Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

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

Dydd Llun, 27 Ebrill 2015
Monday, 27 April 2015

Cynnwys
Contents

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

The proceedings are reported in the language in which they were spoken in the committee. In

addition, a transcription of the simultaneous interpretation is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Alun Davies	Llafur Labour
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
William Powell	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Lindsay Whittle	Plaid Cymru (yn dirprwyo ar ran Simon Thomas) The Party of Wales (substitute for Simon Thomas)

Eraill yn bresennol
Others in attendance

Mark Drakeford	Aelod Cynulliad, Llafur (y Gweinidog Iechyd a Gwasanaethau Cymdeithasol) Assembly Member, Labour (the Minister for Health and Social Services)
Anna Hind	Llywodraeth Cymru Welsh Government
Kate Johnson	Llywodraeth Cymru Welsh Government
David Pritchard	Llywodraeth Cymru Welsh Government

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

Stephen Boyce	Y Gwasanaeth Ymchwil Research Service
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Ruth Hatton	Dirprwy Glerc Deputy Clerk
Gareth Pembridge	Cynghorydd Cyfreithiol Legal Adviser
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Joanest Varney-Jackson	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Gareth Williams	Clerc Clerk

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, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. We have apologies from Simon Thomas,

but I'm very pleased to welcome Lindsay Whittle here as his substitute this afternoon. I'll just make the usual housekeeping announcements. We do not expect a routine fire drill, so if we hear the alarm, please follow the instructions of the ushers. Could you switch all mobile devices either off or on to 'silent'; they can interfere with our equipment, otherwise. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there is a translation on channel 1. Channel 0 will amplify our proceedings should you require that service.

13:34

Tystiolaeth mewn perthynas â'r Bil Rheoleiddio ac Arolygu Gofal Cymdeithasol (Cymru)
Evidence in relation to the Regulation and Inspection of Social Care (Wales) Bill

[2] **David Melding:** Item 2, then, is evidence in relation to the Regulation and Inspection of Social Care (Wales) Bill. I'm delighted to welcome the Member in charge, Mark Drakeford, the Minister for Health and Social Services. Minister, do you want to introduce your team?

[3] **Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol (Mark Drakeford):** Diolch yn fawr, Gadeirydd. Gyda fi y prynhawn yma mae David Pritchard, pennaeth yr adran sy'n gweithio ar y Bil, a Kate Johnson ac Anna Hind, sy'n gweithio i'r adran gyfreithiol.

The Minister for Health and Social Services (Mark Drakeford): Thank you very much, Chair. With me this afternoon are David Pritchard, the head of the department working on the Bill, and Kate Johnson and Anna Hind, who work for the legal department.

[4] **David Melding:** Thank you, Minister. Can I start with the traditional question about competence? Are you are fully satisfied that this is within competence and have you had any discussions that were necessary with UK Ministers to determine that?

[5] **Mark Drakeford:** Yes, thank you, Chair. Well, I am satisfied that the Bill falls within the competence of the National Assembly. I believe that its content falls, fair and square, within the field of social welfare. I was grateful to see the Presiding Officer's determination on 23 February that, in her view, the Bill was within the competence of the Assembly. In preparing the Bill, my officials had discussions with colleagues in the Wales Office, prior to its introduction, and no issues of competence were raised within those discussions.

[6] **David Melding:** Thank you for that, Minister. I think it's fair to say in general that, of the Bills that come before us, this contains a lot of powers to make subordinate legislation. We'll obviously go into the specifics of some of these areas, but why has it been necessary to leave so much to secondary legislation, Minister?

[7] **Mark Drakeford:** Well, Chair, I think my starting point would be to say that, actually, I believe that this Bill puts a great deal more onto the face of the legislation than the legislation that it updates and substitutes for. The Care Standards Act 2000 is the Act that, primarily, we've relied on in these fields up until now. That had 71 parts, as an Act; this Bill has 188 parts and three Schedules. The reason for that is that we have sought to put a great deal more, particularly in relation to workforce regulation, on the face of the Bill than has been the case in statute up until now. Here's a precedent: I was cheered up by what the leader of the opposition said on the floor of the Assembly when the Bill was introduced, because he said,

[8] ‘It is good to see that there is a refreshing lot of detail in this legislation. Very often, we are asked in this place to hand over powers to Ministers in the hope that they will fill in the blanks…This Bill obviously does have a great deal of detail in it’.

[9] So, I was encouraged by what was said there. But, as you know, it’s always a matter of trying to strike a balance. There are areas where we know the Bill will need updating over time, where leaving those powers to regulations and so on, rather than having to return to the Assembly every time we have to do something of that order, is necessary. We think that the Bill sets out a clear direction of travel, proper parameters for the use of subordinate legislation and that, subject to what this committee says, to which I will attend very carefully, of course, we think we’ve got the balance broadly right.

[10] **David Melding:** One thing that doesn’t consistently appear on the face of the Bill is the duty to consult. In fairness to you, the policy intent document does provide instances where you do intend to consult on various regulations, but why don’t you take a consistent approach? We’ll talk about some of these in more detail but they relate to very serious matters about professional practice and fines and all sorts of things, so why, if you are going to consult, didn’t you just have a duty to consult on the face of the Bill?

