



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

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

**Dydd Llun, 8 Mehefin 2015
Monday, 8 June 2015**

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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynnddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgriafiad 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

Angharad Huws	Llywodraeth Cymru Welsh Government
Ken Skates	Aelod Cynulliad, Llafur (Dirprwy Weinidog Diwylliant, Chwaraeon a Thwristiaeth) Assembly Member, Labour (Deputy Minister for Culture, Sport and Tourism)
Eifiona Williams	Llywodraeth Cymru Welsh Government

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

Stephen Boyce	Y Gwasanaeth Ymchwil Research Service
Matthew Richards	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Naomi Stocks	Ail Glerc Second Clerk
Joanest Varney-Jackson	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 13:37.
The meeting began at 13:37.

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've received apologies from Dafydd Elis-Thomas, who was elected to the committee last week. I'm sure we'll want to record our thanks to Simon Thomas, who was such an outstanding member of this committee over the last four years. Can I just make a few 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 leave the building safely. Could you switch all mobile devices either off or onto 'silent'. These proceedings will be conducted in Welsh and English and, when Welsh is spoken, there is a translation on channel 1. Channel 0 will amplify our proceedings, should

you need that.

13:38

**Tystiolaeth mewn Perthynas â Bil yr Amgylchedd Hanesyddol (Cymru)
Evidence in Relation to the Historic Environment (Wales) Bill**

[2] **David Melding:** Item 2 is evidence in relation to the Historic Environment (Wales) Bill, and I would like to welcome Ken Skates, the Deputy Minister for Culture, Sport and Tourism, who is the Member in charge. Deputy Minister, do you want to introduce your colleagues?

[3] **The Deputy Minister for Culture, Sport and Tourism (Kenneth Skates):** Yes. Thank you, Chair. To my left, I have Angharad Huws, and to the right, I have Eifiona Williams.

[4] **David Melding:** Thank you. Welcome, all. Can I just start with the usual initial question, anyway, and that is are you satisfied that the Bill is within the Assembly's legislative competence?

[5] **Kenneth Skates:** Thank you, Chair. Can I take this opportunity to thank the committee for considering the Historic Environment (Wales) Bill? I am satisfied that it is within competence. Its principal purpose is to enhance the protection of buildings and monuments of archaeological, architectural and historic interest. Its purposes relate to subjects that are contained in Schedule 7 to the Government of Wales Act 2006, namely ancient monuments and historic buildings, culture, town and country planning, and also the environment. None of the provisions comes within the exceptions listed in the Government of Wales Act. Indeed, on 1 May, the Presiding Officer confirmed her opinion that the Bill is within competence.

[6] **David Melding:** Thank you for that, Minister. A substantial part of the Bill amends two Westminster Acts and, initially, it seems to us, this could've been a great opportunity to have had a consolidating Bill. Was it considered? Why have you not actually framed this as a consolidating Bill rather than having this approach of amending Westminster statutes?

[7] **Kenneth Skates:** Yes. There were three years of consultation that led to the drafting of the Bill. I think it's worth noting that the two Acts that we're amending, from 1979 and 1990, are fundamentally robust, but there are clear deficiencies contained within them, which this legislation seeks to address. Working within the legislative timetable for the fourth Assembly and given the limited resources available, pulling together all of the historic environment legislation into one Bill was not practicable. It would've been a major project and it would've gone much wider than just a technical consolidation, especially as the 1990 Act is a planning Act and there are plans in place to consolidate the planning legislation in the next term. So, the approach that I've taken will enable us to deliver on the policy objectives for the Bill within a framework of legislation that is already familiar to stakeholders, to those groups involved with maintaining the historic environment, to local planning authorities and also to members of the public. The provisions within the Bill will most certainly take Wales ahead of the other nations of the UK.

[8] **David Melding:** I see you're confident it will achieve your policy objectives, and, anyway, that's for another committee to determine, but it does create a messy situation, then, because we're again in this game of amending Westminster statutes, so you'll have the Secretary of State mentioned, the amendments will talk about Welsh Ministers, and it's very difficult for anyone out there to now read the new statutory framework and really understand

who's being referred to. So, did you consider any of these issues?

