



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

**Y Pwyllgor Materion Cyfansoddiadol  
The Constitutional Affairs Committee**

**Dydd Iau, 25 Chwefror 2010  
Thursday, 25 February 2010**

**Cynnwys**  
**Contents**

- 3 Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau  
Introduction, Apologies, Substitutions and Declarations of Interest
- 4 Offerynnau Na Fydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhifau 15.2 a 15.3, Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol) ac Offerynnau Drafft sy'n Agored i Gael eu Cymeradwyo yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Gadarnhaol)  
Instruments and Draft Instruments in Respect of which the Assembly is Not Invited to Pay Special Attention under Standing Order Nos. 15.2 and 15.3, Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (Negative Procedure) and Draft Instruments subject to Approval Pursuant to a Resolution of the Assembly (Affirmative Procedure)
- 7 Ymchwiliadau'r Pwyllgor: Ymchwiliad i'r Datblygiadau yn Atodlen 5 i Ddeddf Llywodraeth Cymru 2006, gan gynnwys Eithriadau i Faterion, a Monitro Canlyniadau Adroddiadau'r Pwyllgor ar Offerynnau Statudol—Tystiolaeth gan Ganolfan Llywodraethu Cymru Prifysgol Caerdydd  
Committee Inquiries : Inquiry into the Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters and Monitoring the Outcome of the Committee's Reports on Statutory Instruments—Evidence from the Wales Governance Centre of Cardiff University
- 29 Ymchwiliadau'r Pwyllgor—Gwybodaeth Ychwanegol: Monitro Canlyniadau Adroddiadau'r Pwyllgor ar Offerynnau Statudol: Tystiolaeth Ychwanegol gan Jeff Godfrey, Cyfarwyddwr yr Adran Gwasanaethau Cyfreithiol  
Committee Inquiries—Additional Information: Monitoring the Outcome of the Committee's Reports on Statutory Instruments: Additional Evidence from Jeff Godfrey, Director of the Legal Services Department
- 29 Gohebiaeth y Pwyllgor: Llythyr gan Mike German AC, Cadeirydd Pwyllgor Deddfwriaeth Rhif 4 ar Adroddiad Pwyllgor Deddfwriaeth Rhif 4 ynghylch Gorchymyn Arfaethedig Cynulliad Cenedlaethol Cymru (Cymhwysedd Deddfwriaethol) (Addysg) 2010  
Committee Correspondence: Letter from the Chair of Legislation Committee No.4, Mike German AM, regarding the Report of Legislation Committee No. 4 on the Proposed National Assembly for Wales (Legislative Competence) (Education) Order 2010
- 31 Cynnig Trefniadol  
Procedural Motion

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynndi yn y pwyllgor. Yn ogystal, cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee.  
In addition, an English translation of Welsh speeches is included.

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

Alun Davies	Llafur Labour
Michael German	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
William Graham	Ceidwadwyr Cymreig Welsh Conservatives
Rhodri Morgan	Llafur Labour
Janet Ryder	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)

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

David Lambert	Cymrawd Ymchwil, Canolfan Llywodraethu Cymru, Prifysgol Caerdydd Research Fellow, Wales Governance Centre of Cardiff University
Elizabeth Smith	Ymchwilydd, Canolfan Llywodraethu Cymru, Prifysgol Caerdydd Researcher, Wales Governance Centre of Cardiff University

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

Stephen George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Stephen Davies	Cynghorydd Cyfreithiol Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk

*Dechreuodd y cyfarfod am 9 a.m.*  
*The meeting began at 9 a.m.*

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

[1] **Janet Ryder:** I welcome Members, officials and members of the public to this meeting of the committee. In an emergency, ushers will indicate the nearest safe exit. Headsets are available for translation and amplification. I remind Members to switch off all mobile devices completely.

[2] We have not received any apologies. I am pleased to welcome all members of the committee here this morning.

9.01 a.m.

**Offerynnau Na Fydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhifau 15.2 a 15.3, Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol) ac Offerynnau Drafft sy'n Agored i Gael eu Cymeradwyo yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Gadarnhaol)**

**Instruments and Draft Instruments in Respect of which the Assembly is Not Invited to Pay Special Attention under Standing Order Nos. 15.2 and 15.3, Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (Negative Procedure) and Draft Instruments subject to Approval Pursuant to a Resolution of the Assembly (Affirmative Procedure)**

[3] **Janet Ryder:** Steve, I think that you have been looking at CA390, the Scallop Fishing (Wales) Order 2010.

[4] **Mr Davies:** There are no reporting points this week on this or CA391, the Scallop Fishing (Wales) (No. 2) Order 2010. However, the committee should note that CA390, the Scallop Fishing (Wales) Order 2010, was laid on 4 February 2010 and, before it was checked, CA391, the Scallop Fishing (Wales) (No. 2) Order 2010, which revokes the first Order, was laid. This was done because in the original scallop fishing Order, which, in brief, regulates scallop fishing in Welsh waters, the sea co-ordinates specifying where and when fishing can take place and what equipment could be used were incorrect. So, they were corrected and a No. 2 Order was issued.

[5] **Rhodri Morgan:** What was incorrect?

[6] **Mr Davies:** The sea co-ordinates.

[7] **Rhodri Morgan:** Oh, the co-ordinates.

[8] **Mr Davies:** Yes. Basically, they are the co-ordinates stating where and when you can fish for scallops.

[9] **Alun Davies:** So, this has now been corrected.

[10] **Mr Davies:** It has.

[11] **Alun Davies:** This has already been in the *Cambrian News*; it is a very serious business. So, it is important to get this right.

[12] **Janet Ryder:** This was rather difficult for lawyers to check, so I have suggested that we write to the Minister to ask for an explanation. As more and more pieces of legislation come through that relate to offshore territory, or the sea, it is important that we start to track what kind of technical issues we pick up in them so that we can keep a track on anything like this.

[13] **Alun Davies:** I agree with you, but I wonder where the expertise lies to do that. Steve is an extraordinarily well-qualified lawyer, but I might doubt his expertise as a mariner.

[14] **Michael German:** How do you know?

[15] **Alun Davies:** Well, I am looking across at him.

[16] **Janet Ryder:** That is a fair comment and perhaps we should write to the Minister to ask how these things are checked. It would be interesting to know who picked up the issue in

the first place and why the second piece of legislation was therefore issued.

[17] **Michael German:** I know that it is a tradition in the British constitutional process that everything is written down in words, letters or digits of some description, but, in the old days, when you had planning applications and so on, it was accompanied by a map, a chart or a plan. Would it not make more sense for pieces of legislation that have considerable geographical relationships to have an accompanying map—in this case, it would be a chart—which would lay it out in a way that makes it clear to the reader? That might help to achieve clarity, which we always try to get in legislation. It might run counter to anything that has ever happened in the British constitutional process, but I do not see why we should not start a new practice.

[18] **Janet Ryder:** The lawyers seem to be nodding in agreement.

[19] **Mr Griffiths:** There is no reason at all why maps should not be included in Orders. That regularly happens with compulsory purchase Orders and roads Orders, and there is no reason at all why it should not happen in this sort of case. Certainly, when I dealt with fisheries legislation in Cathays park, I would insist on getting the plans to ensure that the coordinates described were correct. In the case of roads Orders, they often were not. So, it does need to be checked carefully.

[20] **Janet Ryder:** We will include that in the letter to the Minister.

[21] **Alun Davies:** In terms of the law, the co-ordinates are what would matter rather than a map, which would be for illustration rather than—

[22] **Mr Griffiths:** It depends on how the Order is worded.

[23] **Mr Davies:** In this case, the co-ordinates are crucial to what the Order applies to.

[24] **Janet Ryder:** We will check that. We will write to the Minister, asking her to include maps, and we will inquire about who first discovered this anomaly and how it was put right. It is good that it was picked up and put right, but it would be interesting to see how it reached that point.

[25] **Rhodri Morgan:** It was not us.

[26] **Janet Ryder:** No, it was not this committee that picked it up. The second piece of legislation, CA391, was laid before lawyers had a chance to look at CA390. So, the anomaly was picked up and put right beforehand. Someone is checking it and putting it right. However, if you consider some of the other pieces of work that we have looked at, such as the Marine and Coastal Access Bill and the waste Bill, pieces of legislation may fall out of those that relate to offshore locations. So, if there is an issue here, it is important that we identify it as quickly as possible.

[27] **Rhodri Morgan:** I want to ask the lawyers what the possibilities are. Was it the civil servant who drafted it who realised, 'Oops, I have drafted this wrongly; I had better withdraw the Order and resubmit it', or would there have been stakeholders to whom it would have been shown in draft before it came to this committee and who would have picked it up and said that the map or the co-ordinates were wrong?

[28] **Mr Davies:** I do not think that it would have been shown to stakeholders. I think that it must have been picked up by an official in Cathays park or someone based in the Department for Environment, Food and Rural Affairs.

[29] **Mr Griffiths:** I suspect that it would have been sent in draft to the enforcement officers, for example, so that they had it immediately it came into force and they may have picked it up.

[30] **Rhodri Morgan:** It would be interesting to know, from a quality control point of view, where that quality control, on this occasion, operated successfully, because we can then judge whether it was a near miss or not.

[31] **Janet Ryder:** Okay. If Members are content with CA390 and CA391, we will move on to CA392, the Non-Domestic Rating (Unoccupied Property) (Wales) (Amendment) Regulations 2010 and CA393, the Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) Order 2010. Are Members content with those two? I see that you are.

[32] The next is CA394, the Non-Domestic Rating (Demand Notices) (Wales) (Amendment) Regulations 2010 and CA396, the Community Health Councils (Establishment, Transfer of Functions and Abolition) (Wales) Order 2010. I see that Members are also content with those.

[33] We will now move on to item 2.2. Gwyn, are you dealing with CA398, the School Standards and Framework Act 1998 (Repeal) (Wales) Order 2010?

[34] **Mr Griffiths:** Yes. There is not much to say about this, because it is a clear report, but it is related to another Order that will come before the committee next week, given that it is related to consequential changes. So, it is a matter for the committee whether you wish to proceed with this report today or whether you prefer to adjourn it until next week, which we could do, and deal with it with the other Order, on which there are reporting notes.

