



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

**Y Pwyllgor Is-ddeddfwriaeth
The Subordinate Legislation Committee**

**Dydd Llun, 29 Medi 2008
Monday, 29 September 2008**

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Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynnddi 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

Eleanor Burnham	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Alun Davies	Llafur Labour
David Lloyd	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)
Joyce Watson	Llafur Labour

Eraill yn bresennol
Others in attendance

David Lambert	Cymrawd Ymchwil Anrhydeddus, Ysgol y Gyfraith, Caerdydd Distinguished Research Fellow, Cardiff Law School
Marie Navarro	Cydymaith Ymchwil, Ysgol y Gyfraith, Caerdydd Research Associate, Cardiff Law School

Swyddogion Gwasanaeth Seneddol y Cynulliad yn bresennol
Assembly Parliamentary Service officials in attendance

Anna Daniel	Clerc Clerk
Gwyn Griffiths	Cynghorydd Cyfreithiol Legal Adviser
Keith Bush	Prif Gynghorydd Cyfreithiol a Chyfarwyddwr Gwasanaethau Cyfreithiol Chief Legal Adviser and Director of Legal Services
Joanest Jackson	Cynghorydd Cyfreithiol Cynorthwyol Assistant Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk

Dechreuodd y cyfarfod am 2.31 p.m.
The meeting began at 2.31 p.m.

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

[1] **David Lloyd:** Croeso i gyfarfod diweddaraf Pwyllgor Is-ddeddfwriaeth Cynulliad Cenedlaethol Cymru. Yr ydym yn cyfarfod ar brynhawn Dydd Llun am y tro cyntaf oherwydd y byddwn yn cymryd tystiolaeth ar gyfer yr ymchwiliad i mewn i gylch gwaith y pwyllgor hwn.

David Lloyd: Welcome to the latest meeting of the National Assembly for Wales's Subordinate Legislation Committee. We are meeting on a Monday afternoon for the first time because we will be taking evidence as part of the inquiry into the terms of reference of this committee.

[2] Dechreuwn, fel arfer, gyda materion llai safonol na'r pwnc astrus hynny. Croesawaf fy nghyd-Aelodau, swyddogion a'r cyhoedd sy'n pentyrru i mewn i'r oriel

We will begin, as usual, with less formal issues than that difficult subject. I welcome my fellow Members, officials and the public flooding into the public gallery. I also

gyhoeddus. Croesawaf hefyd ein tystion, ond dywedaf mwy amdanynt nes ymlaen. Os bydd argyfwng, bydd y tywyswyr yn ein harwain at yr allanfa agosaf. Gellid defnyddio'r clustffonau i gael cyfieithiad ar y pryd ac i addasu lefel y sain; gall y tywyswyr ddangos i'r cyhoedd sut i'w defnyddio. Rhaid diffodd ffonau symudol yn llwyr. Mae'r pwynt hwnnw fel arfer yn fwy perthnasol i Aelodau'r Cynulliad yn hytrach nag aelodau'r cyhoedd. Mae cyfieithiad ar y pryd o'r Gymraeg i'r Saesneg ar gael ar sianel 1, a gellir clywed cyfraniadau yn yr iaith wreiddiol ar sianel 0.

welcome our witnesses, but I will say more about them later. Should there be an emergency, the ushers will lead us to the nearest exit. Headsets are available for interpretation and amplification; the ushers can explain to the public how the headsets work. Mobile phones must be switched off completely. That point is usually of more relevance to Assembly Members than the public. Simultaneous translation from Welsh to English is available on channel 1, and contributions can be heard in the original language on channel 0.

[3] Yr ydym wedi derbyn ymddiheuriad gan Mark Isherwood. Fel y gallwn weld, mae Eleanor Burnham yn dal i fod yng ngogledd Cymru, yn ei holl ogoniant. Mae hi'n ymuno â ni drwy gynhadledd fideo o Prifysgol Glyndŵr yn Wrecsam. Croeso arbennig, felly, i Eleanor, yn ogystal ag i bawb arall i'r trafodaethau'r prynhawn yma.

We have received apologies from Mark Isherwood. As we can see, Eleanor Burnham is still in north Wales, in all her glory. She joins us via video conference from Glyndŵr University in Wrexham. Therefore, I extend a special welcome to Eleanor, as well as to everyone else to today's proceedings.

2.33 p.m.

Offerynnau y Bydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig Iddynt o dan Reol Sefydlog 15.2 ac Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol)
Instruments in Respect of Which the Assembly is Invited to Pay Special Attention under Standing Order 15.2 and Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (Negative Procedure)

[4] **David Lloyd:** Mae Gwyn wedi bod yn craffu ar SLC189, Rheoliadau Grantiau a Benthyciadau Dysgu y Cynulliad (Addysg Uwch) (Cymru) (Diwygio) 2008. A oes gennych unrhyw beth i'w hychwanegu, Gwyn, nad yw gerbron eisoes?

David Lloyd: Gwyn has been scrutinising SLC189, The Assembly Learning Grants and Loans (Higher Education) (Wales) (Amendment) Regulations 2008. Do you have anything to add, Gwyn, that has not been raised already?

[5] **Mr Griffiths:** Dim ond ychydig. Mae'r rheoliadau hyn yn gwneud nifer o fân ddiwygiadau i set o reoliadau a wnaed yn gynharach eleni. Mae'n fwriad gan y Llywodraeth gydgrynhoi'r rhain ymhen ychydig fisoedd. Bydd hynny'n cywiro hyn. Yr wyf hefyd wedi cymryd y cyfle i dynnu sylw'r drafftwr at fater o arddull y dylid ei hosgoi yn y dyfodol, ac mae ef wedi cytuno i wneud hynny.

Mr Griffiths: Only a little. These regulations make a number of minor amendments to a set of regulations made earlier this year. It is the Government's intention to consolidate these in a few months. That will correct this. I have also taken the opportunity to draw the draftsman's attention to a stylistic matter that should be avoided in future, and he has agreed to do that.

[6] **David Lloyd:** Diolch yn fawr, Gwyn. A yw pawb yn hapus i basio'r rheoliadau hyn? Gwelaf eich bod. Diolch yn

David Lloyd: Thank you very much, Gwyn. Is everyone happy to pass these regulations? I see that you are. Thank you very much.

fawr.

2.34 p.m.

Ehangu'r Gwaith Craffu ar Is-ddeddfwriaeth: Ymchwiliad i'r Gwaith Craffu ar Is-ddeddfwriaeth a Phwerau Dirprwyedig
Enhancing the Scrutiny of Subordinate Legislation: Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers

[7] **David Lloyd:** Dyma'r brif eitem y prynhawn yma. Ymchwiliad swyddogol gan y pwyllgor yw hwn. Cofiwch i'r pwyllgor gytuno i gynnal ymchwiliad i'r gwaith craffu ar is-ddeddfwriaeth a phwerau dirprwyedig. Bydd yn edrych ar sut mae'r broses yn gweithio ar hyn o bryd, ac yn helpu'r pwyllgor i benderfynu ar y ffordd orau o ymdrin â'r cylch gwaith, sydd wedi ehangu yn dilyn Deddf Llywodraeth Cymru 2006. Mae ein cylch gwaith ni hefyd wedi ehangu. Er enghraifft, mae modd i'r pwyllgor hwn ystyried rhinweddau offerynnau statudol, yn ogystal â phwerau dirprwyedig Mesurau'r Deyrnas Unedig, sydd yn bwerau newydd i'r pwyllgor hwn.

David Lloyd: This is the main item this afternoon. It is an official inquiry by the committee. You will recall that the committee agreed to conduct an inquiry into the scrutiny of subordinate legislation and delegated powers. It will look at how the process works at the moment, and will help the committee to decide on the best way to deal with the remit, which has expanded following the Government of Wales Act 2006. Our remit has also been expanded. For example, this committee can now consider the merits of statutory instruments, as well as delegated powers in UK Bills, which are new powers for this committee.

[8] Dyma sesiwn gyntaf yr ymchwiliad ar gyfer casglu tystiolaeth lafar. Yr ydym wedi bod yn brysur yn casglu tystiolaeth ysgrifenedig, ac yr wyf yn falch o'r cyfraniadau—maent o sylwedd ac yn gwneud i rywun feddwl am yr holl bwnc, y gall pobl feddwl ei fod yn astrus ac yn sych. Fodd bynnag, a bod yn deg, mae cyfraniadau ysgrifenedig bendigedig wedi dod i law.

This is the first oral evidence session of the inquiry. We have been busy collecting written evidence, and I am pleased with the contributions that have been made—they are substantial, and they make us think about this whole subject, which people might think can be rather difficult and dry. However, to be fair, we have received some excellent written contributions.

[9] Mae gennym dri thyst y prynhawn yma. Keith Bush yw Prif Gynghorydd Cyfreithiol Gwasanaeth Seneddol y Cynulliad—croeso i chi unwaith eto i'r pwyllgor, Keith. Hefyd gyda ni mae David Lambert a Marie Navarro o Ysgol y Gyfraith Caerdydd, sydd hefyd wedi bod yma o'r blaen. Croeso i'r tri ohonoch i'r cyfarfod y prynhawn yma.

