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 Llun, 11 Gorffennaf 2005
Monday, 11 July 2005

Cynnwys
Contents

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introduction, Apologies, Substitutions and Declarations of Interest 3

Cofnodion y Cyfarfod Blaenorol
Minutes of the Previous Meeting 3

Y Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth (Cwestiynau 361-468)
The Better Governance for Wales White Paper: Evidence (Questions 361-468)..... 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: Yr Athro Robert Hazell, Sylwebydd Gwleidyddol; Rhodri Morgan, y Prif Weinidog; Jenny Randerson, Cadeirydd y Pwyllgor Busnes; Hugh Rawlings, Cyfarwyddwr Grŵp Llywodraeth Leol, Gwasanaeth Cyhoeddus a Diwylliant; yr Athro Rick Rawlings, Sylwebydd Gwleidyddol; Roger Sands, Clerc a Phrif Weithredwr Tŷ'r Cyffredin.

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: Professor Robert Hazell, Political Commentator; Rhodri Morgan, First Minister; Jenny Randerson, Chair of the Business Committee; Hugh Rawlings, Director of Local Government, Public Service and Culture Group; Professor Rick Rawlings, Political Commentator; Roger Sands, Clerk and Chief Executive, House of Commons.

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

Committee Service: Siân Wilkins, Clerk.

Dechreuodd y cyfarfod am 9.15 a.m.
The meeting began at 9.15 a.m.

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

Y Llywydd: Bore da a chroeso i'r cyfarfod hwn ar y Papur Gwyn, Trefn Lywodraethu Well i Gymru.

The Presiding Officer: Good morning and welcome to this meeting on the Better Governance for Wales White Paper.

Cofnodion y Cyfarfod Blaenorol
Minutes of the Previous Meeting

Y Llywydd: Yr eitem gyntaf o fusnes ffurfiol yw cadarnhau cofnodion y cyfarfod diwethaf.

The Presiding Officer: The first formal business is to ratify the minutes of the last meeting.

Do we agree the minutes?

Cadarnhawyd cofnodion y cyfarfod blaenorol.
The minutes of the previous meeting were ratified.

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

[361] **The Presiding Officer:** I welcome Jenny Randerson, Chair of the Business Committee, to our select gathering this morning. Would you like to make a brief opening statement, or go straight into questioning from Jocelyn Davies?

Jenny Randerson: First, I would like to say how delighted I to be here, and say what an important topic this is. If all Members have had the opportunity to read my paper, I am content to go straight into questions.

[362] **Jocelyn Davies:** I assume that you have been following the work that we have been doing so far, and that you are aware that another witness was of the view that the idea of setting up a special commission to draft the Standing Orders of the new Assembly would be both unnecessary and partronising. What is your view of that?

Jenny Randerson: I think that it is unnecessary, and it would not be an efficient way of drafting Standing Orders. Over the years, the Business Committee has drafted, and steered through the Assembly, hundreds of amendments to Standing Orders. We have built up a body of expertise, and I think that the most efficient and effective way of drafting our Standing Orders would be for the Business Committee to take that through. It would be inappropriate to be put in the position where, if Standing Orders were to be given to us by the Secretary of State, in effect, we would be able to change them afterwards to suit ourselves.

There is another issue here of what happens if the Business Committee cannot successfully steer through the Assembly a whole raft of new Standing Orders. One of the ways that we need to deal with this is to have a series of backstop positions. If we did not get a two-thirds majority for the new Standing Orders, as they come through, we would have to have a backstop position within the Assembly—a kind of troubleshooting team, which, in the past, has been the four party leaders working together. That would be put in place to deal with any problems. I cannot believe that there would not be compromise in the end, given the spirit with which we have approached other difficulties over Standing Orders over a period of time. We have had difficulties, and we have worked through them. Only after that would the special commission come into play, if we needed to deal with any ongoing problems; I do not foresee that there would be any.

If the Business Committee takes on this work, there will have to be additional, dedicated meetings for that work, and I suggest that it would be appropriate for the Presiding Officer to attend those committees. I do not take the Scottish view that the Presiding Officer should have nothing to do with Standing Orders. The Presiding Officer is always represented on the Business Committee, and he may wish to attend himself when Standing Orders are dealt with.

[363] **Jocelyn Davies:** I am sure that we can all think of a number of occassions when the Presiding Officer has suggested changes to Standing Orders, which we have then taken up. The point being made in Scotland was that the person who interprets Standing Orders should play no part in drawing them up. That probably does not apply to us, although it is certainly the Scottish view.

In your paper you mention the scrutiny of Ministers. From the visit to Edinburgh, it seemed that many subject committees were busy with legislation, and were falling down on their duties to carry out other things. Could you expand on that, and perhaps say how we may avoid that?

9.20 a.m.

Jenny Randerson: We had a very successful and informative trip to Scotland. I think that everyone would say that that has been extremely useful in relation to the current exercise. However, one worrying thing that that trip revealed was that some committees devote virtually all their time to legislation. They do not deal with the scrutiny of Ministers in any other context—they only scrutinise Ministers in relation to legislation. They also do not do any policy development work. I would greatly regret it if the committees here went down that path. The problem in Scotland may be because the committees were set up with a role that

encompassed everything, without anticipating that the legislation would grow to the volume that it has. Some committees still do the policy development role, but others do not, simply because it has been forced out. We need to anticipate that the bulk of legislation will increase as time goes on, and we must be aware of that.

There is a fairly difficult logic to get your head around, in that we will be restricted to 60 Assembly Members—Scotland finds it difficult with 129. In the long term, having 60 Members is totally unsustainable, but that is what we must accept. In that respect, we must find a way for our committees to work as efficiently and effectively as possible. However, the scrutiny of legislation must be absolutely rigorous. When you consider that a straightforward Bill can take 100 hours of scrutiny, that is a phenomenal amount of work for committees. Therefore, committees will have to adopt the Scottish model of working much more flexibly, meeting regularly every week, with the option to cancel a slot if they do not have business, obviously, and fitting in additional meetings when there is legislative pressure.

Although I do not have firm views on this, we might want to consider whether to set up specific committees for pieces of legislation. I am not 100 per cent convinced of that, simply because I cannot see where we would fit it in the timetable without denuding people from Plenary. That is a real issue—Plenary sessions would suffer in terms of people being absent to scrutinise legislation on special committees for that purpose.

[364] **Jocelyn Davies:** We had a suggestion last week that committees should sit at the same time as Plenary. I think that they disregarded this in Scotland, even though they admitted that the attendance in their chamber was poor, and generally confined to those people taking part in the debates. However, there are only so many hours in the day.

I also wanted to ask you about subordinate legislation, and how you think, after the changes, that that may be scrutinised.

Jenny Randerson: Our current Legislation Committee needs to be developed into a subordinate legislation committee, in the fullest sense of that term, along the Scottish model. It is very important that we have a rigorous system for scrutinising subordinate legislation, but that, at the same time—and this is my personal view—the process by which subordinate legislation goes through should not be entirely in the hands of the Executive; the Assembly must have a say in how subordinate legislation goes through. The Legislation Committee would be one way to deal with that process, although the rights of all backbenchers involved in the process would be important. With regard to the current role of the Legislation Committee, it has been greatly underdeveloped. It should have had a much more prominent role. That situation has led to the Business Committee picking up that role, which is not something that it should be doing. I have long felt that we should be concentrating on procedural issues and business programming. We should not be doing the work of the dedicated Legislation Committee.

[365] **Jocelyn Davies:** On the existence of the Business Committee, the White Paper states that the only committee that we must have is the Audit Committee. How do you feel about the possibility of there being no Business Committee? Apart from deciding the timetable, what roles should the Business Committee take on?

Jenny Randerson: The Business Committee has proved to be a very effective way of dealing with business programming. It allows all parties to have a say in the way that business is programmed. It fits the new model. Scotland has a Parliamentary Bureau and a Procedures Committee, which deals with the matters that I see as forming the work of the future Business Committee. Scotland has separated those roles, but with only 60 Assembly Members, there is no way that we could separate them; we must keep those roles together. I have never seen a clash between the two roles. The members of the Business Committee have always separated

the two parts of the agenda and dealt with them in different ways. A modern parliament, if I can put it that way, needs a business committee. It does not need to go back to the old-fashioned Westminster approach of discussions in corridors and 'via the usual channels' and so on. One is well aware that you, as business managers, have discussions outside the Business Committee, but the Business Committee provides a formal structure for dealing with issues and for the Business Minister to put her point of view.

[366] **Kirsty Williams:** To come back to the issue of Standing Orders, I agree wholeheartedly about the appropriateness of your approach. As there will be extra meetings of the Business Committee, are there enough staff to take us through the process? If it were to fall to the Business Committee, would we need additional staff? The Business Committee has struggled with making private Member's legislation more effective and with providing more opportunities for it. We have spent many hours trying to devise a way to make that mechanism more effective. Does the new set-up have the potential to improve the situation, or, indeed, to make it worse?

Jenny Randerson: To take your second question first, the issue of private Member's legislation is very important. In future, if it is going to be effective—and seen to be effective, in the short term at least—the committee is going to have to be able to request the Executive or the Assembly, depending on which process we follow, to ask the UK Parliament to grant the right to legislate in a particular area. We have discussed that in the past, and now is the time to enable that to happen. Private Member's legislation is still an area of difficulty, and if we are really going to enable it fully, then we must have the widest possible interpretation of how that could work. It is also important to remember that we need to have a process for committee legislation. If subject committees are going to be developing policy, then they need to have a role, or a potential role, in being able to put committee legislation together and steering it through the Assembly.

9.30 a.m.

In relation to staffing, I think that there will clearly be a need for additional staff, because there will be a massive body of work to be done on Standing Orders. That will be a short-term demand on additional staffing, but it is a useful opportunity to raise the question of staff resources in general. If we are going to do legislation effectively, we have to increase our capacity. You know that there are serious issues with capacity in relation to legislation from time to time anyway and, therefore, there will be phenomenally increased pressure. If we are going to do it, we must do it well. The fewer Assembly Members you have, the more staff resources you are going to need as back-up. We are stuck with our 60, so we will need the additional staff resources to ensure that that full technical expertise is available to us.

[367] **David Melding:** Jenny, you talk about the time constraints on our work. One thing that has not been touched upon yet, if we move towards being a more standard parliamentary body, is the number of days on which we sit. In effect, we only sit on a Tuesday and a Wednesday at the moment, with the occasional overspill into a Thursday. Monday and Thursday, or possibly Thursday and Friday, with Monday free, will have to be used for parliamentary business, will they not? We will have to sit for four days a week during our sessions, and that is surely unavoidable.

Jenny Randerson: If you look at the evidence I gave, you will see that in the first Assembly, we devoted only 9 per cent of our time to legislation. Scotland devoted 25 per cent, and the message we received was that that is actually an increasing percentage. I think that we should welcome the fact that legislation comes as an addition to the other work that we do, and there are certainly ways or other mechanisms to make some of the things that we do less onerous in terms of time, but we cannot throw out all the things that we currently do in Plenary sessions. Therefore, legislation and proper scrutiny, Second Reading debates and so on, will have to

come as additional Plenary time. As Chair of the Business Committee, I have given reports to Plenary in the past indicating that we must accept that the focus is going to change slightly, and that we are going to find our centre of activity much more here rather than in our constituencies or with other organisations and so on. I think that it is inevitable that we become primarily parliamentarians.

[368] **David Melding:** My expectation of a four-day parliamentary week would not be far off, do you think?

Jenny Randerson: What we are in danger of doing currently here is being seen as a two-day-a-week organisation. Occasionally, you do a Thursday morning, and very occasionally, you have to do a Thursday afternoon. In terms of formal sittings and committee meetings, we have to accept that we are going to move towards being a three-day-a-week organisation, that we will have to be here from Tuesday morning through to Thursday afternoon inclusive, and that there will be other things that will intrude on a Monday or even a Friday, depending on how we arrange our calendar. It was noticeable in Scotland that several committees were held on a Monday. We will have to adjust our expectations of our role, as will the public, to fit that.

[369] **David Melding:** The other point is how committee work will be structured. You indicated that, at present, we are doing about 9 per cent of work on—

Jenny Randerson: That was in Plenary time.

[370] **David Melding:** Was it less in committee?

Jenny Randerson: Yes.

[371] **David Melding:** This is the time spent looking at secondary legislation. The reality is even more skewed than the statistic suggests, because only two or three committees of the seven do nearly all of that work at the moment. Is it not the case that, if this package takes us down the road to being a more standard parliament with a more enhanced legislative role, if my committee, the Health and Social Services Committee continues to exist, it will do nothing other than look at legislation? There will be the occasional window when the Government is not active in that sphere, but that will be very infrequent. Other committees will have next to no legislation in a whole four-year term.

The only way to get out of that is to have Standing Committees but, of course, I would anticipate that a Standing Committee on health or on social care would share a substantial amount of its membership with the Subject Committee, because those people would have the expertise needed. It is going to take an awful lot of development to adapt the current structure, is it not? Do you think that the Assembly, which I understand would no longer have to mirror ministerial portfolios, will have to have a good long look at this issue? A committee as large as the Health and Social Services Committee will just not be viable, will it?

Jenny Randerson: I would agree with your analysis. One issue with the current Government of Wales Act 1998 is that, having set up a very prescriptive committee structure—not in terms of the names of the committees, but in setting up Subject Committees—there has been a wish to consider them all as the same. I will not use the term ‘equal’. They have to meet with the same regularity, and they must have the same structure in terms of membership and what they do. We have to be a great deal more flexible on that and recognise that some committees may have to be split up, because they will have such a major burden. The other committee that has a really big burden is the Economic Development and Transport Committee, which also covers energy and seems to continually expand. It recently took on Ofcom, creative industries and so on. It seems to me that those two committees are currently overburdened, although maybe the burden of economic development legislation will not be that great, so that will not

apply in the future. That points to the complexity of the whole issue.

We need to take an open-minded look at this and say either that some committees will be burdened and will have to be treated differently, or that there will have to be a Standing Committee structure. What we also need to address when Members are appointed to committees is that they have different interests. Clearly, that is already reflected in the committee that you are on, but some Members may want to be involved in legislation regularly, while others will prefer to be involved in the policy development side of it. There will have to be a more flexible approach, from us as Members and in the set-up of the committees' structures. Although every element of a Minister's portfolio needs to be covered, perhaps that does not have to be exactly reflected in the committee structure.

9.40 a.m.

[372] **David Melding:** Finally, we are an Assembly of 60 Members and, if there are at least 12 Ministers, that will give us an effective pool of 48 Members—well, fewer than that once the Presiding Officer and his deputy are taken out of the equation. One witness said that a possibility would be for Standing Committees, as we will call them for the moment, in looking at legislation, to co-opt experts from the business sector, the voluntary sector, legal experts or whatever as non-voting members, and that that would increase the pool of expertise. Do you think that that idea should be investigated?

Jenny Randerson: I would need some persuading that that would be an appropriate approach generally. We have that kind of structure on the Committee on Equality of Opportunity, and it works very well in that scenario. I wonder whether it would necessarily work elsewhere, such as in the health scenario, for example. That does not mean, however, that you cannot always refer to experts. For particular people to have regular membership of a committee is perhaps not appropriate, but committees will rely on expert advisers much more often. We will not be able to do our work unless we have a stronger draw on expertise.

