Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol
The Constitutional Affairs Committee

Dydd Iau, 3 Chwefror 2011
Thursday, 3 February 2011

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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'r pwyllgor yn bresennol
Committee members in attendance

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

Eraill yn bresennol
Others in attendance

David Lambert	Cymrawd Ymchwil, Canolfan Llywodraethiant Cymru, Ysgol y Gyfraith, Caerdydd Research Fellow, Wales Governance Centre, Cardiff Law School
Marie Navarro	Cydymaith Ymchwil, Canolfan Llywodraethiant Cymru, Ysgol y Gyfraith, Caerdydd Research Associate, Wales Governance Centre, Cardiff Law School

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

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

Dechreuodd y cyfarfod am 9.30 a.m.
The meeting began at 9.30 a.m.

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

[1] **Janet Ryder:** I welcome officials, Members and members of the public to this meeting of the Constitutional Affairs Committee. In an emergency, ushers will indicate the nearest safe exit. Headsets are available for translation and amplification; translation is on channel 1 and amplification on channel 0. I remind everyone to completely switch off all electronic devices. We have received no apologies so we will go straight to the first piece of business.

9.31 a.m.

Offerynnau Na Fydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhifau 15.2 a 15.3 ac Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (Y Weithdrefn Negyddol) Instruments in Respect of which the Assembly is Not Invited to Pay Special Attention under Standing Order Nos. 15.2 and 15.3, and Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (The Negative Procedure)

[2] **Janet Ryder:** The first instrument is CA522, the Independent Health Care (Fees) (Wales) Regulations 2010. Gwyn, have you looked at this?

[3] **Mr Griffiths:** Mae'r rheoliadadu hyn yn pennu'r ffioedd a fydd yn daladwy gan ysbytai, clinigau ac asiantaethau meddygol annibynnol o dan Ddeddf Safonau Gofal 2000. Nid oes dim i'w nodi o ran craffu technegol ar y rheoliadau hyn.

Mr Griffiths: These regulations determine the fees that will be payable by hospitals, clinics and independent medical agencies under the Care Standards Act 2000. There is nothing to note in regards to the technical scrutiny of these regulations.

[4] **Janet Ryder:** Diolch. A yw pawb yn hapus â hynny? Gwelaf eich bod.

Janet Ryder: Thank you. Is everyone content with that? I see that you are.

[5] The next instrument is CA524, the Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2011. Gareth, you have been looking at these regulations.

[6] **Mr Howells:** Rheoliadau sy'n darparu ar gyfer cymorth ariannol i fyfyrwyr o Gymru yw'r rhain, a rhaid bod yn fyfyriwr cymwys yn dilyn cwrs dynodedig, yn preswylio yng Nghymru ac yn y blaen. Nid oes pwyntiau i'w hadrodd, ond cododd nifer o bwyntiau yn y fersiwn ddrafft, a thrafodwyd hynny gyda'r Llywodraeth cyn inni gael yr adroddiad clir heddiw.

Mr Howells: These are regulations that provide for financial assistance to students from Wales, for which one has to be an eligible student on a designated course, resident in Wales and so on. There are no reporting points to note, but a number of points arose from the draft version, which were discussed with the Government before we received today's clarified report.

[7] **Janet Ryder:** It is fair to say that, when Gareth says that he worked with the drafters, it amounted to six days of work to ensure that all the points that needed to be corrected at draft stage were corrected. The value of looking at pieces of legislation at draft stage is underlined by the fact that they have now come through in an acceptable way, but it reinforces what we have said time and again on this committee, which is that, if we were allowed to see things and work with people at draft stage, a number of the defects could be ruled out at that stage. Gareth, is there anything else that you would like to add on the nature of amendments?

[8] **Mr Howells:** Un o'r newidiadau mawr oedd newid y cyfan i fod yn niwtral o ran cenedl; gan fod y rheoliadau dros 230 o dudalennau, yr oedd llawer o waith ynghlwm â hynny. Yr oedd angen newid rhai pethau pwysig hefyd—newid y ffigur incwm mewn un adran, a chysoni'r derminoleg. Hefyd, yn y fersiwn ddrafft, yr oedd myfyrwyr o Loegr, yr Alban a Gogledd Iwerddon hefyd yn gallu cael cymorth, ond dim ond i fyfyrwyr o Gymru a gweddill Ewrop yr oedd y rheoliadau i fod yn gymwys.

Mr Howells: One of the main changes was to make all references gender neutral; as the regulations were over 230 pages long, that meant quite a lot of work. There were also some important things that needed to be changed—changing the income figure in one section and ensuring consistency in terminology. Also, in the draft version, students from England, Scotland and Northern Ireland would have been eligible for assistance, but the regulations were only meant for students from Wales and the rest of

Europe.

[9] **Rhodri Morgan:** Camsyniadau eithaf sylweddol, felly.

Rhodri Morgan: They were quite significant errors, then.

[10] **Mr Howells:** Un neu ddau, ie.

Mr Howells: One or two, yes.

[11] **Alun Davies:** I find it extraordinary that the Government would be able to make such basic errors.

[12] **Janet Ryder:** It seems rather a shame—to say the least—that, after 12 years of drafting, people are still making gender errors when drafting pieces of legislation. However, they are now okay, so if everybody is happy to accept then, we will move on to the next instrument.

[13] The next instrument is CA525, the Education (School Day and School Year) (Wales) (Amendment) Regulations 2011. Gwyn, have you been looking at these?

[14] **Mr Griffiths:** O'u cymharu â dros 200 o dudalennau yn y rheoliadau blaenorol, tair tudalen sydd yn y rhain. Y cyfan y maent yn ei wneud yw newid nifer y sesiynau ysgol y mae angen eu cynnal mewn blwyddyn er mwyn caniatáu un diwrnod hyfforddiant mewn swydd ychwanegol. Nid oes unrhyw bwynt technegol yn codi o'r rheoliadau byr hyn.

Mr Griffiths: Compared with over 200 pages in the previous regulations, these have only three pages. All that they do is change the number of school sessions that have to be held in a year in order to allow one extra in-service training day. There are no technical points arising from these short regulations.

[15] **Janet Ryder:** Is everyone satisfied with that? I see that you are. Let us move on to the next item on the agenda.

9.35 a.m.

Offerynnau ac Offerynnau Drafft y Caiff y Cynulliad ei Wahodd i roi sylw Arbennig iddynt o dan Reolau Sefydlog Rhif 15.2 a/neu 15.3, Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol) ac Offerynnau Drafft sy'n Agored i Gael eu Cymeradwyo yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Gadarnhaol)
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[16] **Janet Ryder:** First, we have CA523, namely the Care Standards Act 2000 (Notification) (Wales) Regulations 2011. Gwyn, do you have any comments to make?

[17] **Mr Griffiths:** Mae tri phwynt adrodd yn yr achos hwn, er nad ydynt yn faterion mawr. Mae'r pwynt cyntaf yn bwysig o ran gwybodaeth y Cynulliad, sef y ffaith nad yw rhai o'r pwerau wedi cael eu cychwyn, ac eithrio at ddibenion gwneud rheoliadau. Cyn i'r rheoliadau hyn ddod i

Mr Griffiths: There are three reporting points in this case, although they are not major issues. The first point is important in terms of information for the Assembly, in that some of the powers have not been commenced, aside from for the purposes of making regulations. Before these regulations

rym, bydd angen rhoi gweddill yr adrannau ar waith, at ddibenion ychwanegol. Mae'r Llywodraeth wedi ymateb, gan ddweud y bydd hynny'n digwydd cyn 1 Ebrill.

come into force, the remaining sections will need to be brought into effect for additional purposes. The Government has responded, stating that that will happen before 1 April.

[18] Mae'r ail bwynt yn cyfeirio at y defnydd o 'rhagnodedig', a'r ffaith nad yw'r pwerau y cyfeirir atynt yn y rhagarweiniad yn cyfeirio at un isadran. Fel y nodwyd gan y Llywodraeth, mae'r wybodaeth honno wedi'i chynnwys yn y troednodyn. Mae hynny'n foddhaol.

