



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

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

**Dydd Mawrth, 2 Hydref 2007
Tuesday, 2 October 2007**

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

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Eleanor Burnham	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Alun Davies	Llafur Labour
Andrew R.T. Davies	Ceidwadwyr Cymreig Welsh Conservatives
Paul Davies	Ceidwadwyr Cymreig Welsh Conservatives
Irene James	Llafur Labour
David Lloyd	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)
Sandy Mewies	Llafur Labour
Janet Ryder	Plaid Cymru The Party of Wales
Karen Sinclair	Llafur Labour

Eraill yn bresennol
Others in attendance

Alan Trench	Cymru Yfory Tomorrow's Wales
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Swyddogion Gwasanaeth Seneddol y Cynulliad yn bresennol
Assembly Parliamentary Service officials in attendance

Gwyn Griffiths	Cynghorydd Cyfreithiol Legal Adviser
Joanest Jackson	Cynghorydd Cyfreithiol Cynorthwyol Assistant Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Chris Reading	Clerc Clerk

Dechreuodd y cyfarfod am 8.16 a.m.

The meeting began at 8.16 a.m.

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

[1] **David Lloyd:** Croeso i gyfarfod diweddaraf y pwyllgor hwn. Mae gennyf rai sylwadau agoriadol i'w gwneud. **David Lloyd:** Welcome to the latest meeting of this committee. I have some opening remarks to make.

[2] Croesawaf yr Aelodau, gan gynnwys Jonathan Morgan, sydd yn oriel y cyhoedd. Efe yw Cadeirydd y Pwyllgor ar y Mesur I welcome the Members, including Jonathan Morgan, who is sitting in the public gallery. He is the Chair of the Proposed NHS Redress

Arfaethedig ynghylch Gwneud Iawn am Gamweddau'r GIG (Cymru) 2007, ac mae'r pwnc hwnnw ar ein hagenda yn nes ymlaen y bore yma. Croesawaf hefyd y swyddogion ac aelodau'r cyhoedd.

(Wales) Measure 2007 Committee, and that subject is on our agenda for discussion later on this morning. I also welcome the officials and members of the public here.

[3] Os bydd argyfwng, bydd y tywyswyr yn ein harwain at yr allanfa agosaf. Gellir defnyddio'r clustffonau i glywed y cyfieithiad ar y pryd, ac i addasu lefel y sain. Os cewch anhawster, gall y tywyswyr ddangos ichi sut i ddefnyddio'r offer. Rhaid diffodd ffonau symudol yn llwyr, a gwnewch hynny yn awr. Mae'r cyfieithiad ar y pryd o'r Gymraeg i'r Saesneg ar gael ar sianel 1, a gellir chwyddo'r sain ar sianel 0.

In the case of an emergency, the ushers will guide us to the nearest exit. The headphones can be used to hear the simultaneous translation or to adjust the volume. Should you experience any difficulty, the ushers will show you how to operate the equipment. Mobile phones must be switched off, so please do that now. Welsh to English interpretation is available on channel 1, while the sound can be amplified on channel 0.

[4] A oes ymddiheuriadau? Gwelaf nad oes.

Are there any apologies? I see that there are none.

8.17 a.m.

Offerynnau na Wahoddir y Cynulliad i Roi Sylw Arbennig iddynt o dan Reol Sefydlog Rhif 15.2

Instruments in Respect of which the Assembly is Not Invited to Pay Special Attention under Standing Order No. 15.2

[5] **David Lloyd:** O dan yr eitem hon, ystyriwn offerynnau statudol ac offerynnau statudol drafft na chyflwynir adroddiad arnynt o dan Reol Sefydlog Rhif 15.2, sef SLC44, Rheoliadau Hadau (Diwygiadau Amrywiol) (Cymru) 2007, ac SLC45, Rheoliadau Bwyd at Ddefnydd Maethol Neilltuol (Diwygiadau Amrywiol) (Cymru) 2007. Gan na chyflwynir adroddiad ar y rheiny, nid oes disgwyl i Joanest na Gwyn ddweud dim. Yr ydych i gyd wedi darllen yr offerynnau'n drwyadl. A oes gennych sylwadau? Gwelaf fod pawb yn fodlon eu cymeradwyo.

David Lloyd: Under this item, we will consider statutory instruments and draft statutory instruments that are not required to be reported on under Standing Order No. 15.2, and they are SLC44, the Seed (Miscellaneous Amendments) (Wales) Regulations 2007, and SLC45, the Food for Particular Nutritional Uses (Miscellaneous Amendments) (Wales) Regulations 2007. As they will not be reported on, there is no need for Joanest or Gwyn to comment. You have all read the instruments thoroughly. Do you have any comments? I see that we are all content to approve them.

8.18 a.m.

Offerynnau y Gwahoddir y Cynulliad i Dalu Sylw Arbennig iddynt o dan Reol Sefydlog Rhif 15.2

Instruments in Respect of which the Assembly is Invited to Pay Special Attention under Standing Order 15.2

[6] **David Lloyd:** O dan yr eitem hon mae offerynnau statudol ac offerynnau statudol drafft y cyflwynir adroddiad arnynt o dan Reol Sefydlog Rhif 15.2. Mae'n edrych fel pe bai Joanest wedi gwneud y cyfan yn

David Lloyd: Under this item we have statutory instruments and draft statutory instruments on which a report is made under Standing Order No. 15.2. It looks as though Joanest has dealt with everything in this

hyn o beth. Yr ydym yn sôn am SLC20, Rheoliadau Grant Dysgu'r Cynulliad (Addysg Bellach) 2007, SLC21, Rheoliadau Lwfansau Cynhaliath Addysg (Cymru) 2007, SLC22, Rheoliadau Grantiau a Benthyciadau Dysgu y Cynulliad (Addysg Uwch) (Cymru) (Diwygio) 2007, SLC23, Rheoliadau Addysg (Ffioedd a Dyfarniadau) (Cymru) 2007, ac SLC24, Rheoliadau Grantiau Dysgu'r Cynulliad (Sefydliadau Ewropeaidd) (Cymru) 2007. Draw atoch chi, Joanest.

regard. We are dealing with SLC20, the Assembly Learning Grant (Further Education) Regulations 2007, SLC21, the Education Maintenance Allowances (Wales) Regulations 2007, SLC22, the Assembly Learning Grants and Loans (Higher Education) (Wales) (Amendment) Regulations 2007, SLC23, the Education (Fees and Awards) (Wales) Regulations 2007, and SLC24, the Assembly Learning Grants (European Institutions) (Wales) Regulations 2007. Joanest, over to you.