[11] **Mark Drakeford:** Well, Chair, I think you’re right to point to the statement of policy intent. These are relatively new parts of the legislative landscape at the National Assembly. When the Social Services and Well-being (Wales) Bill was introduced, for example, there was no such document produced alongside it, and part of the purpose of having such a statement, I think, is to give Assembly Members the confidence that the Government does intend to consult, even when we don’t put that as a duty on the face of the Bill. Once it’s there as a duty on the face of the Bill, then every time changes are necessary in that particular provision, there would be a duty to consult on those changes, and, while we give commitments to consult pretty regularly in the statement of policy intent, it’s because we think that there is likely to be a need to consult when establishing some of the new provisions of the Bill, but it would be very over-burdensome, on the sector, its stakeholders and on the Assembly itself, if we were to have a duty to consult every time we wanted a modest updating or refreshing of some of those parts. So, that’s the basic rule of thumb that I think we have tried to navigate. There are specific items that stand at the cusp of that decision, and I’m sure the committee will want to rehearse some of those specifics.

[12] **David Melding:** Okay. We will now move to the specifics, as you put it, but thank you for stating those general principles, anyway, that have shaped the way the Bill is drafted. I’ll ask William Powell to start with the first set of more specific questions.

[13] **William Powell:** Thank you very much, Chair. Minister, it would be very useful to know why the information required in the annual return is not actually on the face of the Bill, given that it’s listed in the accompanying policy intent document, rather than being left to regulations under section 8(2) and also whether a duty to consult in this case, notwithstanding what you said earlier, should be placed actually on the face of the Bill.

[14] **Mark Drakeford:** Thank you to Bill for that question. I think it does raise a significant issue. There are two different examples in the Bill. One is in relation to applications for registration under section 6(1)(d) of the Bill. It is just a replication in this statute of the system that we have run under the Care Standards Act 2000. The requirements there were made under the negative procedure by this Assembly back in 2002. There was a further updating of them, again made under the negative procedure. They are of a relatively mundane and administrative nature, and we saw no case for altering the system that had already served the Assembly well.

[15] When it comes to the annual return, however, under section 8(2), I understand the

different arguments that can be made there. This is a new provision. Up until now, providers have not been under an obligation to produce an annual return to a national specification, nor has there been an obligation on them to publish the document that they have. So, in a way, this is a more significant requirement of them. Our view has been that the way that we've set it out in the statement of policy intent is sufficient to explain to Assembly Members how we will go about it, and that the negative procedure is sufficient. If, as a result of your deliberations, you feel that this is one of those cases where consultation and the affirmative—or, rather, the affirmative procedure the first time the regulations are made and a reversion to the negative after that—is necessary in order to establish the new system, I would look carefully at such a view.

13:45

[16] **William Powell:** Thank you for that response. Given that a failure to submit such an annual return, and to do so in a timely fashion, would be an offence, do you consider that actually specifying the time limit on the face of the Bill would have merit?

[17] **Mark Drakeford:** Actually, I don't believe it would have merit. In this case, I feel quite positively that it would not be the right thing to do, because, as you say, here a criminal offence is being created, so I think we have to work very carefully with the sector to make sure that we establish timelines for the production of annual reports that don't inadvertently lead to people committing offences of this sort. Because it is a new provision we might, for example, want, in the first iteration of them, to give a bit longer for these reports to be produced and, as they become part of the routine work of the sector, to reduce the time limits to take account of people's greater familiarity with the new system. So, I think that the face of the Bill would actually be the wrong place to put a rigid time limit from the outset. This is something better left to regulations where proper discussions with the sector can be carried out, and where some extra flexibility in implementation will be possible.

[18] **William Powell:** Thank you, Minister, for explaining the rationale behind that. If I could turn now to section 19(6), it would be useful to know whether regulations made under section 19(6) should, in fact, be subject to the affirmative procedure, given that they may arguably be used to dilute one of the very central provisions in the Bill.

[19] **Mark Drakeford:** Chair, I think I would probably want to take issue with the contention that these are powers that are capable of being used to dilute a central purpose of the Bill, because I think there are other safeguards within the Bill—the general requirements that are in it—that would prevent that from happening. Maybe I could try to explain—and rely on my colleagues here to rescue me if I get it wrong—what this particular power is all about. The Bill sets up a new statutory role of the responsible individual. It is a very important new role set up by the Bill, because it places new obligations on people at board level for the oversight and the quality of the services that they provide. What section 19(6) is is essentially a fallback position that means that, if a responsible individual, for example, suddenly left a company or was suddenly incapacitated through illness and unable to discharge those obligations, or for any other reason had to stand back from the role, the registration of the service per se would not be put in danger by that. We would not want a competent, well-run and quality service to be put in danger because there was a temporary period when a responsible individual was not in place. That's what this provision is really about. It is a contingency provision. We would not be making long-term arrangements to allow a company not to have a responsible individual, but we don't want the temporary inability to provide such an individual to have consequences that we wouldn't expect it to have. For that reason I think that, as we conceive of it in the Bill, it's proportionate with the purpose that we expect that power to discharge.

[20] **William Powell:** Thank you for that response. If I could turn now to sections 26 to

30, with regard to regulations and guidance. Minister, why is so little information provided on the face of the Bill about what in fact may be included in the form of regulations and what in the form of guidance made under sections 26 to 30?

