# Cofnod y Trafodion
# The Record of Proceedings

## Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

## The Constitutional and Legislative Affairs Committee

21/09/2015

Trawsgrifiadau'r Pwyllgor
Committee Transcripts

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

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

| | |
|---|---|
| Suzy Davies | Ceidwadwyr Cymreig<br>Welsh Conservatives |
| Dafydd Elis-Thomas | Plaid Cymru<br>The Party of Wales |
| David Melding | Y Dirprwy Lywydd a Chadeirydd y Pwyllgor<br>The Deputy Presiding Officer and Committee Chair |

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

| | |
|---|---|
| Mark Drakeford | Aelod Cynulliad, Llafur (y Gweinidog Iechyd a Gwasanaethau Cymdeithasol)<br>Assembly Member, Labour (the Minister for Health and Social Services) |
| Dewi Jones | Adran Gwasanaethau Cyfreithiol, Llywodraeth Cymru<br>Legal Services Department, Welsh Government |
| Nia Roberts | Adran Gwasanaethau Cyfreithiol, Llywodraeth Cymru<br>Legal Services Department, Welsh Government |
| Chris Tudor-Smith | Uwch Swyddog Cyfrifol, Llywodraeth Cymru<br>Senior Responsible Officer, Welsh Government |

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

| | |
|---|---|
| Stephen Boyce | Y Gwasanaeth Ymchwil<br>Research Service |
| Gwyn Griffiths | Uwch-gynghorydd Cyfreithiol<br>Senior Legal Adviser |
| Ruth Hatton | Dirprwy Glerc<br>Deputy Clerk |
| Gareth Howells | Cynghorydd Cyfreithiol<br>Legal Adviser |
| Gareth Williams | Clerc<br>Clerk |
| Dr Alys Thomas | Y Gwasanaeth Ymchwil<br>Research Service |

*Dechreuodd y cyfarfod am 13:33.*

*The meeting began at 13:33.*

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

[1] **David Melding**: Good afternoon and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I have two apologies—from William Powell and Alun Davies. Before I start today's meeting proper, can I just make a brief statement on the declaration of Members' interests and remind Members that new rules on the declaration of Members' interests are now in force? The rules now include the requirement to declare relevant interests of Members and their family. It is the responsibility of individual Members to judge whether an interest relates sufficiently to a particular proceedings to require declaration. The Chair and the clerk can give advice on Standing Order requirements but cannot give advice on whether specific interests should be declared. If Members have any concerns or queries, they should seek advice from the register of Members' interests in the first instance.

[2] Can I start with 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. Turn electronic equipment onto silent or off, please. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there's a translation on channel 1. Channel 0 will amplify proceedings, should you require that service.

13:34

## Tystiolaeth mewn Perthynas â Bil Iechyd y Cyhoedd (Cymru)
## Evidence in Relation to the Public Health (Wales) Bill

[3] **David Melding**: We move now into item 2, which is evidence in relation to the Public Health Bill. I am delighted to welcome the Member in charge, Mark Drakeford, the Minister for Health and Social Services. Minister, do you want to introduce your team?

[4] **The Minister for Health and Social Services (Mark Drakeford)**: Diolch yn fawr, Gadeirydd. With me this afternoon I have Chris Tudor-Smith, who is in overall charge of the Bill from a policy perspective, and two colleagues from legal services, Nia Roberts and Dewi Jones.

[5] **David Melding:** You're all very welcome. Can I just start with the usual question on whether you're satisfied that this Bill on introduction, is within competence?

[6] **Mark Drakeford:** Yes, Chair, I am confident of that. I'm aware, as you will all be, of the correspondence that the committee will have received from the Presiding Officer. I'm aware as well of differences of views that can be there between lawyers on an interpretation of section 110(2) of the Government of Wales Act. As you know, from the Government perspective, we take the use of a conditional tense in that clause to be deliberate—that it

[7] 'would be within the Assembly's legislative competence'.

[8] We rely on the conditional in two ways: one that, of course, the Bill has to secure the approval of the National Assembly to appear on the statute book. In that sense, if it doesn't, it is not within competence. Secondly, we believe that it allowed me to make that declaration despite the fact that we are still seeking a number of consents from the Secretary of State. If we can't secure those consents in the way that we confidently expect to secure them, then we would have to bring the Bill within competence in a different way.

[9] **David Melding:** And can you update us on your discussions, or negotiations? I'm not quite sure how we should refer to them.

[10] **Mark Drakeford:** Of course, Chair. There have been very recent discussions between officials—my officials and officials in the Wales Office. Those discussions continue to give us confidence that we will secure the consents that are necessary for those three sections and the two paragraphs in Schedule 1 prior to the end of Stage 1 proceedings.

[11] **David Melding:** Okay. And, then, my final question relates to the balance that's achieved between the face of the Bill and then what's left to secondary legislation. First of all, can I commend you on the policy intent document? That is most helpful.

[12] **Mark Drakeford:** Thank you.

[13] **David Melding:** I do hope that it will serve as a model for your colleagues. But, however helpful that is, does it fundamentally—you know, the structure of the Bill—strike the right balance in your view?

[14] **Mark Drakeford:** Well, Chair, first of all to say that I entirely agree that there is a balance to be struck. We go about trying to strike that balance conscientiously, but don't claim that it is struck definitively because there are proper differences of view as to where the balance should lie. I will listen very carefully to what the committee concludes in relation to where we have struck the balance in relation to the different parts of this Bill.

[15] However, your question was about how we did strike the balance, and I suppose we go about it in this way. First of all, we look at any precedents because there are aspects of this Bill that pick up previous legislation, where regulation-making powers have been allocated between the affirmative and the negative procedures, and we look to see what was done in the past and what satisfied previous legislators. If those arrangements have not proved unsatisfactory, we tend to transpose them into this Bill. So, we look first there. Then we look to see whether there are aspects that seem to us to be technical or administrative. If they are of that nature then we allocate those to the negative procedure.