[7] **Ms Jackson:** Diolch. On SLC20, I confirm that the Government has accepted the identified reporting points, and amendments will be made when these regulations are next to be amended, which is expected to be in readiness for the coming into force of regulations on 1 April 2008.

8.20 a.m.

[8] The amendments to SLC21 have been accepted, and, in most of the following regulations, the main point identified was an inconsistency between the English and Welsh texts. It dealt with the ascending line of persons who were entitled to benefit from the regulations if they were members of the family of European workers and Turkish workers. With regard to SLC21, I understand that the Government's intention is to amend these as soon as possible.

[9] Amendments have been accepted to SLC22, and, in the next few weeks, we will be getting some regulations to amend SLC22. There are some requirements to bring in provisions that relate to certain distance-learning courses, so we should have those before us very shortly.

[10] I understand that SLC23 is to be amended in readiness for regulations coming into force at the end of April 2008. Similarly, I am given to understand that some amendments are anticipated to SLC24 for the coming into force of regulations in February 2008.

[11] **David Lloyd:** Diolch yn fawr, **David Lloyd:** Thank you, Joanest. Janet Joanest. Janet Ryder sydd â'r cwestiwn Ryder has the first question. cyntaf.

[12] **Janet Ryder:** The problems that have been highlighted in these regulations are the kinds of problems that can cause appeals when you are trying to apply the legislation, when people are applying for the grants. I accept that the Government has said that it will amend the regulations, but it is unclear as to where that power lies, particularly with SLC20. Does that power lie with the Secretary of State, the Minister or the Higher Education Funding Council for Wales? You say that it is to be amended by 2008; is that the earliest by which it could be amended, and will it already be in use before then?

[13] **Ms Jackson:** The regulations came into force on 31 August, so they are already in force. Given that it is through the Assembly that these regulations will be administered, I do not think that there is a doubt as to where the power lies. I do not think that a court would take an adverse view of this particular point, because I do not think that anyone will be disadvantaged by it. I agree that it is not absolutely clear, but there is probably sufficient guidance so that those who are meant to benefit from the regulations know how to apply. There is no doubt that the power is vested in the Assembly.

[14] **Janet Ryder:** In that case, if it is clear in whom the power is vested, there are anomalies as regards who can apply for these grants in some of the regulations.

[15] **Ms Jackson:** No, it is quite clear who can apply.

[16] **Janet Ryder:** Are you satisfied that that is the case for all of the regulations?

[17] **Ms Jackson:** Yes, I think that it is quite clear that no-one will be disadvantaged by the points that we have identified, although they need to be correct.

[18] **Sandy Mewies:** A general point has been made in the papers that some of the language being used is still gender specific. We discussed this issue many times in the former Legislation Committee. We know that the language should not be gender specific, because that is how we work here, yet it is still happening year on year. That is a message that we must make clear and stamp down on.

[19] **Eleanor Burnham:** Yr wyf am i chi gadarnhau pam ein bod yn edrych arnynt yn awr, os bydd angen eu diwygio eto y flwyddyn nesaf. A yw hynny oherwydd iddynt ddod i rym ym mis Awst heb inni gael cyfle i edrych arnynt? Nid wyf yn siŵr am hynny.

Eleanor Burnham: I would like you to confirm why we are looking at these now, if they will need to be amended again next year. Is that because they came into force in August but we have not yet had an opportunity to look at them? I am not sure about that.

[20] **Ms Jackson:** Daethant i rym dros doriad yr haf, ond dim ond yn awr y mae'r cyfle inni edrych arnynt yma. Er hynny, tynnwyd y prif bwyntiau at sylw rhai o gyfreithwyr y Llywodraeth dros doriad yr haf.

Ms Jackson: They came into force during the summer recess, but we only now have the opportunity to look at them here. However, the main points were brought to the attention of some of the Government's lawyers during the recess.

[21] **David Lloyd:** A oes unrhyw gwestiynau neu sylwadau eraill? Gwelaf nad oes. Felly, gyda'r sylwadau hynny gan Joanest, a ydych yn hapus i gymeradwyo'r rheoliadau hyn? Gwelaf eich bod.

David Lloyd: Are there any further questions or comments? I see that there are not. Therefore, bearing Joanest's comments in mind, are you happy to approve these regulations? I see that you are.

8.26 a.m.

**Mesur Arfaethedig ynghylch Gwneud Iawn am Gamweddau'r GIG (Cymru)
2007: Trafodaeth gyda Cymru Yfory
Proposed NHS Redress (Wales) Measure 2007: Discussion with
Tomorrow's Wales**

[22] **David Lloyd:** Symudwn ymlaen yn awr at brif eitem y cyfarfod hwn, sef trafod ymhellach y Mesur arfaethedig ynghylch Gwneud Iawn am Gamweddau'r GIG (Cymru) 2007. Byddwn yn trafod y mater ac yn cymryd tystiolaeth gan sefydliad Cymru Yfory.

David Lloyd: We will now move on to the meeting's main item, namely our further discussion on the Proposed NHS Redress (Wales) Measure 2007. We will discuss the matter and take evidence from Tomorrow's Wales.

[23] I olrhain y cefndir, bydd pobl yn To give you the background, people will be

ymwybodol bod y Mesur ynghylch gwneud iawn am gamweddau'r GIG yn caniatáu i iawn gael ei ddarparu heb ddwyn achos sifil. Dyna'r feddylfryd. Bydd Aelodau'n cofio i ni drafod hyn yn y Siambr cyn yr haf, ac yr oedd cytundeb bras â'r syniad o gyflymu'r broses o sicrhau ymddiheuriad neu iawndal mewn achosion llai, heb ymyrraeth—neu, fel y dywedais yr wythnos diwethaf, heb gymorth—cyfreithwyr. Mae pwyllgor Mesur hefyd yn trafod y Mesur hwn ac, unwaith eto, croesawaf Gadeirydd a chlerc y pwyllgor hwnnw i'r cyfarfod hwn, felly bydd rhywfaint o gydweithio rhwng y ddau bwyllgor.