[35] **Janet Ryder:** Are Members satisfied with that? We can delay this or deal with it today, but a series of measures are coming through next week, which will deal with the same issue. Although there is no technical point on this, this piece of legislation is the first to move us towards three-year funding. Therefore, the merit issue in this is that it is quite a significant change in Government policy. However, there are a series of pieces that we will look at next week that all deal with the same issue. So, we can report on this separately or we can report on them all together. I will be guided by Members.

[36] **Mr George:** There is only one such Order next week, but it deals with a series of issues relating to school funding, including three-year funding and excess deficits carried in school budgets, which are matters of contention. Members may want to have a think about those as well as the technical issues.

9.10 a.m.

[37] **Rhodri Morgan:** Is it deficits only, not deficits and surpluses?

[38] **Mr George:** You are quite right. It is excess surpluses in budgets.

[39] **Rhodri Morgan:** Excess surpluses? That is fine.

[40] **Janet Ryder:** What would Members like to do with this piece? Would you like to leave it on the table and roll it over to next week?

[41] **Michael German:** Yes.

[42] **Rhodri Morgan:** Yes.

[43] **Janet Ryder:** That is what we shall do, then. That brings us to the end of the pieces of legislation for this week. I warn Members now that lawyers are considering a number of pieces of legislation for next week. We are not sure yet whether there will be anything to note on them, but there will a number of pieces of legislation coming through.

9.11 a.m.

**Ymchwiliadau'r Pwyllgor: Ymchwiliad i'r Datblygiadau yn Atodlen 5 i Ddeddf  
Llywodraeth Cymru 2006, gan gynnwys Eithriadau i Faterion, a Monitro  
Canlyniadau Adroddiadau'r Pwyllgor ar Offerynnau Statudol—Tystiolaeth gan  
Ganolfan Llywodraethu Cymru Prifysgol Caerdydd**

**Committee Inquiries : Inquiry into the Developments in Schedule 5 to the  
Government of Wales Act 2006, including Exceptions to Matters and Monitoring  
the Outcome of the Committee's Reports on Statutory Instruments—Evidence  
from the Wales Governance Centre of Cardiff University**

[44] **Janet Ryder:** This is the sixth evidence-taking session. As the witnesses settle themselves down, I will remind Members that we have taken a number of pieces of evidence for this inquiry. We had a very interesting session last week with the Wales Council for Voluntary Action, and Mark Isherwood, as the Chair of Legislation Committee No. 5, also came to give evidence. Today, we shall take evidence from David Lambert, who is a research fellow at the Wales Governance Centre of Cardiff University, and from Elizabeth Smith, who is a researcher.

[45] I ask the witnesses to please introduce themselves for the record. If there is anything that you would like to say in your opening remarks, we would welcome that.

[46] **Mr Lambert:** I am David Lambert, and I was a Government lawyer all my professional life until my retirement in 2004. I was the legal adviser to the Presiding Officer from 2000 to 2004. As you say, I am a research fellow at the Wales Governance Centre and a lecturer at Cardiff Law School.

[47] **Ms Smith:** I am Elizabeth Smith, a postgraduate law student at Bristol University. I am currently on a gap year to work with David Lambert at the Wales Governance Centre as a research student.

[48] **Janet Ryder:** You have submitted some written evidence to this committee already, therefore I know that you are fully aware that this inquiry is looking at developments related to Schedule 5 to the Government of Wales Act 2006, including exceptions to matters. We have taken a number of pieces of evidence. Would you like to say anything to begin with in addition to your evidence or just as an introduction before we start with the questions, David?

[49] **Mr Lambert:** We find that Schedule 5 is getting ever more complex, and that is one of the reasons why we wanted to put in this evidence, because we monitor the development of Schedule 5 as part of our work in the Wales Governance Centre in producing our Wales Legislation Online. What floored us was the arrival of the environment LCO, the like of which we had never seen before. We would like to say a few little things to your inquiry about it. For us, the environment LCO was the tipping point, as it really is so complex.

[50] **Janet Ryder:** You might want to expand on that, because I am going to start with the first question. In your evidence, you state that

[51] 'while there is an overall consistent approach to the drafting of Parts 2 and 3 of Schedule 5, there is no consistency in the drafting, either of the descriptions of the Matters or

the Exceptions to the Matters in Part 1 of the Schedule resulting in a lack of clarity.’

[52] Would you like to expand a little on why you believe there is a lack of consistency in the drafting of Part 1?

[53] **Mr Lambert:** Schedule 5 is unique, because it is worth remembering that it is part of an Act of Parliament. The Acts of Parliament that I have grown up with over the years have all been drafted by one or two Parliamentary Counsels. So, there is a sort of structure in an Act and a structure in a Schedule, but there is no structure to Schedule 5, because, uniquely, Schedule 5 is drafted by different people. It can be drafted by Parliamentary Counsel if the development stems from framework powers coming from an Act of Parliament; it can be drafted by Assembly Government lawyers; and it can be drafted by Assembly lawyers. Therefore, it is done according to where the law is coming from. If it comes from framework powers it comes from Whitehall, and if it comes from LCOs it can come from the Assembly Government or from the Assembly. There is no person who is in overall control; there is no gatekeeper of Schedule 5. That is why it is so unusual. When you start reading Schedule 5, you blink and realise that every page is expressed differently. That is different to a normal Act of Parliament and normal Schedules. You get used to reading the structure of a Schedule, but you will never get used to reading this because every matter in every field is expressed differently. I find that so strange, and, as I said, what floored us in the Wales Governance Centre was the arrival of the environment LCO. It is all so different.

[54] **Janet Ryder:** Does the strangeness purely come from the fact that you are used to reading things expressed in a different way, or is it a strangeness that could lead to difficulties and uncertainty in understanding how things should operate?

[55] **Mr Lambert:** It will lead to difficulties and uncertainties, because every matter in every field is expressed in different ways. You get these wonderful wide powers in social welfare, which is marvellous, because it just says ‘adoption’, and then you get 15 separate matters in relation to education. I feel very sorry for the Assembly in having to produce a Measure in relation to education, because it has to read every single one of those 15 matters to decide whether or not the Measure will be in the envelope of those 15 matters, whereas social welfare has these lovely, zippy powers, given the use of the word ‘adoption’, which are so much wider. It is so unfair for the Assembly to have to adjust its mind according to the way in which that particular legislative power is expressed. It is completely ad hoc, and that cannot be right for a parliament.

[56] **Janet Ryder:** You are seeing a difference according to the subject of the LCO. Can I infer therefore that the differences that you are seeing in the subject matters, according to who has drafted them, limits the ability of the Assembly to legislate, because of that particular background?

[57] **Mr Lambert:** Yes, because it is so strange that the power of the Assembly to legislate depends completely on the way in which the matter is expressed. That cannot be right.

[58] **Rhodri Morgan:** I do not know whether you have followed the evidence given to us so far by other witnesses to this inquiry, but two schools of thought seem to be emerging. Alan Trench, from the devolution unit, for instance, has put forward what are pretty much identical points to those in your evidence, namely that it is a mess and that he does not approve of the way in which this is emerging. However, strong cases for the defence were put to us in our last session by the Office of the Parliamentary Counsel of the House of Commons, and by Thomas Watkin—I have forgotten his official title.

[59] **Mr Griffiths:** He is the First Welsh Legislative Counsel.



[60] **Rhodri Morgan:** They said that with any practical problems, any competent lawyer would be able to handle the inconsistencies of approach that arise for the reasons that you have given. So, we will have to draw up a report eventually that uses the judgment of Solomon to decide between the two. Are you saying that you think that the inconsistencies of approach to drafting will cause practical problems to a competent lawyer or is the essence of your case that, while a competent and trained lawyer would be able to handle the inconsistencies in style, it might disadvantage a layperson, who could be an education administration official, a social worker or someone else with a stake in the field? What case are you putting to us with regard to the practical implications?

9.20 a.m.

[61] **Mr Lambert:** I am putting a case that a trained lawyer would find this extraordinarily difficult. With all due respect—Thomas is a good friend of mine—I would find it extraordinarily difficult to understand exactly the legislative powers of the Assembly, particularly given that you now have three parts to Schedule 5. Part 1 covers the matters, which themselves have exceptions, and then there are exceptions to the exceptions. Part 2, which covers general restrictions, also has general exceptions and then exceptions to the general exceptions. Part 3 covers exceptions from Part 2. On top of that—

[62] **Rhodri Morgan:** I understand that, but you must accept that I am not a lawyer, although during my parliamentary career I drafted thousands of amendments to Bills, none of which passed, of course, because we were in opposition. [*Laughter.*] So, I did have a lot of experience of trying to write law. The nature of writing an amendment is that you may be providing an exception to a general principle or an exception to an exception to a general principle. However badly I was doing it, I was doing it, as a layperson, and you get used to it. The problem is that lawyers—who are good at doing this—are paid to hold in their heads the general principles, what rights you are being denied or ordered to do by the law, and then the exceptions to that law, and then, perhaps, the many exceptions to the exceptions, and so on. If you are not a lawyer, it is hard to get to that third stage, but sometimes you can manage the first stage and somewhere in the middle, but the exceptions to exceptions are pretty damn difficult for the layperson. However, lawyers are trained to do it. I must concede that the Law Society agrees with the view taken by you and by Alan Trench, but it fiercely defended the present position expressed by the Office of the Parliamentary Counsel in the Houses of Parliament and here, which is that lawyers with decent training can cope, albeit that laypeople perhaps cannot.

[63] **Ms Smith:** We think that they would be able to cope with it with some training, but this must be understood by the laity as well. We think that there is an easier way of organising these matters, because they need not be so sporadically placed, with no consistent style or structure. As David explained, the fact that it seems to be incrementally developed, with no one person looking at style, so that each field is not coherent in style, adds a lot to the confusion. A trained lawyer would be competent to understand it, but it is a question of whether that problem can be solved, and we think that it could be.

