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Cenedlaethol
Cymru

National
Assembly for
Wales

Cofnod y Trafodion The Record of Proceedings

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

The Constitutional and Legislative Affairs Committee

3/10/2016

Agenda'r Cyfarfod

Meeting Agenda

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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynnddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd. Lle y mae cyfranwyr wedi darparu cywiriadau i'w dystiolaeth, nodir y rheini yn y trawsgrifiad.

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. Where contributors have supplied corrections to their evidence, these are noted in the transcript.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Yr Arglwydd / Lord Dafydd Elis-Thomas Bywgraffiad Biography	Plaid Cymru The Party of Wales
Nathan Gill Bywgraffiad Biography	Annibynnol Independent
Huw Irranca-Davies Bywgraffiad Biography	Llafur (Cadeirydd y Pwyllgor) Labour (Committee Chair)
David Melding Bywgraffiad Biography	Ceidwadwyr Cymreig Welsh Conservatives

Eraill yn bresennol
Others in attendance

Mark Drakeford	Aelod Cynulliad, Llafur, Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol Assembly Member, Labour, Cabinet Secretary for Finance and Local Government
Andrew Hewitt	Llywodraeth Cymru Welsh Government
Gareth McMahon	Llywodraeth Cymru Welsh Government

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

Siân Giddins	Dirprwy Glerc Deputy Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerk

Joanest Varney–
Jackson

Uwch–gynghorydd Cyfreithiol
Senior Legal Adviser

*Dechreuodd y cyfarfod am 14:30.
The meeting began at 14:30.*

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

[1] **Huw Irranca–Davies:** Prynawn da, good afternoon, and welcome to this session of the Constitutional and Legislative Affairs Committee. Quite a busy session we have this afternoon, both in public and in private.

14:30

**Y Bil Treth Trafodiadau Tir a Gwrthweithio Osgoi Trethi Datganoledig
(Cymru): Sesiwn Dystiolaeth gydag Ysgrifennydd y Cabinet dros Gyllid
a Llywodraeth Leol**

**The Land Transaction Tax and Anti–avoidance of Devolved Taxes
(Wales) Bill: Evidence Session with the Cabinet Secretary for Finance
and Local Government**

[2] **Huw Irranca–Davies:** We're delighted to start this afternoon's session with a short examination of the Land Transaction Tax and Anti–avoidance of Devolved Taxes (Wales) Bill. And, in front of us today, we have the Cabinet Secretary for Finance and Local Government, Mark Drakeford, Assembly Member—you're very welcome indeed—who is also the Member in charge of this Bill. And you have accompanying you Andrew Hewitt and Gareth McMahon, your Welsh Government officials. Do you want to briefly say, Minister, what their function is in respect of this Bill?

[3] **The Cabinet Secretary for Finance and Local Government (Mark Drakeford):** Of course.

[4] **Mr Hewitt:** I'm the policy manager for the Bill.

[5] **Mr McMahon:** I'm one of the lawyers working on this Bill.

[6] **Huw Irranca–Davies:** Brilliant. Thank you very much. So, between the

Cabinet Secretary and the two of you, there should be nothing you're not able to answer, he says, confidently. Okay, well, if we can get straight into it, Cabinet Secretary, and if I can ask you first of all, on the broad areas of the Bill, are you satisfied that what we have in front of us with the Bill is within the Assembly's competence, and what discussions have you had with UK Ministers to assure yourself of that as well?

[7] **Mark Drakeford:** Well, thank you, Chair. The Wales Act 2014 amended the Government of Wales Act 2006 to provide the Assembly with the legislative competence to make provision in relation to devolved taxes, and that includes a tax on transactions involving interests in land. That's what this Bill therefore is, that's where its competence derived, and so it falls under section 108 and Schedule 7 to the Government of Wales Act 2006, as amended. So, I am confident that it is entirely within the competence of the National Assembly to bring forward this Bill and to see it progress, hopefully, through the Assembly. I have had discussions about the Bill with UK Ministers at the Treasury, but it's generally been about the substance of the Bill rather than the competence issue. Officials will have had discussions with the Wales Office on competence, and no issues in relation to competence have been raised in any of those conversations.

[8] **Huw Irranca-Davies:** That's excellent. Further to that question, one of the areas that I know you and other Welsh Government Ministers will be very concerned with is giving clarity, simplicity, transparency, to the legislation that we take forward, this legislature. How have you attempted to do that with this Bill? Are you confident that this—it's a very complex Bill—makes it as clear as it possibly can be?

[9] **Mark Drakeford:** Well, Chair, I think you're right to point to some principles that, occasionally, find themselves in a bit of tension with one another. We have been very keen to provide a Bill that is clear, but, sometimes, clarity, involving putting things on the face of the Bill so that they are there for easy study, is in a bit of tension with simplicity. Because, the more detail you provide, inevitably, you add to the length of a Bill—it's a very long Bill, and it is, as you said, technical in nature.

[10] We've attempted to address the points you make in a number of different ways. First of all, one of the reasons for the Bill being the length it is, is that it brings together in one place legislation that had grown up, in the nature of things, through amendments to a variety of different Acts of Parliament. Where you would have to go and search in a number of different

places to find the relevant law, we bring it all together in one place, and we try to make it more consistent in the way that the Bill is laid out, making it easier for the user. In a relatively limited number of places, we've tried to simplify some existing procedure. For example, we introduce a single targeted anti-avoidance rule, which brings together in the one place a series of previously single rules, dealing with known examples of previous tax avoidance. But I suppose the real way in which we have tried to pursue those objectives is by making this Bill recognisable to those practitioners who practise under the current legislation.

[11] **Huw Irranca-Davies:** And you're confident that you have done that? Perhaps I could ask you, as a supplement to that, how these powers, described in this Bill, compare with current powers that were previously available before this Bill is enacted.