[16] We also look at those aspects of the Bill where there is relatively rapid societal and technological development going on, and where, if the affirmative procedure were to be used, the Assembly would find itself maybe repeatedly being asked to go over ground where the basic principles have already been well established. What they're really looking at is just updating, but updating that may be needed relatively regularly given the changing nature of that particular field. We then rehearse. I think the next thing we do is rehearse in the statement of policy intent—and thank you for what you've said about that—to explain why, in each instance, we've come to the conclusion that we have, and that ends up with the distribution of the balance between secondary and aspects of that put on the face of the Bill.

[17] **David Melding:** Well, thank you for that. That's helpful. We will now be able to follow up in detail some of the issues that you've alluded to. I'll ask Dafydd Elis Thomas to start our session.

[18] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr, Gadeirydd. Rwy'n credu fy mod i'n iawn i ddweud mai dyma Fil Iechyd y Cyhoedd (Cymru) cyntaf i ymddangos, ac felly, fe fyddwn i'n dymuno eich llongyfarch chi ar y dechrau ar gyflwyno'r math

**Lord Elis-Thomas:** Thank you very much, Chair. I believe I'm right in saying that this is the first Public Health (Wales) Bill to appear and therefore, I would like to congratulate you at the very outset on introducing that kind of legislation.

yna o ddeddfwriaeth.

[19] Wedi dweud hynny, ni fyddwch chi'n synnu gwybod fy mod i'n tueddu i ffafrio'r weithdrefn gadarnhaol ar bob amser posib, yn enwedig pan mae yna faterion sy'n ymddangos yn dechnegol ond, mewn gwirionedd, y maen nhw'n faterion o bolisi cyhoeddus. A fyddech chi'n cytuno y gellid dadlau bod y penderfyniad i bennu ystyr 'caeedig' a 'sylweddol gaeedig' mewn rheoliadau o dan y Bil hwn yn faterion y gellid eu hystyried yn effeithio ar bolisi cyhoeddus yn gymaint ag y maen nhw'n dechnegol.

Having said that, you won't be surprised to hear that I tend to favour the affirmative procedure whenever possible, particularly, when there are issues that appear to be technical, but in reality, they are issues of public policy. Would you agree that one could make the case that the decision to define 'enclosed' and 'substantially enclosed' in regulations under this Bill are issues that could be considered to have an effect in terms of public policy, as much as they could be considered technical.

[20] **Mark Drakeford:** Diolch, wrth gwrs, am y cwestiwn. Rwy'n mynd i ymddiheuro, achos rwy'n mynd i ateb yn Saesneg, achos pan rwy'n delio gyda phethau technegol, maen haws i fi ei wneud yn Saesneg.

**Mark Drakeford:** Thank you, of course, for the question. I'm going to apologise, because I will respond in English, because when I'm dealing with technical matters, it's easier for me to do so in English.

[21] **Yr Arglwydd Elis-Thomas:** Weinidog, rydym yn genedl ddwyieithog; mae pawb yn cael dewis eu hiaith. Dyna ogoniant y lle hwn.

**Lord Elis-Thomas:** We are a bilingual nation; everyone can choose the language that they use. That's the glory of this place.

[22] **Mark Drakeford:** Ie. Diolch yn fawr.

**Mark Drakeford:** Yes. Thank you very much.

[23] Of course, I accept the general argument that it would be possible to apply the affirmative procedure to this aspect of the Bill. The preference that we struck for using the negative procedure, the argument behind it, went a little in this way: first of all, as I said, we look at the precedent, and the precedent here was the Health Act 2006 and the definitions of 'enclosed' and 'substantially enclosed' public places in that Act. The regulations that gave expression to that were navigated by the negative procedure; they gave rise to the 2007 regulations.

[24] Chair, I struggle a little bit to see how much scope there is to make that definition different to the definition that we currently use. These have to be enclosed or substantially enclosed public places, and I don't know quite how much scope there will be to deviate from the definitions that we already use. Certainly, it is our policy intent to pick up the 2007 regulation definitions and to use them again for the purposes of this Bill. On those grounds, we feel that we are simply taking forward definitions that have proved satisfactory and have not been controversial in the scrutiny that they've required under previous legislation and that the negative procedure is adequate to the task.

[25] **Yr Arglwydd Elis-Thomas:** Mae hyn yn codi cwestiwn ehangach, wrth gwrs—ac nid wyf am fynd ar ei ôl yn rhy hir y prynhawn yma—sef: beth yw'r rhesymeg gwahaniaethu rhwng beth sydd mewn rheoliadau a beth sy'n cael ei osod mewn deddfwriaeth gynradd wrth ddelio â pholisïau cyhoeddus fel hyn? Os caf i awgrymu, rwy'n meddwl ein bod yn gallu bod yn rhy wasaidd yn ein dynwarediad ar ôl San Steffan yn y Cynulliad hwn, yn yr ystyr ein bod yn tueddu i ddilyn patrymau o rannu rhwng deddfwriaeth gynradd a rheoliadau, mewn ffordd nad ydyn nhw bob amser yn arwain at ddeddfwriaeth ddealladwy. Fe garwn i i Weinidogion Cymru ystyried yr egwyddor honno hefyd, ochr yn ochr ag unrhyw gynsail mewn deddfu, os caf i awgrymu.