[64] **Mr Lambert:** You must be a very special trained lawyer to understand, for example, what the Assembly can do in relation to the environment. There are Parliamentary Counsel specialist lawyers and Government lawyers as well. However, if ordinary lawyers were asked by a client to advise on whether an Assembly Measure made under the three environment matters is legal or not, 95 per cent of them would find it extraordinarily difficult, because we are now into four pages, I think, of environment exceptions, and exceptions to exceptions. So, only 5 per cent could do that. I suppose that I could sit down and work it out carefully, but it would take days. So, 95 per cent of solicitors represented by the Law Society would find it almost impossible.

[65] Speaking on behalf of the Law Society, there is a worry that, if ordinary solicitors do not have a grasp of what the Assembly can do and then give the wrong advice to their clients—which should be that they should challenge the law and not whether you are guilty within the law—they will find themselves being sued. That is fine if they were negligent, but I would feel desperately sorry for them because it is easy to be negligent in trying to interpret Schedule 5. Expert constitutional lawyers can understand Schedule 5, but it is changing all the time, which is another problem that none of us are used to. I am sure that even Parliamentary Counsel is not used to a Schedule that changes month by month. The Wales Governance Centre issues a monthly list of the powers, and it is amazing how they have changed from September to now. So, you have to be a specialist. I am not sure that there are many such lawyers in Wales.

[66] **Rhodri Morgan:** Excuse my ignorance, as I have never taken a single lecture in law, but is it not the case that the law as it pertains to England, Wales, Northern Ireland, the USA, Australia and so on—everywhere, apart from Scotland, that has English as the main language—for which the base is common law, is an accumulative, accretive process for which you have to have six different law books out on the desk and to nose back and forth from one to the other to discover the current state of the common law in that area? Then, very unusually, there will be an attempt to consolidate the law. In the case of Assembly LCOs and Measures, the LCO on children, which aimed to lead to a children's Measure, was specifically intended to avert that problem. In other words, the Measure aimed to consolidate those powers and to make it easier for the layperson in social work, adoption, fostering or whatever to understand them, because 100 years of common law had gone before that. The norm for lawyers is to dodge back and forth between six different law books with their noses on the statute, trying to find out the exact state of the law. Barring Measures that are intended to consolidate, is it not inherent in a common law system that you will have this mess? That is what common law is, is it not?

[67] **Mr Lambert:** It is indeed. Beth has copies of our latest edition of Schedule 5. Schedule 5 is unique in the sense that no lawyer in Cardiff Law School is trained to understand anything like it. We train our students to understand Acts of Parliament, but no lawyer anywhere is trained to understand the subtleties of Schedule 5. You read an Act of Parliament, the interpretation of it and the exceptions. However, I do not think that anyone is taught to understand something like this, in which every page is different. Again, for me, the tipping point was the environment, and I invite you to have a look at the section on environment in Schedule 5. It is four to five pages long. The Assembly's power, which is a lovely power, is expressed in two lines, and then there is a page and a half of exceptions to that power. You turn the page over, and there is then another power and another set of exceptions. Then, blow me down, at the end of the four pages, there are general exceptions to what you have just been reading. So, it is incremental. You can get it into your head that you have a power that has an exception, but then you realise that there is another exception, and another, and that there is an exception to an exception. That is just Part 1. You then go to Part 2, and there are general exceptions and exceptions to those, and you then go on to Part 3. I do not think that any lawyer is trained to deal with that. Even the Office of the Parliamentary Counsel would never set out to draft in this way. That is why, without having any sort of doorkeeper to Schedule 5, it has developed in this amazingly random way. That is my opinion.

[68] **Janet Ryder:** Thank you for giving us paper copies. Would it be possible to send us this electronically, so that we can make sure that everyone has a copy of it and we can add it to our body of evidence?

[69] **Rhodri Morgan:** Can you have colouration on electronic scans?

[70] **Michael German:** Yes.

[71] **Janet Ryder:** Do you have a small point on this, Alun? We will then move on to William.

[72] **Alun Davies:** You have referred, David, on a number of occasions to the environment issue, and you have made your feelings clear on it. Could you explain why you think that it is the tipping point?

9.30 a.m.

[73] **Mr Lambert:** My colleague, Marie, who has just had a baby, and I have been monitoring the powers of the Assembly from day one.

[74] **Rhodri Morgan:** That is foetal monitoring. [*Laughter.*]

[75] **Mr Lambert:** Yes, indeed. So, since 1 July 1999, we have monitored the powers of the Assembly, and there were all the terrible problems in the first Assembly about who could do what under the executive powers. Then, the legislative powers came along and we started producing our little monthly list. We found a way of producing it and began to understand what was happening. There were a few little problems in relation to education, where you have 15 matters. Then, suddenly, environment comes along. If you look at pages 6 and 7 on the environment, you will see that it starts in a way that we would have understood. You will see under matter 6.1 the words ‘This matter does not include’, so Marie and I, and our other colleagues, would be used to that. What we were not used to, however, was the last sentence at the end of the ‘This matter does not include’ section at the top of page 7 which states,

[76] ‘See below for further provision about what this matter does not include’.

[77] If you then go to page 8, you see this extraordinary list. We had never seen this before. A power is given to the Assembly, and then it is stated that the Assembly cannot legislate in relation to A, B and C on the top of page 7. Then you turn the page and find that, on page 8, what you have read is subject to the section ‘Not included in matters 6.1, 6.2, 6.3 and 6.4’. You say, ‘Great, we cannot do that’. Then you see that the Assembly cannot legislate upon matters included in 6.1 and 6.2, which is the next general exception. Then you see the section ‘Not included in matters 6.3 and 6.4’. So, you have an extraordinary hierarchy of a power with five exceptions written into it and that is just Part 1. Heaven only knows what is in Part 2; in fact, in Part 2, there are floating exceptions which relate to the environment as well.

[78] I cannot begin to grasp what on earth the Assembly can do, but it is vital for everyone, including farmers or anyone affected by the environment, such as those advising farmers and everyone else, to understand that. They have to know whether what the Assembly is producing is law because, as you know, the Assembly’s law can be challenged as being illegal. I am sorry that it can because you cannot challenge UK law, generally speaking. Professional people, and anyone for that matter, have to know not only whether they are keeping within the law, but whether it is actually law. I would not be able to advise anyone whether a Measure produced by the Assembly in relation to the environment is law. I might be able to do it after about four weeks, but I would need that amount of time to know whether what the Assembly was doing is law. That is because there is this dire structure. There may be no other way of doing it, but it looks as if this is what we are going to get. That is why I say that there has been a sea change since September, where you suddenly have Part 2 on the environment—we did not have Part 2 like this before September. Heaven help us all trying to absorb paragraph after paragraph of what the Assembly cannot do. You will suddenly find, for example, that it cannot control emissions from post office vans. What on earth is that

doing in relation to a Parliament? That is something from the old days of the Welsh Office. This is not the way to deal with a Parliament.

[79] **Alun Davies:** That is a very clear explanation.

[80] **William Graham:** I will draw, if I may, on floating exceptions and fixed exceptions. The environment LCO to which you refer is the one that left here at three pages and came back at eight because of all these exceptions. Are there any advantages or disadvantages in having floating exceptions and fixed exceptions? There have been criticisms that they are unwieldy documents, and you are making that criticism already.

[81] **Mr Lambert:** Elizabeth and I think that it is not so much ‘advantages’; it is just that under this strange structure, it looks as though you have to have both fixed exceptions and floating exceptions. Fixed exceptions are necessary if you just want to except certain areas from a particular matter. Floating exceptions seem to be necessary as well if you want to have general overall exceptions. It is terribly difficult, but as Rhodri was saying, reading the evidence given by Thomas in particular, I understand that you cannot just have fixed exceptions.

[82] Before September, an extraordinary table was beginning to appear at the end of Part 1, which tried to allocate fixed exceptions to a number of matters. As Thomas rightly says, it was not working. Ten matters were identified separately and we were trying to apply the same exception to those 10 specific matters. Instead of that, just to have a general statement to say ‘You cannot do this in relation to anything at all’ seemed to be much better than this amazing table. As I said, we were monitoring it month by month for our monthly report. Marie and I were shaking our heads in disbelief as this table was going on and on. In the end, it reached about five pages in length. I think that Thomas is right to say that you then had to get to floating exceptions. However, you could not also get rid of fixed exceptions.

[83] **William Graham:** Could you develop your answer on floating exceptions a little? It is bad enough here, but it must be even worse for the layman.

[84] **Mr Lambert:** We were knocked for six a bit in relation to the fact that floating exceptions are expressed by reference to particular fields. You have to be a very specialised lawyer to understand that the heading at the top of a floating exception, in relation to culture, for example, does not mean that what you are reading underneath that heading applies only to culture; it magically applies to any field, but you would never understand that by reading the exceptions under that particular matter. So, in Part 2, highways and transport has exceptions, but I am not sure how you know—unless by osmosis, or something—that what you are reading are not fixed exceptions, but general exceptions, and you have to read it not only in relation to highways, but the whole thing. That is our problem: the fact that we think that you have to come up with a different way of telling everyone that what you are now reading in this part is not what you have been reading in the first part. You are reading it generally by reference to all of the fields and not just to one. That is not coming over at all—speaking as a young graduate and as an elderly graduate.

[85] **Janet Ryder:** To put this in blunt layman’s terms, it is impossible to track what the Assembly can or cannot do.

[86] **Mr Lambert:** It is indeed.

[87] **Janet Ryder:** If it is impossible to track, it must therefore be incredibly difficult to try to draw up any Measures that might fall out of these things.

[88] **Mr Lambert:** Yes, indeed. I would like to add something to that. What particularly

threw Marie and me was that they were obviously experimenting with what floating exceptions would look like, so they would make a draft LCO and then withdraw it. I think that this was done with the environment LCO, which was used in draft to add floating exceptions that had nothing to do with the environment. Suddenly, the environment LCO started talking about floating exceptions in relation to highways. They then withdrew that and put in another LCO relating to highways.

[89] **Janet Ryder:** Can you explain who the ‘they’ are?

[90] **Mr Lambert:** It must be the Assembly Government.