[12] **Mark Drakeford:** Chair, the Bill has been carefully designed with the help of known experts in the field. It is a special-interest area, where you've got people who spend their whole professional lives dealing with just these things, and we've been fortunate to have been able to draw a group of people of that sort together to give us advice. The single most important message that they have been keen to convey to us is the need for the system that we introduce in this Bill to provide a smooth transition from the system that everybody is familiar with now, and that's what we have tried to do.

[13] There may be a chance later on to explain how we have made provision for future divergence, but, on the first day, the main objective for me is that people who do this day in, day out, are not taken by surprise—that there are no big departures that they are not expecting. That's why we published the Bill back in July in a draft form, so that practitioners could have some comfort that they would see that we have responded as much as we can to that wish. As a result, we are inevitably drawing on existing legislation: that's SDLT or stamp duty land tax in England and Wales; the Scottish equivalent—Scotland being a couple of years ahead of us around this track—is land and buildings transaction tax. We draw on both of those recognisable forms of legislation to try and make the best legislation we can for Wales.

[14] **Huw Irranca-Davies:** I see that neither of your officials are demurring from you at all so far. We said at the outset that we love, as a committee, to look at things such as whether things are subject to affirmative resolution or negative resolution and so on. But this Bill is even more innovative, and on

that subject, I will turn to my colleague, David Melding.

[15] **David Melding:** Good afternoon, Cabinet Secretary. Can we look at section 24(1), which sets initial rates and bands for land transfer tax? So, you're going to do that—the first regulation—under affirmative procedure, which I'm sure we agree with, but then second and subsequent regulations would be subject to provisional affirmative procedure. I think this is what the Chair was referring to. This is a new and rare bird, I think it's fair to say. It's used occasionally in Westminster and has now been adopted in Scotland, but it's new to us. So, could you outline what it does and why you're using it?

[16] **Mark Drakeford:** Thank you, Chair. So, the provisional affirmative power is introduced in this Bill to take account of those circumstances where the Assembly, now being for the first time a revenue-raising authority, needs to act quickly in changing rates and bands. Just to give you a different example, I was in the Finance Committee and you'll know, in the budget, if the Chancellor decides to put up the price of petrol, he doesn't announce that it'll happen in a month's time, but it happens later that day and that's to prevent people from trying to act in the short term to avoid the tax that they would otherwise have to pay. We need to be in the same position here. If we were to alter rates and bands, we do not want people trying to arrange their affairs, bringing them forward or postponing them to try and take advantage of the new arrangements. So, the provisional affirmative procedure allows a Minister to change rates and bands and for those changes to have immediate effect, but for the Assembly, within 28 days, to have the opportunity to confirm or overturn the Government's decision. So, the Assembly always has that ability built into it, but the delay doesn't result in distortions in the market.

[17] **David Melding:** I think, in fact, an affirmative resolution has to be then made, doesn't it—unless that's made, the regulations would fall. Is this used for stamp duty at the moment, this procedure?

[18] **Mark Drakeford:** Well, of course, in the House of Commons, they have some other devices that are not available to us in Wales. They have an annual finance Bill, which they tend to use for these purposes, and they have access to the Provisional Collection of Taxes Act 1968, which gives them this power too. But, SDLT does have the provisional affirmative procedure within it and it has been used in the past for these purposes, but it's not the normal way it would be done at Westminster, because they've got other ways, in the conventions that have grown up there, that they would be able to act in the

way I've just described.

[19] **David Melding:** Is it used in the fashion you intend to use it anywhere else? In Scotland, you mentioned—

[20] **Mark Drakeford:** Yes, Scotland have adopted exactly this procedure—

[21] **David Melding:** So, you've taken their example.

[22] **Mark Drakeford:** We've taken the Scottish example. Obviously, we discussed it with the Presiding Officer and the Commission in advance to make sure that there weren't any unforeseen difficulties as far as Assembly procedures are concerned. We think it is a proper balance between the need to be able to ensure that taxes that are properly needing to be collected are collected while giving the Assembly the opportunity to confirm or deny that decision.

[23] **David Melding:** What protection is there for the taxpayer? I'm sure you wouldn't behave in this manner, but, say one of your successors pushes through an increase that's not thought, on reflection, to be justified or seen as arbitrary and excessive, and the Assembly, then, within 28 days, refuses its assent to that. You would have taxed some people at that rejected rate; what would happen to those people? I appreciate this is hypothetical, but it could happen.

[24] **Mark Drakeford:** The Bill specifically makes provision for that. If someone has paid more tax than the Assembly legitimates, then the Bill provides for the Government to repay that tax to the individual. So, the risks are all borne by the Government. The individual is protected. If they've had any advantage in the meantime, then they keep it. If they've had any disadvantage, they get reimbursed. The individual is protected from the risks of the provisional affirmative procedure.

[25] **David Melding:** Finally on this, because it is a new method and we're looking at these things for the first time, in the explanatory memorandum it says that this is required to

[26] 'minimise forestalling and provide market certainty.'

[27] I can appreciate with booze and fags that you need to do that quickly, but we're talking about land. You're not going to have people rushing out to

sell land very quickly, within 28 days, so why do you think something quite so speedy is required to stop people making decisions you think are only being made to avoid the tax?

[28] **Mark Drakeford:** Chairman, I'll give you a practical example of where this did become an issue. In the Scottish experience, in the autumn of 2014, the Scottish Government announced its rates and bands in advance of them taking on this responsibility, live, in April 2015. In their autumn 2014 announcement, the Scottish Government said that properties in Scotland valued at more than £330,000 would in future have a higher rate of tax than under the existing system. We now have figures of, for example, houses worth over £1 million that were traded during that period. Up until the announcement, in Scotland, 12 properties a month, on average, worth over £1 million changed hands. The Scottish Government having announced that, in future, those properties would be taxed at a higher rate, by March, 90 properties of that value were transacted in that month. In the four months after April, it fell to between 3 and 4 a month. So, there you see, quite rapidly, in a matter of just a few months, how people were able to draw forward transactions, simply with a view to try and avoid the tax that they now knew they would otherwise be liable to. So, even in this area, and I completely agree that it isn't the same as petrol in terms of speed, but even there you could see—. I think the Scottish Government lost a significant number of millions of pounds in revenue as a result, and we are trying to make sure we don't find ourselves in that position.

