

Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

Y Pwyllgor Is-ddeddfwriaeth
The Subordinate Legislation Committee

Dydd Mawrth, 4 Tachwedd 2008
Tuesday, 4 November 2008

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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
Mark Isherwood	Ceidwadwyr Cymreig Welsh Conservatives
David Lloyd	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)
Joyce Watson	Llafur Labour

Eraill yn bresennol
Others in attendance

Kay Powell	Ymgynghorydd Polisi, Cymdeithas y Cyfreithwyr Policy Adviser, The Law Society
Huw Williams	Geldards LLP Geldards LLP

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

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

Dechreuodd y cyfarfod am 8.14 a.m.
The meeting began at 8.14 a.m.

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

[1] **David Lloyd:** Bore da ichi i gyd. Mae'r awr benodedig wedi cyrraedd i gyfarfod diweddaraf y Pwyllgor Is-ddeddfwriaeth. Croesawaf fy nghyd Aelodau, swyddogion, ac aelodau'r cyhoedd.

David Lloyd: Good morning to you all. The appointed hour has arrived for the latest meeting of the Subordinate Legislation Committee. I welcome my fellow Members, officials, and members of the public.

[2] Os bydd argyfwng, bydd y tywyswyr yn ein harwain i'r allanfa agosaf.

In the case of an emergency, the ushers will guide us to the nearest exit.

[3] Gellir defnyddio'r clustffonau i glywed cyfieithiad ar y pryd ac i addasu lefel y sain. Gall y tywyswyr ddangos i'r cyhoedd sut i'w defnyddio. Mae'r cyfieithiad ar y pryd ar gael o'r Gymraeg i'r Saesneg ar sianel 1, a

Headphones can be used to hear the simultaneous interpretation and to adjust the volume. The ushers can show members of the public how to use them. The interpretation from Welsh to English is on channel 1, and

gellir clywed cyfraniadau yn yr iaith wreiddiol ar sianel 0.

contributions in the original language can be heard on channel 0.

[4] Rhaid diffodd ffonau symudol yn llwyr—mae'r neges honno'n benodol i'r Aelodau.

Mobile phones must be switched off completely—that message is mainly for the Members.

[5] Ni chafwyd ymddiheuriadau. Gan fod popeth yn gweithio—gobeithio—symudwn ymlaen.

No apologies have been received. Since everything seems to be working—hopefully—let us move on.

8.15 a.m.

Offerynnau y Bydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhifau 15.2 a 15.3

Instruments in Respect of which the Assembly is Invited to Pay Special Attention under Standing Orders Nos. 15.2 and 15.3

[6] **David Lloyd:** O dan yr eitem hon y mae offerynnau sy'n agored i gael eu dirymu yn unol â phenderfyniad gan y Cynulliad, sef y weithdrefn negyddol. Mae Joanest wedi craffu ar SLC212, Rheoliadau Milheintiau a Sgil-gynhyrchion Anifeiliaid (Ffioedd) (Cymru) 2008. Joanest, a oes gennych rywbeth i'w adrodd?

David Lloyd: Under this item are instruments subject to annulment pursuant to a resolution of the Assembly, that is, the negative procedure. Joanest has scrutinised SLC212, the Zoonoses and Animal By-Products (Fees) (Wales) Regulations 2008. Joanest, do you have anything to report?

[7] **Ms Jackson:** Ychydig bach. Fel y gwelwch, mae pwyntiau wedi codi ynglŷn â'r offeryn hwn, ond rhai bach ydynt. Credaf mai rhyw ddrwg yn y meddalwedd drafftio oedd wedi achosi'r broblem. Mae'r Llywodraeth yn derbyn y pwynt, ac fe gaiff y rhifau eu cywiro pan fydd yr offeryn yn cael ei gyhoeddi.

Ms Jackson: A little. As you can see, points have arisen with regard to this instrument, but they are minor ones. I believe that the problem was caused by a glitch in the drafting software. The Government has accepted the point, and the numbering will be corrected when the instrument is published.

[8] **David Lloyd:** Diolch yn fawr. A yw pawb yn hapus gyda'r adroddiad?

David Lloyd: Thank you very much. Is everyone content with that report?

[9] **Eleanor Burnham:** Er gwybodaeth, rhag ofn bod rhywun yn darllen am y mater pwysig hwn, a allwch egluro beth yn union yw 'zoonoses'?

Eleanor Burnham: For information, in case anyone should read about this important matter, can you clarify what exactly 'zoonoses' are?

[10] **David Lloyd:** O'm cof tila meddygol, heintiau anifeiliaid a all ddigwydd mewn pobl yw 'zoonoses'.