[91] **Janet Ryder:** The Assembly Government was doing this?

[92] **Mr Lambert:** With all due respect to it, yes. In our little handout, we show you what is in draft as well as LCOs that have been approved. So, there was a draft environment LCO that was dealing not only with the environment, but, in relation to Part 2, it was dealing with general exceptions about highways. So, we wrote all of that out, but it was then withdrawn as regards general exceptions to highways, and a special LCO was brought in that only exempted. It gave no powers at all to the Assembly; it just exempted certain matters from the Assembly’s powers. By this time, we were shaking our heads in disbelief. We are the consumers in the sense that we are monitoring this. It is just amazing.

[93] **Janet Ryder:** Could you clarify which LCO deals only with exceptions?

[94] **Mr Lambert:** From what I recollect, the first environment LCO in draft not only dealt with the environment, but had a Part 2 that also dealt with general floating exceptions. I think that this was the first time that we had seen floating exceptions. It was around October. We had never seen floating exceptions before and they were added to Part 2 for the first time.

9.40 a.m.

[95] Then, there was a lot of criticism. The House of Lords said that the LCO was virtually unconstitutional—and some of us still think that it is virtually unconstitutional, but there we are—particularly commenting on what on earth an environment LCO was doing dealing with floating exceptions about highways. So, that was withdrawn. Then you had the environment LCO, which you have here. However, they then produced another stand-alone LCO that just dealt with exemptions from the Assembly’s legislative powers. It does not give any matters to the Assembly. We have never seen anything like this. It just said, ‘You will not be able to do this in relation to highways, whenever you get your matters’. So, we are having to learn to look at these various documents as they come out. They come out, then they are withdrawn; we take them off our list, but then we get another one; we include it, but it may be amended and so we take it off our list. If you are trying to monitor that, it is impossible.

[96] **Janet Ryder:** May I take you back to this negative LCO so that I can try to clarify the situation? You are telling us that the Assembly Government has drawn up an LCO that tells itself what it cannot do?

[97] **Mr Lambert:** It tells you, the Assembly, what you cannot legislate on, when eventually you get a matter on that particular area. At the moment, you have an exempted LCO. It is extraordinary, is it not? That LCO tells you, when you get a matter in this area, that you will not be able to do this or that, but it is a unique LCO because it does not first of all say, ‘Here are the matters that you can legislate on regarding highways’. It just says that whenever you get a matter, you will not be able to do this. I just shook my head in disbelief.

[98] **Janet Ryder:** May I just clarify something? Was it the Assembly Government or the

British Government that drew up that LCO?

[99] **Mr Lambert:** It was probably the Assembly Government, working on the advice of the Constitution Committee of the House of Lords, when the House of Lords said that what they had just been looking at was bizarre. They said that it was virtually unconstitutional.

[100] **Michael German:** I chaired Legislation Committee No. 4, which looked at this LCO and I think that it would be helpful to this committee, at this point, to have the relevant sections of the legislation committee's report on that LCO. However, more importantly, it would be helpful for the committee to have the reports that Keith Bush, the Assembly's senior legal adviser, wrote about this very issue. I do not suggest that we request all of them because there was a large number of them, but we might have to have the relevant excerpts from the reports that were sent to the legislation committee to help us to understand this process. What David is alluding to was quite clear to the legislation committee, in that we were including exceptions to matters, when we did not have any matters.

[101] **Janet Ryder:** I know that it is not the done thing to question a member of the committee, but as you were Chair of that committee, could you clarify where that negative LCO originated from—here or Westminster?

[102] **Michael German:** The LCO was laid by the Welsh Assembly Government, but, as I understand it, it had been the subject of a negotiation over a considerable period of time between UK Government and Welsh Assembly Government officials. However, it was down to the Welsh Assembly Government to lay it in the end. If you look at the relevant sections of the Record for that committee, you will see that the Minister makes that clear. The Minister said that she would be grateful if the committee were to help her in making the crooked pathway straighter.

[103] **Mr Lambert:** It is on pages 32 and 33 of our little handout. It is this unique thing called, the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009 and it runs for two pages. As I say, those of us who are consumers are bewildered.

[104] **Janet Ryder:** I know that you are talking about the environment LCO, but another stand-alone LCO also came forward. We will try to get some background information on it because it sounds like a situation that we need to explore.

[105] **Mr George:** The LCO that David referred to is the one that is referred to on page 32, which is the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009. That simply sets out the range of additional exceptions.

[106] **Mr Lambert:** Yes, indeed. Originally, what you see here was extraordinarily added to the first draft environment LCO. That went before the House of Lords committee and the Welsh Affairs Select Committee, and they just threw up their hands in horror and said, 'What's an environment LCO doing dealing with these things?'. So, what you see in the paper was, as I recollect, originally attached to the first draft of the environment LCO. It was then taken out of that and put in to this separate, stand-alone LCO on exceptions to matters.

[107] **Michael German:** There is another piece of evidence that will be useful, and that is the joint letter that Hywel Francis, chair of the Welsh Affairs Select Committee, and I signed and sent to Peter Hain, the Secretary of State, and there is also the Secretary of State's response to these issues.

[108] **Janet Ryder:** If my memory serves me correctly, the evidence that we took from Swansea University alluded to a point when drafters at Westminster suddenly realised that they had better start saying, 'No, you can't do this, that or the other'. If my recollection is

right, is that the trigger point that you are talking about?

[109] **Mr Lambert:** Yes.

[110] **Janet Ryder:** Thank you.

[111] **William Graham:** I wonder whether I might depart from the script slightly. On functions of a Minister of the Crown, we have already had advice that the sorts of powers granted to a Minister of the Crown in the Assembly Government are somewhat defective compared to those granted to a Minister of the Crown at Westminster. Would you comment on that?

[112] **Mr Lambert:** In what way would that be?

[113] **William Graham:** Because of the exceptions, particularly.

[114] **Mr Lambert:** Yes, I am sure that that is right.

[115] **William Graham:** And all the exceptions to the exceptions and so on.

[116] **Mr Lambert:** Yes, indeed. You see, when you start off in Parliament, drafting a Bill, as Rhodri said, you can put exceptions in, but it is for Parliament itself to decide what self-denying ordinance it will put in its own legislation. The Assembly is stuck with this legislative competence Order on exceptions to matters, whether you like it or not. That is what I find so strange. So, when you eventually do get a matter in relation to economic development, you have already been told what you cannot do. Somehow, that just cannot be right. You are the parliament. I am sure that Scotland is not told what it cannot do before a bid for a power is even made. That is the issue.

[117] You are absolutely right, if I may say so; a very different approach is being imposed on us compared to the one taken by Parliament.

[118] **Alun Davies:** You sound exasperated, Mr Lambert. [*Laughter.*]

[119] It would be interesting to see how exceptions to powers are dealt with at the UK level because, if you look at exceptions to matters on page 32 of your paper, it shows some of the areas covered there, such as those of nuclear safety and broadcasting, for example, which are reserved powers in all UK territories. It would be interesting to see how the Governments of other devolved administrations deal with that issue, because those powers are reserved in Scotland and Northern Ireland as well. If we could have some advice on that, it would be useful.

[120] As for where we are here, I seem to remember UK Ministers at the Wales Office arguing that the floating and fixed exceptions actually clarify the situation and are designed to make the whole process easier and less cumbersome. Would you say that they have succeeded in that?

[121] **Ms Smith:** In and of themselves, the fixed and the floating exceptions are fine; it is just how they are structured. We have suggested in our humble draft example, which we have submitted at the end of our report, not changing any of the content, but structuring them in a different way, and we will touch on that a little later. In Part 1, we only deal with matters, so, speaking from a layperson's perspective, you are able to see straightaway from that first part what powers the Assembly has. Then, when you look at Part 2, you can see specific exceptions, and it is all in the right order.

[122] **Mr Lambert:** To add to that, we have highlighted parts of our little handout in different colours to show that even though Part 2 is headed 'exceptions to matters', there are actually exceptions scattered throughout Part 1, but Part 1 does not say anything about exceptions to matters, it is just headed 'matters'.

9.50 a.m.

[123] You have to be a clever person to understand that what you are looking at in Part 1 includes what you cannot do, as well as your having to look in Part 2 for what you cannot do. This is all part of this ad hoc approach, particularly when Part 3 is also about exceptions. Each Part has exceptions and exceptions to exceptions. We find this tripartite system difficult to understand.

[124] Why cannot matters in Part 1 just be matters with no exceptions and why cannot Part 2 be specific exceptions, general exceptions and exceptions to those? We think that the heading of Part 2 is very misleading, because it gives the impression that there and there alone will you find exceptions, but exceptions are scattered everywhere throughout the Schedule. We have used different colouring to highlight them, because they are expressed in different ways in Part 1. On the first page of our handout, you have an exception about animals in the middle of the definition and then, at the end of the first page, there is an exception at the end of this matter, but in the first one, the exception is in the middle of the matter. Surely someone should be in control of all this. Why do we, as consumers, have to adjust all the time to the different ways in which all this is expressed?

[125] **Alun Davies:** Are you simply saying that it is a matter of drafting rather than a matter of law?

[126] **Mr Lambert:** Yes, we are. As I said in my previous reply, if we have to accept that there will be exceptions, fine, let us have exceptions, but let them be drafted properly so that we will know straight away that there are exceptions because they will be signposted. There are no signposts here. We should know exactly where to find the exceptions, but we do not. You literally have to read page after page. Fancy coming up with an exception in the middle of a thing about animals. You would only find it if you were reading the Schedule line by line, and not everyone will do that.

[127] **Alun Davies:** A lawyer would.

[128] **Ms Smith:** We have highlighted the ordinary exceptions, which you would expect to find in Part 1, in orange. Our concern was that you would get used to seeing them showing up as 'This matter does not include', with that phrase always at the beginning of the sentence, but then sneaky ones are thrown in, such as on page 21 of our handout, where 'This matter does not include' is no longer at the beginning of the sentence. You have to read through it very carefully, which is time-consuming. It does not follow a set structure, and that was our main concern with the way that it is drafted.

