. To go through everybody's primary care records and then to filter out the costs that relate only to an asbestos-related disease is quite a significant exercise for a number of people; you would need to give that some thought. So, it would be sensible, if that happened, to have it as an affirmative procedure, where everyone gets to see positively how that is going to be achieved, but that is not something that we are proposing in the Bill.

[94] **Mick Antoniw:** It is fair to say that when we started the process of looking at the Bill, we looked at incorporating all costs including primary care costs. We excluded it because it added a complicating feature with regard to the costs of administration and collection. It seemed more suitable to leave it out in those circumstances, but it was not left out as a matter of principle; it was purely for administrative efficiency.

[95] **David Melding:** Are there any further questions on matters that relate to our remit? I see that there are not. Thank you very much to Mick, Vaughan and Lisa for giving evidence this afternoon. We will now have a short adjournment. Thank you.

*Gohiriwyd y cyfarfod rhwng 3.49 p.m. a 3.56 p.m.
The meeting adjourned between 3.49 p.m. and 3.56 p.m.*

[96] **David Melding:** This meeting of the Constitutional and Legislative Affairs Committee is reconvened, and we continue our evidence session on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill. I am delighted to welcome the Minister for Health

and Social Services, Lesley Griffiths, together with her officials, Mark Osland and Fiona Davies. Minister, I think that you are well aware of the procedures that we follow in looking at the use of delegated powers and any wider constitutional matters that a Bill may have.

[97] I will start the session by asking whether you feel that the Bill, as currently drafted, strikes the right balance in what is on the face of the Bill and what will be left, or is proposed to be left, to subordinate legislation.

[98] **The Minister for Health and Social Services (Lesley Griffiths):** Yes. The Government is content that the balance between the provisions contained in the Bill and the provisions to be made by subordinate legislation are appropriate to enable the proposed cost-recovery scheme to operate efficiently. Members will be aware that this is a Member-proposed Bill, and we have not had detailed discussions, but we are content with that.

[99] **David Melding:** We note from previous evidence that there have been discussions on this between the Member and the Welsh Government. Has the Welsh Government had any discussions with the UK Government? There are issues, potentially, in this Bill that have a wider scope than just what is within our competence.

[100] **Lesley Griffiths:** No, not at the moment. Again, it is probably too early to have those detailed discussions. Members will be aware that the explanatory memorandum is available, and certainly there has been no contact made by Whitehall officials or by Ministers to me. The only discussions, really, are the preliminary discussions that Mark Osland has had with the compensation recovery unit.

[101] **David Melding:** I wonder whether you or your officials have had a chance to give full consideration to the Presiding Officer's letter to me of 3 December and the accompanying note on potential ambiguities in terms of competence, particularly on the issue of a Bill that seeks to bind the Crown and whether we have been able to resolve or bring any greater clarity to this particular issue.

[102] **Lesley Griffiths:** I do not know whether there is anything further, because I was content with what the Presiding Officer believed, that we were within the realms of competence. Have there been any further discussions, Mark or Fiona?

[103] **Mr Osland:** No.

[104] **Ms Davies:** No, we remain content that the Bill is within competence.

[105] **David Melding:** Thank you. I will ask Simon Thomas to ask some questions.

[106] **Simon Thomas:** Weinidog, roeddech yn glir iawn pan gyflwynwyd y Bil ar ei ffurf bresennol fod gan y Llywodraeth '*supportive position*' tuag ato. Wrth edrych ar bwrpas y Bil a'r pwerau a ddirprwyir i chi fel Gweinidogion, a ydych yn hapus y bydd gennych bwerau digonol o dan y Bil fel y mae i weithredu'r hyn a fwriedir ynddo?

Simon Thomas: Minister, you were very clear when the Bill was introduced in its current form that the Government was taking a '*supportive position*' towards it. In looking at the purpose of the Bill and the powers that will be delegated to you as Ministers, are you content that you have sufficient powers in the Bill as it stands to implement its purpose?

[107] **Lesley Griffiths:** You are quite right; I expressed my support for the policy intentions of the Bill, and that remains the position of the Government. As I said, we believe that the balance of powers is right and that we have the necessary competence.

4.00 p.m.

[108] **Simon Thomas:** Os felly, a fyddwch, yng Nghyfnod 2, yn ceisio newid y pwerau sydd yn y Bil? Hynny yw, a fyddwch yn chwilio am bwerau ychwanegol, neu'n ceisio newid neu ddileu rhai? Pe baech yn ceisio gwneud hynny, byddai gennym fel pwyllgor ddi-ddoreb mewn cael cyfle i edrych ar hynny, yn enwedig os ydych yn bwriadu gwneud rheoliadau pellach yn sgil y Bil presennol.