**Lord Elis-Thomas:** This raises a broader question, of course—and I don't want to pursue it at length this afternoon—which is: what is the rationale in differentiating between what is in regulations and what is placed in primary legislation in dealing with public policies such as these? If I may suggest, I think we can be too subservient in following the practices of Westminster in this Assembly, in the sense that we do tend to follow patterns in terms of the separation between primary legislation and regulations in ways that don't always lead to legislation that's easily understood. I would like Welsh Ministers to consider that principle along with any precedent in legislation, if I could make that suggestion to you.

[26] **Mark Drakeford:** No, I don't dissent from that at all. I certainly wouldn't want us to be slavishly following conventions and precedents set elsewhere. I agree that we ought to think for ourselves in how we decide how matters are best distributed between those that ought to be on the face of a Bill and those things that are best left to regulation. In this case, I think this is a matter that is better pursued through regulations than appearing on the

face of a Bill. But, I entirely agree: these things are a matter of judgment and it's quite possible to come to different conclusions on a case-by-case basis.

[27] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr, Weinidog. Fe garwn i ofyn yn fwy penodol ar gyfer y rheoliadau dan adran 11(1) ynglŷn â'r gofynion ar gyfer arwyddion mewn mannau di-fwg. O fynegi consýrn, efallai, pa mor amrywiol y gallai'r arwyddion newydd hyn fod ledled Cymru a'i fod yn bwysig bod yr arwyddion yn gyson, onid ydy hynny'n ddadl dros ddilyn y weithdrefn gadarnhaol, er mwyn sicrhau bod yr hyn sydd yn yr arwyddion yma yn ddealladwy ac yn gyson?

**Lord Elis-Thomas:** Thank you, Minister. I would like to ask more specifically on regulations under section 11(1) for the requirements for signs in smoke-free premises. In expressing a little concern, perhaps, as to how diverse these signs could be the length and breadth of Wales and it is important that these are consistent, isn't that a case for adopting the affirmative procedure, in order to ensure that these signs are well understood and consistent?

13:45

[28] **Mark Drakeford:** I probably want to separate two strands in that question, Chair, because I completely agree that consistency is a very important object in this part of the Bill. We will want signage that is absolutely the same across Wales in the different dimensions of signage that this Bill creates. I'm not absolutely sure I'm following the argument as to why the affirmative procedure would be more likely to secure consistency than the negative procedure, because there would be the same outcome in terms of consistency. The affirmative procedure gives the Assembly greater scrutiny of whether or not it is consistent, but it can be equally consistent whether it's made under the one procedure or the other. Our aim is certainly for consistency.

[29] Members here will be very familiar, I'm sure, with the signage that was created when the original smoke-free regulations were passed by the National Assembly, and they are recognisably the same signs wherever you go. They were made under the negative procedure; our aim will be to do the same again. Some of this is genuinely technical in nature, to do with the size of the font that's used on a sign, it's to do with the spacing of words on the sign. I think we can secure consistency, and we intend to secure consistency in the way that we have in the past. So, I very much share the object of the

question; I think the negative procedure is equally capable of leading to that as the affirmative.

[30] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr. A gaf i ddilyn hynny gydag un cwestiwn pellach ynglŷn ag adran 12(1) o'r Bil? Rwy'n deall mai bwriad y Llywodraeth yw sicrhau bod awdurdodau lleol yn awdurdodau gorfodi, ond eto nid yw'r Bil wedi ei gwneud yn ofynnol i Weinidogion ddynodi awdurdodau lleol. Fe garwn i gael sylwadau'r Gweinidog am hynny a hefyd o ran a fyddai'n dymuno i gyrff cyhoeddus eraill neu i fudiadau gwirfoddol neu gwmnïau preifat gael eu dynodi yn awdurdodau gorfodi yn yr un modd?

**Lord Elis-Thomas:** Thank you very much. May I just ask one further question on section 12(1) of the Bill? I understand that the Government's intention is to ensure that local authorities are designated as enforcement authorities, and yet the Bill doesn't require Ministers to designate local authorities. I would like the Minister's comments on that and also on whether it would be desirable for other public bodies or voluntary organisations or private companies to be designated as enforcement authorities in the same way.

[31] **Mark Drakeford:** I'd like to take the last part of the question first, Chair. It's not my intention to designate anything other than public authorities as enforcement authorities for the purpose of this Bill. For the majority of its provisions, local authorities will indeed be the enforcement authorities, but they are not necessarily exclusively the enforcement authorities, and that's why I don't, at the moment, intend to—. The Bill doesn't require Welsh Ministers to designate local authorities. Members here will be aware that, in the regulations that we have recently completed, which will prevent smoking in cars where children are present, the designated enforcement authority there is the police, not the local authority. We have some other examples where national parks are a designated enforcement authority. So, the reason why we don't simply require Welsh Ministers to designate local authorities is, although, for the most part, they will be, there will be some examples where others can be involved, and therefore we don't want to prevent us from being able to designate them, too.

[32] **Yr Arglwydd Elis-Thomas:** Ni fydd y Gweinidog yn synnu, wrth gwrs, fy mod i'n gryf o blaid rhoi pob hawl i barciau cenedlaethol i reoli beth sy'n digwydd.

**Lord Elis-Thomas:** The Minister will not be surprised, of course, to hear that I am strongly in favour of giving all rights and powers to national parks to manage what happens

within them.

[33] **Mark Drakeford:** Wrth gwrs.

**Mark Drakeford:** Of course.

[34] **Yr Arglwydd Elis-Thomas:** Dau gwestiwn arall cysylltiol ynglŷn â hyn: o ran ymgynghori gyda rhanddeiliaid ynglŷn â ffurf y cais i gofrestru, rwy'n deall y ddadl o ran a ddylai dyletswydd fod ar wyneb y Bil neu beidio, ond fe fyddai'n dda cael cadarnhad o awydd y Llywodraeth i ymgynghori â rhanddeiliaid, a hefyd, i fynd i'r un cyfeiriad, ynglŷn ag ymgynghori ynglŷn â phennu trosedd newydd o ran tybaco neu nicotin mewn rheoliadau o dan adran 40(2). Mae hwn yn bwysig iawn yn ei effaith ar fusnesau. A allwch chi ateb y rheini gyda'i gilydd? Diolch.