[129] **Alun Davies:** Lawyers are paid by the hour and perhaps that is why it is drafted that way. However, regarding where we are today, I understand the points that you are making and, as Rhodri mentioned earlier, when the Welsh Legislative Counsel and the Parliamentary Counsel were here, they acknowledged that it was somewhat complex, but they said that the priority was having certainty about where power lies. Would you say that, notwithstanding the issues that you have explored with us this morning regarding its complexity, Schedule 5 provides certainty of interpretation of where the power to legislate lies?

[130] **Mr Lambert:** No. I think that it is perilously near breaching the rule of law, in that there is no clarity in Schedule 5, to the extent that no-one, not even a good lawyer, would be



able to advise a client clearly as to whether a Measure made under Schedule 5 was law or not. To me, that is very bad.

[131] **Alun Davies:** I remember you writing something in which you described it as a legislative fog, in some ways. That criticism was also made by the Law Society, but the Welsh Legislative Counsel and the Parliamentary Counsel had no truck with it at all, and said that any competent lawyer would be able to do it. They agreed that it would take time and that they would have to read it line by line, but that is what lawyers are paid to do—we do not pay lawyers to read the first sentence of a paragraph, but to read the whole paragraph. They said that, by doing so, any competent lawyer would know with certainty where these powers lie. I think that people understand that a layperson might find this difficult, but then again, that would not be unique in legislation, would it?

[132] **Mr Lambert:** Not at all. I would have agreed completely with the First Parliamentary Counsel up to September, but then both the National Assembly for Wales (Legislative Competence) (Environment) Order 2010 and the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009 came along. From then on, as an old Government lawyer, I would not be able to say that I am clear on what the powers of the Assembly are. Until that happened, all the specific exceptions were in Part 1. You would have a matter, and you would have a little statement underneath as to what the exceptions were, and you could understand that. The matters were expressed in a variety of ways, which was a pity, but never mind. Then, suddenly, the LCO on the environment came along, which not only used the system to which Marie and I were used to from 2007 onwards, where you get a matter and an exception, but, as I have shown, you get an exception and then you turn the pages over and there are more exceptions to the matter, and then yet more. You then go to Part 2 and find even more exceptions. To me, that is a dramatic change. Until that happened, we were all content with Schedule 5. Yes, it would take a bit of reading, but I have not a clue now of what the Assembly can or cannot do.

[133] **Janet Ryder:** Rhodri has been trying to come in on this for quite some time.

[134] **Rhodri Morgan:** I am only trying to establish whether your objections in the end were about user-friendliness and clarity of the law from the point of view of the lawyer or the layperson who needs to understand this, or whether the exasperation that you had expressed was related to the nature of the settlement—this combination of the 1998 and the 2006 Government of Wales Acts, and this mechanism that we now have for transferring legislative competence on a case-by-case basis.

[135] On user-friendliness and the points that you have just made about the two most recent LCOs passed having contributed to an avoidance of clarity and an excess of complexity, in a way, some of the exasperation that you have expressed seems to be more about the nature of the 2006 Act, or that plus the 1998 Act, rather than about user-friendliness. I am just trying to keep these two things separate. It is not our concern to look at the validity of the 2006 Act. That is there. Our concern is to look at the quality of the legislation that is emerging from it. Is it 'tidy', as we would say in Wales, or not? Matters relating to the nature of the settlement go beyond our remit. Is that a fair point?

[136] **Mr Lambert:** Yes, indeed. It certainly is. Insofar as we have to accept that the settlement requires Schedule 5 to be set out in this way, rather sadly, from our point of view, you have to be told what the Assembly can do and, therefore, what it cannot do. If you have to accept that there will be exceptions, it seems to us that this thing is completely out of control. The one thing that we would ask is that, if we have to live with Schedule 5 at present—and we do—could it be tidied up so that it does become 'tidy'? That is our little suggestion, so that, when you look at Schedule 5, you will know exactly where to find the exceptions straight away, under a heading 'Exceptions'. So, we suggest that, first, you find

matters—just pure matters, with no exceptions at all—and then you go to Part 2, where all the exceptions will be. Lo and behold, you will then have something akin to Schedule 5 to the Scotland Act 1998, and Schedules 2 and 3 to the Northern Ireland Act 1998, which tell you straight away what the Scottish Parliament and the Northern Ireland Assembly cannot legislate on.

10.00 a.m.

[137] **Rhodri Morgan:** I think that this point was put to the two persons from the Office of the First Parliamentary Counsel in London. I think that they said that, although the number of occasions on which this will occur in relation to the Scottish settlement are far fewer than in the Welsh settlement, because of the difference between the two 1998 Acts, there were exceptions and exceptions to exceptions. Alun just mentioned areas such as broadcasting and some aspects of criminal law and so on, but, although it happens less frequently, it nevertheless occurs with Scottish legislation.

[138] **Mr Lambert:** They are all laid out in Schedule 5 to the Scotland Act 1998. So, if you are a Scottish Parliament lawyer or a Member of the Scottish Parliament, you know what you cannot do by looking at Schedule 5, because it is all there. However, we do not know where it is at the moment. It could be anywhere in here—and you have only to look at all these colours. Given that we must put up with Schedule 5 for at least the next few years, we should try to get it all into a particular ‘Exceptions’ segment, which would include specific exceptions, floating exceptions, and exceptions to exceptions, all under one heading.

[139] **Janet Ryder:** We are moving onto an area in which Mike has a question, which is perhaps more about Schedule 7.

[140] **Michael German:** I have three questions. Before I move on to the Lambert solution, which is how to make all this more clear, I want to look at the words of Schedule 5 that you have highlighted in blue in the notes that you have given us, which you say could possibly be illegal. Can you tell us, in clear terms that a layman could understand, why you think that parts of Schedule 5 to the Government of Wales Act 2006 are now possibly illegal?

[141] **Mr Lambert:** It is not illegal, in the sense that it appears in Schedule 5, so you have got to try to give some sort of meaning to that. In blue are the words,

[142] ‘including (but not limited to) pollution’.

[143] What does that mean? If it is not limited to pollution, what else is excepted?

[144] **Ms Smith:** It is a vacuum area that we felt was uncertain, and, according to the rule of law, you need certainty and clarity. So, we just feel that that example and the other on page 23 have a question mark hanging over them.

[145] **Alun Davies:** It is quite ironic to have a vacuum in the paragraph that is defining ‘air’. [*Laughter.*]

[146] **Janet Ryder:** The following is stated on page 23. It is matter 15.9.

[147] ‘Supporting the provision of care by carers and promoting the well-being of carers.’

[148] ‘This matter includes (but is not limited to) social care services to help carers.’

[149] If you were a lawyer, how would you explain that?

[150] **Mr Lambert:** That is absolutely right.

[151] **Michael German:** Fortunately, this came up in a committee that I was chairing and the legal advisers were questioned on this very point. There is extant a note from our legal advisers on this framing of words, which was questioned again when we came to deal with it.

[152] **William Graham:** Can we see that note?

[153] **Janet Ryder:** We will see whether we can get a copy of it.

[154] **Alun Davies:** We need all the legal advice that we can get. *[Laughter.]*

[155] **Michael German:** Where we have tested these matters, we have asked for legal advice, and we have received some advice from Assembly lawyers on these matters, which might be helpful.

[156] I now move onto the Lambert solution, which, I believe, is to improve clarity but not certainty.

[157] **Mr Lambert:** Yes, it is, really. That is a very good way of putting it, if I may say so.

[158] **Michael German:** Right, so can you tell me why the Lambert solution is much clearer than the ad hoc solution that we have had so far?

[159] **Mr Lambert:** It is because you would know where to look for the exceptions. There is one direct place to look, just as in Schedule 5 to the Scotland Act 1998, which is the sole place in the Scotland Act, as far as I know, in which specific exceptions are set out about what the Scottish Parliament cannot do. We suggest that it cannot completely be likened to the Scotland Act, because that does not tell you what the Scottish Parliament can do. We have a system whereby we have to be told what the Assembly can do, which is why we have Part 1. It would be nice if Part 2 were the only place in which you could see what the Assembly cannot do, rather than being dotted among the parts highlighted yellow, blue, pink, green or orange in our paper. It is all there in one part.

[160] **Michael German:** So, you look at each field and you put each matter down in each field and you track it in your hierarchy. Is that right?

[161] **Mr Lambert:** That is exactly it.

[162] **Michael German:** Apart from the Lambert solution, are there any other solutions of which you have heard that would do this in the same way?

[163] **Mr Lambert:** No.

[164] **Michael German:** So, no-one else has come up with anything.

[165] **Mr Lambert:** No. What we are worried about is that, now that we have these things as a precedent, with this defining time of September 2009, unless someone comes up with something, this will develop in the way we are talking about this morning. What we are looking at now are initial developments. We have the LCO on the environment, with floating exceptions for the first time in Part 2, and we think that this can only get worse and worse unless someone comes up with something.

[166] **Michael German:** Given that your suggestion does not involve altering any powers and is merely a matter of how you arrange them and how it looks, what is the process required

to effect that change, considering that you would be reorganising Schedule 5? Who would be responsible for bringing forward a proposal to restructure the way in which it is written?

[167] **Mr Lambert:** Given that these LCOs are so extraordinarily flexible, it looks as though it could be done through another LCO, given the LCO on exemptions that you passed. I do not think that it would even be necessary to have an Order in Council. Here you have a proposed LCO on exemptions creating for the first time floating areas—and you do not have floating matters—so it seems remarkably flexible.

[168] **Michael German:** So, to be absolutely clear, the Welsh Assembly Government, if it wanted to, could produce an LCO that would reorganise Schedule 5 without giving any more powers to the National Assembly for Wales? It would simply reorganise the way in which it was written.

[169] **Mr Lambert:** Indeed, and I would say that that is because of the precedent of the LCO on exemptions that you have here. I would not have been able to say that before, but now that we can see what an LCO can do, it seems that they can do quite a lot.

[170] **Michael German:** I think that you have made your point very strongly about things not being clear and the fact that, to put it in layman's terms, different writers are doing things in different ways and that, therefore, different styles have emerged that have been put together. Will that problem be solved if there is a referendum and Schedule 7 comes into force? Will Schedule 7 always be as easy to read as it is currently?

