Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru

The National Assembly for Wales
The Committee on the Better Governance for Wales White Paper

Dydd Mercher, 6 Gorffennaf 2005
Wednesday, 6 July 2005

Cynnwys
Contents

Cyflwyniad, Ymddiheuriadau a Chofnodion
Introduction, Apologies and Minutes 3

Y Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth (Cwestiynau 109-169)
The Better Governance for Wales White Paper: Evidence (Questions 109-169)...................... 3

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynddi 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 o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant , Kirsty Williams.

Tystion: Dr John Marek, y Dirprwy Lywydd a Chadeirydd Pwyllgor y Tŷ; David Lambert, Ysgol y Gyfraith Caerdydd; yr Athro David Miers, Ysgol y Gyfraith Caerdydd; Marie Navarro, Ysgol y Gyfraith Caerdydd.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Witnesses: Dr John Marek, the Deputy Presiding Officer and Chair of the House Committee; David Lambert, Cardiff Law School; Professor David Miers, Cardiff Law School; Marie Navarro, Cardiff Law School.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

Dechreuodd y cyfarfod am 9.13 a.m.
The meeting began at 9.13 a.m.

Cyflwyniad, Ymddiheuriadau a Chofnodion
Introduction, Apologies and Minutes

Y Llywydd: Bore da a chroeso i drydydd cyfarfod y pwyllgor hwn. Arnaf i mae'r bai ni wnaethom gadarnhau cofnodion cyfarfod Dydd Llun, 4 Gorffennaf yng nghyfarfod ddoe. A gaf i dderbyn bod y cofnodion yn gywir? Gwelaf fod pawb yn cytuno.

The Presiding Officer: Good morning and welcome to the third meeting of this committee. It is my fault that we did not agree the minutes of the meeting on Monday, 4 July in yesterday's meeting. May I take it that the minutes are correct? I see that everyone agrees.

Cadarnhawyd y cofnodion.
The minutes were ratified.

Y Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth
The Better Governance for Wales White Paper: Evidence

[109] **Y Llywydd:** Croeso i'n gwestai arbennig heddiw, Dr John Marek, Cadeirydd Pwyllgor y Tŷ.

[109] **The Presiding Officer:** Welcome to our special guest today, Dr John Marek, Chair of the House Committee.

Lorraine, I understand that you are now recovering.

[110] **Lorraine Barrett:** I think that I can manage. Welcome, John. Looking to a few years hence when we have new powers, and thinking about the Assembly Parliamentary Service staff and the extra services that they will need to provide to Members after the new powers are introduced, what are the current areas of deficiency? How will we deal with attracting and

retaining staff of sufficient calibre, and what are the resource implications? We should also perhaps be taking into account extra training for staff and Members.

The Deputy Presiding Officer: I take it that you have all read the evidence. It was only produced late yesterday afternoon, so we will assume that. I refer you to the section of the evidence relating to Assembly staff under paragraphs 9, 10, 11 and 12. You will see there that I believe, along with the House Committee—and the White Paper states—that Assembly staff should have comparable terms and conditions with the civil service, but that they should not be civil servants. We would like secondments to be possible and we would like to see staff transferring to the new Assembly Parliamentary Service and then being able to transfer back into the home civil service, so that there is flexibility.

We would probably need to pay a premium for our staff in some ways because, of course, career prospects could be constrained given the small nature of the institution that we will be running. We will obviously have to address that matter. Staff will have to work very hard for 32 weeks of the year and then the other 18 weeks, they will not have to work so hard. So we may have to look at annualised hours. However, the important point is that we can sort this out for ourselves once the Bill is enacted—or perhaps before then, once we know the shape of the Bill. Importantly, the message that we should send back to Westminster to the Secretary of State for Wales is that we are fairly content with what he proposes in the White Paper—namely that we would have our own staff of the parliament and that we would be able to vary their terms and conditions, though keeping them broadly comparable to those of the civil service.

On the other part of your question on where we have shortages, we will obviously need to develop an expertise on primary legislation. We will have to address that and we will need extra staff. We do things very much on a shoestring here. Remember that two years ago, we spent money on 10 members of staff for the Members' Research Service, and I think that everyone has said that that money was very well spent.

We will need another step change when we operate the Bill, but the good thing about it is that we will not start producing primary legislation from day 1; we will probably try one or two Bills and that process will develop, which will make it easier for us to fit in staff as time goes on.

[111] **Lorraine Barrett:** We heard evidence from Mike German earlier this week, and he argued, and I do not think that there was much disagreement with him, that the present sitting hours would not be adequate in the future. What do you consider to be the implication of that on our resources in terms of staff time and having enough staff to serve the Assembly for longer hours? We have just gone through the Senior Salaries Review Body review, so do you see any implications there with regard to a complete step change in the way Members work here and in their remunerations?

The Deputy Presiding Officer: First, if we have longer hours, it does not mean that there will be more work to do. Members might speak for longer and whether that results in more work is another matter. To be serious, Members may speak for longer in order, for example, to illustrate and make points. I know that Members would prefer, in some important debates, not to be limited to five minutes, so they could speak for eight or 10 minutes with interventions—not to introduce new material, but to argue and to persuade. However, if we are sitting longer, we will need more security people and attendants, so there will be consequential increases. However, as far as expert staff are concerned, they will be to deal with primary legislation. Remember that, when we draft primary legislation, we have to get it right; we cannot afford to put a comma in the wrong place. It has to be absolutely right. Most of you on the Business Committee will know that drafts can be far too sloppy, lackadaisical, and cut and pasted from one document to another without checking. That will not be

permissible once we start doing primary legislation. That is where we will need to have expert staff.

[112] **Kirsty Williams:** I note that, where the White Paper refers to Standing Orders, you disagree strongly with its position that Standing Orders should be created by a commission to advise the Secretary of State. I think that it is implicit, but will you clarify that that is not just your personal view but a view supported by the entire House Committee?

9.20 a.m.

The Deputy Presiding Officer: I am happy to say that that is the case. I believe that we could actually fashion the new Standing Orders better ourselves, because we now have six years of experience, we have competent people who take an interest in procedure and in matters such as Standing Orders. We know our own foibles and those of the institution. I am sure that we can fashion these Orders ourselves. Rather than drafting a completely new set of Standing Orders, I would like to see us starting from our existing Standing Orders, taking them in sections and changing each section as and when we reach agreement. For example, if you wanted to update planning legislation, you could have a look at that as it is a section of Standing Orders that stands on its own.

The treatment of subordinate legislation obviously would have to be changed quite radically. We are not yet in a position to decide how we will deal with statutory instruments in future. I have had a preview of David Lambert’s paper, which I think you will consider later. It is very interesting and is a good paper for us to consider once we have a committee, or whatever, considering changes to Standing Orders.

However, I would first like to see a debate among Assembly Members so that we can have a consensual approach as to how we deal with the different types of statutory instruments. I do not want to go through it all, but we may be able to import a negative procedure and an affirmative procedure here. You then have the questions of whether statutory instruments will be amendable. Perhaps this will not be done at the final stage but in committee. It will have to be looked at slightly more seriously where committees decide to look at a particular statutory instrument; they would have much more responsibility in doing so knowing that perhaps it will go through on the nod in Plenary later on. I do not know. We need to sort our ideas on that. Let us think about it and have feedback.