Simon Thomas: If that is the case, will you, at Stage 2, seek to change the powers in the Bill? That is, will you be seeking additional powers, or to change or delete some? If you were to try to do that, we as a committee would be interested in having an opportunity to look at that, especially if you intend to make further regulations as a result of the present Bill.

[109] **Lesley Griffiths:** At present, I do not have any plans to bring forward any amendment that would give any new powers to Welsh Ministers, but, obviously, I would have to take in any recommendations from the Health and Social Care Committee. I would give you plenty of notice so that both the Health and Social Care Committee and this committee would be able to scrutinise and question me.

[110] **Simon Thomas:** One of the things that came up in the previous evidence session was the possibility of primary care being included. That is an example where, if changes were made, I am sure that this committee would want to scrutinise them, whether that is the affirmative or negative procedure or whatever.

[111] **Lesley Griffiths:** Yes, I can see that. Last week, I gave evidence to the Health and Social Care Committee as part of its Stage 1 consideration. That was certainly an issue that was raised with me.

[112] **William Graham:** Minister, could you explain whether you have any concerns about the appropriateness of the procedural controls, including those in relation to the exercise of delegated powers?

[113] **Lesley Griffiths:** I will ask Fiona to answer that.

[114] **Ms Davies:** We are content that the proposed Assembly procedures for each of the subordinate legislation-making powers are appropriate. They very much follow the Health and Social Care (Community Health and Standards) Act 2003, and this proposed scheme very much replicates the scheme under that 2003 Act. Much of the information in the subordinate legislation will be detail, detailing different scenarios regarding when a disease has been incurred, and, for example, if someone has had a compensation payment, whether it was an interim payment or a final payment. A lot of it is mathematics and about making sure that all the figures are correct and covering all of the different scenarios. I think that is best suited to being in subordinate legislation under the negative procedure. For the two key provisions that are to be set out under the affirmative procedure, we are content that that is the most appropriate procedure for those two sections. I can talk about that if you want me to do so.

[115] **William Graham:** No, as long as you are content with it.

[116] **Ms Davies:** Yes, we are content.

[117] **David Melding:** I will press you on this point, because I asked the Member in charge of the Bill about it. He quoted the 2003 Act, and what would concern us when we look at this is whether that Act has any more detail on the face of it and then whether we are not having a primary check, either on the face, or at least in an affirmative measure, in terms of very significant regulations that affect the scheme profoundly. So, in referring to the earlier Act, do you think that it is as much a framework Act as this one will be?

[118] **Ms Davies:** It very much follows the basis on which the 2003 Act operates. So, they are very similar. We did think, at the outset, about whether to have a completely different approach, but, given that the 2003 Act works well and that the compensation recovery unit could possibly implement this scheme, it made sense to replicate that. There was no good reason to deviate from the way in which it has been approached already.

[119] **Mark Drakeford:** Dim ond un **Mark Drakeford:** I have only one question. cwestiwn sydd gennyf. A wnewch Will you expand on the likely timetable for ymhelaethu ar yr amserlen debygol ar gyfer the commencement of the Bill? Can you tell cychwyn y Bil? A oes rhywbeth y gallwch ei us anything about the Government's intention ddweud wrthym am fwriad y Llywodraeth i with regard to introducing the subordinate gyflwyno'r is-ddeddfwriaeth a fydd yn deillio legislation that will emanate from the Bill? o'r Bil?

[120] **Lesley Griffiths:** We hope, with the Assembly's will, that we will have Royal Assent in the summer. The day after that, we would start to consult on regulations. That would probably take us to the end of the year and then we would like to commence the Act in the financial year 2014-15.

[121] **David Melding:** I see that there are no further questions. I think that that covers the ground that we are concerned to scrutinise. Thank you for your attention this afternoon.

[122] **Lesley Griffiths:** Thank you very much.

4.04 p.m.

**Cynnig o dan Reol Sefydlog Rhif 17.42 i Benderfynu Gwahardd y Cyhoedd o'r
Cyfarfod
Motion under Standing Order No. 17.42 to Resolve to Exclude the Public from
the Meeting**

[123] **David Melding:** I move that

the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order No. 17.42(vi).

[124] Are all Members content with that? I see that you are.

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 4.05 p.m.
The public part of the meeting ended at 4.05 p.m.*