[171] **Mr Lambert:** I have a copy of a page of Schedule 7 to show you all. Please look at it as you will see straight away that it is visually different from Schedule 5. I draw your attention in particular to 'Education and training', which refers just to education. It is so different from the 15 different matters on pages 1, 2, 3, 4 and 5 of our handout on Schedule 5. It is wonderfully concise. That is why we like 'Social welfare', which is about adoption, for example. It is just one little word. Instead of four pages of the LCO on the environment, in field 6, you have the words 'Environmental protection'. So, presentationally, it is splendid. Provisos are written in, and it is very much like Schedule 5 to the Scotland Act 1998, except that it tells you what the Assembly can do.

[172] However, there is this major problem that we cannot do anything about, which is that Schedule 7, in Part 2, is subject to the fact that, with some exceptions, the Assembly will not be able to make Acts of the Assembly in relation to any areas for which the UK Ministers are responsible prior to the coming into force of Schedule 7. So, although 'Environmental protection' looks so much better than the environmental statutory instrument, you have to read that subject to the proviso that you will not be able to make any Acts in relation to whatever central Government can do as regards the environment. I suppose that what central Government can do with regard to the environment in Wales is set out in all these exceptions to the LCO on the environment.

10.10 a.m.

[173] However, it is much better because you can say, 'Here it is'. No longer do the Lamberts and Smiths of this world have to produce a monthly bulletin of your powers. You can say, 'Here are our powers'. It is so much better, not politically, but from a legal point of view. However, I would sound the major proviso that, when you read it, not everything is as it seems, which is strange for an Act of Parliament. Usually, when you read something, unless it has a proviso, you think, 'Splendid—there is no proviso to environmental protection, so we can start controlling the building of the second Severn barrage', but you cannot, because there are UK provisos. However, it has to be better than what we have been looking at this morning.

[174] **Michael German:** So, for example, nuclear power is already excluded from Schedule 5, so we cannot have powers over that in Schedule 7.

[175] **Mr Lambert:** No, even though it is not an exception. What is strange about Schedule 7 is that, in health and health services, there are wonderfully wide powers, including the promotion of health and the prevention of disease, but there are then exceptions. It possibly gives the wrong impression that, where there are no exceptions, such as in relation to the environment, or where there is only one exception, in relation to education, there are no other exceptions—yet there are, unfortunately, because of Part 2. However, presentationally, it is much better.

[176] **Michael German:** To be absolutely clear, when and if Schedule 7 comes into force, there will be a single extant work, but it will not be Schedule 7 as it appears in the Government of Wales Act 2006, as it will be mixed with bits of Schedule 5, which will then become a list of what the National Assembly can do. It would then be possible for someone to produce a tome or book listing those, which would be fixed, but which would be a lot longer than Schedule 7.

[177] **Mr Lambert:** Indeed it would. I entirely agree. That is absolutely right. If you look at Wales Legislation Online, you can see areas in which central Government is responsible for different matters. Unfortunately, within a particular Act of Parliament, for example, you will find that central Government is responsible for certain Parts within an Act, and the Assembly is responsible for the rest. It is very sad that you have to work out the executive powers of central Government to determine the legislative powers of the Assembly under Schedule 7. What a strange business it is that the executive powers of central Government are controlling your legislative powers. To me, that is odd. That is what is meant by paragraph 1 of Part 2 of Schedule 7.

[178] **Janet Ryder:** There is more evidence that we would like to hear from you. We have had a wide-ranging discussion on Schedule 5 this morning.

[179] **Rhodri Morgan:** I would like to ask one more question, if I may. With regard to your being the interface between the legal profession and the layperson who has to use law books from time to time, and the creation of new legislation and the forerunner to it, namely LCOs, there could be a set of barristers and solicitors in Cardiff, Swansea, north Wales and so on who would need to be able to use the new legislation to advise clients on whether they should challenge a new piece of law as being ultra vires, or whether they would simply use it as a piece of law. I have heard it said that the legal profession in Wales is perhaps 10 or 20 years behind the legal profession in the rest of the UK—not just in London, but even in Bristol—in respect of specialising in different areas of law. We are still producing a lot of generalist lawyers, but everywhere else, people have gone down specific paths. I do not know whether that is true, but if it is, do you think that the legal profession in Wales, including solicitors and barristers, will have to start specialising in one way or another? If they do specialise, do you think that that makes the greater complexity with which they will be faced less of a problem? In other words, they should have been doing this 10 years ago, and it has nothing to do with the Government of Wales Act 2006, as they should have been moving towards having sub-specialist barristers, and not generalist barristers, which is, to some extent, true for solicitors as well.

[180] **Mr Lambert:** Yes. It is difficult, even now, to find specialist solicitors and barristers in Wales who will take administrative law cases. There are exceptions, but, generally speaking, sadly, people still go to Bristol and London for administrative law cases. I know that it upsets the judges who are trying to insist that they go to an administrative court in Cardiff. This will require a complete change of attitude by all solicitors in Wales, as well as

those in England. They will have to start advising clients, even on small environmental matters. For example, if a farmer is accused of polluting a river, and that that criminal offence is created by an Assembly Measure, the solicitor will have to have sufficient training to realise that not only should he be preparing a defence for the farmer, but he should also be considering whether or not the law that he is looking at is actual law. That takes specialist training, which we do not have in Wales at the moment.

[181] **Janet Ryder:** Are you satisfied with that, Rhodri?

[182] **Rhodri Morgan:** Yes.

[183] **Janet Ryder:** Is there anything else that we should have touched on in relation to Schedule 5? Would you like to add anything in particular?

[184] **Mr Lambert:** Yes. The one sadness is that we thought, in our innocence, that when Schedule 5 started off, it would be using words from Schedule 7, so that instead of 15 different matters in relation to education you might just have one matter entitled 'education of primary school children'. You might say that that is ridiculous, but I invite your attention to social welfare, which is on pages 21 and page 22 of our paper. To us, these are wonderfully wide powers, for example: 'functions of public authorities relating to—(a) safeguarding children from harm and neglect'. If you turn over to page 22, you will see 'adoption services', 'fostering', and 'social care services for any of the following'. That is a wonderful power, is it not? Matter 15.5 reads 'social care services for any of the following children'. If you can do that in relation to one field, why have we not been able to do that in relation to others?

[185] **Rhodri Morgan:** We accept that, as a result of the settlement, a unique system has been set up, which is not paralleled anywhere in the world, as far as we know. Therefore, lawyers and users have to get used to the fact that this is unique, that they cannot read across, and that part of the LCO system will be used for the purposes of preparing the way for consolidation Measures, as is the case with the Children and Families (Wales) Measure 2010. Consolidation Measures are supposed to do the job that you are talking about: update 100 years of law from 20 different laws of the past and try to get help for practitioners as well as their legal authorities, private practice, and so on, to know where they stand. There will be others where the purpose is not to consolidate, but to transfer powers, as with the environment LCO, which does not have a consolidation purpose, but no doubt at some stage it will—maybe in 100 years' time, or five years' time, we do not know. By the nature of the unique LCO process, from time to time there will be consolidation Measures and transfer-of-power legislation that will be entirely different. It is not fair to judge the environment LCO by the standards of a consolidation Measure, which it is not. It was meant to maximise the amount of powers that could be transferred to Wales, even if the line is extremely ragged as a result and will create a need for consolidation Measures somewhere down the line. A different approach has been taken in the case of the children's Measure, which says: 'for God's sake, after 100 years, 20 different Acts of Parliament, why not consolidate?' Is that a fair way of looking at it?

[186] **Mr Lambert:** It is. To an outsider, it is a pity that there are not more wide powers such as those on page 22 of our paper in the rest of the Schedule. If you can have them on page 22, why can you not have them elsewhere? In relation to the environment LCO, I accept that it may be necessary to have all those exceptions, but why did we have to have 16 different matters in relation to children? The answer is that it was not under your control at the Assembly.

10.20 a.m.

[187] This was wished on you by an Act of Parliament; that is another example of this

strange business that when you are in control you can produce something like page 22. However, when you are subject to Acts of Parliament, and there are a fair number of them that give the Assembly powers, one of the things that Marie and I were saying a year last October is that you are, sadly, not in control of these powers, and I find that strange. There is no system by which the Assembly can influence the Acts of Parliament that give you framework powers. Parliament is giving you these framework powers in an entirely different way to many LCOs; the children's LCO, for example, only expresses executive powers in a sort of legislative mode. As I have said, legislation should be expressed in an entirely different way to listing specific little powers for Secretaries of State; that is why you have vast education Acts with 200 sections, each of which has a power for the Secretary of State. Surely there should be an entirely different approach when you are asking the Assembly to legislate.

[188] **Janet Ryder:** Perhaps that would be a good point for us to conclude our consideration of Schedule 5 this morning.

[189] We have asked you to look at the review of statutory instruments, and your evidence draws attention to a number of different errors. In his written evidence to us, the Government's director of legal services indicated that most errors are due to production errors, mostly involving numbering, cross-referencing, typographical, minor drafting and translation errors, and errors in cross-referencing with relevant UK and EU enactments in texts and footnotes—those are the bulk of the errors in his opinion. Is that a fair analysis? What suggestions would you make to eliminate errors of that kind?

[190] **Ms Smith:** The question is whether these are fundamental errors, or whether they could be side-stepped and ignored, and the answer depends on the relative position of the reader. David Lambert, having more legal experience than me, was able to excuse many of these errors and was able to understand the meaning of the statutory instruments. I found the process baffling and did not understand why the statutory instruments would have these errors. I thought that it was something that should have been checked, because they were slightly sloppy drafting errors. However minor they may be, errors are errors; for example, acronyms are not defined. Annex 2 includes the acronym 'MHS'; initially I thought that 'NHS' had been incorrectly typed, but on reading the document further I realised that that could not have been the case.

[191] My humble suggestion for rectifying the errors would be to have a member of the laity checking over the documents, for them to have a list of what they would consider to be fundamental errors and for that to be some sort of benchmark. The process would then be foolproof. So, the question depends on the relative position of the reader.