David Lloyd: From my feeble medical recollection, 'zoonoses' are animal diseases that can occur in humans.

[11] **Eleanor Burnham:** Diolch ichi. Mae pobl yn ymddiddori yn yr hyn yr ydym yn ei wneud a'i drafod, a meddyliais fod angen eglurhad.

Eleanor Burnham: Thank you. People take an interest in what we do and say, and I thought that a clarification was in order.

[12] **David Lloyd:** Diolch, Eleanor, am eich diddordeb yn y pwnc. **David Lloyd:** Thank you, Eleanor, for your interest in the subject.

8.17 a.m.

**Darpariaethau Pwerau Dirprwyedig 'Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru) 200-'
Delegated Powers Provisions in 'The Proposed Local Government (Wales) Measure 200-'**

[13] **David Lloyd:** Mae Joanest wedi paratoi papur i'r eitem hon. Mae'r Pwyllgor ar y Mesur Arfaethedig ynghylch Llywodraeth Leol yn cyfarfod yn syth ar ôl y cyfarfod hwn. Mae rhai ohonom yn aelodau o'r pwyllgor hwnnw hefyd. Bydd yr Aelodau wedi gweld y papur. Joanest, a ydych am ddweud cwpl o eiriau? **David Lloyd:** Joanest has prepared a paper for this item. The Proposed Local Government Measure Committee is meeting straight after this meeting. Some of us are also members of that committee. Members will have seen the paper. Joanest, do you wish to say a few words?

[14] **Ms Jackson:** I will not say much, as I am conscious of the time, and you will be far keener to hear from Kay Powell and her colleagues, I am sure.

[15] In the paper, I have outlined the various Order-making and regulation-making powers contained in the proposed Measure. I also refer to the procedures to be followed when making subordinate legislation. I draw your attention in particular to the fact that a superaffirmative procedure has been proposed for Orders made under section 32 of the Measure. Chair, I suggest that we return to this paper when we have heard evidence from Dr Brian Gibbons, the Minister in charge of the proposed Measure. Perhaps once we have heard his evidence, we can consider it alongside the paper. It might be easier for the committee to consider the appropriateness of the delegated powers.

[16] **David Lloyd:** Diolch yn fawr, Joanest. A yw pawb yn gytûn? **David Lloyd:** Thank you, Joanest. Is everyone in agreement?

[17] **Alun Davies:** I generally agree with that proposal; it makes sense. In our discussions with the Minister, we will need to flesh out some of the issues in this proposed Measure, because it appears that the Government is creating powers for itself in relation to secondary legislation; Welsh Ministers will be able to set clear and new Orders and strategies for local government by way of secondary legislation. I would be interested in knowing and understanding why that is to be done through secondary legislation and why many of the issues are not on the face of the proposed Measure.

[18] **David Lloyd:** Yn naturiol, cymerwn hynny fel sylw priodol. Y bwriad yw y byddwn yn craffu ar y Mesur arfaethedig hwn yn ôl arfer y pwyllgor ar yr ochr ddeddfwriaethol. Yn rhan o'r craffu hynny, gwahodddwn y Gweinidog perthnasol, sef Dr Brian Gibbons, y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol, i roi tystiolaeth. Byddwn hefyd yn craffu ar bethau eraill a dod i gasgliad, fel yr ydym wedi ei wneud gyda Mesurau blaenorol. **David Lloyd:** Naturally, we accept that as an appropriate comment. Our intention is to scrutinise the proposed Measure according to the committee's custom on the legislative side. As part of that scrutiny, we will invite the relevant Minister, Dr Brian Gibbons, the Minister for Social Justice and Local Government, to give evidence. We will also scrutinise other matters and then form a conclusion, as we have done with previous Measures.

8.20 a.m.

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

[19] **David Lloyd:** Mae a wnelo'r eitem hon ag ymchwiliad y pwyllgor i wella sut y creffir ar is-ddeddfwriaeth a phwerau dirprwyedig.

David Lloyd: This item deals with the committee's inquiry into improving the way in which subordinate legislation and delegated powers are scrutinised.

[20] Hon yw'r drydedd sesiwn dystiolaeth. Yr ydym yn craffu ar y pwerau newydd, ac ar yr ystod gwaith ehangach sydd gennym fel pwyllgor o dan Ddeddf Llywodraeth Cymru 2006. Yn naturiol, mae cyfleon, ond mae oblygiadau i hynny hefyd. Fel rhan o'r ymchwiliad, yr ydym yn edrych ar sut yn union mae'r broses yn gweithio ar hyn o bryd a sut y gobeithiwn ehangu'r cylch gwaith. Yr ydym wedi cymryd tystiolaeth gan nifer fawr o gyrff, a bu'r pwyllgor yn San Steffan ddoe i ymweld â dau bwyllgor yn Nhŷ'r Arglwyddi sy'n ymhél â'r pwerau ehangach sydd gennym. Bu inni ymweld â'r pwyllgor sy'n gyfrifol am *merits scrutiny*. Bu inni hefyd ymweld â'r Pwyllgor Pwerau Dirprwyedig a Diwygio Rheoleiddio yn Nhŷ'r Arglwyddi.