The second point refers to the use of the term 'prescribed', and the fact that the powers that are referred to in the introduction do not refer to one sub-section. As the Government notes, that information is included as a footnote. That is satisfactory.

[19] Y trydydd pwynt yw bod ffurf o eiriau wedi'i defnyddio nad yw'n glir: mae angen cyfeirio at y brif Ddeddf cyn y gellir deall y peth. Nid yw hynny'n ffordd ddelfrydol o ddrafftio. Dylai is-ddeddfwriaeth fod yn glir ohono'i hun. Mae'r Llywodraeth wedi derbyn y pwynt hwnnw. Ni chredaf fod angen unrhyw waith pellach ar ran y Llywodraeth.

The third point is that a form of wording has been used that is not entirely clear. We need to refer to the main Act in order to understand what is meant. That is not an ideal of drafting subordinate legislation, which should be clear in itself. The Government has accepted that point. I do not think that any further work is needed by the Government on this.

[20] **Janet Ryder:** Is everyone content with that explanation? I see that William would like to make a comment.

[21] **William Graham:** Was the Government response not received in time to be printed?

[22] **Janet Ryder:** Steve, have we had the Government's response?

[23] **Mr George:** Yes, we have had a written response. However, I am afraid that the slightly chaotic nature of the agenda for this meeting means that you have not received it. Would you like to see a copy? I see that you would.

[24] **Janet Ryder:** The Government has accepted those corrections, has it not?

[25] **Mr Griffiths:** Yes.

[26] **Janet Ryder:** Is everyone content with that? I see that you are.

[27] We now move on to CA519, the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011. This is the first piece of legislation emanating from the NHS Redress (Wales) Measure 2008. We were going to look at this today, but these regulations have been withdrawn. Would you like to explain, Steve?

[28] **Mr George:** We were informed by the Government fairly late last night that it intends to withdraw the draft instrument. I understand that there is a factual error—something to do with the financial information—in the explanatory memorandum. The Government would prefer to correct the error and re-lay the regulations, so that the Assembly is making a decision based on the proper information. When the Government does that, we will obviously have a chance to consider it at that time. The Plenary debate that was scheduled for next Tuesday will be deferred to an appropriate time in future.

[29] **Alun Davies:** That Measure was one of the first pieces of legislation that we debated at the beginning of this Assembly. It seems somewhat curious that we are now within two

months of dissolution and we still do not have the regulations that give life to this legislation. In terms of where we are as a committee, it would have been good to see this legislation come before us some time ago. We need some sort of guarantee from the Government that this will happen before dissolution.

[30] **Janet Ryder:** Gwyn, do you have anything to add?

[31] **Mr Griffiths:** Hoffwn wneud un pwynt ychwanegol. Bydd hyn yn rhoi cyfle i'r Llywodraeth gywiro'r materion sydd wedi'u nodi yn yr adroddiad drafft, yn y gobaith y bydd adroddiad clir pan ddaw'r rheoliadau hyn yn ôl gerbron y pwyllgor.

Mr Griffiths: I would like to make one additional point. This will give the Government an opportunity to correct the issues noted in the draft report, in the hope that there will be a clear report when these regulations are brought back to the committee.

[32] **Janet Ryder:** Steve, do we have any assurance that these regulations are going to be brought forward?

[33] **Mr George:** I cannot give you an assurance on behalf of the Government. My understanding is that these regulations will be re-laid very soon, possibly even today. If they are re-laid, that would set the clock ticking again, so it would be a couple of weeks before we got around to looking at them.

[34] **Rhodri Morgan:** Does that mean that we will probably be considering these regulations a fortnight hence?

[35] **Mr George:** Possibly. The reason I say 'possibly' is that, if the Government simply re-lays the explanatory memorandum with the same regulations, I cannot see any reason why we could not consider them next week, but I am not absolutely sure how they are proposing to go about things, so I do not want to commit to any particular timetable, because that is in the Government's hands.

9.40 a.m.

[36] **Rhodri Morgan:** However, they have told you that there is an error only in the explanatory memorandum, not the legislation.

[37] **Mr George:** Yes, but the Standing Orders require the explanatory memorandum to be laid with the statutory instrument, so I think that that is the reason why they want to withdraw the whole thing and start again.

[38] **Janet Ryder:** I call on Alun Davies.

[39] **Rhodri Morgan:** If they are finding their own mistakes, it saves Gwyn having to find them.

[40] **Janet Ryder:** Can we have a little order? Alun, do you want to come back on that or are you satisfied to accept it?

[41] **Alun Davies:** We have no choice but to accept it. I am tempted to say that perhaps the committee should send a note to the Government that it is three years after this became law and that, when we discussed these matters, we discussed the need for speed on NHS redress. That was one of the key issues that we debated as a committee three years ago. It is curious, at least, that we are in this position now.

[42] **Janet Ryder:** I think that I was on the original committee also and I remember the arguments that were put forward on this. We could highlight that we have maintained all along that when Orders or proposed Measures are brought forward, the policies behind them need to have been thought out. If the policies are thought out, the regulations should flow quite quickly from that.

[43] **Alun Davies:** However, the NHS Redress (Wales) Measure 2008 implemented legislation that was already being implemented in England in Wales. So, I am not convinced that this is a clinical or a policy issue. I think that it has more to do with the mechanics of Government. It is important that we make a note of this and perhaps write to the Minister to say that we would have expected this to have happened some time ago.

[44] **Rhodri Morgan:** On a 60:40 basis, Alun is probably right, but we have all seen the letter from the Patients Association or a body purporting to represent a lot of patients with redress-type complaints in Wales, claiming that this Measure is completely wrong. The Government may conceivably—I think that it is less likely than Alun's explanation—have taken note of some of those complaints. Has anybody else seen that letter?

[45] **William Graham:** Was it from the independent health examiners?

[46] **Rhodri Morgan:** Yes, that is right.

[47] **Janet Ryder:** It may be, but we do not know. We are trying to guess what the Government is doing. All that we can do is to work according to what it has done. It has withdrawn this and it will be laid again, so when it comes around again we will return to this Measure.

[48] **Kirsty Williams:** I may be being pernickety and rubbing salt into the wound, but if the issue is around the explanatory memorandum, it is signed off by the Minister with the following words:

[49] 'In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact'

[50] of these regulations. If I was the Minister I would be furious.

[51] **Janet Ryder:** We will leave it there and draw this discussion to an end.

9.43 a.m.

Ystyried y Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru)—Canolfan Llywodraethiant Cymru, Ysgol y Gyfraith, Caerdydd
Consideration of the Proposed Local Government (Wales) Measure—Wales Governance Centre, Cardiff Law School

[52] **Janet Ryder:** Steve has alluded already to the fact that our agenda and the timings of this morning's meeting have changed considerably this week. I want to thank the members of the committee for their help in arriving at this stage. We will now deal with the issue of the amendments that have been laid to the Proposed Local Government (Wales) Measure by the Government. This is a long scenario. I will read through the chronology that I have in front of me. On 6 July 2010, the proposed Measure was referred to Legislation Committee No. 3 by the Business Committee. On 12 July 2010, the Minister for Social Justice and Local Government introduced the proposed Measure and explanatory memorandum, which states:

[53] 'The proposed Local Government Measure will make changes intended to strengthen the structures and working of local government in Wales at all levels and to ensure that local councils reach out to and engage with all sectors of the communities they serve.'

[54] On 13 July, the Minister made a legislative statement in Plenary and, between July and October, Legislation Committee No. 3's consultation period on the proposed Measure was held. On 23 September, the Minister gave oral evidence to Legislation Committee No. 3. On 13 October, this committee took evidence from the Minister. On 15 December, our committee laid its report before the Assembly. On 27 January, last week, we discussed in private the amendments proposed by the Welsh Government, which would allow the Government to amalgamate local authorities. It was at that point that we raised concerns about the extent of those amendments, given that we had had no notice or consultation. We felt that they were introducing major policy changes that had not been subject to any previous consideration in the Assembly or by Assembly committees.

