



# **Cynulliad Cenedlaethol Cymru**

## **The National Assembly for Wales**

### **Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol**

#### **The Constitutional and Legislative Affairs Committee**

**Dydd Llun, 22 Ebrill 2013**  
**Monday, 22 April 2013**

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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynndi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad 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**

Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
Vaughan Gething	Llafur (yn dirprwyo ar ran Julie James) Labour (substitute for Julie James)
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**

Carys Evans	Dirprwy Gyfarwyddwr, Materion Cyfansoddiadol a Chysylltiadau Rhynglywodraethol, Llywodraeth Cymru Deputy Director, Constitutional Affairs and Inter-Governmental Relations, Welsh Government
Carwyn Jones	Aelod Cynulliad, Llafur (Prif Weinidog Cymru) Assembly Member, Labour (the First Minister of Wales)
Mike Lubienski	Uwch-gyfreithiwr, Tim Gofal Cymdeithasol, Llywodraeth Cymru Senior Lawyer, Social Care Team, Welsh Government
Steve Milsom	Dirprwy Gyfarwyddwr Gwasanaethau Cymdeithasol, Polisi a Strategaethau, Llywodraeth Cymru Deputy Director, Social Services Policy and Strategies, Welsh Government
Julie Rogers	Dirprwy Gyfarwyddwraig yr Is-adran Deddfwriaeth a Polisi Gwasanaethau Cymdeithasol Deputy Director, Social Services Legislation and Policy Division, Welsh Government
Gwenda Thomas	Aelod Cynulliad, Llafur (y Dirprwy Weinidog Gwasanaethau Cymdeithasol) Assembly Member, Labour (the Deputy Minister for Social 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	Gwasanaeth Ymchwil Research Service
Alys Thomas	Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerc

*Dechreuodd y cyfarfod am 1.34 p.m.  
The meeting began at 1.34 p.m.*

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

[1] **David Melding:** Good afternoon and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I have apologies from Eluned Parrott and from Julie James; we expect Vaughan Gething to substitute for her. I have the usual housekeeping announcements to make. We do not expect a routine fire drill, so if we hear the alarm, please follow the instructions of the ushers who will help us to leave the building safely. Please switch off all electronic equipment, as it will interfere with our broadcasting equipment. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there is a translation on channel 1 and you can amplify the proceedings on channel 0.

1.35 p.m.

### **Offerynnau nad ydynt yn Cynnwys unrhyw Faterion i'w Codi o dan Reolau Sefydlog Rhif 21.2 neu 21.3 Instruments that Raise no Reporting Issues under Standing Order Nos. 21.2 or 21.3**

[2] **David Melding:** Item 2 of the agenda concerns instruments that do not raise reporting issues under Standing Orders. CLA247, the University of Wales Newport Education Corporation (Dissolution) Order 2013, will now appear under item 3 of the agenda; not this item. So, the instruments are listed on the agenda. Do Members have any queries? I see that you do not; therefore, we will move on.

1.36 p.m.

### **Offerynnau sy'n Cynnwys Materion i Gyflwyno Adroddiad arnynt i'r Cynulliad o dan Reolau Sefydlog Rhif 21.2 neu 21.3 Instruments that Raise Issues to be Reported to the Assembly under Standing Order Nos. 21.2 or 21.3**

[3] **David Melding:** I suggest that we start with CLA247, the University of Wales Newport Education Corporation (Dissolution) Order 2013. Do you wish to raise any points on the merits report? I see that you do not, so we are satisfied with that. There are two other instruments under item 3. Are Members content? Are you satisfied?

[4] **Suzy Davies:** I want to confirm that there are no legislative consent motions involved in the composite Order at all.

[5] **Mr Williams:** No.

[6] **David Melding:** No, there are not.

[7] **Suzy Davies:** Thank you.

**Cynnig o dan Reol Sefydlog Rhif 17.42 i Benderfynu Gwahardd y Cyhoedd o  
Eitem 4 y Cyfarfod  
Motion under Standing Order No. 17.42 to Resolve to Exclude the Public from  
Item 4 of the Meeting**

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

*the committee resolves to exclude the public from item 4 of the meeting in accordance with Standing Order No. 17.42(vi).*

[9] Does any Member object? I see that no Member objects.

*Derbyniwyd y cynnig.  
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 1.36 p.m.  
The public part of the meeting ended at 1.36 p.m.*

*Ailymgynullodd y pwyllgor yn gyhoeddus am 2.00 p.m.  
The committee reconvened in public at 2.00 p.m.*

**Tystiolaeth mewn cysylltiad â'r Adolygiad o Bwerau Gweinidogion Cymru yn  
Neddfau'r DU  
Evidence in relation to the Review of Welsh Ministers' Powers in UK Bills**

[10] **David Melding:** I welcome everyone back to this meeting of the Constitutional and Legislative Affairs Committee. We move now to item 5, which is the evidence session in relation to our short inquiry into the Welsh Government's response to the committee's March 2012 report on powers granted to Welsh Ministers in UK laws. I am delighted to welcome the Right Honourable Carwyn Jones, First Minister. He is accompanied by an official, Carys Evans, who is the deputy director of constitutional affairs and inter-governmental relations.

[11] Welcome, First Minister, and also to your official. I think that you are well aware of how we proceed, but I just want to start with a general question on the progress that has been made in implementing the recommendations that the Government has accepted, and how satisfied you feel with progress to date. Obviously, we have a range of particular questions that we are going to follow up on that indicate our matters of great interest, and some concern in particular areas.

[12] **The First Minister (Carwyn Jones):** We have taken a number of specific actions in relation to the recommendations in the report. If I could come back to those actions in a moment, I will just say that we did view the committee's report as a significant part of our overall response to the challenges of ensuring that UK legislation reflects the needs of Wales appropriately. What we are trying to do is to build on our response to the report in the light of experience, emphasising those areas where we can see the greatest practical benefit. We have taken steps, I believe, to improve our processes for dealing with UK legislation since we obtained, as an Assembly, full primary law-making powers in 2011.

[13] To give you some examples of what has changed, and I think improved, since that time: we are doing all that we can to give the Assembly as much advance notice as possible of UK Bills that make provision for Wales in devolved areas. We cannot of course breach any duties of confidentiality that we owe to the UK Government in that regard, and so we cannot

share everything that, perhaps, we would like to share given that duty of confidentiality. However, when Bills are announced by the UK Government, we work to ensure that the legislative consent motions are laid as soon as possible—certainly as soon as possible after the Bills are introduced. We have provided regular updates on the state of play, if I can put it that way, with UK Bills and potential LCMs to Business Committee.

[14] If we look at recommendation 2 in particular, I know that the former Leader of the House wrote to the Presiding Officer following the Queen's Speech last year with the best information that we had at that time about the likely consent requirements of Bills in the UK Government's legislative plans. We plan to do the same thing this year. It is not possible to give an exhaustive and definitive list of Bills that might fall into this category, because, of course, as they are drafted and detail added, so issues of consent may arise further on in the legislative process. We have contributed to the Business Committee discussion on amendments to Standing Orders dealing with the LCM process, and I know that some changes were agreed in Business Committee on 18 March.

[15] Finally, perhaps I could explain what we have done to improve the accessibility of information about Welsh laws made in Wales. You will be aware, Chair, that the Counsel General has made several statements in this regard. We are promoting stand-alone Bills for Wales where that is practicable, instead of amending existing legislation that, of course, would apply outside Wales. We are contributing to the work that is being led by the National Archives to improve the legislation.gov.uk website. We are developing an online encyclopaedia that will provide an explanatory narrative of the law within devolved areas. There are two issues that we will need to consider further on down the line. First, there is the issue of when we should look at consolidating legislation in the future, which would mean a substantial body of work where such legislation is taken forward. Secondly, there is the need for access to a law commission function, whether that is done through Welsh Ministers being able to seek the advice of the Law Commission directly, which is not possible at the moment, or whether there will be a need for a separate Welsh law commission. Our preference at this time is for Welsh Ministers to be able to have the appropriate access to the Law Commission of England and Wales in its present set-up.

[16] **David Melding:** Thank you for that helpful introduction. I will start by taking us to one area of concern that we have, and that is our recommendation that the Governments negotiate and for 'Devolution Guidance Note 9' to be further adapted so that the LCM process can be widened to bring it into line with practice in Scotland and Northern Ireland, where Ministers get powers through UK Acts. We would then, as a legislature, have power to consent to that. At the moment, we are the odd legislature out in not having that. Most of us were a little surprised by the attitude of the Wales Office to this, and I know that there has been correspondence. I wondered what your view is of the response on behalf of the UK Government that has been received so far.

[17] **The First Minister:** I cannot agree with the response that has come from the Wales Office. The reasoning behind the response appears to be that it would put the Assembly in a position in which it would have to approve a UK Government Bill. I do not follow that, because that does not apply in Scotland and Northern Ireland. I see no reason why Wales should be treated any differently, in principle, to Scotland and Northern Ireland. So, I am not in agreement with the response that has been received, but we will, as a Government, continue to press the issue.

[18] **David Melding:** So, the Welsh Government is following this up and seeking to discuss the matter further with the Wales Office and hopes to come to a resolution. It is curious, given that we are the odd institution out and there is obvious precedent elsewhere.

[19] **The First Minister:** Yes, as I said, I do not quite understand the reasoning behind

this. It is right to say that the Welsh devolution settlement is different, in the sense that we do not have a reserved powers model, or a three-limbed model as exists in Northern Ireland, but that should not affect the approach to this issue in Wales and there is no reason to distinguish Wales in this regard from Scotland and Northern Ireland.

[20] **David Melding:** Would the general view of the Government be that, where there is consensus in the Assembly to change Standing Orders and to improve the process of scrutiny, other things being equal, the devolution guidance notes should reflect that, rather than set the parameters for our Standing Orders? That seems to be the way around in which we have ended up in this particular instance.

[21] **The First Minister:** The difficulty is that they are two different things. Standing Orders are the Assembly's procedural rules. They do not have a direct influence on what happens in terms of the UK Government, or indeed the Parliament. The devolution guidance notes are UK Government creations in that regard, because they lay down the guidance as to how UK Government departments should deal with devolved administrations. However, unless there is agreement that Wales will be treated in the same way as Scotland and Northern Ireland, any change in Standing Orders would, effectively, be toothless. So, it is important that that agreement is in place first and then the Standing Orders can be changed. In terms of the question of whether the Assembly's Standing Orders should be subject to a review of inter-governmental procedures or procedures in the UK Parliament, in principle, they should not, but, in practice, they would be in this regard.

[22] **Simon Thomas:** Hoffwn droi at yr argymhelliad cyntaf yn ein hadroddiad, sef y syniad y dylid gosod rhyw fath o femorandwm gerbron y Cynulliad yn esbonio dehongliad Llywodraeth Cymru o gonfensiwn Sewel, sut byddai'n gweithio a sut byddai'n gymwys yng Nghymru. Rwy'n cofio pan oeddem yn llunio'r adroddiad hwn ac yn ystod yr ymchwiliad yn y lle cyntaf, cawsom dipyn o dystiolaeth gan bobl a oedd yn dweud y bu o fudd yn yr Alban i gael y math hwnnw o ddatganiad a dehongliad. Nid yw hynny wedi digwydd eto, er eich bod wedi derbyn yr argymhelliad mewn egwyddor. A oes rhywbeth ar y gweill er mwyn gwneud hyn ac a yw Llywodraeth Cymru yn gweithio ar hyn o bryd i osod y fath femorandwm?

**Simon Thomas:** I would like to turn to the first recommendation in our report, namely the idea that some sort of memorandum should be laid before the Assembly explaining the Welsh Government's interpretation of the Sewel convention, how that would operate and how that would apply in Wales. I remember when we were preparing this report and undertaking the inquiry in the first place that we received a great deal of evidence from people who said that it had been beneficial in Scotland to have that kind of statement and interpretation. It has not happened yet, even though you accepted the recommendation in principle. Is there something in the pipeline in terms of this and is the Welsh Government working to table such a memorandum?

[23] **Y Prif Weinidog:** Rydym yn ddigon hapus i wneud datganiad ynglŷn â hyn, ond mae popeth yn dibynnu ar yr hyn sy'n digwydd gyda Rheol Sefydlog Rhif 29, sef y mater y gwnaethom ei drafod funud yn ôl. Unwaith y delir â hwnnw a bod cytundeb, dyna'r amser i wneud datganiad.

**The First Minister:** We are more than happy to make a statement on this, but everything is dependent on what happens with Standing Order No. 29, which we discussed a few moments ago. Once that has been resolved and there is agreement, the time will be right to make a statement.

[24] **Simon Thomas:** Rydych yn dweud bod hwnnw hefyd yn ymwneud â Swyddfa Cymru, mewn ffordd *roundabout*.

**Simon Thomas:** You say that that is also related to the Wales Office, in a roundabout way.

[25] **Y Prif Weinidog:** Y peth yw, er

**The First Minister:** The thing is, in order to

mwyn delio'n gyflawn â'r mater o gael Rheol Sefydlog sy'n gweithio yn y ffordd y byddem am ei gweld yn gweithio, rhaid cael rhyw fath ar gytundeb ar y ffordd y mae is-ddeddfwriaeth sy'n effeithio ar Gymru yn y ffordd y soniodd y Cadeirydd amdani yn gynharach yn cael ei thrin yn Llundain.

[26] **Simon Thomas:** Ers inni wneud yr argymhelliad yr ydych chithau'n ei dderbyn mewn egwyddor—gan dderbyn bod ambell beth wedi codi ers hynny—a oes rhywbeth sylweddol wedi codi sy'n gwneud i chi deimlo bod hyn yn llawer anoddach nag yr oeddech yn ystyried ar y pryd, ynteu broses ydyw yr ydym yn mynd drwyddi sy'n cymryd amser i'w deall?

[27] **Y Prif Weinidog:** Proses yw hi. Nid oes unrhyw beth wedi codi ers y tro diwethaf yr oeddwn yma sy'n ei gwneud yn anoddach i symud ymlaen â hwn. Y pwynt yw hyn: nid wyf yn credu y byddai'n beth call i wneud datganiad â rhai materion heb eu cytuno yn y cyfamser.

[28] **Simon Thomas:** Pan fyddwch yn barod i wneud datganiad, a fyddwch yn ymgynghori arno neu yn rhannu drafft ohono â'r pwyllgor hwn—unwaith y bydd pethau megis y Rheolau Sefydlog ac ati wedi cael eu setlo—i weld a oes modd cael dehongliad ar y cyd, fel petai?

[29] **Y Prif Weinidog:** Nid wyf yn gweld unrhyw broblem mewn gwneud hynny, ond ar hyn o bryd, y broblem fwyaf yw nad oes cytundeb ar y ffordd y bydd is-ddeddfwriaeth o'r math hwn yn cael ei thrin.

[30] **Simon Thomas:** Diolch am hynny. Symudwn at rywbeth arall sydd eto yn ymwneud â'r broses hon o gydlyn materion o ran Biliau'r Cynulliad a rhai'r Senedd. Rydym ni wedi edrych ar wefan Llywodraeth Cymru, a chafodd honno ei diweddarau ddiwethaf ym mis Gorffennaf 2008 ynglŷn â'r materion hyn. Felly, mae'n dal i drafod LCOs a Mesurau a phethau felly. Rydym yn sôn yn benodol am y canllawiau ar gyfer cydlyniaid a chyd-drafod â Llywodraeth y Deyrnas Gyfunol—er, mae gwefannau weithiau'n rhewi—yn y broses hon. A ydych yn hapus bod gennych ganllawiau cyfatebol, fel y'i trafodwyd, ar gyfer gweision sifil yng

deal completely with the issue of having a Standing Order that will work as we would want it to, you would need some sort of agreement on the way in which subordinate legislation that affects Wales in the manner that the Chair referred to earlier is dealt with in London.

**Simon Thomas:** Since we put forward this recommendation, which you have accepted in principle—I accept that some things have arisen since then—has anything significant arisen to make you think that this is much more difficult to do than you thought it would be at the time, or are we going through a process that is taking us time to understand?

**The First Minister:** It is a process. Nothing has arisen since my previous visit to make it more difficult to proceed with this issue. The point is that I do not think that it would be wise to make a statement while there are still some issues that have yet to be agreed.

**Simon Thomas:** When you are ready to make a statement, will you consult on it or share a draft of it with this committee—once such things as the Standing Orders and so on are settled—to see whether there is a means of obtaining a joint interpretation, as it were?

**The First Minister:** I can see no problem in doing that, but at present, the major problem is that there is no agreement on the way that subordinate legislation of this sort will be dealt with.