This is the third evidence session. We are scrutinising the new powers, and the wider remit of the committee under the Government of Wales Act 2006. Naturally, there are opportunities, but there are also implications. As part of the inquiry, we are looking at how exactly the process works at the moment and how we hope to extend the committee's remit. We have taken evidence from a number of bodies, and the committee was in Westminster yesterday to visit two committees in the House of Lords that deal with the extended powers that we have. We visited the committee responsible for merits scrutiny. We also visited the Delegated Powers and Regulatory Reform Committee in the House of Lords.

[21] Ar ôl y rhagarweiniad hwnnw, estynnaf groeso twymgalon unwaith eto i gynrychiolwyr Cymdeithas y Cyfreithwyr, sydd yma i roi tystiolaeth. Croesawaf Kay Powell, cynghorydd polisi, a Huw Williams. Yr ydym eisoes wedi derbyn cyflwyniad ysgrifenedig gennych, ac mae hwnnw wedi ei ddosbarthu ac mae'r Aelodau wedi darllen bob gair. Yn ôl ein harfer, mae gennym restr o gwestiynau i sicrhau ein bod yn ymdrin â phob peth ac nad ydym yn anghofio dim byd.

After that introduction, I extend a warm welcome once again to representatives of the Law Society, who are here to give evidence. I welcome Kay Powell, policy adviser, and Huw Williams. We have already received a written submission from you, which has been circulated, and Members have read every word. As usual, we have a list of questions to ensure that we cover everything that we need to cover and do not forget anything.

[22] Gofynnaf y cwestiwn cyntaf. Yr ydych yn awgrymu yn eich papur y dylai ein cefnogaeth gyfreithiol wneud y craffu technegol gan adael digon o amser i'r pwyllgor hwn gyflawni craffu rhagoriaeth, hynny yw, *merits scrutiny* o ddeddfwriaeth sylfaenol ac is-ddeddfwriaeth. Fel y gwyddoch, mae craffu technegol yn orfodol, ond nid yw'r ystod ychwanegol o waith yn orfodol o gwbl. O gofio hynny, a oes

I will ask the first question. You suggest in your paper that our legal support should undertake the technical scrutiny, leaving plenty of time for this committee to undertake the merits scrutiny of primary and secondary legislation. As you are aware, the technical scrutiny is mandatory, but the additional range of work is in no way mandatory. With that in mind, do you have any comments on the value of technical

gennych sylw ar werth craffu technegol o scrutiny compared with wider scrutiny and
gymharu â'r craffu ehangach a'r cydbwysedd how to strike the best balance between the
gorau i'w daro rhwng y ddau? two?

[23] **Mr Williams:** I will go first, and then my colleague, Kay Powell, will follow. Thank you for the invitation to give evidence to this committee. The Law Society is grateful for the opportunity to participate in this process. We are pleased to hear that you were at the House of Lords yesterday and that you are looking in practice at this distinction between technical scrutiny and merits scrutiny. From our point of view, in making the observations that we did, the Law Society is conscious that, of course, the National Assembly for Wales has limited resources compared to the Palace of Westminster when it comes to these tasks. Technical scrutiny is vital. I had the advantage of reading Keith Bush's paper in preparing for this meeting, which points out the valuable work that has been done. Nevertheless, it is a very legalistic process, and apart from AMs who happen to be lawyers, the main contribution that the membership of the committee can make is to be satisfied that the process of technical scrutiny is being carried out and that there is a thorough and detailed investigation being carried out into the standards of the drafting of subordinate legislation.

[24] Merits scrutiny is an interesting, and in some respects more fruitful, field to begin to investigate, because one recognises that, in this context, 'merits' has a somewhat narrow definition. It is not about ranging over the whole *raison d'être* for subordinate legislation, but, nevertheless, it is an opportunity to probe into the background in terms of the policy that the secondary legislation is intended to implement, and whether it achieves its objectives. In that sense, it is a valuable addition to the scrutiny process. I am conscious that this committee will feel its way, because merits scrutiny is a fairly new concept, even in the Palace of Westminster. It is an important link to the possible further development of this committee's powers. I appreciate that you are currently constrained by Standing Orders, but later in the session we might explore the boundaries between secondary legislative scrutiny and the wider implications in terms of the legislative role of this Assembly, including the links with Westminster, and so on. That tends to flow from this committee's work, as well as the parameters of the investigation—which you have set yourselves.