[373] **Jane Hutt:** We have a lot to learn from Scotland, and our visit there a few weeks ago was very useful. What struck me about the parliamentary bureau role was the fact that it seemed to be an efficient way of doing business and agreeing it. Much was said across all parties about the true spirit of compromise. There was negotiation, which obviously took place through normal channels prior to the bureau meeting. There was also a great deal of flexibility. Do you foresee that that kind of development, in terms of the maturity of this body, would have to emerge as a result of taking on these extra powers?

Jenny Randerson: Yes, I do. Although I would say that, for practical reasons, we cannot separate our Business Committee's two roles, I do not see any reason why that could not develop further. In practice, we do most of what the bureau does in Scotland. However, we do not undertake the procedure committee's role in launching investigations into particular aspects of how the Parliament does business. Pressure of time and diversity have prevented us from doing that, perhaps, but I think that we would want to do that anyway after two or three years of the new structure. I think that the Business Committee might well want to undertake that. However, in terms of the bureau aspect of the Business Committee's role, I think that we do most of what they do, and it seems to me that it worked in a very similar manner. That is, it had evolved in a similar manner to the way in which our Business Committee has evolved with regard to its weekly role in business programming, in enabling points of conflict to be flagged up, and in encouraging full co-operation by all involved.

[374] **Jane Hutt:** Of course, that means that matters are agreed at the bureau, and that the business Minister does not present the business statement to be adopted, because the business is done at the bureau, which is a different direction to the one that we have taken with regard to the opportunity for Members to challenge the business statement in Plenary. My

understanding is that a lot is agreed at the bureau so that it can do business more effectively and more quickly.

Jenny Randerson: Actually, my understanding was not quite the same. They do object to the business statement on the floor of the house, but rarely. That might just be to do with the individuals involved and the way in which things have operated. It could be to do with the party balance there, which is far less tight, given that there are two parties in Government and the significant majority there. Perhaps there is less point in opposition parties objecting. However, there is a process—and my recollection on this is very strong—by which the business statement is taken to the floor of the house and they can vote against it. However, they only ever vote against it if they have said that they might do so, or if they have reserved their position in the business committee.

[375] **Jane Hutt:** Yes, as you said, as much as possible is agreed through normal channels.

Moving on from that, I wish to explore the issue of secondary legislation and how we handle it. As you said, if we had a strengthened subordinate legislation committee looking at the technicalities as well as the merits of instruments, in terms of the affirmative or negative resolution, it would change the balance in the Assembly regarding the amount of time that committees spent looking at secondary legislation. As we work through what this could mean for us, we also have to take into account that, if we went down that route, the legislative balance would be through framework legislation and through Orders in Council measures coming to committees.

In terms of the role of the subordinate legislation committee, as you said, I am sure that this would be very different from what we have now, and Ministers, as you said in your paper, would take the lead responsibility in terms of their role. It is very early to predict this, but what would our timetable be in terms of legislative load, policy delivery and inquiry, which has already been referred to, and how would that emerge as a timetable for the Assembly?

Jenny Randerson: I think that what we have done in the last six years is to make the best of our limited powers via secondary legislation. We have used them wherever possible to provide distinctive policy as far as it is possible to do that given the will of the Government at the time. Therefore, we have given it a great deal of attention. We will be doing far more under the new powers given to us by the UK Government on a Bill-by-Bill basis. Therefore, I think that subordinate legislation, statutory instruments and so on will need a more streamlined process. That is why the role of the Legislation Committee is called into play.

However, if you look at the Scottish parallel once again, you will see that, actually, they have a very complex process. As an ordinary Member, you can ensure that subordinate legislation is debated and reconsidered and so on. I think that it is important that that fall-back position exists and that it does not just become an issue of ministerial diktat. After all, a similar situation exists in the UK Parliament. I think that we need to look at the Assembly's process by which either committees or individuals can ensure that legislation is debated, however minor it may appear to be.

9.50 a.m.

[376] **Kirsty Williams:** Going back to this issue of the bureau in Scotland, would you agree that its experience has been very similar to that of the Business Committee in the sense that parties, as you said, state in the bureau that they reserve their position to vote against the business statement on the floor should they go back to their groups, which then find themselves unsatisfied with the decision that the bureau has come up with. Indeed, the Liberal Democrats themselves were being accused of playing fast and loose with the system, because they were signing up to things in the bureau, and then the stroppy backbenchers would

perhaps speak out against the business statement. In fact, that is very similar to what we have found happening in the Business Committee. So, with regard to making that distinction and saying that having a bureau system allows things to run more smoothly, it is not necessarily that different from what we have had here.

Jenny Randerson: I came away from that meeting with the distinct impression that there was a remarkably close parallel between the bureau and how the Business Committee does business and how that plays out on the floor of the house. I had the distinct impression that business was done through the business managers in the bureau saying, 'We are not happy with this or that, we reserve our position; or we will vote against this unless you do something, such as propose a particular debate'. Then they go through and oppose it on the floor of the house. The parallels even with backbenchers are there, because a Labour backbencher here speaks most weeks when we have the little debate on our business for the week. There is almost always a Labour backbencher calling for something—

[377] **The Presiding Officer:** It is usually the same one though, is it not?

Jenny Randerson: No, there are two, Presiding Officer.

One of the Liberal Democrat backbenchers was said to be doing the same thing in Scotland. The only difference in the process that I have detected is that people here vote more frequently against the business statement. As I said earlier, I think that that is down to the practicalities of the numbers.

[378] **Jocelyn Davies:** Coming back to the delegated powers, we would be in an entirely different position than Scotland, would we not, because the Ministers there hold delegated powers given to them by the Parliament that they sit in and are accountable to? The proposals here are different, because some of the delegated powers will be given directly by the UK Parliament to the Ministers here. That is entirely different, is it not? We are told that important powers will be given to the Assembly and the unimportant things will be conferred directly on the Ministers, which seems to be a strange constitutional position to be in—to hold Ministers to account on powers that have been given to them by the UK Parliament.

Perhaps you have not thought about this aspect of it, Jenny, and there is no reason why you should have, but who will decide what is important? Will we be in a position sometimes where the Assembly holds powers and we may need to delegate again? So, perhaps we will be delegating to Ministers. The White Paper does not lay out that much detail, but we will be in a difficult position in holding Ministers to account for powers that we did not give them.

Jenny Randerson: That is one of the many anomalies. The process that we have been offered has attractions in terms of potentially giving us a lot more than we have now, but it is riven with anomalies, difficulties and practical problems, which we will have to face. It would be just as complex, certainly for many years, and until we have delegated to us a very significant bundle of powers, we will be facing all these issues daily in the same way that we do now, for example, we can deal with some a certain matter in subordinate legislation, but the UK Government still has power over other aspects and so on.

One of the problems that we need to address in our Standing Orders is how we deal with creating a structure that is as parliamentary as possible, that divides the Executive from the Assembly, but still ensures that Ministers are held to account by the Assembly as a whole. You are right that we will have to re-delegate powers on various occasions. It is fatal for anyone ever to say that something is important while something else is not, because the strangest things become important in particular circumstances. You would require the judgment of Solomon to say what is important and what is not.

[379] **Jocelyn Davies:** You campaigned when the last White Paper was published, and I guess that you fell into the same trap as us, in that you completely oversold what would be possible under that White Paper to the people of Wales. Do you feel that there is a danger that history could repeat itself, and that we completely oversell the potential powers; we are referring to the powers that we might have and the powers that we will be getting, but the powers could actually be quite puny.

Jenny Randerson: Having experienced six years of endless frustration about our lack of legislative power, the opportunity to take greater legislative power should not be rejected; we should not do anything other than welcome it wholeheartedly. However, it is important that we bear in mind that those opportunities mean that we have capacity issues, both for Assembly Members and officials. It is very important that we look at those difficulties. We need to ensure that we maintain our scrutiny and policy development roles as an Assembly. The key problem will be when we have an Assembly that is not politically in tune with the Government in the UK Parliament. When it is not able to ensure the smooth passage through of the Assembly's wishes on legislation, we will have difficulties. I noted that Peter Hain, in an article in the *Western Mail* on Saturday, said that he believed that if a Secretary of State turned down a request from the Assembly for powers over a particular piece of legislation, I think that his words were more or less that that would be a trigger for the need for a referendum. Whether he would be granted it, is another matter.

[380] **The Presiding Officer:** I think that he may be about to say that now, just over the road. To conclude, I would like to ask you what has become known in this committee as the David Melding question, or one of the David Melding questions. Could you expand on this sentence at the end of your eighth paragraph:

'The implications of the requirement for the Assembly effectively to scrutinise draft legislation in both English and Welsh simultaneously should not be under-estimated'.

Could you expand on that a little to guide us further?

Jenny Randerson: We have the additional responsibility and privilege of providing bilingual legislation and conducting all of our business bilingually. If we are to provide more legislation, then that responsibility has to be carried out efficiently, effectively and fully. We already have a trend that legislation is held up because of translation. I cannot explain why quite a lot of the legislation does not come through, other than capacity issues in general. We have a trend of doing things later than England. There are, therefore, capacity issues in general.

10.00 a.m.

However, occasionally we have a piece of legislation that we have to put back because the translation is not ready. There is a hidden waiting list for legislation, because it has to be translated. Therefore, we have to make sure that we have a body of lawyers here, who are able to work in both languages. That is a rare expertise. Bilingual legislation is best done when drafted simultaneously in both languages, rather than translated. At the moment, we are on the receiving end of a load of stuff from London that we translate. When we make our own legislation, I hope that we will be approaching it in a different way, and doing it truly bilingually. That will mean considerable extra burdens.

[381] **David Melding:** Would you see a distinction then? Whatever we call the enhanced powers, they are more akin to primary powers, so would you see us concentrating our resources in terms of doing the work bilingually in that regard, and then saying that a lot of the secondary legislation that we currently deal with may have to go through in English only, if it is not scrutinised or picked up? We simply do not have the capacity to do both. Could you

envisage that happening?

Jenny Randerson: I would very much regret our going down that route. I do not think that we should be doing that. We should be adhering to the principles that we have already established. There are things that we do not translate currently. One of the criteria that we use would be in relation to an immensely technical document, where the vocabulary would be similar in many ways. We also look at the usage of the document. I think that it would be a retrograde step if we were to turn around and say that we are not going to translate secondary legislation. I was also trying to say in my answer that the additional capacity that we would need would not just be translators.

In terms of the number of pieces of subordinate legislation that we pass each year, the additional burden—even in full flow—would be around 10 pieces of legislation, and I would anticipate that it would take a couple of years to work up to that. The Scottish Parliament has done 72 pieces in six years. The Scots have a separate judicial system, which sparks an additional demand. Let us be generous and say that it would be 10 pieces a year. The demand on translation related to that volume of legislation is not going to be that massive, compared with the volume of subordinate legislation that we do at the moment. However, we will need people who can draft bilingually from the start, rather than producing legislation in English, and then doing the Welsh as an afterthought.

[382]**David Melding:** In that case we would have to have a legal adviser who can conduct a conversation on legal concepts in Welsh; otherwise it is not a bilingual process.

Jenny Randerson: That is an additional issue. The demand for legal advice for committees will, clearly, be much greater than it is now.

[383] **Jocelyn Davies:** I have a comment, but I could phrase it as a question. It is important for us, is it not, Jenny, that co-drafting is the concept that everyone understands rather than things being translated? If you translate, then, obviously, the law is to be found in the English, which is translated into Welsh, rather than the law and the interpretation of law being able to be found by looking at both languages side by side. I think that that is very important in a bilingual nation, and in an institution that produces its law bilingually.

Jenny Randerson: I agree with you totally. The important issue is equal status, which can only truly be achieved if you do these things so that they are presented in both languages from the start as opposed to eventually emerging in both languages.

[384] **The Presiding Officer:** I am tempted to go a little way down this road again. You said, did you not, earlier in evidence, that a trend was developing whereby you were not receiving the texts of Assembly instruments in both languages at the same time? Is that my understanding?

Jenny Randerson: We have had some examples in recent weeks whereby we have not received both the English and the Welsh, and we have had to defer consideration of the legislation by the Business Committee. There is an ongoing capacity issue, which has gone on for many months, in terms of the availability of sufficient translators to do that.

[385] **The Presiding Officer:** There is a legal issue here. Section 122 of the Government of Wales Act 1998 is clear regarding texts in English and Welsh, for all purposes, being of equal standing. Clearly, if they are not produced at the same time, they cannot be of equal legal standing.

Jenny Randerson: That is why we do not consider it; we do not consider it in the Business Committee if it is not available in both languages.

[386] **The Presiding Officer:** Would you recommend that we take a further look at this in terms of capacity?

Jenny Randerson: Yes. It is an issue; if you look at the Business Committee minutes you will see that we have expressed our concern.

[387] **Jocelyn Davies:** I wanted to make the point that we say that they are not produced in both languages at the same time, but what we mean is that we always have the English version; I do not believe that we have ever been in a position, Jenny, where we have had the Welsh version and been without the English version.

Jenny Randerson: You are absolutely right. However, from the point of view of how they are presented to us as the committee, we will not consider them if they do not come in both languages, and are not available in both languages at the time of the committee meeting.

[388] **Jane Hutt:** It is perhaps just a matter of record, because this is a key issue for the Welsh Assembly Government. It is a matter of capacity, but it is only on rare occasions that we have had to defer. I am happy to follow this through after this meeting in terms of clarifying the position.

[389] **The Presiding Officer:** That is very helpful, Minister, thank you. It is always good to have a Minister on the committee—giving undertakings that will be on the record.

[390] **Jane Hutt:** I have to put the record straight.

[391] **The Presiding Officer:** We are very grateful to you, Jenny, for your paper and for your evidence this morning.

Jenny Randerson: Thank you.

[392] **The Presiding Officer:** Thank you, Roger Sands, for giving us of your presence and your time. We seem to be doing rather well in this committee—we have had a former clerk of Parliament, and now we have the clerk and chief executive of the House of Commons. We are very grateful to you.

Mr Sands: You have had Sir Michael.

[393] **The Presiding Officer:** He is a kind of resident here—after the Richard commission, and all that.

[394] **Kirsty Williams:** Mr Sands, could you explain to me the powers that committees in the House of Commons have to summon persons, papers and records, and any advice that you could give us on what powers our committees should have to do the same?

Mr Sands: There will be a significant difference, because, in the UK Parliament, the powers stem from the sovereignty of Parliament, whereas in Scotland—and I imagine that the same pattern will be followed in Wales in the future—they stem from statute, and so they are limited. Therefore, when Parliament confers on a committee the power to summon persons, papers and records—we call it PPR for short—it confers on the committee the Parliament's own powers, which are inherent, to use a rather grand expression. What they mean in practice is, of course, a completely different thing. As you probably know, there has been a long running debate between Parliament and the Executive as to what PPR means in practice in relation to Government documents and Government civil servants. I can expand on that if you like, but it is a very long story.

10.10 a.m.

[395] **Kirsty Williams:** Perhaps you could give us the abridged version.

