



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

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

**Dydd Llun, 17 Tachwedd 2014**  
**Monday, 17 November 2014**

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

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

**Aelodau'r pwyllgor yn bresennol**  
**Committee members in attendance**

Alun Davies	Llafur Labour
Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
William Powell	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

**Eraill yn bresennol**  
**Others in attendance**

Jeff Godfrey	Cyfarwyddwr Gwasanaethau Cyfreithiol, Llywodraeth Cymru Director of Legal Services, Welsh Government
Theodore Huckle QC	Cwnsler Cyffredinol Cymru Counsel General for Wales
Dylan Hughes	Prif Gwnsler Deddfwriaethol, Llywodraeth Cymru First Legislative Counsel, Welsh Government

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

Stephen Boyce	Y Gwasanaeth Ymchwil Research Service
Daniel Greenberg	Cynghorydd Arbenigol Expert Adviser
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Ruth Hatton	Dirprwy Clerc Deputy Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerc

*Dechreuodd y cyfarfod am 13:44.*  
*The meeting began at 13:44.*

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

[1] **David Melding:** Good afternoon, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I apologise that we are running slightly late due to circumstances beyond our control. I will just go through the usual housekeeping announcements. We do not expect a routine fire drill, so if we hear the bell, please follow the instructions of the ushers, who will help us to leave the building safely. All mobile devices need to be switched at least to silent mode or off. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there is a translation on channel 1, and channel 0 will amplify our proceedings.

**Tystiolaeth mewn perthynas â'r Ymchwiliad Deddfu**  
**Evidence in relation to the Making Laws Inquiry**

[2] **David Melding:** We move on to item 2, which is evidence in relation to the making laws inquiry. I am very pleased to welcome Mr Huckle QC, the Counsel General. This is our first evidence session. Before I ask you to make introductory remarks, do you just want to introduce your team?

13:45

[3] **Mr Huckle:** By all means. I am accompanied, I am glad to say, today, by Jeff Godfrey, who is the director of Legal Services for Welsh Government, and by Dylan Hughes, who is First Legislative Counsel.

[4] **David Melding:** I should remind Members that Dylan Hughes will give evidence separately, on behalf of the Office of the Legislative Counsel. So, he is here to assist in the clarification of evidence, if that is required, to Mr Huckle, but not as a witness in his own right. So, without further ado, I will ask the Counsel General to make some introductory remarks.

[5] **Mr Huckle:** Thank you very much. Good afternoon to everyone. Thank you for the invitation to appear before this committee. I am grateful to you all for your necessary, I suppose, continuing interest in the standard of legislation that our National Assembly passes. I personally—and on behalf of Government, of course—welcome this inquiry very much, as it is an opportunity to reflect on what has been achieved since 2011, and to consider, in anticipation of the next Assembly, further improvements to the legislation, which I am sure we all would wish to make.

[6] Overall, I believe that Members of the Assembly, Welsh Ministers, and officials can all be proud of the work done in developing, scrutinising, and, ultimately, passing the new Acts of the Assembly, under Part 4 of the Government of Wales Act 2006. As you know, 17 Bills have been passed, 14 of them Government Bills, while a further eight Bills are either before the Assembly already, or are about to be introduced. By the end of this Assembly, more than six Bills a year will have been passed, many of which are lengthy and make wholesale changes to the law in particular areas of social, economic, or cultural activity, for, and of, the people of Wales. Broadly speaking, that represents a doubling of the Assembly's primary legislative output, by comparison with the third Assembly.

[7] There is no doubt that achieving this has, for everyone concerned, been a challenge. Developing good law is difficult, even for Governments and legislatures with considerable experience and expertise. Here, law making of this kind is a relatively new thing, of course—for the Welsh Government as the promoter of the majority of legislation, and for the Assembly as a fully fledged primary legislator. However, you have all, if I may say so, demonstrated that you can do it, and do it well.

[8] Chair, I should explain that I am here, as I think you have been warned, to deal with issues relating to the technical quality and appropriateness of the Government's legislation, speaking from my perspective as the Government's law officer. As I believe you know, I am afraid that I am unable to deal with wider issues relating, for example, to the management of the Government's legislative programme, or to the Assembly's capacity to legislate. Similarly, decisions relating to the extent of consultation on Bills undertaken prior to their introduction and other like matters are outside my remit. Subject to that caveat, I am very happy to answer the questions that you have for me.

[9] **David Melding:** May I say first of all on that that we do have a series of questions based on the written evidence? I ask you to answer them as fully as possible, given the qualification that you have just made. In some areas, you would be able to give at least a partial answer, I think. However, the Government has indicated that it is happy for other witnesses to be called—including Dylan Hughes, and, possibly, the Minister for business, and, indeed, we could call the First Minister as well—so I do not think that we will have a lack of people to give us the evidence. It is just a matter of the appropriateness of each witness giving evidence in the various areas that we want.

[10] May I just say, before I put the first question to you, that the written evidence was very helpful indeed? I thought that it was candid, and well thought through, from the Government's point of view, though I think it raises issues from our point of view as well, which we will want to tease out. However, it is helpful to be able to have a document like that on which we can then launch various questions, and probe the Government's attitudes to making laws.

[11] So, the first question that I would put to you, Counsel General—if you can answer this to some extent, because I presume that you give some advice on this—is on when the paper quite rightly states that the first judgment to make is whether a piece of legislation is required at all, in so far as you need a new legislative vehicle, and it does something that cannot be done currently, or at least not very conveniently. What is your involvement in whether a particular action does require legislation, or can be worked through the existing legislative framework, or just with the general policy powers that the Government has?