**Lord Elis-Thomas:** Two related questions on this issue: with regard to consultation with stakeholders on the form of the application for entry to the register, I understand the argument as to whether this should be on the face of the Bill or not, but it would be good to have confirmation of the Government's desire to consult with stakeholders, and also, along the same lines, on consultation in terms of new offences in terms of tobacco and nicotine in regulations under section 40(2). This will have a huge impact on businesses. Could you answer both questions together? Thank you.

[35] **Mark Drakeford:** Diolch yn fawr. Thank you very much; those are two important questions and, by putting them together, I think it allows me to draw a bit of a contrast between the two. In relation to the register of retailers of tobacco and nicotine products, as the statement of policy intent makes clear—and I'm very happy to repeat that assurance orally this afternoon—it is fully the Government's intention to consult and engage with relevant stakeholders, trading standards officers, representatives from the retail sector, and so on, in drawing up the way in which that register will operate and how the regulations that surround it will be drawn up. It's for the committee, of course, to think about whether that ought to appear on the face of the Bill. I think I'm simply saying to you that it is the Government's intention to do it. Whether you feel that has to be reflected on the face of the Bill, you'll think about.

[36] I might just, Chair, as an example, though, draw your attention to the Social Services and Well-being (Wales) Act 2014, where I have been responsible for taking the regulations that flow from it through the National Assembly. We have consulted on 20 separate issues where there was no obligation to consult on the face of the Bill, but where Ministers had given

clear assurances that consultation would take place. So, we've had two tranches of consultation, and those 20 aspects have themselves involved over 500 responses from stakeholders. So, making sure the consultation happens isn't necessarily always secured by being on the face of the Bill, and we do intend to consult in this case.

[37] The second issue, however, that Dafydd has raised is the duty to consult stakeholders regarding offences, and I've been giving some thought to that matter. I'm open, certainly, to the suggestion that there is a difference in significance between putting a duty to consult on the face of a Bill in relatively administrative matters like how a register should be drawn up and how it should run, and a duty to consult when new offences are being created. If the committee came to the conclusion that there should be a duty to consult on the face of the Bill in relation to section 40(2), then I'm happy to give an indication this afternoon that I'd see the sense in that.

[38] **Yr Arglwydd Elis-Thomas**: Mae hynny'n ddefnyddiol iawn. Diolch yn fawr, Weinidog.

**Lord Elis-Thomas**: That's very useful. Thanks very much, Minister.

[39] **David Melding**: Suzy.

[40] **Suzy Davies**: Good afternoon, everyone. I might come back to that question about consultation on the face of the Bill shortly. But just to keep this in chronological order, moving on to special procedures, I'd like to ask you about sections 51 and 52, which require Welsh Ministers to bring forward licensing conditions in connection with the special procedure licence. I'm pleased to see that it says 'requires' rather than 'empowers'; I think that that makes sense within the scope of the Bill. How far down the road are you at the moment in designing what those conditions might look like?

[41] **Mark Drakeford**: Well, I think we're at the stage, Chair, that is set out in the statement of policy intent. I've brought my copy with me—

[42] **Suzy Davies**: I've got it here as well.

[43] **Mark Drakeford**: —so that I can refer to it. Members will see, on page 33 of my copy, there are a set of issues to which mandatory licensing conditions may relate. So, our thinking certainly is that such conditions would include regulations in relation to hygiene, in relation, for example, to

the storage of equipment, in relation to record keeping, and in relation to the displaying of a licence—one of the really important parts of the Bill as far as special procedures are concerned is that, in future, a Welsh citizen visiting a place where a special procedure was carried out would have the confidence of knowing that a licence would have to be publicly displayed telling you that that premises and the practitioner had met the criteria that allows them to get a licence. So, our thinking has got as far as having identified the sorts of things that we think would be covered. But we are very keen to engage the practitioner community directly in fleshing out the criteria that lie beneath that headline, because this is a new area for regulation. It hasn't been done before. It's very important we take that community with us. We've had very good engagement with them so far, and they are very keen to participate in it. So, I think that's the stage we're at; we've identified the headlines; the details we want to fill in in consultation.

[44] **Suzy Davies:** Okay. It occurs to me—and it's a pleasure for this committee to see it, really—that the policy intent is quite clear and some thought has gone into it already. And because of that, I was curious to know why perhaps these basic criteria aren't on the face of the Bill.

[45] **Mark Drakeford:** I think there are a number of reasons why we thought that would not be the best course of action, Chair. The first and the main one for me is that I think—for me, anyway—there's an objection of principle between having some criteria on the face of the Bill and some in regulations. I think it is more sensible all round to have everything in one place; I'm especially allergic to the idea that you create two different classes of regulation. People might feel that those things that are on the face of the Bill are the really important things, and the things that are in regulation are somehow a sort of subsidiary or second class set of obligation, whereas, of course, they're not—they all have equal force in law. So, I'm a bit allergic to the idea of trying to separate the two out. I also think it makes it more difficult for the person on the ground on whom these obligations then fall that they have to go to two different places to try and find out what it is that they are being asked to do. So, that's one objection.