[24] Yr ydym wedi cael papur tystiolaeth, a heddiw yr ydym i glywed tystiolaeth gan Cymru Yfory. Bydd Aelodau'n cofio'r drafodaeth a gawsom yr wythnos diwethaf pan gytunwyd y byddem yn cymryd tystiolaeth bellach am bwyntiau deddfwriaethol yn unig, oherwydd dyna bwrpas y pwyllgor hwn. I'r perwyl hwnnw, yr ydym wedi gofyn i Cymru Yfory i gyflwyno tystiolaeth ac ateb cwestiynau. Yn hwyrach, bydd y Gweinidog yn dod ger ein bron, i gael ei harchwilio ynglŷn â manylion y Mesur hwn. Heb ymhelaethu ymhellach, cyflwynaf gynrychiolydd Cymru Yfory—Tomorrow's Wales i chi, sef Alan Trench. Mae'n gymrawd ymchwil hŷn anrhydeddus yn uned cyfansoddiadol Coleg Prifysgol Llundain ac yn ysgol y gyfraith, Prifysgol Caeredin, ac y mae hefyd yn gyfreithiwr anweithredol yng Nghymru a Lloegr. Estynnaf wahoddiad i Alan roi cyflwyniad byr ac i fy nghyd-Aelodau i ofyn cwestiynau wedi hynny.

[25] **Mr Trench:** Thank you very much, Mr Chairman. May I say what a pleasure it is to be here, even at this hour of the morning? [*Laughter.*] It is a great honour to be the first person to give evidence to this committee, and to do so on the first Measure to come before the Assembly. I ought to emphasise at the outset that I am speaking in a personal capacity. The nature of Tomorrow's Wales means that we are not the sort of organisation that has a collective position, because we are a group of people with varying interests. I am fairly confident that pretty much everything that I have to say would be endorsed by most members of the group—and we had a discussion on this at our last executive meeting—but I ought to note that I am speaking for myself, and that the reason I have come here is because I have a background in these sorts of matters that not all members of the committee have in such detail.

8.30 a.m.

[26] I ought to emphasise that our concerns are to do with the legislative nature of this

aware that the NHS redress Measure will permit redress without the need to bring a civil action. That is the thinking behind it. Members will remember that we discussed this in the Chamber before the summer, and there was broad agreement for the idea of speeding up the process of securing an apology or compensation in smaller cases, without the interference of—or, as I said last week, without the assistance of—solicitors. A Measure committee is also discussing this Measure and, once again, I welcome the Chair and the clerk of that committee to this meeting. There will be a certain amount of co-operation between both committees.

We have received an evidence paper, and today we will be taking evidence from Tomorrow's Wales. Members will remember the discussion that we had last week when we agreed that we would take further evidence on legislative points only, because that is the purpose of this committee. To that end, we have invited Tomorrow's Wales to give evidence to us and to answer our questions. Later on, the Minister will also appear before this committee to be scrutinised on the details of this Measure. Without further ado, allow me to introduce the representative of Tomorrow's Wales—Cymru Yfory, Alan Trench. He is an honorary senior research fellow at the University College of London's constitution unit and at the law school at the University of Edinburgh, and he is also a non-practising solicitor in England and Wales. I invite Alan to give a brief introduction and I invite my fellow Members to ask questions after he has finished.

proposal, not the principle of finding alternative redress or the policy that is involved. Indeed, at the root of our concerns is the fact that we do not really know what the Assembly Government is substantively proposing to do. What has been proposed is essentially a framework Measure, which will enable the policy to change substantially without any further need for primary legislation in this place, and with limited scrutiny by, and accountability to, the Assembly.

[27] That is the first of our three major concerns about the Assembly Government's proposals, namely that this constitutes an excessive delegation of powers that properly belong to the Assembly as a legislature to the Assembly Government. That is important in itself and because of what it indicates about the nature of representative democratic government in Wales. The second concern is that what is proposed would raise serious concerns if it were to be proposed at Westminster. Those concerns would be taken into account by what is now the Delegated Powers and Regulatory Reform Committee of the House of Lords. Thirdly, this may have implications for subsequent conferrals of legislative powers on the National Assembly by the UK Parliament at Westminster.

[28] I do not want to go into the detailed history of this, but, to elaborate a little, there is a long history in British constitutional practice relating to the nature of delegation of powers to the executive and its assumption of powers. This is the root of disputes between Parliament and Tudor and Stuart monarchs in the sixteenth and seventeenth centuries; it is the root origin of the civil war of the middle of the seventeenth century, which was essentially won by Parliament in what is known as the Glorious Revolution of 1688-89. In practice, during the twentieth century, that line shifted somewhat from the purist position that Parliament legislates and Government executes laws passed by Parliament, because it is simply impossible to run the sorts of public services that we now have without a degree of flexibility to shape regulation according to particular circumstances. However, that still leads to an ongoing set of skirmishes about where exactly the line is drawn, and this has resulted in a complex set of understandings—not always mutual—at Westminster, between Parliament on the one hand and Government on the other, about where the line should be drawn. That led to the establishment of what is now the Delegated Powers and Regulatory Reform Committee in the House of Lords, following the 1992 report of the Jellicoe committee.

[29] It seems that part of the issue here is where exactly that line gets drawn in Wales. In many respects, we would argue that this piece of legislation draws that line much too far in favour of the Assembly Government, leaves the Assembly Government too much discretion to make and to change the arrangements that are introduced in Wales, which should be determined first and foremost by the Assembly, and to reshape those arrangements over time. That is particularly important because the procedures for changing any regulations made will come before the Assembly in the form of negative resolution instruments—annulment procedure instruments—rather than affirmative procedure ones.