[12] **Mr Huckle:** You rightly advert to the advisory issue, if I can put it that way, because obviously, as I have said on a number of occasions in the Senedd when asked questions there, there is a limit to what I can say about what I have been asked to advise on. In general terms, though, I would say that my involvement is very limited at the point of working up policy, as one might expect. Obviously, lawyers work with policy officials and maybe ask questions about what can be done competently and so on, but the essential process of developing policy is not one that lawyers are usually asked to give their opinions about, if I can put it like that.

[13] **David Melding:** It is fair to say that if there were a big policy intention in a particular legislative proposal, your advice might be sought in terms of 'Well, can this already be achieved via current legal powers, or would it require new legislation?' Would that sort of question be put to you, or that sort of advice sought?

[14] **Mr Huckle:** To be honest, it is relatively easy to determine whether something is already covered by the existing statute book, for example, so the chances of the Counsel General in particular being asked to advise on a matter like that are pretty limited.

[15] **David Melding:** Okay. That is a very clear answer, thank you. You made reference to the 17 Bills, or whatever it is, that we have handled so far. It is a pretty impressive amount of legislation that we have had to deal with. Obviously, the Assembly is a young institution, as is the Welsh Government. I just wonder, to expand on that, whether you think that the current output is optimal, or whether we have legislated too much, for instance, in terms of the capacity. How does it sit at the moment, in terms of a manageable volume and workload?

[16] **Mr Huckle:** I think it is fair to say that everyone is under pressure. I would not suggest that there are people who feel that it is an easy process. I do not think that it is an easy process. The challenges that are being presented for all concerned—for the lawyers, the policy officials, and for Assembly Members in scrutinising the legislation—have been considerable and will no doubt continue to be considerable, particularly when resources are necessarily stretched by current economic conditions. Having said that, I am not concerned about a lack of ability to deal with the legislative programme. I suppose it follows that the rate

of passing of legislation at the moment is not far off the optimum.

[17] **David Melding:** Okay. I will now ask Alun Davies to take us through the next set of issues that we want to examine.

[18] **Alun Davies:** Thank you very much, and thank you, Counsel General, for the evidence. As we go through the Government evidence, it appears to describe a well-oiled machine that works perfectly every day—a car that has never failed to start in the morning. Would that be how you would characterise the last three years?

[19] **Mr Huckle:** It would be quite difficult to characterise anything like that, really, would it not? I am not sure that I would agree that the Welsh Government's submission to you is quite like that. I think, probably, if the car does not always start perfectly, at least it is getting to the end of the journey—that is probably how I would put it—and getting to it in pretty good order.

[20] **Alun Davies:** I am not sure that I quite understand how a car that does not start gets to the end of a journey, but—

[21] **Mr Huckle:** I have called the AA. [*Laughter.*]

[22] **David Melding:** I think he means that it has started and has pretty much got to where it wanted to go. [*Laughter.*]

[23] **Alun Davies:** It started at some point in the past. [*Laughter.*] Okay. I understand the caveats that cover most of the interesting parts of the questions that we might have, but in terms of your role, Counsel General, providing advice to the First Minister and to Ministers on the appropriateness or otherwise of legislation, are you confident that that role is understood within Government by Ministers?

[24] **Mr Huckle:** Generally speaking, yes. I think I would say that everybody has been on a very steep learning curve. For example, the whole structure of Legal Services, as was, or the legal group, as I now call it, within the Welsh Government, has changed. In particular, Mr Hughes's department has been separated out from what were the amalgamated Legal Services into the Office of the Legislative Counsel and a new Office of the Counsel General was created to provide a second tier of advisory expertise, particularly in relation to competence matters. So, there is a whole structure, which I think is taking a bit of time for everyone to get to grips with. Earlier on, I suppose, there was a tendency to want to seek the Counsel General's view on things perhaps when what I might call the primary initial legal thinking had not been done already. However, I do not see it as a problem now, let us put it that way. I think that systems have been developed, restructuring has taken place and, as far as I am concerned, I am confident that it is working reasonably well now.

[25] **Alun Davies:** So, we went through that teething period, if you like, for the first year or two of this Government, and things have settled well. In terms of the process of legislating, are you confident that Ministers and officials would have sufficient recourse to legal advice sufficiently early in the policy-making process to actually identify where legislation will be needed in the future in order to achieve policy objectives?

[26] **Mr Huckle:** Yes, I am confident. I have no doubt that Ministers have access to legal advice from the earliest moment of policy development. I suppose that it partly depends on who is in control of the particular aspect of policy development and the extent to which they make use of the resource that is undoubtedly available. In principle, there is no difficulty with taking legal advice from day 1.

[27] **Alun Davies:** Okay, thank you. In terms of the machine, car or otherwise, that we have in front of us, there will be aspects that you will be looking at on a regular basis where you are happier and less happy. Would it be possible for you, perhaps, to open that particular door on your thinking?

[28] **Mr Huckle:** No. The main reason for that is that I am not sure that I fully understand the question.

[29] **Alun Davies:** Not all aspects of the process work equally as well. I am trying to understand from you where you feel that there are still improvements to be made and where you believe that the Government has the capacity, if you like, or the requirement to improve more widely.

[30] **Mr Huckle:** As things presently stand, I would not identify any particular pinchpoints, if I can put it that way. Obviously, we had a significant problem at one stage with legislative drafting capacity, but that has been addressed and I am happy that that is in reasonably good order at the moment as well. As I say, I do not consider that we are in a position where we have spare capacity waiting to be employed. It seems to me that everyone is working pretty hard, as that is a function of the increasing demands, mainly placed upon my department, if you like, by the growth of the primary legislative function, but also because of the restrictions of resources that are all too familiar and I do not need to go into.

[31] **Alun Davies:** I will leave it at that.