[46] **Suzy Davies:** I understand your answers well, but, I mean, looking at what you had in the policy intention document, it doesn't actually say, 'This is what the regulation will look like'—it's just the areas in which regulation would be made. I'm just curious to know why these general headlines aren't on the face of the Bill, because those are the things that give the certainty to the people who are likely to be affected by this Bill that regulations will be

made on those particular subjects, even though we don't know what the regulation says here, for the very reasons you said and which I accept. I mean, I think if I were involved in this industry I would like to know that, for example, vehicles will be included in this.

[47] **Mark Drakeford:** Chair, I think the Bill as drafted goes some way to answering Suzy Davies's point in—. I always get my Parts and my Schedules—

[48] **Suzy Davies:** We forgive you.

[49] **Mark Drakeford:** In section 52(2) it says:

[50] 'Mandatory licensing conditions may (among other things) relate to—

(a) the premises or vehicle at or in which a special procedure is to be performed, or at or in which equipment or material used in a special procedure is to be stored or prepared (including, among other things, facilities and equipment available there, cleaning and maintenance, and standards of hygiene)'.

[51] So, It's not comprehensive, I accept, but I think those things are on the face of the Bill.

[52] **Suzy Davies:** That's great, because I was trying to establish, I think, whether you're intending—. I'm not saying it would never happen, but it's not your intention necessarily to add to that list at the moment on the face of the Bill.

[53] **Mark Drakeford:** No.

[54] **Suzy Davies:** That's fine; that's great.

[55] **Mark Drakeford:** Thank you.

[56] **Suzy Davies:** Can we move on to section 76, which I think it is now? I mean, obviously, the position is we've got primary legislation on the issue of special procedures at the moment, and obviously a lot of consultation has gone into this. If it's such a serious area of public policy that we need to have primary legislation on it, then the exemptions to any licensing conditions will obviously be of great concern as well. If I understand this correctly, any exemptions for people having to have a licence for special procedures—that

list is subject to the negative procedure. Is that right?

[57] **Mark Drakeford:** That is how it's presently proposed.

[58] **Suzy Davies:** Is there a particular reason for that?

[59] **Mark Drakeford:** Well, Chair, again—

[60] **Suzy Davies:** Because the exemptions are as important as the positive licensing conditions, obviously.

[61] **Mark Drakeford:** Yes. Of course, Chair, I'm very happy to listen to the views of the committee on this. And maybe our thinking has moved on a little in a way that I think would strengthen the argument that Suzy has just made. In the original discussions that I had around this, I think my understanding of our policy position at the time was that we would only be thinking of exempting premises that were already covered by other regulatory arrangements. So, a doctor's surgery, for example, or a consulting room in a pharmacist. So, they would already have regulatory cover because they would have had to have been approved by a different regime. It is possible that we may wish to think of exemptions in some other instances than that, and because of that I think the balance of argument is tipping in favour of this being through the affirmative rather than the negative procedure.

14:00

[62] **Suzy Davies:** Simply on the point of reassurance, because even though the premises itself, you know, a doctor's surgery—. There's still activities that might happen in a doctor's surgery that aren't currently covered by their regulatory system, I suppose. So, I think the affirmative procedure would seal off any potential loophole on that one, so I'm pleased to hear your answer on that one. Thank you.

[63] Section 77—body piercing and the current definition. I'm thinking anyone who sticks a needle in their forehead to inject some Botox might fall within this definition, but it's not clear to me that it might do that. Is there any particular reason why the negative procedure is applied to this, because we don't know what the future of piercing is going to look like and it may come up with some rather controversial procedures that could fall in here?

[64] **Mark Drakeford:** Indeed. I'm probably going to ask Nia to help me with these questions, because I find myself quickly out of my depth when we get into some of these areas.

[65] **Suzy Davies:** No Botox, Minister? [*Laughter.*]

[66] **Mark Drakeford:** I've not even been there. [*Laughter.*] I think, at the moment, what we feel we've got is an area which falls within the criteria that I suggested at the very beginning, Chair, of an area that is rapidly moving and where things do change and where we thought the flexibility of the negative procedure was the right one in order to allow the law to be kept in line with development, without the National Assembly finding itself continuously having to return to issues of detail. But I'll just make sure—if Nia wants to explain why we've arrived at the definitions we have; why we think they are sufficiently future-proofed and would allow the law to work effectively.

[67] **Ms Roberts:** In relation to body piercing, it was important to catch, as the Minister's already said, the technical developments that are happening in the field. So, for example, the ordinary understanding of body piercing doesn't necessarily catch flesh plugs, which are used in the ears at the moment to make a gap and you increase the gap and the bigger the hole gets. So, we wanted to make sure that we were catching items such as that. It's not the intention that it would catch Botox or dermal fillers. If that was to be included, it would be included as a new special procedure in section 46 under the power in section 76, which the Minister's already alluded to. So, those new sorts of things would be a new special procedure rather than amending a currently widely accepted definition of body piercing, for example.

[68] In relation to acupuncture and the other special procedures and the definitions given there, they were reached after thorough research and in-depth consultation with stakeholders and the wider public. Acupuncture, for example, is given this definition:

[69] 'The insertion of needles into an individual's tissue for remedial or therapeutic purposes.'

[70] So, that's the widely accepted definition of acupuncture. If, for example, there was a change in technology and acupuncture was to be carried out using the insertion of something else, then that would not be

added to acupuncture; it would be a separate special procedure, and again, added to the list in 46 under the regulation making power in 76.

[71] **Suzy Davies:** Right, because it did occur to me that there's a distinction between the decorative body piercing and those that might be for therapeutic purposes, as you mentioned. That's actually why I brought Botox up, because apart from its wrinkle-free promises, it's also a therapy in managing migraines, which I consider more in the acupuncture line of things rather than—what do you call them, the 'plugs'?

[72] **Ms Roberts:** Flesh plugs.

[73] **Suzy Davies:** Flesh plugs, yes; I know the things that you mean.