I would eventually like to see a committee that will look at these Standing Orders, and I would recommend to you that your message to the Westminster Government should say that we have the expertise here, we have the knowledge and the experience, and we will not do anything stupid. I am not averse to the idea of the Secretary of State for Wales perhaps agreeing to have some reserve power, for example, in case we fail to do our duty. However, I have no doubt that we will do our duty on Standing Orders. I have high hopes that we will be allowed to do this, so, although it cannot be guaranteed, I think that we are probably looking at an open door if we send that type of message.

[113] **Kirsty Williams:** Coming to the role that the House Committee currently has in this institution, that will obviously be changed by the new proposals. You talk about setting up a statutory commission to look at some of these issues. Could you expand on that further? Also, how can we ensure that any structure that perhaps then deals with the budgets that the House Committee currently deals with will be looked at in an open and transparent way?

The Deputy Presiding Officer: On the Standing Orders, I want to avoid a statutory commission. I think that we want a committee of the National Assembly looking at these Standing Orders. With respect, I do not think that it should be the Business Committee. I think that the Business Committee could do it, but this would be quite a lot of work. It will be

a very hard-working committee, so you need to have people on the committee who want to do it. The committee has to produce consensual Standing Orders.

In terms of finance, paragraphs 6 and 7 here are on financial matters. There will be a corporate body, when it is set up. I recommend that you look at section 21 of the Scotland Act 1998, which sets out 'the Scottish Parliamentary Corporate Body'. I find that type of legislation appealing, especially with Schedule 2. If you look at it—and I can provide you with a copy if you do not already have one—you will see that it gives the Scottish corporate body all the powers that it needs to serve the Scottish Parliament well. If we can have something roughly similar, I would be very content.

In terms of scrutiny of the corporate body, in Scotland it is done by a finance committee. We need some form of scrutiny—I do not disagree with that. Again, we need to think about exactly how we do it. It is not important for the White Paper and the draft Bill, but it will be important for us to put into Standing Orders in due course. So, my answer is 'Yes, we need it'. I think that a finance committee sitting just for that budgetary period might be an answer, but there are other possibilities as well. We could do it in the Chamber.

[114] **The Presiding Officer:** I will intervene briefly before I call Kirsty, who has another question, I believe. I think that we may be in some danger, John, of getting into problems of nomenclature here. I think that what we were referring to is the fact that, in your letter to the First Minister, you say that a statutory National Assembly commission should be created. He responds by saying that they are making provision for this in the Bill, although there was no specific reference to the White Paper. I assume that that is what you were talking about, Kirsty?

[115] **Kirsty Williams:** Yes, that is it.

The Deputy Presiding Officer: We have just moved on. At that time, I thought that the door was shut, but it is not. I think that it is open, in which case, my ideal position would be that we should do it.

[116] **The Presiding Officer:** Can I pursue the issue of the commission further, unless other Members have that question? I take the First Minister's letter as the latest thinking of the Government of Wales—if I can use that expression—on this matter. Therefore, it reflects what is likely to be in the Bill, because he says that they are making provision for this in the Bill. You foresee no problems in transferring the House Committee's activity into a commission, but would you see the commission structured differently to the House Committee, which is, after all, a creature of our Standing Orders, and on which the poor Presiding Officer does not even have a vote?

The Deputy Presiding Officer: Yes, I was mixed up. I was originally talking about our Standing Orders, and that we can do fine ourselves. We ought to have a statutory corporate body.

[117] **The Presiding Officer:** Could I ask you not to use the words 'corporate body', as that is the Scottish experience? That would confuse us again with a 'body corporate', which is a late, lamented structure that we are now moving out of.

The Deputy Presiding Officer: I stand corrected; it is just that it says 'the Scottish Parliamentary Corporate Body' in section 21 of the Scotland Act 1998. So, shall we call it a 'statutory commission'?

[118] **The Presiding Officer:** What you asked for in your letter to the First Minister was 'a National Assembly commission'. I think that we are very happy with that, are we not?

[119] **Kirsty Williams:** I was happy—well, potentially.

The Deputy Presiding Officer: 'Statutory commission' is fine by me. However, importantly, I would like to see it governed by powers similar to those contained in the Scotland Act 1998, namely section 21 and Schedule 2, as a guide.

[120] **The Presiding Officer:** Jane Hutt will ask the next question and then David Melding. I promise that I will not interrupt again.

The Deputy Presiding Officer: No, do—put me right.

[121] **Jane Hutt:** John, your paper clearly demonstrates that, as we said at the last House Committee meeting, the First Minister's response was very much welcome on the points that you made in your earlier letter. I want to tease out this issue about the financial arrangements a bit more.

You will know that we have had a small budget and a light touch, as it were, in terms of that kind of scrutiny and budget making, and that has to be much more robust and rigorous, as you have expected; I think that we would find that to be the case. However, we will need to extend the powers and the role and the scope of the Assembly Parliamentary Service, and Lorraine has already led on this in terms of those discussions. Therefore, do you have any more thoughts about the financial arrangements? I believe that, in Scotland, there are special procedures for determining how much the Parliament should spend on its own administration and on public audit. I think that that will be a key issue for us in terms of how much we receive for the administration of the Assembly.

The Deputy Presiding Officer: The Scottish model—and we were both there last Monday—demands that the budget be approved by a special finance committee. That is one way of doing it. However, on the other hand, the process that we use for scrutinising the Government budget now is to debate the Government's draft budget in the Chamber, and then, six or eight weeks later, we have a final budget after Members have been able to discuss it and after it has gone before committees. That is an alternative way of doing it. If you like, the House statutory commission budget could be laid as a draft budget before Plenary in exactly the same way as your Government's budget is at present, and it could go through the same procedures. So, those are two ways. I do not want to distinguish between them, because I would like Members to think about it. If we can come up with a consensual view, then let us do it, but if we cannot, we will have to make a decision one way or the other. It has to be robust and open.

9.30 a.m.

[122] **Jane Hutt:** I will follow on from some points made earlier on about staff, capacity and competency. Do you have any thoughts on what Members will need in terms of support, backing and expertise from the Assembly Parliamentary Service, in terms of its new roles and responsibilities? If so, how can we deliver that?

The Deputy Presiding Officer: The latest review of the Senior Salaries Review Body provided each Member with two and a half members of staff. I would have thought that that would be adequate at this stage. Currently at Westminster they can have three staff, and there could easily be discussion about that. However, we do have an extra half member of staff, and my view is that we ought to wait to see how it goes for a year or two. When we get into drafting primary legislation, and it is in full swing, we may need to revisit that and ask the SSRB to review the salary allowance. Personally, I am open to that, but I cannot give you a sensible answer at this stage, since I do not know how it will develop. This extra half a

member of staff from this year is welcome, however.