[32] **William Powell:** Counsel General, you have already responded to a couple of the issues that I wish to raise around capacity in some of your earlier answers. I wonder whether you could comment on the scope that there is within your department for a flexible deployment of staff in the light of particular drafting pressures in certain areas.

[33] **Mr Huckle:** I think that, in principle, there is no difficulty with flexible deployment and redeployment of staff to deal with particular pressures, but, rather more, I think that it is to do with the proper planning of a particular Bill. So, usually, the Bill team that is put together and the legislative programme unit work together very much to identify what the demands are going to be and to allocate the resources accordingly. It is not something that I am considering to be a particular problem. The need to switch resources on a regular basis can happen, but it is quite an unusual thing. I am going to look now to my director of legal services to see whether he takes any different views.

[34] **Mr Godfrey:** No, I do not think so. Clearly, there is movement of lawyers within the department to meet the principal pressures, but, within the legal services department at least, there is flexibility and we will move it to wherever the priority pressures are. As the Counsel General has said, there was an issue in the early part of the Assembly in relation to drafting—it would be for Dylan to answer those questions—but there has been an increase in capacity there. There certainly would not be movement between legal services and, for example, the Office of the Legislative Counsel.

14:00

[35] **Mr Huckle:** Just to add to that, to finish that last point, part of the point of separating out the Office of the Legislative Counsel on the one hand and the Office of the Counsel General on the other was that those subdivisions of the department as a whole are intended to act, to some extent, with an independent mind in relation to what they are responsible for. So, we do not, generally speaking, not on a temporary basis, mix people between those different parts of the legal group, although, within the larger legal services group, there may well be scope for moving people between teams. However, I am not conscious of it happening day to

day, as it were.

[36] **William Powell:** Okay. That is useful. I wonder whether you could also comment on what you feel to be the department's capacity to be innovative in the drafting of legislation and also to draw on best practice in other legislatures, whether in the UK or even further afield.

[37] **Mr Huckle:** I am very happy with the capacity of lawyers to be innovative. Always, the driver is policy, of course. It is not for the lawyers to make policy, and they do not do so. However, as with any client in private practice, they will seek to assist the client to achieve what the client wants to do. That sometimes means thinking outside the box, as it were. So, I have no difficulty with the idea that the lawyers in the Welsh Government legal group are innovative. There is a lot of wrangling over the odd word or two, as you can probably imagine. You will not want me to go into the detail of any of that, because it is utterly tedious to somebody who is not a lawyer, usually. However, no, there is no difficulty with that at all.

[38] Sorry, the second part of your question related to—.

[39] **William Powell:** It related to best practice elsewhere in the UK, or maybe within Europe or further afield—in the Commonwealth even.

[40] **Mr Huckle:** Well, as you may know, I have already made one trip to Australia and New Zealand for the specific purpose of making a comparative—. 'Making a comparative study' is probably putting it a bit too high, but it was certainly to engage in the process of looking further afield for a comparison of practice and best practice. We start, of course, with the practice of many years in Westminster and, to a lesser extent, the practice of a full primary legislature in Scotland and, again, to some extent, in Northern Ireland. So, we have a number of models, both within the UK and outside, that we can turn to, and we do. There is no doubt about that. A lot of time is spent considering the way things have been done in other places.

[41] **William Powell:** Finally from me for now, could you give us some further insights into the opportunities that arise but also the challenges of drafting both in English and in Welsh and the particular benefits that potentially flow from that?

[42] **Mr Huckle:** I am just wondering where my note is about this; I had a few notes on this. Could you point me to the note I had on this, Dylan? Anyway, I can remember. There are some downsides, so let us get those out of the way first. Of course, it is resource intensive and there are great complications caused by the fact that we have a background of English-only statute law upon which we are now laying a new layer of bilingual statute law. There are some who would say that it was a negative picture because of those two factors. I would not agree. There are definite advantages to the process, apart from the fact that we are a bilingual nation with two official languages, and we in Welsh Government are completely signed up to that idea, of course. That is the starting point.

[43] However, even if you just look at it from the point of view of whether there are any benefits to arranging things in this way, you will see that there are, because the process of consideration and thinking in the two separate languages as part of the drafting process helps to tease out meaning in a way that would not happen if you were simply using a single language. For example, a comparison that we could make is that the New Zealanders have a specific expertise in linguistic analysis as an add-on to the legislative process. We take the view that we do not need that because we automatically have it by virtue of the fact that drafters are working in both Welsh and English and constantly considering, as they are doing so, how things are expressed in the two languages separately and whether there is a better way of doing it to achieve the same meaning accurately in both languages.

[44] **William Powell:** Okay. Thank you very much.

[45] **David Melding:** Could I just ask what sort of training goes on in terms of the use of Welsh? You have got the challenge, presumably, that some of the team can draft in English and in Welsh, while some will be monolingual, and some of them may have come in from outside and may not really understand an awful lot about the cultural differences in Wales. Is there some programme that goes on to ensure that these highly technical experts still have that basic knowledge of why we do things like this in Wales?

[46] **Mr Huckle:** Chair, I am going to say straight away that I am not in a position to answer that question. There are two ways that I can approach this: either I can ask Mr Hughes to help you with it or you could leave it until he gives evidence himself. I am quite content to approach it in either way.

[47] **David Melding:** We will do the latter, I think, and wait until Mr Hughes is here. I am sure that, on the next set of questions, however, on primary and secondary legislation and the balance et cetera, you will have a view. I will ask Suzy Davies to take us on.

[48] **Suzy Davies:** Yes, thank you, Chair. I hope that you can help us with this. Ministers routinely come before us and say that they are confident that they have the right balance between what is on the face of their Bills and what is in secondary legislation. Are they right to be confident?