[30] One must note that, in many respects, the proposed Measure does something similar to what the NHS Redress Act 2006 does in relation to England, but I would draw attention to the rather different context of the provisions that apply in England. England is much larger than Wales, and it has a much more complex health service than Wales. There is, for example, a variety of hospital provision: foundation hospitals; ordinary NHS trust hospitals; treatment centres; and private sector provision at the expense of the NHS. So, the context is different and, because England is so much larger, greater flexibility is needed by the Executive in order to achieve a sensible policy. I would argue that that is not so much the case in Wales, as it is much smaller and has a simpler set of arrangements, which makes it possible to have greater explicitness, not less, in the legislation that is put to you.

[31] Secondly, the Government in Wales is much closer to the general public and to individual citizens. Part of the purpose of devolution was to bring it closer still. To move

away from that and to simply stick to what has been established as the norm in England would amount to a failure to live up to the aspirations of devolution. As this Measure, in some ways, gives greater power to the Executive than the English legislation does, it is, in that sense, a rather regressive move.

[32] This Measure does not simply apply to hospital services, as the English legislation does. The English legislation expressly excludes primary care, while the legislation proposed here does not. I think that that is a significant area of concern.

[33] I would also say that the provisions for England of the NHS Redress Act 2006 are not a shining example of good legislative practice at Westminster. That is a piece of legislation, in my view at least, that would stretch the envelope of granting powers to the Executive quite a long way. These clearly caused the Lords' Delegated Powers and Regulatory Reform Committee some concern. Those concerns were mitigated by the fact that the English legislation only applied to hospital services, by the extensive flexibility that already exists for the NHS in England in the hands of the Secretary of State, by the fragmented nature of existing powers and arrangements in the area, and by having a clear memorandum in front of them, which explained what was needed and why and how the Government proposed that the system would work. I think that the system here differs from that in three respects. The first is the point about primary care, which I have already mentioned; the second is that quite a lot of legislation has been made for Wales since 1999 that has altered how the NHS is run here, puts it on a less flexible and less discretionary footing and places it in a more formal legislative and legal context; and the third is that the sort of clarity of explanation of what is proposed is not applied here to anything like the same degree.

[34] Beyond that, I should note that the delegated powers committee is extremely sceptical when it is confronted with what it calls 'skeleton Bills', which is essentially what is the case here. In very recently issued guidance—I found it a couple of days ago, although it is dated October 2007—from the committee, it says that

[35] 'If a bill is, in effect, a skeleton bill (so that the real operation of the Act would be entirely by the regulations made under it), the Committee will expect a full justification for the decision to adopt that structure of powers'.

[36] I would suggest that at least that standard, if not a higher one, is probably what should apply in Wales.

[37] None of this is to say that Westminster standards should be applied in Wales, but I would suggest that if different standards are applied, they should be more and not less stringent. There should also be greater clarity, precision and transparency in legislation so that the Government can be brought to the public at large until society can take part in the legislative process, instead of granting the Executive greater freedom.

[38] I wish to refer to a slightly different point, which I am not sure has been drawn to your attention. It is worth asking why this piece of legislation comes to you in the form of an Assembly Measure, rather than in a set of regulations. A very definite policy decision has been made that that should be the case. I think that that rather begs the question of why a piece of skeleton legislation then emerges. The NHS Redress Act 2006 conferred powers on what I will call the old National Assembly—the Assembly established under the Government of Wales Act 1998. Those powers automatically transferred to the Welsh Assembly Government, not to the Assembly, when the Government of Wales Act 2006 came into force. I understand that that caused some concern in the Welsh Assembly Government and the Wales Office in London, because the point was that the framework powers were to be legislative framework powers and would therefore be in the hands of the Assembly. So, a piece of legislation was made that transferred these and other similar powers and converted

them into appropriate matters, in this case within field 9 of Schedule 5 to the 2006 Act. That piece of legislation—the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007—is what is being used, and it appears to have assumed, on the basis that the Assembly would actually legislate, not having been granted legislative powers, that it would hand them straight back to the Assembly Government to use as it saw fit.

8.40 a.m.

[39] Finally, these issues cannot be considered as purely black-letter issues in a vacuum, because they will also affect the development of the relationship between Wales and Westminster, particularly when it comes to the conferral of legislative powers. Several parliamentary committees—the Welsh Affairs Committee in the House of Commons and the Constitution Committee in the House of Lords, at Westminster—expressed concerns about the quality of legislative scrutiny when considering, in the first case, ‘Better Governance for Wales’ White Paper, and, in the latter case, the Bill that became the Government of Wales Act 2006. A failure by the Assembly to scrutinise the Assembly Government properly and to have in place arrangements to do that may have the effect of making Westminster and Whitehall look less favourably rather than more favourably on future conferrals of legislative powers. I would, therefore, suggest that the committee seeks greater precision from the Assembly Government about the nature of the scheme that it intends to introduce. It should seek, in particular, to establish whether or not that scheme extends to primary healthcare—and it should seek a great deal of clarity about that—if not legislative provision relating to it. You ought to insist, at all events, that any regulations made under this Bill are made by an affirmative procedure rather than an annulment procedure so that the legislature has an adequate degree of control.

[40] **David Lloyd:** Diolch yn fawr i Alan Trench am gyflwyniad a oedd yn arbennig yn ei fanylder a’i arbenigedd. **David Lloyd:** I thank Alan Trench for his detailed and expert presentation, which was excellent.

[41] Mae llwyfan i gwestiynau yn awr oddi wrth Aelodau. There is now an opportunity for Members to ask questions.

[42] **Eleanor Burnham:** If we are going to take Mr Trench’s advice, what is the next step?

[43] **David Lloyd:** I think that I will wrap that up at the end of the question-and-answer session. Is that all right, Eleanor? The next step is to have the Minister here, but I will dwell on that later on.

[44] **Eleanor Burnham:** Okay. The other thing is that most of the legislation that we have looked at this morning comes under the negative procedure. What provision do we have for insisting that most of the legislation that comes before us under the affirmative procedure rather than the negative procedure?

[45] **Ms Jackson:** Of what we have considered this morning, the Assembly and the Ministers are constrained by the provisions of the parent Act. The primary legislation, generally, will indicate which procedure is to apply, and there are specific provisions in the Government of Wales Act 2006 that deal with the application of a procedure in respect of powers that were granted to the previous Assembly in primary legislation, post 1999. So, other than when a determination is made in a Measure as to what procedures are to be used, we have to look back to the primary legislation to identify the appropriate procedure.