[74] **Lord Elis-Thomas:** We learn so much. [*Laughter.*]

[75] **Suzy Davies:** I know. I'm not going to ask you any more intimate questions about piercing, you'll be glad to hear. [*Laughter.*] So, just confirm for me again, if you had something like acupuncture, which is on the therapeutic side, any changes to the understanding of what that meant would come in as a new procedure rather than a variation to the existing procedure. I've got that right, yes?

[76] **Mark Drakeford:** Yes.

[77] **Ms Roberts:** Yes.

[78] **Suzy Davies:** Good. I think that's all I want to ask. Thank you very much, everyone.

[79] **Mark Drakeford:** Thank you.

[80] **David Melding:** Minister, if I can take matters forward, in section 100, the powers to make consequential and transitional provisions are very wide in scope and they're very powerful as well. I'm not sure they're in any other Bill we've seen, but why are they so extensive?

[81] **Mark Drakeford:** Chair, the consequential and transitional provisions in this Bill are drafted to meet the particular needs of this Bill. So, we look at them each time a Bill comes forward. I believe I'm right, but I'm going on memory, that they are identical to the provisions in the Qualifications Wales

Act 2015, so they're not unprecedented.

[82] **David Melding:** Okay. I apologise for that. Gwyn, is there any other Bill that uses as extensive a definition?

[83] **Mr Howells:** No, I think we just looked at the current Bills in front of the Assembly, and there was never the same wording; they all seemed to have different wording. I think that's the query we had.

[84] **Mark Drakeford:** Yes. Well, I suppose there are only two ways of doing it, Chair. One is off the shelf, in which you just use the same words every time, or customised, where you try and make sure that the arrangements you have are right for the Bill in front of you. I think we try and steer our way down that course, making sure that the way we set them out in each Bill is right for the Bill in front of the Assembly, but not reinventing them from scratch every time, where we think that there are ways in which we can be consistent with previous legislation.

[85] **David Melding:** I suppose our fear is that, under the guise of transitional and consequential arrangements, fairly major interventions are going to be possible here. If the Bill is any good, as it's currently drafted, why do you need that?

[86] **Mark Drakeford:** I detect echoes of a conversation I remember in front of the committee when I was here with the Regulation and Inspection of Social Care (Wales) Bill. The advice I have is that this section is drafted in a way that simply allows us to make a sensible transition from previous legislation to this one, and to deal with consequential amendments in other places, and it is not intended to go beyond that.

[87] **David Melding:** Okay. Well, we'll reflect on that. Issues relating to human rights have cropped up quite extensively, I think it's fair to say, in correspondence and other discussion. I think the legal opinion, generally, is that in discussing human rights that clearly do apply, any court of law would expect our procedures—in terms of the legislative process—to go into this very extensively indeed. So, I think we need to spend a little bit of time on this.

[88] The first one is: do you think you have struck a fair balance between the rights of employees, and then the rights of people to enjoy, for instance, what is also a family dwelling, in terms of smoking after the hours of work? It

can still leave smoke lingering, and so forth. So, how have you tried to weight up the balance there between what a homeowner has a right to enjoy, and the protection that an employee should expect?

[89] **Mark Drakeford:** Well, thank you for that question, of course. Members will be aware that this was very specifically raised by the Presiding Officer in her letter to committees as an issue on which she had sought and secured specialist legal advice of her own, because of the way that these arguments are so finely balanced. On the basis of the specialist advice that she received, she reached the conclusion that the formula that we've used in this Bill was Human Rights Act 1998 compliant. But she very properly draws everybody's attention to that discussion. I faced questions on this, in some detail, in front of the Health and Social Care Committee, as well. So, I hope you'll forgive me, Chair, I brought the note of what I said there with me, to make sure I'm as consistent as I can be in making the explanation as to how we came to strike the balance we did, because it is a matter of striking a balance here, and there is more than one interpretation possible, I'm sure.

[90] So, the change that this Bill sets out is this: at the moment, if you are using your home to carry on a business, then you are not allowed to smoke in those parts of your home that are used exclusively for business, but you are allowed to smoke in that part of a dwelling that is used occasionally, or intermittently, for business. And what this Bill says is that, in future, you will not be able to smoke, or use an e-cigarette, in any part of a dwelling that is used for business purposes, whether that is continuously or intermittently. But, in the parts of your home that are not used for business, and outside business hours, you will be able to use all of the dwelling to smoke in, or to use an e-cigarette. In doing so, you are balancing the rights of the homeowner to the human rights that they possess in relation to the enjoyment of their private property against the rights of users of the home for business purposes, who have a right to be protected against second-hand smoke and the potential impacts on their health. So, we balance those rights against one another, and we offer additional protection to the user of the premises, because it's now not possible for a person running a business to circumvent the law by designating a room as only occasionally used for business, and therefore smoking can be allowed in it. Wherever business is conducted during business hours, they will be smoke free, and we believe that that protects the rights of the person visiting. But the rights of the homeowner are protected because any part of the dwelling that is not used for business can be smoked in, and once business is over, smoking can take place anywhere in the premises.

[91] Now, I perfectly understand that it is possible to take a different view as to where the balance of rights and human rights lies between the businessperson and homeowner and the person using the premises to obtain a service, but that's how we have balanced those competing rights in this Bill, and I was pleased, of course, to see that, when the Presiding Officer asked for specialist legal advice on the way the balance had been struck, her advice was that it had been struck in a way that was human rights Act compliant.

[92] **David Melding:** Did you wish to follow up, Suzy?

[93] **Suzy Davies:** Yes. It's just a quick question this, and forgive me, it may already have been covered elsewhere. Is this to apply also in the case of a sole proprietor whose business isn't outward facing? So, you know, people don't come to the home to meet that person.