**Simon Thomas:** Thank you for that. Let us move to something else that is still concerned with this process of co-ordinating matters that relate to Assembly Bills and parliamentary Bills. We have looked at the Welsh Government's website, and it was last updated in July 2008 in relation to these matters. It therefore still talks about LCOs and Assembly Measures and things of that nature. We are talking specifically about the reciprocal guidance and liaison with the UK Government—although websites can sometimes freeze—as part of this process. Are you content that you have reciprocal guidance, as has been discussed, for Welsh

Nghymru fel eu bod yn gwybod sut i ddelio ag adrannau Llywodraeth y Deyrnas Gyfunol?

civil servants so that they know how to deal with UK Government departments?

[31] **Y Prif Weinidog:** Mae hwn yn cael ei ystyried ar hyn o bryd, ac mae canllawiau yn cael eu creu. Mae'r gwaith hwnnw'n symud ymlaen, a bydd y canllawiau hynny ar gael cyn bo hir. Rydym yn ddigon hapus i sicrhau bod y pwyllgor yn cael gwybod y sefyllfa ddiweddaraf pan fydd y canllawiau hynny wedi cael eu cyhoeddi.

**The First Minister:** That is being considered at present, and guidance is being drawn up. That work is proceeding and the guidance will be available before long. We would be more than happy to ensure that the committee is updated on the latest situation once that guidance has been published.

[32] **Simon Thomas:** Pa fath o feysydd y bydd y canllawiau hynny'n eu cwmpasu? Beth ydych yn bwriadu ei gynnwys ynddynt?

**Simon Thomas:** What kind of fields will that guidance encompass? What do you intend to include in it?

[33] **Y Prif Weinidog:** Bydd yn ffordd o ddelio ag adrannau yn Whitehall. Nid yw pob adran yn Whitehall yn trin datganoli yn yr un ffordd; nid yw pob un yr un peth, ac mae'r un peth ynglŷn ag unigolion. Mae'n bwysig dros ben bod ein staff ni'n deall beth yw eu dyletswyddau hwy, a hefyd yr hyn ddylent ei wneud os bydd rhyw fath o broblem yn codi, megis â phwy y dylent siarad a ble y dylent edrych i gael canllawiau, sef naill ai drwy'r memorandwm cyd-ddealltwriaeth neu drwy nodiadau canllawiau datganoli, neu unrhyw goncordat sydd rhyngom ni ag adran yn Whitehall, fel y gallant gefnogi eu sefyllfa hwy.

**The First Minister:** It will be a means of dealing with Whitehall departments. Not all Whitehall departments treat devolution in the same manner; they are not all alike, and the same is true of individuals. It is very important that our staff should understand what their responsibilities are, and also what they should do if a problem of some sort should arise, such as who they should talk to and where they should look for guidance, either through the memorandum of understanding or through devolution guidance notes, or any concordats that exist between us and the Whitehall department, so that they can support their position.

[34] **Simon Thomas:** Rhan allweddol o'r job yn awr yw monitro'r hyn sy'n digwydd yn Whitehall ac yn San Steffan a gwneud yn siŵr bod unrhyw beth sy'n debygol o effeithio ar Lywodraeth Cymru neu'r Cynulliad yn cael ei gydnabod mewn da bryd. Ers yr adroddiad, a ydych chi wedi newid unrhyw beth yn y gwasanaeth sifil i wella'r ffordd yr ydych yn monitro'r hyn sy'n digwydd ar lefel y Deyrnas Gyfunol, neu, yn wir, i wella'r ffordd yr ydych yn rheoli'r berthynas rhwng y ddau gorff?

**Simon Thomas:** A key part of that work now is to monitor what happens in Whitehall and Westminster and to ensure that anything that is likely to affect the Welsh Government or the Assembly is acknowledged in good time. Since the report, have you changed anything in the civil service to improve the way in which what happens at the UK level is monitored, or, indeed, to improve the way in which you manage the relationship between the two bodies?

2.15 p.m.

[35] **Y Prif Weinidog:** Mae gennym dîm sy'n edrych ar ôl y materion cyfansoddiadol hyn, a hefyd deddfwriaeth seneddol, er mwyn cydlynu ac i roi cyngor i Weinidogion ynglŷn ag ymateb i ddeddfwriaeth sy'n dod o Lywodraeth y Deyrnas Unedig. Mae gennym hefyd unigolion ym mhob ardal, sy'n dod o

**The First Minister:** We have a team that looks after these constitutional issues, and parliamentary legislation as well, to co-ordinate and to provide advice to Ministers on responding to legislation by the UK Government. We also have individuals in every area under directors general who are



dan reolaeth cyfarwyddwr cyffredinol, sy'n gyfrifol am fonitro deddfwriaeth y Deyrnas Unedig er mwyn sicrhau bod buddiannau Cymru yn cael eu gwarchod. Felly, mae pobl ar gael ym mhob adran sydd â dyletswydd i wneud hynny.

[36] **Simon Thomas:** Yr argymhelliad a wnaethom bryd hynny oedd efallai bod angen cynyddu'r capasiti i wneud y gwaith hwn. Roeddech ar y pryd yn derbyn y byddai'n fuddiol pe bai modd gwneud hynny, achos mae mwy o effaith a dylanwad gan y fath ddeddfwriaeth yn awr, ac mae'n rhedeg ar draws bob adran, fel rydych yn ddweud. A ydych yn hyderus fod y capasiti yn Llywodraeth Cymru i wneud y gwaith monitro ac i reoli'r berthynas?

[37] **Y Prif Weinidog:** Ydw, ond rydym hefyd yn ystyried ym mha ffordd y gellir cryfhau pethau yn y dyfodol. Mae hynny'n rhan bwysig o Lywodraeth. Ar hyn o bryd, rwy'n hapus â'r capasiti sydd gennym, ond nid yw hynny'n meddwl ein bod yn eistedd yn ôl a meddwl bod popeth yn mynd i fod yn iawn am y blynyddoedd i ddod. Mae'n bwysig dros ben ein bod yn edrych yn fanwl bob blwyddyn ar y capasiti sydd gennym er mwyn ei adeiladu i'r dyfodol.

[38] **Simon Thomas:** Felly, mae'n faes actif yn y cyd-destun hwnnw?

[39] **Y Prif Weinidog:** Ydy.

[40] **Simon Thomas:** Yn olaf, wrth gyflwyno ar y dechrau i'r pwyllgor, gwnaethoch gadarnhau y byddwch eto eleni yn ysgrifennu at y Llywydd gyda'r hyn rydych yn ei weld yn Araith y Frenhines sy'n faterion o bwys i'r Cynulliad ac o ddiddordeb i ddeddfwriaeth Gymreig. Mae hynny'n sefydlu confensiwn, am wn i, ac mae'r pwyllgor yn croesawu hynny gan ein bod eisiau gweld hynny. Serch hynny, un o'r pethau sy'n codi yw bod pethau'n digwydd rhwng gwahanol Areithiau'r Frenhines, ac mae monitro'r rheini yn bwysig. Rydym newydd drafod y capasiti i wneud hynny, ond pa gamau neu ganllawiau sydd gennych i ddefnyddio'r capasiti hwnnw i wneud yn siŵr bod y Cynulliad yn ymwybodol o'r pethau sy'n codi yn ystod y flwyddyn? Rydym wedi cael sawl enghraifft—efallai y byddwn yn eu

responsible for monitoring UK legislation to ensure that the interests of Wales are protected. So, people are available in every department with a responsibility to do that.

**Simon Thomas:** The recommendation we made at the time was that perhaps the capacity needed to be increased to undertake this work. At the time, you accepted that it would be beneficial if that could be done, because such legislation now has more of an impact and influence, and it runs across every department, as you say. Are you confident that the Welsh Government has the capacity to undertake the monitoring work and to manage the relationship?

**The First Minister:** Yes, but we also consider in what ways we can strengthen things in the future. That is an important part of Government. At present, I am content with the capacity that we have, but that does not mean that we are resting on our laurels and thinking that everything will be fine for the years to come. It is very important that we look carefully every year at the capacity that we have in order to build it for the future.

**Simon Thomas:** So, it is an active area in that context?

**The First Minister:** Yes.

**Simon Thomas:** Finally, in your opening remarks to the committee, you confirmed that you will again this year be writing to the Presiding Officer with what you consider to be pertinent matters to the Assembly in the Queen's Speech and of interest to Welsh legislation. That establishes a convention, I suppose, which the committee welcomes as it is something that we want to see. Nevertheless, one of the matters that arise is that things happen between different Queen's Speeches, and monitoring those is important. We have just discussed the capacity to do so, but what steps or guidelines do you have in place to use that capacity to ensure that the Assembly is aware of the matters that arise during the year? We have had many examples—perhaps we will discuss them later on—of things that arose that were not in

trafod yn nes ymlaen—o bethau sy'n codi nad oedd yn Araith y Frenhines, ond sydd wedi gosod dyletswydd ar y Cynulliad i ddeddfu neu'n gosod dyletswydd arnoch i ymateb.

[41] **Y Prif Weinidog:** Dyna yw'r sialens fawr, achos nid ydym yn gwybod beth yw'r manylion pan mae Araith y Frenhines yn cael ei gwneud. Pan mae Biliau yn cael eu drafftio, ambell waith rydym yn ffeindio bod rhywbeth sy'n effeithio ar Gymru, neu mae gwelliant yn cael ei roi mewn yn hwyr iawn sy'n effeithio ar Gymru.

[42] **Simon Thomas:** Yn Nhŷ'r Arglwyddi, er enghraifft, neu lle bynnag.

[43] **Y Prif Weinidog:** Fe ddigwyddodd hynny gyda budd-daliadau'r dreth gyngor yn ddiweddar. Rydym yn ystyried y rhain pan maent yn codi. Weithiau, mae'n rhaid i ni eu trafod yn gyflym iawn, ond mae lan i bob adran sicrhau ei bod yn monitro beth sy'n digwydd ynglŷn â deddfwriaeth yn Llundain, er mwyn sicrhau ein bod yn gwybod cyn gynted â phosibl pan fo rhywbeth yn effeithio ar Gymru. Weithiau, rydym yn cael rhybudd gan Lywodraeth y Deyrnas Unedig ynglŷn â newidiadau, ond rydym yn cael y rhybudd hwnnw o dan ddealltwriaeth nad ydym yn rhannu'r manylion gyda neb arall. Mae hynny'n rhan o'r gwaith rhynglywodraethol beth bynnag.

[44] **Simon Thomas:** Ai Swyddfa Cymru sy'n chwarae'r rôl honno? A ydyw o ddefnydd i chi yn y broses honno?

[45] **Y Prif Weinidog:** Na, mae hwn yn rhywbeth rydym yn ei wneud o ran y berthynas rhyngom ni fel Llywodraeth ag adrannau eraill yn Whitehall.

[46] **Simon Thomas:** Felly, mae'n uniongyrchol rhwng yr adrannau a Llywodraeth Cymru?

[47] **Y Prif Weinidog:** Ydy, fwy neu lai.

[48] **Simon Thomas:** A ydych wedi dysgu unrhyw wersi yn ystod y flwyddyn o'r broses hon? Cawsoch rybudd ar ôl mis Mai y llynedd, a gwnaethoch ysgrifennu at y Llywydd yn dweud, 'Dyma beth rydym yn ei

the Queen's Speech, but which placed a duty on the Assembly to legislate or which placed a duty on you to respond.

**The First Minister:** That is the great challenge, because we do not know the details when a Queen's Speech is made. When Bills are drafted, we sometimes find something that has an impact on Wales, or that a very late amendment is proposed that impacts on Wales.

**Simon Thomas:** In the House of Lords, for instance, or wherever.

**The First Minister:** That happened recently with the council tax benefits. We consider these when they arise. Sometimes, we have to discuss them very swiftly, but it is up to every department to ensure that they monitor what happens with legislation in London, to ensure that we know as soon as possible when something has an impact on Wales. Sometimes, we are given advance notice by the UK Government about changes, but we are given that advance notice with the understanding that we do not share the details with anyone else. That is part of the inter-governmental work in any case.

**Simon Thomas:** Does the Wales Office play that role? Is it of use to you in that process?

**The First Minister:** No, this is something that we do in terms of our relationship as a Government with other Whitehall departments.

**Simon Thomas:** So, it is directly between the departments and Welsh Government?

**The First Minister:** More or less, yes.

**Simon Thomas:** Have you learnt any lessons during the year from this process? You were given advance notice after May of last year, and you wrote to the Presiding Officer saying, 'This is what we expect'. You have

ddisgwyl'. Rydych newydd sôn am un peth a gododd, ond mae cwpwl o bethau eraill wedi codi hefyd. Efallai bod gwersi i'r Llywodraeth yn y fan honno, ond mae hefyd wersi i ni fel deddfwrfa a Senedd. A ydych yn teimlo bod gennych ddigon o brosesau yn eu lle i adnabod y pethau hyn, a'u rhannu gyda'r Cynulliad, pan fo hynny'n briodol, pan fydd angen deddfu neu ymateb, neu beth bynnag? A ydych yn hyderus bod hynny i gyd yn ei le ar hyn o bryd?

[49] **Y Prif Weinidog:** Ydw. Weithiau, rydym mewn sefyllfa lle mae'n rhaid i ni ddelio â rhywbeth yn gyflym iawn. Ynglŷn â'r hyn a ddigwyddodd cyn y Nadolig, rwy'n deall y byddai Aelodau yn meddwl efallai bod angen craffu ymhellach o ran yr hyn a ddigwyddodd gyda budd-daliadau'r dreth gyngor, ac rydym yn deall hynny. Felly, mae'n bwysig dros ben, pan fydd sefyllfa o'r fath yn codi, ein bod yn ystyried bod yn rhaid cael rhyw fath o broses er mwyn i Aelodau allu craffu ar y rheoliadau hynny fel y gallant fod yn hapus bod y rheoliadau yn iawn.

[50] **Vaughan Gething:** You have touched on this area in the first two rounds of questions, but you told this committee on 21 November that you did not anticipate a situation where a UK Government Bill conferred powers on Welsh Minister except in exceptional circumstances—and we have already mentioned the council tax regulations. Apart from confirming that that is still your expected approach to UK Bills, could you provide us with any details that you are aware of at present where UK Bills will contain Welsh provisions in devolved areas?

[51] **The First Minister:** First, my position has not changed since last November. My view remains that there should be a strong presumption in favour of using Assembly Bills, given the fact that we had the powers in 2011, rather than UK Bills, to give powers to Welsh Ministers. However, there may be circumstances where there is a UK Bill that is in situ, where fairly minor, but perhaps important, changes can be taken through via the UK Bill rather than producing an Assembly Bill. I anticipate that those situations will get fewer and fewer in the future, but I cannot rule them out completely, given the fact that there may be circumstances where that might happen.

[52] There are always inter-governmental discussions, which I would not be able to share with the committee at this moment in time, where there may be sense in a UK Bill taking forward a particular item of legislation, rather than introducing an Assembly Bill at some point in the future. However, the presumption always is that an Assembly Bill is the main vehicle.

[53] **Vaughan Gething:** So, is there no current legislation passing through Parliament where the Welsh Government has sought amendment in devolved areas?

[54] **The First Minister:** No, not in devolved areas. There will be Bills that are England and Wales Bills, where there is an element of devolution to Wales and where it would not always be the case that we would want to have a separate Assembly Bill. However, without

just mentioned one thing that arose, but a couple of other things have also arisen. There may be lessons for the Government there, but also lessons for us as a legislature and Senedd. Do you believe that you have sufficient processes in place to identify these things, and share them with the Assembly, when appropriate, when there is a need to legislate or to respond, or whatever? Are you confident that that is all in place currently?

**The First Minister:** Yes. There are times when we are in a situation where we have to deal with something very swiftly. Regarding what happened before Christmas, I understand that Members may feel that more scrutiny was required in terms of council tax benefits, and we understand that. Therefore, it is very important that, when such a situation arises, we consider that there must be some kind of process so that Members can scrutinise the regulations so that they can be content that the regulations are accurate.

sharing too much detail at this stage, given the confidential nature of the discussions, what I can say is that the general principle of this would have been an exceptional course of action and that, normally, an Assembly Bill would be the way forward.

[55] **Vaughan Gething:** You touched, with Simon Thomas, on inter-governmental arrangements. Will you give us your view on the current adequacy of those inter-governmental arrangements and whether Wales is sufficiently represented in joint ministerial fora at present?