As far as expertise is concerned, we now have a good team at Members' Research Committee Services. You will get feedback from ordinary Assembly Members as to how they feel they are being served when they ask questions of MRCS. Do they get the necessary answers so that they can scrutinise Ministers or whatever else they might wish to do? My feeling is that it is working well, and we may need to augment staff numbers in years to come, but I think that with this process starting slowly and speeding up as we go on, it is an excellent reason for us not to do anything too drastic, while remaining open to the possibility that we may need to augment expertise in any particular area.

[123] **Jocelyn Davies:** This is more of a comment than a question. You remarked on the current competence of drafting within the Assembly and I know that you keep a careful watch on that. It has improved a great deal, but you made the point that it would not be robust enough for primary legislation. You cannot have what there is not; it is like saying, 'I need a dentist therefore I can have a dentist'. It does not happen like that, does it? Where will we find these people? It is all very well to say that we need this expertise, but is it there?

The Deputy Presiding Officer: Yes, I think it must be. Government will have to get its own parliamentary draughtsmen and draughtswomen in for primary legislation. It already has lawyers to make sure that statutory instruments are right; Jane could tell you about that. Statutory Instruments are not always right, and they are withdrawn due to flaws, and they have to be re-tabled and brought before the Business Committee a second time. I do not think that we can afford to do that with primary legislation, because this will be very public and will affect the country very much more. Although the Government will have to get it right, we will have to have the experts here in Paul Silk's department, making sure that legislation is in order, rather than right. It is for the Government to argue whether or not the legislation is desirable, but we would have to get it right to make sure that every amendment is in order, that there are no inconsistencies between amendments, and that the work of setting timetables for tabling amendments, and going through a line-by-line examination of primary legislation, is done properly and without any room at all for error. So, there will be that responsibility on the new APS, but equally, at the end of the day, Government carries the can for the legislation it proposes and asks Plenary to pass. It will clearly have a much greater expenditure in ensuring that legislation is drafted by parliamentary draughtspeople.

[124] **The Presiding Officer:** Before I ask David Melding to come in, have you considered the position of what is currently our Standing Order No. 31, namely legislation or proposals for legislation which emanate from Members, as opposed to from the Executive? How do you propose that that might be dealt with?

The Deputy Presiding Officer: It is early days, but I refer to it in paragraphs 13, 14, 15 and 16. You will notice that the issue is not only Standing Order No. 31 legislation, but private Bill legislation. Although you did not ask this, Dafydd, I think that there is a good case for us asking for private Bill legislation to be taken over by the Assembly. It is usually about matters that are of concern to us in Wales, such as extensions to the Aberystwyth jetty, marinas or whatever. It is that type of local legislation, which properly should, I think, for better quality of decision, at the end of the day, be done here. As you know, in Westminster, there is never time for it, and if a Member shouts 'object' at a particular time, then that is the end of that legislation for at least six months before the chairman of Ways and Means manages to put it down as private business for a Second Reading debate. It can take two or three years before these things go through. I am not saying that we should rush legislation like this, but I am sure that private legislation would get a much fairer, better and more accurate treatment if it were the prerogative of the Assembly to do it.

To return quickly to your point about Standing Order No. 31, obviously it needs to be done. It

depends how we do it; are we still going to allow every Member, once in a four-year term, to have a backbench piece of legislation? I hope we could do that, although we might not be able to do it initially. In Westminster, those Members of Parliament who secure seven places, I think, in the private Member's ballot, have access to parliamentary draughtsmen in order to fashion their legislation. However, I suspect that we would probably get lobby groups presenting Members with ready-made, off-the-shelf Bills a lot more because it would be primary legislation and there would be that incentive; that is, actually, I am sorry to say, absent at present.

[125] **Jocelyn Davies:** On those two points, and I am sure that Kirsty was going to make the same point, when we visited the Scottish Parliament last week, we found that the private Bills were taking up a great deal of MSPs' time. We were there on a Monday and the committee was meeting that day to consider a private Bill, and it had been meeting for many months on Mondays and Fridays to consider that Bill. Even though you make the point that it would be better that it were done by the Assembly, do you think that Assembly Members would have to meet as a committee to consider that legislation? We could find ourselves bogged down with a great deal of private Bills.

The Deputy Presiding Officer: My understanding of Scotland is that it goes through the whole of legislation, as Westminster used to do. However, I think that the modernisation of our procedures would mean that there would be some preliminary scrutiny here in the National Assembly, and a vote in principle, and that it would then go to a public inquiry under an inspector. It would be taken away completely from the Assembly and perhaps come back for a final vote. All these things need to be thought through and put right, but I hold by my original contention. I think it would be better and we would have better legislation as a result.

[126] **Jocelyn Davies:** On private Member's Bills, I would imagine that an Assembly Member who was successful in a ballot could choose to do something that would require an Order in Council.

The Deputy Presiding Officer: Yes, that is right. It would go through the procedure.

[127] **Jocelyn Davies:** It would go through the procedure, so there would probably be a great deal of work involved in that. How would the bid for that Order in Council be made? Would it be made by the Assembly to the Parliament, or by the Executive here to the Executive there? Who is the bid made by and to whom?

[128] **The Presiding Officer:** Bearing in mind that an Order in Council is unamendable in both Houses of Parliament, which makes it even more complicated.

The Deputy Presiding Officer: Yes, but remember that the Order in Council would not give the details of the Bill. I believe that David Lambert has it in his paper that an Order in Council would be an affirmative resolution that this particular piece of legislation is passed and it may or may not be amendable. It would not be amendable in Westminster—it would be a 'yes' or a 'no'. I am reasonably attracted to the Scottish solution, that when somebody—Government, usually— produces a piece of primary legislation, it goes to a committee and it is there for scrutiny for about two months; so, it is properly scrutinised. If a private Member had a piece of legislation, then some help with drafting would obviously be required, but it would then go to committee and through the procedure.

9.40 a.m.

However, I hope that this committee recommends to Westminster that there ought to be no bids for Orders in Council and one-and-a-half-hour debates on affirmative resolutions. We ought to be able to have as many as we wish of those. It is certainly conceivable that if there

were two or three Orders in Council at the same time, they could go through both Houses and be debated at the same time, for a one-and-a-half-hour debate with three different votes at the end of it. That often happens in Westminster, when they debate amendments to primary legislation. There might be 300 amendments, grouped into about 10 groups with 30 amendments in each group. We will have to have something that is not as bad as that, but we will have to have procedures that can take many amendments in a reasonable amount of time. Obviously, the trick is to do that, but not to lose out on important debates that Members wish to have in their scrutiny of legislation.

[129] **The Presiding Officer:** Taking this a bit further, speaking completely impartially, Standing Order No. 31 is one of the worst things that we have in terms of non output. In many cases, and pardoning the Minister's blushes, what has always happened here is that a Member comes forward with an idea, which is technically an instruction to Ministers under our present system, the Government was able to vote down that instruction, so nothing happens except for complete frustration on the part of the Member and whoever was supporting that Member.