[396] **The Presiding Officer:** It is a story that has already featured in this committee in evidence from the Permanent Secretary, and I know that Kirsty Williams has a great interest in these matters.

[397] **Kirsty Williams:** Yes, and if you will forgive me for pursuing that interest a little further this morning, I would be ever so grateful.

[398] **The Presiding Officer:** I think that it would be appropriate.

[399] **Kirsty Williams:** Perhaps you could give us the abridged version of the story. It has always struck me as strange in this institution that, for instance, a committee does not have the power to call the lead civil servant of a department, who has the day-to-day responsibility for running that department and the responsibility for the performance of that department. I wonder whether you have had the same problems in the House of Commons. The Permanent Secretary here seems to be of the opinion that the committee should not have the power unless the Minister allows the civil servant to come, so we could not make an independent request to see the civil servant. I just wonder whether you could explain some of the difficulties that perhaps you have had. My understanding is that Sir Nigel Crisp was a regular attendee at the Health Committee.

Mr Sands: I have to preface what I say by saying that in 90 per cent of cases—probably more—no trouble arises over this at all. A committee indicates its interest in pursuing an investigation on a particular topic, and the civil servants who give evidence, and the documents that are provided by those civil servants, come from the area of the ministry that is directly concerned with the subject and no problem arises. The problems that have arisen have arisen when a committee has chosen to focus on an issue where there is a very high political content. The classic case in point was the Westland helicopter affair, which led to a senior Cabinet Minister walking out of Government. When a committee tried to focus on how this had happened, and get behind the basic decision and the reasons for it into the interstices of the exchanges between ministries on this issue, it then started to tread on toes. At that point, the Government took the view that if a committee was going behind the decisions and the basic information underpinning them, then Ministers ought to be coming to answer the questions and not individual civil servants, and that there was a danger that civil servants would be before a committee acting almost as a disciplinary tribunal, rather than investigating the work of Government. That is one inhibition that has definitely been imposed. It is for Ministers and senior civil servants to discipline other civil servants, not for a parliamentary committee.

The other inhibition imposed by the Government is that, as you say, if push comes to shove, and only occasionally does push come to shove, it is the responsible Minister who decides which of his or her civil servants should answer to the committee. The committee could, in the final analysis, because the power is absolute, summon a civil servant, and, if it got that Order through the house, which would be most unlikely, the civil servant would be obliged to attend. However, at the same time, the civil servant is bound by his terms and conditions of office which require him to answer on behalf of the Minister. So, if he is asked a question by the committee that the Minister does not want him to answer, he will just say so and there will be a stand-off. A committee will ask the question and a civil servant will decline to answer. Everyone realises that that is a waste of time, so the issue has not been pressed to a point of resolution.

[400] **Kirsty Williams:** Though I hate to admit it on public record, I find Mr Heseltine's memoirs very interesting indeed on the Westland affair. In the end, as you said, the committee, by virtue of the powers given to it by the UK Parliament, has the right to demand that a civil servant appears—

Mr Sands: It has the ultimate right.

[401] **Kirsty Williams:** It has the ultimate right to demand. Do you agree that it is not beyond the wit of Members of Parliament or Assembly Members to know what questions are appropriate or not appropriate to ask a civil servant, or the Minister, and that they can differentiate between the two?

Mr Sands: I am sure that they can differentiate, but they do not always do so.

[402] **David Melding:** Mr Sands, in this committee we have discussed with other witnesses the idea of using Orders in Council to enhance our legislative powers. Basically, diametrically opposite models have been proposed to us. One is that an Order in Council would be the conclusion of a process, so the Government or a committee of the Assembly would say that it wishes to modify, adapt, extend or repeal legislation in a particular subject area. We have used an example in relation to the welfare of children, but it does not matter what it is. The initiator would identify the current applicable legislation and how it would want to change that, and we would go through a sort of mock-Bill process in the Assembly. It would be fleshed out and agreed, packaged and sent up to Parliament where it would then appear under a simple Order in Council, which would be subject to an affirmative vote after a relatively short debate.

Others have said that it could not possibly work that way, because that would be far too liberal a procedure, and the power would come from and be identified in the Order in Council; it would have to be agreed after extensive debate in Parliament and would be narrowly focused, because Orders in Council tend not to be over controversial matters. The power that would come to the Assembly would be much more limited, and the power of initiation would not really rest with the Assembly, because it would have to get agreement for the Order in Council to proceed in the first place. Which of those models do you think is more likely?

Mr Sands: You are taking me into an area where I have relatively little expertise. I should say that of the three devolved assemblies, if I can lump them together like that, this is the one that I know the least about. I know the most about the Northern Ireland Assembly, because I have had a lot to do with that body. So, I come to this hearing on the back of considerable ignorance, but I have read the White Paper fairly closely. I agree that that is a key part of the proposals, but how it would work exactly is not clear in the White Paper.

10.20 a.m.

One has to start by asking what an Order in Council like this would look like. Would it simply define a block of legislative responsibility and transfer it to the Welsh Assembly, or would it be much more detailed, as you describe, not just transferring responsibility, but doing so on a basis of law, which was what the Welsh Assembly wanted? It could then be modified in future if and when the need arose. What one thinks an Order in Council would look like depends on what procedure you think might be appropriate to it. If it is just a piece of framework, one can imagine a relatively simple debate in the National Assembly as authority for the Executive to put this request to the UK Government, and then, quite probably, a fairly straightforward debate at Westminster. The block of responsibility then goes over and that is it; you have got it and you make what use of it as you decide. If it comes over with a lot of baggage attached to it—if I can put it that way—obviously, the process of debate somewhere

has to be a lot more detailed. However, whether the detailed discussion takes place here, before, as you say, the almost draft Order in Council is sent up to Westminster for rubber stamping, or whether just an outline request is sent up and the detailed discussion goes on in Westminster—I would have thought that the latter was less likely—is a matter for discussion. Exactly what was intended, however, I am not clear, but it will have to be clear by the time the legislation, which we have to pass in Westminster, is formulated.

[403] **David Melding:** Given that Orders in Council are currently used in areas that are not regarded as being particularly controversial, and that they will develop considerably if they are to be used as a device to give us more legislative authority in areas that would be controversial occasionally, if not frequently, is it not likely that Westminster will want to do some of the scrutiny on Orders in Council, or do you think that it would be happy not to have the traditional, narrow, non-controversial approach and be more expansive and say, 'Yes, fine, over to the Assembly'? It seems rather a complicated way if it is just going to give the Assembly authority. Why go through the loop of an Order in Council? Why not just say, 'Well, that is a delegated policy area—you have primary powers on it'? I cannot yet quite understand what the Westminster side is there to guarantee or deliver.

Mr Sands: An Order in Council is just a piece of machinery. I do not think that I would agree with you that it is necessarily always used for non-controversial items. In the Northern Ireland context, for example, when the Assembly is suspended, as it currently is, alas, Orders in Council are the means by which the United Kingdom Government legislates for Northern Ireland. These may be controversial as they are the equivalent of primary legislation for Northern Ireland, and I have no doubt that some of them are quite controversial. Certainly, some of them are very detailed; they have all the detail of a statute. So, I am not quite sure that I share your starting point.

[404] **The Presiding Officer:** To pursue this a little further with evidence from the House of Lords, when Lord Evans repeated the statement on the White Paper, one possibility that he described in answer to a question was that an Order in Council would probably have been phrased in the same way as the long title of a Bill. Could you conceive of it as being as permissive and as broad as that in general circumstances?

Mr Sands: Yes. I must admit that when I heard Peter Hain's oral statement, before I had read the White Paper, my immediate impression was that the sort of thing that he had in mind was that the Order in Council would be a very short document that would just convey a chunk of legislative competence over to the Assembly with not much baggage attached to it, and defined in terms of existing statutes or something of that sort.

[405] **The Presiding Officer:** Sorry, David, I interrupted you. Do you want to continue?

[406] **David Melding:** No, that is fine.

[407] **The Presiding Officer:** Fine. Jocelyn?

[408] **Jocelyn Davies:** We can guess that the Assembly will have more legislative powers through new Acts of Parliament and these Orders in Council. We all accept, therefore, that the way in which we scrutinise Ministers must change, and, obviously, we would like to draw from your experience. Is there anything that we should not do in the future? Do you think that we could learn lessons not just from best practice, but in terms of things that we should not consider?

Mr Sands: Coming from a big Parliament that has never had the luxury of sitting down with a blank sheet of paper and saying, 'This is how we should do it', and one that has always had a huge inherited conglomerate of custom and practice and little power cells here, there and

everywhere, which are very difficult to break down, it is difficult for me to try to give a lecture to a much smaller parliament that does have that luxury. One thing that you probably should not do is overcomplicate the situation. I think that that would be a great mistake. If you have a huge range of pieces of machinery and people are rushing from one to another, that probably diverts attention and focus, whereas if you have flexible pieces of machinery that can be used as and when required and in a way in which each particular piece of business requires, it is probably more efficient.

[409] **Jocelyn Davies:** Obviously, with a small number of Members, we do not want to be dashing around all over the place. Certainly, there would be no need to create work for people because I think that we will have enough to do. Have you any advice to give us on how best to scrutinise Ministers? As you have probably already heard today, some of the committees will not have time to scrutinise Ministers. When we visited the Scottish Parliament, I was disappointed that the opportunities to scrutinise Ministers seemed to be very limited.

Mr Sands: Is that scrutiny of Ministers within committees or just within the house?

[410] **Jocelyn Davies:** Well, it was confined to the chamber. Some committees did not scrutinise Ministers apart from when a Minister appeared at committee to champion the piece of legislation that that committee was considering. Ministers and Governments do a great deal more than just produce legislation. One of my concerns is that if the Government keeps Assembly Members busy with legislation, then perhaps they will not notice everything else that it is doing. It is important that we are able to scrutinise the Ministers on their Executive action as well as on the legislation that they are proposing.

Mr Sands: You raise a very profound point. One of the difficulties for any parliament is to strike a proper balance between doing things that are the Government's agenda and setting your own agenda. If I have a criticism of our departmental select committees, which are the equivalent of your subject committees, it would be that they set their own agenda too much and just totally ignore other issues. A ministry has a number of issues at any one time that are big in its head and are what it is concentrating on. If a committee hauls them off to think about something else that it is not really thinking about, it will obviously respond and it will dig the papers out and so on, but you are probably not connecting with it in the way that will be the most fruitful from both sides.

10.30 a.m.

On the other hand, you cannot afford to let committees set the agenda to such an extent that there is a problem there that they do not want you to get at. You have to have the capacity to get at it, pull it out and expose it to public gaze. Striking the balance between those two things is the most difficult thing for any parliament. This applies not only to committees, but to the way in which time is disposed in the chamber and elsewhere, and the amount of time that the parliament spends on legislation. I think that we spend too little time on legislation in the House of Commons. The tendency has been to timetable it—the word is 'programmed', but 'timetabling' is what it means—and constrict the amount of time spent on legislation, and to allow much more time for Members to raise topics that are of concern to them. We have a huge range of subjects usually just under the adjournment debate, where there is no issue to be decided—this is when a Member raises a subject of local concern to his constituency or region; we are very generous with opportunities like that. The Minister comes under scrutiny there but, because those Members are not paying attention to the detail of the legislation that is going through in the way that they perhaps used to, it is possible to query whether they are doing their job as legislators.

[411] **Jocelyn Davies:** We mentioned earlier the scrutiny not just of the primary legislation or these important powers that we will have under the Orders in Council, but the subordinate

legislation. We currently have robust procedures for dealing with the scrutiny of subordinate legislation—we can table amendments, committees can consider them, and we debate them in Plenary. Do you have a view on how we might deal with scrutiny of subordinate legislation along with everything else that we will be trying to do?

Mr Sands: We draw a clear distinction between what I describe as technical scrutiny—making sure that a piece of delegated legislation has complied with the powers given to the Minister by the parent Act, and does not make any unusual use of them and that sort of thing—and the merits of the policy underlying the instrument. We have some solid and fairly well-resourced machinery underpinning the technical scrutiny. We have a committee that meets weekly more or less and does nothing else, and we have three legal advisers who go through every instrument and give advice to the committee on that. We are much weaker on the merits side. Generally speaking, the vast majority of negative instruments, which are the ones that do not have to be approved by Parliament, are not debated at all and are not looked at from the point of view of merits. The House of Lords has tried to plug this gap a bit recently by setting up a committee to look at the merits of instruments, but there is such a huge range of them that it is a very difficult job. You have to be selective and accept, eventually, that delegated legislation means what it says—you are delegating a power and there has to be a safety net to catch the really bad ones that might otherwise slip through, but you cannot look at everything.

[412] **Jane Hutt:** We do not have the luxury of starting from scratch, as you said earlier on, Mr Sands, but we can certainly learn, as we hope that we are doing—not only from you, but from Scotland, Northern Ireland and other administrations. One issue that we are interested in is the parliamentary service and the civil service. As you will be aware, until now, all staff are civil servants and, with separation, we will be developing a difference between them. Do you have any comments on this issue, in terms of the principles of the parliamentary service in relation to the civil service? Do you think that we could continue to have some permeability between the parliamentary service here and the civil service in terms of the roles that have to be played?

Mr Sands: I would advocate permeability. When I joined the House of Commons service more years ago than I care to think of, the tradition was that, once you took the decision to enter the House of Commons service rather than the civil service, that was it. We even had reservations about bringing in people on secondment from ministries because we thought, ‘We will not know where their true loyalties lie; will Members be able to trust them?’. We have got over those reservations recently.

We have realised that the great drawback of an impermeable parliamentary service is that it can get sclerotic and set in its ways; it is not open to outside influences. We send our people out on secondment when opportunities arise—it is difficult to organise, but there are a few opportunities—and, increasingly, as we have recently expanded our committee service, we are bringing in people on secondment from various bits of the public service. Some degree of permeability is good for both sides: it helps the mainstream civil service to understand a bit more about how parliamentarians think and work and how Parliament works, which, frankly, they are often very ignorant about, and, from Parliament’s side, it gets people in who bring with them fresh thinking and a fresh approach to the job.

[413] **The Presiding Officer:** We understand, although it is not specifically in the White Paper, that we are about to have something called the National Assembly for Wales commission—modelled, presumably, on the House of Commons Commission. How does that work in terms of day-to-day management? You have experience of the history of this issue, including the time before there was a commission. It would be useful to compare and contrast how it has worked.

Mr Sands: It has made a great difference to the House of Commons, having its own centre of authority for administration and its own budgetary authority. That was the key change made by the House of Commons (Administration) Act 1978: it set up a body that had the virtually unfettered power to set a budget for the House of Commons. Before that Act, such a body did not exist. When you go to Westminster and find that we have grand new buildings and an office for every Member, at last, it is because the House of Commons has its own budgetary authority. From that point of view, it has been a success. There is still disagreement in some quarters on the make-up of the commission, such as whether the Speaker should chair it and whether it should be a more openly elected body than it is now.

At present, the Speaker is ex officio, the Leader of the House of Commons representing the Government is ex officio and there is a nominee of the leader of the main opposition party, usually the shadow leader of the House. That leaves just three of its six members to be elected from the backbenches. That process of election, like any election that takes place in the House of Commons, is not obviously transparent in that way. Many discussions go on behind the scenes, but it is not a secret ballot, if I could put it that way. There is a growing body of opinion that perhaps the commission ought to be a body more representative of the ordinary Tom, Dick and Harry backbencher, but it is still in the minority.