[56] **The First Minister:** The structure is fine; there are plenty of organisations and agreements in place to govern the inter-governmental relationship. We have, of course, the joint ministerial committee, which meets in Plenary—if I remember—once a year and outside of that twice a year. There is the joint ministerial council on Europe, which also meets to deal with European matters. We have the memorandum of understanding, the devolution guidance notes, and the dispute avoidance and resolution protocol, which is linked up with the joint ministerial committee. The question is about the willingness to implement them. I do not believe that there is a need for a different structure, but there is always a need for a commitment to use that structure in order to facilitate better relations and, sometimes, to avoid disputes.

[57] **Vaughan Gething:** That is interesting, because, of course, in your speech on the future of the union last November, you said that we need to develop further the more formal mechanisms of inter-governmental machinery, such as the JMC, to manage these complex relationships. Given that you have said that things are generally fine but that there may need to be a willingness to implement those agreements, could you give us an idea of what type of more formal mechanisms you think need to be developed? You are talking about the structure rather than just a willingness to implement.

[58] **The First Minister:** While the methods of dealing with disputes are, I believe, functioning, the difficulty is that the settlement is not as clear as it might be. We saw this in relation to the Local Government Byelaws (Wales) Act 2012 and I have no doubt that we will see this arising again in the future. My view on this is well known. My view is that we should move to a reserved powers model, as is operated in Scotland. This would provide greater clarity as to who is responsible for what. The difficulty that we have at the moment with our current settlement is that there are some very fuzzy edges, which lead to disputes between Governments that are not easily resolved and that are in no-one's interest.

[59] **Vaughan Gething:** That is more about the settlement than the machinery for working between the Welsh Government and the UK Government. Is there any action that you have pushed for, sought or suggested since the speech on the future of the union? I refer to current arrangements and how they might work better, and to structural changes that you would like to see, rather than a change to the wider devolution settlement.

[60] **The First Minister:** No, the constitutional settlement is at the heart of this. The fact that we have a constitutional settlement that is not as clear as the Scottish settlement is bound to lead to disputes. The Local Government Byelaws (Wales) Act is one example. It was simply a question of us taking one view and the UK Government taking another. It was not possible to agree, because there were two fundamentally different positions that had to be resolved by the Supreme Court. Actions such as that should be exceptional, but, under our present settlement, I do not think that they will be, in the future. There will be scope for more matters to be decided in the Supreme Court. That is not the way in which inter-governmental relationships should work. The machinery for dealing with inter-governmental relations works; the problem is that the basis on which that machinery works is not as clear as it might be.

[61] **Vaughan Gething:** Given the current settlement, is it fair to say that your view is that the basic structure for resolving inter-governmental issues is there, but that this is about the political willingness to deal with those issues, and the personal relationships that go alongside that, to make the system work as well as possible? Is that a fair summary of where you are now?

[62] **The First Minister:** That is fair, but I would add that there is a need for clarity. I have already mentioned this in terms of the settlement, but it is also there in terms of the way, for example, that a devolution matter is defined in the memorandum of understanding and the devolution guidance notes. The definition is slightly different. Based on a reading of the memorandum of understanding, our view, quite strongly, is that the issue that we had previously raised with the Secretary of State in relation to UK Government Bills and their effect, in terms of subordinate legislation in Wales, was a devolution matter and should require a legislative consent motion from the Assembly in order to proceed. In the devolution guidance notes, however, there is a slightly different definition. It all comes down to clarity. The more clarity that there is, the easier it is for inter-governmental relationships to work more efficiently, and the easier it is for officials and politicians to understand the limits of the different powers.

[63] **David Melding:** I now bring in Suzy.

[64] **Suzy Davies:** I think that Simon will be asking these questions, Chair.

[65] **David Melding:** We therefore move on to Simon.

[66] **Simon Thomas:** A dweud y gwir, Brif Weinidog, rydych wedi ateb y rhan fwyaf o fy nghwestiynau. Mae gennyf set o gwestiynau am sut yr ydych yn ymwneud â Swyddfa Cymru. Rydych wedi datgan yn glir bod gennych berthynas rynglywodraethol uniongyrchol ag adrannau penodol o'r Llywodraeth. Hoffwn droi at fater sy'n parhau i fod yn fater pen agored, sef y nodyn datganoli mewn perthynas â'r canllawiau ar y Twrnai Cyffredinol a thrafodion llysoedd sy'n ymwneud â materion datganoli ac ati. Ni chredaf fod y nodyn hwnnw wedi'i gyhoeddi na'i ddiwygio. Beth yw'r sefyllfa ddiweddaraf ar y mater hwnnw?

**Simon Thomas:** In truth, First Minister, you have answered the majority of my questions. I have a set of questions about your dealings with the Wales Office. You have stated clearly that you have a direct inter-governmental relationship with individual Government departments. I would like to address an issue that continues to be open-ended, namely the devolution note that relates to the guidelines on the Attorney General and court proceedings on devolution issues and so forth. I do not believe that that note has been published or amended. What is the latest on that issue?

[67] **Y Prif Weinidog:** Fel y gwyddoch, mae hwn yn fater i Lywodraeth y Deyrnas Unedig, ac ni ddrafftiwyd unrhyw nodyn arno. Nid ydym wedi gweld un, felly nid oes unrhyw beth wedi'i gyhoeddi.

**The First Minister:** As you know, this is an issue for the United Kingdom Government, and no note has been drafted on it. We have not seen one, so nothing has been published.

[68] **Simon Thomas:** A fyddai nodyn o'r fath wedi bod o ddefnydd, o ran rhai o'r pethau sydd wedi digwydd yn ddiweddar, fel y Bil is-ddeddfau yn cael ei drafod yn y Goruchaf Lys?

**Simon Thomas:** Would a note of this kind have been useful, in terms of some of the things that have happened recently, such as the bye-laws Bill being discussed in the Supreme Court?

[69] **Y Prif Weinidog:** Byddai. Serch hynny, byddai mwy o eglurhad o ran y setliad

**The First Minister:** It would. However, more clarity about the constitutional

cyfansoddiadol a Deddf Llywodraeth Cymru 2006 wedi bod yn fwy gwerthfawr. Dyma fan cychwyn y mater hwn—sichrau bod eglurhad ar y Ddeddf. Yna, byddai cael unrhyw eglurhad ynghylch pa bryd y byddai materion yn mynd i'r llys yn gallu adeiladu ar hynny. Heb eglurhad yn y ddeddfwriaeth, nid wyf yn gweld y byddai nodyn canllaw 7 yn gallu bod yn ddigon effeithiol.

2.30 p.m.

[70] **Simon Thomas:** A fydddech yn disgwyl gweld unrhyw fath o nodyn cyn inni gael trafodion sy'n deillio o Silk?

settlement and the Government of Wales Act 2006 would have been more valuable. That is the starting point of this issue—ensuring that there is clarity on the Act. Then, clarity on when issues would go to court could build on that. Without clarity in the legislation, I do not see that guidance note 7 could be effective enough.

**Simon Thomas:** Would you expect to see a note before we get anything flowing from the Silk report?

[71] **Y Prif Weinidog:** Nid wyf yn gwybod pam nad yw'r nodyn wedi cael ei gyhoeddi—

**The First Minister:** I do not know why the note has not been published—

[72] **Simon Thomas:** Byddai rhyw fath o nodyn yn help.

**Simon Thomas:** Some sort of note would be useful.

[73] **Y Prif Weinidog:** Byddai, heb os nac oni bai, er mwyn bod rhyw fath o gyd-ddealltwriaeth ynglŷn â phryd a pham y byddai materion yn mynd i'r llys.

**The First Minister:** Yes, there is no doubt about that, in order to ensure understanding on both sides as to when and why issues would go before the court.

[74] **Simon Thomas:** Rwyf am ofyn cwestiwn o bersbectif arall. Yn eich cyflwyniad i'r pwyllgor ar ddechrau'r cyfarfod, roeddech yn sôn am y camau rydych wedi'u cymryd fel Llywodraeth i agor llyfr statud Cymru, i'w wneud yn fwy cyhoeddus ac agored. Sonioch yn benodol am gydweithio gyda'r archif cenedlaethol. Rwy'n meddwl bod y Cwnsler Cyffredinol wedi gwneud datganiad yn dweud ei fod yn gobeithio y bydd y gwaith hwn yn dod i fwcwl yn y gwanwyn. Mae'r gwanwyn wedi dod yn ystod yr wythnos diwethaf—o'r diwedd—felly a allwch ddiweddarau'r pwyllgor ynglŷn â'r gwaith hwn? Bydd y gwaith, am wn i, yn sichrau bod deddfwriaeth ar gael yn y ddwy iaith. Mae'n bwysig bod y ddwy iaith yn cael eu hadlewyrchu.

**Simon Thomas:** I will ask a question from another perspective. In your introduction to the committee at the beginning of the meeting, you talked about the steps that you have taken as a Government to open the Welsh statute book, to make it more public and open. You spoke in particular about co-operation with the national archive. I think that the Counsel General has made a statement, saying that he would hope that this work would be concluded in the spring. Spring has arrived over the last week—at last—so could you give the committee an update on that work? I believe that that work is going to make the legislation available in both languages. It is important that both languages are reflected.

[75] **Y Prif Weinidog:** Mae'r gwanwyn wedi dechrau, ond nid yw wedi dod i ben eto—

**The First Minister:** Spring has sprung, but it has not concluded yet—

[76] **Simon Thomas:** Mae'n bosibl na ddaw haf chwaith.

**Simon Thomas:** It is possible that we will not see a summer either.

[77] **Prif Weinidog:** Rwy'n credu y

**The First Minister:** I think that it would

byddai'n help i'r pwyllgor pe bawn yn assist the committee if I were to write to you  
ysgrifennu atoch er mwyn rhoi mwy o to give you greater clarity on the timetable.  
eglhurhad ynglŷn â'r amserlen.

[78] **Simon Thomas:** Byddai hynny'n help; diolch yn fawr. **Simon Thomas:** That would be a great help; thank you.

[79] **Suzy Davies:** First Minister, you have touched on it already, but I have a few questions on conflict resolution. I want to go back to something that you said in your 2012 speech about political diversity and needing more formal mechanisms to deal with that. Alongside that, we have also had differences of opinion to do with the legislation that is going through this place. Do you think that we need stronger, more formal mechanisms to deal with differences of opinion on competence, in the same way that we would need more formal mechanisms to deal with differences of political colour?

[80] **The First Minister:** In principle, yes. The difficulty is around who decides. Ultimately, it is the court. One of the weaknesses that I perceive in the current settlement is that it is not possible, as far as I am aware, to go to the Supreme Court and ask for a ruling over whether something is in competence. It has to be done once a Bill has been taken through the Assembly. There is no way of getting a preliminary ruling to that extent. I know that there will be those who argue that you cannot really do that until you see the detail, which I appreciate, but sometimes there will be an issue where a ruling on the limits of the settlement would be quite useful.

[81] **Simon Thomas:** Human transplantation, for example.

[82] **The First Minister:** At the moment, that does not seem to be an issue in terms of the law. In terms of the Local Government Byelaws (Wales) Act, the whole issue turned on definition of 'consequential' or 'incidental' We argued that the removal of the Secretary of State power was in that category and the argument of the UK Government was that it was not in that category. There is no halfway house in that regard. It had to be dealt with by the court. A similar issue has arisen over the Agricultural Wages Board for England and Wales, which we maintain is within the competence of the National Assembly. The UK Government takes a different view. In an ideal world, there would be some way of understanding where competence lies, but it is not there. The only way in which it can be determined at the moment is via a reference to the Supreme Court, usually once a Bill has been drafted.

[83] **Suzy Davies:** Do you think that what has happened with the agricultural wages board and the bye-laws Bill has contributed to an argument for introducing the idea of declaratory rulings?

[84] **The First Minister:** It is a stronger argument in favour of reviewing the settlement to make it clearer. The number of cases that have come from Scotland following devolution is quite small—if any—in terms of questions of competence. There have been one or two, but not many. My fear is that, in Wales, because of the fuzzy edges that we have, this will become—if not common—something that happens on a fairly regular basis. I do not think that that is the way to run things. It is important that there is as much clarity as possible to avoid the need for intervention from the Supreme Court in the future.

[85] **Suzy Davies:** I would agree with you on that. Is there no scope within the current settlement for additional guidance agreed between the two Governments on how to take things like that forward?

[86] **The First Minister:** No. It is very difficult. With agriculture, for example, the views that the two Governments take are very public. Our argument would be that it falls within the

competence of the National Assembly because it is an agricultural matter, as it is in Scotland. The UK Government would take the view that it is an employment law matter and, therefore, not devolved, even though it is devolved in Scotland, where employment law is not devolved. There are two different viewpoints. The only way of resolving that, at the moment, is, if it comes to that and if there is disagreement, via reference to the Supreme Court.

[87] **Suzy Davies:** Yes. You are saying that there is no space for an agreed protocol between the two Governments, effectively, that will trump—

[88] **The First Minister:** No. There is also a policy difference. The view of the UK Government is that it wishes to get rid of the Agricultural Wages Board. Our view was that we did not want to get rid of the Agricultural Wages Board. There are policy differences and there is a difference in terms of approach as to the competence of the National Assembly when it comes to agricultural wages.

[89] **David Melding:** In our routine scrutiny of Assembly Bills, we have always been struck by the slightly ad hoc nature of the communications, both ways—I am not saying that any side is wrong—between the Welsh Government and the UK Government. Basically, Ministers here write to the relevant department in Whitehall, saying, ‘There is legislation in this area. We believe that we are competent to do it’, and unless there is a reply it is just assumed that there is no problem. Is that robust enough? Would it place too much burden on us to get confirmation? That might be over-anxious on our part. Perhaps we should just leave it for the other side to respond. How do you approach it?

[90] **The First Minister:** We write to UK Government departments as a matter of courtesy. If they choose not to respond, that is a matter for them. If issues of competence are raised, they will be quite often channelled through the Wales Office, which will then become involved in the discussions. However, we are a primary law-making body. As a matter of courtesy, we write to UK Government departments. If they do not respond, clearly we cannot wait for them to respond before moving ahead with our own legislation.

[91] **David Melding:** Have some of these issues been resolved? Can you give us that much detail without getting us into the rather extraordinary situation of the Local Government Byelaws (Wales) Act going to the Supreme Court?

[92] **The First Minister:** Most issues are resolved. The Local Government Byelaws (Wales) Act was unusual—not unique, I suspect, in the future—but I would not want to give the impression that everything is challenged by the UK Government. That would not be right. The Supreme Court judgment, I think, has been helpful for us and also for the UK Government. It has also led to there being less disagreement.

[93] **David Melding:** That is interesting.

[94] **Simon Thomas:** I wanted to ask about the Agricultural Wages Board. As you know, the Assembly also believes that it is within its competence and passed a legislative consent memorandum on that basis, which begs the question whether you will be challenging it in the Supreme Court.

[95] **The First Minister:** It is not for us to challenge it; it is for us to bring forward a Bill. We believe that it is within competence, so we would look to bring forward a Bill. We may bring forward a Bill, which is our intention, to put in place a similar body in Wales. We would not go to the court first to ask whether we could do it. We would simply—

[96] **Simon Thomas:** So, you would bring forward a Bill and then you would wait for the challenge to come from Westminster—



[97] **The First Minister:** That is the procedure that is open to us. Of course, it is a matter either for the Attorney General or the Counsel General to refer a Bill if it is believed that there is outside competence.

[98] **Simon Thomas:** Are you in any position to refer a Westminster Bill to the Supreme Court?

[99] **The First Minister:** No. That is parliamentary sovereignty; that much we know. There is an argument otherwise, but the Supreme Court would not, historically, see itself as having a role in reviewing primary legislation from Westminster. However, it has a strong role in terms of potential judicial review.

[100] **Vaughan Gething:** Dr Rawlings gave evidence to this committee alongside you in November 2011—that is a long time ago—and this is about his point about the concordats, and the concordats that are currently available. One of the things that he said that was interesting was that, essentially, with departments that the Welsh Government deals with on a regular basis, there is not really a problem or a need to refer to them, whereas, with other departments, concordats can be helpful. What he said about the regular players, as it were, was that both sides ‘understand the rules of the game’. Is it still your experience, and your view, First Minister—that departments that you deal with regularly do understand the rules of the game, in the sense of how you try to resolve issues between the two Governments relating to matters that are devolved, and where there is a crossover?

[101] **The First Minister:** It is less an issue of disputes being resolved than a question of devo-awareness, if I can put it that way. The concordats set out the rules of engagement between the Welsh Government and individual UK Government departments. Those concordats are kept under ongoing review. It is fair to say that, historically, those departments that have a greater exposure on a day-to-day basis to devolution are better at understanding it than those that do not. That is still our experience.