[21] **Mark Drakeford:** Thank you, again, Bill, for that. Partly, it is what I said in answer to one of the Chair's questions: that we set out a good deal of the detail about what we intend to do using these powers within the statement of policy intent. It is true, I concede, that we could go down the route that was adopted in the Care Standards Act 2000, where, in section 22 of that Act, it does set out quite a lengthy list of the things that we are talking about. I think, though, the danger is that if you put an illustrative list—and that's all it could be at this point—on the face of the Bill, people would begin to think that it's actually the definitive list, and, as that list is augmented and amended through regulations, as we imagine it would be, it becomes confusing to have two lists in operation, where the real list is not actually the one on the face of the Bill, because it's been overtaken by the development of requirements that we would be developing through the regulations. So, we've decided not to do that for the purposes of this Bill, and that partly explains why you don't have what appears to be the detail that was there in the Care Standards Act.

[22] I'll ask my colleagues if there's anything that I ought to add to that in terms of the general explanation.

[23] **Ms Johnson:** The only other point to make is that whatever duties we impose upon providers, whether they be general regulations or the standards, they have to be true to section 4, which sets out the objectives of the regulator under this part of the Act. So, the things that can be done under those regulations are not a limitless field—they have an end to themselves. I think that's an important point to make in terms of what could be done under those powers.

[24] **Mark Drakeford:** In relation to section 30, which I think the Member mentioned, just to say that, in a way, that is a parallel to the responsible individual power, but now a power in relation to the service. So, it is possible, we think, that the service can be run quite competently by a registered manager in temporary arrangements, and it wouldn't be desirable to cancel the registration in circumstances where a service can be properly carried on while the long-term arrangements are being re-established.

[25] **William Powell:** Minister, given the importance of the regulations made under section 26(1), is there a case to be made for them to be subject to a superaffirmative procedure?

[26] **Mark Drakeford:** I do agree that these are regulations that will be at the heart of the new system that is being established. It is why, in this instance, we have placed a duty to consult on the face of the Bill. I'm not certain myself whether there would be sufficient additional gain in moving to a superaffirmative procedure, which, in my experience of overseeing the superaffirmative procedure under the Social Services and Well-being (Wales) Act 2014, essentially, rests on the duty to consult.

[27] **David Melding:** You'd be publishing the draft regulations, wouldn't you, as part of the consultation, if you accepted the superaffirmative? I think that's what we're driving at.

[28] **Mark Drakeford:** Okay. We'll certainly look at that, but there is already a duty to consult, and consultation would have to be on the basis of—

[29] **David Melding:** At the minute, it's your duty to consult before making the regulations; you wouldn't have a duty to publish the draft regulations unless you agreed, as a result of our recommendation, to do so in this case, in the superaffirmative procedure.

[30] **Mark Drakeford:** I'm very happy to consider that point.

[31] **David Melding:** You don't have an objection in principle, if I understand you.

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

[33] **Mr Pritchard:** I think it's important to recognise here the key issue is the standards that apply themselves, not necessarily the regulations that surround them. So, we would not envisage a situation where those standards would not be the things that were consulted on. Whether that would be the regulations that surround those standards is another matter.

[34] **William Powell:** Chair, if I could conclude my questioning with reference to regulations about service users that go into liquidation, it's been my unfortunate experience to be rather close to that situation, and I know you've had, Minister, cause to speak to council leaders in a particular authority in Wales regarding this very issue in recent days. What is the rationale for including the powers in sections 29(1) and 30(1), and how do you envisage them being used?

[35] **Mark Drakeford:** Thank you. The rationale for including the powers is a parallel to the discussion we had on the responsible individual: that if someone dies, for example, or there is liquidation, then you don't want to have an automatic trigger of cancellation where the service itself can be properly sustained. So, that's the rationale for it. The powers that we take in these sections are all existing powers drawn from the Care Standards Act 2000. This is the exact formula that's on the statute book now. These powers have had to be used already, and there are recent examples where they've been relevant. Our belief is that they have stood the test of that experience, and that they provide a reasonable way in which, where a service can be sustained temporarily, it allows that to happen without the disruption of automatic closure of a service because of a failure in one particular aspect of it.

[36] **William Powell:** And finally from me, do you think again that there is a case that could be made for sections 29(1) and 30(1) to be subject to the affirmative procedure given the significance that they have?

[37] **Mark Drakeford:** Chair, I don't think I would think so. These are, as I have said, essentially contingency matters, particularly in relation to the last matters we've just discussed. As I've said, we are simply transposing into this Bill a set of procedures that are there already. They haven't been subject to the affirmative procedure previously, and I don't think we've been able to find any instance where that has been brought to create detriment.

[38] **David Melding:** Thank you very much. Before I ask Alun Davies to take us through the next set, can I just go back to section 6, which relates to the application for registration as a service provider? The information that will need to be set out is on the face of the Bill, and you refer to two previous—one Measure, one Act, or two Measures. Anyway, you could add to that information by way of the negative procedure, which, given that there is a lot on the face of the Bill, would normally not excite us, really, but the policy intent document does refer to Operation Jasmine and that that will inform the content of regulations that may need to be made. That kind of then raises the possibility in our minds that it may be a bit more fundamental than is indicated. So, if that happens, do you think the affirmative procedure may be appropriate, or perhaps in the first instance after you've considered the review, and then you could return to a negative procedure afterwards?