We have three witnesses this afternoon. Keith Bush is the Chief Legal Adviser to the Assembly Parliamentary Service—welcome again to committee, Keith. Also with us are David Lambert and Marie Navarro from Cardiff Law School, who have also joined us before. I welcome the three of you to the meeting this afternoon.

[10] Rhannwn y drafodaeth yn ddwy. Gofynnwn gwestiynau i gynrychiolwyr Ysgol y Gyfraith Caerdydd yn gyntaf, a symudwn ymlaen wedyn i gwestiynu Keith Bush. Felly, gall Keith orffwys am y tro, a gwrando ar gyfraniadau David a Marie.

We will divide the discussion into two parts. We will ask questions of the Cardiff Law School representatives first, and then move on to question Keith Bush. Therefore, Keith can relax for the moment, and listen to David and Marie's contributions.

[11] Mae gennym restr o gwestiynau sydd

We have a list of questions that have been

wedi eu paratoi i ni eu gofyn i chi. A hoffech wneud cyflwyniad agoriadol, neu a allwn fynd yn syth at y cwestiynau? Gwelaf eich bod yn hapus i fynd yn syth at y cwestiynau.

prepared for us to ask you. Do you wish to make an opening presentation, or can we go straight into questions? I see that you are happy to go straight into questions.

[12] Un o ragoriaethau bod yn Gadeirydd yw fy mod yn gallu gofyn y cwestiwn cyntaf. Soniwch yn eich tystiolaeth fel Ysgol y Gyfraith Caerdydd am yr ystod eang newydd o gyfrifoldebau sydd gan y pwyllgor hwn. Dywedwch fod yr union waith hwn, sy'n newydd i'r pwyllgor hwn, yn cael ei wneud gan bum gwahanol bwyllgor yn San Steffan. Felly, a oes gennych sylw ar sut y gall un pwyllgor yn y Cynulliad ymgymryd â'r cylch gwaith newydd eang hwn, o dan Ddeddf Llywodraeth Cymru 2006?

One advantage of being the Chair is that I can ask the first question. In your evidence as Cardiff Law School, you mention the new wide range of responsibilities that this committee has. You say that this exact same work, which is new to this committee, is undertaken by five different committees in Westminster. Therefore, do you have any opinions on how one Assembly committee can undertake this wide new remit under the Government of Wales Act 2006?

[13] **Mr Lambert:** I believe that the only way that this can be done—and it is a huge remit—is by working closely with these five committees. When I was the Assembly Parliamentary Service Legal Adviser, in about 2000, we had a long discussion with the Regulatory Reform Committee of the House of Commons. Sadly, nothing happened as a result of that discussion, but the officials were happy to share all their information with us, to keep us abreast of all the various developments that were happening. Unfortunately, nothing happened here. However, they realised that we just did not have the staff to carry out the sort of work that they were doing. You are now responsible for another four committees' work in Parliament besides that of the Regulatory Reform Committee. Therefore, the only thing that I can suggest is that you will have to constantly liaise with these committees, because the expertise that they have gathered, and the technical advice that they have available to them, is second to none. If you can connect into them like that, I believe that it would be of great help.

[14] **David Lloyd:** Mae gan Alun **David Lloyd:** Alun has an additional gwestiwn ychwanegol ar y pwynt hwn. question on this point.

[15] **Alun Davies:** The first point in your paper deals with the committee's extensive remit, and you compare that with the situation in Westminster. However, is it not the case that, in Westminster, these five committees have to review a much broader area of policy, as well as coping with a far greater volume of statutory instruments? I believe that Keith Bush notes in his evidence to us that last year 2,496 statutory instruments were made across the United Kingdom of which only 318 made in Wales. Therefore, in both scope and volume, this committee's work is not overly difficult.

2.40 p.m.

[16] **Mr Lambert:** No, but it is extensive; you have taken on extensive work. It might be fewer in number, but the extent of work that you have to do is large. You cover the work of five committees in London, which is a tremendous amount. However, I can understand why your predecessor committee in May 2007 suggested that your remit be extended to all these other matters. The committee said that, unless the Subordinate Legislation Committee did it, no-one would because no-one else in the Assembly would be able to take it on. So, at the moment, it seems to us that there are very important areas of work that one might not be able to look at in the depth that one would hope for in the Assembly. It seems to Marie and me that, if you do not look at it, it will not be looked at at all. I know that that is rather blunt.

[17] **Alun Davies:** I do not disagree with that analysis. I think that you are right. I

certainly think that there is considerable scope for us to improve and strengthen the work that we do with the equivalent committees at Westminster. Do you know, from your experience, whether this is unusual in the devolved administrations in the UK? Are there closer relationships between those five committees and, I assume, their shadow committees in Scotland and Northern Ireland?

[18] **Mr Lambert:** That I do not know, but I would have thought that we had the closest possible relationship with the UK Government, because already, we have counted on our Wales Legislation Online website more than 5,000 existing powers in Acts of Parliament for the Assembly Government to exercise. So, there is this tremendous basis of powers coming from Acts of Parliament in which those five committees are involving themselves and, in each new session now, you are getting more powers through Acts of Parliament as well as through LCOs. So, it seems to me that, for the reasonable future, there is much more of a link between us and the United Kingdom Parliament than between Parliament and Scotland or Northern Ireland.

[19] **Ms Navarro:** There is also no Sewel convention with Wales, unlike with Scotland. So, unlike Scotland, we have more primary legislation in common with the UK Parliament, which is important.

[20] **Alun Davies:** Yes, you are right about that. On those 5,000 individual pieces of power, they will have gone through the normal scrutiny processes at Westminster.

[21] **Mr Lambert:** No, many of them are derived from the start of the Assembly, on 1 July 1999. A rather extraordinary transfer of functions Order at that time transferred the functions contained under 350 Acts of Parliament, which is a tremendous number of powers but, since then, subsequent powers in new Acts of Parliament would have been scrutinised to a certain extent, but not, dare I say it, to a considerable extent, by Parliament. They may have been scrutinised by the committees, but I do not know whether Parliament scrutinised these powers before deciding whether to give them to the Assembly.

[22] **Alun Davies:** That is a conversation for late at night. May I finish with one final question?

[23] **David Lloyd:** Yes.

[24] **Alun Davies:** Do you believe that the five committees at Westminster scrutinise the powers that are devolved to Wales sufficiently, and are there opportunities at Westminster for a discussion of the powers that are devolved to Wales through subsequent legislation?

[25] **Mr Lambert:** Some of the reports refer to devolved powers, but, when they have none to prod them to look at them, which they do not have at the moment, they might skirt over them. However, conversations with the marvellous Regulatory Reform Committee in 2000 showed that, if we guided them on the sort of advice that we wanted from them, they would give us that advice. They were waiting for someone to tell them what the Assembly would have liked, but, sadly, it was never taken forward by the Assembly.

[26] **David Lloyd:** I symud ymlaen ond i ddilyn yr un trywydd, o gofio bod craffu technegol y pwyllgor hwn yn ofyniad statudol a bod y rhannau newydd yr ydym yn sôn amdanynt yn ddewisol, yn sylfaenol, a oes gennych sylw ar y cydbwysedd rhwng yr ochr craffu technegol a'r gwaith newydd y dylai'r pwyllgor fynd i'r afael ag ef?

David Lloyd: To move on but to stay on the same lines, bearing in mind that the technical scrutiny work of this committee is a statutory requirement and that the new areas that we are discussing are discretionary, in essence, do you have any comments on the balance between technical scrutiny and the new work that this committee should undertake?

[27] **Mr Lambert:** All that I can say about that is that, if you do not do it, nobody else will. If Parliament considers it necessary to establish five committees to do this work, it must be necessary for the Assembly to do it. At the moment, perhaps the Assembly is not aware of matters of which these committees are aware.

[28] **David Lloyd:** To flesh out that point, is it your view that there is absolutely no overlap in jurisdiction between the responsibilities of this committee and those of any other committee in this place? If not, or if so, to what extent could responsibilities be picked up by some of the other committees, given their policy expertise, or are these matters more appropriately dealt with by a specialist legislation committee?

[29] **Mr Lambert:** The fact that the House of Lords and the House of Commons both decided to establish specialist committees points to the answer to that, I think. Having appeared before the Joint Committee on Statutory Instruments a number of times when I was in the Welsh Office, I know that they have a tremendous amount of accrued precedents and knowledge that I do not think policy committees would necessarily get from really looking at much wider matters. Just before we came, Marie and I were looking at the agenda of the Children and Young People Committee and the Health, Wellbeing and Local Government Committee and we saw that, understandably, they are looking at policy matters and not at these sorts of things. That is why, when you look at the interesting guidance that the Merits of Statutory Instruments Committee and the Delegated Powers and Regulatory Reform Committee have issued to Government departments, you realise the tremendous experience that they have accrued, even though they have been sitting for only a couple of years.