[102] **Vaughan Gething:** Given that that is still your experience, are you satisfied with the formal concordats? That is, not so much their working, but the wording of the concordats with those departments that the Welsh Government has less regular contact with.

[103] **The First Minister:** In terms of the concordats themselves, we see no difficulty with them or the wording. It is a question of ensuring that the concordats are observed and understood.

[104] **Vaughan Gething:** So, it is not about the wording; it is the understanding and implementation of the concordats that is at issue here. So, you are not looking to expand and write more of them.

[105] **The First Minister:** No. There have been some issues that have arisen in terms of the understanding on the part of some Whitehall departments of the devolution settlement in Wales. I cannot expand on them, but, from time to time, it is necessary to remind them of the different structure of government—not just in terms of the existence of the Assembly, but the different structure of governance within the public sector in Wales.

[106] **David Melding:** On concordats, are we more reliant on them because of the somewhat more vague settlement that applies in Wales—we do not have the reserved powers model—or do you feel that their operation is important for inter-governmental relations across the UK?

[107] **The First Minister:** I think they are important in the way that they govern

relationships. In reality, when we engage, to use that word, with UK Government departments, we do not wave the concordat at them particularly, and usually the level of engagement is fine, particularly with those departments that are used to working with devolved administrations. The difficulty can sometimes come not in terms of the concordat but in terms of an understanding of the different governance in Wales on the part of departments that are not used to dealing with devolved government in Wales. Reminding them of that is something that we keep on doing.

[108] **Suzy Davies:** I just wanted to ask: do you foresee that there might be more concordats, bearing in mind what you have just said?

[109] **The First Minister:** No, I do not see a need for more concordats. What I do always see the need for is a constant reminding of Whitehall departments of the nature of devolution, particularly in regard to Wales. Many of them are quite used to dealing with devolved counterparts in Scotland and Northern Ireland, and areas that are devolved there, but not in Wales. Quite often, it is those departments that find it more of a challenge to understand the nature of governance in Wales.

[110] **Vaughan Gething:** A different area: we recall recently the reversal of the UK Government proposal to remove the requirement for Welsh membership of the independent judicial appointments commission. I am interested in how the concerns of the Welsh Government about the original proposals were first identified—whether it was brought to your attention from outside government, or whether someone from within the Welsh Government recognised that this was a potential issue, and then what you did in terms of raising the concerns. Was it direct, Minister to Minister? Was it that you went through friends in the Wales Office? How did the process then work for actually dealing with that as an issue?

2.45 p.m.

[111] **The First Minister:** You said ‘friends in the Wales Office’. [*Laughter.*] We have colleagues in the Wales Office, of course. What happened was that it was brought to my attention, to the best of my recollection, by officials. I raised the issue directly in November last year with the Lord Chancellor in a meeting and said that I objected to the original proposal. Then, on 29 January, the Lord Chancellor wrote to me, confirming that he had considered the matter further and had decided to include a Welsh commission representative in the Crime and Courts Bill.

[112] **Vaughan Gething:** This is not an area that is devolved, is it?

[113] **The First Minister:** It is not devolved.

[114] **Vaughan Gething:** So, this is an area where the Welsh Government has a view on a non-devolved matter and there does not appear to be a formal mechanism for raising this, or is there? Is there a mechanism that allows you to raise it formally? If you directly see the Lord Chancellor, that is one thing, but, if you had not seen him directly, how could you have gone about raising this, on an issue that is not devolved, but where the Welsh Government has a view and wants that view to be listened to?

[115] **The First Minister:** I would have written to him, of course. The Counsel General also has a role in examining legislative proposals in non-devolved areas and making particular observations to me, which I can then make to the UK Government. The issue of the jurisdiction is another debate, but we have the jurisdiction of England and Wales. So, it is perfectly proper for us to make representations to ensure that it properly reflects England and Wales. For me, the next objective is to make sure that, whenever there is a Welsh case heard in the Supreme Court, we have a Welsh judge sitting on that case, whether it is a permanent

Supreme Court appointment or somebody who is brought in from the lower courts to sit on that case. It is standard practice in Scottish and Northern Ireland cases that there are judges from those jurisdictions who sit on the Supreme Court bench for those matters. The same should apply to Wales.

[116] **Vaughan Gething:** I do not want to go back into the jurisdiction debate, but I am interested, as you have raised it, how you would define who and what is a Welsh judge. It is fairly easy with a judge who sits in the Court of Appeal for Northern Ireland or in a separate Scottish legal system. How do you define who and what a Welsh judge is? Is it a Welsh lawyer who practices in London?

[117] **The First Minister:** This is tricky; that is quite true. A Northern Ireland lawyer is somebody who practices in the jurisdiction of Northern Ireland. That is easy. It is the same with Scotland. It is rather more difficult in Wales. One way of doing this might be to have somebody who self-identifies themselves, as long as that is not seen at some point in the future as an easier route to a Supreme Court appointment. I do not think that it is difficult in a practical sense. There are many lawyers who see themselves as Welsh lawyers who do not practice primarily in Wales. As you know, for years, there was an established career route to the Bar, particularly, from Cardiff and Swansea to London, when people took silk. I suspect that, at the moment, the interim solution is that Court of Appeal judges are brought to the Supreme Court bench to deal with Welsh matters. There are plenty there with an interest in devolution and devolved law, in order to provide that voice on the Supreme Court bench when Welsh matters are before the Supreme Court.

[118] **Vaughan Gething:** I want to look at a broader issue, of which this is an example, regarding non-devolved areas that clearly have an impact in Wales and have an impact on devolved areas. Welfare reform is another example, potentially. Given the example that we have just heard about, where there was direct contact with the Lord Chancellor, is it the case that resolving those issues—where decisions are made that have an impact in Wales, whether on devolved areas of competence and responsibility or not—depends on communications that are simply a matter of personal relationships and politics, rather than structure? Is there any structural mechanism that you would like to see in place to deal with communication from the Welsh Government to the UK Government, of whatever colour or form?

[119] **The First Minister:** I think that the communications between the two Governments are fine. I have had several communications with the Ministry of Justice, and those communications have been reasonable and concerns have been listened to. I do think that much of it depends on personality; that is inevitable in any walk of life, but I do not see any issue at the moment in terms of there needing to be a more formal structure to deal with these issues, because non-devolved departments will engage with us. They are happy to have an exchange of correspondence, and to examine certain issues. Sometimes they will accept that there needs to be change, as already outlined here, and at other times they will take a different view. However, I am not particularly concerned about the formal nature of the relationship between ourselves as a Government and departments at Whitehall that deal with issues that are not devolved to Wales.

[120] **David Melding:** Finally, First Minister, I will take a slightly different area, which is to ask why there has not been very much subordinate legislation activity, either under Acts of the Assembly—and there have not been many so far—or under Measures in the last Assembly. They have not generated much secondary legislation. Is there any particular reason for this?

[121] **The First Minister:** The reason, I suspect, is that they have not needed to generate it. As you will know, Chair, the balance that any Government has to maintain on the face of a Bill is how much to put into the Bill and how much to leave to secondary legislation.

Flexibility, of course, is the key to this. We now have a number of Bills that have passed through the Assembly. I will give one example of where regulations were needed—the Food Hygiene Rating (Wales) Act 2013. Those regulations were developed alongside the Bill to ensure that an appropriate balance was achieved between the provisions of the Act and the matters of detail that were dealt within those regulations. Those regulations have been issued for consultation. A similar approach is being taken to the Social Services and Well-being (Wales) Bill; again, there will be a co-ordination between the Bill and regulations on the creation of a code of practice. The answer, in terms of why there has not been much subordinate legislation, is the fact that we have not yet developed a large corpus of law that would create the need for a lot of subordinate legislation at this stage.

[122] **David Melding:** It is interesting that you mention the social services Bill—and, indeed, we will be taking evidence on that this afternoon. It will generate a lot of secondary legislation, and indeed there are other Bills that we have scrutinised that intend to leave quite a lot to regulations. Will there be the capacity for that slightly more creative work, as I suppose one could describe it? In the past, we have often adapted what has come from the UK departments for use in Wales as secondary legislation. However, with regard to that more primary work now that follows from our law-making powers, do we have the capacity to take that forward?

[123] **The First Minister:** Yes, I am confident of that. Inevitably, we are in a position now where we are taking forward Bills of our own that will not have an equivalent in Westminster, and so there is not a set of regulations that can be lifted and adapted. That has been the case for some years. It was the case a decade ago, and it is something that we are well used to. I am happy with the legislative capacity that we have. It has been a steep learning curve. The legislative competence Order process was a useful halfway house, but it could only ever be that. However, it has enabled us to develop drafting capacity not just in terms of Bills but in ensuring that regulations or any other secondary legislation are brought forward in an appropriate timescale.

[124] **David Melding:** With regard to the teams that are looking at proposed legislation, is planning the application of secondary legislation a key part of that work? If that starts to get uncoordinated it could have a big impact on how you roll out and achieve your policy objectives. Is that timetabled into the process?

[125] **The First Minister:** Yes, it is, and sometimes, of course, it is concurrent, as I have already mentioned with the Food Hygiene Ratings (Wales) Act. There will be Acts of the Assembly that will not have much real effect until the regulations are drafted and approved. That is why, as in the example that I have used, it is important to get the regulations in place properly in order to ensure that the Act itself has some teeth.

[126] **David Melding:** Finally, do you have some internal mechanism to monitor the powers exercised by Welsh Ministers under Welsh Assembly Measures and Acts?

[127] **The First Minister:** We would not have an internal mechanism ourselves, no. That is a matter ultimately, I suppose, for the Assembly, in terms of scrutiny. The approach that we take is that where, for example, there may be a Bill at some point in the future that is on the face of it quite short, but which would require a large body of regulations to give it effect, in those circumstances, it may well be that we would take the view that that would need an affirmative process as far as Assembly Members are concerned. In the main, regulations are there to implement detail—relatively uncontroversial detail, one would hope—following the passage of a Bill through the Assembly. The detail is not always uncontroversial; I understand that.

[128] **David Melding:** We could have an argument about how uncontroversial it is. That is

perhaps for another time. We have covered a lot of ground, and I do not see any Members wanting to extend this session. I thank you for your evidence this afternoon, First Minister. It has been a great help. We think that it is quite important to follow up our principal inquiries with a second short inquiry, just to see what progress has been made, particularly in terms of the recommendations that have been accepted by the Welsh Government. We have had an interesting and fruitful discussion on those matters this afternoon. Thank you again.

*Gohiriwyd y cyfarfod rhwng 2.56 p.m. a 3.05 p.m.  
The meeting adjourned between 2.56 p.m. and 3.05 p.m.*

### **Tystiolaeth mewn Cysylltiad â'r Bil Gwasanaethau Cymdeithsol (Cymru) Evidence in Relation to the Social Services (Wales) Bill**

[129] **David Melding:** Welcome back to this meeting of the Constitutional and Legislative Affairs Committee. I am delighted to welcome Gwenda Thomas, the Deputy Minister for Social Services and the Member in charge of this Bill. Deputy Minister, would you like to introduce your team?

[130] **The Deputy Minister for Social Services (Gwenda Thomas):** Yes. Thank you, Chair.

[131] **Mr Lubienski:** I am Mike Lubienski and I am the senior lawyer in the social care team of Welsh Government legal services.

[132] **Ms Rogers:** I am Julie Rogers. I am the senior responsible officer for this Bill and I am deputy director of social services legislation and policy.

[133] **Mr Milsom:** I am Steve Milsom, deputy director of social services policy and strategies.

[134] **David Melding:** This session will be conducted in Welsh and English. If any of the officials require translation, it will be on channel 1.

[135] Deputy Minister, I will start by putting to you the most crucial question from our point of view, which is: how do you strike the balance between what you are going to do in regulation and subordinate legislation and what is on the face of the Bill? I think that we have already picked up a certain disquiet from aspects of the community most directly affected by social care, in that some people feel that there is not much detail on the face of the Bill. They feel slightly uneasy about so much being left to regulations. What is your view on that in general?

[136] **Gwenda Thomas:** This Bill is a major piece of primary legislation. I think that it is larger in scope than any other that the Assembly has undertaken before. It is an enabling Bill, which aims to set the framework for social care in Wales and—this is very important—is intended to last a generation. Subordinate legislation will rightly provide the detail. This approach enables flexibility in changing times. The Bill is within competence and we have the necessary consents in place. I have a short list of regulations here, but perhaps I can elaborate on that as we go through the meeting. Getting the balance right between subordinate legislation and what is on the face of the Bill has been key to our thinking and I think that we need the flexibility that subordination can provide.

[137] **David Melding:** The word 'flexibility' crops up so often that we have noticed it too. I suppose it goes back to my opening question. There are stakeholders out there who feel that they have to comment on a legislative process that does not have much meat to it at the

moment, because so much is left in regulations. When they see flexibility, they think, ‘Gosh, that means the Minister has an awful lot of power here, so how does the legislature keep track of the Minister’s intentions?’

[138] **Gwenda Thomas:** There are plans in place to develop policy intent prior to regulations. I have asked that that be done by December. I want committees to have ample time to consider that. Of course, I will be more than willing to update this committee when I have those to hand.

[139] **David Melding:** We will follow that up in terms of the procedures that you intend to use in key sections of the Bill. Scrutiny has to occur somewhere. If it is going to be in the subordinate legislation process, then that needs to apply and it is a matter of great concern to us—on all legislation, not just this particular Bill. On the approach, you often refer to the power to make regulations, particularly over areas that relate to minor details. In fact, this is used 45 times in the Bill to justify the use of subordinate legislation. On 45 occasions, you say that it is because it relates to a minor detail. Perhaps 45 minors equals a major, does it not?

[140] **Gwenda Thomas:** Each one relates to the individual regulation. The point is made in relation to each regulation, which are in the explanatory memorandum. As the committee suggests, perhaps it is possible to view these as you suggest, Chair. It is possible to view these as a totality, which I accept would mean that the overall content of regulations is more substantial. Nevertheless, I think that it is still the case that the subject matter of regulations needs to be considered through comparison with the systematic transformation of social care in Wales that the Bill is legislating for, in relation to its general functions and its duty to individuals. So, I think that each of those relate to the individual regulation.

[141] **David Melding:** Finally, we have ‘flexibility’ quoted to justify this approach, which is so heavily reliant on regulations. There are minor details, and the third one that you use is the ability for Ministers to act quickly. Again, this has caused some disquiet among various stakeholders that it leaves an awful lot of power, potentially, for Ministers to act quickly and not receive very much scrutiny.

[142] **Gwenda Thomas:** There are circumstances where we need to act quickly and to be able to change regulations to meet circumstances as they arise. The references here, I believe, are to safeguarding, complaints and one other topic. So, all of those topics are issues where I can imagine we would need to move quickly, particularly safeguarding. That option is key in order to be able to react and to change circumstances where they need to be changed quickly.

[143] **David Melding:** We will now move on to some of the particulars in order to probe the criteria, and then develop some of these points. I invite Suzy Davies to speak.

[144] **Suzy Davies:** Hello, Deputy Minister. One of the advantages of this Bill is about trying to make the whole system more person-centred. Perhaps we would all agree that that is a good thing. That gives me disquiet in the case of two particular sections. I will draw your attention to section 3(6), which concerns the definition of ‘disabled’, and section 9(3), which enables Welsh Ministers to prescribe further categories of people who may be treated as deaf, blind or deaf and blind. Both of those sections give Welsh Ministers the opportunity not just to expand a category, but to shrink a category. That, I would say, is a matter of quite serious policy. Why do you think that that is suitable for the negative procedure? There is even an argument that that should be contained on the face of the Bill, perhaps.

[145] **Gwenda Thomas:** In relation to section 3(6) and the definition of ‘disability’, the definition that we use is the one used by the Equality Act 2010. However, I understand that the disability organisations have always supported the social model, just as I do. We need to be very clear that the social model of disability is a concept and has no basis in law.

Therefore, we needed to rely on an Act in order to be sure that we had a legislative base for it. The powers in section 3.6 enables Ministers to prescribe further what categories of people can or cannot be included under the definition of disabled. I gave a commitment to the Health and Social Care Committee that we would consider this further.

[146] **Suzy Davies:** Thank you. Obviously, the concern is that you can also shrink that category as well as add to it.

[147] **Gwenda Thomas:** Yes, indeed. In terms of section 9(3)—

[148] **David Melding:** In terms of the affirmative procedure—

[149] **Suzy Davies:** Is it about the procedure or the content of that particular section?