14:45

[29] **David Melding:** Thank you.

[30] **Huw Irranca-Davies:** Nathan Gill.

[31] **Nathan Gill:** Cabinet Secretary, in the explanatory memorandum it states that, for many regulation-making powers, the affirmative procedure is prescribed, because the regulation-making power could be used to impose or increase an individual's tax liability. May I just ask you why this requires the affirmative procedure?

[32] **Mark Drakeford:** Thank you, Chair. In a way, it is exactly for the reason that that question suggested—that by using the powers of this Bill, it will be possible for Welsh Government to increase the tax liability that taxpayers will have to meet in the future. And my judgment was that that is a significant

use of power and that the National Assembly ought to have additional scrutiny arrangements to make sure, in a check and balance sort of way, that that power is being used reasonably.

[33] Where powers can be used in the Bill only to lower the amount of tax that is paid, we have opted generally for the negative procedure, but where the amount that someone would have to find is increased, we think it's right that the National Assembly should be able to examine that and decide whether that's reasonable.

[34] **Nathan Gill:** Okay. What thought was given to using the superaffirmative procedure in the Bill, both generally and, for example, in relation to the power in section 30(6)?

[35] **Mark Drakeford:** In general, Chair, I don't think the powers that we are talking about here will require the additional level of consultation, and so on, that the superaffirmative procedure expects.

[36] In relation to the specific example, which I think is introducing new reliefs, if I've got that section right, if you think of the test that I just set out, if you're introducing a new relief then people can only benefit from it in the sense that that can only be tax-reduced. You might argue that, if we were to amend a relief so that people became liable for more tax, or take a relief away so that you had no relief from tax at all, that that would require a higher level of scrutiny.

[37] Up until now, I have felt—. As I say, in general, I don't think the superaffirmative procedure would be justified. In relation to the issue of reliefs, if the committee were to hear evidence or to give further thought to this, then I would look carefully at what the committee had to say.

[38] **Nathan Gill:** Okay, thank you. Again, looking at section 34(6) relating to unit trust schemes, why is this subject to negative procedure, then?

[39] **Mark Drakeford:** For the reason, Chair, that I outlined. This power can only be used to reduce the amount of tax taken, and that's the principle we've adopted. If you're acting so that the liabilities on taxpayers are reduced—the negative procedure. The unit trust schemes is a very good example of just that.

[40] **Huw Irranca-Davies:** So, you'll bear with us if we continue to test your

consistency on this.

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

[42] **Nathan Gill:** So, again, looking at section 64(1) relating to the issuing of certificates, again this is subject to negative procedure.

[43] **Mark Drakeford:** Well, a slightly different principle there, Chair, and that's to do with provisions that are simply technical and administrative in nature. You have to provide a certificate now from HMRC if you want to have a property transaction registered by the Land Registry. We intend to continue that practice. This is simply a power to amend the nature of the practical business of multiple certificates, duplicate certificates or the form of the certificate—not something which I feel that the National Assembly in Plenary would need to approve every time you carried out such a mechanical, technical change in the operation of the Act.

[44] **Nathan Gill:** Thank you, Chair.

[45] **Huw Irranca-Davies:** Thank you, Nathan, for that question. We're going to carry on a little bit as well, because clearly you've got a very good thought process behind some of the judgments that you've come to, but we just want to test it a bit further because this is such a complex Bill. So, David, over to you.

[46] **David Melding:** Thank you, Chair. If we look at section 76(1), which are regulations that make incidental, consequential, supplemental, transitional, transitory or saving provisions for the purpose of, or in connection with, or for giving full effect to, the Act—sorry about that rather long description—these attract the negative procedure unless you make the judgment that the effect of the regulations may lead to the imposition or an increase in an individual's liability to tax, in which case the affirmative procedure is to be used. So, how are you going to make that judgment? That seems to me a very fine call indeed.

[47] **Mark Drakeford:** Thank you, Chair. I've been in front of this committee before, and I did anticipate that this would be a part of the Bill that would be of interest to Members. So, if you don't mind, I'm going to refer to my note more on this, because I want to give a proper account of why—in a way that I absolutely accept it's unusual to have a power that is usable either way. Both the negative and the affirmative procedures are available in this part of the

Bill, and it's a judgment for the Minister as to which procedure to invoke. So, knowing that that would be of interest to the committee, I'm going to just give a slightly fuller answer than I might have done otherwise.

[48] So, the first thing to say is, as David has said, that the scope of regulations under section 76 is limited to giving effect to incidental, consequential or supplementary changes required as a result of the Bill becoming law. The power cannot be used to make regulations containing new substantive provisions, or to make fundamental changes to other legislation, or to extend the scope of the Bill. They can only be used to make the necessary changes to ensure that the provisions of this Bill work properly. The power in section 76 would only be used for such matters as making changes to other legislation needed in consequence of the provisions of this Bill. In that sense, I think it is consistent with the report of the committee at the end of the fourth Assembly, when the committee said that using a power of this sort would need a special reason. I think that there is a special reason in relation to this Bill, which is the one that I outlined earlier: the need for a very smooth transition between the system as practitioners know it today and the system they will be working under, if the Bill succeeds, from 1 April 2018. So, in order to make that smooth transition, you need to be able to make these provisions in the way that is as seamless as possible.