[192] **Janet Ryder:** A number of the errors that we pick up tend to fall into those categories, and if there was a gatekeeper to check the documents too they would not necessarily happen. Alun, I believe that you have some questions on this issue.

[193] **Alun Davies:** Has your work produced any evidence to suggest that errors in statutory instruments occur more commonly when Whitehall drafts are adapted, rather than when legislation is developed from scratch by the Welsh Government?

[194] **Mr Lambert:** That is a very interesting question; we have not looked at it from that point of view, but we are happy to do so to see if that is the case. To add to what Beth said: from the legal point of view, you never know, as a lawyer, whether you can apply a slip rule and say that something looks like a mistake but that it is all right and try to work with the statutory instrument, or whether you should challenge it. There is a question of what powers we, as lawyers, can use in advising our clients to say that something else was meant. I find that very difficult, and I think that we will come to that when we talk about the problems with

regard to the differences between Welsh and English. We would certainly be interested to have a look at that. We could do it from our website, because we know which statutory instruments are being adapted from Whitehall and which originate from the Assembly Government.

[195] **Janet Ryder:** We would welcome that piece of evidence if you would be able to look at that. The points that you are making are points that have been made repeatedly by this committee: to what extent do you accept an error as human error, and to what extent does it need to be a precise and correct piece of legislation?

[196] **Mr Lambert:** Exactly. It is law, not a book or something similar. It is law, and we will have criminal circumstances or assumptions.

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

[198] **Janet Ryder:** Mike, do you have a question?

[199] **Michael German:** I have a similar question—not about Welsh and English, but European legislation. Do you detect any difficulties associated with the implementation of European legislation as opposed to legislation that has emanated from the Welsh Assembly Government?

[200] **Mr Lambert:** Being French, Marie, who is not here, looks at it from the French point of view as well. I think that she would say that she is surprised at the specific way in which Whitehall implements EU legislation. It seems to take it to an extreme that she says would not be done in France, as France has a more flexible approach.

[201] **Alun Davies:** That is amazing. *[Laughter.]*

[202] **Mr Lambert:** I suppose that she would say that the Whitehall precedents are not the only way of implementing an EU directive. I would gently ask whether Scotland implements it in the same, almost over the top, way. There is a belt-and-braces approach, but three sets of belts and braces.

[203] **Michael German:** It is gold-plating.

[204] **Mr Lambert:** Yes.

[205] **Michael German:** Where would you suggest we look for evidence to prove or disprove your theory?

[206] **Mr Lambert:** I would suggest Scotland and Northern Ireland first, and then France.

[207] **Michael German:** May I suggest, Chair, that we do that?

[208] **Janet Ryder:** I think that you have just set us off on another track, but it is an interesting one.

[209] **Michael German:** Perhaps we could ask the Scottish Parliament and the Northern Ireland Assembly through correspondence whether they detected an issue here and how they are dealing with it. It might be possible to find another way of dealing with it in relation to France.

[210] **Janet Ryder:** We will certainly look into that area. Do you have any further questions, Mike? I see not.



[211] **William Graham:** We have had some evidence and suggestions in relation to drafting legislation in Welsh and English. What is your opinion of co-drafting, as is the practice in Canada?

[212] **Mr Lambert:** I will ask my colleague, who is a Welsh speaker.

[213] **Ms Smith:** I have also consulted my colleague, Manon, who is sitting over there.

[214] **Mr Lambert:** By the way, Manon is translating Wales Legislation Online into Welsh.

[215] **Ms Smith:** We think that it is far better to have it co-drafted, simply because we have found that when it is done separately, the English version is always drafted first and then the Welsh has to try to accommodate the English and adapt to suit it. When they are drafted together, considerations can be made. On that note, because the English version is invariably drafted first, it is almost as if the Welsh is given a secondary footing, which goes against the equality rule. So, we would say that it is preferable to co-draft.

[216] **William Graham:** We heard that co-drafting may be more time consuming.

[217] **Ms Smith:** We are being paid by the hour, as you said. [*Laughter.*]

[218] **William Graham:** I thought that lawyers were paid by the six minutes.

[219] **Ms Smith:** It is preferable to co-draft. The end result would be more accurate and both languages would correlate more accurately. It is a matter of balancing that against the time.

[220] **Janet Ryder:** Rhodri, you have some questions on this.

[221] **Rhodri Morgan:** I am looking through the fascinating example of the Transmissible Spongiform Encephalopathies (Wales) (Amendment) Regulations 2007 and the use of two different Welsh expressions for ‘gum’—as in ‘teeth’—and trying to apply that to what you just said about co-drafting.

10.30 a.m.

[222] Are you saying that co-drafting would have avoided the use of two different Welsh expressions for ‘the gum’, namely ‘*cig y dannedd*’ and ‘*deintgig*’? I must admit, I would probably say ‘gum’ in Welsh, but I do not know what a Welsh-speaking vet talking to a Welsh-speaking farmer in west Wales would say for ‘gum’. The key question, in the circumstances of practical life on a farm, is: which word would a vet and a farmer use for ‘gum’ in a Welsh-speaking context? Would it be ‘*cig y dannedd*’, ‘*deintgig*’ or some other word, and how would co-drafting solve that problem?

[223] **Ms Smith:** That is an issue outside the co-drafting remit. That is more to do with section 156(2) and our suggestion about creating a completely new Welsh legal dictionary that would include official words, because even if you are co-drafting, you cannot have the Welsh draftsman using different phrases, which might all be completely acceptable. As I say, we are not dealing with a book or a novel here, but with law and, as such, it has to be completely precise. We have mentioned section 156(2), and we included in our submission to you the section that relates to having a power to be able to produce this new dictionary. At the moment, the only system that legal advisers have is Term Cymru, which is part of the Welsh Assembly Government website. That is a system where you can type in a word and it gives

you a scaling of 1 to 5—‘1’ being the most officially recognised term and ‘5’ being not so official. However, we would like to have every single word come up as a number 1 because we cannot allow for a number 3 or 4. It would be a job, but we think that it is necessary in legal terms for every single word to be the right word. So, if it says in this dictionary that we are using ‘*deintgig*’, that word has to be used.

[224] **Rhodri Morgan:** But would that not, to some degree, depend on common usage in a Welsh-speaking context? For example, in this case, that word would be used by a vet, farmer and an inspector.

[225] **Ms Smith:** It would have to be one specific term.

[226] **Rhodri Morgan:** I can see the point of not using two different terms, which is what has happened, but when it comes to choosing between those two terms or a third term, you have to think about the context in which the use of the term might arise, in this case on a farm during an inspection. So, for example, what would a veterinarian say to a farmer and what would the farmer say back to the vet? How would they say ‘gum’ in Welsh? It is as simple as that, is it not?

[227] **Janet Ryder:** I think that there is an exception because, as you know, different words can be used for different things in north and south Wales. We are not talking about general usage here, but specific usage as law is being translated.

[228] **Ms Smith:** We have a similar system on the Welsh Assembly Government website, where you have a scaling of 1 to 5, and ‘5’ means that usage could be variable, but for the purposes of law, it should always be—

[229] **Rhodri Morgan:** But is that right? You make another point that, at a certain stage, the uncertainty created by either having two separate expressions in Welsh or an incorrect expression in Welsh renders the statutory instrument problematic for use, and possibly open to challenges, being ultra vires. In other words, the law has not been created, although the impression is given that it has been created. Is what makes it ultra vires the fact that bad Welsh has been used or that two different words have been used in Welsh or that the Welsh is not equivalent to the English, or that the English is not equivalent to the Welsh? If a term is used in Welsh that no-one in a Welsh-speaking context has ever heard of before, does the fact that that word is in a dictionary make it good law, or is it bad law because of the fact that no-one has ever heard of it before in a Welsh-speaking context even though it is marked number 1 in your dictionary?

[230] **Ms Smith:** It would be for an official body to decide on what words were considered good or bad. Our point with ‘gum’ was that the first expression, if it is translated literally—because two expressions in Welsh for ‘gum’ were used—means ‘through the meat of the tooth’. In that sense, our concern is that when it is being translated and cross-referenced to the English, it does not refer to the gum. It is a problem for legality in that sense.

[231] **Rhodri Morgan:** I have no idea what vets and farmers say, but if that is what they say and how they describe ‘the gum’ in common practice—

[232] **Ms Smith:** They could do, but it could be challenged, because, in translating it to English, it does not mean what it is supposed to; it refers to something completely different.

[233] **Rhodri Morgan:** That is the nature of language, is it not?

[234] **Ms Smith:** Is that acceptable, though?

[235] **Janet Ryder:** Mike has something to say about this.

[236] **Michael German:** Is the issue here one of certainty—

[237] **Rhodri Morgan:** Ask the vet.

[238] **Michael German:** If you have local uses or colloquialisms in different parts of the country, do you need to have one term that is always used for legislation to create that level of certainty? Given that Welsh does not have words that match up to the required words in English, you need to have that certainty. That is what I am trying to grapple with.

[239] I have one other question to tack on to that while you are thinking about the first. I know of one other example, in another country, where they have exactly this problem. This is in Catalonia, where they dealt with the problem by creating a department of linguistic normalisation. Essentially, it does precisely what you say, in that it gives the official word to be used in official documents for a particular word in Spanish. So, if you want to translate that word into Catalan, you have a legal word. That provides certainty. I want to be absolutely clear that this is what legislation requires.

[240] **Ms Smith:** It is not changing the Welsh language, which is so much more flexible than English. It is just a matter of accepting that when Welsh is relating to a legal issue, it has to change and use specific words. In other European countries, the EU is able to look at the meaning, the general meaning and then cross-reference that to another language to understand something. Because of section 156(1), both languages have to be equal, so we are not able, because of that law, to say, 'Let's look at the meaning and cross-reference it to the English' because, by default, you would be giving more importance to the English version over the Welsh, which we are not allowed to do. The only solution, as in section 156(2), is to create that official dictionary to give clarity, and then the problem is virtually solved.

[241] **Janet Ryder:** Rhodri, are you satisfied with the answers to your questions?