[150] **Gwenda Thomas:** This is the negative procedure, I believe.

[151] **Ms Rogers:** Yes. It is in relation to the content. There has been a lot of feedback from stakeholders on the definition that is being used. The Minister has given a commitment that we would look again at the content and perhaps give a commitment quite early on, with more detail about how we might use those regulation-making powers.

[152] **Suzy Davies:** Did you consider the affirmative procedure for that at the same time?

[153] **Gwenda Thomas:** Yes, I believe so. I will take committees' views very seriously in regard to what you think about that.

[154] **Suzy Davies:** That is good. Perhaps I could ask that you report back to this committee. What would be appropriate for us to know about that update?

3.15 p.m.

[155] **David Melding:** I think that we are likely to make a recommendation. In an area where you are dealing with a co-definition, if it is not on the face of the Bill we would normally have automatically expected the affirmative procedure to be used on such a critical matter. Anyway, I do not want to give away what might be in our report.

[156] **Suzy Davies:** That is fine. I was not quite sure what the process was; that was all.

[157] I have another question on section 7(3), which is a definition of social enterprise and third sector organisations. I am slightly less worried about this, but I have to say that it is a brave Deputy Minister who attempts to define social enterprise at the moment, particularly as it is a word that we use in all sorts of contexts within the Assembly. Are you worried that, by putting a definition of social enterprise in this particular Bill, that might affect how those two words are used throughout legislation and debate in the Assembly? Secondly, because of that, do you think that perhaps we should be using the affirmative procedure to look at any amendments to that definition?

[158] **Gwenda Thomas:** Section 7(3) does enable Ministers to prescribe further what categories of organisations and activities may or may not be included as social enterprises, co-operative organisations, or third sector organisations. So, it is a regulating power that we believe that we need in order to futureproof this Bill—if nothing else—with regard to being able to develop our thinking here. I am wondering whether the committee would support a change in the procedure on this occasion.

[159] **Suzy Davies:** Perhaps I am speaking out of turn here, but I think that we would like

to help you to futureproof the Bill, in which case the affirmative procedure is probably a bit more appropriate in my view. Thank you. I think that that is all that I need to ask, Chair.

[160] **David Melding:** Okay; I call Vaughan to speak.

[161] **Vaughan Gething:** Good afternoon, Deputy Minister. I would like to take you to section 19 of the Bill, on meeting the needs and determining eligibility. In this area, the explanatory memorandum states that you set out the principle substance in the Act, but there will be more detail in subordinate legislation, although this area involves considerations of special importance. I am interested in how you would expect the regulations themselves to affect the way in which a local authority determines a person's eligibility to have their needs met, but then also what you would expect those considerations of special importance to be. That comes from the explanatory memorandum that there are some primary criteria on the face of the Bill, but there are obviously still details to be left to regulation.

[162] **Gwenda Thomas:** These regulations are subject to the affirmative procedure and, therefore, there will be robust scrutiny of them. I think that this is most important. The Bill will enable us to look at these regulations in detail. I have mentioned flexibility before, so I will not go into that again. However, regulations under section 19 provide for extra provision to enable local authorities to determine eligibility in certain circumstances, as you say. One of these is eligibility for safeguarding. I have a big concern here because anyone who finds themselves subject to any threat of abuse, even if they might not have been assessed as eligible for any service, would become immediately eligible for the service. We need to have that flexibility to look at certain circumstances even for people who are not known to the system possibly. This section will do that. It also determines the eligibility and the consideration of meeting those needs. So, that is an example of special circumstances where we would need the power of this regulation.

[163] **Vaughan Gething:** For example, you refer to section 19(1)(b), which states that a local authority must,

[164] 'if the needs do not meet the eligibility criteria, determine whether it is nevertheless necessary to meet the needs in order to protect the person from—

- (i) abuse or neglect or a risk of abuse or neglect, or
- (ii) in the case of a child, other harm or a risk of such harm'.

[165] I understand what you were saying about safeguarding because there may be someone who does not meet eligibility criteria, but there is a safeguarding need in relation to that adult or child that means that they would then become eligible in any event. Is there a reason why we are making that permissive, where that may happen? Why did you not just say on the face of the Bill that, in those circumstances, regardless of any other eligibility criteria, the person meets the need, rather than leaving that for a piece of subordinate legislation, even though I appreciate that that subordinate legislation would be subject to the affirmative procedure?

[166] **Gwenda Thomas:** Again, I am going to look to that word 'flexibility', in that we might need to change the emphasis of the regulations as circumstances become known to us—even the circumstances of the improvement that I think will come about because of the Bill. We need to react to that as well in regulations. If it helps, committee Chair, I can ask Steve Milsom to add to that.

[167] **David Melding:** Please do so.



[168] **Mr Milsom:** It is important to recognise the significance of this section of the Bill, and the move to national eligibility criteria. It is something that has not happened anywhere in the UK or beyond, as far as we can determine. It is important that the safeguards that are in place through the affirmative procedure are there. We have done a lot of work with partners over the last nine months about how we develop that through the statutory bodies, the third sector and beyond, and what we need to ensure is that there is the correct balance between national determination through these regulations and local accountability through the democratic process. That is why there is the flexibility of 'local authorities may' in the construct.

[169] This is an area on which the Deputy Minister has promised to issue a written statement, so there will be a lot more detail forthcoming in the next month or so that will build on what is here. In particular, there is a report from the Social Services Improvement Agency that captures the progress that we have made around this area to date. There is a lot more work to do to develop the regulations, but when Members see that report I hope you will be assured about the basis on which we are taking this forward, and particularly striking that balance between protecting people in very difficult circumstances and safeguarding situations that threaten life, for example, which are currently only at guidance level in the unified assessment process. So, as we are moving forward, we are certainly elevating and strengthening the legislative protection that will be in the new system.

[170] **Vaughan Gething:** I certainly hope to have the written statement before the Deputy Minister returns to the other committee on 6 June.

[171] **Gwenda Thomas:** Yes. The name of that report is the care and wellbeing Wales report, from the SSIA.

[172] **Vaughan Gething:** Moving on to a different area, the regulation-making power in sections 23, 26 and 27 is about the duty to meet the care and support needs of children, and then the duty to meet the support needs of adult carers. Obviously, it is an important area for you to make regulations in. I can see that there is a skeleton on the face of the Bill about what should be in the regulations, but then the regulations themselves are subject to the negative procedure. Given the importance of these areas, why have you currently opted for these to be determined by the negative procedure?

[173] **Gwenda Thomas:** These do give additional powers to bring in additional conditions, for example, on the care and support needs of the child, adult carers and child carers, and these are important issues. I am certainly open to considering the affirmative procedure for these regulations, although in my view, the subject matter is relatively minor in terms of detail in the overall legislative scheme. I would be interested to know what committee thinks, and will consider it.

[174] **Vaughan Gething:** This committee does tend to prefer the affirmative procedure, especially with matters that are clearly important. This is not a simple, technical exercise; it is much more important, about the way that services will be delivered. I know that the other committee will have a view on this as well.

[175] **David Melding:** We have also occasionally suggested the use of the affirmative in the first instance, and thereafter negative, if you feel there will be a need to adapt things quite frequently. There is flexibility; it is just that getting the initial scrutiny is a high priority for us, and that is really what we are probing.

[176] **Gwenda Thomas:** I am certainly open to considering that, and I can tell committee that officials have been very careful in considering Welsh Government guidelines on the criteria for negative and affirmative procedures, and have done their very best to fit in with

those guidelines. However, as I say, I am open to considering that.

[177] **David Melding:** This is supposed to be a work in progress.

[178] **Vaughan Gething:** Yes. Sections 34 to 37 on direct payments again set out a skeleton, but section 37 contains really quite a lot of detail on some of the definitions. In the explanatory memorandum it says that this,

[179] ‘replicates the approach taken in the Health and Social Care Act 2001.’

[180] I am interested in why you decided to replicate that approach on the face of the Bill, and whether we could anticipate any further change in regulations around it.

[181] **Gwenda Thomas:** It is not only the Health and Social Care Act 2001; it is also the Children Act 1989. So, however the drafting has been changed, it has been changed to make the section easier to understand, I hope. The original sections in the 2001 Act were amended by the Health and Social Care Act 2008 to allow direct payments to be made to people who lack capacity. The provision for direct payment for children is based on the provision in section 17A of the Children Act 1989, so the same approach has been adopted to set a framework in the Bill and provide a regulation-making power to set out the details of that scheme. The power does not require local authorities to make direct payments in all cases, but allows local authorities that discretion in certain cases. That is to allow regulations under the Bill to replicate the current regulations, where direct payments to certain categories of service users with drug and alcohol issues and those receiving certain mental health provisions are at the discretion of the local authority. The point in saying that is to try to explain the complexity of the regulation at the moment. I think that we need that simplification, and hopefully these sections will allow us to do that.

[182] **Mr Lubienski:** It is also true to say that there are some elements of the current scheme in the regulation-making powers have been lifted up and elevated into what is on the face of the Bill. So, in this instance, there is a greater level of detail in the Bill than exists currently in comparable provision, which is in the Health and Social Care Act 2001 and the Children Act, other than section 17A.

[183] **Vaughan Gething:** So, the question is: why have you decided to replicate the same scheme, essentially, with some streamlining? I know that you talk about the complexity of the current scheme, but is there a particular reason why you have essentially decided to keep the same sort of scheme, as far as the law is concerned, in this area?

[184] **Mr Lubienski:** The reason for having a scheme with a regulation-making power to set out the detail is to cater for a range of different situations without occupying a huge number of sections of the Bill, and creating a level of detail that might be excessive. The rationale for maintaining the regulation-making power for Welsh Ministers either to require or allow local authorities to make direct payments is to cater for the range of different situations that the Deputy Minister referred to. In certain circumstances, it would not be appropriate to have a default position of requiring direct payments from a local authority, as there are certain types of service user receiving treatment related to drug and alcohol issues, or certain criminal or mental health categories, where it would be more appropriate for a local authority to be in an open situation and not expected to provide direct payments, other than where one of the exceptions applied.

3.30 p.m.

[185] **Vaughan Gething:** So, these essentially consolidate, as far as the law is concerned, and we can then expect to see some attempt to reform in practice, but that that would come

more from regulation. You do not appear to be suggesting that the way that these sections of the Bill are written really change too much of what the law is, although I understand what you are saying about moving elements and regulation to the face of the Bill. We should, therefore, see this as a consolidating element of the legislation, but that you want to see a change in practice in any event. That does not require you to change essentially the legal scheme that we have, however.

[186] **Gwenda Thomas:** We want to retain the local authorities' discretion in direct payments, and we have explained the categories of people. However, the issue of complexity is an important one for me, because people need to understand this Bill and the regulations. As has been explained, I hope that we can consolidate primary legislation effectively by use of this.

[187] **Vaughan Gething:** I can see that Simon Thomas wants to come in on this point. I will not get into the policy drivers of this, because that is really for another place.

[188] **David Melding:** Indeed. We are not here to scrutinise the policy, though it is sometimes difficult to keep the distinction in our minds.

[189] **Simon Thomas:** In which case, my next question might make it a little difficult to keep that distinction. However, following on from Vaughan's point, the last 10 years or so have seen a signal change in the attitude towards direct payments. It seems to me that you are keeping the architecture of the legislation that you have now, albeit with some of it put on the face of the Bill rather than in regulation. However, your policy intentions do not quite match that architecture, because your policy intentions go further than the current legislative architecture. I can see that the things that you have described exist as problems, but they are very much exceptions to the overall policy thrust.

[190] I want to ask the same question, in a sense, but in a different way. Bearing in mind your policy intentions, are you sure that you have the right architecture here in the Bill, so that this really does deliver the new look that you would want to see for payments, rather than trying to tag on to existing regulations and primary legislation what has been quite a change in this field in Wales over the last 10 years or so?

[191] **Gwenda Thomas:** Yes; I am assured that we do have that. You know that it is my intention—to encroach on to policy—to extend direct payments, and to do that for carers and other people, and to work with Mark Isherwood on his Member-proposed Bill. We are doing that, and we have an overarching group that has been set up to look at direct payments and the way forward. I am advised that the architecture that we have will allow that to happen.

[192] **Simon Thomas:** We are not here to criticise or to ask questions about policy, but we do need to understand whether these Bills are capable of delivering your policy intentions. We do not want to see another Bill in five years' time, do we? Or even in three years' time.

[193] **Gwenda Thomas:** I am assured that they will.

[194] **Simon Thomas:** Okay.

[195] **David Melding:** Back to you, Vaughan.

[196] **Vaughan Gething:** Moving on, Part 5 of the Bill deals with the charging and financial assessment arrangements. The explanatory memorandum says:

[197] 'Similar powers are currently contained within the Social Care Charges (Wales) Measure 2010.'

[198] Are we correct in understanding that this step is simply consolidating the law, or should we be aware of new drafts and changes to the law within this section and how it may or may not differ from the current Measure?

[199] **Gwenda Thomas:** I think that this is about bringing together the charging regimes that we have at the moment and providing a clear set of arrangements for charging, right across the scope of the Bill, and with regard to services that can be charged for.

[200] The charging regime set out in Part 5 covers adults, children and carers, and it will apply to residential and non-residential services. You will know, of course, that the Social Care Charges (Wales) Measure 2010 covers only non-residential care. So, I think that we have long needed a simple set of regulations for charging that people can understand, and that they include the opportunity to review or to bring mistakes in the calculations to people's notice. We need to set those quite clearly, and, as I have already said, to have this clear set of arrangements.

[201] **Vaughan Gething:** I understand that there is an element of extension. The explanatory memorandum also states that Part 5 helps to implement the introduction of the people model that you set up in Part 4 of the Bill. It would be interesting to understand more about what you see a people model as being. Are you talking about a similar provision of care for adults and children, in terms of assessing need and the charges that go with that? How will the charging element in Part 5 help you to implement what you say is the model of the Bill in Part 4?

[202] **Gwenda Thomas:** The Bill is based on the people model, which is fundamental to our thinking and which underlines the whole approach to the Bill. So, we need a clear set of arrangements for charging that cover all charges, so that we demolish artificial boundaries due to age, and that we have a single process to assess ability to pay, to set charges and to future-proof that; I know that I use that term quite often. However, there will be times when we need to look at changing charges, due to inflationary rises, or whatever. We need the flexibility to do that quickly. You cannot set a charge and expect it to remain for the next 25 years, which I anticipate would be the life of this Bill. Therefore, we would need a process to allow us to change the charge if the need arose.

[203] **Mr Lubienski:** To add to that, the charging provisions in Part 5 include a scheme that covers adults and children, but Members will notice the distinction between section 21, in relation to adults, and section 23, in relation to children. Charging is an essential element of the adult process before coming to a decision about meeting needs, but children are rarely charged for services, as now. So, even though there is a power to do that, it is not an integral part of the decision about the provision of the service.

[204] **Mr Milsom:** It is also worth clarifying that this section of the Bill would allow Ministers to introduce the Wales set of arrangements that the Deputy Minister issued a written statement about. There was a Plenary debate the other day about the paying for care agenda. The provisions are broad enough to allow Wales to find its own model of paying for care in future as well.

[205] **David Melding:** Is the people model similar to the social model of disability? Is it a concept, or do you intend to define it?

[206] **Gwenda Thomas:** The people model goes back to what we learned during the Green Paper stage, if I can call it that, and the wide evidence base that underlined the report of the independent commission, chaired by Professor Geoffrey Pearson. The need to set up a people model was clearly a theme throughout that paper, and the transition from childhood to early

adulthood, and from late adulthood to older life, was also very important in the social care field. The concept of the people model allows us to do that and to have a smooth transition throughout life's process for people who need it.

[207] **David Melding:** So it is a concept, which will not have a legal definition in regulations or on the face of the Bill.

[208] **Gwenda Thomas:** It is a concept of delivering a people's Bill, yes.

[209] **Simon Thomas:** Mae gennyf gwestiynau ar Ran 6 y Bil. Fodd bynnag, cyn i mi symud at y cwestiynau hynny, rwyf eisiau cadarnhau wrth basio yr hyn y mae Mr Milsom newydd ei ddweud, achos y cwestiwn cyntaf yr oeddwn am ei ofyn oedd i gadarnhau bod rhan 5, sy'n sôn am y system codi tâl, yn paratoi ar gyfer y dyfodol ac yn paratoi ar gyfer y materion y bu inni drafod yr wythnos diwethaf ynglŷn â'r ymateb i Dilnot, ac ati, yng Nghymru. Mae erthygl gennych yn y *Western Mail* y bore yma ar hynny hefyd, Dirprwy Weinidog. Fodd bynnag, mae Mr Milsom wedi ateb y cwestiwn hwnnw, a derbyniaf eich bod yn cytuno.