[39] **Mark Drakeford:** Well, Chair, I've had the benefit of a number of discussions now with Dr Margaret Flynn, who is conducting that review. Her report will be available during the time that this Bill will be proceeding through the National Assembly. If it were to be the case that she had views about this particular aspect that meant that more significant changes

were to be included at a later point in the Bill's progress, then I'd be happy to look at whether, in those circumstances, the affirmative rather than the negative procedure would be more proportionate to it. I don't think I can probably go further than that, but I understand the point you make, and if that does arise, then we will look at the whole arrangement that we propose.

[40] **David Melding:** Thank you, that's helpful. Alun Davies.

14:00

[41] **Alun Davies:** Thank you very much. Minister, I'm interested in the section 35 and section 56 inspection ratings, and the introduction of the ratings, which, I very much agree with you, will help to improve quality and standards. In drawing up the regulations to deliver these quality ratings, do you believe that a duty to consult would actually help you in doing so, and would certainly help deliver what the ratings seek to deliver? Given the significance of the ratings system in ratcheting up quality and standards, would you not agree that a superaffirmative procedure should apply in both cases, and would actually significantly help you achieve your objectives?

[42] **Mark Drakeford:** Chair, I certainly agree that there will be a very significant need to consult. This is a major potential part of a new regulatory regime, so it's both new and it's significant. We commit to that sort of consultation in the statement of policy intent. I'm happy to consider, in a positive way whether, because it is new and significant, that duty to consult ought to appear on the face of the Bill, although the commitment to it is absolutely clear. Again, re: what the Chair said earlier, I would think about whether—without yet feeling convinced—with a duty to consult clearly on the face of the Bill, were it to be there, the additional requirements that would go with superaffirmative would be sufficient to merit it, but I'm not ruling it out either. I'll just have to think that through.

[43] **Alun Davies:** Okay. I think that's fair enough. But you have used the Food Hygiene Rating (Wales) Act 2013 as an example of this, and, of course, there was a lot more on the face of that legislation than appears on the face of this legislation, so it would appear that perhaps a superaffirmative procedure would actually help in this case.

[44] If you'd like to move on, in terms of the penalties for failure to comply with requirements in regulations, again, you have been suggesting that the Government uses the affirmative procedure to deliver the regulations under sections 43, 44, and 57. Do you not accept that, given that these are very serious offences that are being created by these sections, perhaps a superaffirmative procedure should apply to these regulations?

[45] **Mark Drakeford:** I think my answer is probably close to what I've said in relation to my last answer. I accept that the Bill provides the potential for new offences to be committed, and that the penalties for some of those offences, because they are triable either way, would be significant. Because I'm in agreement with what Alun said on that, then I'm happy to look at whether the consultation, to which we are committed already in the statement of policy intent, would be better placed on the face of the Bill. Whether I would go further than that, in making the superaffirmative procedure apply to this area, as well as the other suggestions that have been made, I think I would really need to think more carefully about.

[46] **Ms Johnson:** I think it might also be worth mentioning that these provisions that create offences are linked to the section 26 power to impose duties upon providers, and then these are the offences that apply to those duties. Obviously, section 26 has a power to consult, if making the first set of regulations, and anything significant subsequently. So, you're going to get that consultation by virtue of them being part of the section 26 regulations.

[47] **Alun Davies:** So, these regulations will, in fact, be part of other regulations, which

will be consulted upon?

[48] **Ms Johnson:** Yes.

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

[50] **Alun Davies:** I think that does help us. Can I move on to section 55, in that case, and the local market stability reports? This is something that we spent some time on in the health committee. Again, I very much agree with your proposals here and with the objectives of local market stability reports. There are some concerns about whether the capacity exists to actually deliver on these ambitions, but that's probably for another place than here today. I think what might be relevant here is the description of those reports on the face of legislation and in the explanatory memorandum. It doesn't appear to me that there's sufficient meat there for us to fully understand what you are anticipating from these reports and therefore I think, whilst local authorities at the moment seem to be somewhat concerned about their capacity to deliver them, we are somewhat concerned, I think it's fair to say, about what they will actually look like as well. Would it be helpful, Minister, if, perhaps, there was more here on the face of the Bill, or, perhaps, if your department were at least to provide an example of what you would anticipate a local report to look like, in order to enable us to understand what you're seeking to achieve here?

[51] **Mark Drakeford:** I'm certainly happy, Chair, to provide a note for the committee that draws out the information that we have developed already about the way that market stability reports will be prepared, the time cycle over which they will be prepared, the time period over which they will be required to report and the powers that the Act would provide to Welsh Ministers to prescribe the form of these reports, because I think all of those things are there in the way that the Bill has been drafted. If it's helpful to draw them together into a note that would help the committee to answer some of the concerns that Alun has raised, I'd be very happy to arrange for that to happen.

[52] **Alun Davies:** I think that will be very useful. Thank you.