[25] **Ms Powell:** On the possibility of technical scrutiny being done elsewhere in report form, with certain matters being highlighted in order to free up time for this committee to get involved with the broader merits scrutiny—and especially because Standing Order No. 15.3 extends into public policy areas, and so on—that will require a new kind of input into the committee.

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

[27] **Joyce Watson:** Following on from where you left off, Kay, and exploring those themes, you suggest that the committee separate its scrutiny functions to ensure sufficient time and resources for the new merits scrutiny function. Could you explain how these functions might ideally, but realistically, be separated? For example, do you envisage separate committees, sub-committees, or some other approach?

[28] **Ms Powell:** That will depend on the way that merits scrutiny is adopted, and the way that you arrange feedback. However, the responsibility will still lie with this committee, so sub-committees could not take over different roles—it would just depend on how involved you were with merits scrutiny, and how much time was taken over it. The resources issue is more to do with people supporting the committee as opposed to the membership of the committee. We have not gone into great detail in considering how far down the line that would take you, whether you should separate the functions, or whether that would be a paper exercise in creating separate agendas so that you would be aware that you were moving from technical scrutiny to merits scrutiny.

[29] **Mr Williams:** I would suggest that the present number of Members makes a sub-committee impractical. You would be splitting the committee up into too small a group and, as Kay suggested, it is really is about how you organise your business—how much is taken on paper, and as read, and how much is taken in a formal committee meeting. That is where you can potentially create some space to give yourself more time to develop the merits aspect of the committee's work.

[30] **Joyce Watson:** Do you see any role for Assembly scrutiny committees in this process?

[31] **Mr Williams:** If I can tease out your meaning slightly, do you mean in relation to merits or the technical aspects?

[32] **Joyce Watson:** Either, I suppose, but I was thinking more of merits.

8.30 a.m.

[33] **Mr Williams:** This is the interesting boundary line between merit scrutiny in the narrow sense that I described in my previous answer, and the broader policy question of whether these matters should be dealt with in subordinate legislation. That leads you into the whole structure of legislation. Issues will inevitably come before this committee, especially if its remit expands, for which the relationship between what this committee does and what the subject committees do will be critical.

[34] However, if you are seeking to define the role, this committee has the ability to set the tone and standard of how the whole question of the delegation of powers is investigated, and perhaps to raise the awareness of the subject committees, when they scrutinise legislation, of this important aspect, namely of how much will be retained by the Assembly and how much will be passed down to the Assembly Government, albeit subject to the appropriate subordinate legislation procedures. So, subject committees have a role to play in this, but the dividing line between merit and wider scrutiny will evolve over time.

[35] **David Lloyd:** Gan symud ymlaen at agwedd arall, nodwch yn eich papur bod gwell craffu a gwell rheoleiddio yn cynnwys craffu ôl-ddeddfu. Gwnaethom ddarganfod yn Nhŷ'r Arglwyddi ddoe, er gwybodaeth, nad yw craffu ôl-ddeddfu yn digwydd yn yr unlle, ac mai ers 2003 yn unig y bu *merit scrutiny* yn digwydd yn Llundain.

David Lloyd: Moving on to another aspect, you note in your paper that improved scrutiny and improved regulation include post-legislative scrutiny. We discovered in the House of Lords yesterday, out of interest, that no post-legislative scrutiny takes place anywhere, and that merit scrutiny has been occurring in London only since 2003.

[36] O ran craffu ôl-ddeddfu, sut y credwch ei bod yn ymarferol inni fonitro deddfwriaeth sydd eisoes wedi ei phasio yn y lle hwn, a phwy ddylai fod yn gwneud y gwaith hwnnw—ai'r pwyllgor hwn, y pwyllgorau pwnc gwahanol, neu rywun arall, o gofio nad yw'n digwydd yn yr unlle ar hyn o bryd?

On post-legislative scrutiny, how do you think it would be practical for us to monitor legislation that has already been passed here, and who should do that work—this committee, the various subject committees, or someone else, bearing in mind that it does not currently happen anywhere?