[55] In light of that discussion last week, I wrote to the Minister inviting him to attend today's meeting. I am sure that committee members will appreciate that this is on a very tight timescale now. Legislation Committee No. 3 is now looking at this proposed Measure at stage 2 and is dealing with these amendments. We invited the Minister in today to give evidence, but, unfortunately, he has not been able to attend. You will have received, I hope, the Minister's response. It is a very short letter, explaining that he has previous commitments, and cannot attend today. However, he says

[56] 'I would however be able to attend the Constitutional Affairs Committee to discuss these matters on 10 February'.

[57] That is next Thursday, and he suggests a time slot between 9 a.m. and 9.45 a.m., so that is 45 minutes for the consideration of what could be some fundamental changes to this proposed Measure. My initial feeling is that, perhaps, after today's session, we may wish to extend that time slightly. As we cannot, it seems, extend it beyond 9.45 a.m., we may have the option of extending it before 9 a.m., but I would suggest to committee that we take today's evidence and then return to this matter afterwards.

[58] I am thankful to the witnesses for coming in at short notice. I requested that the Wales Governance Centre look at the amendments and prepare a paper for us. It is unusual for us to go back and look at these amendments, but they are a significant move away from the original intent of the proposed Measure. The Wales Governance Centre has prepared a paper for us and it has been circulated to members of the committee, who have been able to look at it. We asked David Lambert and Marie Navarro to come in at very short notice, and they have agreed. If Members are content, I will now invite them in, and we can take evidence on their paper.

[59] I will give our witnesses some time to settle in, but while they are doing so, I thank them very much indeed for submitting a paper at short notice, and for making themselves available to come in this morning. I am, as Chair of this committee, very grateful for that. These amendments have raised a number of points of discussion. It is not usual practice for this committee to return to a piece of legislation once we have signed it off, but we felt, after last week's discussion, that this may prove a significant development, and there is no other opportunity to take evidence on these amendments. I am grateful to you both for coming in—you have been to committee on a number of occasions now. Please introduce yourselves for the record, and if you have any introductory remarks, feel free to make them at this point.

9.50 a.m.

[60] **Ms Navarro:** Bore da. My name is Marie Navarro and I have been working with

David Lambert on Wales Legislation Online in Cardiff Law School for the past 12 years.

[61] **Mr Lambert:** I am David Lambert, and I have been working with Marie for the past 12 years on Wales Legislation Online. We are both members of the Wales Governance Centre, and I am also a lecturer and tutor in public law at Cardiff Law School.

[62] **Janet Ryder:** Thank you for that. One of the reasons why we came to you is because you have, for many years now, observed how legislation has been developed in the Assembly. We are looking forward to the evidence that you are going to give us today. The paper has certainly raised a considerable number of questions, so if it is okay with you, we will go straight into those questions.

[63] I will start on the exercise of powers that the amendments refer to. Your paper refers to the Cabinet's Office guidance that states that

[64] 'matters which are controversial should best be set out on the face of the legislation so that Parliament can consider them once as a matter of principle rather than having to return to them each time when individual delegated legislation has to be considered'.

[65] You further state in your paper that you consider that

[66] 'the order making powers contained in the amendments tabled to the Proposed Local Government Measure should therefore be included on the face of the Measure for the reasons given by the Cabinet Office'.

[67] You also outline the reasons why the Cabinet Office at Westminster would put issues on the face of a Bill. Can you explain why these amendments should be placed on the face of the proposed Measure, on the basis of that Cabinet Office guidance?

[68] **Mr Lambert.** We see a parallel between these amendments and the provisions of the Public Bodies Bill, which is going through Parliament and which will abolish something like 160 bodies. Most of these bodies are established by Acts of Parliament, and they will be abolished by Order. The House of Lords Constitution Committee's criticism is that if bodies are created by statute, they should be abolished by statute. In other words, you should take each individual body on its own, and decide whether, as a matter of a new Act of Parliament, that body is to be abolished or not, based on the facts relating to that body.

[69] It seems to us that it is the same situation with local authorities in Wales, which were established by an Act of Parliament, namely the Local Government (Wales) Act 1994. If there is to be any merging or abolition of any of those local authorities, then they, too, should be the subject of separate Measures, because they were established by an Act of Parliament. You should not therefore have an Order that can merge or abolish 22 authorities and end up with seven. In other words, if something is established by statute, you should abolish or merge by statute; you should not do it by Order. That is the criticism of the House of Lords Constitution Committee.

[70] **Janet Ryder:** We are a different body to Westminster. The Assembly has always set out to work in a way that is right for Wales. However, would you expect a Government to be operating along similar guidance lines as those issued by the Cabinet Office when considering what amendments to bring forward?

[71] **Mr Lambert:** We would, because these comments do not come from the Cabinet Office but from the Constitution Committee of the House of Lords, which has a tremendous standing. To us, it is looking at it from a fundamental constitutional point of view, in that, if something is established by primary legislation, then it should be merged or abolished by

primary legislation, not by Order, so that your Parliament—the Assembly—just like the UK Parliament, has the opportunity of carefully considering the proposals in relation to a particular body on the facts of that particular body at the time. For us, you can only consider that by the usual process of looking at a Measure or, in Parliament, an Act, not by Order.

[72] **Janet Ryder:** One defence that the Government seems to be giving for tabling the amendments is that it is not its intention to reshape the whole of local government, as the power would be used on an individual basis in which up to three councils could be merged at one time. You said that that could give it the ability to reduce the number of local authorities to seven. Technically, it would, but the defence that we may hear from the Government is that it would be used on a case-by-case basis. In that case, would the arguments that you have put forward still stand?

[73] **Mr Lambert:** Yes, I think that they would, because that is the argument in relation to the Public Bodies Bill. The Government says, 'We don't intend to abolish all these bodies; we'll pick and choose'. The Constitution Committee's response is still, 'All right, you pick and choose and make your proposals individually by means of primary legislation'. If you have no particular plans, you will do it bit by bit, and you will have the opportunity to do it in that way by primary legislation. You do not need an Order in any case, because there is no emergency.

[74] **Alun Davies:** You seem to be saying that your objections to the amendments are on a point of principle in relation to where the executive powers of a Minister and where the powers of the legislature should rest. So, you would object to the powers being used by a Minister, whichever way they were introduced.

[75] **Mr Lambert:** By Order.

[76] **Alun Davies:** So, for you, the amendments are an issue, but not the defining one.

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

[78] **Alun Davies:** On the range of powers that are available to a Minister, the Minister made it clear that the power would be used only in extreme circumstances, and that it is a power that he seeks to hold as a backstop power in order to encourage local authorities to collaborate and improve. Where a local authority has not improved, the backstop power is there to force improvement. I understand that a similar power exists in England, in that the relevant UK Minister can make amalgamation Orders. Would you object to the use of that in England as well?

[79] **Mr Lambert:** Yes, I would, on the basis of the criticism by the House of Lords Constitution Committee. It said that, if there is an emergency, we have a fast-track system of looking at new primary legislation. The Assembly also has a fast-track system.

[80] **Alun Davies:** Therefore, you simply do not think that the power should exist at ministerial level.

[81] **Mr Lambert:** Indeed, because of the advice of the Constitution Committee.

[82] **Alun Davies:** Even if it is a backstop power that would be used once in a lifetime.

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

[84] **Rhodri Morgan:** If I were the Minister, I think that I would be saying to you, 'Look, the Public Bodies Bill has a clear stated intent: it is the bonfire of the quangos Bill in posh

legal language'. The Minister would say that the proposed Measure, however, is not a bonfire of local government Measure at all. As Alun put it, it is a wish to have an adjunct power to abolish a group of local authorities by merger. However, that is not the intent of the proposed Measure; the power is an adjunct to the other powers in it to compel or oblige local authorities to improve or to seek continuous improvement in their performance. It will be adjoined to those powers, because, if that is the only way in which you can secure continuous improvement, you need it there as a backstop. That is quite different from the intent of the bonfire of the quangos Bill. How would you respond to that criticism? The whole basis of your argument is that they are not chalk and cheese, but the same circumstances as those addressed in the Bill in the other place.

[85] **Mr Lambert:** I would say that the Government has not made out a case for seeking this Order-making power, because it has no proposals in mind at the moment. It has not laid down any criteria, and we do not know the extent of the powers. Why, therefore, if there is no emergency or rush, does it not come to the Assembly with a proposal each time?