[30] **David Lloyd:** Thank you. It is time for north Wales to have its voice now. Eleanor is going to ask the next series of questions using the videoconferencing facility.

[31] **Eleanor Burnham:** I am at a slight disadvantage, because I have no notes in Welsh and I cannot see everybody—I cannot see David and Marie at the moment—so I hope that I will be forgiven.

[32] I am particularly concerned about the practice of the House of Lords Merits of Statutory Instruments Committee. I understand that Cardiff Law School highlights specific ways in which that committee operates, including ways to improve the transparency of publishing correspondence, holding seminars, and improving communication through close contacts with Government departments and consulting widely. What do you believe we can learn from the way in which that committee works, particularly given the constraints on time and resources that were highlighted earlier? What might we be able to do even better?

[33] **Mr Lambert:** To me, it all comes down to liaison with the officials of the merits committee, particularly on the reasons why they thought it necessary to issue this guidance, particularly the guidance about what should be set out in an explanatory memorandum, including why you have these powers, why they are necessary, and why you have not thought about something else. It is very interesting. I felt with the Regulatory Reform Committee that those three officials actually put on a sort of a cinema show for us. It was marvellous. They were so fascinated that somebody was interested in what they were doing that they took us through all these things. They had a flow chart that showed how they analyse the various aspects of their work and come to the various conclusions. If we tied in with them, I think that, after a little bit, we would learn a tremendous amount from them. I also found that they were able to say what they would like to do but cannot do as yet. That is a marvellous lesson for us. If we were to liaise with the officials of that merits committee, for example, we would find out what else they would like to do but cannot, and perhaps we could do it down here.

[34] **Eleanor Burnham:** That sounds really fascinating. It is a bit like bringing history to

life, almost by re-enactment. How do you think this committee could best engage with the external stakeholders who might have an interest in the regulations that are being scrutinised by the committee?

[35] **Mr Lambert:** Again, look at how it is done by the officials of these various committees in London. What do they look for in particular? What is in the guidance that they issue? Why are they sometimes dissatisfied as to whether there has been sufficient consultation with outside bodies? What sort of trigger mechanism leads them to say, 'Sorry, we are not happy about what has gone on', and to send the matter back to the Government department? It is just a question of seeing how those committees work.

2.50 p.m.

[36] **Eleanor Burnham:** That is interesting. What suggestions do you have for the Subordinate Legislation Committee to identify relevant statutory instruments effectively, as the merits committee does? We note that it identifies statutory instruments that raise questions in relation to criteria similar to those in the Assembly's Standing Orders Nos. 15.3(ii), (iv), (v) and 15.6(v).

[37] **Mr Lambert:** They have been working for more than two years now, and you can see from their guidance what they are beginning to get used to asking Government departments for. The officials of the Regulatory Reform Committee were able to identify in their flow chart exactly what they were looking for. If it was not in an instrument that they were looking at, it would be seen as a defect and they would note it down. So, they have this memorandum, which was almost like checking boxes, so that they can say, 'Right, at this point, we want to know about this, and if it is not there, we will go back to the Government department, because we are not satisfied with it'.

[38] **Eleanor Burnham:** That sounds like a very logical flow—almost like project management.

[39] My last question for the time being is about your example of the merit committee's commenting on the impact of introducing many new statutory instruments at the start of the school year, so to speak. Do you have a view on whether this more general approach to considering the impact of statutory instruments, or maybe post-legislative scrutiny, would be a useful role for the committee?

[40] **Mr Lambert:** I am not sure about post-legislative scrutiny, if only because you have such a vast remit as it is and so having to catch up with that would be difficult. I would have thought that post-legislative scrutiny would be a matter for policy committees, because they can look at how the policy is bedding down and being implemented. However, it is certainly worth commenting if 10 statutory instruments are being made when you could have had one. The particular thing that Marie and I are interested in is the lack of consolidation of statutory instruments. You might get a statutory instrument that amends another, and six months later, you get another statutory instrument to amend it. In the end, it becomes like the cities of Troy, with eight, one on top of the other, instead of having just one. The Assembly Government could learn from that, we think, about the need to issue guidance to consolidate as far as is possible. I noted that the merits committee said to the Government departments, 'Right, this is an amendment statutory instrument, so when do you propose to consolidate it?'. Instead of having two statutory instruments, it was asking what the timetable was for making one statutory instrument, and that really makes them think.

[41] **Eleanor Burnham:** To finalise that, you are of the opinion that we could be a beacon in this regard, are you? We could do the streamlining, ensuring that we do not waste time, do not over-govern, and get it all right all along.

[42] **Mr Lambert:** Certainly, I think so. It is not just the technical side of things, which, I must say, we think you are doing wonderfully well; it is also the practical side, which is larger. You do exactly what the Joint Committee on Statutory Instruments does, but you also have to do what these other committees do, particularly the merits committee.

[43] **David Lloyd:** Moving on to European legislation, Joyce has a series of questions.

[44] **Joyce Watson:** Cardiff Law School suggests that there are particular opportunities for joint working on EU legislation. Are there specific aspects of EU legislation of particular relevance to Wales that might be inadequately considered if approached through joint working?

[45] **Mr Lambert:** First, I think that this is really an area where it would be beneficial for you to liaise with the merits committee, because, sooner or later, the Assembly Government is bound to have to implement in some way or other a directive for which it is responsible. England has to implement it; we also have to implement it if it is within our powers, and therefore that is a marvellous way of finding out from the merits committee what it looks for. Its comments are very interesting. Sometimes, it says, 'Did you really need a statutory instrument? Why could you not have just achieved this by amending an existing statutory instrument or by issuing guidance?' and things like that. I really would never have thought about that, but that committee is used to it, after two or three years. It is a marvellous thing to work with them.

[46] The problem with that—and the gentleman here has raised it—is that that committee is looking at a tremendous number of matters, but the Regulatory Reform Committee was happy to sieve things out. It said 'We are not going to inundate you with information; we are not going to send you everything on the agenda of our committee every week—we will sieve it out for you and we will highlight what we consider to be important for the Assembly, bearing in mind its powers.' So, there will be many things that are reserved matters that you will not have to look at, unless you want to. So, instead of sending you an agenda with 100 matters, the committee will take it down to two or three matters. In relation to European Union matters, that would cut things down tremendously because you have reserved matters but also a fair amount of devolved matters.

[47] **Joyce Watson:** It has also been suggested that there should be a continuing liaison between the two committees that enables the subordinate legislation committee to draft the conclusions of the merits committee to suit the particular requirements of the Assembly's jurisdiction. You suggest that the committee could follow the merits committee model and consider issues such as the gold-plating and comparing practices with other member states, checking, of course, that timely consultation has taken place. How might the subordinate legislation committee adapt the merits committee's conclusions? What level of joint working would be necessary to achieve that goal?

[48] **Mr Lambert:** Because of your limited time, this would essentially have to be done through officials. You have very few officials, but it is down to officials to work out what is necessary to bring before you and to show what the merits committee's view is. However, you are not in any way bound by it of course. The merits committee cannot dictate to you, but at least you can see the problems that it is worried about in a particular instrument, and then you can decide whether they are matters that you should or should not adopt. The very fact that it has commented about it might lead to wider thoughts from your point of view. However, the merits committee is just a guide. It could say 'We are talking to a quasi-Parliament, as it was in 2000, and we are not in any way going to dictate—all we are going to give you is our background information and analysis, and then we are going to show you the briefing that we give to our committee and it is entirely up to you what you do with that

briefing; you can adopt it, change it or say that it is quite ridiculous and that you do not accept it.’.

[49] It means that it would have done the initial work on which the officials could work. We do not necessarily see that there would be much availability of Assembly Members to work with the committee, if only because there are five committees that sit for three hours a week. So, you would not be able to spread yourselves, and that is why I did this initiative in 2000 of officials to officials, because it was the type of thing that I was used to doing in the Welsh Office—you worked between officials and then you involved Ministers afterwards. The initial work was done with officials but always bearing in mind that the officials never told Ministers what to do—we just said ‘Here we are, here are possible options, now it is for you to decide.’. So, the committee would see the results of the conversations that had been held, but it would be entirely up to you whether you adopted it. You might think that it had gone over the top on gold-plating, in which case you could say that you were not interested.

[50] Marie and I have spent limited time working through, in particular, the merits committee’s report—which I found fascinating, because it included things that I had never thought about before. I never realised that a committee can wag its finger at the Government and say ‘This is completely unacceptable.’, and the Government must reply. It is marvellous, because the guidance says that if the Government does not reply, the committee can report against the instrument. So, the Government gets the message, and it replies.

[51] **Joyce Watson:** Thank you—that has certainly given us some food for thought. What type of information does the committee need in order to consider whether EU legislation has been inappropriately implemented by the Welsh Assembly Government?