[46] **David Lloyd:** Diolch yn fawr, **David Lloyd:** Thank you, Joanest.

Joanest.

[47] I am looking to drill down into Mr Trench's excellent statement. Sandy is next.

[48] **Sandy Mewies:** Thank you, Mr Trench, for that very erudite and detailed piece of evidence. Do you disagree with the purpose of this proposed Measure?

[49] **Mr Trench:** If you mean the purpose of securing alternative redress, of course not. That would not be a matter for coming to you with evidence about anyway.

[50] **Sandy Mewies:** So, it is about the procedure.

[51] **Mr Trench:** It is about the procedure and the legislative arrangements that the proposed Measure puts in place, and the way in which it is drafted.

[52] **Sandy Mewies:** Fine. I heard you say that we should be asking why this is coming as an Assembly Measure and not in any other form. You also suggested that it would be considered as being in skeleton form. I think that what you were saying is that it will probably be rejected. So, I will throw that question back to you. Why do you think that it is coming to us in this form? Do you think that it will be rejected or is that something of which you are 50 per cent sure?

[53] **Mr Trench:** I am not entirely sure that I can answer the first question; I could only speculate.

[54] **Sandy Mewies:** Can you speculate then, because you threw out this hint of what we should be doing with no reason why?

[55] **Mr Trench:** I am aware that the First Minister has put a great deal of emphasis on this as a priority for the Assembly. A combination of the political pressure that that has led to and a desire to ensure that a piece of legislation is in place quickly has led to an undue degree of haste.

[56] On the second point, in many respects, this piece of legislation—the proposed Measure—is a replication of what was enacted at Westminster for England. The difference is the different context in Wales, namely the different set of expectations that underpin devolution in terms of the relationship between Government and the public at large—that Government would be closer to the public rather than further away—and the fact that England is operating in a much more complex environment where greater flexibility is needed. That is why something different should be done in Wales. However, it is clear that, as far as England was concerned, similar provisions were passed with a report from the House of Lords Delegated Powers and Regulatory Reform Committee that I would characterise as being neutral or very guardedly supportive. That committee clearly had a great deal of information in front of it about what in fact was going to be done as well as the broad skeleton that was put to it.

[57] **Sandy Mewies:** I still have some questions. I think that what you were saying is that the situation in England is different—it is more complicated because of how it is structured. You also mentioned that ophthalmic services and dentistry should be scrutinised more clearly. However, do you think that primary measures should be included?

[58] **Mr Trench:** It is not for me to express a view on that; that is a policy matter.

[59] **Sandy Mewies:** So, this is entirely on procedure?

[60] **Mr Trench:** Yes, and on the legislative framework that is being put in place. There may be good reasons for doing that. I would note that the House of Lords committee was concerned about the potential inclusion of primary measures in relation to Wales—what became section 17 of the Act, namely the framework power for Wales. The fact that primary services were excluded for England was evidently, from its report, a material factor in its willingness to be neutral or guardedly supportive of the Westminster legislation.

[61] **Sandy Mewies:** Of course, there is no guarantee that that view will be the same in future. However, it seems to me that the thrust of what you are saying, particularly one of the last points you made about affirmative rather than negative amendments, is a scrutiny issue.

[62] Finally, you say that this was presented to us as a paper from Tomorrow's Wales, but you have made it quite clear today that this is not a group view from Tomorrow's Wales.

[63] **Mr Trench:** The paper is the group's view; the paper was considered by the members.

[64] **Sandy Mewies:** Has it gone through?

[65] **Mr Trench:** Yes.

[66] **Sandy Mewies:** Therefore, I do not understand the point that you made in the beginning: if this is the group's view, then it is the group's view.

[67] **Mr Trench:** Given that this is an area of legal and legislative expertise and that I am one of the specialist advisers to Tomorrow's Wales, I cannot say that every member of Tomorrow's Wales would necessarily endorse my comments on the legal matters.

[68] **Sandy Mewies:** You are the man who knows, but this is the group view.

[69] **Mr Trench:** The broad group view is in the written submission.

[70] **Janet Ryder:** On Sandy's point on your reference to primary care, the only reason that I could detect for you referring to it was that it is not included in the legislation for England. However, that does not give me any reason why it should not be included here, if we have the powers to do so. Can you elaborate on that?

[71] **Mr Trench:** It is no reason not to do it; it is a reason to ensure that there is clarity about what is involved and because, in practice, I would suspect that—and this is where one does start to talk about policy matters—quite a substantial number of the claims that are likely to be handled under such a system would arise from primary care rather than from hospital care. That is a good reason for ensuring a close degree of control by the Assembly, rather than simply allowing the Assembly Government to take over this area.

8.50 a.m.

[72] I have not looked at detailed information about how exactly these sorts of claims arise, and what the numbers are, but, as I say, I would suspect that a large number of the potential claims are likely to arise from primary care. Therefore, the scope of what will be enacted will be much broader if primary care is included.

[73] **Janet Ryder:** If we were to deal with this as a series of regulations, could they be expanded piece by piece, as the Assembly saw fit to expand them? The power exists now, vested in the Assembly to do that.

[74] **Mr Trench:** I am not sure that I understand your question.

[75] **Janet Ryder:** Instead of vesting it in the Minister, if we retained more power in the hands of the Assembly, and dealt with it through a series of regulations, it is within our power to extend those regulations as we see fit, and when we see fit to do so.

[76] **Mr Trench:** It would be within your power to pass Measures, as you saw fit; it would be for the Assembly Minister, as I understand it, to propose regulations, and to frame regulations. There is a difference between primary legislation made as an Assembly Measure, and secondary legislation made by Ministers subject to a degree of Assembly control.

[77] **Janet Ryder:** Are you suggesting that the power is vested in the Minister, but clearly defined, and then that a series of regulations are brought, or that the power is not vested in the Minister, that it remains in the Assembly, and that we deal with it in another way?

[78] **Mr Trench:** I would prefer to see these powers vested in the Assembly, on the principle—from my understanding of how the separation of powers should work—that, as these are legislative powers, vested in the Assembly, they should remain with the Assembly, and be exercised by the Assembly, not by the Assembly Government. However, if the Assembly wishes to delegate them, and allow Ministers to exercise them instead, that is a perfectly proper thing for the Assembly to decide to do. However, I would suggest strongly that the Assembly needs to ensure a close degree of scrutiny in that case; it should not simply allow Ministers to be able to do what they wish.