**Simon Thomas:** I have questions on Part 6 of the Bill. However, before I move to those questions, I want to confirm in passing what Mr Milsom said, because the first question that I was going to ask was to confirm that Part 5, which talks about the charging system, prepares for the future and prepares for the matters that we discussed last week in relation to the response to Dilnot, and so on, in Wales. You have an article on that in this morning's *Western Mail*, Deputy Minister. However, Mr Milsom has answered that question, and I take it that you agree.

[210] **Gwenda Thomas:** Ydw, ac rwyf wedi dweud hynny.

**Gwenda Thomas:** I do, and I have said that.

[211] **Simon Thomas:** Do. Ymddengys bod gennych ddigon o rym yn hynny o beth.

**Simon Thomas:** Yes, you have. It appears that you have enough power in that regard.

[212] Symudaf ymlaen i drafod Rhan 6, sy'n ymdrin â phlant sy'n derbyn gofal a phlant sy'n cael eu lletya yn benodol. Fy nealltwriaeth i o'r rhan fwyaf o'r hyn sydd yn rhan hon y Bil yw ei fod yn dyblygu'r hyn sydd eisoes ar gael o dan Ddeddf Plant 1989 a bod y rhan fwyaf o'r pwerau i wneud rheoliadau hefyd, felly, yn cael eu trosglwyddo o'r Ddeddf honno. A allwch gadarnhau mai dyna yw'r sefyllfa?

I will move on to discuss Part 6, which relates particularly to looked-after and accommodated children. My understanding of the majority of what is contained in this part of the Bill is that it duplicates what is already available under the Children Act 1989 and that most of the regulation-making powers also, therefore, are to be transferred from that Act. Can you confirm that this is the case?

[213] **Gwenda Thomas:** Rydym yn sôn am y plant mwyaf bregus yma, ac mae hyn yn hollbwysig. Am y rheswm hwnnw, rydym wedi cadw'r rheoliadau a'r fframwaith sydd yn Rhan 3 Deddf Plant 1989 o fewn Rhan 6 y Bil hwn.

**Gwenda Thomas:** We are talking about the most vulnerable children here, and this is crucial. For that reason, we have retained the regulations and the framework from Part 3 of the Children Act 1989 within Part 6 of this Bill.

[214] **Simon Thomas:** Gan droi at rywbeth penodol, felly, mae adran 62(5) yn galluogi Gweinidogion, lle maent yn credu ei fod yn angenrheidiol er mwyn diogelu aelodau o'r cyhoedd rhag anaf difrifol, i gyfarwyddo

**Simon Thomas:** Turning to a specific point, section 62(5) enables Ministers, where they think it is necessary to safeguard members of the public from serious injury, to issue directions to a local authority with respect to

awdurdod lleol o ran arfer pwerau'r awdurdod lleol. Nid oes gweithdrefn ar gyfer hyn, wrth gwrs, oherwydd cyfarwyddyd ydyw. A yw'r pwerau hynny gennych yn awr?

the exercise of the local authority's powers. There is no procedure for this, of course, because it is a direction. Do you have those powers at present?

[215] **Gwenda Thomas:** Mae adran 62(5) yn rhoi'r pŵer i awdurdodau lleol gyflwyno cyfarwyddyd; hynny yw, i orfodi awdurdodau lleol i ymateb i anghenion y plant hyn.

**Gwenda Thomas:** Section 62(5) gives local authorities the power to issue a direction; that is, to force local authorities to respond to the needs of these children.

[216] **Simon Thomas:** Mae hwn yn rhoi pwerau penodol i chi fel Gweinidog; a oes gennych y pwerau hyn yn awr ynteu ydyw'n bŵer newydd?

**Simon Thomas:** This gives you specific powers as a Minister; do you have these powers now or is this a new power?

[217] **Gwenda Thomas:** Oes, o dan Ran 22 Deddf Plant 1989. Gall hwn gael ei ddefnyddio dim ond pan fydd yn angenrheidiol er mwyn inni amddiffyn y cyhoedd rhag camdriniaeth.

**Gwenda Thomas:** Yes, under Part 22 of the Children Act 1989. This can be used only when required in order for us to protect the public from abuse.

[218] **Simon Thomas:** A oes gennych enghreifftiau—heb roi manylion? A yw'r pŵer wedi cael ei ddefnyddio? Rwy'n edrych i wneud yn siŵr, wrth gyfuno deddfwriaeth, eich bod yn cael gwared ar ddeddfwriaeth sydd wedi dyddio.

**Simon Thomas:** Do you have examples—without giving details? Has the power been used? I am looking to make sure that, in consolidating legislation, you get rid of outdated legislation.

[219] **Gwenda Thomas:** Mae hwn yn creu mwy o le i ni amddiffyn. Ni allaf ddweud yn benodol a yw hwn wedi cael ei ddefnyddio. Gallaf ysgrifennu at y pwyllgor i ateb y cwestiwn hwnnw. Nid wyf yn meddwl y byddai'n cael ei ddefnyddio yn gyffredinol yn lleol, ond credaf ei bod yn gall i ni ei gynnwys fel ei fod ar gael pe bai ei angen yn y dyfodol.

**Gwenda Thomas:** This gives us greater scope to protect. I cannot tell you specifically whether this has been used. I can write to the committee with a response to that question. I do not believe that it would generally be used at a local level, but I believe that it is wise for us to include this so that it is in place if it were required for the future.

[220] **Simon Thomas:** Pe byddech yn defnyddio pŵer fel hyn, sy'n gyfarwyddyd, heb gyfeiriad at y Cynulliad o gwbl—a deallwn mai prin y byddai'n cael ei ddefnyddio a'i fod yn ymwneud ag achosion eithriadol, efallai—a oes unrhyw weithdrefn o ran adrodd yn ôl i'r Cynulliad i ddweud bod y pŵer wedi cael ei ddefnyddio ac i esbonio'r camau nesaf ar ôl i bŵer o'r fath gael ei ddefnyddio?

**Simon Thomas:** If you were to use a power like this, which is a direction, without referring it to the Assembly at all—and we understand that it would be used very rarely and that it is for exceptional cases, perhaps—is there a procedure for reporting back to the Assembly to say that the power has been used and to explain the next steps after such a power has been used?

[221] **Gwenda Thomas:** Credaf y byddem am wneud hynny a byddai'n bwysig ein bod yn gwneud hynny. Byddai hwn yn eithriadol, ond efallai bydd ei angen.

**Gwenda Thomas:** I believe that we would want to do that and that it would be important that we do so. This would be exceptional, but it may be necessary.

[222] **Simon Thomas:** Byddai'n dda i dderbyn enghreifftiau o sut y mae'r pŵer presennol yn cael ei ddefnyddio, er mwyn gweld bod y pŵer yn un sy'n angenrheidiol ar wyneb y Bil.

**Simon Thomas:** It would be great if you could put forward examples of how the current power is used, in order to see that it is essential that the power is on the face of the Bill.

[223] Symudaf ymlaen at adran 85. O dan yr adran hon, mae'r Arglwydd Ganghellor yn gwneud rheoliadau gyda chydysyniad Gweinidogion Cymru. Beth yw'r rheswm dros y cymal hwn?

I will move on to discuss section 85. Under this section, regulations are made by the Lord Chancellor, with the consent of the Welsh Ministers. What is the reason for this clause?

3.45 p.m.

[224] **Gwenda Thomas:** Mae hwn yn ymwneud â'r Arglwydd Ganghellor. Mae'r pwerau hyn ar gael yn adran 26 Deddf Plant 1989. Mae hwn yn bŵer i'r Arglwydd Ganghellor, oherwydd ei fod yn ymwneud â materion teuluoedd yn y llys, ond fe allai gael ei ddefnyddio mewn achosion newydd. Fodd bynnag, oherwydd bod y mater hwn yn ymwneud â'r *Welsh family proceedings officers* sydd hefyd yn swyddogion y Gwasanaeth Cyngori a Chynorthwyo Llys i Blant a Theuluoedd Cymru, bydd yn rhaid i Weinidogion Cymru rhoi sêl bendith i adeiladu hwn i mewn fel *precondition* er mwyn cael defnyddio'r pŵer hwn.

**Gwenda Thomas:** This relates to the Lord Chancellor. These powers are available in section 26 of the Children Act 1989. This is a power for the Lord Chancellor, because it relates to the issue of family courts, but it could also be used in new cases. However, because this issue relates to Welsh family proceedings officers who are officials of the Children and Family Court Advisory Support Service Cymru, Welsh Ministers would have to give their seal of approval to build this in as a precondition in order to make use of this power.

[225] **Simon Thomas:** A yw swyddfa'r Arglwydd Ganghellor yn Llundain wedi rhoi cydysyniad i'r cymal hwn? A yw'n hapus gydag ef?

**Simon Thomas:** Has the Lord Chancellor's office in London given consent to this section? Is he content with it?

[226] **Mr Lubienski:** Consent is not required because it is merely re-enacting, in identical terms, what is in the Children Act 1989.

[227] **Simon Thomas:** Even the bit that states 'consent of Welsh Ministers'?

[228] **Mr Lubienski:** Yes.

[229] **Simon Thomas:** Okay. Diolch.

[230] Yn olaf, hoffwn droi at le mae newid wedi bod yn yr hyn yr ydych yn ei argymhell, sef gwneud rheoliadau o dan adran 97, lle mae darpariaeth yn Neddf Plant 1989 wedi'i wneud o dan y weithdrefn negyddol, ond rydych yn dweud yn y nodyn esboniadol eich bod yn dymuno defnyddio'r weithdrefn gadarnhaol oherwydd goblygiadau Confensiwn y Cenhedloedd Unedig ar Hawliau'r Plentyn arnoch chi, fel

Finally, I want to turn to where there has been a change in what you recommend, which is to make regulations under section 97, where the provision in the Children Act 1989 is made under a negative procedure. However, you say in the explanatory note that you wish to use the affirmative procedure because of the obligations on you as Ministers of the UN Convention on the Rights of the Child, in the light of a Measure

Gweinidogion, yn sgîl Mesur wedi'i basio gan y Cynulliad. Pam mae'r confensiwn wedi gwneud i chi ystyried y weithdrefn gadarnhaol yn lle'r un negyddol? Ym mha ffordd y mae'r confensiwn yn cael ei ystyried wrth edrych ar adrannau eraill yn y rhan hon lle'r ydych yn delio yn benodol â phlant sy'n cael eu hedrych ar eu hôl?

[231] **Gwenda Thomas:** Mae hwn yn fater hollbwysig. Gallaf ddweud heb flewyn ar dafod ein bod wedi ystyried y confensiwn o'r dechrau wrth inni feddwl am y Bil. Ni fyddwn i'n bersonol wedi cyflwyno'r Bil pe na baem wedi ystyried y confensiwn. Y Llywodraeth hon a ddaeth i mewn â'r goblygiadau o ran hawliau plant. Wedi dweud hynny, ni allwch chi wneud rhywbeth mwy difrifol i blentyn na'i gadw mewn dalfa a mynd â'i ryddid. Felly, mae'n rhaid inni ddefnyddio'r weithdrefn gadarnhaol, fel ein bod yn ystyried barn pawb, ac yn dod i'r cytundeb gorau y gallwn i sicrhau ein bod yn gwneud ein gorau i'r plant hyn a bod yn deg iddynt drwy gydol y broses, wedi inni ystyried y confensiwn.

[232] **Simon Thomas:** Diolch. I orffen, mae rhan arall yn nes ymlaen—adrannau 92 a 93—sy'n ymwneud â chymorth ar gyfer pobl ifanc categorïau 2 a 3, fel y'u disgrifir. Rwy'n credu bod hyn yn ymwneud â llety a llesiant mewn llety ac ati. Gan eich bod newydd ateb mor gadarnhaol ynglŷn â'r confensiwn—ac rwy'n derbyn hynny—mae hi bach yn annelwig bod y rhannau yma o'r Bil yn sôn am ddefnyddio rheoliadau i ganiatáu Gweinidogion i ymateb yn amserol a hyblyg, pan fo tystiolaeth yn dangos bod angen newid. Mae'n swnio'n aneglur iawn ac fel pe na baech yn siŵr beth yr ydych yn ei wneud yn yr adrannau hyn. A ydych yn hyderus eich bod yn ddigon clir ar wyneb y Bil a bod y weithdrefn yn ddigon cadarn i'r Cynulliad i wybod yn iawn beth yw'r argymhellion wrth gyflwyno'r Bil?

[233] **Gwenda Thomas:** A ydych chi'n cyfeirio at adran 92?

[234] **Simon Thomas:** Ydw; adrannau 92 a 93.

[235] **Gwenda Thomas:** Mae'r materion

passed by the Assembly. Why has the convention made you consider the affirmative rather than the negative procedure? In what way is the convention considered in looking at other sections of this part where you deal specifically with looked-after children?

**Gwenda Thomas:** This is an issue of crucial importance. I can say quite categorically that we have considered the convention from when we first started to consider the Bill. I personally would not have introduced the Bill had we not taken the convention into account. It was this Government that brought in the obligation in relation to the rights of children. Having said that, there is nothing more serious that could be done to a child than holding them in custody and taking away their freedom. So, we must have the affirmative procedure in place, so that we take account of everybody's views and reach the best possible solution to ensure that we do our best for these children and we treat them fairly throughout the process, having taken account of the convention.

**Simon Thomas:** Thank you. To conclude, there is another part later on—sections 92 and 93—that relates to support for category 2 and 3 young people, as they are described. I think that it is about accommodation and wellbeing in accommodation and so on. As you just responded so positively in relation to the convention—and I accept that—it is a bit ambiguous that these parts of the Bill talk about using regulation to allow Ministers to give a timely and flexible response, when evidence shows that there needs to be a change. It seems quite unclear and as though you are unsure of what you are doing in these sections. Are you confident that you have sufficient clarity on the face of the Bill and that the procedure is sufficiently affirmative, so that the Assembly knows what your recommendations are in introducing this Bill?

**Gwenda Thomas:** Are you referring to section 92?

**Simon Thomas:** Yes; sections 92 and 93.

**Gwenda Thomas:** These, again, are



hyn yn bwysig hefyd—cefnogi plant mewn llety ac wrth fynd ymlaen i addysg uwch, er enghraifft. Mae'r materion hyn yn bwysig iawn ym mywydau plant. Efallai y byddwn eisiau newid y rheoliadau ar y materion hyn o bryd i'w gilydd. Felly, bydd rhoi hyn mewn rheoliadau yn help a bydd yn gadael i ni edrych yn ôl a dysgu wrth ddatblygu'r ddeddfwriaeth hon, er mwyn sicrhau ein bod yn gallu symud gyda'r amser. Rydym wedi gweld hynny yn y ddegawd diwethaf. Rydym wedi gweld bod eisiau newid rheoliadau er mwyn dal i fyny. Rwyf o'r farn bod y broses iawn gyda ni yn y fan hon.

important issues—supporting children in accommodation and in going on to higher education, for example. These issues are very important in the life of a child. We may wish to change the regulations on these issues from time to time. So, placing this in regulation will be of assistance and will allow us to look back and to learn from past experiences as we develop this legislation, to ensure that we are able to respond. We have seen that over the past decade. We have seen regulations needing to be changed to catch up with events. I believe that we have the correct process in place.

[236] **Simon Thomas:** Fy mhryder i oedd nad oedd llawer o fanylion ar wyneb y Bil fel yr oedd. Roedd llawer wedi ei fwrw ymlaen i'r rheoliadau. Mae lot wedi datblygu dros y ddegawd diwethaf, fel rydych chi'n dweud, Weinidog. A oes modd ystyried rhoi mwy ar wyneb y Bil er mwyn ei gryfhau o'r safbwynt hwnnw?

**Simon Thomas:** My concern was that there was not a great deal of detail on the face of the Bill as drafted. A lot was then left to regulations. A lot has developed over the past decade, as you said, Minister. Could you give greater consideration to putting more on the face of the Bill to make it a stronger Bill in that regard?

[237] **Gwenda Thomas:** Rwyf wedi defnyddio'r hawl i wneud rheoliadau yn y pŵer sydd yn adran 23(b) a 23(c) Deddf Plant 1989, ac rydym wedi rhoi'r rheini yn adrannau 92 a 93 o'r Bil.

**Gwenda Thomas:** I have used the regulation-making powers in section 23(b) and 23(c) of the Children Act 1989 and we have transposed those into sections 92 and 93 of this Bill.