[52] **Mr Lambert:** It seems to us to be the type of criteria adopted by the merits committee, which sometimes says that it was not necessary to implement a directive in this draconian way and that there is a much more flexible approach that would not affect business or civic society in Wales to such an extent; that is another way of doing it. In rather the same way, as I understand it, the French do not necessarily follow a draconian way of implementing directives—they have a lot of fluffiness around the side.

3.00 p.m.

[53] So, why do we do it? It is most interesting that Government officials get told off by the merits committee, when it says, ‘We just do not think that you had to do it this way at all. The directive gives you a lot of discretion, and you have no discretion in your statutory instrument.’, or it says, ‘You already had a statutory instrument, you did not need another one. All you needed to do, at the most, was to amend a tiny provision in the existing statutory instrument.’. Reading this has been very interesting. The sorts of approaches that they have laid down provide wonderful guidance for you to follow. It would be marvellous, from our point of view, because you are a democratic body, for you to tell Government officials, ‘Sorry, this is unacceptable, because it is too tough and the directive does not ask for toughness; it asks for a little softness, and you have not achieved that.’. If you do not do that, we cannot think of any other Assembly committee that will.

[54] **Joyce Watson:** Moving on, assuming that we are nice and fluffy now—[*Laughter*]—EU legislation is decided in Brussels, sometimes years before directives are implemented in Wales and before deadlines for implementation are fixed in directives. So, do you have any views on the procedures that the Welsh Assembly Government has in place at the moment for implementing EU directives and consulting stakeholders?

[55] **Mr Lambert:** I have to say that we have not studied this much at all, so, no.

[56] **David Lloyd:** Alun now has a series of questions on the scrutiny of Bills.

[57] **Alun Davies:** During this session, I have not disagreed with anything that you have said in terms of philosophical approach—you have wide-ranging experience in Government and as an adviser to this place. In practice, I have great concerns about the place of the Welsh Assembly Government in the processes by which Whitehall Government departments draw up legislation. I am not convinced, and I have not been convinced by any Minister sitting in front of me at any point in time, that they are involved early enough in the legislative process, which is a wider and different question. In that context, how practical is it for us to be able to work with some of the committees, such as the merits committee that we have discussed this afternoon, let alone with legislation coming from Brussels to achieve these objectives?

[58] **Mr Lambert:** I think that you will have to. It is a terrible thing to say, but the problem is that, if you do not do it, no-one else will. The five committees in Parliament, particularly the House of Lords committees, issued documents earlier this year about delegated legislation that said that, with their two committees and with the Joint Committee on Statutory Instruments, they thought that, in total, they were able to carefully analyse the nitty-gritty of legislation carefully, which is vital to the wellbeing of the people of this country. That is pretty high-blown stuff, but that is in the guide issued by the House of Lords on delegated legislation. All that one can say is that what they said about that has to apply to the work of the Assembly. If these matters are not done, putting it strongly, the people of Wales will suffer. The Assembly Government will not be questioned in the way that it should be questioned on these various matters.

[59] **Alun Davies:** I accept that as undoubtedly correct, but if we look at the legislative process, any Bill will have a memorandum that will outline the powers to be effected by subordinate legislation. A memorandum is published at the beginning of a Bill's progress in the House of Commons, and it would be possible for us to see that memorandum and use it. My concern is that legislation is brutally amended during this process, particularly in the House of Lords, after the Government has learnt some lessons in the House of Commons. It might well be that the explanatory memorandum, once the Bill has gone through the legislative process, is almost irrelevant to the Bill that becomes an Act. Given the relationship between the two legislatures—here and Westminster—how can we realistically have an input to that process?

[60] **Mr Lambert:** The Delegated Powers and Regulatory Reform Committee, in its guidance to departments for October 2007 said that, exactly in the situation that you have described, it requires a supplementary memorandum in relation to all amendments being made to the Bill while it is in the House of Commons. It will then consider the whole situation again and report to the House of Lords, not just on the original Bill but on the matters that have been added to the Bill afterwards. For that purpose, its guidance sets out all of the matters that it requires and it also has a couple of paragraphs in relation to devolution arrangements.

[61] 'The application of delegated legislative provision to Scotland and Wales should be clearly explained. In particular, the Committee has asked that the memoranda for bills involving England and Wales should say whether, and if so how, the devolution arrangements have influenced the Government's decision as to which parliamentary procedure should be applied in relation to delegations to Ministers.'

[62] If you worked with the delegation committee, it seems to me that you could assist in looking at the Bill. Also, quite separately to what the Delegated Powers and Regulatory Reform Committee is doing in relation to Government departments, you could ask the same sort of questions that it is asking in relation to the Assembly Government. If the Delegated Powers and Regulatory Reform Committee is worried, you can tell the Assembly

Government, ‘We are worried.’—if you want to. Therefore, to us, you work with the Delegated Powers and Regulatory Reform Committee, which has much more contact with Government departments in Whitehall, but, separately, you ask these pretty good questions in relation to the Assembly Government. Suddenly, they all start realising that someone is monitoring this. Again, I think that the Delegated Powers and Regulatory Reform Committee, like the merits committee and the Regulatory Reform Committee in the House of Commons, can give you a tremendous amount of ammunition for this. You do not have to follow it; you can be different. It can do a great deal of the speed work, which you cannot really do due to time constraints and officials’ constraints.

[63] **Alun Davies:** Do you think that it would be useful to have a member of that committee in Westminster charged specifically with looking at all of these different instruments for ‘the Welsh representative’?

[64] **Mr Lambert:** I think that the officials might be happy about that. I do not know whether a Member would do it, but I suppose that you could always contact a Welsh Member of the House of Lords. Again, Regulatory Reform Committee officials said, ‘We are very happy to work with you and to identify anything that you want us to identify.’ They said, ‘It is just part of our work.’

[65] **Alun Davies:** I appreciate the fact that the officials would be able and willing to do that, but my concern is that, in some ways, are we not seeking to do the job of a committee in Westminster? Surely, in any sort of federal system, the law that is passed there is their responsibility, not ours. It has implications for us, as we have discussed this afternoon, but surely it is the responsibility of the Members of Parliament rather than us here to ask those questions.

[66] **Mr Lambert:** I would say that it is also your responsibility because I think that Marie has identified six Bills currently going through Parliament that give a variety of powers to the Assembly Government. I think that you must be aware of those because they could be very wide-ranging powers; they could be statutory instrument powers where perhaps, by chance, no supervisory powers are given to the Assembly. I think that, at present, around one third of general statutory instruments do not come before you because there is no procedure at all, negative or positive. Some are negative when, possibly, they should be affirmative. Therefore, you have as much right as Parliament to know what is going on. Parliament is giving powers to a body that Parliament is not supervising—you are supervising it and, to me, you should know exactly the contents of those Bills.

[67] **Alun Davies:** It would be useful to have a note on those examples.

[68] **Ms Navarro:** Five of them give you affirmative or negative resolution procedures. The sixth one is only asking for the Secretary of State in England to consult the Welsh Ministers. I have read the draft legislative programme for next year, and, for sure, another four Bills will be added to that list, and possibly another four, which would make twelve in total.

3.10 p.m.

[69] **Alun Davies:** It would be useful to have a note on those. I have no problems with Westminster passing the powers to Welsh Ministers directly. Is it your contention that the purpose of our scrutiny is to ensure that that is happening in a way with which we feel comfortable? Is there an element that some of these powers should be supervised by the Assembly, but, also, that some of these powers should be passed through Measures, rather than through subordinate legislation?

[70] **Mr Lambert:** That could be a matter as well. That is certainly a question that you ask the Assembly Government. Once the liaison with the Delegated Powers and Regulatory Reform Committee has thrown up that sort of matter, you then ask it separately to delegate the powers; but, of course, it is not really interested in that. So, yes, by all means.

[71] I always go back to the fact that the Delegated Powers and Regulatory Reform Committee is thought of by the House of Lords as being necessary for the protection of the people of Great Britain. So, if it is doing it, the Assembly should be doing it for the protection of the people of Wales.

[72] **David Lloyd:** Moving to the suggested ways forward, Eleanor has the next question, which is question 15.

[73] **Eleanor Burnham:** I was Chair of the first legislative competence Order committee on special educational needs last year and it was the intention that we and Westminster would work jointly. However, it never happened. I would like you to explain in more detail how practical joint working with Westminster could take place, particularly in view of the fact that some very loud voices were made at the end of the last summer term proclaiming that Westminster has too much work and that some felt that it was overloaded with Assembly requests.

[74] **Mr Lambert:** I would say again that, initially, this must be a matter for officials here and in the various committees to work out, who would sieve out the most important matters and then put them to Assembly Members. Otherwise, I agree that you will be absolutely overwhelmed. However, these committees are staffed to such an extent that they are able to draw your officials' attention to matters that they think the Assembly should know about. I do not think that Assembly Members can generally keep up to date with the progress of Bills; Keith and I have worked on Bills, and, once they start, they really go forward at a tremendous rate and you are looking at different prints of the Bills almost every three weeks or so. If you are working through these people, who are demanding memoranda every time there are changes to Bills, that is a tremendous amount of the spade work done, allowing Assembly Members to make the important decisions that are necessary once everything else has been sieved out.