[9] **Kenneth Skates:** Yes, yes we did. First of all, I think there would be much to recommend a consolidation Bill in a future Assembly. We would not rule that out. However, we've got a mandate to deliver this piece of legislation. In so far as discrepancies are concerned, both the 1979 and 1990 Acts, as you note, predate the devolution settlement. Now, in legislation that predates devolution but which has been amended since, it's common to find differences in references. Those familiar with the historic environment legislation will be aware that pre-devolution references to the Secretary of State are to be read as referring to Welsh Ministers. This is also made clear to lay readers using legal databases, as these databases will also include explanations and footnotes. Now, the only way that we would've been able to provide absolute clarity would've been to make textual changes to every single reference to the Secretary of State, which would've been, indeed, a very significant undertaking. In addition, it would've been necessary to amend parts of the 1979 Act and the 1990 Act, going beyond the policy intent, which, in turn, would've widened the scope of the Bill and detracted from the priority of improving the protection of ancient monuments and listed buildings.

[10] **David Melding:** Okay. Well, I think you've ably demonstrated the disadvantages of proceeding this way, but we are fairly familiar with them. I'll ask Suzy Davies to take us forward.

[11] **Suzy Davies:** I was just going to say, Chair, you've almost made the argument for a consolidation Bill there. I mean, I hear what you say about the references to the Secretary of State versus Welsh Ministers, but, in terms of public accessibility, even though I hear your answer, I don't think it's that straightforward, even for professionals, to find out what's going on here. Perhaps I can just give you a couple of examples, if that's all right. Early on in the Bill, section 2 refers to the concept of interim protection, but this is a concept that only applies in Wales. Is it clear from reading the amended existing Westminster statutes that this concept of interim protection really does just apply to Wales?

[12] **Kenneth Skates:** Well, I think, in addition, we are also providing Keeling schedules, which will help lay readers as well as professionals and local planning authorities to appreciate the amendments. The Keeling schedules that we've been able to provide to the committee are also being published on the Assembly website and also on Cadw's website. So, that will assist in public awareness of the differences, but we do recognise that amending legislation does make it more difficult for the public to access.

13:45

[13] **Suzy Davies:** Yes, and thank you for the Keeling schedules, which I had a look at before I came, as well. Actually, I have to say they highlighted this issue that there's a difference between Welsh Ministers and the Secretary of State, which would've been resolved by consolidation.

[14] We're staying on the same sort of subject area here about, shall we say, the unexpected consequences of not consolidating? I refer in particular to section 2(5)(a) of the Ancient Monuments and Archaeological Areas Act 1979, which extends to Scotland. Under your Keeling schedule, there's a new section 2(5A) that only applies to Wales, but on a completely different subject. Is that the kind of—even I'm going to use the word 'technical' now, Chair—technical error that should've been spotted before the draft Bill came out? I appreciate it's very specific.

[15] **Kenneth Skates:** Eifiona, could you outline the—?

[16] **Ms Williams:** Yes, that's fine. Basically, the change that's been made by the Scottish legislation obviously only applies in Scotland. Now, we are working within the legal jurisdiction of England and Wales, so that specific subsection that you refer to would've been vacant in the law of England and Wales. That's one of the reasons why we've produced these Keeling schedules—to avoid that complication. So, if we had used a different section number that would've come afterwards, it would potentially have misled the reader to think that that Scottish provision actually applied within our jurisdiction. So, that's why we've taken the approach we have.

[17] **Suzy Davies:** Doesn't the reverse also apply: that you've got something that refers only to Wales but could be mistaken for applying in Scotland, as well?

[18] **Ms Williams:** The same theory applies there: it's only in the jurisdiction of England and Wales. I mean, this is normal drafting practice for our Office of the Legislative Counsel and the Office of the Parliamentary Counsel.

[19] **Suzy Davies:** Well, it's useful to know that, actually, in terms of our making laws inquiry, but in terms of keeping law obscure, it probably does just that. But I thank you for your answer anyway.

[20] Could I just ask you now about our good old favourite: the balance of what's on the face of the Bill and what's in regulation? What criteria did you take into account in deciding what should go on the face of the Bill and what could be safely left to regulation?

[21] **Kenneth Skates:** Okay. First of all, if I can just take a step back and add one more point to the previous question, there are some databases, such as Westlaw, which enable the reader to view legislation by reference to each separate jurisdiction, which should then help in appreciating the differences between the laws of each nation.