[49] The Assembly's procedures provide for and require close scrutiny of the substance of any Bill, and it's not normally necessary, I think, for these regulations to be subject to the affirmative procedure where their effect is administrative in nature. That's why the negative procedure is available within section 76. However, section 76 could also be used in a way that would increase the tax liability of any individual. Consistent with that basic principle—that if a regulation-making power is exercised in that way it should be affirmative—then this section allows for the affirmative procedure to be used in those instances. That's the basic way in which the decision that David has asked about would be made. It is for the Welsh Ministers to decide between negative and affirmative here, but that's the way that the decision will be made. Where it is just smoothing the path from the current position to the future position, the negative procedure; where the section is used to increase tax liability, the affirmative procedure. It is unusual. It's not unique. Parallel powers exist in the Government of Wales Act and in the Regulation and Inspection of Social Care (Wales) Act 2016, which I remember being in front of this committee on only last year.

[50] **David Melding:** If I understand you, then, as we move to the new

system, which sees the transition from the old one, there's a possibility, when you make these adjustments, that you're going to capture

[51] that you're going to capture people who are currently not paying the taxes. Is that what you're thinking of? I'm a bit confused in terms of—. We're in transition—is that what you mean? There's a small number of people or categories that will then get captured, potentially.

[52] **Mark Drakeford:** I'll ask Andrew just to outline the circumstances in which that could happen.

[53] **Mr Hewitt:** There shouldn't necessarily be any new people caught within the tax, because who's caught by the tax is very clearly set out on the face of the Bill. So, it's not a matter that a different type of land transaction could be brought within the charge through these regulations.

[54] **David Melding:** You do use the word 'imposition', mind. I don't know whether legally that leads us anew—

[55] **Mark Drakeford:** We might need some help to see where the word 'imposition' appears.

[56] **Huw Irranca-Davies:** We understand that where the regulations may lead to the imposition or an increase in an individual's liability to tax, in that situation you would use the affirmative resolution.

[57] **Mark Drakeford:** There are two different ways in which tax liability can be changed. Whenever they occur in this Bill, they are subject to the affirmative procedure. There may be circumstances in which no tax is required today, but where in future rules change, tax will become payable. Secondly, there are circumstances in which tax is payable today, but the rules would change in such a way as to increase the amount of tax that would be payable in the future. In both of those instances, the affirmative procedure is always used.

[58] **David Melding:** So, if it's then shown that these incidental and separate changes have led to an increase in liability, you will then use the affirmative procedure. It won't be under your discretion at that point, once an increase is demonstrated. Is that correct?

[59] **Mark Drakeford:** I think it is under the discretion of Ministers, but I think you asked me in the first question as to how we would distinguish, and

what process we would follow, and I just tried to outline the process that lies behind, I think. It is a judgement for Welsh Ministers, but where a new liability to tax is created, or an additional liability to tax is created, consistently with the way that we've constructed the whole of the Bill, the affirmative procedure would be used.

[60] **David Melding:** So, it's not discretionary there—you will follow the affirmative procedure in those circumstances.

[61] **Mr McMahon:** If I can just clarify—

[62] **David Melding:** Because it can't be both, can it?

[63] **Mr McMahon:** The short answer is: where it is clear that these regulations have the effect of imposing or increasing tax liability on an individual, then, yes, the Bill says that the affirmative procedure should be used.

[64] **Huw Irranca-Davies:** So, there's no judgement call there.

[65] **Mr McMahon:** The judgement call is whether the regulations have the effect of imposing or increasing a tax liability. It's kind of necessary, I guess, to go back to what these regulations can actually be used for, and they're going to be used alongside something else more often than not. We've either got these substantive provisions in the Bill that they are giving effect to, in effect, or we've got some other regulations that are being made using some other powers in the Bill. There's a question mark here over whether the regulations or the substantive provisions in the Bill actually have the effect of imposing or increasing a tax liability on an individual, or whether it's the supplementary incidental provisions that do so. This power, as the Cabinet Secretary has mentioned already, is really intended to be used to tidy up whatever needs to be tidied up as a result of introducing this new tax. We've got a suite of substantive powers across the Bill that do a bit more than that—sometimes do a lot more than that—and it's really those powers that we think deserve the additional scrutiny of the Assembly. But there is the potential for these regulations to be used in such a way that they could impose or increase a tax liability on an individual, which is why we said in those cases that the affirmative procedure should be used.

[66] **David Melding:** Okay. And is this mechanism, which seems to me to give you belt and braces in case you're before the courts, and you will then

justify an increase in imposition via these means—is it used anywhere else?

[67] **Mark Drakeford:** As I said, the use of two procedures—. A choice between procedures is to be found in other legislation, although it is rare. There is in the regulation and inspection Act a regulation-making power where it is for the Welsh Ministers to decide whether or not to use the superaffirmative or the affirmative procedure, and that's a judgment each time, depending on the nature of the change being made. There is an example in the Government of Wales Act 2006 too, where the choice of procedures lies in the hands of Ministers. What we're trying to do here is to be clear that there is a rule that lies behind the decision that will be made.

15:00

[68] **David Melding:** We might want to test this further or speak to our lawyers because, obviously, it's very much on the edge of my comprehension, I think it's fair to say.

[69] **Mark Drakeford:** Chair, given that it is unusual, I will be very interested to—

[70] **David Melding:** Raising tax is a serious business, and I think the way you construct these things does take a lot of technical skill, and you've got to think of the situations you might be in. You've got to avoid all ambiguity or have other methods if you need to cover a legitimate target for the tax. Can I move to Schedule 5, paragraphs 27(4) and 28(1)? These relate to including the rent element of residential leases and the rent element of non-residential leases. We're basically back to the first question I put to you where you set the first regulations with the affirmative procedure and then you go to provisional affirmative procedure, and I just wonder, in this case, why you think that's appropriate.

[71] **Mark Drakeford:** Thank you, Chair. One of the ways in which we have sought to simplify the operation of the law in this area in Wales is that we've taken a policy decision that we will not include the rent element of residential leases within the scope of the LTT, but the Bill provides a power for that to change in the future should Welsh Ministers make a different decision then. If it were to be brought within the scope of LTT and non-residential and mixed leases are within the scope, then the arguments are exactly the same. If you wanted to change the rates and bands, you would want to be able to do it with immediate effect, to prevent people from organising their affairs to take

advantage of the change. The Assembly would, within 28 days, be able to confirm or overturn the Government's decision.