Let us take that into the new scenario. Do you envisage that we would go through all the processes of the Bill here, and then the request would be taken down to Parliament presumably by the learned clerk, on the 125 high-speed train, with a little ribbon around it, because it would be a request from the Assembly not the Government—

The Deputy Presiding Officer: Wrapped up in a red ribbon?

[130] **The Presiding Officer:** There would also be a green ribbon; it would be wrapped up in red and green. It gets there and it appears in Westminster. Do we then go through the Order in Council process at that stage? What if the Secretary of State says 'No, no, we cannot have this one', or someone else, which we will come to later, such as the House of Lords Select Committee on Delegated Powers and Regulatory Reform says, 'You are not going to have that one'?

The Deputy Presiding Officer: I cannot prejudge that, but I would like to see the procedure for a private Member's Bill, if it is passed in Plenary, following the same route as Bills proposed by the Executive. It would be primary legislation and, in my view, there should not be a different procedure simply because it emanates from a backbench Member as opposed to a member of the Executive.

[131] **The Presiding Officer:** I have not discussed this with the Minister but, presumably, the Welsh Government's proposals for legislation would go through the Orders in Council procedure before they were legislated upon here. What about the labours of an ordinary Member if that were the reverse process, and it was after the Bill had been passed here that it had to go through that procedure? Do you see what I am getting at? I am trying to point out that it might be even worse that Standing Order No. 31 has proved to be.

The Deputy Presiding Officer: Speaking personally, Standing Order No. 31 is unsatisfactory at present, because it is not a backbench Member's motion, because it has been taken over by the Minister. I would like to see a system where backbench Members, ideally, have one chance in every four years to produce legislation. The Executive ought to lend the Member its expertise, but the Executive would then obviously take its own view of whether that piece of legislation was right, whether it was amendable or whether it should be rejected in the other place, in Parliament. There, of course, are silly ways of doing things, by putting people up to speak for about 50 minutes so that time runs short.

[132] **The Presiding Officer:** You never did that, of course.

The Deputy Presiding Officer: Perish the thought.

Of course I used to do it, but as you get older you realise that it is stupid to do so. It is far better to have a proper procedure and then to decide whether you want the Bill or not, and to have a vote on it. There are other considerations; you do not want backbench Members hanging about here on Thursday evening when they could be somewhere else, simply because there might be a vote on a private Member's measure. However, we can arrange to have votes at convenient times for Members, but the principle ought to exist that Members ought to have that possibility. I would like to see the legislation fashioned here.

Obviously, there would have to be a relationship with the Secretary of State for Wales. Requests for legislation would then go to the Secretary of State for Wales, and he, in this particular case, would have to say 'yea' or 'nay', and, if he were to say 'nay', well, let us see what happens when he does. However, in practice, I find it difficult to believe that a Secretary of State for Wales would say 'no' to something that has been passed by the Assembly and which does not impinge on any of the non-devolved matters that are properly the concern of Westminster.

[133] **The Presiding Officer:** David Melding has been very patient.

[134] **David Melding:** I hope that I am always patient, Presiding Officer.

I want to ask you specifically how likely it is that the enhanced or even mock primary legislative process, or whatever we call this creature, will operate through the medium of Welsh, because this will be the most extensive line-by-line discussion of legislation in Wales in Welsh. I would be very concerned that we improve the current arrangements, which often mean that the Welsh-language version of any piece of legislation is often delayed. Also, there are people who can help the committees to look at legislation effectively through the medium of Welsh line by line. It seems to me that there is a real possibility of impairing the process via the medium of Welsh, which will infringe very much on our bilingual principle in the Assembly.

The Deputy Presiding Officer: You raise a very important point, and I have no answer to it. I think that we, obviously, will need more expertise in translation. We should not look at that as a penalty, as it is something that we simply have to do because ours is a bilingual nation. The second problem, of course, is that if we try to get more people here, the Executive will get worried because it will not be able to have people for its translation and drafting. We need to go hand in hand with the Government on this matter, so that we do not try to beggar each other. However, there is a difficulty, for example, in that if somebody accepts an amendment in English, can the translators assure us that they can do a translation that faithfully reflects the amendment made in English, or vice versa if somebody tables an amendment in Welsh. I would like to think 'yes', but, inevitably, you would probably be able to give a better answer to that than I can, Dafydd.

[135] **The Presiding Officer:** I promise you, I am not answering anything today. However, since David has raised the matter, it is a field that we have not yet looked at or received evidence on. If there are people listening to the broadcast of these proceedings who regard themselves as experts in this field, they might like to think about it.

The Deputy Presiding Officer: We obviously should seek advice or at least see what they do in places such as Quebec or those countries where they do draft in more than one language.

[136] **The Presiding Officer:** I think that, in Quebec, they mostly speak French.

[137] **David Melding:** I accept your answer, Deputy Presiding Officer, and it is an area that the committee perhaps needs to look at. It is not just a matter of cold translation as it is about

the whole vitality of debate in committee and having lawyers who are presumably native Welsh speakers, or lawyers who, having learnt the language, are able to discuss legal concepts through the medium of Welsh. That is quite a challenge, and I suppose that I am saying that that is something that we should be planning for. We should anticipate that this will be quite a challenge for us. It is a challenge that we should welcome, as you said, but it will not be addressed satisfactorily unless we accept that it is a major piece of work that we need to plan for.

The Deputy Presiding Officer: Thinking about it, something that could perhaps provide a little solace is that Members in committee, even when undertaking line-by-line scrutiny, will not be worried too much about the grammar or the technicalities, although they will on occasion, which is why I think that what you ask is important. However, I think that Members will, by and large, still try to get political principle, and the arguments will very much be ones about political principle and the types of debates that we have here now, albeit much more focused. The debates on particular arcane points that require close and careful scrutiny will, I think, be very few and far between.

[138] **Carl Sargeant:** Briefly, John, just to take you back to a statement that you made earlier, there have certainly been discussions with other witnesses as to whether primary legislation is primary legislation and so on, particularly with regard to your comment on the Secretary of State and the Orders in Council going back to Westminster for approval or not. As has been asked before, if a future Government at Westminster is of a different political colour to that of the Assembly, do you see that as a major obstacle in the proposed procedures?

9.50 a.m.

The Deputy Presiding Officer: That is a political question, and I, of course, have my views. I do not think that it should necessarily change one way or the other what you should recommend to the Westminster Government about how it drafts the Bill, but, to put it into a couple of sentences, I think that, for it to properly mature, this Assembly needs a change of Government. I am not being party political here; it simply needs a different administration so that we mature and do different things. It also needs a situation where there is an administration of one type in Westminster and an administration of another here. In the fullness of time, that is bound to come about. We just have to wait. Meanwhile, our job is to try to fashion the changes that are now being offered to us, and to get them right and anticipate what might happen and what inevitably will happen and ensure that the rules that we fashion are robust enough to be able to manage that type of situation. On whether they will be robust enough, you can talk to different Assembly Members in the National Assembly about that and you would probably get different answers. Things would change anyway over the years.