[75] **Eleanor Burnham:** I have a few supplementary questions to ask, if I may, Chair.

[76] **David Lloyd:** One or two, Eleanor.

[77] **Eleanor Burnham:** Are you talking about committees with direct influence over the UK Government or some form of looser joint working?

[78] **Mr Lambert:** I think that it is about working with the Delegated Powers and Regulatory Reform Committee. I am fascinated at the power of this committee and the Merits of Statutory Instruments Committee in being able to issue guidance for Government departments—I will be referring to this in my lectures to public law students. That is pretty good stuff. The guidance states to departments, 'We require an explanatory memorandum. Here is a model explanatory memorandum that we want for a Bill and here is a model explanatory memorandum that we want for a statutory instrument. In paragraph 5 are the reasons why we want that'. If they do not get it, the committees will report against the statutory instrument and report against the Bill.

[79] So, by working in this way, you could, I would suggest, within the next year, prepare these sorts of documents for the Assembly Government and then, if you want to be critical of what the Assembly Government is doing, you just say, 'You are not following paragraph 3 of this guidance'. It is real democracy for Parliament to say to Government, 'This is what you

have to do, and if you do not do it, it is not acceptable to us’.

[80] **Eleanor Burnham:** That is very interesting. I have another supplementary question to ask—

[81] **David Lloyd:** Hang on, Eleanor, Marie wants to say something in addition.

[82] **Eleanor Burnham:** I am sorry; that is the difficulty. I cannot see Marie and I cannot see David.

[83] **David Lloyd:** Do not worry. That is why we have a Chair.

[84] **Ms Navarro:** I just wanted to mention that I have used hyperlinks in our evidence on these guidance documents, so if you want to have a look at those, they are accessible from the evidence document.

[85] **Eleanor Burnham:** The next few questions are about any suggestions that you might have for improved mechanisms or links between Assembly committees, central Government departments and parliamentary committees. What would be the best way of enabling Assembly committees to consider papers and evidence from parliamentary committees, and finally, if we have full devolution, does it get us away from all this?

[86] **Mr Lambert:** Taking the final point first, by ‘full devolution’ I take it that you mean the implementation of Part 4 of the Government of Wales Act 2006. Even then, you may still have Acts of Parliament giving powers to the Assembly Government. In the current interim settlement we have already seen these fascinating lists of Bills that are being used to fill in Schedule 5 to the Act with powers, rather like filling in the holes in Gruyère cheese. As Marie said, we have had six powers added, and there are another eight on the way. So, certainly, in the next three to four years, I would say that we need to establish links with these various committees, and we need to carry this forward. I am sure that we will.

[87] **Eleanor Burnham:** Finally, is it a worry that there is too much work, and that that could work against us? If Members of Parliament are already worried that they will not be able to fulfil their obligations, or that we will hinder them or take the limelight from them, is not that in itself a rather worrying prospect—particularly as we have the bit between our teeth here at the Assembly?

[88] **Mr Lambert:** You would not be hindering Westminster if you used the machinery that is available to you. The Delegated Powers and Regulatory Reform Committee, with its guidance, the Merits of Statutory Instruments Committee, and the Regulatory Reform Committee of the House of Commons, are able to intervene with Government by saying, ‘Government, you are not doing this’. We would not be adding to that; these committees would just be saying, ‘What about devolution?’. In other words, you would be asking them to raise a matter on your behalf.

[89] So, you would not be creating new machinery, because the machinery is there already. However, you would be using the information that you get from these parliamentary committees to ask the Assembly Government nice in-depth questions that it possibly has not yet been asked, such as ‘Why is this power necessary?’, or ‘Why is there not a affirmative resolution procedure?’, and so on. Westminster could not accuse the Assembly of interference there, so that would be an added dimension. As regards Parliament, I cannot see that we would be worrying Parliament separately. In my opinion, the machinery is there already to worry Parliament.

[90] **Eleanor Burnham:** I am very taken with your enthusiasm.

[91] **David Lloyd:** The committee's enthusiasm is in danger of making us run over time, so we move on to the last question, from Joyce.

[92] **Joyce Watson:** It has been suggested that joint working with the House of Lords committee would be more relevant than working with Scottish committees, because of common legislation for England and Wales. This is a little similar to the question that Eleanor asked: do you think that increased legislative competence in the Assembly will make such joint working less relevant or more confusing in times to come?

[93] **Mr Lambert:** Certainly not in the interim period, because everything derives from Parliament: the LCOs, the proposed Measures and everything else. However, subsequently—I think that Scotland shows this, even given the Sewel agreement—there are still 18 Acts of Parliament, on average, made at Westminster each year at the request of the Scottish Parliament. So, even when you reach Part 4, you may still find that the Assembly Government feels that it would be helpful to get powers more quickly by piggybacking on a Westminster Bill, in which case, all the machinery here should still be available for you. Our involvement with parliamentary committees might decrease a little, but I can never see us closing our relationships with them entirely—not for a long time, and perhaps never.

[94] **David Lloyd:** Alun, you had a short supplementary question.

[95] **Alun Davies:** Do you see any role at all for the Welsh Affairs Committee in any of this?

3.20 p.m.

[96] **Mr Lambert:** That is a very interesting question. It has a role on LCOs, of course, but my worry is about the speed of this legislation. Once the Bill starts going in Parliament, you have to attack the main Government department that is making the proposals. If you went to the Welsh Affairs Committee—by all means keep it up to date with what is happening—by the time it has sat, you will find that the Bill has gone two stages over, or has gone from the House of Commons to the House of Lords. That is why I think that the House of Lords Select Committee on the Merits of Statutory Instruments does not deal with another parliamentary committee; it deals with the Government department directly. I think that it would feel that, if it were dealing with another parliamentary committee, the whole thing would be slow and that it would miss the whole opportunity.

[97] **Alun Davies:** I agree very much with that. The more that we discuss this, the more I become convinced that we need greater Welsh channels of legislation in Westminster, just as, prior to devolution legislation, you would have had Scottish channels for Scottish legislation. It might be that, rather than this committee attempting to piggyback on the parliamentary, established committees, it should look at using the Welsh Grand Committee and other mechanisms to scrutinise aspects of legislation as they impact on Wales, to enable a lot of these issues to be picked up. I am quite concerned—we have limited resources, and you said in your submission that you accept that—that we are also trying to do the job of an MP. If we look at the development of a federal model in the United Kingdom—I accept that that could be emotive—surely we need a federal channel within the UK Parliament rather than our doing it ourselves.

[98] **Mr Lambert:** To Marie and I—this is a personal comment—it seems very strange that the UK Parliament is making legislation that we have to implement in Wales, and we are saying, 'Oh well, you know what you are doing'; it may not. At the moment, we are not even making any comments about it, so the UK Parliament is just saying, 'Well, there are no comments coming from the Assembly; that is fine'. It seems odd. You are a democratic body,

you are a parliament and yet you are waiting for the UK Parliament to say to you 'This is how it is going to be done in the Bill'. I think that you have to be upfront. The UK Parliament may still say, 'It's very interesting that you think this, but we are not doing it', but, at the moment, it seems to us that there is a silence from the Assembly. No-one has really commented on these Bills, for example.

[99] **Ms Navarro:** Three of these five Bills put matters in Schedule 5, so they are your legislative powers.

[100] **Mr Lambert:** When we have met in the past with Members of the House of Lords, when Illora Finlay has got together members from all parties in the House of Lords, informally, they have said, 'Isn't there anybody filling us in on this from Wales? We'd love to make a speech on behalf of Wales, but nobody is giving us the ammunition'. That is what you need.

[101] **Alun Davies:** Is it not the role of the Wales Office to fulfil that function at that end of the M4? I see our role here as being a nascent legislature, and we provide scrutiny of Government and legislation where appropriate here, and then the Wales Office fronts the presence of Wales and legislation through Wales at the other end of the M4.

[102] **Eleanor Burnham:** Chair, may I ask a question?

[103] **David Lloyd:** Go on; we will have two answers then. It will have to be brief, Eleanor.

[104] **Eleanor Burnham:** Is this not a lot to do with the scheduling of goings on in Westminster? We are overwhelmed in the Assembly and, at the same time, Westminster is overwhelmed with what it has going on, and it is difficult to work jointly. From our point of view, politically, we talk to the House of Lords but we are very busy and the House of Lords is very busy and it is difficult to join up.

[105] **David Lambert:** Marie has just written this down. The Wales Office works with the Welsh Assembly Government; it is about one Executive talking to another. I humbly suggest that, somehow, you have to speak to the Parliament. You are a parliament; you have to speak to the UK Parliament. By all means, speak to the Wales Office, but the Wales Office is not a parliament. That is why the Wales Office and the Welsh Assembly Government currently seem to be dictating, possibly, what goes into these Bills.