[79] **Alun Davies:** Thank you for your presentation. On a philosophical approach, I agree with where you are coming from in terms of us as a legislature giving as few powers as is necessary to Ministers to act in an executive fashion; that is probably a good thing in terms of principle. There are other issues regarding the proposed NHS Redress (Wales) Measure. If you look at the discussion that we had in the Finance Committee two weeks ago, the information that we were given by the Government on the legislation's financial implications was woefully inadequate. I do not believe that the Measure can continue until greater information is provided by the Government to enable us to take reasoned decisions. That is not the case at present.

[80] On scrutiny, you seem to be saying that the issue is an excessive delegation of power to the Executive, without the necessary scrutiny. Are you saying that this is not being scrutinised by the appropriate committee that is dealing with this Measure?

[81] **Mr Trench:** Of course not—I believe that it is meeting later today. It is a question of the effectiveness of that scrutiny, and of the ability to scrutinise not only what is being put to you now, but what may come to you in six months, a year, five years, eight years, or 20 years' time, when the Government decides to alter the basis on which this scheme has been made. Again, I hesitate to mention Westminster, but the experience there is that the Government will commonly use powers that were conferred on it many years before to do something unexpected a long time later, because it is the quick, convenient or expedient way to do it. That is the point that must be watched, and this committee is the watchdog that must keep an eye on that.

[82] **Alun Davies:** I am not sure that I agree with that. I agree with your point about a subsequent Government making different use of particular powers. In terms of principle, it is always better for a Government to seek new powers to act differently or to certainly go to the legislature, be it at Westminster or here, to seek those powers.

[83] In terms of what we do on this Measure, I do not feel that we have a Measure yet before us, because it has not been through the scrutiny process or a process of amendment. It

would be in order, for example, for the Minister to bring amendments to the committee, which is beginning its work at the moment, to quite fundamentally change the Measure that we see today in order for it to comply with the philosophical approach that you are proposing here. I actually quite like Westminster experience, because they have more experience than we do of legislation, and one thing that we have all found in recent years is that Government legislation changes fundamentally through scrutiny, which is a good thing, surely.

[84] **Mr Trench:** It is, indeed; no question at all.

[85] **Andrew R.T. Davies:** Thank you for your informative presentation. I am a new Member from the May intake and, as such, drafting and creating law is quite different to what I used to do before, which was basically to shovel a lot of the proverbial on the farmyard, as it were. Some people might say that the two are one and the same thing, mind. *[Laughter.]*

[86] **Alun Davies:** You are as eloquent as ever.

[87] **Andrew R.T. Davies:** Listening to what you have said today, I think that we all agree with the aspirations of this Measure, as such, in that it will take out the trauma for many people who are seeking redress, especially in the case of smaller claims. However, it seems that the aspiration has got ahead of the practicalities of delivery within the Measure, especially with regard to the transfer of powers between the Assembly and the Government. What worries me from your remarks is the difficulty of this Measure getting through Westminster and the transfer of that power. There is a danger then of further Measures just being bogged down. Is it your understanding, from how this has been drafted and pursued, that it has no chance of getting through?

[88] **Mr Trench:** I would not say that, and it would not be for me to say it, either, because it is for you, as Assembly Members, to decide whether it will get through or not. As I said, we know that something rather similar was passed at Westminster, but in the very different context of how the NHS operates in England. It clearly did not have the smoothest of rides.

[89] **David Lloyd:** Mae gennyf rai cwestiynau o'r gadair. Cawsom un ddadl ar y Mesur hwn yn y Siambr cyn yr haf, ac yr oedd cytundeb sylweddol rhwng pob plaid ynglŷn â bwriad y Mesur hwn, a'i fod yn syniad iawn, er bod pawb, yn naturiol, yn poeni am y manylion. Yr ydym yn sôn yma am Fesur sy'n caniatáu iawndal mewn achosion llai. A oes diffiniad, naill ai mewn deddfwriaeth yn Lloegr neu mewn man arall, o'r hyn a olygir gan achos llai? A oes diffiniad o uchafswm yr iawndal, er enghraifft, a ganiateid o dan y fath Fesur?

David Lloyd: I have some questions from the chair. We have debated this Measure once already in the Chamber before the summer, and there was substantial agreement between the parties with regard to the intention of the Measure, and that it was a good idea, even though we all, naturally, worry about the details. We are talking about a Measure that will permit redress in smaller cases. Is there a definition, either in English legislation or elsewhere, of what is meant by smaller claims? Is there a definition of a maximum for redress, for example, permitted under such a Measure?

[90] **Mr Trench:** I could not speak about England with any degree of precision, but it is obviously the case that this Measure does not propose a maximum level. There is nothing in principle that I can see in this Measure that would inherently stop the scheme from being applied to the very largest claims—the type of claims that deal with catastrophic damage caused by medical negligence during childbirth, for example. Whether such claims would, in fact, go through this system is another matter, but there is nothing to stop it being able to do so.

[91] **David Lloyd:** Tynnu'r cyfreithwyr **David Lloyd:** The purpose of this Measure is

o'r busnes yn gyfan gwbl yw bwriad y Mesur hwn. O ystyried y bwriad hwnnw, cymerwn na fyddem yn delio â materion mawr neu gymhleth. A oes diffiniad yn rhywle arall—mae'r Mesur hwn yn rhwym o fod yn gweithio rhywle arall—o achos llai lle bo modd trin a thrafod a mesur iawndal a sicrhau ymddiheuriad yn absenoldeb cyfreithwyr? Dyna yr ydym yn ceisio ei wneud—sicrhau iawn i bobl heb ymyrraeth cyfreithwyr.

to remove the lawyers from the whole business. Given that intention, we can assume that we will not be dealing with major or complex issues. Does a definition exist elsewhere—this Measure is bound to be in operation somewhere else—of a smaller claim in which it is possible to evaluate and measure redress and obtain an apology in the absence of lawyers? That is what we are trying to do—ensure redress for people without the intervention of lawyers.

9.00 a.m.