[242] **Rhodri Morgan:** I am stuck, because I wish we had a vet here who could say what the normal word for 'gum' is when one is working on a farm.

[243] **Janet Ryder:** Surely, the premise is that if you are drawing up a legal dictionary, you would make reference to a vet beforehand.

[244] **Rhodri Morgan:** Absolutely, and somebody may have done.

[245] **Michael German:** Surely, the point is that if you have a vet from west Wales and another from north Wales who might use different terms, someone has to adjudicate.

[246] **Mr Lambert:** Exactly, and that is where the uncertainty lies. We just wonder, if there is uncertainty, what that means in relation to equal standing. What standing do you give the north Wales vets as opposed to the west Wales vets? That has dramatic consequences because if you cannot give equal standing, as Beth and I read this, it means that the statutory instrument is potentially illegal, and that is rather fundamental.

[247] **Janet Ryder:** That is the crucial point, namely how these would be looked at in a legal setting. It is an issue that we have tussled with on a number of occasions, where we have picked up these differences.

[248] **Michael German:** I do not know who has the experience here. I just mentioned one, but there must be other legislatures that have two languages of equal standing. How do they approach this problem, and where do you suggest we look for examples? Do any of you have

any ideas?

[249] **Mr Lambert:** The area that I know is the semi-independent area of north Italy, which was once occupied by Austria. There, the University of Innsbruck has produced an official dictionary of Italian and German words, so it produces all legislation in German and Italian, and that is all by reference to the official dictionary, which is prepared in the faculty of law in Innsbruck.

10.40 a.m.

[250] **Janet Ryder:** That is very interesting. We will have to see whether we can do something with that.

[251] **Mr Lambert:** Hence our recommendation to implement section 156(2), and we are very sad that it has not been implemented because it has been there since the first Act. It was put in by my colleague, Cedric Longville, when the first Government of Wales Act was going through in 1998. He thought that this would be marvellous, and the Parliamentary Counsel agreed. It is a wonderfully unique power and it is there for the purposes that Mr German mentioned. It helps provide certainty.

[252] **Janet Ryder:** We are in danger of opening at least three further reviews, and this would be a discrete review of its own. We may have to return to it as we start to develop a body of bilingual legislation. We will see what evidence we can draw together on this. On the particular issue about the errors that you have picked up in statutory instruments, is there anything else that you wish to add on that?

[253] **Mr Lambert:** Beth was going to answer on that particular matter. We do not think, for the purpose of what is meant by 'equal standing', that you can distinguish between a minor error—in other words, a minor distinction between Welsh and English—and a major one, because it just says that they are to have equal standing. Even if it is a minor difference, it is probably not equal. Interestingly, if it is not equal, there is no solution provided for section 156(1). You have to treat it as equal—the implication being that if you cannot treat it as equal, it is not law.

[254] **Ms Smith:** The problem is that there is no case law on this, so what authority do we have to say what errors are and are not minor? It is a precaution more than anything.

[255] **Janet Ryder:** That is something that we have tried to be cautious with every time that we have raised this point. It has been brought up as a technical point, but it is a crucially important technical point and we would share your concerns on that. It is an area that we need to look at in more detail.

[256] If there is nothing else that you wish to add, thank you very much for coming in this morning and offering some very interesting and challenging evidence. I am aware that you have circulated a number of extra pieces of evidence, and you have also said that you will supply further pieces of evidence. Although you have handed hard copies of your evidence to us, would it possible to collect them together and send them to the committee clerks electronically so that it will be a little easier to store it with the evidence? We look forward to receiving the other pieces of evidence that you will provide to us.

[257] **Mr Lambert:** So, would you like our Schedule 5?

[258] **Janet Ryder:** Yes.

[259] **Ms Smith:** Do you want Schedule 7 as well?

[260] **Janet Ryder:** Yes. I have Schedule 7 and Schedule 5 in hard copy, but you were going to take another look at the errors that occur in instruments that are drafted uniquely in Wales, compared with errors that might occur when they are translated. There will be a copy of the Record for you to check. I think that it might be rather jumbled, considering what we have discussed this morning. Thank you very much for coming in and for providing a very challenging evidence session for us.

10.44 a.m.

**Ymchwiliadau'r Pwyllgor—Gwybodaeth Ychwanegol: Monitro Canlyniadau  
Adroddiadau'r Pwyllgor ar Offerynnau Statudol: Tystiolaeth Ychwanegol gan  
Jeff Godfrey, Cyfarwyddwr yr Adran Gwasanaethau Cyfreithiol  
Committee Inquiries—Additional Information: Monitoring the Outcome of the  
Committee's Reports on Statutory Instruments: Additional Evidence from Jeff  
Godfrey, Director of the Legal Services Department**

[261] **Janet Ryder:** Jeff Godfrey gave evidence on 28 January, and we asked him for further evidence on co-drafting, resources and Welsh checking, an issue that we have just discussed. You have had a copy of that evidence. Do Members have any comments on that further evidence, or do you just want to bear it in mind when we are drawing up our report?

[262] **William Graham:** We will come to it again.

[263] **Janet Ryder:** Yes, we will come to it again when we are drawing up our report.

10.45 a.m.

**Gohebiaeth y Pwyllgor: Llythyr gan Mike German AC, Cadeirydd Pwyllgor  
Deddfwriaeth Rhif 4 ar Adroddiad Pwyllgor Deddfwriaeth Rhif 4 ynghylch  
Gorchymyn Arfaethedig Cynulliad Cenedlaethol Cymru (Cymhwysedd  
Deddfwriaethol) (Addysg) 2010  
Committee Correspondence: Letter from the Chair of Legislation Committee  
No. 4, Mike German AM, regarding the Report of Legislation Committee No. 4  
on the Proposed National Assembly for Wales (Legislative Competence)  
(Education) Order 2010**

[264] **Janet Ryder:** We have a letter from Michael German, Chair of the Legislation Committee No. 4, on the report of Legislation Committee No. 4 on the Proposed National Assembly for Wales (Legislative Competence) (Education) Order 2010.

[265] **Michael German:** Do you want me to explain my letter?

[266] **Janet Ryder:** Yes, would you like to introduce it?

[267] **Rhodri Morgan:** Go and sit over there, Mike, where the witnesses usually sit [*Laughter.*]

[268] **Michael German:** The issue that the committee was vexed by was the explanatory memorandum. If Members have it in front of them, they can see that the explanatory note, which is on page 3 of the Order, it fairly incomprehensible. I know that you have been given copies of the legislation committee's view on that. We knew that this committee was looking at the clarity of legislation and we asked that Welsh Ministers give consideration to reviewing

the way in which these explanatory memoranda are written, in order that the amount of information provided about the powers being sought is clearly explained. One of the problems that we face—as I know that many legislation committees face in the Assembly—is that, because it is not clearly explained in the explanatory note, when you take evidence from external bodies, they frequently address a different question to the one that the Order is intended to solve. The purpose of the letter was to draw that to your attention, in the hope that you might support that work in the work that you are doing here on this committee.

[269] **Janet Ryder:** We have raised that in our previous recommendations. We have highlighted the importance of the explanatory memorandum, in that it is the first point of reference that people will read. Rather than having to sit down and read through a piece of legislation, which can be rather off-putting, they will read the explanatory memorandum, which has to be clear, complete, and easily understood. The styles, however, seem to vary slightly. It is becoming dubious whether there is any consistency in this. We could issue some guidance on what we expect to see in explanatory memoranda. However, I do not think it would be very wise to do that without taking further evidence, and I do not think that we have the capacity at the moment, while we are undertaking this review, to embark on a review of explanatory memoranda. We may want to look at the language aspect or at the explanatory memoranda as a further review.

[270] **Michael German:** Put it in the queue.

[271] **William Graham:** We could issue draft guidance, subject to further evidence and consultation. That might be helpful.

[272] **Janet Ryder:** We could draw something up for the committee, for your further consideration, if you would be happy to do that. We could issue it as an initial step in that direction.

[273] **Mr George:** I do not think that it is just about explanatory memoranda for primary legislation. There are issues regarding explanatory memoranda for statutory instruments, which are variable in their clarity and which we do pursue separately. That is something that I wish to draw to your attention as well. Is Legislation Committee No. 4 expecting a response from the Minister on these points? Would it be useful for this committee to wait for that response to be received?

[274] **Michael German:** I am hesitating because I am no longer the Chair of that committee. I cannot answer for the committee at the moment, but I would have thought that the expectation was that we might have had a response, but the LCO has been laid already. However, it would be useful to clarify that issue with the current Chair of Legislation Committee No. 4.

[275] **Janet Ryder:** We will speak to the clerk to find out what is happening with that. We will find out whether we have had a response and, if not, we will wait until we have had that response and include it in a letter. We will also try to draw up an initial piece of guidance. It is an area that we will need to look at and take some evidence on at a future date, but not while we are conducting this review, which is becoming more and more complex as time goes on. Are Members satisfied with that? I see that you are.

10.50 a.m.

**Unrhyw Fater Arall a Dyddiad y Cyfarfod Nesaf  
Any Other Business and the Date of the Next Meeting**

[276] **Janet Ryder:** That concludes the business on the agenda for today. The next meeting will be on 4 March. I am not too sure where it will be held. I just wish to remind Members of a couple of things. At the next meeting, there may well be a number of pieces of legislation to go through, and we will be taking evidence from Sir Emyr Jones Parry, the chair of the All-Wales Convention, and Dame Gillian Morgan, the Permanent Secretary to the Welsh Government.

[277] It is noted in my papers that the next meeting is to be held in this room, but I think that we will confirm that by e-mail. We had full attendance today, and I encourage Members to attend the next meeting or to encourage a substitute to come along. We have two important witnesses to the review next week and it is important that we put on a good show.

10.51 a.m.

**Cynnig Trefniadol  
Procedural Motion**

[278] **Janet Ryder:** We need to go over this morning's evidence. I move that

*the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order No. 10.37(vi).*

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

*Derbyniwyd y cynnig.  
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 10.51 a.m.  
The public part of the meeting ended at 10.51 a.m.*