[72] **David Melding:** Okay. I think that's fairly clear. Then, paragraph 2, Schedule 10—I'm going to read this because I don't really understand the vehicle it refers to. But, anyway, it gives Welsh Ministers the power to make further provision for the application of relief where a land transaction involves alternative finance investment bonds—that's the bit I don't really understand—and this will be subject to the negative procedure. Will you just outline why negative procedure in this case is appropriate?

[73] **Mark Drakeford:** I may ask for help on this as well, Chair. But, as I understand this, this is to allow for the equal treatment of alternative financial investment bonds, which are sharia law compliant. This is so that people who want to act in a way where their income arises from rents rather than from interest are able to structure a bond in that way. We want to make sure that they are not taxed in a way that a more conventional bond arrangement would be taxed. It's negative because you can only use it to lower the amount of tax that someone would have to pay rather than raise it.

[74] **David Melding:** That's does bring light to the issue.

[75] **Mr McMahon:** Perhaps I can just clarify as well: the actual power you're referring to in Schedule 10 is really there to kind of—. If there's any developments in the way sharia financing operates, it enables Ministers to respond to those developments and make the necessary changes in these provisions.

[76] **Huw Irranca-Davies:** There was a moment there, Cabinet Secretary, when I thought you'd put David off his train of questioning by flattering us with reference to a previous report from the fourth session. But, no, he was going to keep at it. [*Laughter.*] Thank you for that questioning. Lord Dafydd Elis Thomas.

[77] **Yr Arglwydd Elis-Thomas:** Wel, **Lord Elis-Thomas:** Well, the only yr unig wahaniaeth ynglŷn â beth difference in terms of what I'm going sydd gen i i'w ofyn yw fy mod yn to ask is that I'm going to be asking gofyn yn Gymraeg, achos ni allaf in Welsh, because I couldn't possibly siarad Saesneg gyda'r Ysgrifennydd speak English to this much respected Cabinet parchus hwn mewn pwyllgor. Cabinet Secretary at a committee. But Ond rwyf wedi cael problem ar hyd y I have had some problem over many

blynyddoedd ynglŷn â'r penderfyniad gan Lywodraeth pan yn deddfu beth yw roi ar wyneb y Mesur fel deddfwriaeth gynradd a beth i'w osod mewn rheoliadau. Felly, rydw i am fynegi syndod a diolchgarwch bod y Gweinidog, yn y Ddeddf yma, gyda'i swyddogion, wedi ceisio sefydlu egwyddor, sef y byddai amrywiaeth sylweddol mewn trethiant, yn enwedig pe byddai hynny'n debygol o fod yn gynnydd mewn trethiant, yn fater a fyddai'n gofyn am y weithdrefn gadarnhaol, ac yna bod y weithdrefn negyddol yn cael ei defnyddio mewn cyfeiriadau eraill. Ond mae gen i broblem bellach ynglŷn â hynny hefyd, sef, os mai penderfyniad i Weinidogion Cymru yw hyn, unig rôl graffu'r Cynulliad Cenedlaethol yn y sefyllfa yna yw'r mis o gyfnod i wrthwynebu. Ac wedyn nid wyf yn siŵr iawn ymhle rydym yn manteisio ar y sefyllfa yna, neu ar y penderfyniad egwyddorol y mae'r Gweinidog wedi'i gynnig.

[78] **Mark Drakeford:** Wrth gwrs, rŷm ni'n deddfu mewn maes newydd i ni fan hyn. Beth rŷm ni wedi gwneud yw trial dysgu o brofiadau maen nhw wedi'u cael yn yr Alban yn barod, i drial ymateb i'r sefyllfa y mae Dafydd wedi cyfeirio ati. Yn fy marn i, beth rŷm ni'n trial ei wneud yw cael rhyw fath o falans rhwng y pwerau a fydd yn rhaid i'r Llywodraeth eu defnyddio, os ŷm ni'n mynd i drethu a chasglu treth i wneud lot o bethau pwysig yng Nghymru, ac, ar yr ochr arall, bod yn gyfrifol am yr hawliau

years regarding the decision taken by Government when legislating as to what should be put on the face of the Bill as primary legislation and what should be placed in regulations. Therefore, I want to express surprise and gratitude that the Minister, in this legislation, along with his officials, has tried to establish a principle, namely that any significant change in taxation, particularly if that were likely to be an increase in tax, would be a matter that would require the affirmative procedure, and that the negative procedure should be used in other regards. But I have a further problem in terms of that also, which is, if this is a decision for Welsh Government Ministers, then the only role of scrutiny in the National Assembly in that situation is that month-long period when one can oppose. So, I'm not really sure how we benefit from that situation, or from the principled decision that the Minister has put forward.

Mark Drakeford: Of course, we are legislating in a new area for us here. What we've done is try to learn from experiences they've had in Scotland already, to try to respond to the situation that Dafydd has referred to. In my view, what we're trying to do is have some sort of balance between the powers the Government will have to use, if we are going to tax and collect taxes to do a lot of important things in Wales, and, on the other hand, being responsible for the rights that people have as

sydd gan bobl fel unigolion. Dyna pam rŷm ni wedi trial adeiladu'r Bil yn y ffordd yma.

individuals. That is why we have tried to build this Bill in this way.

[79] **Yr Arglwydd Dafydd Elis-Thomas:** Fel roeddwn i'n dweud, rydw i'n cymeradwyo'r ymgais i wneud hynny, ond mae gyda ni ddiddordeb arbennig lle mae yna amrywiaeth rhwng defnyddio'r rheoliadau cadarnhaol a'r rheoliadau negyddol, oherwydd bod y rheoliadau cadarnhaol yn rhoi mwy o le craffu i'r sefydliad hwn. Felly, rydych chi'n deall pam rydym ni'n mynd i'r cyfeiriad yna. Er enghraifft, y rheoliadau o dan baragraff 2(3) yn Atodlen 14—mae hynny'n dilyn gweithdrefn negyddol. Beth oedd y rhesymau yn y fan honno?