[49] **Mr Huckle:** Yes, of course they are. No, I think the real answer is that I consider this to be essentially a political question in the end, because there are various approaches and various degrees of approach in relation to how much you put on the face of the Bill and how much you leave to secondary legislation. I see it as part of the process of, first, the development of the legislation and the drafting of it, but more particularly of the analysis, scrutiny and passing of it to reach final conclusions about that. From a lawyer's perspective, it does not to me much matter—obviously, there might be extreme examples where I might think that it did matter, but, generally speaking, I do not take strong views about it because it is a matter of the process of scrutiny to me. Of course, different people and different bodies will take different views about where the balance is right. I know that Ministers have been appropriately questioned about the balance in relation to particular Bills and views have been formed by this committee and ultimately by the Assembly as to whether they are right or not. I think that it is something that it is, first, very difficult to generalise about; it very much depends on the subject matter. I think that there are some misconceptions, by the way. I think of the social services Bill. I know that there have been some suggestions that the balance is wrong there and that it is in some way a framework Bill. I fail to see how a Bill as long in detail as that Bill could properly be described in that way. However, again, my judgment does not matter too much on it.

[50] **Suzy Davies:** You talked about misconceptions there. Some of the Ministers who come before us, in their responses to the question, 'Have you got this balance right?', rely quite heavily on the fact that they are following your guidelines. Do they have any misconceptions about your guidelines?

[51] **Mr Huckle:** No, I do not think so. I think that what I say about the guidelines—. I am conscious of the observation that the Chairman made in one of the meetings about Ministers' reliance on the guidelines, and I fully accept, by the way, that it is a matter for this committee and ultimately the Assembly to take its own view of the appropriateness of—. I think that, in that case particularly you asked the question about affirmative and negative procedures, but these things tend to merge one into the other. All of these matters are matters where, as far as my guidelines are concerned, I still believe that we have done the best we can to set out the principles. However, where you think an individual case, a particular case, falls—on which

side of the line a particular decision falls—is a matter of judgment that people will take perfectly appropriate differing views about. The question then becomes: who decides?

[52] **Suzy Davies:** That is a good question in itself.

[53] **Mr Huckle:** But it is not me. [*Laughter.*]

[54] **Suzy Davies:** Well, perhaps I can ask you this one to do with appropriateness. We have noticed as a committee, and in fact it is in the Government's evidence as well, that one of the elements that a Minister might have to take into account in deciding what is on the face of the Bill and what ends up in secondary legislation and, indeed, the procedure applied to it, is the need to balance the need for scrutiny with the effective use of Assembly time. Do you think that that is an appropriate guideline or a good thing to rely on?

[55] **Mr Huckle:** I am relaxed about reliance on guidelines like that, because we live in the real world where practicalities have to be taken into account. I am conscious that there is a lot of consideration of the burdens placed on Members who are scrutinising legislation. The idea of regularly introducing additional burdens of that type to scrutinise procedures is not very appealing, if I may say so. Again, it depends on what judgment you make about a particular matter and, clearly, differing views can be taken, and it is appropriate for differing views to be taken and considered and a judgment formed or judgments formed.

[56] **Suzy Davies:** You acknowledged that there is quite a lot of pressure on the scrutiny role of the Assembly. It is not an easy process, and you call that pressure considerable, but you also said that we, meaning the Assembly, can do it and we do it well and that you were not concerned by the lack of ability to deal with the legislative process. So, does it concern you at all that any Ministers are using this question of the balance of the need for scrutiny and the time available to the Assembly in order to justify any of the balance questions that they put forward? Would you not agree that scrutiny and how much scrutiny that we carry out are matters for this Assembly, and it is not for the Government to turn around and say, 'We're very sorry, Assembly, you don't have an awful lot of time to do this. We'll make the decision for you'?

[57] **Mr Huckle:** I suppose that you raise a perfectly proper question for me, and I do not feel that I am the person to answer it, now that I think of it. All that I was trying to suggest was that it seems to me that anybody making a decision of any kind is entitled to take into account the practical realities of what can be achieved and what resources are available. However, I can see how a different view could be taken on that point.

[58] **Suzy Davies:** Thank you; that is good to know.

[59] **David Melding:** It would seem to me to sit more logically with, or be more seemly for, the legislature to determine what its capacity is rather than the Government, would you not say?

[60] **Mr Huckle:** I am not going to be drawn any further, Chair, I have to say. I can understand that, were I to be in the position of a Minister, I would take things of that kind into account, unless somebody told me that I should not.

[61] **Suzy Davies:** I think that we have a clear view on that now, Chair. Perhaps I could ask you a little bit about other routine reasons that we are given by Ministers for deferring certain things to regulation, and they include the need to futureproof a Bill or add flexibility to a Bill, and, of course, we would recognise that that is necessary in some situations. We are just a little concerned that it tends to be a routine answer. Would you expect Ministers, in those circumstances, to explain why specific powers are necessary for flexibility or

futureproofing, rather than just giving it as a bland response with no follow-up?

[62] **Mr Huckle:** That is what is called a leading question, I think.

[63] **Suzy Davies:** Yes. [*Laughter.*]

[64] **Mr Huckle:** I expect Ministers to be subject to scrutiny in what they say that they are doing. I do not think that I can say any more about it, really. Again, it depends on the individual case, but I am of the belief that the whole purpose of this procedure is so that this committee and the Assembly can test the reasons put forward for taking a particular line.

[65] **Suzy Davies:** Are they getting sufficient advice to be able to answer questions of that nature?

[66] **Mr Huckle:** Advice from—

[67] **Suzy Davies:** Depth of advice from their legal teams, I am guessing. Maybe that is not a question for you, but I am not sure whom to ask.