[22] In terms of the balance between what's on the face of the Bill and what's placed as secondary legislation, in drafting the Bill, we were very careful to place as much as possible on the face of the Bill, rather than relying on secondary legislation. We believe that it does strike the right balance between the detail on the face of the Bill and the need to be able to react to what are often changing circumstances within the historic environment.

[23] So, as detailed in the explanatory memorandum, the Bill necessarily includes, say, what are a modest number of powers to make subordinate legislation, but most relate to administrative arrangements. Where they concern more substantive matters, we propose that they're subject to the affirmative procedure. There are new provisions that need to fit in with the existing regime, and in most cases are there to either simplify or to strengthen the existing legislation. So, for example, in section 5 of the Bill, there is a power to make regulations providing for the simplification of scheduled monument consent processes. The consent process is already governed by regulations, so we considered that making these changes by regulations was the most appropriate approach.

[24] **Suzy Davies:** Thank you very much for that answer.

[25] **David Melding:** Could I just probe on this business of needing to use a database and all the rest of it? They are useful, of course, but they're expensive. This is a piece of legislation that deals with thousands—potentially, anyway—of monuments, down to one that could be in an individual's back garden. There are a whole slew of organisations out there that seek to protect their local environment and the historical fabric of an area. These are not sophisticated lawyers; these are people who need some access to the law to realise what the current obligations are. Did you think about this when you decided not to consolidate and to have what I think we have to accept is a very technically convoluted approach to making law?

[26] **Kenneth Skates:** Well, there will also be a comprehensive mapping database that will be accessible to all and able to inform any person of the location and the details of a scheduled monument. Insofar as listed buildings are concerned, owners will be aware through searches of any listed status of a building that they purchase. Eifiona, is there anything you'd like to add?

[27] **Ms Williams:** There's been a lot of consultation with, obviously, the external stakeholder groups, so, the people who work within this field of legislation day in, day out, have been on board during the progress of this Bill. I know there have been a lot of policy and electronic bulletins to make them aware of the changes that will be coming in.

[28] **David Melding:** And you asked them about whether they prefer a consolidated measure or having to rely on these access tools to really understand what their legal obligations are. Did you get into that detail?

[29] **Ms Huws:** We did ask, and I would be lying if I said that they would want to see the amending legislation that we have. They support the policy intent, and they would like to see, in the future, consolidated historic environment legislation for Wales, yes.

[30] **David Melding:** That's a helpful answer. Back to you, Suzy.

[31] **Suzy Davies:** Can I just check with you on that? When the Bill was laid and we had the statement introducing the legislation, I asked this question about consolidation, and the Deputy Minister said something about an external reference group. Is that the group we're talking about—who said that consolidation was not a particularly attractive proposition? That doesn't seem to be the same as what you've just told me.

[32] **Ms Huws:** I think what we were talking about was that the reform of the system wasn't a particularly attractive option to look at. They were happy with the structure and the framework of the legislation, but they would have liked to have seen all the legislation come into one piece of historic environment legislation for Wales.

[33] **Suzy Davies:** Okay. And the fact that this was initially timetabled to be the last of the pieces of legislation in the Government's legislative programme—didn't that give you an advantage over other departments that perhaps had to bring in Bills three or four times this size in a much shorter period of time? Although I appreciate the long consultation period—that was great—we could perhaps have had a longer drafting period that would have allowed consolidation. Is that a fair observation?

[34] **Ms Huws:** I think it was just a balance between resource, timetabling and the magnitude of the work, once it was looked at, to try and pull the legislation together, and not taking account of the unintended consequences of doing so. It was a much bigger piece of work than initially probably thought.