[92] **Mr Trench:** That is true, although it is worth noting that both the English legislation and the proposed Measure contain provisions for enabling assistance of various kinds to be provided to applicants or potential claimants, so that they are aware of their rights. That is a very important part of the legislative scheme, because it is a way of ensuring that people are not induced to use the scheme set up under the new legislation to their serious detriment, so that they are able, at Government's expense, to obtain the sort of advice that they would otherwise get from lawyers. It may be that lawyers will be the people giving that advice, at least in certain cases, as well as doctors and other experts. After all, lawyers are the people with established expertise about the amount of damages that you pay to people who have experienced certain sorts of loss. There is copious information available through legal databases and legal reference books that will give you the price of the damages that can be expected for practically any sort of injury that you can envisage.

[93] **David Lloyd:** Diolch am hynny. O gofio'r wybodaeth honno, a oes uchafswm iawndal sy'n gallu arwain rhywun i feddwl fod hwn yn achos llai ac felly yn cwmpo o fewn y Mesur hwn, neu bod yr achos yn rhy fawr ac felly yn gorfod dilyn y llwybr traddodiadol o ddelio â chwyn?

David Lloyd: Thank you for that. Bearing that information in mind, is there a maximum redress that could lead someone to think that this was a smaller claim and would therefore fall within this Measure, or that the claim was too large and must therefore follow the traditional route of dealing with a complaint?

[94] **Mr Trench:** The problem is that we do not know. Given that we are confronted with a skeleton Measure in this case, we do not know what the ceilings would be and how they might change, because, apart from anything else, one would expect the ceilings to change over time with inflation and an appropriate ceiling now would be inappropriate in 15 or 20 years' time. I have not seen any information to suggest what that ceiling would be initially or in due course, or whether or not it would be necessary to have a ceiling. I have experience from work done by former colleagues that there may be cases where liability is not an issue, and the issue is simply to work out quantum, where it would be appropriate to use a mechanism such as this to resolve part or all of a major claim.

[95] **David Lloyd:** O'r profiad yn Lloegr, sut mae'r ddeddfwriaeth sydd yn debyg i'r Mesur hwn yn gweithio yn Lloegr? A ydyw'n cwmpasu achosion llai yn unig, neu, fel yr ydych wedi crybwyll, a oes hyblygrwydd yn y system sy'n caniatáu achosion mwy lle nad oes anghytuno ynglŷn â beth ddigwyddodd?

David Lloyd: From the experience in England, how does the legislation similar to this Measure work in England? Does it only cover smaller claims, or, as you suggested, is there flexibility in the system which allows larger claims when there is no disagreement about what occurred?

[96] **Mr Trench:** I am afraid that I am not an expert in how the system works in England,

so I cannot answer that question.

[97] **David Lloyd:** Mae fy nghwestiwn olaf i'n cyfreithwyr. Pe bai'r is-ddeddfwriaeth fydd yn tarddu o'r Mesur hwn yn cael eu gwneud o dan y weithdrefn negyddol, yr wyf yn cymryd y byddai'r rheoliadau hynny yn dod ger bron y pwyllgor hwn bob tro i graffu arnynt.

David Lloyd: My final question is to our lawyers. If the subordinate legislation that will arise from this Measure were to be made under the negative procedure, I assume that those regulations would always come before this committee to be scrutinised.

[98] **Ms Jackson:** Byddant yn dod gerbron y pwyllgor, ond byddant wedi cael eu gwneud cyn hynny, yn yr un modd â'r rheoliadau a welsom y bore yma.

Ms Jackson: They would come to this committee, but they would have been made prior to that, in the same way as the regulations that we saw this morning.

[99] **David Lloyd:** I gadarnhau, ac er gwybodaeth i bawb, mae cyfle i ni wneud rhywbeth amdanynt fel Aelodau o fewn pa amser?

David Lloyd: To confirm, and for everyone's information, within what timescale do we as Members have an opportunity to do something about them?

[100] **Ms Jackson:** Pedwar deg diwrnod.

Ms Jackson: Forty days.

[101] **David Lloyd:** Felly, gallem newid pethau o fewn 40 diwrnod, er y bydd y rheoliadau wedi cael eu pasio yn y cyfamser cyn inni graffu arnynt yn y pwyllgor hwn.

David Lloyd: So, we could change things within 40 days, despite the fact that the regulations will have been passed in the meantime before we scrutinise them in this committee.

[102] **Ms Jackson:** Mae gennyf bwynt bach ar hynny. Y tro diwethaf i mi edrych, nid oedd y rheoliadau sy'n creu'r cynllun wedi dod i rym yn Lloegr eto.

Ms Jackson: I have a small point on that. The last time I looked, the regulations to create the scheme had not yet come into force in England.

[103] **David Lloyd:** Diolch am hynny. Yr oeddwn o dan yr argraff eu bod wedi dod i rym, a dyna pam y gwneuthum holi am y profiad yn Lloegr. Os nad yw pethau wedi dod i rym yn Lloegr, nid oes profiad ohono yn y fan honno ychwaith. A oes unrhyw gwestiynau eraill?

David Lloyd: Thank you for that. I was under the impression that they had come into force, which is why I asked about the experience in England. If things have not come into force in England, then there is no experience of it there either. Are there any other questions?

[104] **Karen Sinclair:** The powers were vested in the Government at separation—we cannot have our cake and eat it, and have the cherry on top. There must be a decision about which way it is done, and the decision has been made. What do you see as the benefits of everything going through the positive procedure? The negative procedure would flag it up and there would then be an opportunity for it to go to the floor and for Assembly Members to vote something down, which would mean that the Government would have to go back and rethink anyway.

[105] **Mr Trench:** I know what the answer would be at Westminster. The answer at Westminster would be that practically all statutory instruments made using the various negative procedure routes never get anywhere near receiving the attention of the floor of either House of Parliament. They attract minimal attention, even from the relevant committees; I think that there has been one vote, once, in the last 20 years on a negative procedure instrument on the floor of the House. However, I appreciate that that Westminster

experience does not really apply here because the circumstances are different: you have a different volume of legislation and, of course, you are, to a substantial degree, since May, a new institution, having to find and develop new ways of working with new Standing Orders. Therefore it is a question of how these things will in fact work here and how vigilant the Assembly is able to be in practice in dealing with that sort of legislation, which, in itself, depends partly on the volume of legislation that is made by the Assembly Government, using the various powers that are delegated to it.