[53] **David Melding:** Before I ask Lindsay Whittle to take us through the next stage, can I just clarify something on penalty notices? I don't know if wiring this back to section 26 is enough, but I want to ask this very explicitly anyway. In referring to the standard scale—I realise why you're doing that; I don't have a problem with that—there has been a proposal, which has now been withdrawn, before the UK Parliament to actually increase, by affirmative procedure, the standard scales, and, in fact, to increase them by a factor of four. That could well happen in the future, which, of course, would then affect your range of penalties. Some reassurance that, if that ever becomes a possibility, you would consult would be perhaps appropriate at this stage.

[54] **Mark Drakeford:** Yes, Chair, I'm happy to give that commitment. I'm happy to look at whether, if we were to place a duty to consult on the face of the Bill in relation to the new offences and the penalties attached to them that we discussed earlier, it would make sense in a coherent way to extend that same duty to the issue of the standard scale of fines that matter too, because they are connected in the Bill. If there's a duty to consult on the one, then maybe it makes sense to put it on the face of the Bill in relation to the other.

[55] **David Melding:** Thank you for that. Lindsay Whittle.

[56] **Lindsay Whittle:** Thank you, Chair. Good afternoon, Minister. The policy intent document tells us that you have no intention to charge local authorities a fee in respect of their social service inspections, yet 149(c), which is a new section that you're inserting, says that you can charge—by regulation, of course. What is it to be—to charge or not to charge?

[57] **Mark Drakeford:** Well, Chair, in the current regime that we have, there is no intention to charge. But, the Bill sets out a number of ways in which the system will be different in the future. Now, we are slightly anticipating things here, but I will give one example of why I think the power is worth retaining in the Bill. In quality ratings, for example, local authorities will, potentially, be quality rated by the regulator. If it were to be possible, in that regime, for a local authority to seek to be rerated, then I don't think it would be unreasonable to charge the local authority when it, itself, is seeking a rerating. Now, where we require it to be rated—and that's the current policy—I don't intend to charge local authorities for things that we require of them, but if they were to ask for something to be revisited in the future, then I don't think it would be unreasonable to think that they might need to bear the cost of that. This particular part of the Bill would allow for that possibility and therefore it's worth retaining in the Bill.

[58] **Lindsay Whittle:** And it is only for a review, and not for the initial inspection.

[59] **Mark Drakeford:** I have no intention of using it for the initial inspection, Chair, no.

[60] **Lindsay Whittle:** Okay, thank you. That's quite clear. Thank you very much, Minister. The next question I have is: given the importance of some of the regulations that can be placed under the new section 94A of the Social Services and Well-being (Wales) Act, which referred to specific requirements of local authorities, for example, to test the fitness and the type of staff who undertake work with children and, indeed, the fitness of premises to be used, do you think that the affirmative procedure should apply and should there be a duty to consult placed on the face of the Bill?

[61] **Mark Drakeford:** Well, Chair, I'm aware of this issue. It's a relatively complex one, so I'll do my best to explain it, but I may need to have some assistance with it. My understanding here is that the section that we will insert into the 2014 social services Act—that's to say, the new section 94A—is actually a subordinate regulation-making power to the power that already exists in the social services Act under section 87. So, 87 is the substantive power and this will be a power subordinate to it. The National Assembly agreed, in the passage of the social services Act, that the negative procedure should be used in relation to section 87 regulation-making powers and it would seem odd to have the negative procedure for the substantive regulation, but to require an affirmative procedure for the subordinate power, and that's why we have put the two things on the same basis. Now, I hope I haven't misled you in my explanation.

[62] **Lindsay Whittle:** Okay. I'll take your word for it [*Laughter.*]

[63] Could I go on to ask you a little bit about section 60(6), which talks about the assessment of financial sustainability of service providers, and ask you, again, whether you think the superaffirmative procedure should apply to that—you know, whether there should be a duty, perhaps, to consult placed on the face of the Bill?

[64] **Mark Drakeford:** Well, Chair, this is another of the major changes that this Bill introduces, because we're talking here about those circumstances where new powers are being taken to be able to check the financial fitness of some major providers of residential and domiciliary care in Wales. This particular section—section 60(6)—is the section of the Bill that identifies those people from whom information could be required in order to make a judgment about the financial health of an organisation. In a bit of a theme of the afternoon, I think my answer would be that while I would remain to be convinced about the need for the superaffirmative, given that these are new and significant powers, if the committee felt that the duty to consult be on the face of the Bill rather than in the statement of policy intent, I'd be happy to look positively at that.

[65] **Lindsay Whittle:** Okay. And, if I could, finally, through you, Chair, talk about section 60(7), the power is drafted very broadly. I don't think the explanatory memorandum or the policy intent document expands further on how that power will be used. So, perhaps you could explain to us how that power will be used.

14:15

[66] **Mark Drakeford:** Thank you, Chair. Well, both Alun and Lindsay would have been at the Health and Social Care Committee where we discussed this very issue, and I promised to write to members of that committee with a broader explanation of the way in which these powers will be used. I am very happy to share that note with members of this committee, too. But this is the power that sets out how the financial fitness of an organisation would be assessed, so, in trying to answer Lindsay's question about how it would be used, I think it is a three or four-stage procedure that we have here. First of all, the Bill sets out ways, or allows us to set out ways, in which we will distinguish those major suppliers. We expect there to be about 15 to 20 in Wales. How will we decide whether an organisation is on the list or not? Well, in residential and nursing care, it's likely to be the number of beds that that provider supplies. In domiciliary care, it's likely to be, for example, the number of hours of domiciliary care the provider supplies and, if you're above a certain threshold, you will be on the list.