10.40 a.m.

[414] **The Presiding Officer:** Have any issues involving the political management of officials arisen as a result of this system?

Mr Sands: No, I do not think that it has not been a significant issue, partly because of the strong tradition of the Speaker's impartiality, and I suppose that officials shelter behind that. The commission has the statutory power to appoint any member of the House of Commons service but, in practice, at a very early stage, it delegated the power to appoint heads of department to the Speaker, and delegated the power over all other appointments to heads of departments. That has effectively minimised any risk of political interference in appointments. The other factor is that we now have a very powerful Commissioner for Public Appointments, and if an appointment were made to a senior position in the house in a way that was not open and transparent, I am pretty sure that the commissioner would say something about it.

[415] **The Presiding Officer:** Are there any other questions? We are very grateful to you, especially for giving us your interpretation of the White Paper, because we also tend to view that there is not absolute clarity as to how the legislative process might work.

Finally, I know that it is early days yet, but would you envisage the House of Commons or both Houses jointly seeking some way of scrutinising the draft Orders in Council by way of a committee? Might it be a role for the Select Committee on Welsh Affairs or some successor body?

Mr Sands: I am sure that the Select Committee on Welsh Affairs will want some kind of role in considering which areas of legislative competence should be devolved to the Assembly. If my interpretation of the intention of the White Paper is wrong, and it is envisaged that these Orders in Council might be quite detailed and convey quite a substantial body of legislative provision as well as competence over to the National Assembly, there will need to be that kind of joint consideration, possibly even jointly between Parliament and the National Assembly, which has happened with one or two pieces of legislation so far. On Wednesday this week, we will be renewing the power that it gave in the last Parliament to the Select Committee on Welsh Affairs to meet concurrently with the committees of the National Assembly. I have no doubt that it would be a suitable use for that power.

[416] **The Presiding Officer:** Thank you for bringing us that good news. It is something that has worked very well and which we have all benefited from. Could I ask you to consider another favour in return, which you do not necessarily have to answer this morning if it is invidious of me to ask it? We will go down the route of rewriting our Standing Orders in some form or other, however that is done, as a result of the separation and changes in structure. Would you feel able to assist us in that if we called upon your services?

Mr Sands: Yes, I would be willing, but I am not sure whether I would be the best person to do it. I could certainly offer some skilled assistance from within the Clerk's Department. I had something to do with the drafting of the Northern Ireland Assembly Standing Orders, and it is certainly a fascinating exercise. I would add to my advice that it is much better to leave plenty of space between the lines, if I can put it that way, rather than to be too detailed or prescriptive.

[417] **The Presiding Officer:** Thank you for that very helpful answer, and for the rest of your evidence.

Dyna ddiwedd y sesiwn gyhoeddus ar hyn o bryd. Byddwn yn torri am 15 munud ac yn ail-ymgynnull am 11 a.m. i holi'r Prif Weinidog.

That brings us to the end of our public session. We will now adjourn for 15 minutes, and then reconvene at 11 a.m. to question the First Minister.

Gohiriwyd y cyfarfod rhwng 10.45 a.m. ac 11.01 a.m.
The meeting adjourned between 10.45 a.m. and 11.01 a.m.

[418] **Y Llywydd:** Bore da, Brif Weinidog; croeso i'r pwyllgor hwn. Yr wyf am ofyn i un o'ch Gweinidogion agor y batio, os nad ydych am wneud datganiad.

[418] **The Presiding Office:** Good morning, First Minister; welcome to this committee. I will ask one of your Ministers to open the batting, unless you wish to make a statement.

[419] **Jane Hutt:** First Minister, we have had some very positive responses from witnesses over the past week in terms of the opportunities that the White Paper offers us. It has been described as an infinitely flexible settlement. However, what the people of Wales want to know is what it will mean for them in terms of measures, delivery of Government, and policy objectives. Could you do anything to illustrate, or clarify, how we can take this forward, and explain what the particular route of the Orders in Council will mean? There has been quite a lot of discussion about the scope, the breadth of fields, and the opportunities that we have in the Assembly to lay the terms of that in relation to then submitting it through procedures to Westminster. Is there any way that you can clarify or explain what this would mean in terms of policy objectives for the people of Wales?

The First Minister: Yes. Well, I hope so. However, short of listing a 'such as' here, and a 'such as' there—because I am not sure that it really helps matters if you do—there is an important principle here, which is that you should never seek additional powers for the purpose of aggrandisement or status, but to have the tools to do the job, and to deliver what you believe, through the political and democratic process, the people of Wales want from their Assembly. That principle is what lies behind the approach taken in the White Paper—it is for a purpose, not for status reasons.

You then try to illustrate that, and you are immediately into this territory of listing 'such as' examples, which can mislead, confine or, occasionally, just simply be in error; it is rather a risky procedure to start listing a 'such as' this, and a 'such as' that. However, if we try to replay what has happened just recently in terms of the Assembly being able to have the power to operate within a framework Bill—whether it is a framework Bill that, by accident, has used a kind of 13.2 set of principles—then the Education Act 2002, which gave us the power over

student finance to make our own determination in the end, is a good example of a framework type of Bill, even though it preceded the provisions of the White Paper. It enabled us to make our own decision, taking into account the very different circumstances in Wales and England in terms of higher education.

You might say that the public health Bill, which is an England-and-Wales Bill, but which will, in effect, enable Wales to make its own decision, either in advance of, or differently from England, will possibly be the first example of a 13.2 type of Bill, now that we have the White Paper preceding that Bill—it is called the Health Improvement and Protection Bill, I think, in England. Therefore, it will be an England-and-Wales Bill, but the Wales bit will be 'For Wales, we are leaving it to the Assembly', and the power will be transferred to the Assembly. Therefore, that is an example of how it may work in the future.

There were other examples where we thought, for example, 'What about the Mental Health Bill?', which is a very interesting and complicated one, because there are non-devolved aspects to it because there is a lot of Home Office stuff in there. However, we had this joint committee of the Lords and Commons—not a joint committee involving the Assembly, but both Houses of Parliament—and you would think to yourself, 'Well, the mental health services in Wales work in a particular way and they have developed differently from those in England'. You then have to try to move out the Home Office powers and just concentrate on the health powers. That would be a good one for trying to apply—maybe it is too late to apply it—a kind of framework principle, at least to the devolved parts of the Mental Health Bill. I just come back to the original principle that you do this not for the purposes of conferring status on us as Ministers, or everybody as Assembly Members, and so on; it is not about status, it is about delivering services.

[420] **Jane Hutt:** It is also, of course, about having a mature relationship between the Assembly and Westminster in order to improve and deliver services that meet the needs of Wales. Do you agree that we have achieved that mature relationship in terms of joint scrutiny for the Transport Bill, for example, and, indeed, in ensuring that we have Wales-only Bills? The Children's Commissioner for Wales Bill was the first and perhaps most publicly understood and well-known one, but concern has been expressed about what would happen if there was a Government in Westminster of a different political complexion to that in the Assembly. However, you robustly counteracted that when you made your statement in June. Can you comment again on that issue in terms of the new circumstances that we will have in the future with regard to this maturing relationship?

The First Minister: There are three points there. One is that the more that Assembly Members and MPs work together on an issue, the more they will wish to do so further in the future, because what you are doing is overcoming a kind of inhibition and the need for flexibility in timetabling things and in ensuring that you reduce the length of time and the silly nonsense of people having to do things twice over, provided that you can overcome the physical obstacles. If you are going to have joint scrutiny, it involves being in the same place at the same time. However, the more used you get to doing that, you can see that, for the public outside, it is far more sensible than a House of Commons committee doing something and then the Assembly doing something separately. If it can be done on a joint basis, it is quicker, better, and it is much better overall for witnesses, who do not get paid to be full-time politicians. Secondly, there is the issue of how you think the British constitution works, and then, finally, I will come on to the cohabitation question.

I believe, and there are others like me, that the British constitution—others will take a different view, especially academic constitutional lawyers, who take a strict view that the British constitution should all be written down, so that you can discuss it, admire it and write papers about it—evolves in a very flexible way. Provided that you can establish custom and practice about the Assembly and the Houses of Parliament evolving a satisfactory set of

working arrangements in which Parliament can release powers to the Assembly, then that fits in very much with a tradition of the British constitution evolving flexibly according to the time, rather than according to a strict set of constitutional rules that are set down and which you then cannot change without some massive constitutional upheaval. In America, for example, you have to have 75 per cent of the states agreeing to change in their own referenda, or their own congresses and so forth. If you have a written constitution, you have to work out how you can change it, because you cannot have it so that you cannot ever change it, whereas the British constitution, in not being written down, is much easier to change.

Finally, on cohabitation, what happens, and is the White Paper proposal workable with regard to cohabitation? It is something that you want to see designed for cohabitation. Obviously, as a democratic politician in a competitive contest of politics, I do not want cohabitation—I would rather have Labour staying in power here and in Westminster forevermore, but I know that that is absolutely not possible. In any democracy, the tide always turns and the pendulum always swings the other way.

11.10 a.m.

Therefore, the question is whether this is workable, and more workable than the present system. Provided that custom and practice have been established, and there is an opportunity for there to be some exercise of the new provisions of the White Paper—and you cannot predict the outcome of the 2007 Assembly election—a change of Government in Westminster following getting a few Orders of Council under our belts in a typical session would lead to people saying, 'That is how it works. That is fine; we know how it works and we can continue to operate that system'. Whereas under the present system it is very hard to see why, when we make an approach from here for primary legislation to be passed on our behalf in Westminster, any future Conservative Secretary of State in Westminster would take the time to take a non-Conservative Assembly administration's Bill through the Houses of Parliament, when he or she did not believe in a single word of it.

[421] **Jane Hutt:** So the strength of our present settlement and the backing of the Assembly, and the fact that we are talking about devolved functions that are in our purview anyway, are important in terms of a message coming through from the Assembly. It could be an Executive measure or a committee or a backbench measure, but with the backing of the Government here.

The First Minister: You have to have something that provides for someone outside the ministerial set-up here to also have the ability to put a measure to the Assembly. If the Assembly passes the measure, it should have the ability to go into the Order in Council procedure as a measure coming from Ministers; in the same way that private Member's Bills in the House of Commons have a chance, though it is not always a great one without some measure of Government support. The same would probably apply to any private Member's Bill here, it would have to get some kind of Government backing, otherwise the Government would not find the time for it, but I do not think that proposing measures should be exclusively a matter for Government. There must be some sort of safety valve for backbenchers to have the right to come in with measures, provided that they get the backing of the Assembly, and to persuade the Government that it is a sound and sensible thing to do, even though it was not its original priority, in the same way as the private Member's Bill in Westminster.

[422] **Jane Hutt:** I have one more question, which is about the capacity of Government in terms of taking this forward, particularly in relation to the drafting of Orders in Council. Do you have any comment or thought about how we would have to build the capacity and competence of Government in this respect?

The First Minister: It is probably no different from what we have gone through over the past six years, in that we all accept that the history of administrative devolution, that is pre-1999 devolution, was very different in Scotland and Wales. The Scottish Act of Union 1707 preserved the Scottish legal system as separate, therefore there was always a body of legislation to be updated, so there were four or five Scottish Bills a year going through Westminster between 1707 and 1999, updating legislation on commercial law, bankruptcy, fostering and adoption or whatever it might be. No law lasts forever, and every 50 years or so you have to modernise your body of legislation. We did not have that in Wales. We had hardly any body of Welsh law that required updating, and therefore we were distinctly rusty and out of practice in 1999. We have coped reasonably well with the uplift in legislative input, in going from one Act every five years to one a year. This will enable our legislative competence to evolve and develop, and enable the civil service, legal, non-legal and ministerial, as well as the Assembly, in scrutiny terms, to move up another notch. It is not such a huge rise that it would give me doubts about the Assembly's ability to cope. I am sure that we will be able to cope.

[423] **Lorraine Barrett:** How do you believe that secondary legislation should be scrutinised post-2007? Do you have any views on the important kinds of legislative Orders and strategic plans that should continue to rest with the Assembly?

The First Minister: It is a bit difficult for First Ministers to start laying down the law about how secondary legislation should be scrutinised; that is primarily a matter for the Assembly as a legislature. In being much more of a legislature in the future, it will want to make its own decisions on how to achieve scrutiny.

I have said on many occasions that if the legislative input or the proportion of time spent by the Assembly on legislation were to rise from the present 10 per cent to 50 per cent, or something of that sort, which is what I would anticipate, the Assembly will get a lot better in terms of teams of backbenchers scrutinising. It is a maturing of the Assembly right across the board, as I said at the end of my answer to Jane's last question. That maturing will apply to civil servants, lawyers, Ministers, backbenchers and Chairs of scrutiny committees, in order to go through the legislation. However, I will not say whether it should be done by subject committees, special committees, standing committees, or scrutiny committees. I do not think that I should prescribe it.

You mentioned strategic plans and legislative Orders. Hugh, do you want to deal with the question of legislative Orders? I am sorry; I did not introduce Hugh Rawlings earlier.

[424] **The Presiding Officer:** I think that we have met Mr Rawlings before—he was once seen masquerading as a Presiding Officer, but I have forgiven him for that. [*Laughter*.]

Mr Rawlings: That was a long time ago, Presiding Officer.

The issue concerning secondary legislation is that if we are talking about the measures that the Assembly will make post 2007, I would expect that the Wales Bill will stipulate some sort of basic principles, standards or procedures that will have to be observed in the scrutiny of those measures. For example, I could refer you to section 36 of the Scotland Act 1998, which talks about a Scottish Bill having to have a discussion of the general principle, a consideration, effectively, of line-by-line scrutiny, and then a final vote to decide whether to approve it or not. We might well have something like that for the way that measures are examined in the Assembly. However, the precise way in which that would be done, how the flesh would be put on those bare bones, would be a matter for Standing Orders.

The First Minister: In other words, it depends on what exactly you mean by secondary legislation. If, as Hugh put it, you include an Order in Council, which, I suppose, is a form of

secondary legislation, but with a lot of meat on it, then it is hard to imagine another process. It would be nice to be totally original about these matters, but having gone round the block and thinking 'We must do things in a new and different way,' you come back to having some sort of Second Reading debate on the principle, setting up a committee to go through it line by line and then a debate, in the end, on the amended Bill, which is boring because it copies the procedure used in Scotland and Westminster. However, until somebody comes up with a better one, you are still going to come round to that kind of model.

I do not know whether we could have an exchange of views in writing on this question of the legislative Orders and the strategic plans—the spatial plan is the obvious example. Perhaps we could come back to how you would deal with the approval of something at that level, which is not strictly speaking legislation. We could put a few ideas to you, as a committee, or you could put a few ideas to us—I do not mind which—and we could bounce them back and forth before you complete your work by the end of the month, or the end of August, whenever you are going to complete it.