[238] **Suzy Davies:** I have some questions on safeguarding, under part 7. There is a considerable number of regulations that could be introduced that vary considerably in importance or how frequently it is likely that they will need to be changed. They are all subject to the negative procedure, apart from section 117, as far as I can see. There are two that give me concern in particular. The first is section 105(9), which enables Welsh Ministers to place restrictions on the persons who may be an authorised officer for the purposes of applying to a justice of the peace for an adult protection and support order. You can imagine what my concern is: it is placing a restriction on someone who is trying to protect someone. Should those restrictions be subject to the negative procedure? Secondly, section 112(4), which enables Welsh Ministers to prescribe further functions of the safeguarding board, if it would assist the objectives of the safeguarding board, is of concern. It would be useful to have some scrutiny on the additional powers you would like to give a safeguarding board. Would you consider the affirmative procedure for that as well? Those are the two that caught my eye in particular.

[239] **Gwenda Thomas:** I might be confused, and I will have to take some advice. I understand this to be the affirmative procedure.

[240] **Mr Lubienski:** The section referred to is section 105(9). That is the first section.

[241] **Suzy Davies:** I am not including section 117 in my question at the moment. It is section 105(9).

[242] **Gwenda Thomas:** Yes, that is to do with adult protection court orders.

[243] **Suzy Davies:** Yes, but there is an opportunity for Ministers in regulations introduced through the negative procedure—so, essentially, nobody sees them—to introduce restrictions on those people. The introduction of restrictions, I would have thought, would give us a cause, perhaps, to require the affirmative procedure, if you are restricting someone’s ability to make an application for an order.

[244] **Gwenda Thomas:** I will look at the affirmative procedure for that.

[245] **Suzy Davies:** That is encouraging.

[246] **Gwenda Thomas:** This is part of my statement on safeguarding, which we have consulted on. It is very important that we get it right and that we move to that place together. This is unique. It will be unique for Wales in the UK to safeguard adults, and the adult protection court orders will facilitate that. We know that we do not have consent to go for power of entry. Therefore, fundamentally, we need to be able to apply to a court for a court order of protection, and that is what it is all about. I am very willing to consider the affirmative procedure.

[247] **David Melding:** That is usually music to our ears.

[248] **Suzy Davies:** Yes. May I press you on section 112(4)? It is about providing further powers to the safeguarding board, so that we are in a position to know and be aware—

[249] **Gwenda Thomas:** I will look at that as part of the package.

[250] **Suzy Davies:** That is excellent; thank you. I will take you to the slightly trickier section of 117, which is the creation of the single national safeguarding board. I am pleased to see that you have already introduced the affirmative procedure in draft legislation for that, but you say in the explanatory memorandum that this is a power involving considerations of special importance. It would be fair to say that, in terms of lobbying, this is the section about which I have had the most correspondence. If it is of such significance and such a major change, is there an argument for saying that any regulation that comes in as a result of this particular section to change the functions of the board at any time should be subject to the superaffirmative procedure? This new creation is almost iconic, is it not?

[251] **Gwenda Thomas:** The superaffirmative procedure would be quite lengthy, and I think that the affirmative procedure would cover it. The merging of the boards, as I have made absolutely clear in all the statements that I have made, could only happen when it was felt that the time was right. This will not happen on a cliff edge. We will develop the adult and children boards separately on the footprints of six, which I have made absolutely clear. However, given that the principle of the Bill is to be a people’s Bill, there would come a time when merger might be in the interests of the people whom we want to protect, but, certainly, that would not happen until there was consultation and due consideration as to whether that truly was the best way forward.

[252] **Suzy Davies:** Bearing in mind that you have acknowledged that a considerable amount of consultation will be needed in connection with a change of that magnitude, is there not an argument for—

[253] **David Melding:** You are almost defining the superaffirmative procedure.

[254] **Gwenda Thomas:** My view at the moment is that the affirmative procedure would be sufficient to do that.

[255] **Suzy Davies:** Thank you for your answer.

[256] **David Melding:** Over to you, Simon. We are working you hard this afternoon.

[257] **Simon Thomas:** A throi at Ran 8 o'r Bil, sydd yn ymwneud â swyddogaethau gwasanaethau cymdeithasol, rwy'n dechrau gyda chwestiwn tebyg i un Suzy Davies, achos rydych wedi rhestru yn Atodlen 2 i'r Bil beth yw swyddogaethau gwasanaethau cymdeithasol, ond yn adran 119 mae gennych fodd o ychwanegu eitemau at y tabl, dileu eitemau o'r tabl neu ddiwygio eitemau yn y tabl. Hynny yw, mae gennych hawl, Ddirprwy Weinidog, i newid swyddogaethau gwasanaethau cymdeithasol yn sylweddol iawn. Mae'n wir eich bod yn dweud y bydd hyn yn digwydd o dan y weithdrefn gadarnhaol, ond gofynnaf yr un cwestiwn eto, sef, gan fod hyn mor sylweddol, oni ddylai fod yn rhan o ymgynghoriad ehangach ac, felly, yn gofyn am y weithdrefn uwchgadarnhaol?

**Simon Thomas:** To turn to Part 8 of the Bill, which relates to social services functions, I will start with a similar question to the one that Suzy Davies just asked, because you have listed in Schedule 2 to the Bill what social services functions are, but in section 119 you have a means to add items to the table, to delete items from the table or to amend items in the table. So, you have the right, Deputy Minister, to change social services functions very substantially. It is true that you say that this will be done under the affirmative procedure. However, to ask the same question again, because this is so significant, should it not be part of a wider consultation and so require the superaffirmative procedure?

[258] **Gwenda Thomas:** Roeddwn wedi edrych ar hyn cyn dod, achos roeddwn yn meddwl mai 'archgadarnhaol' oedd y gair.

**Gwenda Thomas:** I had looked at this before coming, because I thought that the Welsh word for superaffirmative would be 'archgadarnhaol'.

[259] **Simon Thomas:** Cewch chi fod yn 'arch' a chaf i fod yn 'uwch'. [*Chwerthin.*]

**Simon Thomas:** You can be 'arch' and I can be 'uwch'. [*Laughter.*]

[260] **Gwenda Thomas:** Efallai y dylem gytuno—

**Gwenda Thomas:** Maybe we should agree—

[261] **Simon Thomas:** Dylem gytuno ar y geiriad.

**Simon Thomas:** We should agree on the wording.

[262] **Gwenda Thomas:** Roeddwn yn meddwl am 'archfarchnad'.

**Gwenda Thomas:** I was thinking of the Welsh word for supermarket, which is 'archfarchnad'.

[263] Rwyf yn meddwl bod y broses gadarnhaol yn ddigonol yn y fan hon. Mae'n bwysig, ond mae fy mhrofiad yn dangos i mi fod angen edrych ar yr hyn y mae adrannau gwasanaethau cymdeithasol yn ei wneud ac i gael yr hawl hon i ymyrryd os oes angen. Nid wyf yn meddwl bod angen y broses uwchgadarnhaol, ond, fel rydym yn dweud yn y Bil, rydym yn cefnogi'r broses gadarnhaol.

I think that the affirmative procedure is adequate here. It is important, but I believe, from my experience, that there is a need to look at what social services departments are doing and to have this power to intervene should the need arise. I do not think that we need the superaffirmative procedure, but, as we state in the Bill, we are supportive of the affirmative procedure.

[264] **Simon Thomas:** Mae angen ystyried hynny, ond symudwn ymlaen at rannau eraill o Ran 8. Mae adran 120 yn ymwneud â

**Simon Thomas:** That needs to be considered further, but we will move on to other parts of Part 8. Section 120 relates to social services

chyfarwyddwyr gwasanaethau cymdeithasol ac mae modd pennu cymwyseddau iddynt drwy'r weithdrefn negyddol. Efallai bod hynny'n dderbyniol ac efallai nad yw, ond mae hefyd gennych ffordd o lunio cod ymarfer ar gyfer proses statudol. Mewn ffordd, roeddwn i'n teimlo bod dwy ffordd wahanol o wneud yr un peth. A ydych yn siŵr bod y ddau beth yn gorwedd gyda'i gilydd yn iawn?

4.00 p.m.

[265] **Gwenda Thomas:** Nid wyf yn credu y byddai'r un ohonynt yn creu problem—nid y cod na'r hyn sy'n adran 120.

[266] **Simon Thomas:** Mewn ffordd, rwy'n gofyn i chi, gan fod gennych god statudol a'r broses honno, pam fod angen y broses ar wahân benodol hon ar gyfer cyfarwyddwyr gwasanaethau cymdeithasol. Oni fyddai'r cod yn delio â hynny?

[267] **Gwenda Thomas:** Mae'r cod yn welliant mawr ar gael un Gweinidog yn cyflwyno canllawiau—pa un ai fo hynny mewn cyfraith ai peidio. Byddai'n rhaid i'r cod ddod gerbron y Cynulliad i gael ei drafod.

[268] **Simon Thomas:** Dyna yr oeddwn yn ei ddweud, mewn ffordd. Mae'r cod yn broses llawer mwy cynhwysol na Gweinidog yn dweud sut y dylai pethau fod.

[269] **Gwenda Thomas:** Rwy'n credu bod angen dewis o ran pa un sy'n mynd i gyflwyno'r eglurder mwyaf i drafod y mater.

[270] **Simon Thomas:** Ni fyddaf yn dweud mwy, achos mae hyn siŵr o fod yn mynd tuag at bolisi. Yn y bôn, mae gennych ddwy ffordd o flingo'r un gath ac mae'n fater o ddewis ym mha ffordd yr ydych eisiau ei wneud.

[271] Hoffwn symud ymlaen, gan aros gyda'r cod hwn. Mae gennych broses o wneud cod ond wedyn mae modd dirymu'r cod, naill ai drwy ei ddisodli a gwneud cod newydd neu drwy gyfarwyddiadau—y syniad hwn bod y Gweinidog yn gallu cyhoeddi cyfarwyddiadau i dynnu'r cod allan o

directors and you can specify their competencies through the negative procedure. Perhaps that is acceptable and perhaps not, but you also have the means of setting a code of practice for the statutory process. In a way, I felt that there are two different ways of doing the same thing. Are you sure that the two things dovetail?

**Gwenda Thomas:** I do not think that either of them would create a problem—neither the code nor what is in section 120.

**Simon Thomas:** In a way, I am asking you, given that you have a statutory code and that process, why this separate specific process is needed for the directors of social services. Will the code not address that?

**Gwenda Thomas:** The code is a great improvement on having one Minister introducing guidelines—whether in law or not. The code would have to come before the Assembly to be discussed.

**Simon Thomas:** That is what I was saying, in a way. The code is a far more inclusive process than having a Minister saying how things should be.

**Gwenda Thomas:** I think that we need a choice regarding which approach is going to provide the greatest clarity in dealing with this.

**Simon Thomas:** I will not say any more, because I am sure that that would encroach on policy. Essentially, you have two ways of skinning a cat and it is a matter of choosing the way in which you want to do it.

I would like to move on, staying with this code. You have a process of making a code but then the code can be revoked, either by replacing it with a new code or through directions—the idea that a Minister can put forward directions to take the code out of circulation, as it were. I find it strange that

gylchrediad, fel petai. Rwy'n ei gweld hi'n od bod gennych god sy'n cael ei sefydlu drwy broses statudol ac mae'r Gweinidog yn gallu ei ddirymuso yn syml iawn drwy gyfarwyddyd. Nid yw hynny yn gorwedd gyda'ch gosodiad chi eich bod eisiau i'r cod hwn fod yn welliant ar y system bresennol a chynnwys mwy o bobl yn y ffordd y mae'r cod statudol yn cael ei wneud. Pam eich bod eisiau'r pŵer i dynnu'r cod yn ôl?

[272] **Gwenda Thomas:** Rwy'n gallu gweld y byddai'r angen yn codi i newid y cod neu ddod â chod newydd i mewn. Fodd bynnag, byddai'n rhaid inni ddweud wrth y Cynulliad pe bai hyn yn digwydd. Ni allwn ei wneud heb ddweud ei fod yn digwydd.

[273] **Simon Thomas:** Fodd bynnag, bydd y Cynulliad yn gwybod wedyn. I bob pwrpas, gyda'r cyfarwyddyd gan Weinidog, byddwch yn dweud wrth y Cynulliad ond byddai ar ôl iddo ddigwydd ac ni fydd ymgynghori ynglŷn â'r weithred—nid o reidrwydd. Efallai y byddech yn dewis gwneud hynny fel Gweinidog, ond ni fydd dyletswydd arnoch i wneud hynny.

[274] **Gwenda Thomas:** Rwy'n credu bod adran 122 yn creu'r cydbwysedd rhwng beth fyddai eisiau inni ei drafod ac ymgynghori yn ei gylch ac efallai ymateb i sefyllfa lle byddai angen newid y cod, neu ran ohono, i ddod â rhywbeth gwell i mewn. Yr unig reswm y gallaf feddwl amdano dros wneud hynny fyddai i greu gwelliant.

[275] **Simon Thomas:** Mae'n siŵr eich bod chi eisiau gweld gwelliant, Ddirprwy Weinidog, ond nid wyf yn siŵr a yw pob Gweinidog yn hanes y ddeddfwriaeth eisiau gwelliant bob tro, ond ni waeth am hynny. Hoffwn orffen drwy ofyn cwestiwn, heb fynd i mewn i fanylion, oherwydd mae sawl enghraifft o adran 125 ymlaen lle mae llawer o gyfarwyddiadau yn ei gwneud yn ofynnol i gydymffurfio â chodau ymarfer ac ati. Yn gyffredinol, pam ydych yn credu mai cyfarwyddo yw'r ffordd ymlaen yn hytrach na'r broses o wneud rheoliadau—hyd yn oed drwy'r weithdrefn negyddol, sydd o leiaf yn rhoi rhywfaint o graffu gan y Cynulliad dros eich gweithredoedd chi?

[276] **Gwenda Thomas:** Rwy'n gallu

you have a code that is established through a statutory process and the Minister can revoke that code simply through direction. That does not square with your statement that you want this code to be an improvement on the current system and to include more people in how the statutory code is made. Why do you want the power to revoke the code?

**Gwenda Thomas:** I can see that the need may arise to change the code or to introduce a new code. However, we would have to inform the Assembly if that were to happen. We could not do it without informing the Assembly.

**Simon Thomas:** However, the Assembly would know afterwards. To all intents and purposes, with a ministerial direction, you will inform the Assembly but it would be after the fact and there will be no consultation on the action—not necessarily. Perhaps you would choose to do so as a Minister but there would be no duty on you to do so.

**Gwenda Thomas:** I believe that section 122 strikes that balance between what we would need to discuss and consult upon and perhaps responding to a situation where the code, or part of the code, would need to be changed to bring something better in. The only reason for doing so that I can think of would be to improve the code.

**Simon Thomas:** I am sure that you want to see improvements, Deputy Minister, but I am not sure that every Minister through the history of the legislation has wanted to see improvements every time, but never mind about that. I would like to conclude by asking a question, without going into detail, because there are several examples from section 125 onwards where many directions make it compulsory to adhere to codes of practice and so on. Generally, why do you think that directions are the way forward rather than the process of making regulations—even through the negative procedure, which at least gives the Assembly some scrutiny over your actions?

**Gwenda Thomas:** I can see that a situation

gweld y gallai sefyllfa godi lle byddai angen inni ymyrryd mewn llywodraeth leol. Rydym wedi gweld esiamplau o hynny'n ddiweddar ac yn hanesyddol. Fodd bynnag, nid wyf yn meddwl y byddai gwneud rheoliadau bob amser yn gadael inni ymyrryd mewn sefyllfaoedd yn ddigon clou. Rwy'n gallu gweld sefyllfa lle byddai'n rhaid ymyrryd ar unwaith. Credaf y bydd y pŵer hwn yn golygu y byddwn yn gallu gwneud hynny, neu'n gwneud yn siŵr bod y pŵer gyda ni i orfodi o ran unrhyw beth y mae llywodraeth leol i fod i ymateb iddo. Felly, mae'n cynnwys pwerau gorfodi hefyd, ac mae hynny'n bwysig, oherwydd ni allwch fod yn ling-di-long bob amser ynglŷn â'r pethau hyn, a rhaid inni allu symud yn glou.

could arise where we would intervene in local government. We have seen examples of that recently and historically. However, I do not think that making regulations would always allow us to intervene swiftly enough. I can see a situation where intervention would be required immediately. I think this power would enable us to do that, or ensure that we have enforcement powers in terms of things that local government should respond to. Therefore, it also includes enforcement powers, and that is important, because you cannot always take your time on these issues, and we must be able to move quickly.