As far as Standing Orders are concerned, if we do it on a gradualist basis, which I think we can do and which I recommend, we will continue to be able to change them if there are different administrations or if things change. As far as the new system with Westminster is concerned, if it needs change, different administrations in Westminster will have that prerogative and will be able to do it.

[139] **The Presiding Officer:** Unless colleagues have any more questions, I will thank John for stimulating our discussion on this as usual.

The Deputy Presiding Officer: Thank you.

[140] **Y Llywydd:** Mae’n bleser mawr gan y pwyllgor groesawu’r Athro David Miers,

[140] **The Presiding Officer:** It is the committee’s pleasure to welcome Professor

David Lambert a Marie Navarro.

David Miers, David Lambert and Marie Navarro.

[141] **David Melding:** I will start with a question on definition. I think that we are reaching a conclusion in this committee that the prospect of having enhanced powers and powers via the Order in Council process takes the Assembly very close to having some form of primary law-making power—if you accept that there is a difference between primary law making and secondary law making. At least the Assembly will be less derivative and will have greater scope for wider-ranging legislation, if I can put it that way. I notice that in your paper, David Lambert, you say that you think that that is quite durable and that it would effectively survive any change of Government because Westminster would interfere with it at great cost. One of you points out that the Acts of the Scottish Parliament are technically subordinate legislation, but they are not really, in the world of practical politics, because the costs of annulling them from Westminster would be so enormous as to probably spark a constitutional crisis. So, is it your view that the system would be as robust as that and that, in effect, the Government at Westminster would interfere at its peril?

If we are in a process that, as far as legislation is concerned, is much more demanding of the Assembly and much more robust and is likely to take an awful lot more time, what sort of capacity will we need here in the Assembly, given that it is very unlikely, in the first instance, that we will have any more Members and that we would be operating as a legislature of 60 people, which is one of the smallest legislatures in the world?

Mr Lambert: I think that it would be robust once you have an Order in Council. David will be dealing with the possible problems of getting an Order in Council, but, once you have that, Parliament and central Government will probably leave us alone, provided that they are satisfied that we are working within the provisions of the Order in Council.

In relation to the second part, Marie and I have given an illustration, based on the example in the White Paper, relating to an Order in Council that provides powers for the Assembly to make laws for the welfare and care of children in Wales. We have calculated that it would be possible, if you had an Order in Council of that width, to disapply something like 30 Acts of Parliament relating to children, in relation to Wales. That really would need expert staff to be able to do that. We never had that staff in the Welsh Office; in fact, no Government department has that kind of staff because that rests solely with the Parliamentary Counsel. I foresee that you would have to second a number of Parliamentary Counsel staff, possibly two or three, for at least the first four or five years, because nobody could draft on that magnitude, disapply Acts and put an Assembly measure, or whatever it will be called, in its place. I would not have the capacity and, with all respect to my colleagues, I think that they would accept that they did not have it either in the Assembly.

[142] **David Melding:** In terms of how the Welsh statute book would look, do you think that the system of using Orders in Council would be fairly understandable for the public, for those who have specific interests, such as voluntary organisations, pressure groups, business interests and the like? Will it be clearer than what we have now? Will people realise what scope there is for change in the Assembly to influence public policy, or will the system merely be more confused? You could argue that we should take Occam's razor to all this and say, 'In effect, this is a Scottish Parliament by other means, or at least a Northern Ireland Assembly by other means'. Why do we not just recognise that fact and have a more direct expression of where the Assembly has primary powers and create that in statute at Westminster, rather than having this constant rolling programme where we supplicate to Westminster?

Mr Lambert: I think that Marie, who is the editor of our *Wales Legislation Digest*, would probably agree that we could not have a more confusing system than the present one. It is

dreadful, because every time an Act is passed by Parliament, poor old Marie has to read every line of every section of that Act, just in case there is a mention of the Assembly. Just because something is outside the 18 subject areas of Schedule 2 to the Government of Wales Act 1998, it does not necessarily mean that there will not suddenly be a reference. You cannot have anything worse than that.

We hope that, gradually—it really will be gradual—these Orders in Council will enable the Assembly to replace its diverse powers in relation to a particular policy area by one measure. On that basis, the people of Wales would not be interested in the Order in Council, but they would be interested in the measure. We would hope that everything relating to the protection and welfare of children in Wales, for example, would be in just one measure, instead of scattered among something like 400 sections of 29 Acts. I think that that would be marvellous. It is the reason why we set up the *Wales Legislation Digest*, because neither of us, nor David, could see any other way of trying to explain the powers of the Assembly.

Professor Miers: Could I just make an observation in response to Mr Melding's question on public confusion? I think that it is important to note that the public would need to recognise that there are two distinct steps in the case of the enhanced settlement, the Order in Council procedure. The first step is obtaining the Order in Council. That, I think, will take some time in any case. David Lambert has already remarked on getting things right in terms of the application of laws related to the protection of children, for example. John Marek spoke about not getting commas out of place in primary legislation, in Bills, but that will apply with equal force to the draft Orders in Council that will go from the Assembly to the Secretary of State and then to Parliament, presumably to some joint or separate committees on the floor of each house. That procedure alone will occupy a great deal of time and must occupy time on the floor of the Assembly, in Plenary and in Committee, just to get it right. That is quite distinct from the later application by the Assembly of its powers, thus granted, in any particular case. That may be one, two or three years later than the procedure for getting the Order in Council, and then the getting of the Order in Council. Sorry, this is quite circumlocutory, but to come to your point, after two or three years, the public might well say, 'Well, you have the Order in Council, so why you are not doing anything about it?'

10.00 a.m.

[143] **David Melding:** The process as I understand it—and please interrupt me if I am wrong, because I probably started off thinking that it was the reverse of what I am going to describe—is that the Assembly, often prompted by the Government, will wish to seek an Order in Council governing, say, the welfare of children; it will then go through a parliamentary process, in effect, here, and deliver a finished Order in Council detailing all the areas in which it wants to amend or alter law. That is a substantial piece of work, which could take up to 12 months in the Assembly system, if you had a lot of time for it. Is that correct? We would not simply be asking for an Order in Council that says—I think that we were told that, in the House of Lords, it would just be like the long title of a Bill, and we would then get the powers after it has been passed as an Order in Council. The process that you are describing is a full parliamentary procedure, which would then be subject to approval by affirmative vote via the Order in Council process. The clerk would dress up in some court uniform that we would devise, get on the 125 train to deliver the Order in Council, bedecked in ribbons, and Parliament would say 'yes' or 'no'. Have I got that right, or am I fundamentally misunderstanding the process?

Professor Miers: My understanding of what is proposed here is that, in the first instance, there would be a request from the Assembly. The question immediately arises as to how that request would come to be formulated. A necessary condition of that formulation is that it would need to be done with attention to every comma and detail by the Welsh Assembly Government. It would then have to be debated here. The paper that I have submitted suggests

that that debate would be analogous to a Bill debate in Parliament—in Plenary and committee and so on—so that when that request eventually comes to be considered in Parliament by, let us say, the Delegated Powers and Regulatory Reform Committee in the House of Lords, the committee can be satisfied that proper consultation has taken place, because that is one of the requirements that it imposes.