[67] The second stage will be that we will expect the regulator to carry out due diligence on all the 15 or 20 providers that are on that list, in a proportionate way. Where, as a result of the due diligence exercise, the regulator believes that there are causes for concern over the financial health of that provider, then the third part of the process will kick in, and that will allow the regulator to require the service provider to undertake a business review and to provide the regulator with contingency planning arrangements. Where, at the end of that process, having received the business review and the contingency planning arrangements, the regulator still believes that this is a service at risk, then the fourth stage in the process would come in, and that is where the regulator would have a duty to inform the local authority where that service is being provided of its assessment.

[68] So, that's how the power would be used. It's there, as Members will understand, to guard against a replication of events that led to the closure of Southern Cross. These powers replicate very closely the processes set out in the Care Act of 2014 in England, because we are very well aware that, when we are talking about these large providers, these will be providers operating across borders, and where there are concerns about the financial health of an organisation, it will be very important for regulators in Wales to work closely with regulators elsewhere. So, we've done our best to mirror the processes set out elsewhere so that that intelligence sharing can be made as easy as possible.

[69] **Lindsay Whittle:** Could I, through you, Chair, ask a supplementary? At what stage did you say the regulators would involve the local authorities, please?

[70] **Mark Drakeford:** At the fourth stage. So, this is where the due diligence has been carried out and that has led to the regulator being sufficiently concerned to require the provider to carry out a financial check or a business review, as we call it, and to produce a contingency plan. Now, at that point, the regulator may decide that, with all that extra information, its anxieties have been addressed, and there is no need to alert the local authority, but if they believe, having gone through the business review and having received the contingency plan, that there are causes for concern, then there would be a duty to inform the local authority because, at that point, the new obligations that the Assembly placed on local authorities in the 2014 Social Services Act—which are to pick up the pieces if everything goes wrong—will kick in.

[71] **Lindsay Whittle:** Again, sorry, another supplementary: I appreciate the confidentiality of that sort of inspection, but do you think the fourth stage is too late?

[72] **Mark Drakeford:** Well, Chair, it is an important question, and the whole Act, or Bill—I beg your pardon—is a balancing act, always, between the rights of service providers and workers in the workforce area, and how you balance those rights, both human rights and other rights as well, against the rights of users of the service to have their rights properly observed and protected. We think we have done our best to get that balance right here. You would not want premature disclosure of anxieties about a service provider, because those anxieties themselves may become part of a business problem for that provider. So, that's why we make sure we go through all the processes first, before any concerns are shared beyond the regulator.

[73] **Lindsay Whittle:** Thank you very much.

[74] **David Melding:** Minister, can I just move us to Parts 3 and 4 and Social Care Wales, which is what you're going to rename the Care Council for Wales? Section 72 sets out procedures by which SCW could make rules. Basically, what we need to clarify is why you think they will need these powers and, more particularly, why there should be no procedure for us nor any endorsement by you.

[75] **Mark Drakeford:** Thank you, Chair. This is primarily the part of the Bill where we have placed a great deal more on the face of the Bill than is in the Act of Parliament that it supersedes. We have elevated into primary legislation the fundamental principles and processes of workforce regulation. So, there's a great deal more clarity on the face of the Bill about registration and about regulation. We feel that, with that greater, full legislative force, it is sensible to allow Social Care Wales some greater operational autonomy in the way that it goes about the practical discharge of these duties. I think there are three reasons for that. One is that these then become essentially operational matters. The policy is clearly on the face of the Bill and they have to operate within that policy, but they are discharging it operationally and my belief is that there is a case for allowing them to get on with that. Secondly, I think we are talking about an organisation that has proved itself, over the 15 years of devolution, to be a competent organisation that already goes about its business in a way that has withstood every review and inspection and so on of it. Thirdly, we are directly drawing on the advice of the Law Commission, because the Law Commission, as I'm sure you know, produced a draft Bill of its own over workforce regulation and was very clear in its advice that these rule-making powers should not be capable of being interfered with by Ministers, other than that everything that Social Care Wales will do has to be within the parameters of the rules that Ministers will be responsible for policing. So, we are taking the Law Commission's advice in this approach.

[76] **David Melding:** And then section 110, relating to the title of social worker. I suppose when we look at that and what's in the explanatory memorandum, and your need for flexibility, we just wonder whether this, in effect, gives you a power to amend something on the face of the Bill and to do that by negative procedure, which usually we do not think is appropriate.

[77] **Mark Drakeford:** Chair, I agree with both of those things. Normally, powers to amend primary legislation would not be by the negative procedure. These are powers that do allow for primary legislation to be amended. But, my understanding of them is that these are very narrowly conceived powers where the changes would simply be of a factual nature. So, to give you a different example, there will, I am sure, be statutes that have gone through the Scottish Parliament that refer to the Care Council for Wales. If Social Care Wales is created, that statute will need to be amended to put Social Care Wales in place of the Care Council for Wales. It is exactly that: a factual updating of the statute that this power refers to. There are

no policy powers that lie behind it. It is simply a matter of us being able to be sure that, if there are changes of that factual nature happening elsewhere, we can update the legislation without needing to come back to the Assembly for a greater level of oversight.