[277] **Vaughan Gething:** Looking at roughly where we are, Deputy Minister, under the heading of the next section on wellbeing, there is again a power to issue a code to help achieve outcomes. I know that you have recently issued a further statement on wellbeing. However, this is again subject to the statutory code procedure from section 122, and so you could, potentially, under section 122(7), I think, revoke that by direction. Can you confirm why you think the wellbeing statement should be in a code rather than in a regulation?

[278] **Gwenda Thomas:** I go back to the Chair's first sentence about the concept and wellbeing. Wellbeing as an outcome underpins the whole of the Bill, and I am very interested in what the code provides for us to be able to do. This code will bring clarity to the providers of services of whatever sector and will allow us to make clear to them what is expected in the delivery of the wellbeing statement that I published last week; I am sure that the committee has seen that. The use of the code here, with what you said about the provision of section 122, is, in my opinion, a good way of introducing this and of ensuring that link with providers, users and carers, who need care and support, of course.

[279] **Vaughan Gething:** Okay. The code procedure requires an element of engagement with the National Assembly, and an opportunity for oversight. So, you go through a process, but then, potentially, when you look back—. I am interested in the process point here; local authorities can depart from codes as well. You say that it is a fundamental point and that it is a new concept, so you can issue a code on wellbeing in accordance with section 122, but section 123 provides that a local authority can, if it decides to, depart from that code without further oversight or anything other than setting out why it thinks it is a good idea for it to depart from the code. That is in section 123. I am interested in why you have a process that you have to follow, as the Welsh Government, in terms of laying a code, with all the requirements and duties you expect to impose, having thought about it, consulted, and, no doubt, had conversations about it with people here and wider afield, but then a local authority could simply say under section 123, 'We think it is a good idea for us not to use your code, and so we are not going to.' I appreciate that you can then tell them they have to, but why is it so simple for a local authority to depart, as a process point, from a statutory code?

[280] **Gwenda Thomas:** It does not stop there, because they would still have to find an alternative way of providing the service, and they would have to issue a policy statement in accordance with section 124. It is not as simple as being able to move away from the code and not deliver. They can move away from the code so long as they produce an alternative method of provision and that fits into the requirements of section 123. There is the issue of local democracy, and we have safeguards that we would have an acceptable alternative way of

delivering: that is what that section delivers.

[281] **Vaughan Gething:** Okay. It looks like a self-certification process from the local authority's point of view. So, you provide a national statement, and, as long as a local authority says, 'We think we have a good reason and we are publishing a statement as to why we are doing this in a different way', then that is essentially fine.

[282] **Gwenda Thomas:** We need the provision and they would be answerable to their electorate and would also be subject to the annual report. Therefore, there would have to be a public and published annual report with regard to the delivery of the requirements of this section.

[283] **Simon Thomas:** I would like to ask a question on that point. Is it a sign of an under-developed policy area, or an under-developed concept, that things such as wellbeing and the people's model are being delivered through this legislation by codes rather than by regulation or on the face of the Bill? Is that a sign that this is still too new for legislation? Are you sufficiently confident that the code-making, and the other things that you do in this Bill, can deliver the vision you have for services?

[284] **Gwenda Thomas:** Yes, I am, but we will have to learn. This is a new concept, and it is transitional, as well as groundbreaking, in many aspects. However, there is the national outcomes framework, which will be based in law, within which all these things must happen. Therefore, it is not as if there is no legislative base to it all—there will be, as well as clear, accountable procedures with regard to the provision of service. Therefore, I see these as building blocks within the national outcomes framework. I have issued a statement on this issue, explaining my thinking behind the development of it. So, the over-arching legislative requirement will be the outcomes framework. It is no good our having any policies—on wellbeing or anything else—unless we can measure those outcomes effectively, and unless I can meet a person in the street who can tell me, 'This is the difference that this Bill has made to me'. That simplicity that exists within the wellbeing statement is its strength. I believe that the simple language that is used in that will help us to develop the best possible legislation that we can.

[285] **David Melding:** There is a case for declaratory legislation, where you set out a principle and then define it, but not to the nth degree. When that is done, the definition is on the face of the Bill, normally; it is a declaratory piece of legislation to change the way that people look at a particular area of public policy. It is strange to say that wanting a people's model is at the heart of this Bill, and yet it drifts into guidance or a code. It is a strange way to proceed, if you believe that it is so key to your legislative intent.

[286] **Gwenda Thomas:** I think that it is better to have the code than to have one Minister issuing statutory guidance. Who is accountable for that? It is just one Minister. I think that the Assembly has a part to play in the codes, and they will have to be presented to the Assembly. So, I do believe that the code will—. I also believe in local democracy, but I believe that the power to deliver—. Social services will still be delivered by local government, and will be the remit of local government, and I believe that the code will deliver. With regard to wellbeing, it is set out in the Bill; the wellbeing concept or policy is set out in section 2 of the Bill.

[287] **David Melding:** So, that is also your definition of a people's model, in essence?

[288] **Ms Rogers:** Yes. The people's model will hang off that definition, because that is core to the whole approach.

4.15 p.m.

[289] **Vaughan Gething:** Okay. Sections 143 to 149 contain a series of regulations that are subject to the affirmative procedure. Have you considered any of those for the superaffirmative procedure? I am happy for you to use the English term. [*Laughter.*] Some of these are significant regulation-making powers. For example, section 147, on partnership arrangements, would allow a Welsh Minister to require a specific partnership to be made by two or more local authorities, or by one or more local authorities and one or more local health boards, which would allow you to essentially re-designate functions and those responsible for them. So, effectively, you could re-design services and agglomerate social services and local health board functions by using this particular regulation-making power. I will not go into the policy of that, but from a process point of view of making that scale of change, have you thought, and would you reconsider, whether that sort of significance in change should be subject to a superaffirmative procedure rather than an affirmative procedure?

[290] **Gwenda Thomas:** I think that the affirmative procedure should apply here. However, committee members are always very correct in what you say, but section 144 does not, in fact, include any regulation-making powers, but, rather, refers to the need to insert an additional line into an existing regulation under section 25 of the Children Act 2004. So, there is no affirmative procedure associated with section 144.

[291] With regard to the wider issue of partnership working and the provision of the regulations, the example that stands out in my mind of the use of legislation to ensure partnership working is the legislation that we have already put into place with the integrated family support services. The carers regulations are an example of how legislation can bring clarity to a process. My view is that being able to legislate for partnership working and having this power to do it will help local authorities and local health boards. I absolutely believe in integration. There is a need to integrate health and social care for certain services. I believe that, through life's course, social services has a preventative emphasis. Health, being a universal service, which social services are not, needs to respond to everyone's needs. However, I believe that integration is at the heart of providing better services, particularly to frail and older people and to vulnerable children. To me, this is a very important power and I think that the affirmative procedure will deal with this. I will shortly be issuing a comprehensive statement on integration, which will hopefully help committees to understand my thinking in regard to this, and in association with the Bill.

[292] **David Melding:** Did you want to follow that up, Suzy?

[293] **Suzy Davies:** If you do not mind, Deputy Minister, I wish to take you back to section 111. You just explained that you are happy for the affirmative procedure to be used in section 144 when we are talking about prescribing local authority relevant partners. In section 111, there is a regulatory power that allows you to prescribe any other person or body not listed in the section to be a safeguarding board partner, which, of course, could include someone from the local health authority.

[294] **Gwenda Thomas:** I am sorry. Could you repeat that last bit?

[295] **Suzy Davies:** That could include someone from a local health authority. It is an opportunity for you to bring anyone onto the safeguarding board, effectively. That is only through the negative procedure. Do you not think that, in terms of consistency—

[296] **Gwenda Thomas:** I do not think that that is contentious—

[297] **Mr Lubienski:** To clarify, this may have arisen because I see that there is an error on two counts in the explanatory memorandum submitted by the Welsh Government. So, the fault is on our side. In the explanatory memorandum, both sections 143(3)(h) and 144(4)(b) are both identified as being powers subject to the affirmative procedure and they are not.



[298] **Suzy Davies:** Right. The question, therefore, is why?

[299] **Vaughan Gething:** Also, section 143(3)(h) does not exist. It is section 143(3)(g). There is no section 144(3)(h).

[300] As I said, there is a regulation-making power in section 144(4)(b), so that regulation-making power that comes across from section 25 of the Children Act 2004 is subject to the negative procedure, not an affirmative procedure. Is that right? I just want to clarify that.

[301] **Gwenda Thomas:** Yes.

[302] **David Melding:** We are a little confused about sections 155 to 159, which are supposed to be a restatement of the relevant sections of the Children Act 1989, but they are not a full restatement. So, was your intention to consolidate or have you missed something out?

[303] **Gwenda Thomas:** They consolidate existing provisions in Part III of the Children Act 1989. The provisions in sections 159(4), (5) and (6) give powers to enable Welsh Ministers to specify assistance arrangements for children and young people, and they replicate powers currently in section 26A of the Children Act 1989. Section 159(5)(a) of the Bill provides that regulations must require that the arrangements to provide assistance must

[304] ‘secure that specified persons or categories of persons do not provide assistance’.

[305] This provision will be used to ensure the independence of the assistance arrangements, for example, by providing that no person involved in the management of the case in question or in considering the complaint may act as an advocate.

[306] **David Melding:** I have to say that the technicalities of this are a bit beyond me, at the moment, but we can report on them. However, in terms of sections 155 to 159, it is the Government’s intention to consolidate those provisions in the Children Act.

[307] **Gwenda Thomas:** Yes.

[308] **David Melding:** We will look at that later in our consideration of the evidence. There is some doubt as to whether you are doing it, according to the briefing that I have received, but, as I said, I cannot understand it all.

[309] **Gwenda Thomas:** Perhaps it will help the committee to know that section 155 in the Bill derives from section 26(3) to section 26(3C) in the Act; section 156 derives from section 26(4) to section 26(8); section 157 derives from section 24D; section 158 derives from section 26ZB; and section 159 from section 26A.

[310] **David Melding:** Thank you for that clarity.

[311] **Simon Thomas:** You will be tested on that later, Chair.

[312] **David Melding:** I will recite it back to you, Deputy Minister. [*Laughter.*]

[313] Sections 159(4), (5) and (6) do not seem to have a full explanation in the explanatory memorandum, which troubles us. Is there any reason for that? Are you going to fully explain why you need these powers?

[314] **Mr Lubienski:** This is a re-enactment of section 26A of the Children Act, which is

the section that provides a duty on local authorities to assist children who want to make representations. It is broader than simply children who wish to complain about something; it includes representations about something in anticipation of something happening. It also provides for regulations to ensure that local authorities cannot provide someone to act as an advocate who is too close to the decision making that is being complained of.

[315] **David Melding:** Our concern is more that that is not developed in the explanatory memorandum rather than whether you should have these powers. We think that explanatory memoranda ought to be as robust as possible, but we have noted what you have said.

[316] Finally, the note on section 167 in the explanatory memorandum says that

[317] ‘It is not possible to set all these provisions out on the face of the Bill as it may be that provision can be made in the UK Care and Support Bill, depending on the timing of commencement of the two Bills.’

[318] Do you have any further comments on the Welsh Government’s position on what it might do, using the UK care and support Bill as a vehicle?

[319] **Gwenda Thomas:** This has really interested me. It is a broad power, and we have exceptional circumstances, which I believe have never happened before, namely two Bills happening at the same time, one at Westminster and one in the Assembly. This reflects devolution. We need this power in regard to the consequential from one Bill to the other. The overlap between the Assembly and parliamentary processes means that it is not possible to be certain which will come into force first. We will have consequential amendments that reflect this, of course, and it is exciting that we are here presenting our own Bill with the draft care and support Bill in England. There will be some issues that are non-devolved, of course, which will require consent one way and the other. The purpose of this section 167 is really on the timing in relation to the draft care and support Bill.

[320] **David Melding:** I think I understand that. Is it consequential, or do you have to do major stuff in the UK Bill if it is ahead of your Bill?

[321] **Gwenda Thomas:** We are in front at the moment, by far.

[322] **David Melding:** I am just confused as to—

[323] **Mr Lubienski:** Can I develop that a little? Normally, in a Bill of this nature, which will mean a whole-system change, one would expect there to be a raft of consequential provisions showing how the new scheme set out in our Bill connects to the existing, old system, which would stay in force in England. In this case, because England is also in the process of having a whole-system change, and we do not know which of the two Bills will come into force first, we do not know whether to draft a set of consequential amendments that connect to the old law, or whether to try to anticipate or find out what the English Bill will look like on introduction, or what it may eventually look like after it has been amended as it goes through Parliament. It has been the subject of vexed consideration by both legislative counsel in the Welsh Government and parliamentary counsel, and in the circumstances, the best that can be cooked up is that both Bills will need to have extensive consequential powers to provide for this kind of thing. In order for there to be some transparency, the intention would be that a draft of the consequential Order would be made available within the scrutiny process so that at least Members can see the kind of provision that will be made, even though it is almost inevitable that the Order that is eventually made will have to evolve somewhat from that.

[324] **David Melding:** It is interesting. I am glad I asked the question.

[325] **Simon Thomas:** That has opened up a whole new can of worms. Have you got another hour and a half, Deputy Minister? [*Laughter.*] It is not usual to have such wide-ranging powers in transitional arrangements, I do not think. You have just explained very well why you are looking for that. The problem is that they remain on the face of the Bill, and could be used in the future to unpick some of the things that you want to achieve in this Bill. That is my initial reading of it, and that would be my concern, anyway. Is there any way of time-limiting these, or making sure that they are only there for the purpose that you have just outlined very well to the committee?

[326] **Mr Lubienski:** That is a matter for the Deputy Minister, but it is something to which consideration could be given, if that was what the Deputy Minister thought appropriate.

[327] **Simon Thomas:** These provisions could be used by an incoming Government of a different kind to unpick your social model.

[328] **Gwenda Thomas:** I am not convinced of that. I will take further advice and write to you on that. I will make sure that I have due regard of what you have said there. I will write to the committee on that point.

[329] In regard to that, it is proper to say in committee that I pay tribute to the way that officials have worked together both here and in Whitehall in progressing this process. I also thank the Secretary of State for Wales for the way that he facilitated dialogue between us as well. It is only right and proper to say that.

[330] **David Melding:** Thank you for that, Deputy Minister. I will just clarify one final thing. These consequential could include repeals; is that the case?

4.30 p.m.

[331] **Mr Lubienski:** Yes.

[332] **David Melding:** So, it is something that needs careful scrutiny, I would say.

[333] Do we have any further questions? We have had a very full session. We shall give the officials a chance to add to that, if they have anything to clarify further.

[334] **Ms Rogers:** I would just add one point, which is to be clear about the consequential and repeals. Obviously, the care and support Bill is primarily looking at adult social care. In relation to children's social care, there is the Children and Families Bill in England, but it is not having such a big impact. So, the Deputy Minister is proposing to bring forward a Government amendment with a Schedule that will contain the consequential and repeals in relation to children. That will not necessarily be every bit of legislation relating to children because, as you can imagine, it is a vast amount. However, it will include the primary legislation—the key Acts that people are concerned about. Our hope is to make that available before the end of Stage 1, which we hope will give committees and stakeholders some assurances about the plumbing, let us say, between the new Bill and the old legislation and how that would work in practice.

[335] **David Melding:** Thank you. We will reflect on that. Thank you, Deputy Minister, for giving evidence this afternoon. I think that we have had a very full session, and we have achieved some substantial clarity. We have noted that, in some areas, should we be so inclined to recommend, you are likely to consider a slight change in the processes used for the various pieces of subordinate legislation, and we appreciated that sort of exchange during our evidence session. We may go further and make other suggestions, of course, but I think that

this has been a very useful session this afternoon. I am also grateful to your officials for adding to the clarity of this whole issue, as it is an important Bill and a very technical one in parts, and it takes a lot of time to understand the implications fully. Thank you, all.

[336] **Gwenda Thomas:** Thank you.

4.32 p.m.

**Papur i'w Nodi**  
**Paper to Note**

[337] **David Melding:** The paper to note is the paper from Mick Antoniw.

**Cynnig Trefniadol**  
**Procedural Motion**

[338] **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).*

[339] Does any Member object? I do not see a Member objecting, so we will now meet in private. Please clear the public gallery and switch off all the broadcasting equipment.

*Derbyniwyd y cynnig.*  
*Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 4.32 p.m.*  
*The public part of the meeting ended at 4.32 p.m.*