[35] **Suzy Davies:** Okay, thank you. Well, let's have a look at a couple more of those unintended consequences that have arisen as a result of non-consolidation. I appreciate the Deputy Minister's answer about why certain things are in the Bill and certain things aren't, and we would recognise that regulation is appropriate in many cases, actually, but there is a difference between regulations that allow Ministers to respond to changes in circumstances and things that arise over time, and regulations that are essential and must be introduced in order for the primary legislation to make any sense at all. I'm not going to take you through the entire list that I've got here, but I think I'm not with you on all your choices on this, Deputy Minister. There are some regulations here that I think give you a power to introduce certain activities when perhaps they might be duties. I'll just give you a couple of random

ones here, if that's okay. Section 3 is a very lengthy section, I must admit, but let's go to new section 1AE(6), which would be an amendment to existing legislation. I'll see if I've got the right bit here—actually, it's 1AD(2) and 1AE(6). The first is to do with compensation claims as a result of this new concept of interim protection. It says at 1AD(2), effectively, that somebody can apply for compensation within the prescribed time and in the prescribed manner. Now, they're not going to be able to apply for compensation if there's no prescribed time and no prescribed manner. Can you point me to the duty on Deputy Ministers to introduce regulations to prescribe time and to prescribe manner? You may not be able to do it off the top of your head, and that's fine, but we would need a note in those circumstances.

[36] **Ms Williams:** Clearly, there is an expectation here for the Welsh Ministers to set out that process, because obviously, as you said, they wouldn't be able to actually put in the claim for compensation without those prescriptive circumstances. It's been done in the way it has to allow for an element of adapting as knowledge grows, because obviously this is a new regime that has to fit into an existing regime, so we need to have a little bit of the tried and tested period of time. That's why it's been drafted in the way it has, but certainly, obviously that is something that the Welsh Ministers would do to enable this to work effectively.

[37] **Suzy Davies:** Okay, thank you. A similar issue arises again in the same section, in 1AE(6), which is about reviews of scheduling decisions, and an applicant can apply for a review of scheduling, but, again, if there's no obligation on Welsh Ministers to use the formula by which they can apply for a review, then it leaves the primary legislation inchoate. So, what I'm looking for, really, is an undertaking, perhaps, from the Deputy Minister to go through some of these again and, where you say there is an expectation of Ministers, or Deputy Ministers in your case, to do certain things in order to make the main legislation work, that they put themselves under a duty to do that, because the whole purpose, of course, of primary legislation is to create certainty. There are gaps in certainty here where, perhaps, an entirely different Deputy Minister may decide not to introduce these regulations, leaving applicants who are vulnerable in the circumstances of the Bill, unable to fight for the right, or enforce the right that is set out in primary legislation. There are a few incidences of this; I'm not going to take you through them all, if that's okay. Is that an undertaking you would be prepared to give today?

[38] **Kenneth Skates:** I'm happy to consider any of the recommendations that the committee may have in relation to any of the secondary legislation, for certain, including those that have already been outlined by the Member.

[39] **Suzy Davies:** Well, there's a whole string of them. Can I leave you with just one, and perhaps we can have an answer on this one today?

[40] **Kenneth Skates:** Yes.

[41] **Suzy Davies:** This is the heritage partnerships, which I think are a really interesting part of this Bill. I have to look at my notes here, but in section 9ZA(3)—it's the new section 11; it's in there, although even I'm struggling to find it now—these heritage partnerships have got to work for this Bill to make any sense at all. As I said, I think they're quite an exciting part of this Bill. There's a duty to consult here, imposed on Ministers, if I remember rightly.

[42] **Kenneth Skates:** There is.

[43] **Suzy Davies:** So, there's a duty to consult, you will consult on it, but then you're left with regulations to make provisions about quite fundamental things about what should be consulted upon and what happens to the results of the consultation in setting up a heritage partnership, including, basically, contract terms. Do you think it's safe to leave something as serious as that to a power? Perhaps that's something that a duty should be considered for as

well. I'm looking at this particular subsection, because there are six sub-subsections, some of which are fine, I think, perhaps, to leave to power and some to go to duty.

[44] **Kenneth Skates:** The purpose of section 9ZB(3) is to ensure that regulation-making power is broad enough to allow us to make provisions in regulations, rather than, for example, in guidance. These regulations will be subject to the affirmative procedure. This will, we believe, give Assembly Members the opportunity to consider the consultation requirements as well.

[45] **Suzy Davies:** Well, that would be great if, of course, the Deputy Minister were to introduce those regulations, but if there were a different Deputy Minister who didn't, it wouldn't matter what procedures apply to them, because they wouldn't exist. There are two or three in here that I think, myself, should be subject to a duty and, perhaps you'd include those in the list of what you've been kind enough to look at.