Lord Dafydd Elis-Thomas: As I was saying, I do applaud the effort to do that, but we have a particular interest where there is a divergence in terms of the use of the negative and affirmative procedures, because the affirmative procedures do give more of a scrutiny role to this institution. So, you understand why we are going in that direction. For example, in terms of regulations under paragraph 2(3) in Schedule 14—that adopts the negative procedure. What's the rationale behind that decision?

[80] **Mark Drakeford:** Yn y fan honno, rŷm ni'n siarad am gyrff cyhoeddus, rwy'n meddwl, lle mae popeth sy'n mynd ymlaen yn mynd ymlaen rhwng un corff a'r llall. Beth rŷm ni'n trio'i osgoi yw creu sefyllfa lle rŷm ni'n creu lot mwy o gostau yn y system. So, yn Saesneg, rŷm ni'n ei alw'n *circulation of public money*.

Mark Drakeford: There, we're talking about public bodies, I think, where everything that's going on is going on between one body and another. What we're trying to avoid is creating a situation where we're creating a lot more costs in the system. So, in English, we call it the circulation of public money.

[81] One public body funded by the taxpayer is buying something from another public body funded by the taxpayer. We could make the one pay money to the other; we would create all sorts of costs in doing so. In this case, we eliminate those costs and we use the negative procedure in line with the basic principle. But because this can only be used to reduce the liability to pay tax, the power is exercised using the negative procedure.

[82] **Yr Arglwydd Dafydd Elis-Thomas:** Ym mhob un o'r rhain, mae yna nodi unigolion penodol sydd â

Lord Dafydd Elis-Thomas: In each of these, there is a recording of individual persons who will have

chyfrifoldeb. Fel yna rydych chi'n datrys y sefyllfa, rydw i'n tybio, wedyn—

responsibility. That's how you would resolve the position, I would've thought—

[83] **Mark Drakeford:** Ie.

Mark Drakeford: Yes.

[84] **Yr Arglwydd Dafydd Elis-Thomas:**—trwy nodi unigolion ychwanegol, ac fe fydd hynny, wedyn, yn rhyddhau rhwymedigaeth sy'n berthnasol iddyn nhw, ac felly mae hynny hefyd yn berthnasol i'r corff cyhoeddus.

Lord Dafydd Elis-Thomas:—by noting those additional individuals, and that would then release a particular function for them and then that's also relevant to the public body too.

[85] **Mark Drakeford:** I'r corff cyhoeddus, ie, ond eu bod nhw'n ei wneud e ar ran y corff cyhoeddus.

Mark Drakeford: To the public body, yes, but that they do it on behalf of the public body.

[86] **Yr Arglwydd Dafydd Elis-Thomas:** Rwy'n deall. Hynny yw'r weledigaeth, fel petai, yn y sefyllfa yna.

Lord Dafydd Elis-Thomas: I understand. That's the vision behind this, as it were, in that situation.

[87] **Mark Drakeford:** Ie.

Mark Drakeford: Yes.

[88] **Yr Arglwydd Dafydd Elis-Thomas:** Wedyn, yn yr un modd, carwn i ofyn ynglŷn â'r pwerau i wneud rheoliadau yn Atodlenni 19, 20 a 22. Hefyd, i gysylltu â hynny, fe garwn i symud ymlaen i faes pellach, sef gofyn am gymhwysedd y materion yma ynglŷn ag unrhyw ordaliadau, neu unrhyw weithredu i wrthweithio camgymeriadau trethu. Ble mae'r rheini'n mynd i gysylltu a sut maen nhw'n cysylltu ac yn gymwys o fewn y confensiwn hawliau dynol Ewropeaidd ac yn y blaen? Wedyn, os atebwch chi'r gweddill o beth oeddwn i eisiau ei ofyn ynglŷn

Lord Dafydd Elis-Thomas: Likewise, I would like to ask about the regulation-making powers in Schedules 19, 20 and 22. Also, in relation to that, I would like to move on to another area, which is to ask about competence in terms of these issues in relation to any overpayments or counteraction. Where do those actually link and how do they apply to the European convention on human rights and so on? So, if you could answer both of those questions on the specific regulation-making powers, and then we can perhaps go on to a broader,

â'r pwerau rheoliadau penodol, ac more philosophical area perhaps, wedyn mi awn ni, efallai, ymlaen i which is the European convention. faes ehangach a mwy athronyddol, sef y cymhwysedd gyda'r confensiynau.

[89] **Mark Drakeford:** Wel, os wyf— **Mark Drakeford:** Well, if I—

[90] **Huw Irranca-Davies:** Before, Cabinet Secretary, you reply, if I could just remind Members that we have within our pack a letter from the Presiding Officer on the latter point that Lord Dafydd Elis-Thomas has just mentioned, particularly in respect of the European convention on human rights and fundamental freedoms. Just to draw that to attention. Sorry, Cabinet Secretary.

[91] **Mark Drakeford:** Dim problem, **Mark Drakeford:** No problem, thank diolch yn fawr. Os wyf i'n troi at you. If I turn to Andrew to answer the Andrew i ateb y cwestiynau penodol, specific questions, and I can come ac rydw i'n gallu dod yn ôl at y back to the questions on human cwestiynau ar yr hawliau dynol a rights and so on. phethau fel yna.

[92] So, the specific questions are over to you.

[93] **Mr Hewitt:** In relation to the Schedules referred to—again, these are about adding newly named or new public bodies to a list of existing public bodies. So, for example, Schedule 19 contains a list of public bodies, starting with the Minister of the Crown, the Welsh Ministers, various health bodies that operate in Wales, and then ends with an ability for a person specified for these purposes. So, this provides for an ability for the legislation to grow as other elements of public life grow, as newly developed public bodies are created. They may or may not, depending upon what their functions are, be appropriate to have or to be included in these lists. Certainly, Schedule 19 includes a list of who public bodies are. Again, Schedule 20—which is looking at compulsory purchase and planning obligations relief—again has a list of named public bodies that currently exist, which provides Ministers with the ability to futureproof, effectively, the legislation, by including newly-developed public bodies or other public bodies that it becomes apparent should be party to this relief as well.