[106] **Alun Davies:** So, we need a Welsh parliamentary office?

[107] **Mr Lambert:** You do indeed. To begin with, for us, you work through the existing machinery that you have in Parliament. These are parliamentary bodies; they are not executive bodies.

[108] **David Lloyd:** That is an opportune moment to break off. You have given us excellent evidence. I would also like to compliment you on the standard of the written evidence, which was superb.

[109] We will now move on to Keith Bush, who likewise presented superb written evidence.

[110] Gofynnaf y cwestiwn cyntaf. Yn I will ask the first question. With regard to nhermau craffu rhagoriaeth, yr ydych yn sôn merit scrutiny, you mention the House of am Bwyllgor Rhagoriaeth Offerynnau Lords Committee on the Merits of Statutory Statudol Tŷ'r Arglwyddi a'r effaith ymarferol Instruments and the practical impact that any y gallai unrhyw feirniadaeth gan y pwyllgor judgment by that committee could have with

hwnnw gael o ran ei ddefnyddio yn wleidyddol i wrthwynebu gweithdrefnau negyddol neu gadarnhaol. A chredwch, felly, dylai craffu fel hyn—craffu rhagoriaethol—fod ar a yw'r amcanion polisi wedi eu cyflawni, neu ydy'r math hwn o graffu yn sylfaenol aneffeithiol?

regard to its being used politically to oppose negative or affirmative procedures. Do you believe, therefore, that such scrutiny—merit scrutiny—should be on whether the policy objectives are fulfilled, or is this type of scrutiny fundamentally ineffective?

[111] **Mr Bush:** Nid wyf yn credu y byddaf yn mynd mor bell a dweud ei fod yn aneffeithiol, ond mae terfyn i effeithiolrwydd unrhyw broses lle mae'r Gorchymyn eisoes wedi cael ei wneud cyn bod y feirniadaeth ohoni yn cael ei gyhoeddi. Rhof enghraifft i chi. Bu ichi gychwyn y cyfarfod hwn drwy edrych ar Orchymyn a wnaed ar 5 Awst a osodwyd o flaen y Cynulliad ar 8 Awst, sy'n ymwneud â'r cwricwlwm cenedlaethol ac yn cychwyn ar 1 Medi. Felly, yng nghyswllt craffu technegol—a fyddai'r un peth yn wir am graffu rhagoriaethol—nid yw unrhyw system lle mae'r Gorchymyn wedi ei wneud ac wedi dod i rym cyn i bwyllgor fel hwn cael cyfle i fynegi barn yn hollol effeithiol.

Mr Bush: I do not believe that I would go as far as to say that it is ineffective, but there is a limit to the effectiveness of any process where the Order is made before the judgment on it can be published. I will give you an example. You began this meeting by looking at an Order that was made on 5 August and was laid before the Assembly on 8 August, which relates to the national curriculum and commenced on 1 September. Therefore, with regard to technical scrutiny—and the same would be true for merit scrutiny—no system where the Order is made and commenced before a committee such as this has had the opportunity to express an opinion can be totally effective.

David Lloyd: Diolch. Eleanor, ti sydd â'r cwestiynau nesaf, sy'n dilyn yr un trywydd.

David Lloyd: Thank you. Eleanor, you have the next questions, which are along the same lines.

[112] **Eleanor Burnham:** I am sorry that I cannot see Keith. Do you have any views on how we can ensure that the application of Standing Order No. 15.3 regarding merit scrutiny is effectively used within the National Assembly for Wales? Perhaps you have said enough to our Chair. The merits committee sometimes uses its reports to comment on Government policy when it draws it to the attention of the House on the basis that it is politically or legally important. To what extent does merit scrutiny explore policy issues?

[113] **Mr Bush:** The word 'merits' can be a little misleading. The House of Lords Committee on the Merits of Statutory Instruments—and, indeed, this committee—has the power to draw the attention of the Assembly to an Order because of its political or legal importance. That is not really looking at the merits of it; it is making a judgment as to how important it is that others look at it in detail. The same rules permit the respective committees to look at Orders in order to see whether they have been effective in giving effect to the relevant policy, but it is the policy of Ministers and not the policy of the Assembly as such. So, it is still to do with a rather technical approach to subordinate legislation, which seems to me to be perfectly proper, because this kind of legislation has been delegated to Ministers to make.

3.30 p.m.

[114] So, we need to be clear about the fact that merit scrutiny does not mean having a free for all as to whether you agree or not with the provision made by the Order; it is an extension of the technical, legal scrutiny. It is very much the same kind of scrutiny. In my paper, I have drawn attention to some of the practical difficulties that would be attached to improving that level of scrutiny. The two issues are time and resources. You can have a much higher level of scrutiny provided that you have more people to assist you in carrying out that function.

Perhaps most importantly—because I can assure you that the Assembly Commission is thoroughly committed to providing whatever resources you need in order to undertake further work—the big issue is that of time. It is being able to look at Orders, in one way or another, before they are made and before they come into force. At the moment, the Standing Orders of the Assembly do not permit you to look at a draft of a statutory instrument; you can only look at a statutory instrument once it has been laid. That seems to me an obvious way in which an improvement could be made and encouragement given to the Welsh Assembly Government to share drafts with this committee in advance so that the quality can be improved for everyone's sake.

[115] **Eleanor Burnham:** That is a very interesting point of view. Resources are obviously a politically sensitive issue. Only the other day, the north Wales *Daily Post* had a page devoted to the resources and spend of the commission.

[116] Finally, do you have any views on whether there is still a role for subject committees in undertaking aspects of merit scrutiny?

[117] **Mr Bush:** That is a judgment for you. The work is done in different ways in different legislatures. For example, there is no equivalent of this committee in Northern Ireland; there is an official, an examiner of statutory rules, whose job it is to carry out the technical scrutiny, but who then refers relevant Orders to the specialist subject committees. So, as long as the merits are looked at—if you regard that as being a sufficiently high priority—then the issue of whether it is done by this committee or by a subject committee is, I think, a matter of political choice rather than a matter on which I would want to comment.

[118] **David Lloyd:** Okay. We will move on. In terms of the demands of scrutiny vis-à-vis this committee in general—and we note comments in your paper about the challenge to the Assembly of striking the right balance between effectiveness of scrutiny by the legislature and flexibility of lawmaking by Ministers—do you consider that the Assembly's legislative process is currently achieving the best balance, given its constraints? If not, in what ways would you like to see the balance improved?

[119] **Mr Bush:** With respect, I will decline to answer the question in quite the way that it is posed, because it involves a value judgment. However, it is absolutely clear that the balance has shifted. The result of the Government of Wales Act 2006 was undoubtedly to shift the balance in favour of flexibility and away from the rigorousness of the scrutiny. Under the old procedure—with various exceptions, of course—every important piece of subordinate legislation had to be looked at first by this committee, or its predecessor, and had to be reported upon if there was anything to report. That could be taken into account by the Members. We devised a system—I say 'we', because I was involved in finding an answer to this particular problem—whereby, if this committee found a defect, it could be corrected without the need to have a formal amendment. Interestingly, I notice that the Scottish Parliament's Subordinate Legislation Committee, in its most recent report on this kind of issue, has again suggested that something similar would be a good idea. We have now lost that, and the committee may be looking at ways in which one could perhaps recover the best of the old system, but without going back to its inflexibility, which undoubtedly made it difficult on occasion for Government to act speedily to deal with practical problems.

[120] **David Lloyd:** Joyce has the next questions.

[121] **Joyce Watson:** Good afternoon, Keith. Consultees have suggested having greater support by specialist staff providing technical and preliminary work in order to enable committee members to focus on issues of greater relevance. Do you have any views on how resources might be better allocated?

[122] **Mr Bush:** Again, I do not want to sound presumptuous, and still less patronising, but if I may say so, your talents and abilities are much more evident in relation to issues of policy, and not in relation to legal scrutiny or the comparison of the two language versions of the text or whatever, in relation to which you have the support of extremely able and experienced people—I see them sitting at the end of the table there. However, you have an extremely important role to play in relation to these broader issues of merits, as well as the issue of the principle of how far powers should be delegated to Ministers. So far, we are still very much in the early days of legislation by way of Measures.

[123] However, when the first Measure came before this committee, there was a lively debate on whether the control over the Minister’s law-making power went far enough, and so on, which resulted in the Minister thinking again, and being prepared to take on board this committee’s suggestions. I would venture to say that the result of that was ultimately a better Measure than had that process not gone on, and Members were able to engage in the issues of principle that arose. Therefore, I believe that there is a huge scope for the efforts of this committee to be effectively directed more towards issues of merits, the principle of how far powers should be delegated to Ministers, and what level of control should be retained over the way in which Ministers exercise those powers.

[124] **David Lloyd:** I believe that that possibly answers your second question, Joyce.

[125] **Joyce Watson:** Yes, it does.

[126] **David Lloyd:** Alun has a supplementary question before we move on.