[94] **Mark Drakeford:** This is not someone's own home.

[95] **Suzy Davies:** No, an individual in their own home, but there's no outward-facing role to it and they don't employ anyone or, indeed, have other members of their family involved.

[96] **Mr Jones:** Then I believe this wouldn't apply.

[97] **Suzy Davies:** It wouldn't apply. Okay, thank you very much.

[98] **David Melding:** The second area I just want to look at is the use of e-cigarettes and extending the regime and imposing potential criminal sanctions and obligations on individuals. I suppose it all comes down to the proportionality test that is used in evaluating whether something meets or breaches human rights law, particularly the European convention. Now, I think the thrust behind this Bill is an effort in part to de-normalise smoking and that the actions you wish to take against e-cigarettes are inspired largely by this desire, but the whole concept of de-normalising is a fairly nebulous one. I'm not saying it's unimportant, but it's obviously not an easy one to pin down in evidence. In fact, you know, the English Department of Health has not taken this view. So, how does all this sit in terms of the proportionality test, given that, you know, potentially, you could get clobbered by this legislation if you foolishly don't—. You know, every citizen of course should obey the law, we're not denying that, but it's a serious sanction that is being proposed here.

[99] **Mark Drakeford:** Yes, Chair, thank you. I have to explain a bit about the policy issue. I know that policy is not the primary province of the committee, but, taking up your point, I have to explain something of the policy in order to explain the proportionality of it. So, our policy is very simple: it is that, in future, in Wales, if this Bill is passed, e-cigarettes will be able to used everywhere that a conventional cigarette can be used, and won't be able to be used anywhere a conventional cigarette cannot be used. We advance that policy on three grounds. One, on enforcement: that in order to enforce the law effectively, the law is undermined when people can claim to have been using an e-cigarette rather than a conventional cigarette. It's why e-cigarettes are already banned in places like the Millennium Stadium, the Liberty Stadium, the SSE Swalec stadium—anywhere where there are large crowds, those responsible for enforcing the law concluded that it's easier to enforce it where the law is simple and consistent. But we also believe that allowing e-cigarettes to be used in places where conventional cigarettes cannot be used has the potential to renormalise smoking.

14:15

[100] Given that we have spent so many years doing our very best to make smoking an activity that is not thought of as socially acceptable or normal, we don't want to do anything that would potentially undermine that position. The evidence for renormalisation, I concede, is contested and people take different views of it. As health Minister, I believe it is my duty to take a precautionary approach. Where there is evidence of harm or potential harm, we shouldn't wait to see whether that harm has actually been realised; we should act to prevent its possibility. The policy, therefore, of the Welsh Government—which may not be consistent with Public Health England and its report, which *The Lancet*, I see in its editorial, described as based on 'extraordinarily flimsy' foundations—our policy is consistent with that advocated, for example, by the British Medical Association, the World Health Organization and a whole range of other very responsible and respectable medical organisations.

[101] So, that's the policy background. Is it then proportionate for the law to be used to underpin the provisions that we intend to secure? Well, just, again, to say criminal sanctions, which I think is the thing that you're referring to, are at the very end point of an enforcement regime, not the starting point of it. In this Bill, the first obligation would lie with the manager of any premises where e-cigarettes were no longer to be used. The law

places an obligation on the manager of that premises to secure compliance with the law. Most violations of it will be resolved in that way, simply by the people running the place making it clear to someone that that's not something that they are now entitled to do in that premises.

[102] If that isn't effective, then the next step in the enforcement procedure is a civil penalty, a fixed penalty, where there are no criminal convictions or sanctions. So, if you're not amenable to good advice and you intend to continue to violate the law, then you will face a civil sanction. If the civil sanction doesn't secure compliance, then finally, enforcement authorities have the option—it's not an obligation—of taking criminal procedures.

[103] You will well remember the debates that surrounded this whole issue when we introduced the ban on smoking in enclosed public spaces. It was widely predicted that there would be large-scale violations of the law and people wouldn't be prepared to comply with it and so on. There's been a declining number of criminal prosecutions year by year. It's fewer than 10, on average, across the whole period since that law was introduced, and it's in single figures now. So, I think that having the backstop of a criminal sanction is necessary, but it is very much a backstop, not where the weight of enforcement would lie, and therefore I think is a proportionate response to the nature of the problem we are trying to solve.

[104] **David Melding**: I completely accept that your assessment of the available evidence may be more robust than the English Department of Health and there are probably English law makers that are going to scrutinise the Ministers in charge of delivering health in England. I just wonder though, if, in abstract evidence, the consensus were to emerge that e-cigarettes are not harmful, would your policy then still be justified in terms of enforcement, in your opinion?

[105] **Mark Drakeford**: Well we would be in a different debate; I concede that. When you read the medical journals, like the BMJ and so on, and you look at the Cochrane Collaboration, which is the most robust assessor of evidence in the medical field, they suggest it would be a decade before there is definitive evidence as to whether or not e-cigarettes act as a gateway to smoking for young people, as there is very persuasive evidence in other places, or as a route to renormalisation.

[106] If, in 10 years' time, the evidence was clear that they do not operate in that way, then I would imagine anybody in this position will want to reassess

the position. Whether the enforcement argument by itself would be enough to sustain the law as we would like to see it, I think you could only assess that at the time. My position, as you know, is that I'm not prepared for, in a decade's time, the evidence to show that harm that could have been avoided, particularly to young people, had occurred, when we're in a position to avoid it happening in the first place.

[107] **David Melding**: So, your position is that the precautionary approach is justified and is proportionate.

[108] **Mark Drakeford**: Absolutely.