[94] **Lord Elis-Thomas:** And that could be achieved, if I can follow up,

without further regulation and legislation—it would be up to Ministers to specify further bodies to be added.

[95] **Mr Hewitt:** Exactly. From memory, I think there have been some UK provisions related to SDLT, where individual bodies have been named, particularly in relation to the public bodies relief, where the relief applies automatically if it's a public body to public body transaction. But, sometimes, a public body can take on property from a body that isn't a public body, and in those cases you would need to prescribe the other body that isn't listed as a public body, and then the relief would apply. So, it's about providing flexibility—the list that's provided is those where it is anticipated that they need to be the named public bodies, but it is entirely possible—. Ten years from now, we don't know where we will be. There may be new bodies created by the Welsh Government, by the UK Government, which need to be included. Any statutory instrument is likely to be very short, and just say, 'Here's another one'.

[96] **Lord Elis-Thomas:** Well, that's where I was hoping we were getting to, so I am prepared to at least provisionally accept the fact that this is an innovative form of legislation, which I should support, but that's for later. Minister—Cabinet Secretary, rather.

[97] **Mark Drakeford:** Diolch yn fawr. I should, really, Chair, have responded to the initial point that Lord Elis-Thomas made when he was asking about the balance between what's here on the face of the Bill and regulation-making powers. Just to say that the balance we are trying to strike in that regard is between wanting the system on day one to be close to and recognisable to practitioners, so that there is a smooth transition, but to use regulation-making powers to allow for policy divergence in the future. So, you need some flexibility built into the Bill because the early days are days when we've got to make sure that the people are able to operate effectively in this area. In the future, decisions will be made differently on the other side of the border; future Welsh Ministers may wish to pursue different policy objectives through this tax, and the regulation-making powers are there to allow for the development of difference as time goes on.

[98] Turning to the questions on human rights, there are three areas, which I think the Presiding Officer refers to in her letter. There is article 6, which guarantees the right to a fair and public hearing in determining obligations. I think it's fair to say that case law suggests that the courts are relatively reluctant to get drawn into tax law in this area, but, nevertheless, I

am satisfied that the Bill is consistent with article 6 of the human rights convention, because, if you are an individual who is not satisfied with the determination that the Welsh Revenue Authority has made, you have a right to require the revenue authority itself to carry out a review of its determination. If you are not satisfied with the review that the authority itself has carried out, you have a right of appeal to the first-tier tribunal, and that right of appeal to the first-tier tribunal carries with it all the other subsequent rights to appeal that a first-tier tribunal would normally have at its disposal. So, as an individual, I think there is a fair and proportionate balance struck in the Bill in relation to article 6.

15:15

[99] We use in the Bill a general anti-avoidance rule approach, in which the Welsh Revenue Authority will be able to challenge actions that it believed had been contrived in order to avoid paying the tax that the National Assembly would have, in a democratic way, legitimated.

[100] **Lord Elis-Thomas:** You mean Trump-type cases—allegedly.

[101] **Mark Drakeford:** Allegedly. [*Laughter.*] Just those sort of tax avoidance behaviours. If that is challenged, and comes before the first-tier tribunal, we've constructed the Bill in a way that it is now not for the individual to prove that they have not acted in a way that avoids tax; it is for the Welsh Revenue Authority to have to prove that they have. And, by putting the obligation on the revenue authority rather than the individual, I think that's another way in which we have secured article 6 compliance.

[102] There is nothing in this Bill that is directly relevant to article 8, because article 8, investigatory and enforcement powers, were all constructed in the Tax Collection and Management (Wales) Act 2016. All the powers that will be used will flow from that Act, which was scrutinised in front of this committee and the whole Assembly, which received the Royal Assent, and was not challenged by the Attorney-General and so on. And, so, we rely on that for its compliance there. As far as article 1 of protocol 1 is concerned, this requires that a fair balance is struck between the needs of a community and the obligations placed on the individual, and, of course, in taxation, that is exactly what we are doing. We are deciding that, collectively, we will act to collect money from all of us to pursue important collective purposes. The test that you have to pass in front of a tribunal on this is that the tribunal can only find against the legislature if it finds that the law was

devoid of reasonable foundation, and that's a pretty high test, isn't it? It's got to be devoid, not just lacking in, or deficient in—

[103] **David Melding:** Or unpopular in. [*Laughter.*]

[104] **Mark Drakeford:** —or unpopular in, but devoid of reasonable foundation. And, as this is a Bill designed entirely to make sure that the revenue stream that exists today for important public services in Wales goes on being available beyond April 2018, then I think we would pass that test without undue difficulty.

[105] **Yr Arglwydd Elis–Thomas:** Wel, **Lord Elis–Thomas:** Well, the Cabinet mae'r Ysgrifennydd Cabinet wedi Secretary has responded to all of the ateb pob cwestiwn oedd gen i. Diolch questions I had. Thank you very yn fawr iawn. much.

[106] **Huw Irranca–Davies:** Diolch yn **Huw Irranca–Davies:** Thank you very fawr iawn. A nesaf te—. much. Next, then—.

[107] Before I turn to a final question that I have, just in light of Lord Dafydd–Elis Thomas's line of questioning, how do you get that balance right between the solid framework that is on the face of the Bill with the primary legislation and the adornments of regulation? Well, they're more than adornments, they're essential, but how do you make sure that you are not reappearing in front of us sooner rather than later to say, 'Actually, we need a new Bill. We've added so much stuff to this in secondary regulations that we're back in front of you'?