[46] **Kenneth Skates:** Indeed.

[47] **Suzy Davies:** Thank you. I said it was a long list; I'm not going to take you through them all.

[48] **Kenneth Skates:** I'm happy to consider the entire list.

[49] **Suzy Davies:** Thank you very much.

[50] Can I just take you to your section 39, briefly? This is on a slightly different subject, but I think it is a concerning one. This is Part 5, which is general provisions in the Bill—the sort of tidying-up part, if you like. In section 39(1), you're hoping to, if I understand this correctly, introduce an amendment to the 1979 Act, which is one of the two main Acts that's being considered today, in a way that would allow Welsh Ministers to make regulations or an Order under the 1979 Act to include power

[51] 'to make such incidental, supplemental, consequential, transitory, transitional or saving provision as the Welsh Ministers consider appropriate'.

14:00

[52] Now, this is quite a fundamental change to the 1979 legislation because it gives you powers to amend that Act, not necessarily in a way that any of us might understand. The reason I've raised it is because you're relying on two existing Acts rather than the consolidating Act. The Act that you are introducing makes as many policy changes as you think necessary to the existing Act, in which case you should have a pretty clear idea of what you need to do with the 1979 and 1990 Acts. At this stage, I would expect you to be so clear on that that you wouldn't anticipate any changes to the 1979 Act in the future. Can you give us some idea why this particular clause has been included and the type of changes to the 1979 Act that you would still be anticipating after this Act? Sorry it's a bit of a long question, but I needed to work it through.

[53] **Ms Williams:** The reason we've got this power in there is because, like you say, we're introducing new regimes to fit in with the existing legislation. That legislation obviously dates back to 1979. So, the reason we have this power really is to make sure that there is that smooth transition, and so if there is anything that we do need to change so that we can adapt or make sure that the new regime is effective against the existing legislation, then we may need this power to add to the pure changes that we are introducing via our Bill.

[54] **Suzy Davies:** I could understand why you would consider a section in your own Bill,

Deputy Minister, because you'll be looking for the future. But, we're looking at the moment at a situation where you've got two existing Acts that you're already amending, and, from what I understand from what you've just said, you don't think you've quite amended everything you need to amend yet. Is that a position you should be in if we're not introducing consolidation—consolidating legislation; apologies.

[55] **Ms Williams:** It's not that we haven't amended what we consider necessary to be amended; it's basically looking at the main thrust of those amendments and how they will sit alongside the existing legislation. Obviously, you can go some way to making sure that you've made all the changes needed, but when that regime starts to kick off and work in practice, we don't want to be left in a situation where we're unable to make changes other than by further primary legislation to enable that to work effectively, not only for, obviously, the protection of listed buildings and scheduled monuments, but also for those individuals that are affected by these changes.

[56] **Suzy Davies:** So, effectively, there's not enough flexibility built into the new Bill to enable you to overcome the kinds of concerns that you just articulated?

[57] **Ms Williams:** There are instances throughout where we've done that, but this is a, sort of, common power that's used across all types of legislation. But, that is there, basically, to ensure that there isn't that loophole created by the changes.

[58] **Suzy Davies:** I hear your answer; let's put it that way. I think I've got one more question. Ah, yes, if you don't mind, there's just one more, you'll be pleased to hear, and I think this is section 38(7)(h)—it's the advisory panel. We may have some questions on the advisory panel in the policy committee here, but this is about who makes up the advisory panel, and I know that there's a warm welcome, really, across the board here, which is great. But, to exclude people from such a panel is pretty serious. Can you give us some of your thinking behind this, particularly as people can be taken off this panel with the basic minimum of scrutiny as it's a negative procedure power at the moment?

[59] **Kenneth Skates:** We've already identified the main disqualifications for membership of the panel, and they're set out on the face of the Bill. But, it may prove necessary to amend the list in the future, taking account of any reorganisations or restructuring. And the regulation-making powers are necessary to add to that list of disqualifications on the face of the Bill, in the event of such reorganisations or restructuring taking place. We don't consider it appropriate to subject these regulation-making powers to the affirmative procedure. The affirmative procedure may be appropriate for regulations disqualifying persons from being Assembly Members, given the impact that such disqualifications may have on the democratic process. But, the advisory panel's role is purely advisory, and so it's not appropriate to subject the regulation-making power in section 38 to the same level of scrutiny.