[106] **Karen Sinclair:** So, what you are saying—[*Inaudible.*]—less vigilant than they should be, their scrutiny will not be good enough. That may be what you are saying.

[107] **Mr Trench:** There is a hazard, a danger that scrutiny will not be perfect. That is certainly the case, I must say, at Westminster. I would hope that it would not be the case here.

[108] **Karen Sinclair:** Presumably your organisation would be scrutinising everything anyway because you have been set up as the body to do so.

[109] **Mr Trench:** I very much doubt that we would have the resources to do that, nice as it might be to envisage that happening.

[110] **Eleanor Burnham:** It seems to me that we are in a new mode that is very difficult to compare with anywhere else, because we are neither fish nor fowl. We do not have primary legislative powers and therefore it does not appear to me that we can be compared easily with elsewhere. Could you tell us about the Scottish situation? Are more affirmative or negative statutory instruments laid before the Scottish Parliament? Will you tell us again whether you think, because of what the Richard commission asserted, that we do not have enough spare capacity for proper scrutiny? Due to the insufficient number of Assembly Members outside of the Government, are we going to have problems if we do not take great care?

[111] **Mr Trench:** I could not draw lessons from the Scottish experience; I would need to investigate that. As far as concerns about scrutiny go, you are quite right that the Richard commission did raise those issues. The Assembly was not increased in size in the 2006 Act despite a number of people, including me, calling for that—I ought to add that I was not an adviser to Cymru Yfory at that time. I remember looking at the size of roughly comparable legislatures and elective bodies, dealing with similar populations to Wales, and found that the membership of legislatures in German Länder, like Rheinland-Pfalz or Schleswig-Holstein, was about 50 per cent higher, if not more. They had around 90 to 100 members whereas the Assembly was kept at 60 Members. Even if it had gone to 80, it would still have had slightly fewer Members, proportionately, than those middle-ranking German Länder, which have very limited legislative powers, one should note. To that extent, I think that there must be some concern, simply because of the numbers, about the quality of scrutiny that the Assembly can offer. That is a reason for particular vigilance on behalf of individual Members and the Assembly's committees because this is clearly an issue, not merely in and for Wales, but at Westminster as well.

9.10 a.m.

[112] **David Lloyd:** Diolch yn fawr. Mae ein hamser ar ben, yn sylfaenol. Mae Gwyn wedi mynd am fod pwyllgorau eraill yn dechrau yn awr, gan gynnwys y pwyllgor sy'n edrych ar y Mesur hwn o'r ochr polisi. I fynd yn ôl at gwestiwn cyntaf Eleanor, cadarnhaf y ffordd ymlaen. Byddwn yn cymryd tystiolaeth ychwanegol gan wahanol **David Lloyd:** Thank you very much. Our time has essentially come to an end. Gwyn has left because other committees are about to start, including the committee that is looking at this Measure from a policy perspective. To return to Eleanor's initial question, I confirm the way forward. We shall take additional evidence from various

fudiadau sydd wedi bod yn ysgrifennu atom. Bydd ein cyfreithwyr, y clerc a'r dirprwy glerc yn cydweithio gyda chlercod y pwyllgorau eraill, fel y pwyllgor Mesur, ac, yn dilyn yr hyn a ddywedodd Alun Davies, cysylltwn â chlerc y Pwyllgor Cyllid hefyd, o ran tystiolaeth sydd wedi cael ei rhoi o flaen pwyllgorau eraill.

organisations that have written in. Our lawyers, clerk and deputy clerk will be working with the clerks of other committees, such as the Measure committee, and, following Alun Davies's comments, we will also contact the clerk of the Finance Committee, in terms of evidence that has been presented to other committees.

[113] **Alun Davies:** There are two things that we can do immediately on this. First, we can follow your suggestion and talk to the Government about how Measures are introduced. I do not see this as a conspiracy, but more a learning curve. In some ways, it might well be that the Government, in putting forward its legislation, is still on something of a learning curve, and it would be useful if the Chairs of the different committees scrutinising this legislation communicated to the Government the experience of this first tranche of legislation following our accruing of the new powers. My second suggestion is that we write to the relevant committee considering this Measure with information about our deliberations this morning and invite it to discuss that further as part of the process of making amendments to the legislation.

[114] **David Lloyd:** That would be the expectation. In addition, I confirm today that the Minister will be attending this committee in a fortnight's time to present evidence and answer questions. So, we will have every possible collaboration that we can between all the various committees, be they Measures committees or finance committees, and the clerk will also track down evidence on the details of the legislation that applies in England, even though it has not kicked in yet. That is just for confirmation as regards the nuts and bolts of that procedure. So, in terms of presenting the Government with evidence, we will work together as Chairs and as clerks of the various committees to make sure that as full a brief as possible is given to the Government. As I said at the start, we are basically all in agreement about this Measure, and we need to ensure that we can also agree with the nuts and bolts—the details. I concur with Alun that this is a learning curve for the new Assembly, and it is important that we get it right.

[115] I thank Mr Trench for an excellent presentation and question-and-answer session, which I am sure have greatly informed the Members of this committee and those seated in the public gallery, notwithstanding all those watching this committee on live television throughout the United Kingdom. *[Laughter.]*

9.13 a.m.

Unrhyw Fater Arall Any Other Business

[116] **David Lloyd:** A oes unrhyw fater arall? Gwelaf nad oes. **David Lloyd:** Is there any other business? I see that there is not.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[117] **David Lloyd:** Y mater olaf, felly, yw cadarnhau mai dyddiad y cyfarfod nesaf yw dydd Mawrth, 9 Hydref, am 8.15 a.m.. Diolch yn fawr i chi i gyd, a diolch yn fawr i'r cyfieithwyr. **David Lloyd:** The final matter, therefore, is to confirm that the date of the next meeting is Tuesday, 9 October, at 8.15 a.m.. Thank you all and thank you to the interpreters.

Daeth y cyfarfod i ben am 9.13 a.m.
The meeting ended at 9.13 a.m.