[109] **David Melding**: So, we can note that. My final question again relates to human rights, potentially anyway, and it's about powers of entry to enforce warrants. This is where a dwelling can be entered. I think this whole issue about use of the section 16 power, when a warrant has been issued, to ensure that safeguards are in place to prevent abuse of the exercise of that warrant—. I wonder what you have done to ensure those very high standards for, obviously, entering someone's place of business or whatever. It is a really significant intervention. So, what balance have you struck here?

[110] **Mark Drakeford**: First of all, can I say, Chair, that this is a genuinely serious issue and something that it's very important to think through and make sure that the checks and balances in this area are correct? How are we trying to secure that in this Bill? Well, in a number of ways. Here are three different ways in which I think this Bill attempts to strike the right balance. First of all, it does require a warrant. So, in order to exercise these powers, any authority would have had to have gone to a court of law, would have to have persuaded a magistrate that a warrant was necessary and proportionate, and can only act on the basis of the warrant. So, there's a major safeguard at the front end of it.

[111] Secondly, I am happy to confirm to the committee that I intend to designate only public bodies as enforcement authorities, as I said in answer to Dafydd Elis-Thomas's question at the start of the session. So, I think that's a further safeguard, given that all those public authorities would have to operate with due recognition of human rights obligations and so on.

[112] I think there is an area that is legitimately to be scrutinised, then, as to what happens if a public authority so designated hands on the enforcement activity to another organisation. Obviously, that does happen

now; it happens all the time, you know. I deal in my constituency capacity with cases where the law courts themselves have handed on enforcement of fine collections to a non-public body. Well, there, we have to rely on the fact, I think, that any public body that is handing on the enforcement activity to somebody else—it still retains the duties that it has under human rights legislation to ensure that that person acting on their behalf is acting in a proper and competent manner. I think it's also arguable, under human rights law, that, if that organisation to whom the enforcement activity has been handed is carrying out duties of a public nature, as the Human Rights Act 1998 says, then they are directly captured by the obligations of the Human Rights Act, not just on the grounds that they are carrying them out on behalf of someone who is captured by them.

[113] So, those are the safeguards that I think are in place. We have thought very seriously about them and debated them ourselves, because I do agree that these are serious powers, and we must make sure that they are put on the face of this Bill in a way that protects people's rights, as well as allow the proper purposes of this Bill to be pursued.

[114] **David Melding:** I note the precedents you've just used there, but the law as drafted would also allow—. Let's say it's the local authority that has sought the warrant, it allows the warrant holder to actually take additional people with them, and that's a very grey area, isn't it? Would those additional personnel be subject to human right legislation?

[115] **Mark Drakeford:** Well, I think there are occasions when it will be very important for those people to be able to take other experts with them. To take the sort of example that this Bill is really constructed around, imagine a situation in which it is believed that someone is carrying out intimate cosmetic piercing of someone under the age of 16 without having a proper licence or having the premises from which they operate secured under the law—that it's going on behind closed doors somewhere beyond the reach of the law. If an enforcement authority is able to secure a warrant in the first place, they may, for example, want to take a doctor with them in those circumstances in order to provide the protections that the law is now seeking to provide. So, I can see circumstances in which the enforcement authority would wish to be accompanied—properly accompanied—by other people in order to pursue the objects that the law is then there to secure.

[116] **David Melding:** Okay—

[117] **Mr Jones:** I would also add, if I can, that the local authority and those persons attending with the local authority—. Those persons would be acting on behalf of the local authority, and, of course, the local authority is subject to a duty of reasonableness and rationality under general public law principles. So that would also serve to protect the homeowner in those cases.

[118] **David Melding:** Yes, but you still haven't quite simply said that they would be captured by the Human Rights Act, though.

[119] **Mark Drakeford:** I'll defer to lawyers to give you a more definitive answer than I could.

[120] **Mr Jones:** I'm content that those persons acting on behalf of the local authority would be subject to the requirements of the Human Rights Act. The local authority wouldn't be absolved of its responsibility by the fact that they are delegating their functions to a third party.

[121] **David Melding:** My specific example was actually that the local authority is there as the warrant holder—or whatever officer exercises these functions—but takes other individuals with them. It's whether they're captured.

[122] **Mark Drakeford:** I think they would be. My understanding of the discussions we've had is that they would be captured because they are operating under the umbrella that the local authority has to secure.

[123] **David Melding:** I'm sure we are pleased to note that assurance. Do we have any further questions? I think we've reached the end of our session. All that remains, then, is for me to thank you and your team, Minister. It was a very helpful session, I thought. We'll now reflect on your evidence and draft our report. Thank you very much.

[124] **Mark Drakeford:** Thank you very much. Diolch yn fawr.

14:27

## 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

[125] **David Melding:** Right, we move to item 3, instruments that raise no reporting issues under our Standing Orders. They are, however, listed there. Are we content? I think we are. Then we have affirmative resolutions. We don't need to report on them, but they do refer to the human transplantation regs. So, they're of great public interest; I think we just want to note that.

14:28

## 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

[126] **David Melding:** If we're happy, we can move to item 4, instruments that do raise reporting issues. There is just one—the Water Environment (Water Framework Directive) (England and Wales) (Amendment) Regulations 2015. Are we content with that report? Thank you very much.

14:29

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

[127] **David Melding:** We have some papers to note. We have a letter from Bruce Crawford, Member of the Scottish Parliament and Convener of the Scottish Parliament's Devolution (Further Powers) Committee. I suggest we discuss that in private session. We also have an invitation to give evidence from the Public Administration and Constitutional Affairs Committee of the House of Commons. Again, I would like to refer to that 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.*

[128] **David Melding:** I now move the relevant Standing Order that we conduct the rest of the meeting in private unless any Member objects. I do not see a 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 14:30.*
*The public part of the meeting ended at 14:30.*