[60] **Suzy Davies:** Okay, thank you for that answer, and I think, in certain circumstances, where a body might have disappeared, so they can't have any members from it, that's a perfectly acceptable answer. But, there are two caveats to my response there. One is that it says,

[61] 'a member of staff of an organisation specified in regulations made by the Welsh Ministers',

[62] so that's regulations introduced by you, and I'm not sure whether that would be affirmative or negative; I think it must be negative. And also, somebody who the panel itself considers is unfit to continue as a member. Now, both of those kind of speak to the reputation of an individual and I'm wondering if that shouldn't be something that itself merits the affirmative procedure. Certainly, the second part of it does. If I'm about to be kicked off an

advisory panel because I'm unfit and the reasons for doing so aren't able to be scrutinised by the Assembly, that speaks to my reputation. The likelihood is that a member of this panel is going to be somebody fairly important, I would have thought.

[63] **Kenneth Skates:** Do you have anything, Eifiona?

[64] **Ms Williams:** Yes. If I can use an example from previous legislation that's gone through the Assembly, the Education (Wales) Act 2014 established the Education Workforce Council and the qualification of that council was left wholly to regulations in terms of disqualification elements. Now, that council had more than a pure advisory role; they had more of a scrutiny process. That was deemed appropriate to be left to negative procedure in terms of the regulation-making powers—

[65] **Suzy Davies:** Well, not all of us deemed it appropriate, but, fair enough, I take your point. [*Laughter.*]

[66] **David Melding:** You're sometimes referring to issues where our report was ignored, so you can't assume we will just rely on precedent as somehow reassuring us.

[67] **Suzy Davies:** But I thank you for your answers.

[68] **David Melding:** They're noted. William Powell.

[69] **William Powell:** Diolch, Gadeirydd. Good afternoon, to you, Minister, and the team. Turning to guidance, Orders and directions, there's a link here between what I'm about to ask and the previous emphasis on the absence of scrutiny, really, because the section, as you're aware, allows Welsh Ministers to issue guidance about local planning authorities on their duties with regard to the historic environment records. But, no Assembly procedure applies and there has been some disquiet expressed as to why that is the case. I'd appreciate if you could please elaborate on the answers you've previously given with regard to that.

[70] **Kenneth Skates:** Well, it's not common practice for guidance of this nature to be subject to legislative procedure, and we consider that the duty to consult will provide those using the guidance with sufficient opportunity to consider and to make representations that will inform the issued guidance.

[71] **William Powell:** Okay, because that same concern applies, in some quarters, to section 40, and particularly section 43, which enables Welsh Ministers to commence by Order certain provisions of the Bill that are not automatically commenced. We've previously expressed concern as a committee, as the Chair referred to in another context, about commencement Orders, which do more than merely commencing a provision, and we still have some concerns around that. I wonder if you could expand on the reasons, again, for the lack of procedure under section 40.

[72] **Kenneth Skates:** Under section 40. Well, commencement Orders are not subject to any Assembly procedure because they're merely bringing into force provisions that have already been scrutinised and passed by the Assembly. The Bill will introduce new regimes, and in order to ensure that there is a smooth transition from the existing regime into the new regime, it's considered necessary to include limited ancillary powers. They'll only be used in connection with the commencement of the provisions. Section 40(4) doesn't give a power to make any wider provision in connection with commencement. We've deliberately kept this power as narrow as possible, whilst, at the same time, ensuring that the Bill's provisions can be commenced effectively.

[73] **William Powell:** And staying with this theme, Minister, Schedule 1 inserts Schedule

A2 into the Act of 1979 and paragraph 5(1) of that said Schedule A2 enables current and future Welsh Ministers to issue a direction that anything that should have been done by a duly appointed person in relation to a review of the Welsh decision to list a building, with the exception of making the decision itself, may be done instead by Welsh Ministers. We'd be very interested in exploring, again, why there is a lack of procedure with regard to this, and whether this is not putting too much power in the hand of yourselves, or, indeed, future Ministers.