[425] **Kirsty Williams:** Coming back to the issue of how you would put the meat on the bones, so to speak, the committee has received conflicting evidence about how the Orders in Council might work. The Minister, who repeated this statement on the White Paper in the House of Lords, said that the Orders in Council may contain little more than the long title of a Bill. However, Professor David Miers, who has already given evidence to this committee, believes that the intention outlined in the White Paper is that the Order in Council be much closer to a worked-up Bill, having gone through the procedures that you have described before going any further to London. What is your expectation of how the procedure will work?

11.20 a.m.

The First Minister: I would side with the Government. I read David Miers's paper; it is a wonderful paper, and it really is a very good eye-opener into the constitutional-lawyer type of mind, if you like, but I think that he is quite wrong about the issue of what it is that Parliament is being asked to devolve. It is being asked to devolve a scope, rather than a set of details. Therefore, that would fit in much more strongly with what the Minister said in the House of Lords, namely that it is something akin to the long title. You could not have a situation in which the Assembly had to write and debate the Bill before it even went to Parliament, with Parliament then giving you the right to pass that particular Bill, thereby turning it back to the Assembly to go through it again. That seems to be completely unworkable. It is something much more akin to the long title, and it is the appropriateness of transferring the scope contained in that long title, and not the details of the Bill that has already been filled in in all its lines by the Assembly. The Assembly could have gone to an awful lot of abortive work in trying to write a Bill, only to find that the Secretary of State does not like the principle.

[426] **Kirsty Williams:** To come back to this issue of appropriateness and inappropriateness, and to test Professor Miers's evidence a little further, he pointed out the Lords' committee definition of contentious. How would you anticipate defining the parameters of what is politically contentious before proposing an Order?

The First Minister: Hugh may want to come in on the back of this because I think that he knows some of the examples better than I do. However, we do not share that view, and the whole purpose of this is that you could call it 'not a politically contentious issue'; in other words, it might be constitutionally contentious, but not politically, in the partisan sense, contentious. That is, is it appropriate, given the Assembly's powers, and given the case made by the Assembly, to transfer this power to legislate in a particular area within this scope to the Assembly from Parliament? Here is a request from the Assembly, now you have to ask

whether it is politically contentious. In one meaning, no, it is not, as it is a constitutional issue, is it not? It is about the appropriateness of making that transfer of a capability or competence from one body to another.

I think that he was being unduly pessimistic about the view that the House of Lords would take. However, again, it is a matter of how the British constitution works. This is a unique proposition, and if their lordships test it in their consideration of the Bill and the White Paper and they approve it, then it sets up a precedent, as something that is being done for the first time. Everything has to be done for the first time, as does this, and once it has been done for the first time, it will be done on several more occasions. It will be a different matter once they have got used to a particular type of National Assembly Order in Council transfer of powers, and all previous precedents relating to regulatory reform Orders are not strictly relevant.

Hugh, do you want to add any examples of this issue of political contentiousness in Orders in Council?

Mr Rawlings: I will make just one, if I may. The most recent example—in fact, the only example that I am aware of—in which the Lords threw out a regulatory reform Order as being inappropriate for that process was an Order that attempted to make major and significant reforms to the registration of births, deaths and so on. Bearing in mind that this was a 75-clause Order, and that it amended primary legislation quite significantly, and that the process that was envisaged was that it would just go through on a regulatory reform Order without the possibility of Second Reading, Committee Stage and so on, in that case, I think that the committee was saying, 'Sorry, wrong procedure; this is stuff that needs to be examined from a political standpoint as there could be different points of view on this', therefore it was deemed inappropriate for that procedure. I think that the situation that we are talking about, where, as the First Minister said, you have a relatively self-contained question—whether it is appropriate for a particular subject matter, on which the responsibility for legislating is sought, to be transferred or delegated to the Assembly—is a different kettle of fish from a 75-clause regulatory reform Order.

[427] **Kirsty Williams:** Would you, therefore, say that Professor Miers was also being unduly pessimistic, First Minister, when he suggested that the two-step process of applying for the Order in Council, getting it and using the power to achieve something in the Assembly, could take up to two or three years in timescale?

The First Minister: In answering these questions, I want to avoid sounding as though I am 'Miers-bashing'; I am not. He is doing his job as an academic constitutional lawyer extremely well. In other words, he is probing the areas where he may see weaknesses, or he may have a completely different model in his mind, and may believe that we should be going down an entirely different road—I do not know.

With regard to timing, on average, Bills are now increasingly subjected to the draft Bill procedure in one parliamentary year, the full Bill procedure in the following parliamentary year, and a commencement date usually in the following January or April. It would normally take about two and a half years to go from the starting point and the inception of a publication of a draft White Paper or a draft Bill, to the commencement of its powers. Depending on what happens to the draft Bill stage, the procedure should not take any longer than the present average of two and a half years. Some Bills are going through this year without a draft Bill stage, so sometimes it can be 18 months or so. Two to three years is not being unduly pessimistic—two and a half years is the average time from White Paper or draft Bill publication to commencement; three quarters of Bills are subjected to draft Bill procedure in the devolved fields. We can be at least as quick as that, if not quicker.

[428] **Kirsty Williams:** You have said that the new set-up would be more robust and that a

Conservative Secretary of State was unlikely to find the time to take a Bill through Parliament if it were on something in which he did not believe. If he were not prepared to do that, how much more likely would he be to allow Orders in Council to go through for something with which he fundamentally disagreed?

The First Minister: To a degree, it is more likely. In other words, provided that precedent has been set up and that a system is in place, it depends on how you think the British constitution works. If there was a Conservative Secretary of State in the future, for example, would it be worth the row with the Assembly to say 'We are rejecting this, and we will not take it through—we will not transfer this power to you'? It would depend on how many previous precedents there were of powers in the same field being seen as appropriate to transfer. At the moment, the argument from the point of view of time will be overwhelming. Under the present system, there are 75 bids every year for new legislation, and there are about 25 slots in a typical 12-month parliamentary year, although the present year is 18 months long. In a typical mid-parliamentary period, there are three times as many Bills as you can possibly get through, and it is much more likely that the Assembly Bill will find itself among the 50 rejected anyway, even from your own Ministers on your own side, than among the 25 that will get preference and which will appear in the Queen's Speech. You cannot use the time argument as regards failure to transfer an Order in Council—you must come out into the open and say that you do not agree with transferring the Bill. That may happen, but it is less likely than under the present system.

[429] **Kirsty Williams:** It is just perhaps whether you want to pick a row or not with the Assembly. Let us hope that David T.C. Davies never rises to those heady heights, or we could be in trouble.

[430] **David Melding:** Is that a nomination?

[431] **The Presiding Officer:** It is not appropriate for us to discuss absent friends.

11.30 a.m.

[432] **David Melding:** First Minister, from what you have said, it seems to me that Orders in Council are a very profound development of constitutional practice in this country. While the British constitution is not written down in one document somewhere, on display in the National Archives, it is slightly misleading to say that it is not written down anywhere. It is based on statute, and that statute, I suppose, is not as difficult as fundamental law to change. That is different to the United States' constitution, whereby there are all sorts of other requirements in terms of majorities. We do not have free rein; there are established patterns of behaviour in British political experience, and I want to explore that.

On how the system would survive a change of administration in London, and if there were a Conservative Government, for example, in Westminster and a Labour Government in Cardiff, from what you have said, it seems to me that if the Assembly is minded to adapt, modify, change and repeal legislation in a particular area via an Order in Council route, that request, because it has come from a democratically elected institution, which the Assembly undoubtedly is, is in most practical cases something that a Secretary of State for Wales could not decline to take forward. Is that a fair summary of what you think will be the machinery that will be in place here?

The First Minister: The Secretary of State would undoubtedly have the right to not take it forward, but the question is about whether the Assembly had made its case—that would be one of the key issues—and how well it argued that it was appropriate for the Assembly to have this power to act in the scope that is being requested for transfer. That is when I argue the bit from custom and practice as well. In Parliament, people will have to get used to this

idea of not arguing about the merits of a subsequent Bill, if you like, or the Assembly's use of the legislative power to be transferred. It is not about whether you like the legislation that might emerge from this, but whether you believe it is appropriate for the legislation to be made at the Wales level and not the UK level. It is about getting used to the idea of the appropriateness argument, or the argument from principle, and deciding whether it is right for this scope of legislative competence to be transferred. It think that that idea takes a bit of getting used to, because Members of Parliament are used to asking, 'Look, what are the merits of this measure?', and now they do not have a measure to consider the merits of, but rather a set of principles in the long title of a Bill, and they are arguing about the appropriateness of transferring it and not about the line-by-line scrutiny of the actual detail. It takes a while; a couple of years I would have thought. After half a dozen examples to work through, you begin to get it and to understand this argument about appropriateness. Once that argument has been established among Members of Parliament, it will, I hope, survive the cohabitation situation.

[433] **David Melding:** I believe that the Scottish White Paper that led to the establishment of the Parliament initially stated that the Secretary of State could not recommend for Her Majesty's Assent a Bill on policy grounds. By the time the debate started, that was withdrawn because it was seen to be incoherent that a Scottish Bill, having gone through that process, could then be blocked on policy grounds. Are you saying to me that a Conservative Secretary of State could, feasibly, block a request for an Order in Council on policy grounds, or is that what you are trying to prevent through this mechanism?

The First Minister: Yes, we are trying to prevent it, but you cannot rule it out. I was not aware of the situation in Scotland that you described, but I am not denying what you said at all. You set against that the way in which the Sewel motion procedure has evolved between the Scottish Parliament and the UK Parliament. In principle, what we are talking about here is a very general principle of how the Assembly works with the British Parliament, and it is no different to the way in which Sewel motions have evolved as a co-operative venture on the passing of legislation. Co-operative arguments over Sewel motions have been quite extraordinary, but it is just custom and practice; over six years it has very rarely led to disputes. In theory, you could have imagined enormous constitutional punch-ups over Sewel motions, but it has not happened. Why? That is the evolution of an unwritten constitution.

[434] **David Melding:** I am tempted to pursue the question of whether there is any difference in this system fundamentally from granting us primary powers, but we have accepted in the working of this committee that we should recognise the parameters of what is in the White Paper and how it might practically work, so I am keen to do that.

If the Government here makes a request to change policy and adapt legislation via this process, it seems to me that it would be wise for a Conservative Secretary of State, or whoever, to grant it if that request has been formulated in a coherent way. The parliamentary end of this procedure is going to be fairly minimal, is it not? It will be a simple long-title Bill, as was described in the House of Lords, and, yea or nay, the powers are granted. If we do not want parliamentary interference to start and for the practice there to change, when the powers come to us and we go through more or less the debate in principle, the Committee Stage and then the Third Reading, if we are not doing that scrutiny effectively as an Assembly, it will invite Westminster to say, 'There is no scrutiny going on here and this is a Government getting legislation very quick and fast, so, we may have to do some of this scrutiny and require it to come back before it gets voted through and the Order in Council is given'. It may come up with a different mechanism, saying, 'In principle, we grant this, but we want to see what you will produce'. Do you agree that at the scrutiny end, what the Assembly does as a legislature is crucial for you as a Government, because if that is weak, it could lead to a division in the relationship between Westminster and the Assembly?

The First Minister: I agree with all of that, but you have to set it against the context of the agonies of self-doubt that, in particular, the House of Commons has gone through regarding the quality of some of its own legislation, even that which was passed on a cross-party basis, such as the Dangerous Dogs Act 1991. Some of the legislation passed in the early 1990s is ranked as being among the worst legislation ever passed. People sometimes argue very strongly that the bicameral system is absolutely essential, meaning that the House of Lords, in its function as a revising chamber, is essential, as the House of Commons can sometimes simply pass legislation following a lot of stories in the *Daily Express*, the *Daily Mail* or *The Sun* about dog bites man or man bites dog or whatever, which leads to its feeling that it must do something, so something is done. That legislation is usually done in a hurry and is pretty dreadful. So, people have said, 'Thank God for the House of Lords, because it can take a more cautious attitude'.

That is not an argument for the House of Commons to look, as it were, in a very lordly way, down at either the Scottish Parliament as a unicameral legislature or the Assembly as a unicameral body with some legislative competence and say, 'We do things right, and you might do things wrong', because it has gone through huge self-doubts in this area. The Scottish Parliament is still unicameral, and can, therefore, pass things twice as fast as the Houses of Parliament. On the other hand, the House of Commons almost accepts the argument that it will sometimes do things on the basis of a political tide running very strongly, and it then needs the House of Lords to stop it drafting things on the basis of a tide of public opinion, which causes rash judgment in bringing in legislation that has not been properly thought through. That is the reason for the huge change that has happened over the last seven or eight years, with the bulk of legislation now being submitted to the draft legislation procedure. That means that it takes twice as long, but it enables proper witnesses to come in and give evidence based on their knowledge rather than the traditional line-by-line scrutiny by backbench Members of Parliament in committee challenging the Minister. This is largely seen to have been a waste of time by comparison with witnesses who know something about the subject giving evidence, rather than trying to pick out and say, 'Well, if you move that comma from that line to that line it would have a big bearing on the meaning of this particular clause'. The House of Commons has also gone through agonies of trying to improve the quality of its legislation. So, I do not think that it would be looking down on the Assembly. Everyone is interested in getting better scrutiny, and making sure that you do not legislate in areas on the basis of a political whim, but on the basis of having thought through properly the implications of an Act of Parliament.

11.40 a.m.

[435] **David Melding:** To try to push this a bit further, have you given thought to how many pieces of legislation you would be hoping to pass each year via the Order in Council mechanism, assuming that this process is robust and works effectively after 2007? You use the changes occurring in the mental health legislation as an example, which is a good one if you could disaggregate the non-Home Office side of that. It is important that the Assembly does not take on so much that it cannot effectively scrutinise. So, I am asking for some order of magnitude—four, five pieces of legislation? What would we be thinking about?

You also touched on another question. Most of us would acknowledge that the move to publish Bills in draft has been very welcome and helpful, and has allowed all kinds of bodies, voluntary organisations, experts and the public to comment in evidence sessions. We need to preserve that system, do we not? Once we have the long title passed as an Order in Council, we would need a draft mechanism, presumably under that, before our formal procedure started. Is that how you are thinking?

The First Minister: This is more a matter for the Business Minister, in a way, than for me, as First Minister, but I am a strong believer in the draft legislation procedure. This does not

mean that it has to be applied to every Bill. I probably voted for some of the rotten pieces of legislation that went through the House of Commons frequently because you could not have disagreements across the floor of the house on this or that subject, because they were so important. The only product of the failure to have the usual level of political contention was the passing of very dubious legislation. The key thing missing was not the political contention, but the expertise of witnesses, which you would have had with a draft legislation procedure. I follow the line taken by the late John Smith, who was a very strong believer in draft legislation. I think that it is very important, but that is not to say that you must do it every time. By and large, however, it is a much better system because witnesses from a particular field can indicate what they think a piece of legislation would do to the affected stakeholders. It is a much better method than the tried and trusted, but overrated, line-by-line scrutiny of legislation.

[436] **David Melding:** So, on the order of magnitude, will it be four, five or however many pieces of legislation?

The First Minister: That is a difficult question to answer, but I do not think that you are far off. It could be three, four or five, yes.