[68] **Mr Huckle:** Again, I am not sure, in the end, that that is a legal question. It seems to me to be more of a political question as to whether, in fact, this particular policy requires futureproofing by the use of regulation vehicles rather than primary legislation. However, undoubtedly, as I think that your question accepted in its premise, there will be—perhaps, usually will be—a need to enable if not rapid response, then a quicker response than is required in order to amend previous primary legislation.

[69] **Suzy Davies:** One last question on framework Bills: we tend to criticise everything as a framework Bill here, although I heard what you said earlier. Is it a fair observation to make that Bills should have more detailed development before they are brought to the Assembly, and the fact that they do not is what is prompting a generalised accusation of everything being a framework Bill?

14:15

[70] **Mr Huckle:** No, I do not think that it is a fair observation. My own view of the legislation in this Assembly is that very little, if any of it, can properly be characterised as framework legislation. I understand ‘framework’ to be legislation that really has very little substantive content and that virtually leaves everything to subordinate legislation. I do not think that any of the Bills readily spring to mind as being of that type.

[71] The balance between how much is put on the face of the Bill and how much is left to secondary legislation is a slightly different point and, once again, as I have already said, it is essentially a matter of political judgment to be considered and, if necessary, argued about.

[72] **Suzy Davies:** The reason I asked that is that you may be familiar with what has happened on the Higher Education (Wales) Bill recently, where, at Stage 2, the Minister had agreed to bring forward not only a paper of policy intention so that we might know what would be happening in regulations, but also some draft regulations for us to consider as well. In view of the fact that so little was brought forward by Stage 1—or, actually, the committee stage prior to Stage 1—we think that is good practice, but can you see why, perhaps, people might be wondering whether, if that level of work had been done before the Bill was introduced, the Bill might have looked different to begin with, or a Bill might look different to begin with?

[73] **Mr Huckle:** Possibly. What you are identifying there is, as you are putting it, a lack

of detail. That still does not answer the question of whether it is more appropriate to have it on the face of the Bill on the one hand or as a matter for subordinate legislation on the other. However, whether it would change the balance to have had the draft regulations ready, if you like, at the point of introduction, I do not know; it would depend on the review of the two things taken together.

[74] **Suzy Davies:** Okay, it just makes it more difficult for us to scrutinise if so much is in regulation that we do not see in advance.

[75] **Mr Huckle:** I take the point.

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

[77] **David Melding:** On this section, Alun, do you want to follow up?

[78] **Alun Davies:** Yes. I am not sure that it is possible to produce regulations at the same time as primary legislation, so I would not necessarily agree with that proposition. However, in terms of looking at the progress that has been made, in earlier evidence, Counsel General, you talked about the way in which the drafting office and your own office have developed over this Assembly, in the period since the last election. It would appear to me that lessons have been learned in structures and processes. Have lessons also been learned in terms of the issue of drafting, of balance between primary and secondary legislation, and the use of affirmative and negative procedure? The fact that you have issued guidance on such matters indicates to me that you did have some concerns about that at the beginning of this Assembly at least—or when you were appointed.

[79] **Mr Huckle:** I think there was a commitment made by the former Counsel General that that would be done. I seem to remember that that was the way it played. So, I am not sure that ‘concerns’ is quite right. However, may I put it this way: it seems to me, and us, appropriate to have a set of guidelines by which those who are making decisions as to which to do make those decisions. I hope that that is relatively uncontroversial. That is not, in any way, to dispute, Chair, your observation about it being a matter for this committee, for example, to consider the appropriateness of a decision made and for the Assembly as a whole, in due course, to take its view. However, clearly, those who are making the decisions and those who are advising them need some standards and criteria by which to do it. I remain happy, if I can put it that way, with the guidelines as drafted, although as I said in answer to another question, whether a particular situation falls into one set rather than the other may be a matter of judgment upon which people may reasonably take different views. However, if I can also put it this way, if there is something or there are things about the guidance as currently drafted that are thought not to be optimal, then certainly, as I understand it, the Government and I, personally, are quite happy to consider those. It was not intended as a once-and-for-all, perfect set of guidelines; it was intended as a set of guidelines to be of practical application and to help.

[80] **Alun Davies:** In the drafting of legislation and the production of primary legislation, your office would, of course, have an eye over that and would take a view on whether those guidelines were being delivered in each particular piece of legislation.

[81] **Mr Huckle:** Absolutely. The guidelines are very much at the forefront of the mind of anyone who is considering that issue. They form part of the legislative manual that is the resource work within Welsh Government for drafting. They also form a very important part of the education process of those who are engaged in Bill teams and those who are doing legislation work.

[82] **Alun Davies:** Have there been occasions when you do not feel that drafted legislation

passes the test?

[83] **Mr Huckle:** No, I would not say that there have. I do not think that, as a lawyer, I have felt the need to say that at any stage. Even now, I am probably straying into what I have advised and what I have been asked to advise about. Again, I see this as essentially being a political question.

[84] **David Melding:** I would like to follow up a bit on how subjective it is, and it being political rather than following objective criteria and guidance. On the one hand, you say that Welsh Government believes that it has got this balance right between what is on the face of the Bill and what is left to regulations, and I think you actually said it as well. You only saw that it would be necessary to give advice on extreme cases where it is clear that something that should be on the face of the Bill is not. How can the Welsh Government be confident that it has found the right balance if it is a political question at the end of the day?

[85] **Mr Huckle:** There are a couple of things in that question, Chair. May I go back to what was built into the question firstly? Let me address it in this way. Regarding the decision as to whether a particular form of provision to deal with a particular matter falls into one path of the guidelines or the other, my view is that except in extreme cases it is not a question for the law officer, if you like. It is one upon which—. It is not quite a semantic question, but it is a matter of taking a view as to whether this type of provision falls into one set of rules rather than the other. That I think is a matter of political judgment. It will be informed, no doubt, by advice of various kinds, but nevertheless it is not one that I would ordinarily feel the need to interfere with. My own personal view—and I work very hard to maintain this distinction—is not the point. It is only if I am pushed to the view—to use the Wednesbury formulation that no reasonable person could take the view that it was one rather than the other—that I would feel the need to intervene at all. So, that is that aspect.