10.00 a.m.

[86] **Rhodri Morgan:** If I may just interrupt, you are now changing your ground, are you not? Your previous grounds were that this is pretty well identical to the public reform, bonfire of the quangos Bill. Therefore, the criticism to which that has been subjected by the House of Lords Constitution Committee also applies to this one. I put it to you that they are not, or the Minister would claim that the circumstances are entirely different, because the intent of the Bill is to abolish quangos, and the intent of this proposed Measure is not to abolish local government but to have a backstop power if nothing else can be done to achieve another purpose, which is not abolition but continuous improvement. You are changing your ground from the fact of the similarity between the two sets of circumstances before Westminster and us to something completely different now, are you not?

[87] **Mr Lambert:** No, it is still this problem that if a body has been created by an Act of Parliament, you have to show, to me, extreme reasons for taking a power by Order to abolish that body. That is the problem with the Public Bodies Bill. It seems to me that it is the same problem with local authorities, which were established by an Act of Parliament. Why, suddenly, are you not following the constitutional principle of amending that Act of Parliament individually at the time that you want to merge that particular body? That also seems to be the criticism of the Public Bodies Bill. Why, suddenly, are you saying that it is not for the Assembly to decide how the Local Government Act 1994 will be changed, but for Ministers, who will just put an Order before the Assembly? You will be cutting out the normal procedures that you would have if this was a formal proposal by a new Measure to amend the 1994 Act. This also tends to happen in central Government. It is this whole principle of asking, if something is set up by an Act, why Ministers want to change it by Order. Why can you not change the Act bit by bit, when the need arises?

[88] **Rhodri Morgan:** By an amendable motion?

[89] **Mr Lambert:** Yes, by an amending this with a new Measure.

[90] **Rhodri Morgan:** By a motion that is, in itself, amendable by a vote in the Assembly?

[91] **Mr Lambert:** No, by a new Measure amending the Local Government Act 1994.

[92] **Rhodri Morgan:** Yes, but the difference between an Order and a Measure is that a Measure is amendable by debate, whereas an Order is not.

[93] **Mr Lambert:** Indeed. You have a whole different procedure for Measures. It is

subject to greater consideration.

[94] **Janet Ryder:** I now call on Alun to speak very quickly, because Kirsty then wants to speak.

[95] **Alun Davies:** The key reason why we have these objections is to enable debate and proper scrutiny to take place, so that a Government cannot simply act without any heed to people's fears and concerns. If this is a particular power—a narrow power, if you like; although I accept that the legislation is written more widely than I feel comfortable about—to be used in extremis on a single, case-by-case basis, one would assume that because it is an extreme power to abolish a local authority, a process will have been followed before that power is invoked. The amendment does contain the circumstances in which a power can be used. The burden of my question is that this is not a power that will be used in isolation; it would be the culmination of a process that could take a year, 18 months, or a considerable period of time. It is not so much an Order that would be rushed through this place in an afternoon, but a consequence of a failure of process. Therefore, throughout that process, people would have the opportunity to scrutinise and to discuss, with the Government, the way forward. This is a power that will be used as consequence of a failure of process. Therefore, there would be an opportunity, because there would be quite a long process involved.

[96] **Mr Lambert:** Before Marie replies, how do you know that? There is nothing very much on the face of the legislation. That is what worries us. There is a vague thing about consultation, but how do you know whether it will be used in extremis; and how do you know that there will be tremendous consultation taking place for two years?

[97] **Ms Navarro:** There are so many different issues around the amendment that we have many different grounds on which we think that there could be discussion. First, we could not see any justification from the Government as to why the amendment was necessary in the first place. There is reference to several sections of the proposed Measure and an Act of Parliament, which would have been used beforehand, so we do not know why these powers are not good enough. Why do you have an extra weapon on an extra two lines of Government spend? So, we do not have a justification for why you need the amendment or the legislation in the first place, or for why that need was only perceived as necessary after the proposed Measure was drafted. David and I believe that there should be some conventions with regard to the work of the Assembly and Assembly Government. We think that if there were documents equivalent to these Cabinet Office papers, which we refer to all the time, it would help the smooth running of everything, including the amendments and the contents of legislation in the first place.

[98] I know that the Assembly is different from Westminster and that you will come up with your own criteria and conventions, but Westminster's guidance on drafting amendments is such that such an amendment would never have been accepted, because it would be seen as something more than minor and technical, concessionary or desirable amendments, so it would not have been accepted. I know that it is for the Presiding Officer here to decide.

[99] So, one ground is that we do not know exactly why the powers are sought or when they would be used. That is where I come back to these criteria that we have found. David has read the text of the amendments, as we have not seen any explanatory memorandum, and you could not introduce an amendment in Westminster that contains a delegated power without a supplemental explanatory memorandum.

[100] **Janet Ryder:** I will bring in Kirsty in a moment, but I have a couple of quick follow-up questions. If this power had been sought in the original proposed Measure, the scrutiny of that proposed Measure would have allowed those arguments to have been satisfied—all of that would have come through. As it is coming through at this stage, are you saying that none

of these stages have been satisfied and that this is a major diversion in the intent of the proposed Measure, in your opinion?

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

[102] **Kirsty Williams:** Thank you for your comments and for your paper. As we have heard, it seems that the Government is saying—as articulated by Rhodri Morgan and Alun—that this is a fall-back position and would be used only in absolutely terrible circumstances when everything else failed, and therefore would be an emergency power—I believe that Alun referred to it as a backstop power. I can understand why a Minister would want to have an ultimate sanction and to be able to act in an emergency. Could you explain how a Minister could act in an emergency to dissolve or amalgamate councils without having to resort to the amendments that have been brought forward? Is there another way that a Minister could act in such an emergency?

[103] **Ms Navarro:** We do not know exactly all the contents of the legislation, which is—

[104] **Kirsty Williams:** Forget this legislation. Are there mechanisms already available for a Minister to have a fast-track process to achieve this? Is there something already in existence within the Assembly's procedures that would allow the Minister to do this?

[105] **Mr Lambert:** There is an emergency Measure procedure, under Standing Order No. 23.107.

[106] **Kirsty Williams:** So, if a Minister felt that there was an extreme situation that needed to be dealt with, there are existing processes available to a Minister to do that, are there?

[107] **Mr Lambert:** There are indeed, yes.

[108] **Kirsty Williams:** What is your opinion, Mr Lambert, as to what extent the amendments tabled by the Minister to the proposed Measure could create a constitutional precedent in Wales, so that other Ministers or other Governments could use this example in months and years to come to justify similar actions?

10.10 a.m.

[109] **Mr Lambert:** In the absence of any established principles—I am sorry to mention the UK Parliament again, but it has those principles, many of which are laid down by the Cabinet Office and the House of Lords Constitution Committee—it would set a precedent, and it would be difficult to argue against it, because there are no other existing principles. This is a new principle and the beginning of a new convention; you can change conventions afterwards, but it is always difficult to do so once something like this has been established.

[110] **Kirsty Williams:** So, in your view, there are issues beyond what is before us at the moment; if it was to go forward in this way, it would establish a principle that could be followed in other cases.

[111] **Mr Lambert:** Yes, I think so, in the absence of any other established principles.

[112] **Kirsty Williams:** As you said in your paper, and as you have reiterated this morning, to your knowledge a full and clear explanation and justification has not been given as to why abolishing or merging local authorities should be done by ministerial Order. Can you think of any reason why it would be justifiable to use a ministerial Order to abolish or merge local authorities?

[113] **Mr Lambert:** In the absence of any explanatory note, we cannot; we have not seen such a note. There may be very good reasons, such as the need for emergency provisions, but we have not seen them. Again, that goes against the established convention of the UK Parliament; at least the UK Parliament provides an explanatory note with the legislation.

[114] **Kirsty Williams:** Forgive me for not knowing the procedures in Westminster as well as I should, but if such amendments had been tabled there, would it have been a requirement that a further explanatory note should accompany them to give the back story?