[127] **Alun Davies:** You can strengthen a committee’s authority by either giving it formal powers to do certain things, or by giving it the resources to enable it to take views that are far more deeply informed, shall we say. As a new Assembly Member, I am aware of the issue of resources. We are facing Government, which has enormous resources, including several researchers, legal staff, and so on. There is no equivalence between our abilities, in terms of the resources that are available to us as a committee, and the resources that are available to a Minister, for argument’s sake, who is arguing for a piece of legislation. Therefore, would you not consider it a priority of the Assembly Commission to consider different ways of doing things—we are talking here about subordinate legislation? Some of the things that David and Marie discussed earlier would require vastly increased resources compared to those that exist at present.

[128] **Mr Bush:** I am not sure that I would necessarily agree with the word ‘vastly’.

[129] **Alun Davies:** How about ‘substantially’?

[130] **Mr Bush:** I accept that the more work you take on and the more demanding it is, the more support you will need. However, from the point of view of the legal service, I do not detect any resistance to providing you with extra resources—quite the opposite. I can tell you for a fact that the commission is extremely sympathetic to any requirement for extra legal resources to meet any added work that this committee would take on. However, one would need to look at how the committee is planning to organise its work. I can assure you that I will make it my business to ensure that you have the legal resources to do what you want to do.

3.40 p.m.

[131] **David Lloyd:** Looking ahead, how do you see scrutiny evolving here, particularly as regards the discussion on the superaffirmative procedure, which you introduced when it came to the NHS Redress Measure?

[132] **Mr Bush:** If you mean whether the volume of work will increase because of the number of statutory instruments that are made and so on, that would be like looking into a crystal ball. I have drawn attention to the fact that, over the twentieth century, the quantity of subordinate legislation relative to primary legislation has increased hugely. There is no doubt about that. However, in relation to Welsh legislation, it has not increased vastly since 1999. I gave the figure of just over 300 instruments last year, but, of those, around 100 are local instruments that this committee does not need to deal with. So, the figure is around 200 a year, which has remained more or less at a constant level over the eight or nine years that we are talking about. However, that may change, as there may be more coming forward. I do not know.

[133] As more and more Measures are passed, and if the Assembly acquires the power, under Part 4 of the Act, to make primary legislation generally in devolved areas, the volume of instruments to be dealt with may well increase, and this committee will need to consider novel ways of controlling the activities of Ministers. Chair, you somewhat wryly referred to my drawing the committee's attention to the potential—that was all that I did—of the superaffirmative procedure in an appropriate case, and, interestingly, I note that the local government Measure that has just been introduced includes a particular power that is subject to such a procedure. So, Ministers have clearly indicated that they are alive to the need for a system of scrutinising subordinate legislation that is responsive to the nature, the importance and so on of the legislation that they are making.

[134] **David Lloyd:** Thank you. Alun has the last couple of questions.

[135] **Alun Davies:** As regards how we take our work forward as a committee, we discussed earlier today our ability to view and discuss draft instruments. Do you see any difficulties with our doing that as a committee?

[136] **Mr Bush:** None whatsoever, provided that the Government is prepared to co-operate. What I mean by that is that the greatest pressure is always on time, given the time that it takes to get from an idea to a piece of legislation that is in force. The Government does not want anything that will extend that period. However, there are various ways to get around that problem. For example, no-one is expecting you to have the final draft of a piece of legislation to look at, so that could be built into their existing consultation process. Similarly, in the case of an affirmative Order, one could devise ways to withdraw or amend in some way a draft that had been laid, because one feature of the present system is that if something is wrong with the draft, there is nothing that can be done other than to withdraw it and submit a fresh draft. So, there are practical things that can be done, but they require goodwill all round and a recognition by Government that it is just as much in its interests that legislation be correct as it is in the interests of the public and the Assembly.

[137] **Alun Davies:** You gave the impression in your paper that you felt that the legislation from 1998 through to 2006 introduces quite a cumbersome means of legislating. I certainly read from your evidence that that did not necessarily improve the performance of scrutiny. That was certainly how I read it. However, we have heard this afternoon, in a previous session, that a considerable body of legislation is being taken through Westminster without any apparent scrutiny of its impact on the Welsh Assembly Government or on the Welsh Assembly Government's relationship with this place. Do you have any comment to make on the debate that we were having earlier about our working relationship with Westminster committees and how we could resolve that conundrum?

[138] **Mr Bush:** There is no doubt that the process that we had here, prior to May 2007, was lengthy and could be rather inflexible. The result of it was legislation of a highly technical standard because it was all subject to pre-legislative scrutiny and, in effect, could be

amended. However, there was a price to be paid for that, and so the balance has shifted.

[139] In relation to whether some form of learning or joint working involving Parliament could help, I think that I first ought to remind everyone of one fact, because I think that it may have been missed in the previous discussion: it is not possible for this committee to work jointly on the technical scrutiny and merits aspects of scrutiny of subordinate legislation because the Standing Orders of Parliament and of the Assembly, for very good reasons, prevent you from looking at the instruments that have to be laid only before the other body. If you have a Welsh statutory instrument made by Welsh Ministers, Parliament has absolutely no role in relation to that. If an Order is made jointly by the Welsh Ministers and UK Ministers, which, in David Lambert's day, was the rule, of course, but nowadays is very rare—and European legislation, for example, is quite often implemented by an Order made by the Welsh Ministers and UK Ministers—Standing Orders say that, if an Order has to be laid before Parliament, it cannot be considered by this committee. That seems to me to be complete common sense, because you do not want to be wasting time looking at something in which you have virtually no role.

[140] Where I think there is an obvious role is in relation to the third activity, which is that of looking at whether Acts of Parliament, or Bills leading up to an Act, delegate powers to Welsh Ministers in an appropriate way. When I worked on legislation for the Government, part of what we did was provide memoranda to the Delegated Powers and Regulatory Reform Committee of the House of Lords, which, as David said, demands a justification for powers to be granted to Ministers, and not only powers to legislate, but powers in relation to directions, licences and that kind of thing. You had to make the case for it. If you have a Bill going through Parliament that delegates some powers to the Secretary of State—in other words, UK Ministers in relation to England—and to Welsh Ministers in relation to Wales, there is no mechanism for Parliament to know whether we, in the Assembly, take a different view as to whether they should be delegated. A more extreme case than that is that you could have a situation in which an Act of Parliament delegates powers only to Welsh Ministers and only in relation to Wales, and yet there might be no mechanism under which the Assembly could indicate its views.

3.50 p.m.

[141] I have just floated the idea that that might be a very obvious case for joint working because there is no overlap there. Once the Act is passed, parliamentarians will have no function whatsoever in determining how that power is exercised. I do not know, but the matter might be worth exploring. When such a situation arises, there should be some system under which the parliamentary committee can invite the views of this committee, and sub-contract, as it were, the scrutiny of those powers. They are, effectively, Welsh powers although they are concluded in a UK Act of Parliament. That might be a possibility. That is where there is scope for some joint working, but, for the reasons that I have explained, there are real, practical reasons why joint working with the Joint Committee on Statutory Instruments or the merits committee of the House of Lords would not be possible under the present arrangements.

[142] **Ms Navarro:** On that particular point, interestingly, I have carried out research on the similarity between the statutory instruments made in Wales and their equivalent in England. That has shown that 44 per cent of the statutory instruments made in Wales by a Welsh Minister were similar to, if not exact replicas of, those made in England. So, I accept the fact that there is no jurisdiction, but there are definitely parallels to be drawn and lessons to be learned. So, I accept Keith's points, but I just wanted to build on them.

[143] **David Lloyd:** Have you finished your questions, Alun? I see that you have and, therefore, we have finished in general.

[144] Diolch yn fawr am eich tystiolaeth arbennig, Keith, a hefyd am y dystiolaeth ysgrifenedig arbennig y cyfeiriais ati eisoes. Dyna ddiwedd y sesiwn hon i gasglu tystiolaeth lafar i'n hymchwiliad, ond nid diwedd cyfarfod y pwyllgor. Byddwn, yn Aelodau'r Cynulliad, yn parhau i ymlafnio ymlaen, ond mae croeso i'n tystion adael. Diolch yn fawr. Bydd yr ymchwiliad yn parhau ddydd Llun nesaf.

Thank you for your excellent evidence, Keith, and also for the excellent written evidence that I referred to earlier. That brings this session to gather oral evidence for our inquiry to an end. It is not the end of our committee meeting, however. We will, as Assembly Members, keep trudging on, but our witnesses are free to leave. Thank you very much. The inquiry will continue next Monday.

3.52 p.m.