[86] The other point about the extreme case is that it is verging out of the matter of simple legal advice to the other and rather less clear aspect of the role of the Counsel General as the law officer concerned with (a) the rule of law and (b) questions of good law. Those are slightly different matters.

[87] **David Melding:** But you would regard it as one of the duties of your office should—let us talk notionally—a Government produce a Bill that clearly had a very important principle that went to the core of what was intended in the change of public policy, left at regulation, that could be on the face of the Bill and should be on the face of the Bill. It would be part of a Counsel General's duty to inform the Government that it perhaps needed to revisit that decision in terms of drafting, yes?

[88] **Mr Huckle:** I would not disagree with the proposition.

[89] **David Melding:** I put that abstractedly; I am not going to put it in a question to you.

[90] **Mr Huckle:** However, one has to remember that in this area, I am acting as legal adviser. I do not have a separate public interest, independent hat role in that context.

[91] **David Melding:** But not all your advice has to be asked for, does it?

[92] **Mr Huckle:** No, that is true.

[93] **David Melding:** You give advice as the legislative programme proceeds.

[94] **Mr Huckle:** I am not backward in coming forward, Chair. I will say what I think.

[95] **David Melding:** I find that answer satisfactory; I do not want to push the point. To go back to the original one, in a lot of what happens in these exchanges, there is an element of presenting the best case, being assertive and perhaps hinting that there are stricter criteria than there really are. The balance often is a political judgment, is it not? So, when this committee hears you or another witness saying, ‘Oh, we think we’ve got the broad balance right’, that is fine; I am sure that it is a sincere statement, but it is not very objective necessarily, is it? It is certainly nothing that we could rely on without further enquiry. Would you agree with that?

[96] **Mr Huckle:** Without drilling down to an example, I would find it quite difficult, but, in principle, I would tend to agree with that proposition. I am the one who is formulating it as a political judgment, so it is difficult for me to suggest that, for example, this committee would not be entitled to query a political judgment, because that is part of the process.

[97] **David Melding:** I think that what I just said probably describes most systems. However, we sometimes see things as being more scientific than they really are—they are arts. Anyway, we need to get through a few more questions. William will lead us on.

[98] **William Powell:** Diolch, Gadeirydd. Counsel General, would you like to comment on the extent to which the legislation that has thus far come out of the fourth Assembly has delivered consolidation and what, if any, factors have hindered the delivery of such consolidation?

[99] **Mr Huckle:** It is a big subject this, as you know, and it is one which I am very interested in—I was going to say ‘concerned’, but not ‘concerned’ in a worried sense; it is something that I am very concerned with, if I can put it that way. It is the area, as I think you will know, in which—. If I lead for anything in Welsh Government, it is on the related issues of access to legislation and potential consolidation procedures. Could I put it this way? One, we as a Government, and, in particular, the First Legislative Counsel, and all of the legal group, have done what can be done, as major Bills—well, all Bills, but particularly the major Bills that recast an area of activity—come through, to try to draw in the other statutory sources and to restate them or modify them to bring it all into one place. That has been part of the ethos, if you like, of drafting for Bills, that, where it is possible to do that, that is done. That is, if you like, an individualised, Bill-by-Bill approach to consolidation as you go.

[100] The more general issue of consolidation is frankly more difficult, and the reason it is more difficult is because, given a choice between getting legislation and the programme done and doing things to make life better for the people of Wales, on the one hand, and making the statute book tidy, on the other—if that is a choice—then it is not difficult to understand why many people think that the former is more important than the latter. The latter can be sometimes characterised as an indexing problem, and does technology not deal with all of that? Well, we know that technology does not deal with it all. I would not say that I was concerned about it at the moment, but let us put it this way: if, in 20 years’ time, we have not done a good job of ordering the statute book as it develops from Cardiff against the background of the England and Wales statute book, which I think runs to 4,000 statutes, then it could be an almighty mess and everybody concerned would be appropriately subject to criticism for allowing it to get there. Those are two points.

[101] Thirdly, I know that the new Lord Chief Justice, for example, has made speeches about, and is very interested in, the idea of considering Wales’s ability to do different things in terms of ordering its statute books. So, there is the issue of codification; there are procedures for consolidation that everybody is already talking about. One of the main reasons for going to New Zealand, in my case, was to talk to them down there about their methods. I think I mentioned in Assembly once the New South Wales computerised systems for drafting Bills: you can search back to what the law was at one day 10 years ago or whatever it might be. That is all fantastic, but, of course, we have to acknowledge that the resources issue is

constantly there, and the question always is, ‘How much money is available to spend on these aspects?’ However, I am very optimistic about it because I think that there is a mood in favour of ensuring that, as we go forward into the next Assembly, steps are taken to make sure that the statute book is in good order.

14:30

[102] As you, I hope, may already know, the Law Commission is now going to be engaged in an advisory project to Welsh Government, scoping what can, or ought, to be done to create regularity, if you like—to regularise the position. So, there is good work being done, and we are thinking very hard about it, as I know this committee and the Assembly generally is. Does that answer—? Sorry, that was a very long-winded answer.

[103] **William Powell:** No, that is helpful. Thank you. Some of those who responded to our consultation have suggested that Welsh Bills, when amending previous Westminster legislation, should restate the whole amended section.

[104] **Mr Huckle:** Yes.