[115] **Mr Lambert:** Yes. That is the advice of the Cabinet Office.

[116] **Ms Navarro:** It would go even go further than that; such amendments would not have been accepted. According to the Cabinet Office's documents, they are 'desirable amendments'—we have included the reference in the footnotes of our paper—and are defined as

[117] 'all new areas of policy, even if they do not widen the Bill's scope. Also any issues which are proposed to be added to a Bill which are not essential but merely a new policy idea where the Bill is being used as a vehicle'.

[118] **Mr Lambert:** Interestingly, the amendments would not have been accepted by the Government, as what Marie is reading is the Cabinet Office's advice.

[119] **Kirsty Williams:** As you will be aware, Mr Lambert, over the last 11 years, this institution has sometimes become a bit jumpy if told that it has to follow Westminster practice; in some ways, we have battled against that. Is there any reason why the practice in Westminster that you have described would not be considered best practice? I am trying to understand whether there is a good reason for doing it differently.

[120] **Mr Lambert:** We think that the best practice is not so much established by the Cabinet Office—the Government—but by a body such as the House of Lords Constitution Committee; the latter represents Parliament, and is highly respected. It is interesting that the Cabinet Office seeks to reflect the advice of the House of Lords Constitution Committee. There is an equivalent Select Committee in the House of Commons, but it is the House of Lords Constitution Committee that is referenced; the Cabinet Office paper that we found refers constantly to the principles set out by the House of Lords Constitution Committee. The attitude of the Cabinet Office is, 'Why should we fight against those principles? They are very good principles.' They are coming from the Parliament, not the Executive.

[121] **Janet Ryder:** Given the nature of the questions that we have been asking, I am going to bring in William, because his questions are also on the process.

[122] **William Graham:** You do not consider that the superaffirmative procedure gives as much opportunity for the Assembly and its committees to assess fully the implications of the Minister's proposals as the extensive scrutiny procedures outlined in the Government of Wales Act 2006 and the Assembly's Standing Orders for the consideration of proposed Measures. Why does the superaffirmative procedure not offer much of an opportunity to assess the implications of the Minister's proposals in this instance?

[123] **Mr Lambert:** It seems to us that the superaffirmative procedure is under the control of the Government, whereas proposed Measures and their consideration are under the control of the Parliament. So here is a procedure that states that something happens within 60 days, the Government consults and so on. To us, that seems very different from following the Standing Orders and the principles that have already been established by the Assembly in relation to looking at proposed Measures. So, because this is subordinate legislation, we feel

that it is a bit out of your control. The Government is in the driving seat.

[124] **Ms Navarro:** There are extra stages in dealing with a proposed Measure; Plenary is given much more weight than would be the case with the affirmative resolution procedure. So, that is another argument. It always comes back to the point of why should that power be exercised by Order and not by Measure. So, we are circling around the same idea all the time. If you take it from different angles, you always reach the same conclusion. However, we appreciate that the Government gave the Order-making powers the highest type of control in the superaffirmative procedure.

[125] **Mr Lambert:** It is only the second time that it has been used. I think the Local Government (Wales) Measure 2009 has it, does it not?

[126] **Ms Navarro:** Yes, it is the second time since the Assembly started under Part 3.

[127] **William Graham:** You have touched on my next question, which is about fast-track legislation. You have probably answered why you think the Minister's proposals are better addressed through an emergency Measure. You have clarified that.

[128] **Janet Ryder:** Are you going to ask that question? I had a supplementary question.

[129] **William Graham:** Well, the question has been posed already and the answer has been given.

[130] **Janet Ryder:** I will ask a supplementary question, then. We have talked about the fast-track Measure and the emergency procedure. In his question to you earlier, Alun Davies put forward the idea that perhaps the Minister would require this amendment to go through as part of this proposed Measure as a backstop. Can you explain to me whether there is any difference between having it as a backstop in this proposed Measure or having and using the emergency powers? Would the ability to use those powers to bring forward an emergency Measure to merge two or three local government areas not act in a similar way as a threat, which is what Alun was alluding to? The Government might need this threat to make local government authorities merge. What is the difference between the two, if there is any?

[131] **Mr Lambert:** The difference is that you are in control of emergency Measures, it seems to us. You can decide whether it is an emergency and presumably the Government has to give reasons why it considers an emergency Measure to be required. You can say 'yes' or 'no'. You are not so much in control of the superaffirmative procedure. Once it is there, then the Government says, 'Great, we are going to do this'. Then it follows the procedures and there you are thinking, 'Gosh, we only have 60 days'. Some of those days might be holidays or something such as that, and it is not in your control. It is the Executive doing it and not the Parliament.

[132] **Ms Navarro:** You would not be able to vote on the general principles, as you would for a proposed Measure, either.

[133] **Janet Ryder:** So over and above whatever argument the Government has for bringing forward these amendments within this proposed Measure to make local government work, there is a much deeper argument emerging as to where power should rest: with the Executive or with the legislative body.

[134] **Mr Lambert:** Absolutely. That is what comes out in all of these comments by the House of Lords Constitution Committee.

[135] **Ms Navarro:** We heard that this would only be used in an absolute emergency and so

on. In the amendment, we read that this is necessary for effective local government. We have no idea what 'effective' means, and to me, the worst bit is the word 'likely' that is used. It says that it would be used when all of the provisions that already exist on the statute books are 'likely' to fail. So, not only is there a problem of who should have the power, but of when should it be used. If it were in a separate proposed Measure, then you would have a full debate on the general principles of the proposed Measure, the circumstances, and so on, which you might not have with subordinate legislation.

[136] **William Graham:** So what you are saying, to paraphrase again, is that there is another procedure, and the emergency procedure would be quite effective and would probably be able to, on the face of that particular piece of legislation, spell out exactly what has gone wrong and why a remedy is required.

[137] **Mr Lambert:** If the Government convinces you, yes.

[138] **William Graham:** It would be for the Government to satisfy Plenary or this committee that its emergency Measure was necessary and immediate, and to specify the reasons that the failure had occurred.

10.20 a.m.

[139] **Ms Navarro:** You also fulfil the constitutional principle that only a legislature can change something that has been created by statute; it helps to fulfil all the requirements. Only a Parliament can undo what a Parliament has done; a Minister cannot do that.

[140] **Alun Davies:** To what extent are we dancing on the head of a pin here? You are right, and I have got no disagreement in principle with what you are saying about the need for primary legislation, but in terms of the process of scrutiny and involvement, to what extent, in real terms, do you believe that there is a significant difference between a superaffirmative procedure and an emergency Measure, which, given the circumstances, would be pushed through reasonably quickly? A superaffirmative process provides for a great deal of consultation and discussion on different aspects of any proposed Order—that is why we call for it. It might well be that that process could allow a greater range of people to participate in consultation than simply a rushed parliamentary process that we might seek in order to provide for that legislative parliamentary scrutiny. That could have the impact of tightening or reducing the amount of space and time for real debate about what the Government seeks to do.

[141] **Ms Navarro:** You could have a normal Measure procedure. If there really was an emergency and a rush, you would go to the extreme, and use the emergency procedure, but if there was not such an emergency, you would just use a normal Measure procedure, with all the normal stages. So, you can go back to that. If you wanted to involve even more people, you could have it published in draft and invite a consultation on the draft Measure before it was introduced here.

[142] **Mr Lambert:** This is a classic requirement that we discuss with our public law undergraduates in year one at the university. The Minister is very much in the driving seat. Under this superaffirmative procedure, it is the Minister who decides who is consulted. There is no mention of the Assembly. That worries me. There are many considerations about whether it would be reasonable or unreasonable to consult. It is a classic problem question for undergraduates.

[143] **Alun Davies:** In real terms, when that genie gets out of the bottle, there is no question that there are enough people, even around this table, who would make sure that it was raised in the Assembly. While I recognise and share your concern about consultation issues, in real

terms it would be done here. This amendment lists the circumstances in which the power can be exercised. Without seeking to read out all the different processes that would need to be followed by Ministers before making this Order, it lists a number of processes that must be followed beforehand. So, in terms of what Marie was saying about going through a traditional Measure-making process, that would already have happened. You would not seek to go down that route anyway. In fact, you would be seeking a fast termination of this process, because it would have already failed, given the safeguards that have been put in to the amendment by the Government.