[78] **David Melding:** William.

[79] **William Powell:** Thank you, Chair. Sorry, I've just lost my place.

[80] **David Melding:** On the European convention.

[81] **William Powell:** Oh yes, sorry. Minister, in general terms, could you help us to explore further how the provisions of the Bill are considered to be compliant with the European convention on human rights?

[82] **David Melding:** You have made an indication, actually, through your evidence

[83] **Mark Drakeford:** Yes; thank you, Chair. Obviously, in receiving advice that allowed me to conclude that the Bill was within competence of the National Assembly, and the fact that it is compliant with the human rights convention is part of what you have to be satisfied about. So, I received advice on that that led me to conclude that it was compliant. The Presiding Officer, no doubt, will have had advice of her own on that matter. I think that there are some clear instances in the Bill where we have strengthened people's rights under the European convention. I might just offer you one, if I could, Chair: at the moment, if registration is cancelled in urgent circumstances, the only power that a court of law has is to say 'yes' or 'no'. If it says 'yes', the service is brought to an immediate end and there is no right appeal for the service provider against that decision. In this Bill, we allow a court of law to agree that cancellation should take place, but to provide a timetable for that to happen. That timetable would mean that the provider would be able to appeal that decision to the first tribunal. So, there are new safeguards there that protect the human rights of the provider. Where we've been able to, I think that we have looked to strengthen that aspect of the Bill.

[84] **Ms Johnson:** Can I just correct something slightly—

[85] **Mark Drakeford:** Oh, sorry—oh, yes please.

[86] **Ms Johnson:** —that the Minister said there? There is currently a right of appeal to the tribunal against urgent cancellation. The change in the Bill is that the Order for cancellation can take effect when the magistrates' court says it can. So, there can be a delay for the Order to take effect, and then the tribunal has the power to make any other Order, including an interim Order. So, it could effectively stay the decision of the magistrates, pending an appeal hearing. So, that's a significant change to the current provision in the Care Standards Act 2000.

[87] **William Powell:** I am grateful to you for that answer and the further clarification.

[88] **Mark Drakeford:** Thank you very much.

[89] **William Powell:** If I could pursue this line in terms of section 124, specifically around a duty to investigate, the issue that interests me is whether regulations made under section 124(5) should actually be made under the affirmative procedure as it relates to the right to a fair trial under the European convention on human rights and whether this could be compromised by the composition of a fitness-to-practise panel.

[90] **Mark Drakeford:** Yes. Thank you, Chair. So, this is a slightly different matter now. This is not where a service is under scrutiny, but where an individual practitioner is under

scrutiny. I think, again, that the Bill is carefully constructed to make sure that all necessary investigations and checks and balances are in place prior to any decision to go to a fitness-to-practise panel, and then the Bill is clear that the composition of such a panel cannot draw on anyone who has been involved in the consideration of whether or not to bring such a panel together.

14:30

[91] And, indeed, the Bill is clear that, as has been the developing practice of the Care Council for Wales, the fitness-to-practise panel must be lay led, so its membership will be drawn from people outside the professional ambit itself. We think that those powers are more than sufficient to make sure that the human rights convention and the rights to a fair trial, and so on, are very, very properly protected. I don't myself come to the conclusion that there is a need for the affirmative procedure to be applied to those, because I think those rights are very adequately protected in the way the legislation is drafted.

[92] **William Powell:** Thank you, Minister. And moving finally, from me, to section 135, do you consider that the disclosure of undertakings to additional persons under regulations in section 135(2) to be an administrative function only, or potentially does it engage article 8 of the European convention on human rights, specifically the right to respect for family and personal life? And, if so, do you believe that such regulations should be made using the affirmative rather than the negative procedure, provided for currently in the Bill?

[93] **Mark Drakeford:** I agree that there is the potential for article 8 rights to be engaged, but, again, I think the Bill as drafted is very alert to all of that. We are clear on the sort of information that cannot be disclosed to others. We are alert to the respect for family and personal life. But, this is an area, as I said earlier, where you are always having to balance the rights of one individual against the rights of others. If a practitioner is found, following all the proper due processes and safeguards we've just mentioned, to be engaged in behaviour that causes a risk to other vulnerable individuals to whom that person is providing a service, then there are competing and probably overriding obligations to make sure that that information is shared with others who have a safeguarding duty.

[94] So, I think we've set that out in the Bill in a way that balances those competing priorities adequately, and, again, my conclusion has been that there isn't a need for the affirmative procedure to be introduced; it's there in the Bill itself.

[95] **William Powell:** Thank you.

[96] **David Melding:** I let William continue that line, as he'd asked the first question. On Part 11, final provisions, we seem to have a slight anomaly in section 184(1). It gives you various supplementary—. Where you make supplementary consequential transitory or saving provisions, and if this would affect or alter primary legislation, then the affirmative procedure would apply. And that's not unusual, but then in section 186, which contains the usual powers to commence, it also adds, and I quote:

[97] '(b) include such transitory, transitional or saving provision as the Welsh Ministers think appropriate.'

[98] Why is the power in two places, and it's a very different power in the second one to the first one?