If the kind of criteria that that committee and the Commons equivalent impose on Henry VIII clauses, in regulatory reform Orders and otherwise in relation to delegated powers, are to apply—and I do not see why they should not; the Lords committee said that it would approach matters in Wales that are devolved to the Assembly in the same way—the same kind of rigour is going to be applied in Parliament. Therefore, before it sends the request, the Assembly will have to have gone through quite an elaborate procedure. In effect, it is like a Bill, but I take it that it goes to the Secretary of State first, because that is where the request goes. I will pause there, if that is okay.

[144] **David Melding:** Most of us are laymen and laywomen, as far as the law is concerned. It is important to understand what is being suggested. I will stick with the example of welfare for children. I had assumed that, if we were to have an Order in Council that granted us powers in relation to the welfare of children, we would not be asking for that power in principle, as it were, without any detail. We would be saying that it was because we wanted to establish a children's commissioner, a unified regulatory system of inspection, or because we wanted greater control over foster carers and so on. Therefore, the detail would have to be in the Order, rather than it just being a matter of the principle of whether the Assembly should have competence to pass enhanced legislation on the welfare of children.

Professor Miers: I agree with that, but the point that I am making is that that is not the end of the road.

[145] **David Melding:** Of course, once that has been done—although you have to present the detail in the first place—you more or less have the power to change whatever was the detail, have you not? Frankly, it is a very odd combination. You have the full parliamentary process in the first instance, to justify what you want to do, but, once that has been done, Parliament is out of the loop.

Professor Miers: Parliament is out of the loop, yes.

[146] **David Melding:** That is unless it comes in with its heavy boots and says that we will take all this back. We have already agreed that that is rather unlikely.

[147] **Jocelyn Davies:** Paragraph 1 of David Miers's paper states, in relation, I imagine, to new legislation that is going through Westminster, that Whitehall should, as a matter of principle, move to giving the Assembly wider powers, but that, in the case of Orders in Council, we would have to justify wanting those powers. I would argue that you should, as a matter of principle, be able to say, 'We would like powers over X area', without having to justify that or to gain approval for how you would implement those powers.

Professor Miers: That is right. There are two separate issues here. Clearly, where you are dealing with Bills being enacted by Parliament, and not dealing with a request that Parliament devolve delegated powers to the Assembly to make subordinate legislation to amend its primary legislation—and not just existing primary legislation, but future primary legislation—that is qualitatively a very different exercise for Parliament. However, going back to developing the current settlement, the principle to which I refer is one of them, and you probably recognise it as one of Richard Rawlings's principles. My only comment on this is that it falls to Ministers, the Secretary of State and the UK Government to determine whether, as a matter of policy, it wishes to see devolution develop in a way that starts from the

presumption that, where departments are devolving or delegating powers to Ministers or statutory agencies or bodies in England, those delegations should apply equally to Wales. You start from that presumption, rather than the other way around, as has been argued by many other writers.

Mr Lambert: I will just add to what David has said, if I may. There is that matter that you have both raised referred to in the end of paragraph 3.21 of the White Paper, which states that this consideration of the draft Order in Council

‘could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future’.

I think that ‘could’ is probably ‘should’, really. However, and I think that this was Jocelyn’s point, as the power would be a general and continuing one for that particular policy area, the understanding of how the powers would be used would serve only as an example of what could be done. The issue for the committees and for each House would be the appropriateness, in general, of delegating legislative authority to the Assembly on a particular policy area. So, I think—and David has certainly more experience than I do—that they would want to see initial reasons why you would want the Order in Council, but after that, to take David’s point, you are on your own. You are amending new Acts of Parliament and substituting them. It is a tremendous thing.

[148] **Jocelyn Davies:** Yes, you could, for example, say that you wanted to do A, B and C and then later do D, E, F, all the way to Z, if you wanted to.

In your paper, David and Marie, I feel that you are being quite optimistic about what we will be able to do with Orders in Council. On the bottom of page 4, under the heading of the benefits of the White Paper, in the last paragraph on that page, you say that should the Assembly vote overwhelmingly for a new Order in Council, it would be very difficult for the Secretary of State to refuse to put the draft to Parliament. Do you not remember, when we voted on free personal care for the elderly, an official at the Wales Office describing the Assembly as ‘pathetic’? I think that we have a bit of history there, in that an official felt that he could describe the Assembly’s vote as pathetic. So, I feel that you are being over-optimistic on that. You mentioned the Rawlings principles earlier, but they have never been taken up even though the Assembly unanimously supported them and there have been a number of resolutions asking for broad powers in new primary legislation. Those have been completely ignored. So, I do not know why you are so optimistic about that.

Looking at stage 2, we will have the transfer of functions—this bundle of illogical powers that we already hold—and we will have the powers conferred on us since 1999, which are also illogical in how they have been conferred, and we will also have the Orders in Council powers. I think that it will be a very complex situation. With those powers we will be able to disapply Acts, amend and repeal things, and we will be creating these Assembly measures. It just sounds like a nightmare. From the lawyers’ point of view, is there a possibility that we will need a lot more lawyers just to be able to—

10.10 a.m.

Mr Lambert: You have before you—in Marie and me—the most positive people that you could possibly have on this White Paper. We really are positive—

[149] **Jocelyn Davies:** I think that you are saying that the situation could not be worse than it is at present. Therefore, this is—

Mr Lambert: Absolutely. Yes. Taking your first point, the deregulation and contracting out

committee in the House of Lords, in commenting on the Wales Bill on prevention of smoking, did hint that we have a democratic body in Wales that should be responsible for carrying out its own powers. It actually said that, 'If this Bill were giving powers to the Secretary of State in relation to England, we would throw it out, but this is Wales and therefore we would like to leave it to the House of Lords to discuss whether these very wide powers should be given to Wales, because this is a democratic body'. I just have a feeling that, if you had a 100 per cent vote from the Assembly, the Secretary of State for Wales, having set up this body in the first place, would find it extraordinarily difficult to say 'no'.

I also feel that, if he says 'yes', the House of Lords and House of Commons committees looking at the Order in Council in draft, and then the debates in the Commons and the Lords, would also bear in mind the fact that this request comes from a democratic body, not from the Wales Office, where we were treated with disdain many times. This body is quite different.

Secondly, in respect of what I said to David Melding, it cannot be worse than it is at present, and our example at the end of the paper shows what we think that you can do in relation to children. It must be better. Forget about England; it has to put up with 29 Acts in relation to children. We have the possibility of saying that this is our one law on the protection of children. Marie and I think that that is tremendous.

Ms Navarro: To talk a little more about simplification, now, before the Assembly can exercise something, we have to go through a huge list of single powers to know what can be done. Under the new system, you would first go to the Orders in Council. You would check whether the power or the area of law that you need is included, and forget about the transfer of functions Orders as they are now, and the hundreds of Acts of Parliament. You would only concentrate on that area, so that simplifies everything. In the end, if that system is put in place and remains, in 30 years' time you will need only a few wide Orders in Council. That simplifies my day-to-day to work in reading through everything.