[144] **Mr Lambert:** Again, constitutionally, should it not be you, rather than the Government, in charge of the process? You are not in the driving seat under the superaffirmative procedure.

[145] **Janet Ryder:** Surely, that begs a further question: if it was the Government's intention, when it drafted its proposed Measure, to have the power, as a last stop, to merge councils, should that not have been written in at that time?

[146] **Rhodri Morgan:** Can we try to work out the nature of your objections, and how easily they might be corrected by changing the wording and tightening up slightly subjective expressions? You mentioned that you do not like the word 'likely', and that it is not suitable for use in legislation, and that 'effective local government' is not defined. We all share your unease about this late addition—which is always going to create suspicion about what is going on and whether this is subsidiary to the overall purpose of the proposed Local Government (Wales) Measure, as we have previously understood it. Do you think that other words could be used to tighten up expressions such as 'likely' and 'effective local government' that would dampen your fears that this could be used to achieve purposes that do not fall under the umbrella of the proposed Measure?

[147] **Mr Lambert:** We accept the procedure, but there are no criteria at all. I do not know what 'effective local government' is. We have proposed a number of things. I am not in any way a politician, but does 'effective' mean that the local authority is not bankrupt, or that it produces good social services?

[148] **Rhodri Morgan:** We have all read the paper, but if you were writing this legislation, and the Minister had said that what he needed was a backstop power within the overall umbrella of the proposed Measure so that it is the least subjective and the most objective that it can be, are there words that you could find to satisfy everybody that this was a subsidiary backstop power, to show local government that the Minister was serious about continuous improvement, which is the overall purpose of the proposed Measure? Could you put this in the legislation or amend the legislation and explanatory memorandum so that that is clear? Are you saying that that is impossible, or are you saying that, had it been done with a bit more attention to detail in amending the explanatory memorandum, it could have achieved the purpose of having a backstop power without creating the possibility of the reorganisation of local government by the back door?

[149] **Mr Lambert:** Purely as a lawyer—I have never taken part in the drafting of Bills—I would say that it is very difficult to define the word 'effective'. You can have criteria—

[150] **Rhodri Morgan:** Are you saying that this is impossible or is it just poor, inappropriate choice of language to use 'likely' or 'effective', because they are too open to subjective interpretation, not by this Minister, but by a successor Minister? If so, can you replace them with different words, or are you saying that it is a fundamental flaw, and that this is such a constitutional abortion that you will have to recommend to the committee that we recommend that the Minister withdraw it?

[151] **Mr Lambert:** It is not for us to draft—

[152] **Rhodri Morgan:** No, but are you saying that it is a fundamental flaw?

[153] **Mr Lambert:** I think that it is. I think that you have to set out the criteria individually.

[154] **Rhodri Morgan:** Where would you do that? Would that be in a resubmitted, amended explanatory memorandum? Are you saying that it could be done if you had an amended explanatory memorandum that set out the criteria?

[155] **Mr Lambert:** I think that it would have to go in the amendment itself.

[156] **Rhodri Morgan:** It would have to go in both. So, you do not think that it is impossible.

[157] **Mr Lambert:** It is not impossible.

[158] **Rhodri Morgan:** It is not a fundamental flaw; it is poor drafting.

[159] **Mr Lambert:** It is always possible, I think, to set out criteria.

[160] **Rhodri Morgan:** I have one last point to make. I am not an expert on procedure, but I have observed Henry VIII powers in use—not the original Henry VIII, but the Neil Hamilton Henry VIII power in the Deregulation and Contracting Out Bill of 1994—and they are interesting. However, the key point is that an Order is not amendable, but a Measure or a piece of law is amendable. Picture a backstop power being used to merge Rhondda Cynon Taf and Merthyr Tydfil, Torfaen, Caerphilly and Blaenau Gwent, Conwy and Denbighshire, or Anglesey and Gwynedd. Are you suggesting that that should be amendable?

10.30 a.m.

[161] In other words, if a piece of legislation is brought to the Assembly with the aim of merging two or three local authorities in the Valleys or north Wales, are you saying that that itself is amendable? You could put your hand up to seek to have a vote on creating a situation where, instead of having Torfaen, Blaenau Gwent and Caerphilly, you would delete Torfaen and put in Newport instead, or you could take Torfaen out so that you would have only two local authorities instead of three. That means that you would have an amendable motion to merge. Are you saying that that is the case, or do you accept that, once you reach that stage, it has to be an unamendable motion—in other words, an Order—that is either rejected or accepted? The Order-making procedure is normally unamendable. Are you saying that this has a primary legislative character, whereby the Assembly itself can amend it?

[162] **Mr Lambert:** Yes, indeed. A Measure can make exactly the same provisions as an Act of Parliament. Therefore, your proposed Measure can amend the Local Government Act—

[163] **Rhodri Morgan:** Is that appropriate for consideration of a motion to merge local authorities? If we get to that stage, do you think that the Assembly should consider amendments to add or delete the number of local authorities being merged?

[164] **Mr Lambert:** Yes, I think so. You cannot possibly say that the 1994 Act is in concrete. The Assembly must be able to amend Acts, as it is doing now as part of its Measures. In our view, due to the individual circumstances of particular proposals to merge, they should come to the Assembly individually by means of a Measure.

[165] **Rhodri Morgan:** You are referring to a Measure that would itself be amendable, are you not?

[166] **Mr Lambert:** Yes, indeed.

[167] **Rhodri Morgan:** Therefore, it would be possible to add a local authority or take one out, as well as to vote the Measure down altogether.

[168] **Mr Lambert:** Certainly.

[169] **Janet Ryder:** I have a question on the back of that. In your reading of the original piece of legislation, did you see any intent to merge local government areas? Alternatively, in your interpretation of the proposed Measure, was the intention to improve the performance of local government areas? Is there a connection between the two?

[170] **Mr Lambert:** We thought the latter, which is why we thought that this amendment fell within the final category relating to the Cabinet office: it was desirable, and it suddenly appeared to the Government to be so. According to the Cabinet office, unless there are emergency reasons for moving an amendment, on the basis that it is desirable and urgent, the Government does not accept it. It does not put the amendment forward; it leaves it for further legislation.

[171] **Janet Ryder:** In your interpretation, therefore, is this a step too far, and something that should come as separate legislation?

[172] **Mr Lambert:** It seems to be a desirable amendment, but there is no reason why it has been brought forward at this stage on the basis of urgency.

[173] **Ms Navarro:** Again, the problem is that we do not have the normal documentation that goes with such an amendment so that we can understand why it was brought up in the first place, and why now. We can try to guess and assume, but if we had the necessary documentation, it would make things much easier, and we could have a better debate on this.

[174] **Janet Ryder:** We cannot gainsay what the Minister will say next week, and the reasons that he will give us for this, but, in looking at the evidence that has been brought forward, the only reason that I have been able to find so far comes from a report by Legislation Committee No. 3. The report says:

[175] 'Given the drive towards collaboration across public services generally, we believe that the proposed Measure needs to be strengthened to provide a more effective tool to compel collaboration in circumstances beyond the current limited powers in the 2009 Measure. We recommend that the Minister seeks ways of addressing this issue and strengthening the proposed Measure to look at other circumstances where the Minister may want to compel local authorities to collaborate.'

[176] I appreciate that you may not have seen the report, but it uses the word 'collaborate'. For my benefit, could you draw on your legal background to give me a definition of what you would term as 'collaborate', what you would term as 'merge' and what the difference between them might be?

[177] **Mr Lambert:** Off the top of my head, I would say that 'collaborate' is a kind of administrative statement, whereas 'merge' is very much a legal provision. The two seem to be very different. It is like having a gun in a bag—if you do not collaborate administratively, we will merge you.

[178] **Rhodri Morgan:** That is exactly the Minister's intention.

[179] **Mr Lambert:** However, there are no criteria. The only thing that you have is these provisions that they will look at four sections of last year's local government Measure, and if they do not think that they are sensible or something similar, in this particular case, they will order them to merge. However, what will they take into account in deciding that those sections are not working?