[105] **William Powell:** I do not know to what extent you feel that there are merits in that approach, and how far it has proved possible to date.

[106] **Mr Huckle:** Well, we have done that—you have done that, I am sorry. It depends on context. Sometimes, simply to restate a provision from an Act of Parliament is not much help, really—you would need to go back to the Act of Parliament and look at the context for the provision. Also, sometimes, there just has not been the opportunity to go back and do a complete rewrite, which sometimes is what you need to do to extract the Welsh-only provisions out of Acts of Parliament. So, as I said, where it has been possible to restate the law—drawing in not simply an amended section, but to take the whole of the Welsh part of a statute out, which was done, for example, in the human tissue transplantation legislation—it has been done. Where it is not possible to do it as things presently stand, there have been occasions where it has not been done. It may be that, through force of timing of legislative programme or whatever, the simpler, quicker way of dealing with it now is to amend the existing statute. Decisions are sought to be made on a case-by-case basis, and it is, of course, part of the scrutiny process for this committee and the Assembly to query it if the wrong choice is said to be made, or is suggested to be made.

[107] **William Powell:** Yes, absolutely. Thank you. Finally from me for this section, Counsel General, I wonder whether you would like to take the opportunity to comment on the Planning (Wales) Bill currently before the Assembly—in the context of consolidation, but maybe also drawing on the earlier questions from Suzy Davies around the nature of framework legislation, and the potential pitfalls that apply from that.

[108] **Mr Huckle:** I think that what I can say about it is quite limited at the moment. I think that, in principle, this is an example of where, because what is proposed is to completely change a system that has been in place under Westminster legislation for a long time, it was seen as appropriate to cast more of a framework paving Bill, if you like, ahead of more detailed change in due course. As a lawyer, I have no difficulty with that; again, it is a matter of judgment as to the best way of doing it, and that has been seen as the right way forward, and I am not criticising it.

[109] **William Powell:** Do you understand why some key stakeholders in the field of planning have commented that, in some ways, this Bill is rather like an empty wardrobe, and that so much is to be determined by regulation that there are real concerns about how that will be subject to scrutiny?

[110] **Mr Huckle:** I understand the criticism. I am not a planner by training or practice, but it is my impression that planning has always been based on more of a framework of primary legislation and lots and lots and lots of circulars and guidance and development plans and so on. So, in principle, I am not sure that that is a particularly valid criticism in this particular field, but I am the first to acknowledge my lack of experience of a particular field.

[111] **William Powell:** I am grateful. Thank you.

[112] **David Melding:** It certainly would have been in the public interest if planning law could have been consolidated—maybe it is just not possible. However, it is an example of a big Bill that has big public impact, is it not?

[113] **Mr Huckle:** I am certainly not going to doubt—

[114] **David Melding:** I can understand the pragmatic reasons for what has been done, but—

[115] **Mr Huckle:** Sorry, I should have said this already and I am being reminded that, of course, there is a lot of work there being done with the Law Commission. So, in terms of the fleshing out of the detail of the system as it will in due course be, we are working very closely with the Law Commission to make sure that that is as good as it can be.

[116] **David Melding:** We need to pick up speed a bit if we are going to get through the full list of questions. Suzy, do you want to—?

[117] **Suzy Davies:** Okay. I think I can limit my questions, actually. To stay on this question of expedience and pragmatism, as I think the Chair called it, does that call into question the timing of some Bills? Certainly, with something like the planning Bill, if there is outstanding work at the Law Commission end of things, could this, just as an example, have been delayed a little? Is that a mean question?

[118] **Mr Huckle:** Well, it is not mean, but I am not sure how I am to answer it, really. Any Bill could be delayed or brought forward. Again, it is a question of decisions being made as to the right timetable for a Bill and I do not feel in a position to challenge it.

[119] **Suzy Davies:** No, I perhaps understand that, but the effect of an expediency approach is that the encyclopaedia of Welsh law might not be as accessible or as easy to understand as it could be, as it is developing. It is actually a fetter on your ambition, this. Would you say that is—?

[120] **Mr Huckle:** No, I do not think so at all. Again, we are shading into a related but separate subject there, I think. Given that the policy intent is to completely recast the planning system in Wales, and given that the work is being done with the Law Commission in relation to that, it is a question of making progress and driving the process on. It seems to me that that is what is behind the way the decisions have been made, not that I was directly any party to them; I should make that clear.

[121] **Suzy Davies:** No, that is fine. It does not worry you, however, that the encyclopaedia of Welsh law might be progressing more slowly because we have Acts that are not consolidated.

[122] **Mr Huckle:** Well, no. The encyclopaedia of Welsh law is not progressing more slowly, or, as far as I am concerned, particularly slowly. Good work is being done to get that up and running and we are looking forward to having that up and operational in the early part

of next year. How exactly the legislation on planning is done or progresses does not really affect that process, because the law will be commented on as it is and then updated as the law develops.

[123] **Suzy Davies:** All of those updaters, yes. This is the final question from me: an interpretation Act, do you think that is a good idea?

[124] **Mr Huckle:** It is a necessary evil, in a way, an interpretation Act. On one view of it—and others would disagree, I know—if you need to go to an interpretation Act to understand the Act that you are looking at, then that is a sort of admission of failure. I am, to some extent, being flippant; I am sorry, I do not mean to be—

[125] **Suzy Davies:** No, I think you are being very accurate.

[126] **Mr Huckle:** There are circumstances—there are matters about which an interpretation Act is required. I imagine that the point of your question is directed at whether we need one for Wales, as opposed to the standing Interpretation Act 1978 for England and Wales. Of course, there are elements of interpretation that are particular to the Welsh context, which are simply not dealt with in the interpretation Act as it currently stands, for example, linguistic issues and the interpretation of Welsh expressions and so on. My preference is to make clear on the face of an individual Act what it means.