[74] **Kenneth Skates:** Again, the provision is modelled on existing planning legislation. Directions are generally administrative actions, and there needs to be some flexibility to react to the particular circumstances. So, given this administrative nature, it would not be appropriate to make these subject to the legislative procedure. But, with any administrative action of the Welsh Ministers, there will, of course, be the right to challenge by way of judicial review available.

[75] **William Powell:** Okay. Well, I think my colleague may wish to go into other aspects of potential challenge, so I think that concludes my area of questions.

[76] **David Melding:** Just before we do that, you're right that guidance rarely has any procedure, but, in this case, guidance under section 36 could relate very much to the character, the depth and the breadth of a listing arrangement, or conservation areas being declared, which could have a huge impact on householders, for instance. I suppose it's the impact on the public, and those concerned, that needs to be considered, and, therefore, to do it by guidance, where you really could have a wider policy, as opposed to a narrower one, emerging, is not going to get the level of scrutiny that an alternative procedure would give you. I may be overanxious; perhaps this guidance won't give you that scope.

[77] **Kenneth Skates:** That's just for the historic environment records.

[78] **David Melding:** So, it's just the fact of how the record keeping is.

[79] **Kenneth Skates:** Yes.

[80] **Ms Huws:** The guidance is to do with the creation and maintenance of the historic environment record itself.

[81] **David Melding:** Okay, that's fine. I understand now. Alun.

[82] **Alun Davies:** Thank you very much. I'm sure the Minister will share with the committee consideration of the importance of human rights, and the place of the Human Rights Act 1998 in establishing the context for our work here in Wales. The Act is, of course, engaged on a number of different occasions through the scope of this legislation, and I'm sure the Minister—he's already assured a different committee that the place of human rights has been considered in developing the legislation, and in the way that the legislation has been worded and presented. But, there are a number of areas where, I think, there is a need to give further consideration to these issues. I'm concerned about article 8, rights to a family private life, and protection of property rights. You are assuming some significant powers here over people's property, and people's rights to a family life. Are you content that you have the balance in the right place, and what steps have you taken, Minister, to ensure that that balance is correct?

[83] **Kenneth Skates:** This relates to one of the clearest deficiencies that exist in the current legislation, namely that properties that are being used for storage can be excluded from urgent works, by virtue of them being occupied, essentially. We were very keen to ensure that article 8, and section 54(4A) were not in conflict, and the right balance has to be

struck between what we're trying to achieve in the Bill, in terms of protection of historic assets, and the rights of the individual. So, the new section 54(4A) of the 1990 Act enables local authorities to undertake urgent works to the whole or any part of the building in residential use, but only where those works would not interfere unreasonably with that use. The power can only be used where works are urgently necessary to preserve the listed building, and where those works don't interfere unreasonably with residential use. So, we've built into the system as well procedural safeguards, for example section 54(5A) requires at least seven days' notice to be given in writing.

[84] **Alun Davies:** But you do go a bit further than that, though, Minister, with all due respect. You've quoted section 55; now, that allows the recovery of the costs of work to be imposed on relevant land, as a charge. Now, one way of realising that, of course, is by compelling the sale of that property without the owner's consent, by going through a legal process. Do you believe that's proportionate in terms of what you're seeking to achieve here?

14:15

[85] **Kenneth Skates:** I do believe it's proportionate. There are many examples of local planning authorities being reluctant to carry out urgent works because of a concern of not being able to recover costs. So, new section 55(5A) to (5G) enables the recovery of expenses by way of a local land charge that we are content is proportionate. There are procedural safeguards, as well, built into section 55, which enables an owner to make representation to Welsh Ministers challenging any liability for costs, including on the grounds that the works were unnecessary.

[86] **Alun Davies:** Okay. Carrying on with the same theme about human rights, you have also reversed the burden of proof in some instances through this legislation. New section 2(8A) of the 1979 Act, for example, requires a defendant to prove that he took reasonable steps, whereas at the moment he only has to prove the facts that are set out. That's a significant change in the threshold and the burden of evidence required, and are you content that, clearly, human rights will be engaged in this matter, and are you content again that you have the balance right and that what you're proposing here is proportionate in terms of what you're seeking to achieve?