[180] **Ms Navarro:** That local government is not efficient.

[181] **Janet Ryder:** We will return to this in a minute.

[182] **William Graham:** As a member of that legislation committee, it is worth commenting that what was in my mind and in the mind of others was the collaboration part of it. I am thinking of twenty-first century schools, of which collaboration is a vital part, the Beecham recommendations for collaboration and, to go back to 1994, when it was suggested that there would not be, for the sake of argument, 22 directors of education authorities, but that they would be merged into representative bodies from those area councils. That never came about. We were concerned that the Ministers should have the power to compel, which is the word that was used, collaboration. It was not my intention that that should be used for amalgamation.

[183] **Rhodri Morgan:** This is the critical thing. We have explored the question of what happens if recalcitrant local authorities show no interest in collaboration. The Minister thinks that he is then like a one-legged man in an arse-kicking contest, because he cannot compel the local authorities to do what he wants them to do, but he might be able to do so had he this power in reserve. That is the issue. It is not about an emergency procedure to be used when a local authority is at the point of collapse. It is a backstop power. Can you see the difference between the need for an emergency power, when you would have to rush legislation through because a local authority was on the point of collapse, and the need for something different due to a resolute refusal to collaborate in an exercise of continuous improvement, when it would be inappropriate to use an emergency Measure if what you want is a backstop Measure to oblige collaboration due to recalcitrance?

[184] **Janet Ryder:** Before you answer that, would you have expected the Minister and his officials, in drawing up the original proposed Measure, to have thought it right the way through, with all the subsequent eventualities and, therefore—it does not matter how desirable this may be to some Ministers—to have included it at that stage?

[185] **Mr Lambert:** I hesitate to offer the Cabinet Office advice again, but that is what the Cabinet Office advice is saying. You should first of all sit down, focus and work out the whole extent of a Bill and then present the Bill to Parliament. You do not put in desirable amendments halfway through the Bill process. You are under a duty to think it out at the beginning. That is why we and the Cabinet Office would not agree to desirable amendments going through afterwards.

[186] **Janet Ryder:** I know that Kirsty wants to come in, but I will bring William in because he sat on the committee.

[187] **William Graham:** Bearing in mind what you have said in evidence, why do you think that the subsequent amendments are so detailed? They give the power to the Ministers to give support for amalgamation in terms of community councils, the boundaries of authorities and the numbers of councillors and so on, which does not suggest that it is simply a collaborative agenda.

[188] **Mr Lambert:** It looks as if they were preparing this amendment at the same time as they were putting the proposed Measure forward. What seems to happen in Parliament, and this is against the advice of the Cabinet Office, is that Bills are put into Parliament as quickly as possible, particularly if you have a new Government with new thoughts and then, suddenly, as the Bill proceeds, they afterwards think, 'Ah, let's put an extra little bit in', or a large bit. They had not thought of it at the beginning, but as the Bill is going through, they are preparing the amendment and developing it. In central Government terms, I suppose you would have two Bill teams: one would be the original Bill team, steering through the original Bill, and the other would be a separate, supplementary Bill team filling in all the details of the supplementary part. Again, the Cabinet Office would say, 'That is really not on. By all means, the supplementary Bill team may prepare their proposals, but for another Bill, not for an amendment to this one'.

10.40 a.m.

[189] **Janet Ryder:** William, do I take it from the question that you just asked that it is your assumption that, because of the detailed nature of these amendments, they may have been thought through beforehand?

[190] **William Graham:** I am not convinced that it is about 'collaboration'. In my view, the amendments suggest amalgamation. If that is not the intention, why is there so much detail in the amendments? That is my view.

[191] **Janet Ryder:** Not that the amendments could have been drawn up beforehand.

[192] **William Graham:** Quite.

[193] **Rhodri Morgan:** I have one last question.

[194] **Janet Ryder:** Kirsty has been waiting some time to come in.

[195] **Kirsty Williams:** I guess that there has been a lot of speculation as to why the Minister has brought forward these amendments at this stage and, to be fair to the Government, I do not think that it is in the business of wholesale reform and the redrawing of local government boundaries—I do not think that that is what is in the Minister's mind, if I am being fair to him. There has been a lot of speculation that there is an individual issue that the Minister is seeking to address, and there is probably a legitimate debate to be had about that. However, is there another, more appropriate way, even at this late stage in this Assembly term—and we are approaching the end very quickly—for this Minister to deal with that issue, rather than asking the National Assembly via these procedures to hand over an ill-defined but significant amount of power? Is there another way that the Government or the Minister could achieve those goals rather than asking us for a wholesale handing over of power?

[196] **Mr Lambert:** Yes there is: a proposed Measure, setting out exactly how you would amalgamate two local authorities. You could set out on the face of the proposed Measure the number of councillors in the amalgamated authority, and the number of staff who might have to go, and the whole thing would be a composite document just for those two authorities.

[197] **Ms Navarro:** As a one-off.

[198] **Mr Lambert:** You would see it all on the face of the proposed Measure as it goes through. You see, there is nothing currently on the face of this proposed Measure as regards Orders; all it says is that you can decide the number of councillors, and the number of staff that will go. I think that you could have a self-contained proposed Measure to spell that out.

[199] **Kirsty Williams:** So, there is another way.

[200] **Mr Lambert:** Yes, there is another way.

[201] **Rhodri Morgan:** If you were working within this proposed Measure—despite the unease that we all share in relation to the late addition of these two amendments, and their possible use by a successor Minister to achieve local government reorganisation by the back door, without having to go through the usual White Paper and Measure-making procedure—how would you seek to reinforce the protection or improve the amendments, so that it would be far more difficult, if not impossible, for a successor Minister to abuse them to achieve local government reorganisation by the back door? Are there reinforced wordings or changes to the explanatory memorandum, or ministerial undertakings that could be given, which would throw a block against any future Minister seeking to abuse the power and to go from 22 local authorities to seven or eight without the need for primary legislation?

[202] **Mr Lambert:** What I would say to that—and I do not know if Marie has anything to add—is that you should set out the criteria. On page 2 of our paper, we quote the House of Lords Constitution Committee praising the criteria in section 3(2) of the Legislative and Regulatory Reform Act 2006 for ensuring that the effect of an Order is proportionate and that there is a method of preventing the removal of any necessary statutory protections. It strikes a fair balance between the public interest and the interests of all those who would be adversely affected by the decision. That is at least the beginning of the criteria. There is not any of that in the amendments.

[203] **Kirsty Williams:** Could you please repeat the page number?

[204] **Ms Navarro:** It is on page 2 of our evidence.

[205] **Rhodri Morgan:** Do you think that that is not of itself sufficient, but it is a good start as a reinforcement against any suspicion that a successor Minister could misuse the power in order to achieve wholesale local government reorganisation, shall we say, as opposed to retail local government reorganisation, by the back door, and without it being a backstop power in relation to a refusal to collaborate on continuous improvement, but something that the Minister could just damn well do?

[206] **Mr Lambert:** Yes, we do.

[207] **Ms Navarro:** I would definitely provide for a definition on the face of the proposed Measure, so an amendment to your amendment, to define what is meant by ‘efficient local government’. I would get rid of ‘likely’, because it is a totally subjective word, and provide robust guidance to the Assembly at the same time, in the form of an explanatory memorandum or administrative guidance, as to when and how the powers would be exercised. You should also, and I refer again to the Cabinet Office’s document, give examples as to the precise times when the powers would be exercised or give examples of precedence in order to give a clear idea as to when it would be acceptable to use the power, so that the Minister has a clear understanding of the intention behind the legislation.

[208] **Rhodri Morgan:** To what extent is it useful for the Minister to give spoken undertakings that can be linked to definitions in a proposed Measure, where it is very difficult to find the right words? It is usually regarded as helpful these days that a Minister, speaking on his or her feet in the Assembly, actually names the circumstances in which the power could and could not be used. Is that not normally regarded as helpful reinforcement? It did not used to be, but I think that it is now.