[437] **Jocelyn Davies:** I would agree with you, Rhodri, that the British constitution is incredibly flexible, which is why you can have this ingenious mechanism for getting what some people would say is the equivalent of primary powers without having to have a Bill that says so. Some people—devolutionists and anti-devolutionists—would, of course, find it objectionable as a concept to have a mechanism allowing something not contained in a Bill. You get a parliament, or a virtual parliament, in all but name.

You mentioned the Sewel mechanism, and that is certainly something that we would have to think about, although I suppose that we would call it something else. Our visit to the Scottish Parliament highlighted that there were definitely two views on that—as there are at least two views on everything. The expectation was that Sewel motions would decrease in number over time, when, in fact, the opposite has happened; they have increased in number. Some say that this is because the Scottish Executive would prefer the Westminster Parliament to legislate on things for which it would be unpopular. Others say that it is very pragmatic not to waste your own resources by legislating on a matter that will be legislated upon elsewhere and when you agree with the policy. We will, of course, have to work out who is making the agreement with whom—the Assembly with Parliament, or the Executive with the Executive. You might agree with the policy, but, during the Westminster process, the policy might change a little and might contain things that you do not like. This could be a problem. You need to be able to revisit it if there are changes to the policy and legislation that you say that you have agreed. Therefore, I think that we need to think about that.

The First Minister: The point that I was making about the Sewel motions was that they are a reflection of the flexibility of a system. When you have, in that case, two parliaments—one sovereign and one not quite so sovereign—having a working mechanism, you then find that, once you are used to the working mechanism, you use it more and more. Therefore, I am not surprised that Sewel motions have gone up in number and not gone down, as you say was anticipated by some people. It is simply that people find it convenient. There may be political reasons for the convenience, and not just pragmatism. There are sometimes issues in relation to popularity, or issues that are incendiary in Scotland and not elsewhere. On the other hand, however, it is a classic example of a flexible use of a constitution in an arrangement between two legislatures, which is what we are looking to establish here by custom and practice.

[438] **Jocelyn Davies:** But we must have a mechanism that allows us to revisit, if there are changes to exactly what you believe that you have signed up to, which I think is the—

The First Minister: I would never claim to be an expert on Sewel motions; I do not deny what you are saying.

[439] **Jocelyn Davies:** That is the failure of the current Sewel mechanism as it works between the Scottish and UK Parliaments. I am glad that you did not want to bash Professor Miers too much, because the most enthusiastic advocates of the White Paper that we have seen so far have been those from Cardiff Law School. I think that we would all agree that they were very enthusiastic about it. From his evidence, I felt that—you could argue about how worked up this idea needs to be before you present it—going on from what you have said today, you would need some sort of robust pre-request stage. I could argue that we should, on occasion, ask for powers just for the sake of it—for the empowerment of Wales and of the Assembly—as a principle. However, you say that you need to justify it for specific purposes, so implicit in that is a justification. Therefore, Professor Miers was probably right on those grounds and that you would need some sort of pre-request stage, which we must invent.

The problem with that approach is that you could say that you want this power to do A, B and C, and you might do A, B and C; then, later on, a future Assembly might do D, E and F, which was not envisaged when you applied. Therefore, when you go for the justification, and you say that it needs to be justified, these are going to be enduring powers, and there is a danger there that there may be a certain amount of caution, and caveats will be attached, envisaging that a future Assembly may do something completely different with the powers that have been granted.

The First Minister: Is that not the issue about appropriateness being the principle behind the parliamentary consideration of whether or not to transfer this particular scope to the Assembly? That is not to say, 'What is it going to do with it, and we want to see it on a line-by-line basis before we even agree whether we can vote on transferring it or not?'. It is about getting used to that issue of arguing about the appropriateness of making a transfer of this scope, rather than about what the Assembly is going to do with it.

As regards the short term, you are right. If you take the present White Paper, which is likely to lead to a Bill, including a classic, good 13.2 example for us all to consider, for example, on smoking in enclosed public places—which originated with a private Member's equivalent procedure for us in the Assembly, rather than, strictly speaking, with the Assembly Government's request for legislative power—Members of Parliament, in considering the framework part of the Bill, when it becomes a Bill later this year, could say, 'We are not going to transfer this power until we know whether the Assembly is going to ban smoking in enclosed public places, and we have had a plea from the Brewers' Association in Wales not to do it, because it knows what the Assembly is going to do with it', and so on. Parliament may look at it that way and say, 'We demand some sort of assurances from the Assembly that it will not go any further than the English legislation', and so on. One would like to think that that argument would be slapped down, because the issue here is about the appropriateness of the Assembly making the determination for Wales, while the British Parliament will make the determination for England, on the basis of whether it is better determined in Wales or not, not on exactly what form the ban will take, and so on.

11.50 a.m.

It will be able to read our debates and look at the votes, and draw its own deductions as to what the consequences are. However, what it will determine is the appropriateness of making that transfer of scope to the Assembly, not demanding assurances about what you would and would not do with a power if you did transfer it. You are right that it is an enduring transfer. There could be a change of Government here, and the brewers' pleas to do something different about the ban in enclosed public spaces might persuade a Government of a different colour to change a ban. In two or 10 years' time, it could all go back the other way. That is

democracy. However, the issue is the appropriateness of the transfer. We really have to work at getting that into everyone's heads in order to help people, including Members of Parliament, Assembly Members, commentators and constitutional lawyers, to understand. We must concentrate on the appropriateness of making the transfer, not what we are going to do with it.

[440] **Jocelyn Davies:** I certainly hope that that will be the case. I would not want to see caveats attached to the powers. From my point of view, empowerment as a matter of principle is very important. One of the examples given in the White Paper was the welfare and protection of children. I do not know whether you have read the transcript of our session with Cardiff Law School.

The First Minister: No, I have not.

[441] **Jocelyn Davies:** Some of us are very disappointed that the UK Government pulled back from a full ban on smacking children—you can smack your children as long as you do not leave marks on them. If we were to have powers over the welfare and protection of children, it seems obvious that Assembly Members would probably want to go a stage further and say that people could not smack their children. We would say that if people wanted to smack their children—still without leaving marks—they would have to take them to, say, Gloucester, but that while they were in Wales, they could not lay their hands on children. Using that as an example, I asked David Lambert whether such powers would be possible. He said that the mechanism of Orders in Council would probably allow that. Do you agree? He justified that by saying that the Orders in Council need not have very hard edges. They could be a bit fuzzy, and so we might be able to create a criminal offence. He said that there might be scope for incidental powers in non-devolved areas that could be granted specifically to approve that policy area.

The First Minister: I will ask Hugh to come in on the issue of incidental powers. I am familiar with, but not an expert on, the principle that we already have a small number of powers to exact fines, where they are implicit in the legislative powers that we have with regard to local government or whatever. There is a much wider issue, which may prevent legislative competence being transferred to us—as regards, for instance, the creation of an entirely new criminal offence of parents smacking their children—which is that it may take us into the field of criminal law per se, rather than being a case of incidental powers.

[442] **Jocelyn Davies:** A criminal offence already exists.

The First Minister: I understand that. I will ask Hugh to comment on that, because I am getting into an area that I do not feel legally competent to deal with. It is a matter of where the line is between being able to argue that the criminal aspects are totally incidental and something that is seen as being definitely a matter of criminal law. Criminal law is not devolved, and therefore we could not ask for the transfer of a power in such a case. Hugh, do you want to show your erudition in these matters? It is far greater than mine.

[443] **Jocelyn Davies:** I asked David Lambert about this because his paper said that we could be given an Order in Council for the welfare and protection of children. The question was: what more could you ask for? An easy answer that comes to mind is: the removal of the right of parents to smack their children as long as they do not leave marks on them.

Mr Rawlings: To an extent, this is a question of how the Order in Council conferring enhanced powers on the Assembly is formulated. For example, if it were formulated on the basis that the Assembly was seeking powers to make amendments to criminal law in relation to assaults on children, it would not come within the framework that we are talking about, because it does not relate to a field within which the Assembly has executive functions. On

the other hand, if this were seen to be an example of an incidental consequence of an Order in Council that was about the protection of children, that might be a possibility, because we are looking hard at exactly what sort of powers ought to be available to the Assembly in relation to enforcement and sanctions when it is given powers to legislate in any of the fields under an Order in Council.

So, I think that, to some extent, it is a question of how the request is formulated. If it is formulated in connection with action taken within a field in which we have functions already, it is much more likely to be an acceptable proposition than if it is done at large. As regards the amendment of the criminal law, we are not going to be putting in bids to allow us to change the law of murder, but it is that sort of thing. Why? Because that is not in connection with one of the fields in which we have functions. If we are talking about the protection of children, then it might be in connection with that, and therefore incidental powers might operate.

[444] **Jocelyn Davies:** Obviously, since 1999, we have had some experience of how warm the breeze has been blowing from Westminster and, in some areas, it has been more encouraging than in others. You know that we have had resolutions in the Chamber about granting us wide powers, and we all approved the Rawlings principles following the Assembly review of procedures and discussions there, but it has not been very consistent across departments. Certainly, I have read that the Department for Environment, Food and Rural Affairs actually opposed powers coming to the Assembly under the Pollution Prevention and Control Act 1999, because it was a bit concerned about granting us the same discretion as a Minister would have in Westminster. However, when the Richard commission sat, unfortunately, it did not speak to Government departments, so we have no idea whether that is still true. It is all very shady and cloudy and consists of rumours more than anything else, rather than being out in the open, because we did not actually speak to them. How confident are you therefore that all departments will see the light now and be more generous in the way that the drafting takes place and the way that powers are conferred upon the Assembly?

The First Minister: That is certainly the intention of 13.2 stage 1, namely that all departments are circularised by the Office of the Leader of the House of Commons to say ‘Right, from henceforth, please follow the framework principle’. There may be exceptions of course for technical reasons where you just cannot follow the framework principle but, by and large, we expect the inconsistency to which you refer either to be a thing of the past already as a result of what was in Labour’s manifesto, or to become a thing of the past pretty rapidly. Previously, departments simply varied in the degree of empathy with the principle of devolution, or the way in which they latched on to that when framing a Bill. We hope that that inconsistency has been knocked on the head now.

[445] **Jocelyn Davies:** I have just one last question. Looking back now, I have concerns that the last White Paper was oversold on what we would be able to achieve. How will you avoid the danger of overselling this White Paper and giving people entirely the wrong impression?

The First Minister: On your allegation of an overselling of the previous White Paper, I think that most people have said that that has been far more true of Scotland than Wales. That is, there is much more of a school of devolution betrayed or creating disappointments in Scotland than in Wales. I think that expectations were lower in Wales and, therefore, it has been harder to disappoint. However, in any case, because this is the second White Paper on the same field within the space of eight years, I think that the danger of overselling is much less, and that is why I tend to emphasise—as I did in answer to Jane’s question almost exactly an hour ago—this issue of what it is for. It is not about status, and it is not about Assembly Members, Ministers, or the Assembly as a whole having ideas above its station; it is about wishing to have the tools to do the job, which we do not have now.

[446] **Y Llywydd:** Kirsty Williams nesaf, a byddaf innau wedyn yn gofyn cwpwl o gwestiynau byr a syml i gloi.

[446] **The Presiding Officer:** Kirsty Williams is next, and then I will ask some brief and simple questions to close.

12.00 p.m.

[447] **Kirsty Williams:** First Minister, you said earlier that we were all in the business of improving scrutiny. What kind of powers do you think the committees of the Assembly should have to summon persons, papers and civil servants to come before them? Everyone that has appeared before this committee to date has unanimously said that the Assembly should draft its own Standing Orders. How amenable do you think the Secretary of State will be to this?

The First Minister: I see no reason why the power to call for papers and persons should be any different in the Assembly to the House of Commons. The only area of difficulty, outside the audit process, is where a committee will demand the presence of such and such a civil servant as part of its inquiries, but the Prime Minister in the House of Commons has the right to send a Minister instead of, or as well as, the civil servant. That seems to me to be the principle to which we should adhere here as well: from time to time, the First Minister may decide either to substitute or to add the Minister because of the principle of a civil servant acting on behalf of the Minister and therefore not having a separate personality, except in audit terms when functioning as accounting officer.

The second question was on Standing Orders. The Secretary of State has been quite clear that he does not want the job of drawing up the Assembly's Standing Orders, but he may need to be involved in resolving any stalemate that could arise. So, if the Assembly can come together to prepare a new set of Standing Orders that are appropriate to the consequences of the Bill, as and when it gets passed, and provided that we have solid evidence of cross-party consensus on it, I am sure that the Secretary of State can sign it off. He has to have a reserve power in case we cannot come to an agreement. That is the dilemma that we all face. We all accept on principle that it is better for the Assembly to do it than the Secretary of State, but how do we get going here, post Bill, if there is no agreement on Standing Orders. I hope that we can resolve that in advance of the next Assembly elections.

[448] **Y Llywydd:** Tynnaf eich sylw at ychydig o bethau, a'ch dwyn yn ôl at y cam cyntaf yma ym mharagraff 1.24, sydd yn dweud,

[448] **The Presiding Officer:** I draw your attention to just a few things. I return to this first step in paragraph 1.24, which says,

'Yn gyntaf oll, mae'r Llywodraeth yn bwriadu dirprwyo – ar unwaith'.

'First, the Government intends immediately, to delegate'.

Beth yn union yw ystyr 'bwriadu...ar unwaith'? Hynny yw, a yw hyn wedi digwydd neu a yw'n mynd i ddigwydd cyn i'r Mesur ddod gerbron y Senedd?

What exactly does 'intends immediately' mean? That is, has this already happened or is it going to happen before the Bill comes before Parliament?

Y Prif Weinidog: Fe'i disgrifiwyd fel 13.2. Hyd y gwn i, mae adrannau'r Llywodraeth yn San Steffan a Whitehall yn awr yn ymwybodol o egwyddor newydd pan ddônt at ddrafftio deddfwriaeth dros Gymru a Lloegr. Maent i fwrw ati ar ffurf fframwaith yn hytrach na'r modd traddodiadol. Nid yw hynny'n ddieithriad; efallai bod rhesymau

The First Minister: It was described as 13.2. As far as I am aware, Government departments in Westminster and Whitehall are now aware of a new principle when they come to draft legislation for Wales and England. They are drafting along the lines of framework legislation rather than using the traditional method. That is not without

technegol ambell waith sy'n golygu nad yw'n bosibl gwneud hynny. Fodd bynnag, mewn egwyddor, a hyd y gwn i, mae pob adran yn San Steffan yn ymwybodol o hynny.

exception; there may be technical reasons why that is not always possible. However, in principle, and as far as I know, every Westminster department is aware of that.

[449] **Y Llywydd:** Mae hyn yn mynd i ddigwydd, felly.

[449] **The Presiding Officer:** So this is going to happen.

Y Prif Weinidog: Yr ydym yn meddwl y bydd.

The First Minister: We believe so.

Mr Rawlings: All Bill teams currently working on the current legislative programme have had their attention drawn to the relevant paragraph in the White Paper.

[450] **Y Llywydd:** Felly, pe bai'r pwyllgor yn mynd ati i sicrhau bod hyn wedi digwydd drwy geisio tystiolaeth—ysgrifenedig efallai—oddi wrth yr adrannau, a fyddai problem ynglŷn â hynny?

[450] **The Presiding Officer:** Therefore, if this committee tried to assure itself that this had happened by seeking evidence—in writing, perhaps—from departments, would there be a problem with that?