[99] **Mark Drakeford:** I'm definitely going to ask somebody who understands this better than I do, Chair, to—

[100] **David Melding:** We'll look forward to your answer. [*Laughter.*] If no-one has it immediately, you can—

[101] **Mark Drakeford:** I'm sure Kate will probably be able to explain.

[102] **Ms Johnson:** Yes. The power in section 184 is a general power making consequential provision, and that regulation-making power is likely to be the main power that's used to make consequential provision in the Act. The reference to transitory, transitional and savings provision in section 186 is in relation to the making of commencement Orders only, so it's to make such provision in relation to the commencement. It's more than likely to be used in the context of commencing provisions in the final schedule to the Bill, so where the final schedule refers to the consequential amendments that are going to be made as a consequence of this Bill, then the commencement Order can make transitory, transitional or, more likely, savings provisions in relation to the current system insofar as the commencement of the consequential provision is made.

[103] **David Melding:** Okay. I think our lawyers have heard that as well. [*Laughter.*] It's beyond my capacity to determine here, but thank you for that explanation, and we will refer to it, if necessary, in our report.

[104] I think that concludes our questions. Can I thank you, Minister, and your team; I think we've dealt very efficiently with some complicated matters there. So, we really appreciate your preparation and candour this afternoon.

[105] **Mark Drakeford:** Thank you very much indeed. Thank you.

14:36

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

[106] **David Melding:** Item 3 is instruments that raise no reporting issues, but they are listed, should anyone have any issues. Are we satisfied?

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

[107] **David Melding:** Item 4, then, is instruments that do raise reporting issues. Again, they are listed. Are we happy to accept them? So, we're happy with the reports. Thank you.

Papurau i'w Nodi
Papers to Note

[108] **David Melding:** Item 5: papers to note. We've had correspondence in relation to the inquiry into making laws in the fourth Assembly: a letter from the Minister for Finance and Government Business, a letter from the First Legislative Counsel, and a letter from the Chair of the Finance Committee. Please note the correspondence.

[109] **Alun Davies:** Can I say a word on the letter from Jocelyn Davies? We will be looking at some money Bills, I presume, in the next Assembly, which are very different, I imagine, from that which we have dealt with over the last few years, and certainly in this

Assembly. I also presume that there will be review of Standing Orders prior to the end of this Assembly. Is that the case? It might well be useful if this committee were to write to the Presiding Officer on this subject, asking her whether money Bills will be included in any review of current Standing Orders.

[110] **David Melding:** I don't know the full answer to that at the moment, but I suspect these matters are being examined at the moment, or have been, indeed. I don't know. Does anyone have an immediate answer?

[111] **Mr Williams:** No, other than to say that I think there will need to be procedures to cover these kinds of Bill, but we could seek clarification, either in a letter or perhaps through any report the committee wants to make on its making laws inquiry.

[112] **David Melding:** We could include it in our report, but I think you want to be a bit more immediate by the sound of it.

[113] **Alun Davies:** Not necessarily immediate in terms of—. I'm raising this now because it's on the agenda, but Jocelyn Davies does say two things in her letter. First of all, that

[114] 'there will need to be changes to standing orders, particularly in relation to the budget procedure',

[115] and, secondly, she says:

[116] 'In relation to taxation Bills, at this stage I would not envisage any change from the normal Bill 4-stage Bill procedure for the passing of these taxation Bills.'

[117] There are two slightly different things there, so it would be useful, perhaps, if we were able to ensure that the Presiding Officer would be addressing these issues in any review of Standing Orders.

[118] **David Melding:** I think there's a whole issue about the budget procedure, isn't there? I think that might—. We'll find out and bring that back.

[119] **Mr Griffiths:** Gadeirydd.

Mr Griffiths: Chair.

[120] **David Melding:** Yes?

[121] **Mr Griffiths:** Rwy'n deall bod y Pwyllgor Cyllid wedi bod yn edrych ar weithdrefnau a'i fod wedi paratoi adroddiadau cychwynnol ar y broses o ystyried materion ariannol yn y Cynulliad nesaf, ac rwy'n siŵr y bydd hwnnw yn cynnwys diwygio Rheolau Sefydlog.

Mr Griffiths: I understand that the Finance Committee has been looking at procedures and has prepared some initial reports on the process of considering financial issues in the next Assembly, and I'm sure that they will continue with that work, including reforming Standing Orders.

[122] **Alun Davies:** Perhaps it would be useful—

[123] petai nodyn briffio yn dod i'r pwyllgor yma ar holl fater adolygu'r Rheolau Sefydlog cyn diwedd y Cynulliad yma—cyn bod y Cynulliad yma yn dod i ben.

if a briefing note would come to this committee on the review of Standing Orders before the end of this Assembly.

[124] **David Melding:** Yes, I think that's helpful.

[125] And then there's a written statement, which is an update on the implementation of the Social Services and Well-being (Wales) Act 2014. Members are invited to note that.

14:39

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:

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

Motion:

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.

[126] **David Melding:** I now move the relevant Standing Order that we conduct the rest of our meeting in private, unless any Member objects. I don't see any Member objecting, so please clear the public gallery and switch off the broadcasting equipment.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 14:40.
The public part of the meeting ended at 14:40.