[127] **Suzy Davies:** Thank you. That is all from me.

[128] **David Melding:** Alun is next.

[129] **Alun Davies:** Could I cover explanatory memoranda? The Government accepts that they vary significantly. Are you content with the explanatory memoranda that have been submitted to you over the last three years?

[130] **Mr Huckle:** As a general answer, yes, I think I am content. Again, I think it is a necessary matter that material like this will vary. It will vary because the subject matter will be so different. I am not particularly aware of a vast variance in quality—again, others may take a different view. Generally speaking, however, I am reasonably content that, taken together, the Acts and the way in which they are expressed, which is deliberately plain language drafting, as far as we can do it, on the one hand, and the explanatory memoranda on the other, explaining some of the nuances perhaps, and in a particular context—. I am conscious that, whereas in Westminster there is still a thing called Parliamentary sovereignty, legislation down here is constrained by Assembly Act provisions in the Government of Wales Act and Schedule 7. Therefore, it is sometimes necessary to explain why a Bill does not do something when someone looking at the situation might think that it ought to do it. So, there are issues like that. There are issues of compliance with EU law and human rights law; the explanatory memorandum can assist with an understanding of that. Generally speaking, I do not feel concerned.

[131] **Alun Davies:** Okay. That is interesting. This is one area where I think that there is an issue in terms of the legislative programme. Without straying into particular examples, which might cause you some difficulties, I can think very easily of explanatory memoranda that have failed because they have not reached a sufficient quality threshold. I can think very easily of examples of where there has not been a sufficiently good and close relationship between Government lawyers and drafting officials, which has caused significant difficulties for some Ministers.

[132] **Mr Huckle:** Right.

[133] **Alun Davies:** You do not see any difficulty with that.

[134] **Mr Huckle:** I am wondering whether I should say this, but I am going to anyway: no such instance has been drawn to my attention.

[135] **Alun Davies:** Okay. So, you are completely content with the structure of the relationship that exists between Legal Services and officials, and that there have been no issues at all drawn to your attention about the quality of explanatory memoranda.

[136] **Mr Huckle:** As I said, no issues have been drawn to my attention. So, I was content until you just drew that to my attention. So, now I am no longer content.

[137] **Alun Davies:** You are no longer content. Okay.

[138] **Mr Huckle:** Without further investigation.

[139] **David Melding:** I would just like to touch upon the Supreme Court judgment in relation to the Agricultural Sector (Wales) Act 2014. Has that made your job easier, and has it clarified the situation? Would things be even clearer if we did move to a reserved-powers model, which now seems quite likely? Where do we stand in terms of these quite significant developments in terms of the quality of our law-making process?

[140] **Mr Huckle:** In reverse order, I do think that it would make things clearer if we moved to a reserved-powers model, as seems to be likely. I do not think that it is the panacea that some people think that it is. After all, in the end, you are seeking to define what is, on the one hand, devolved and what is not, on the other hand, devolved. Whether you do that by a conferred or reserved model, it is essentially the same point. It is a matter of defining one category and leaving the rest in the other category. I am revisiting submissions that I made to the Supreme Court here. Nevertheless, experience tends to suggest that, in relation to this form of constitutional legislation, there have been fewer definitional problems, if I can put it that way, with the reserved-powers model than there have been with our model as it currently is. Whether that is truly because it is more difficult to understand the conferred-powers model, or whether it is more to do with attitude to devolution, politically, operating on the one hand towards Wales and on the other hand towards other parts of the United Kingdom, I do not know. However, I certainly do not exclude the possibility that that latter consideration underlies some of these so-called problems to which I have adverted. We saw the bye-laws issue as a non-issue from day one; and we saw the agricultural sector issue as a non-issue from day one. Others disagreed and they still do.

14:45

[141] I was reading very recently observations made, I think, by Lord Howe in Westminster to the effect that tort law is not devolved. If that is the view in Westminster, it is one with which I wholly disagree. It fails to address the question as it was posed and answered in the Supreme Court in reference to the agricultural sector. It seems to me that there is still a lot of misunderstanding about what the nature of even the conferred-powers model settlement is to Wales.

[142] **David Melding:** I think that this could start a whole area of discussion, but we do not have time. Thank you very much, Counsel General, for that evidence session. I think that it added a lot to our knowledge and helped our inquiry very considerably. May I apologise, once again, for the fact that we had a slight delay at the start?

[143] **Mr Huckle:** There is no need.

[144] **David Melding:** It was nothing to do with you or your team. We thank you for your patience. We hope that, in good time, you will find our report interesting. Thank you once again.

14:46

**Offerynnau nad ydynt yn Cynnwys Materion i Gyflwyno Adroddiad arnynt o  
dan Reol Sefydlog 21.2 na 21.3  
Instruments that Raise no Reporting Issues under Standing Order 21.2 or 21.3**

[145] **David Melding:** This item is on the instruments that raise no reporting issues. They are, however, listed there for us. Are Members content? Yes.

14:46

**Papurau i'w Nodi  
Papers to Note**

[146] **David Melding:** There is a written statement in relation to the Social Services and Well-being (Wales) Act 2014. There is correspondence from the SD Alliance and a paper also on the section 109 Order, which is what the paper from the SD Alliance relates to as well. The second one is from the Commissioner for Sustainable Futures. Are we content to note these? Yes. Thank you very much.

14:47

**Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o'r  
Cyfarfod  
Motion under Standing Order 17.42 to Resolve to Exclude the Public from the  
Meeting**

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

*the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(xi).*

[148] I see that the committee is in agreement.

*Derbyniwyd y cynnig.  
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 14:47.  
The public part of the meeting ended at 14:47.*