Y Prif Weinidog: Nid wyf yn dweud bod cylchlythyr wedi mynd at bob adran. Nid wyf yn siŵr o hynny. Fodd bynnag, maent wedi cael neges bod y Papur Gwyn yn sefydlu egwyddor newydd. Nid yw hynny'n ddieithriad am fod rhesymau technegol dros ambell eithriad.

The First Minister: I am not saying that a circular has been sent to every department. I am not sure about that. However, they have had the message that the White Paper establishes a new principle. That is not without exception, as there are technical reasons for the odd exception.

[451] **Y Llywydd:** Ond yr ydych yn deall pam y byddem am ymchwilio i ystyr 'ar unwaith' yn y cyd-destun hwn, onid ydych? Mae'n sefydlu'r egwyddor yn y pen cyntaf. Wrth gwrs, mae hynny'n golygu defnyddio pwerau is-ddeddfwriaethol i weithredu yn y fframwaith hwn. Yr hyn sy'n dilyn o hynny yw pe bai pob adran y Llywodraeth yn Whitehall yn gwneud hyn, byddem yn gweld sefyllfa lle y byddai'r Senedd yn barod i roi i'r Cynulliad, drwy is-ddeddfwriaeth, mwy o bwerau nag a roddwyd i Weinidogion Whitehall—nid ydym yn arddel yr enw 'Neuadd Wen' yn Gymraeg gan ei fod yn peri dryswch.

[451] **The Presiding Officer:** But you understand why we would want to delve into the meaning of 'immediately' in that context, do you not? It establishes the initial principle. Of course, that means using subordinate legislation powers to work within this framework. What follows on from that is if every Government department in Whitehall were to do this, we would reach a point where Parliament would be willing to transfer greater powers to the Assembly, through subordinate legislation, than to Whitehall Ministers—we use 'Whitehall' and not 'Neuadd Wen' in Welsh because it could cause confusion.

Mae dadl ynglŷn â rhoi mwy o bwerau i'r Cynulliad nag i Weinidogion Whitehall, oherwydd bod y Cynulliad yn gorff democrataidd. Fodd bynnag, oni fydd hi'n anaddas i'r pwerau hynny aros gyda'r Gweinidogion Cymreig ar ôl 2007? Pe bai hynny'n digwydd, a bod gan y Gweinidogion Cymreig mwy o bwerau, ond llai o graffu arnynt nag ar Weinidogion Whitehall, oni fydd hi'n angenrheidiol i'r pwerau a roddir i'r Cynulliad cyn 2007, a fydd yn bwerau

There is a debate about giving greater powers to the Assembly than to Whitehall Ministers, because the Assembly is a democratic body. However, would it not be inappropriate for those powers to remain with Welsh Ministers after 2007? If that were to happen, and Welsh Ministers had more powers, but less scrutiny than of Whitehall Ministers, would it not be necessary for the powers given to the Assembly before 2007, which would be more extensive than those given to Ministers in

helaethach na phwerau Gweinidogion San Steffan, gael eu gweithredu drwy Fesur ar ôl 2007? A ydych yn deall yr hyn sydd gennyf?

Westminster, to be done by means of a Bill after 2007? Do you understand what I am getting at?

Y Prif Weinidog: Nid wyf yn hollol siŵr. Mae'ch dealltwriaeth chi yn union yr yn peth â'm dealltwriaeth i o ran y gymhariaeth rhwng y pwerau a roddir i Weinidogion o dan y gyfundrefn bresennol, drwy bwerau Harri VIII ac yn y blaen, sy'n llai na'r pwerau yr ydym yn bwriadu eu rhoi i'r Cynulliad a'i Weinidogion.

The First Minister: I am not quite sure. Your understanding is exactly the same as mine in terms of the comparison between the powers transferred to Ministers under the current system, through Henry VIII powers and so on, which are lesser than the powers that we intend to give to the Assembly and its Ministers.

Ar yr un pwynt allweddol, y grym i greu deddfwriaeth newydd yn hytrach na dim ond i'w gwella wedi'i seilio ar ddeddfwriaeth sylfaenol sydd wrth wraidd pwerau Harri VIII. Mae hynny'n weddus, yr ydym wedi dadlau, achos bod y Cynulliad yn gorff democrataidd â'r gallu i graffu ar waith Gweinidog, felly nid oes angen cymaint o rwystrau neu ffiniau ar y pŵer a drosglwyddir oherwydd yr ydym yn siarad am gorff democrataidd yn hytrach na Gweinidog ac adran. Nid oeddwn yn siŵr i ble yr oedd y gymhariaeth yn mynd wedyn.

On the same key point, the power to create new legislation instead of only improving it is based on primary legislation that is at the heart of Henry VIII powers. We have argued that that is appropriate because the Assembly is a democratically elected body with the ability to scrutinise the Minister, therefore there is no need for as many restrictions or limits on the powers transferred because we are talking about a democratic body rather than a Minister and a department. I was not sure where the comparison was going after that.

[452] **Y Llywydd:** Y ddadl yw, os oes pwerau gan y Gweinidogion Cymreig ar ôl 2007, a fydd yn addas i'r pwerau hynny aros gyda'r Gweinidogion os bydd llai o graffu arnynt nag ar Weinidogion Whitehall? Dyna'r ddadl. Hynny yw, byddai ein Gweinidogion mewn sefyllfa lle byddai llai o graffu ar eu defnydd hwy o'u pwerau, o bosibl, nag y byddai Gweinidogion yn Whitehall yn ei wynebu.

[452] **The Presiding Officer:** The argument is that, if Welsh Ministers have powers after 2007, would it be appropriate for those powers to remain with the Ministers if they were to be scrutinised less than Ministers in Whitehall are? That is the argument. That is, our Ministers would be in a position where there was possibly less scrutiny of their use of their powers, than that faced by Ministers in Whitehall.

Y Prif Weinidog: Mae hynny yn torri ar draws y ddadl wreiddiol ynglŷn â'r broses a chryfder a dyfnder y broses ddemocrataidd yma. Dim ond oherwydd ffydd a hyder yn nyfnder a chryfder y broses a'r sialens ddemocrataidd y byddech yn barod i drosglwyddo pwerau helaethach i Gymru ac i'r Cynulliad nag y byddech yn ei wneud i Weinidog o dan y system bresennol.

The First Minister: That contradicts the original argument about the process and the robustness and depth of the democratic process here. Only because of faith and confidence in the robustness of the process and the democratic challenge would you be willing to transfer greater powers to Wales and to the Assembly than to a Minister under the current system.

[453] **Y Llywydd:** Un cwestiwn olaf sydd gennyf, ac yr ydym wedi trafod y mater hwn sawl gwaith o'r blaen. O ran paragraff 2.6, mae holl resymeg y Papur Gwyn yn pwysleisio'r gwahaniad rhwng Senedd a Llywodraeth ac mae hynny wedi digwydd yma, i bob pwrpas, o fewn fframwaith y

[453] **The Presiding Officer:** I have one final question, and we have discussed this matter many times before. On paragraph 2.6, the whole reasoning of the White Paper emphasises the separation of the legislature and the Executive and that has happened here, to all extents and purposes, within the

Ddeddf bresennol, ac yr wyf yn gwerthfawrogi hynny'n fawr iawn a'ch cyfraniad chi, fel Prif Weinidog, wrth alluogi hynny i ddigwydd. Fodd bynnag, gyda gofid, gwelais, ym mharagraff 2.6, fod yr hen enw annwyl 'Llywodraeth Cynulliad Cymru' i barhau. Onid yw hynny mewn gwirionedd yn parhau â'r dryswch? Os oes dryswch, onid yw parhau i ddefnyddio'r un enw yn achosi dryswch? Mae rhai tystion, er enghraifft pobl o'r cyfryngau ac academyddion, wedi ateb y cwestiwn hwnnw yn gadarnhaol.

framework of current legislation, and I appreciate that greatly and your contribution, as First Minister, in enabling that to take place. However, with concern, I noted in paragraph 2.6 that the dear old name 'Welsh Assembly Government' is to remain. Is that not, in reality, just prolonging the confusion? If there is confusion, will not continuing to use the same name only cause confusion? Some witnesses, for example people from the media and academics, have answered that in the affirmative.

12.10 p.m.

Dyna oeddwn am ei ofyn iti. A ystyriwyd ymhellach enw symlach a haws ei ddeall yn ôl rhesymeg y Papur Gwyn?

That is what I wanted to ask you. Has any further consideration been given to a simpler name that is easier to understand according to the reasoning of the White Paper?

Y Prif Weinidog: Nid mater o draddodiad yn unig yw'r enw. Gwyddom oll nad oes fawr o resymeg yn y teitl 'Prime Minister'—tipyn bach o Ffrangeg a Saesneg ydyw, ond mae pawb yn gwybod ei ystyr. Yn yr un modd, mae 'Her Majesty's Government' bach yn hen ffasiwn yn awr, gan nad yw'n cyfeirio at gyfrifoldeb y Senedd yn hytrach nag Ei Mawrhydi, ond mae pawb yn deall yr ystyr ac yn gyfarwydd ag ef. Nid yw hwn yn fater o ba mor resymegol yw'r teitl ac a yw'n bosibl i rywun gael ei gamarwain ganddo, ond, yn hytrach, a ydych yn gyfarwydd â'r teitl ac yn gwybod ei ystyr. Dyna'r rheswm am gadw pethau yn syml, ac i beidio newid enw, cyhyd â bod pobl yn deall yr ystyr. Dyna'r ddadl.

The First Minister: The name is not just a matter of tradition. We all know that there is little logic behind the title 'Prime Minister'—it is a little bit of French and of English, but everybody knows what it means. In the same way, 'Her Majesty's Government' is somewhat old fashioned now, because it does not refer to the responsibility of the Parliament instead of Her Majesty, but everyone knows what it means, and is familiar with it. It is not a matter of how logical a title is or whether it is possible for someone to be misled by it, but of whether you are familiar with the title and know what it means. That is the reason for keeping things simple, and not to change anything, provided that people know what it means. That is the argument.

[454] **Y Llywydd:** Cofnodwyd hynny, ac ni chredaf fod diben inni fynd drwy'r ddadl honno ymhellach. Diolch yn fawr ichi am ddod, ac i Hugh hefyd am gyfrannu at y broses.

[454] **The Presiding Officer:** That has been recorded, and I do not think that there is any point in our taking that argument any further. Thank you very much for coming, and to Hugh also for contributing to the process.

Y Prif Weinidog: Diolch yn fawr. Yr oedd yn bleser.

The First Minister: Thank you. It was a pleasure.

[455] **Y Llywydd:** Yr ydym yn awr yn mynd o un Rawlings at un arall. Croeso i'r Athro Rawlings a'r Athro Hazell.

[455] **The Presiding Officer:** We now go from one Rawlings to another. I welcome Professors Rawlings and Hazell.

[456] **Jane Hutt:** Welcome. To start, Rick, it would be helpful to have your response on how you feel that things have moved on with regard to the Rawlings principles in relation to the White Paper, following your book, *Delineating Wales*. Also, as you have heard the First

Minister's evidence this afternoon, it would be helpful to have your response on that, particularly on the issue of the apparent dominance of individual departments in Whitehall in driving primary legislation. The First Minister said that he feels that the inconsistency has been knocked on the head. I think that it would be helpful to hear from you whether you think that we have the opportunity to move forward with the enhancing powers and opportunities and to tackle that or knock on the head the inconsistency that you feared would prevent us from delineating Wales appropriately. Robert might have a comment to make on that too.

Professor Rawlings: I will answer that question in two ways. First, the White Paper clearly does present a new opportunity, and the First Minister must be right on that. Coming down this morning, I was thinking of a metaphor to answer this question, and I came up with 'a flotilla of big ships'. You could think of each Whitehall department as being a very big ship, which is difficult to turn around. Trying to turn the whole flotilla around is even more difficult. We must accept, and I took the First Minister to take this point, that this will not happen overnight; it will be a difficult process to achieve, and I incline to the sceptical side about whether it will be achieved.

The second way in which I would like to answer the question is to pick up on a point that was the import of the Presiding Officer's question at the end. It seems to me that the committee could usefully ask the further question as to whether the committee would like to see the Rawlings principles in operation after 2007. It raises a profound question as to whom in the devolved administration these powers would be given. If we go back to the Rawlings principles, the argument that the Assembly and the Presiding Officer in particular were making, was that it was an essentially an argument based on the idea of a corporate body, in that the secondary powers were being given to the corporate body and that it had powers of full scrutiny. It owned them, in a sense, because it could amend draft legislation. It could do everything, in a way that Westminster could not. We must now project forward after 2007 and the division, because we will not be in that situation any more. We will have a legislative branch in the Assembly, and we will have an executive branch. I am troubled by the idea—and I think that this was the import of the Presiding Officer's question—about giving to Assembly Members wider executive powers than the Parliament would give to UK Ministers in respect of England. I find it a very difficult idea, and therefore it seems that two things could flow from that. You might expect step 2—Orders in Council, to overtake step 1, and that step 1 would wither away. You would have England and Wales Bills, but you would have the same kinds of powers being given to Assembly Ministers—not necessarily the same powers, but the same breadth of powers—as a UK Minister would have in relation to England. So, step 1 would wither away.

The other point is—and again this was the import of the Presiding Officer's question—that if we are to persist with step 1, the necessary corollary of that is that those wider powers under step 1 should not be allocated after the division to the Executive in Cardiff, but should go to the Assembly as the legislative branch of what we can call the devolved administration.

[457] **Jane Hutt:** I do not know whether Robert also wishes to comment on the question.

Professor Hazell: I have nothing to add. Please forgive me if I am a little reticent with the committee today—it is because of two reasons. One reason is that my offices in London are in Tavistock Square, so since last Thursday I have not been allowed back in, and I am not as well-prepared as I would have wished. The second reason is the strong reason that Rick is a greater expert on all these matters than I am. Such expertise as I have tends to be mainly towards the Whitehall and Westminster end of things, but, if I may, I will in general defer to Rick.

[458] **The Presiding Officer:** Do not worry, we will get to the Whitehall and Westminster end of things.

[459] **Jane Hutt:** To follow up that issue—I am trying to keep up with you, Rick, in terms of your response—we have to understand what powers and what opportunities that result from the transfer of those powers are transferring to the Ministers and the Assembly as a whole, and, with the separation, the need for the scrutiny of our Ministers will become clearer in relation to the Order in Council route, the framework legislation and secondary legislation. We have questioned witnesses on how we can acknowledge and build up that competency in terms of scrutiny, and it will mean many changes to the way in which we do business. As the First Minister said, do you see that that is an opportunity rather than a threat, and that it may be a challenge, and something on which we could build our competency in terms of our role? Do you also recognise, in terms of the points that were made earlier about what is appropriate in terms of an Order in Council, that that refers to what is appropriately determined in Wales and what is appropriately determined in Westminster? If that can be clarified, it means that the job of scrutinising the Executive and Ministers needs to be done here to a large extent.

12.20 p.m.