Hopefully, the second step would be for the Assembly to make measures under these Orders in Council. These measures will consolidate the whole legislation that applies to Wales. That is where I see the beauty of the proposal, and that is where I am really impressed. I really like the system.

[150] **Jocelyn Davies:** That is assuming that we will have wide powers given to us in Orders in Council. I think that you are being over-optimistic. Coming to the example that you give in your paper, which comes from the White Paper, about powers in relation to the protection and welfare of children, a great many Assembly Members are very disappointed that Westminster drew back from its promise to ban smacking. If we had this, would we be able to ban the smacking of children in Wales? If we are talking about the protection and welfare of children and that Order in Council, would we then be able to say, 'Okay, you can still take your children across the border to England to smack them, as long as you do not leave a mark'? Would we be able to ban smacking in Wales?

Mr Lambert: First, of course, it depends on the width of the Order in Council.

[151] **Jocelyn Davies:** There you are.

Mr Lambert: Well, yes, but if it is on the protection and welfare of children, you would be able to do so. Again, and you will notice how enthusiastic we are about it, paragraph 3.16 states that Orders in Council will:

'give the Assembly powers, in specified areas of policy,'—

the protection of the welfare of children, for example—

‘to modify—ie, amend, repeal or extend—the provisions of Acts of Parliament’,

and

‘to make new provision.’.

So you are not constrained by the provisions of the existing Acts; if those Acts fall within your Order in Council power, you can amend, disapply or do whatever you like and make entirely new provisions in relation to something that is not in the Act. That is fantastic—well, we think that it is.

[152] **Jocelyn Davies:** Yes, but as you say, the devil is in the detail.

Mr Lambert: Yes, but you have an example in the White Paper. It is something rather wider; in fact, we think that this example is extraordinarily wide.

[153] **Jocelyn Davies:** Can I ask you about your conclusion? You say that the British constitution is flexible, but do you really think that Orders in Council are a suitable method for national governance?

Mr Lambert: That is a political question.

[154] **Jocelyn Davies:** You are a lawyer.

Mr Lambert: For me, I do not mind the machinery, provided that you can achieve something better than we currently have. I do not mind what it is, but all of us in Wales must have something better than we have at present.

Ms Navarro: You must have something workable, too.

[155] **Jocelyn Davies:** In the last paragraphs, you mention the Sewel convention, and we have asked other witnesses about this. In your paper, you assume that there will be communication directly between the Assembly and the UK Parliament on something that will work like the Sewel motion. However, in Scotland, in practice, communication is between the two Executives. There has been criticism of that mechanism there, because you may very well agree to allow the UK Government to legislate on something that is a devolved matter, to save yourself resources for a start, as well as a lot of time and effort. However, that legislation sometimes changes then in Westminster. It is subject to amendments or to changes, and you may not like the look of the legislation, but there is no way of revisiting it. Therefore, do you have any idea how a Sewel mechanism may work between the Assembly and Parliament?

Mr Lambert: I am sure that David can say more than I can on that. However, we said that, given that there is this recognition that the Assembly, because of the extent of an Order in Council, can amend or set aside a new Act of Parliament, I just feel that Parliament will want to speak to someone before it enacts new legislation just to see whether or not the Assembly would intend to set it aside. To me—and, I think, Marie—that is not just the Assembly Government; that is the National Assembly. Parliament will ask itself what on earth is the point of making a new Act if the Assembly can set it aside the moment it is enacted—unless there is a proviso that says that you cannot change it. Again, it is tremendously flexible.

[156] **Jocelyn Davies:** Do you have anything to add to that, Marie?

Ms Navarro: No, I agree totally.

Professor Miers: The only observation that I would make on the possible changes in Parliament on a Sewel-type Bill is that, like any other Bill, if there were proposed amendments, you would go back to Ministers, and UK Ministers to determine what they want to do about the amendment. I assume that that would be the case on a Sewel-type Bill. You would come back to the Welsh Assembly Government and ask, 'Are you content with the amendment that has been tabled in the House of Lords or the House of Commons?'. However, you are right that, ultimately, the decision will be for Her Majesty's Government, subject to whatever is built into that Sewel convention between here and London.

[157] **Jocelyn Davies:** Well, we would not call it Sewel.

Professor Miers: No, I am sure that you would not.

[158] **Jocelyn Davies:** We could come up with something else—perhaps we would call it the Lambert convention.

Professor Miers: I am just using shorthand.

[159] **David Melding:** I feel sorry for Lord Sewel—I am sure that he did not realise that his name would be blazoned in history in this way when this amendment went through at the last minute.

[160] **The Presiding Officer:** Lord Sewel is doing fine.

[161] **Jane Hutt:** I want to try to take forward this issue regarding the fact that we have opportunities that we have not had before, and we will have a much greater clarity in terms of the Welsh statute book, which will please Marie in her endeavours. We will not have to shut down debate and discussion because we say, 'Oh well, that is for primary powers', which, we must accept, has been the outcome of some of our debates in the Assembly, whether it is inspired by the Assembly as a whole or the Government.

10.20 a.m.

As David has explored in his questioning, we will need to do our job properly in order to get to the point where we have a measure that we want to take forward for an Order in Council. I see that you are all nodding your heads in agreement. The opportunities that you have very positively laid out are enormous, but would you agree that we need to walk before we run in terms of handling those opportunities, and how would you perceive that happening?

Mr Lambert: Perhaps David can answer on this too, but one of the things that we have emphasised in our paper is this statement that the Government intends to draft parliamentary Bills in the future in a way that gives the Assembly wider and more permissive powers as of now. The three of us think that at least you will have this power, which is in the Education Act 2002, to give effect to the Act. That power is, we think, quite wide, and it seems to us that you could experiment in the next 18 months in deciding how you give effect to an Act. It is quite different from making supplementary provisions—the sort of thing that I grew up with over the years in the Welsh Office, as well as transitional and consequential provisions. To me, giving effect to an Act is to say that if you think that a provision in an Act is unclear, or does not quite achieve what it ought to achieve, you can amend that Act. You are allowed to, anyway, under the provision of the Education Act 2002. It says that in making regulations to give effect to this Act, you can amend Acts. I think that you already have a starting point in the next 18 months.

[162] **Jane Hutt:** Any other responses?

Professor Miers: This would be in respect only of legislation that gives you that power. The question that always remains is whether Ministers will be prepared to say that they will give the Assembly powers to make such provision as it thinks fit with regard to certain aspects of transport, planning, health and so on as they were with the Education Act 2002. That is always a political question.

[163] **Jane Hutt:** I will just follow that up with you, David Miers. You mention in your paper the need for a change in political culture in London. Would you not say that we already have the indications of a maturing political culture, partly as a result of the joint scrutiny that emerged with the Transport Bill, and the fact that we virtually have framework legislation for the health improvement Bill in terms of smoking in enclosed public spaces, which will be devolved to us to decide how to take that forward? Are you more optimistic, given the discussions that we have already had about the possibility of a different Government in Westminster, that there is a maturing political culture and a will, clearly expressed in this White Paper, to deliver those opportunities?