[108] **Mark Drakeford:** Chair, as I've said, what we've attempted to do is to put more than exists in the law elsewhere on the face of the Bill. That's partly in response to some of the debates that were held in front of this committee in the previous Assembly, where there was a regular discussion as to whether or not sufficient was on the face of the Bill and too much was being allowed for in regulation. But, really, we've done it that way for the reasons of clarity. We want to be clear about the intent of the law, and the way to do that is to put it on the face of the Bill. That's why the Bill is sometimes of the length that it is. But you don't want to be coming back and fore to the legislature every year asking for new primary legislation to be passed to deal with changes in circumstances. And the regulation–making powers taken under the Bill are there to allow the Government to respond to changing circumstances, to develop difference and policy differentiation in the future,

with the safeguards that, wherever those changes have an impact directly on the individual and their tax liability, the National Assembly itself would have a scrutinising moment through the affirmative procedure.

[109] **Huw Irranca-Davies:** Brilliant. Now, I'm just looking around at colleagues to see if there any other questions, because, if not, then it falls to me, Cabinet Secretary, to ask you the most important question of all, which is: is there any reason that we should be worried that this Bill affects the private prerogative or hereditary revenue of the Queen or the Duke of Cornwall, such that consent is necessary before the Bill is passed?

[110] **Mark Drakeford:** Well, Chair, I'm pleased to be able to say that the sovereign is already liable to pay tax on her private estates as a result of the Crown Private Estates Act 1862, placed on the statute book by Chancellor Gladstone, as a result, I believe, of the transfer of Balmoral from the ownership of Prince Albert to Queen Victoria. And, using that important precedent, there's nothing in this Bill that upsets that longstanding position, and, as a result, we have come to the conclusion that consents are not required.

[111] **Huw Irranca-Davies:** I think that will be the question that makes *Parliament Today* and also the *Western Mail* front page tomorrow.

[112] **David Melding:** The Balmoral protocol. [*Laughter.*]

[113] **Huw Irranca-Davies:** Indeed. Thank you very much, Cabinet Secretary. Thank you to your two very able colleagues as well, Gareth McMahon and Andrew Hewitt. Diolch yn fawr iawn.

[114] **Mark Drakeford:** Diolch yn fawr.

[115] **Huw Irranca-Davies:** We will, of course, send a transcript through to the Cabinet Secretary to check for factual accuracy as well. Thank you very much to committee members for that robust questioning.

15:23

**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**

[116] **Huw Irranca-Davies:** If we can move now to the next item in front of us, which is item 3, instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3, we have in our papers SL(5)016 the Apprenticeships (Specification of Apprenticeship Standards for Wales) (Modification) Order 2016, and we have, as normal, in our papers the report, the Order itself, and the explanatory memorandum. I'm going to ask Gareth now to—. No, you're going to comment on the Order and we'll see if there are any views from Members.

[117] **Ms Varney-Jackson:** Yes. In May 2013, the Government published the apprenticeship standards for Wales. The Order before you amends those standards. It's reported as being monolingual. The reason being that the 2013 document was made in English only, and, therefore, the modifications are made in English only. However, the Welsh Government state that they do intend to make the standards available in both English and Welsh on the website when the Order comes into force. I think this is what, some time ago, we used to refer to as providing a courtesy translation.

[118] **Huw Irranca-Davies:** Thank you very much for that. Any thoughts, any observations, or are we happy to note that and move on?

[119] **Lord Elis-Thomas:** I'd just like to make an observation, as a former chair of the Welsh Language Board, that there's not such a thing as a courtesy translation. We are either bilingual or we are not. Thank you.

[120] **Huw Irranca-Davies:** There we are. A point well made, and thank you very much for that. We move on to item number 4: papers to note. Sorry, I just wanted to clarify: on that issue, the committee is content to report to the Assembly in line with that paper. Thank you.

15:25

Papurau i'w Nodi Papers to Note

[121] **Huw Irranca-Davies:** Item number 4: papers to note. Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill: correspondence from Llywydd—from the Presiding Officer. I referred to it in our previous session with the Cabinet Secretary. That's simply to note. Are you content to note that? Thank you.

[122] The next item is in respect of the Wales Bill: additional information from the First Minister following the committee meeting on 4 July 2016. The correspondence is in your pack. It is, of course, of direct interest to us in our current examination of the Wales Bill. I don't know if anybody has any comments on that.

[123] We've also had, of course, a wide range, on the next items, of correspondence from National Assembly for Wales committees—our thanks to them for, in short order, turning around the information that we needed in each of their subject areas on their observations on the Wales Bill as well. You're aware that we're quite far advanced in our deliberations, so whilst they're pertinent to it, I'm not sure that either the First Minister's correspondence or the committee correspondence—which will hopefully be forming part of our report—now will necessitate any big changes. Are you happy to note both? Thank you very much. So, we've noted those—the evidence there and the First Minister's letter—as being relevant to the committee's consideration of the report.

[124] We then turn to SL(5)008, the Smoke Control Areas (Authorised Fuels) (Wales) Regulations 2016, which we deliberated upon a couple of weeks ago. We note the Government response—are we happy to note that? Thank you.

[125] Then we move to SL(5)009, the Smoke Control Areas (Exempted Classes of Fireplace) (Wales) Order 2016—the Government response as well. Just to inform Members that the responses that we have now had will be, of course, put on our committee's subordinate legislation home page in line with the previous scrutiny we've done of those two orders. So, we note both of those. That covers the business in public today.

15:27

**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 that the committee resolves to
gwahardd y cyhoedd o weddill y exclude the public from the
cyfarfod yn unol â Rheol Sefydlog remainder of the meeting in
17.42(vi).*

*accordance with Standing Order
17.42(vi).*

Cynigiwyd y cynnig.

Motion moved.

[126] **Huw Irranca-Davies:** So, I'll ask the committee's permission now to resolve to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(vi). Are you happy to move to private session? Thank you very much. We'll move to private session. Could we please clear the gallery?

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 15:27.

The public part of the meeting ended at 15:27.