[209] **Mr Lambert:** I would emphasise what you have said by saying that I would link any explanatory note to statutory criteria. I would not keep it all in explanatory notes. I would have statutory criteria and then expand it by a reference to the explanatory notes. Local authorities, the Assembly and anyone else would then be able to point to the statutory criteria and to the explanatory notes and say, 'Minister, what on earth are you doing? You are not following the statutory criteria and you are not following the explanations given by your predecessor.'

[210] **Rhodri Morgan:** The Minister would then be exposing him or herself to a judicial review threat, with a much higher likelihood of successful challenge because they have broken the guidance.

[211] **Mr Lambert:** Yes, absolutely. The guidance would be before the court.

[212] **Rhodri Morgan:** So, in that sense, you are saying that it is doable, with a lot of additional work, to reinforce the explanatory memorandum, to give guidance, to change some of these subjective words like 'likely' and 'effective local government' and to reinforce by ministerial undertaking the circumstances in which it would and would not be right to us the power and so on. So, it is doable to make it clear that this is subsidiary to the requirement to collaborate, it is a backstop power and cannot be used as a backdoor for local government reorganisation.

[213] **Mr Lambert:** We would prefer an amended proposed Measure.

[214] **Rhodri Morgan:** Yes, but you are saying that it is doable, if all of those things were done.

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

[216] **Ms Navarro:** We would also want a statement stating that this is not a precedent, so that it should not be treated as a precedent.

[217] **Rhodri Morgan:** So, you would want a ministerial statement to that effect.

[218] **Ms Navarro:** Yes.

[219] **Janet Ryder:** We have covered an awful lot of points there. I know that we have asked a lot of you already, but would it be possible for you to provide us with a note on these further things? If we could have something in writing before we have the Minister in, that would be exceptionally helpful.

[220] Kirsty, do you still want to come back on that?

[221] **Kirsty Williams:** I think the point has been made. It is clear that there are things that the Government could do to improve the procedure that it has used. Do you agree that the principle that a Parliament alone can undo something that a Parliament has done is ultimately the principle by which we should be governed? Although there is an opportunity here to address some people's concerns, what you have outlined is no substitute for that basic principle that it is the right of a Parliament to undo what a Parliament has done.

10.50 a.m.

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

[223] **Alun Davies:** Do you believe that the amendment as written gives the Government

the legal powers for wholesale local government reorganisation in Wales?

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

[225] **Alun Davies:** You believe that the safeguards that have been built into it in sections 2(a) and 2(b) are irrelevant, essentially, and that the Government, by using these powers, could amalgamate all local authorities in Wales with others.

[226] **Mr Lambert:** We would say that they are procedural, and, fair enough, there are many procedures for consultation, but they are not substantive—there are no substantive criteria.

[227] **Rhodri Morgan:** They are open to abuse, is that what you are saying?

[228] **Mr Lambert:** They are open to a lot of interpretation. I am sure that Ministers will not want to abuse. When I was studying equity in Aberystwyth, we had a phrase that said that equity depended on the length of the Lord Chancellor's foot. So, the approach to equity depended on the shoe size of whoever was the Lord Chancellor at the time. In this case, it depends on whatever the Minister wants to do.

[229] **Alun Davies:** As Kirsty has pointed out, we are coming to the end of this Assembly, and, when a new Government is formed later in the year, a new Minister could take an entirely different view of the power and use it in a way that the current Minister would regard as unexpected, shall we say?

[230] **Mr Lambert:** Indeed. The new Minister could depart from any statements that his predecessor has given as part of the explanatory note. The Minister could say, 'I have looked at this matter again, and I am changing it.' That is how conventions change in Parliament; ministerial accountability changed almost overnight.

[231] **Ms Navarro:** That is why you need the criteria on the face of the proposed Measure.

[232] **Alun Davies:** Therefore, the only way to give us the safeguards that we want to see—and I think that there is wide agreement on that—is by further amendment to the proposed Measure.

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

[234] **Janet Ryder:** Fundamentally, this goes back to the point that Kirsty raised, which is that it is about whether we allow any future Minister to have the power, or whether we retain it in the hands of the Assembly and a Minister has to come and ask for that power as and when it is needed.

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

[236] **Janet Ryder:** Does anyone have any further questions? There are a number of questions that arise. For me, this issue has raised some fundamental points that go way beyond the proposed Measure. This raises fundamental constitutional questions, and it is a shame that we have reached it in the last few months of this Assembly. There are fundamental questions here about where power is held in Wales in the future, and whether it is handed over to a Government or whether it is held by the Assembly. I may well have overstepped the mark by saying that, but I cannot get away from a deep, deep feeling.

[237] **Alun Davies:** To be fair, Janet, I do not think that those remarks are representative of the committee as a whole. I would not want the record to show that I endorse that, because I

do not. I wish that the Government had acted differently. I do not think that this is the best way in which to go about legislating, and it is not the best way of creating a new statutory framework for local government. However, I do not think that it is an abuse, and I do not believe that the Government is acting in blind faith. We need to differentiate between our own personal and political views about what the Government is seeking to do and what we are dealing with here, which is a particular point of principle with regard to legislation. I do not necessarily disagree with other things that have been said here, but we need to guard against over-interpretation.

[238] **Janet Ryder:** This is the Constitutional Affairs Committee. Politics has nothing to do with the committee; it looks at the constitutional handling of this matter. In your evidence, Mr Lambert, you referred to the evidence that was given by Daniel Greenberg. He said clearly—and you agreed with his statement—that a Government must make its intentions clear at the outset, and show clearly that its policy is thought through and that the aim of the proposed Measure could not be achieved in any other way.

[239] **Ms Navarro:** Any new idea should not be contained in the same piece of legislation. Any new idea arising after a Bill is introduced should go in another Bill.

[240] **Rhodri Morgan:** However, a new idea may be subsidiary to the overall purpose. I find myself acting as devil's advocate or Minister's advocate in a way here, but it seems to me that the Minister's case is that this is a late addition, and he apologises that it is a late addition, but that it is subsidiary to the need for a comprehensive ability to compel collaboration, and that it is not a separate or new idea—it is a subsidiary one. The issue is whether or not that objective to compel or oblige authorities to collaborate is subsidiary, and to be achieved through the amendment, or whether it is a new power, as you say, and a completely different animal. That is the issue.

[241] **Ms Navarro:** That is why we wish that there were established conventions—again, I come back to that point—so that Government, the Assembly and us outside would be clear about what is acceptable for the Assembly. Again, I appreciate that it can be different from Westminster, and, in a way, I hope that it is, but very good practices have been established in Westminster over the centuries, so there are good ones to be kept, and new ones which you can come up with and some that can be changed. However, it would be useful for everyone if, in the new Assembly—with, hopefully, more powers—we would establish conventions and principles. A review of Standing Orders going on, and that may be an opportunity to include some of that there, or it could be kept for conventions, which are more flexible for the future.

[242] **Janet Ryder:** Thank you very much. If you could provide what you were saying about criteria and any further evidence in writing, that would be most welcome. Thank you very much for coming in this morning.

10.57 a.m.

Unrhyw Fusnes Arall
Any Other Business

[243] **Janet Ryder:** Regarding the time that we have asked the Minister to make himself available for, are we satisfied with a 45 minute slot, as the Minister suggests? From looking at the clock, I see that we have had a lengthy discussion this morning, which suggests that there will also be a lengthy discussion next week.

[244] **Alun Davies:** May I suggest that we begin at 8.30 a.m.?

[245] **Janet Ryder:** Is everyone happy to start at 8.30 a.m.? There may be some pieces of legislation to discuss, but we could do those after we have taken evidence from the Minister. I see that everyone is content with that. So, we will invite the Minister in for 8.30 a.m. for next week's meeting.

10.58 a.m.

Cynnig Trefniadol
Procedural Motion

[246] **Janet Ryder:** I ask a member of the committee to move a motion for us to go into private session to discuss the evidence that we have taken.

[247] **William Graham:** I move that

the committee resolves to exclude the public from the remainder of the meeting, in accordance with Standing Order No. 10.37.

[248] **Janet Ryder:** I see that the committee is in agreement.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 10.58 p.m.
The public part of the meeting ended at 10.58 p.m.