Professor Miers: Yes, I would go along with that. I confess that I have no direct access to how Ministers think on these matters, but considering what has already happened and assuming that what we read in the White Paper is a genuine, bona fide statement of intent by the Government, it must be read as contemplating that future Acts of Parliament are more likely to give the Assembly broader powers to do the kinds of things to which David has referred, and which the Education Act 2002 already allows.

Mr Lambert: The wording gives the Assembly wider and more permissive powers to determine the detail of how the provision should be implemented in Wales. That is pretty flexible, subject to the parameters of a particular Act.

[164] **Kirsty Williams:** I am still not quite buying your vision of a simpler world following all of this. For instance, you say that we would be able to ban the smacking of children had we had a previous Order in Council that deferred powers. The Secretary of State for Wales, however, has already said that if, for instance, we had an Order in Council on the organisation and management of local government, perhaps that could allow us to get rid of the 22 local authorities and create one, but it would not allow us to change the way in which local finance is managed, via scrapping council tax, because that would impact upon the Inland Revenue, or its equivalent. So I still think that we will potentially have huge areas where it is not quite as simple as you are suggesting it might be, and that Orders in Council will not be the free for all that we might expect.

Do you think that there is a danger, just as we did before the Assembly, of hyping up the opportunities and raising expectations about what we will be able to do, only to find that, in reality, we cannot deliver on that? We have already heard evidence from people who suggest that we will be doing the equivalent of seven or eight Bills a year. What do you regard as a realistic amount of work for the Assembly to get through? We are already hiring the lawyers and the extra parliamentary staff. Poor old Lorraine will be here until 9 p.m. and on Wednesday mornings. What do you think is a realistic workload, and what can we get through in this process?

Mr Lambert: Perhaps David would comment on the workload.

[165] **Lorraine Barrett:** Should we not go for quality rather than quantity?

[166] **Kirsty Williams:** They are very worried about quality versus quantity. I have always been a quantity kind of person myself.

David Lambert: All this is negotiable and I understand that you have paragraph 3.17 of the

White Paper about not being able to interfere with policy areas, which are a matter for central Government, but there is a hint—so I understand from certain former colleagues of mine, with whom Marie and I keep in touch over tea and coffee when they come down from London—that you will have supplementary provisions in your Order in Council that will, with the agreement of central Government, allow you to amend certain provision that would, otherwise, be a matter for central Government.

It seems to me, therefore, that there is everything to play for because, if you negotiate with central Government, it may understand that you need a clearer package in order to fulfil the requirements for local government. I cannot see community tax going, for example. This business about policy areas for which central Government is responsible is not immutable. It is not as of now. As I understand the thinking in places, which I had better not mention here, that is flexible and Whitehall could decide to give up a particular part of its retained policy areas and give it to the Assembly if it is supplemental to what the Assembly wants to do. Now, you will certainly not get community tax, I agree, but you may get little bits around the edge. So, again, there is a lot to play for. I am sorry to be so positive about this.

Ms Navarro: We have the three examples in the White Paper. Perhaps you will start with having very specific powers first on subjects and competence and then slowly, you will move towards the wider subject areas of policy. We do not know; it will depend on the policy areas in which the Assembly asks for powers and what the two provisos, namely never a full subject area and retained functions, will be.

[167] **Carl Sargeant:** The White Paper is very interesting and you were right to be very upbeat about it, which is encouraging. We all have our views on the devolution process and mine is about taking the people along with you through the process of change. I think that that is particularly important; that is where the White Paper comes into its own.

On your comments on the Orders in Council, we had an interesting discussion yesterday about those and primary and secondary legislations and about where they all sit, where people believe they sit and how important they are. I asked this same question yesterday, but it is also quite pertinent to today’s discussion: do you believe that there is too much emphasis on the supposed distinction between secondary and primary legislative powers and do you think that Orders in Council, while recognising primary and secondary legislations, give us—Wales, the Assembly or whatever—the option to move forward very effectively in future?

Professor Miers: Clearly, that is so, and that has been argued for quite some time. If the Assembly had wide-ranging devolved powers, to go back to the example of the Education Act 2002, it would then have, by definition, the kind of legislative power that resembles a Bill but is not the same as a Bill. We really must understand that, it resembles a Bill, but it is not the same as that; it is not the same procedure, it is not the same in terms of constitutional significance, and it is not legally the same as a Bill.

10.30 a.m.

I will make an observation to answer Ms Williams’s point about what might or might not be appropriate in an Order in Council. I used the adjective ‘appropriate’ partly because it is the adjective that is used by the House of Lords committee. Local government finance is clearly not an appropriate matter for an Order in Council. It is budgetary, it is finance, and I cannot conceive that, as things presently stand, Her Majesty’s Government would permit the Assembly to go down the road of restructuring that. To go into this with a little more detail, appropriateness is defined, or conceived, by the House of Lords committee as things that are not large, controversial or politically contentious. With any matter of that sort, their lordships would simply look at it and say ‘We are not having any of that.’

So, to return to your point, Mr Sargeant, therein lies the constraint, but it is an initial constraint and, again, to return to the point about workload and the subtext of some the questions that have been asked, the Orders in Council procedure puts an enormous premium on the ability of the Welsh Assembly Government to get it right from the outset. I think that that is absolutely crucial. It must not get it wrong in terms of either trespassing on paragraphs 3.17 and 3.18 or of the execution not being as clear as possible about how this power, granted under an Order in Council, will be used next week, next year or in a decade's time, assuming that the primary legislation is not changed. If it is an open, and not time-limited, Order in Council it will mean that it is a continuing power. The burden that is going to fall on the Government here to get it right will be very substantial.

You talked about workload, but I have no particular insight into or grasp on what the implications will be for the Welsh Assembly Government. However, it is equally true to say that it imposes an enormous burden on the Assembly too. When the request goes from here to the Secretary of State, he will need to be absolutely persuaded that what he is then going to lay as an Order, ultimately, for the affirmative resolution procedure, is legally and constitutionally unimpeachable. That is why I have put so much emphasis on that in my paper; to me, that seems to be the crux of it. Of course, Bills present their own problems, but they are problems of a different kind.

[168] **The Presiding Officer:** I am grateful to colleagues and to the three of you for coming here today—for the papers and for giving evidence. I am cutting this short because we are, we hope, soon to be in audio-visual contact with the Scottish Parliament. I thank you, not just for what you have done for us today, but for being critical friends of this institution and the way that we have developed. It is important for all of us that we can turn to a department and a law school that provides academic rigour to the scrutiny of what we do. I hope that we will continue to work together creatively for many years to come, until the matters that we have discussed today are even further clarified.

Professor Miers: I am grateful to you for that, Presiding Officer.

[169] **Y Llywydd:** Dyna ddiwedd y sesiwn gyhoeddus.

[169] **The Presiding Officer:** That concludes the public session.

Daeth y cyfarfod i ben am 10.34 a.m.
The meeting ended at 10.34 a.m.