Monitro Canlyniad Adroddiadau'r Pwyllgor ar Is-ddeddfwriaeth o dan Reolau Sefydlog Rhif 15.2 i 15.6: Y Pwyntiau a fu'n Destun Adroddiad gan y Pwyllgor o dan Reolau Sefydlog Rhif 15.2 i 15.6 a Sawl Gwaith yr Oeddent yn Digwydd
Monitoring the Outcome of the Committee's Reports on Subordinate Legislation under Standing Order Nos. 15.2 to 15.6: Distribution of the Points Reported by the Committee under Standing Order Nos. 15.2-15.6

[145] **David Lloyd:** Yn y cyfarfod ar 15 Gorffennaf, penderfynodd y pwyllgor adolygu canlyniadau ei adroddiadau am offerynnau statudol o dan Reolau Sefydlog Rhif 15.2 i 15.6 yn flynyddol. Byddwch wedi darllen y sydd papur ger ein bron yn fanwl, yn naturiol, sy'n crynhoi'r pwyntiau a godwyd o ran yr offerynnau statudol a ystyriwyd gan y pwyllgor ers dechrau'r trydydd Cynulliad. Mae'n dangos y pwyntiau a fu'n destun adroddiad a sawl gwaith yr oedd pob un yn digwydd, er mwyn dangos y patrymau sy'n codi i gynorthwyo'r pwyllgor wrth fonitro effeithiolrwydd ei waith craffu.

David Lloyd: In the meeting on 15 July, the committee decided to review the outcomes of its reports on statutory instruments under Standing Orders Nos. 15.2 to 15.6 on an annual basis. You will have read the paper that is before you in great detail, of course, which summarises the points raised in respect of the statutory instruments considered by the committee since the beginning of the third Assembly. It shows the points that were reported on and their distribution, to reveal any emerging patterns and to assist the committee in monitoring the effectiveness of its scrutiny work.

[146] Yn ogystal, ysgrifennais at Carwyn Jones, y Cwnsler Cyffredinol ac Arweinydd y Tŷ, i ofyn am yr wybodaeth ddiweddaraf am y camau y bwriedir eu cymryd ac a amlinellwyd yn ymatebion Llywodraeth Cynulliad Cymru i adroddiadau'r pwyllgor lle nad oedd y camau hynny wedi eu cymryd. Anfonwyd ateb y Cwnsler Cyffredinol atoch, a dylai'r ymarfer hwn fod o gymorth i Aelodau wrth inni graffu ar yr hyn sydd wedi digwydd i'n hadroddiadau blaenorol. A oes unrhyw sylw? Gwelaf fod pawb yn hapus.

In addition, I wrote to Carwyn Jones, the Counsel General and Leader of the House, requesting an update on the intended actions that were outlined in the Welsh Assembly Government's responses to the committee's reports where those actions were outstanding. The Counsel General's response has been circulated to you, and this exercise should be of assistance to Members as we scrutinise what happened to our previous reports. Are there any comments? I see that everyone is content.

3.53 p.m.

Mesur Dysgu a Sgiliau (Cymru) (fel y'i cyflwynwyd)
The Learning and Skills (Wales) Measure (as introduced)

[147] **David Lloyd:** Fel y gwyddoch, gosodwyd y Mesur arfaethedig ar 7 Gorffennaf. Sefydlwyd pwyllgor Cyfnod 1, a fydd yn ystyried egwyddorion cyffredinol y Mesur arfaethedig, a bydd y pwyllgor yn cyflwyno adroddiad ddechrau mis Tachwedd 2008.

David Lloyd: As you know, the proposed Measure was laid on 7 July. A Stage 1 committee has been established, which will consider the general principles of the proposed Measure. That committee will report at the beginning of November 2008.

[148] O dan Reol Sefydlog Rhif 15.6(ii), caiff y pwyllgor hwn ystyried,

Under Standing Order No. 15.6(ii), this committee may consider,

[149] ‘pa mor briodol yw darpariaethau mewn Mesurau Cynulliad arfaethedig ac mewn Mesurau ar gyfer Deddfau Senedd y Deyrnas Unedig sy'n rhoi pwerau i wneud is-ddeddfwriaeth i Weinidogion Cymru, Prif Weinidog Cymru neu'r Cwnsler Cyffredinol’.

‘the appropriateness of provisions in proposed Assembly Measures and in Bills for Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General’.

[150] Ystyriodd y pwyllgor hwn y Mesur arfaethedig, fel y byddwch yn cofio, ym mis Ebrill 2008, yn ystod y cyfnod ymgynghori, pan ddaeth John Griffiths, y Dirprwy Weinidog dros Sgiliau, i'r pwyllgor. Ers hynny, gwnaed rhai newidiadau i'r darpariaethau ar bwerau dirprwyedig yn y Mesur arfaethedig. Gofynnwyd cwestiynau i'r Dirprwy Weinidog am y materion hyn hefyd gan y pwyllgor, ac mae papur briffio wedi ei baratoi, sydd ger eich bron, a hwnnw er mwyn inni ei basio ymlaen at bwyllgor y Mesur arfaethedig.

This committee considered the proposed Measure, as you will recall, in April 2008, during the consultation period, when John Griffiths, the Deputy Minister for Skills, attended the committee. Since then, a few changes have been made to the provisions on delegated powers in the proposed Measure. The Deputy Minister was questioned on these issues by the committee, and a briefing paper has been prepared for the committee, which is now before you, so that we can pass it on to the proposed Measure committee.

[151] Gwyn sydd wedi bod yn craffu'n fanwl ar y materion hyn. A oes gennyf sylw i'w wneud am y papur a fydd yn mynd at y pwyllgor Mesur?

Gwyn has been looking into these issues in great detail. Do you have any comments to make on the paper that will go to the Measure committee?

[152] **Mr Griffiths:** Yn gryno, Gadeirydd, mae'r pwyllgor wedi craffu ar y drafft blaenorol. Mae rhai newidiadau wedi'u gwneud ac, yn gyffredinol, fel yr wyf wedi'i nodi ar dudalen 4, maent yn symud i gyfeiriad y byddai'r pwyllgor hwn am ei weld, sef manylu seiliau yn y Mesur, yn hytrach na dibynnu'n llwyr ar reoliadau, gan roi pŵer i ddiwygio mewn rheoliadau. Felly, mater i'r pwyllgor hwn yw penderfynu a yw am glywed ymhellach gan y Gweinidog,

Mr Griffiths: Briefly, Chair, the committee has scrutinised the previous draft. Some changes were made and, generally speaking, as I have noted on page 4, they are moving in a direction that this committee would welcome, namely detailing the basis within the Measure, rather than being entirely dependent on regulations, while giving the power to amend by regulation. Therefore, it is a matter for this committee to decide whether it wishes to hear further evidence

cymryd unrhyw dystiolaeth arall, neu ddefnyddio dystiolaeth flaenorol y Gweinidog yn sail i'w ymateb i'r pwyllgor Mesur.

from the Minister, to take any other evidence, or to use the previous evidence provided by the Minister as a basis for its response to the Measure committee.

[153] **David Lloyd:** Mae angen gwneud y penderfyniad bach hwnnw. A ydyw pawb yn hapus i dderbyn yr hyn a ddywedodd Gwyn, y sylwadau yr ydym wedi'u crynhoi eisoes gyda'r Gweinidog, John Griffiths, pan ddaeth i un o gyfarfodydd y pwyllgor hwn, a hefyd yr adroddiad sydd wedi'i baratoi yn gysail i'r adroddiad y byddwn yn ei ddanfôn ymlaen at y pwyllgor Mesur arfaethedig? Gwelaf eich bod.

David Lloyd: Therefore, we just need to make that small decision. Is everyone content to accept Gwyn's comments, the comments that we have already summarised with the Minister, John Griffiths, when he attended one of our meetings, and also the report that has been prepared as a basis for the report that we will forward to the proposed Measure committee? I see that everyone is content.

3.56 p.m.

Unrhyw Fater Arall Any Other Business

[154] **David Lloyd:** Hoffwn ddiolch i Andrew R.T. Davies am ei gyfraniad at waith y pwyllgor hwn. Mae Mark Isherwood bellach wedi'i ethol yn ei le.

David Lloyd: I want to thank Andrew R.T. Davies for his contribution to this committee's work. Mark Isherwood has now been elected in his place.

[155] A oes unrhyw fater arall gan unrhyw Aelod? Gwelaf nad oes.

Does any Member have any other business? I see that there is none.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[156] **David Lloyd:** Cynhelir y cyfarfod nesaf ddydd Llun, 6 Hydref am 2.30 p.m. i gasglu mwy o dystiolaeth ar gyfer ymchwiliad y pwyllgor.

David Lloyd: The next meeting will be held on Monday, 6 October at 2.30 p.m. to gather further evidence for the committee's inquiry.

[157] Diolch yn fawr am eich presenoldeb, am bob cefnogaeth gan swyddogion a chlercod, ac i Eleanor o Brifysgol Glyndŵr yn Wrecsam. Diolch yn fawr i'r cyfieithwyr hefyd. Mae'r cyfarfod yn awr ar ben.

Thank you for your attendance, for every support provided by the officials and clerks, and to Eleanor for joining us from Glyndŵr University in Wrexham. I also thank the interpreters. The meeting is now closed.

*Daeth y cyfarfod i ben am 3.57 p.m.
The meeting ended at 3.57 p.m.*