Professor Rawlings: Perhaps I have not put it very well; I will try again. What I am suggesting to the committee is that much of the discussion and the evidence—because I have seen some of the evidence papers—has naturally focused on the question of transferring powers from London to Cardiff, as it should, as that is a central issue. However, I am saying that the committee needs to take two questions together. The first is about the transfer of powers to Cardiff, and the second is about who in Cardiff gets them. That is the key point, and it plays for me in two ways. It is a constitutional question, because I sincerely do not think that Ministers in Cardiff should have wide Executive powers of a kind that Parliament would not give to UK Ministers in relation to England. There are issues there about the balance between a legislative branch and an Executive branch. That is the first point. There is also a practical point, because I suspect—and I think that I have used the word ‘import’ during the Presiding Officer’s intervention four times already, but I will use it one more time—

[460] **The Presiding Officer:** I am enjoying it very much.

Professor Rawlings: Right. I feel that in Westminster, if parliamentarians are not assured that these wide framework powers are going to the Assembly as the legislative branch, rather than to Ministers as the Executive branch, Cardiff will have an up-hill task in terms of getting the powers in the first place, and for good reasons.

[461] **The Presiding Officer:** I wish to follow that very quickly, as you have been so kind to me this morning. Would you not perhaps think that the House of Lords Select Committee on Delegated Powers and Regulatory Reform would be very interested in commenting adversely if it were not the case that powers were devolved to the Assembly rather than to Ministers? Might not their lordships’ constitution committee also take a substantial interest in this matter and report accordingly before the Bill is debated in the house?

Professor Rawlings: I can respond only by saying ‘yes’ and ‘yes’.

[462] **The Presiding Officer:** I am grateful to you.

[463] **Jocelyn Davies:** I agree with you wholeheartedly, and I attempted to raise with Jenny Randerson this morning the idea that the Assembly would be expected to scrutinise the use of powers that it did not give to the Executive. I think that that would put us in a difficult position. I do not believe that any powers directly conferred on Assembly Ministers will be scrutinised at all by the Assembly. I wonder how we will have the time, never mind anything else.

The Business Minister said that we had moved on from the Rawlings principles, but I do not think that we ever got there. I think that we adopted them, but I cannot think of one example of when they were used. You might be able to, but I do not think that they have ever been adhered to. The White Paper says that, from now on—and I think that this is from about two or three weeks ago—the UK Government intends that all future Bills will give the Assembly wide and permissive powers. Have you any idea what 'wide and permissive' means in this context, because that depends on your interpretation, does it not? I do not know whether you heard me ask Rhodri Morgan earlier about the Sewel mechanism, Professor Hazell, but can you, with your experience of Westminster, give us some advice on what would be an appropriate Welsh alternative to the Sewel mechanism?

The last issue that I want to raise is paragraph 3.18 in the White Paper, which states

'no Order in Council may transfer the whole of any fields listed in Schedule 2.'

Is that a sign that, in Westminster, there will always be an eye on limiting the powers given to the Assembly in order to meet this requirement? Or is this the mechanism by which powers are guaranteed to remain in Westminster if a referendum were ever triggered—that those powers could be tiny fragments and you would end up having a referendum on powers that were small and insignificant compared with the rest that had been transferred?

On the last White Paper, some of us fell into the trap of overselling it to ourselves as well as to the public, so are we in a situation where history might repeat itself?

Professor Rawlings: Shall I answer those first two questions, Robert, and then you can answer the Sewel question?

Professor Hazell: Fine.

Professor Rawlings: First on step 1, I came up with the phrase, 'consistently permissive'—consistency on the one hand and the more liberal approach on the other. I have to repeat the answer that I gave to Jane, namely that there is an opportunity here, but I am on the sceptical side.

Just to draw that out a little, I was interested in what the White Paper did not talk about in relation to stage 1. It talked about those two aims, but it did not tell us how those two aims would be delivered. That was an interesting omission in a UK Government White Paper because, after all, that is within the realm of what the UK Government can do. So, for example, it did not tell us whether or not there might be change procedures at UK Cabinet level. Neither did it tell us about changing the guidance on drafting legislation and so on. So, it was what the White Paper did not say that struck me in that respect.

On the fields point, I take that restriction to be an attempt to distinguish between stage 2 and stage 3. However, in a sense, it is an attempt to deflect the argument that this is legislative devolution through the back door. If you are going to move away from the Richard commission stages 1 and 2 to White Paper stages 1, 2, 3, then clearly you must be able in some way to distinguish between those stages. It seems to me that a key, no doubt political, rationale for that restriction was to distinguish between stages 2 and 3. However, as you say, that then opens up the question, does it not, of whether a series of Orders in Council could achieve, in effect, legislative autonomy for the Assembly over a whole field?

It is interesting that that paragraph is drafted in terms of one Order in Council not being able to do it; it does not rule out a series of Orders in Council so doing. I do not want to engage too much in semantic analysis. There is a strong message there and one has to be realistic about it.

I would be surprised if the powers-that-be in London, who were concerned to see that paragraph there, would then simply turn around and say, 'well, it doesn't matter, you can do it in two or three Orders in Council'. That does not, in my view, ring correctly.

Professor Hazell: I will also briefly, Chair, respond to your mention of the House of Lords delegation of powers committee and the Lords' constitution committee because, as it happens, we organised a seminar last Monday to launch a book, of which Rick and I are the joint editors, and present at that seminar were the chairs of both those committees. I confirm that the concerns that you raised are by no means fanciful. They both spoke at the seminar, and they are very much alive to the issues that we have been discussing and to some of the risks that are involved. I think, and hope, that you can expect both of those committees to take a real interest in these matters.

12.30 p.m.

Jocelyn Davies asked me about the Sewel convention; first, on its frequency, in the first four years of the Scottish Parliament, 1999 to 2003, there were 39 Sewel motions covering 38 Acts of the Westminster Parliament. The Scottish Parliament gave consent to 38 Westminster Acts that trespassed on devolved matters in four years—roughly 10 Acts a year in which the Scottish Parliament is consenting to Westminster legislating on its patch. It has not increased in the second term of the Scottish Parliament, but it shows no sign of lessening. The frequency continues at approximately the same rate.

Secondly, in terms of the procedure, you are correct in what I think that you might have said to the First Minister in suggesting that this is largely an Executive to Executive procedure. The UK Government and its Bill teams negotiate with their opposite numbers in the Scottish Executive when they are preparing and drafting the Bill. If they identify that the Bill will trespass on devolved matters, they then ask the Scottish Executive whether it is content. If it is, then the relevant Scottish Minister will put a Sewel resolution before the Scottish Parliament, which sometimes includes a substantive debate, but more often it is nodded through. Thereafter, the Scottish Parliament rarely revisits the matter. One criticism of the Sewel procedure is that the Scottish Parliament is, in effect, writing a blank cheque to Westminster in terms of that proposed legislation.

As it happens—forgive me, you are probably well aware of this—the Scottish Parliament has been conducting quite a major inquiry, led by its procedures committee, into the operation of the Sewel procedure. That inquiry is well advanced, and the procedures committee should produce a report, if not before the summer break, then around September. That will be very interesting information and evidence for you on how the Sewel procedures operate from the Scottish end.

In terms of the different kinds of Sewel motion, they fall, broadly speaking, into three different categories. The first, probably the largest, but the least troubling, is where a Westminster Bill trespasses only in a pretty marginal and technical way on devolved matters. It may be a new criminal law power; criminal law is devolved in Scotland, and, therefore, Westminster needs to seek the consent of the Scottish Parliament for quite a lot of the ancillary powers related to some Westminster legislation.

Secondly, there are substantive Westminster Acts that trespass substantively on devolved matters. Sometimes those are, for example, to implement an international obligation, a new convention to which the UK is a signatory and there is not much disagreement in Edinburgh that it too will ratify and implement the convention; if Westminster is legislating on the same matter, then Scotland is quite genuinely content to say, 'Since you are legislating anyway, legislate for us too'. There is then no need for a separate Holyrood Bill to give effect to the same international convention.

In that second substantive category, there are sometimes some more troubling examples; a current example would be the Civil Partnerships Bill, which is a devolved matter in Scotland. The criticism made is that this would be a very controversial issue in Scotland and, therefore, the Executive is perhaps pleased to avoid having that controversy and very difficult set of social and political issues debated in Holyrood, and it has consented to Westminster legislating on that matter, to include Scotland.

The third category of Sewel motions is one that perhaps had not been anticipated when the Sewel convention was originally enunciated. These are ones which confer executive powers on Scottish Ministers in devolved areas. Some people, including Lord Sewel himself, feel that that is inappropriate, and that the Sewel motions should be on legislative matters rather than on executive powers.

Professor Rawlings: I just want to add two comments. I proposed to the Richard commission that, after 18 months in the service of Wales, these should decently be called Richard motions, and I stick to that. My serious point is that this kind of motion has an even greater potential in relation to Wales than it does to Scotland because of our historical and geographical ties with England, and the whole idea of England and Wales as a legal and administrative concept. So, it seems to me that this is an issue with which the Assembly will really need to come to grips.

[464] **Lorraine Barrett:** First, please excuse my coughing earlier when others were speaking.

Regarding the Orders in Council, should they be subject to any special parliamentary procedure beyond affirmative resolution? Would you expect any sort of pre-legislative scrutiny and, if so, how should the Assembly be involved? Our ad-hoc Committee on Smoking in Public Places came to mind. This was a cross-party group that took evidence for nearly a year and came up with recommendations that the Minister has now taken on board. I wonder what thoughts you would have on that.

Professor Rawlings: This brings me back to another question, and I apologise to you, Jane, that I did not pick up the appropriateness question that you asked. Process and content must run together here. What we think is appropriate process at Westminster surely must be informed by what we think is the appropriate set of questions that parliamentarians are asking. It seems to me—and I think that Peter Hain rightly said this in the House of Commons—that we cannot simply have an Order in Council procedure because that takes 90 minutes, and, more importantly, it is no amendment. So, if we only had that, there would be serious objections to proceeding in that way.

It seems to me that, given the nature of Order in Council procedure, one must have a form of pre-legislative scrutiny in Parliament, so that parliamentarians have a genuine forum in which to discuss the question and suggest amendments—perhaps A, B and C are appropriate, but perhaps not D, or, to turn it around, if it is ‘yes’ to A, B and C, why not include D as well, while we are thinking about it, to make a more coherent package?

12.40 p.m.

So, it seems to me that we have to build in to this process some kind of forum in Westminster where those questions can be explored, always remembering what the First Minister has said, that this has to be an appropriateness question, rather than a question of what the Welsh Assembly Government is going to do with the powers. I have always been strongly opposed to that question, because it seems to me to miss the logic of devolution, which is that, whatever the political parties or political belief in Cardiff, Scotland or wherever, this is democratic devolution, and policies in Cardiff and Edinburgh may change. In a sense, if we

are devolutionists, or practitioners of devolution, we all have to sign up to that.

Therefore, the answer is, first, stick with the First Minister—it has to be an appropriateness question rather than an implementation question. Secondly, there has to be more than simple Orders in Council, as there must be machinery at pre-legislative stage. Thirdly, it follows from that that I see no reason why you cannot be creative and, building on what has happened in relation to Assembly committees and parliamentary committees, why you could not be creative at that stage, and bring in Assembly Members as well. However, I emphasise that it is terribly important not to confuse the two questions that one is asking. This has to be an appropriateness question, and Assembly Members would be contributing in those terms.

[465] **Lorraine Barrett:** Some of us have been grappling with what is an Order in Council, and we have been on a learning curve since we have been on this committee. From what you have just said regarding pre-legislative scrutiny by Parliament, and suggesting amendments, how could we, as an Assembly and as Assembly Members, fit in work with that process? I cannot quite see the picture of how that would logistically work.

Professor Rawlings: That in turn links to another thing, does it not, which is how the request for the Order in Council gets to London in the first place. In a sense, I would hope that there would not have to be too much involvement by the Assembly Members at the Westminster stage. I do not want to rule it out; I said that we can be creative about that and that we can have some partnership working. However, it seems that the prime focus of the discussion by Assembly Members is correctly in the Assembly itself. That raises important questions in terms of Standing Orders, as to who moves a motion to make this request for an Order in Council. Clearly, a Minister must be able to do so, and the question is whether others in the Assembly can move such a motion. The next question is to what extent that motion is amendable in the Assembly. That is a whole set of questions. In other words, to what extent will this be Executive driven? One would hope that it would be Executive driven to a large degree. The Welsh Assembly Government is in a good position to move this forward. However, there seems to be a constitutional question there about whether that should be a monopoly, or should other voices inside the Assembly be able to move this process forward, and to what extent those voices should be able to contribute to that process.

Therefore, I would be looking for something quite open there. Again, that is quite important, if you like, tactically and strategically, when it then comes up to Westminster, because the more that Westminster can see that the Assembly as a whole has had an input, the more impressed Parliament is likely to be when it comes to judge the appropriateness question. Therefore, in a sense, the message that I am trying to get over to the committee is how things hang together.

[466] **The Presiding Officer:** I believe that you have a comment on that, Robert Hazell.

Professor Hazell: There is not a single model of Orders in Council, and there is not a single model of Westminster scrutiny of Orders in Council. In a few policy areas, Westminster has developed something called, in shorthand, a super-affirmative procedure, on which I am sure Paul Silk has far more expertise than I do. I was going to do my homework, but, forgive me, because I could not get back into my offices, I have not been able to look up the books.

You will know that the House of Commons Welsh Affairs Select Committee will almost certainly, as soon as it is constituted in two days' time, start an inquiry into the White Paper. I hope that one thing that that committee will do is make some strong suggestions to the House of Commons about a suitable scrutiny procedure for the new Orders in Council. I do not know, but it might be open to some suggestions from the committee or the Assembly about some minimum desiderata that you would like to see in terms of that procedure. I imagine that the House of Lords will decide for itself what the scrutiny procedures will be at its end of the

Palace of Westminster.

[467] **Lorraine Barrett:** You may have heard our discussion with the First Minister about different political parties being in control at either end, and about the idea that we could spend time in pre-legislative scrutiny here, only for it to go to Westminster to be thrown out on a whim, shall we say. I hope that that will not happen, particularly if Westminster sees that we are doing the work seriously. Will you give us your thoughts on that scenario? I imagine that there would have to be a lot of discussion at some level—I am not saying that it would be behind closed doors—as to whether we would be wasting our time to even think about certain matters. Do you have any thoughts on that?

Professor Rawlings: It is so difficult to judge. Listening to the First Minister, the message that he was conveying was that this is new territory and that there is going to be an element of exploration. We should all be open about that. I took the First Minister's point about Professor Miers's evidence to be that Professor Miers was reading across from a pre-existing situation, and, in a sense, rightly, because he was pointing to many of the potential obstacles and pitfalls. I took the First Minister to be saying that you can only read across so far; we are dealing with the National Assembly for Wales, and it comes back to the point about appropriateness, as these are essentially constitutional questions. I am not sure that this is a very good answer to your question. In a sense, I see this as experimental and, because of that, it is very difficult for me to speculate about what is likely to happen.

[468] **The Presiding Officer:** I think that we have completed the questioning. We are very grateful to you both. I understand that you are appearing on another platform in another theatre later today. Good luck to you.

Daeth y cyfarfod i ben am 12.48 p.m.
The meeting ended at 12.48 p.m.