[87] **Kenneth Skates:** Yes, I can assure the committee that careful consideration was given to the defendant's right to a fair trial, and we consider that the imposition of a reversed burden of proof in certain provisions in the Bill is justified and is a proportionate means of achieving the Bill's policy objectives. It's worth noting that the primary burden—that being the burden of proving that somebody has caused damage to a protected site—will still remain with the prosecution. The matters that the accused must show in order to establish the defence are matters that should be within the accused's own knowledge, so the burden should be one he can easily discharge. If the prosecution were required to prove the accused's knowledge, then the regime would not be able to operate effectively, and the courts have held that it's not unfair to place a burden of this kind on the accused in a situation such as this.

[88] **Alun Davies:** So, you've clearly sought legal advice and you have case law to sustain your argument.

[89] **Kenneth Skates:** Yes. In terms of the legal advice, we've given it legal analysis—

[90] **Alun Davies:** I wouldn't seek to ask what that advice was, obviously. I've tried that before and I received short shrift. *[Laughter.]*

[91] **Suzy Davies:** Can I just—? Oh, sorry, Alun, have you finished?

[92] **Alun Davies:** Yes, thank you.

[93] **Suzy Davies:** Just a quick question on that one about what would be reasonable for a defendant to know. The Chair mentioned earlier on that in terms of scheduled monuments, there are thousands of the things, and you may not even know you've got one in your back garden. Before you start digging some ground to put up your extension, you're not necessarily going to think, 'I must go and look at the local land charges register.' What is going to be reasonable in these circumstances?

[94] **Kenneth Skates:** You'd be aware of it from the land charge, wouldn't you?

[95] **Suzy Davies:** Just as a guide—I'm not going to hold anyone to this.

[96] **Kenneth Skates:** If you owned the land—the property—you'd be aware of it from the land charge that would be present on it anyway.

[97] **Suzy Davies:** Well, if you'd owned it for 40 years, you wouldn't necessarily be digging up your original conveyancing documents just to stick up a shed.

[98] **Ms Huws:** With any of the scheduled monuments, Cadw inspectors go out every five years and do monitoring and speak to the owners. Also, we are making available an online mapping database of all the designations, which includes scheduled monuments, listed buildings, park and gardens. That will be publicly available on the Cadw website and will show where the monument is and the land associated with that monument.

[99] **Alun Davies:** And that's an accurate register.

[100] **Ms Huws:** Yes. It will show the statutory designations—

[101] **Alun Davies:** Representing a coal-mining area, I'm aware that the coal authority claims to have all sorts of registers and maps and various things, and quite often, they're found to be quite inaccurate.

[102] **Kenneth Skates:** The Member is absolutely right. So, the royal commission is actually currently auditing the HERs.

[103] **Alun Davies:** Okay.

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

[105] **David Melding:** I think that exhausts the questions we have for you. Thank you very much, Deputy Minister. Thank you also to your officials for assisting us this afternoon.

[106] **Kenneth Skates:** Thank you.

14:19

Offerynnau nad ydynt yn Cynnwys Materion i Gyflwyno Adroddiad arnynt o dan Reol Sefydlog 21.2 neu 21.3

Instruments that Raise no Reporting Issues under Standing Order 21.2 or 21.3

[107] **David Melding:** Item 3: instruments that raise no reporting issues. They are, however, listed. Are we content?

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

[108] **David Melding:** Item 4: instruments that do raise reporting issues. There's just one: the Care and Support (Care Planning) (Wales) Regulations 2015. We're happy.

14:20

Papurau i'w Nodi
Papers to Note

[109] **David Melding:** Item 5 is papers to note. There's a letter from the Minister on renting homes and relating to key workers, and then there's a letter from the Minister regarding the Regulation and Inspection of Social Care (Wales) Bill, and I think that that might come up in our discussions on the report later, but they're there for you to note. In fact, both letters refer to reports that we will be discussing further in our private session.

**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**

Cynnig:

Motion

bod y pwyllgor yn penderfynu gwahardd y cyhoedd o weddill y cyfarfod yn unol â Rheol Sefydlog 17.42(vi).

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

*Cynigiwyd y cynnig.
Motion moved.*

[110] **David Melding:** I now move that we conduct the rest of the meeting in private, unless any Member objects. I see no Member objecting, so, please switch off the broadcasting equipment and clear the public gallery.

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 14:20.
The public part of the meeting ended at 14:20.*