[37] **Ms Powell:** Post-legislative scrutiny is an important part of the legislative process. Even though it is new and people are only now coming to it, there is no reason for it not to be done as well as the other new parts of our legislative process are done. It is particularly important in relation to subordinate legislation. For example, you have just asked the Counsel

General to report on your subordinate legislation reports, so that you have some way of following up those matters that you have asked to be revisited or to be reported on, to see that that was done. From recollection, I think that there were about 14 items, and at least 12 of them had not been actioned. So, from that perspective, your post-legislative scrutiny is good, as it ensures that matters are actioned. Given our special situation in Wales, where we have so many different, overlapping types of legislation, some sort of check is needed to see that they have all been implemented to start with, and then to see how they match together. It will just make it more and more difficult if we keep making legislation without reflecting on what we have done.

[38] This also takes us back to new legislation, because it is only with post-legislative scrutiny that you can then look at other legislation in the field. That is where the consolidation of Acts and Measures might come in, as well. So, post-legislative scrutiny does not just mean looking to see that you did your job; it means looking at legislation as a whole to see that the job was done well, and whether it could have been done better. There is a lot to be learned from that type of scrutiny.

[39] **David Lloyd:** Diolch am hynny. Yr ydych eisoes wedi sôn am brinder adnoddau staffio, y nifer cyfyngedig o Aelodau ac ati sydd yn yr adeilad hwn. Yn ymarferol, felly, sut mae gweithredu craffu ôl-ddeddfu orau?

David Lloyd: Thank you for that. You have already mentioned the shortage of staffing resources, the limited number of Members and so on in this building. Practically speaking, therefore, how can we best carry out post-legislative scrutiny?

[40] **Ms Powell:** Mae'n anodd pan yr ydych yn edrych ar y bobl sy'n gweithio i'r comisiwn. Fodd bynnag, mae'n bosibl defnyddio pobl o'r tu allan hefyd—pobl sy'n arbenigo yn y maes. Mae lle i edrych ar San Steffan hefyd, oherwydd, fel yr ydym yn ei bwysleisio, pan ydym yn deddfu yng Nghymru, ni ddylem edrych ar Gymru yn unig, ond ar yr hyn sy'n digwydd ar draws Cymru a Lloegr hefyd. Dim ond pan fyddwch yn gwneud hynny ac yn edrych ar y pynciau y daw popeth yn glir. Felly, mae rôl i bobl y tu allan i'r comisiwn i edrych ar hyn ac i weithio gyda chi.

Ms Powell: It is difficult when you look at those who work for the commission. However, it is possible to use external people as well—people who have expertise in the field. There is also room to look at Westminster, too, because, as we emphasise, when we legislate in Wales, we should not be looking only at Wales, but at what is happening across Wales and England as well. It is only when you do that and look at the subjects that everything will become clear. Therefore, there is a role for people outside the commission to look at this and to work with you.

[41] **Mr Williams:** If I may, I will just add briefly to Kay's answer. There is clearly a resourcing issue, and, again, it is a question of time, but it would be unfortunate if the committee were not able to find time in its programme. I think that the trick in getting post-legislative scrutiny right is really to focus on a particular stream of legislation, a particular Act or a particular Measure, and then, at an appropriate time, use that as a pilot exercise, in effect, to see what flowed from it, such as how the secondary legislative powers were used and whether the type of Order-making process that was allocated to it was the appropriate one, in retrospect. Rather than trying to cover the entire field, perhaps the best way of ensuring extra resources would be to identify one particular exercise as a suitable one for an inquiry and then look at that from cradle to grave, as it were, draw the lessons from it and report on them.

[42] **Eleanor Burnham:** I am interested in your comments about the explanatory memoranda.

[43] Pam fod y memoranda esboniadol Why are the explanatory memoranda that

sy'n dod o San Steffan yn annigonol? Beth hoffech chi ei weld? come from Westminster inadequate? What would you like to see?

[44] **Mr Williams:** I will start on that one. Explanatory memoranda are an evolving field, as they are a fairly recent innovation. I read a selection of them in the areas of law that I practise, principally planning law, environment law and various public law subjects. To be honest with you, their usefulness tends to vary. Some of them are purely a recitation of the provisions of the legislation in slightly less technical language than the raw material, although they are almost of the same order in length and technicality, and some are a bit more discursive. There appears to be significant departmental variation; indeed, I think that they reflect the individual drafting styles of those responsible for their preparation.

[45] To focus on the identification of devolution issues, however, I think that there is some way to go and the treatment in some of the legislation tends to be a bit perfunctory. I have had an example in recent days with the Planning Bill, which is in its latter stages in Parliament at the moment. The devolution section of the explanatory memorandum suggests that there is not much to do with Wales in the legislation. However, if you delve into it in slightly greater detail—and I apologise for going into some detail, but it is a useful indication of how the system works—as those of you who have studied the Planning Bill will be aware, the Bill will set up the infrastructure planning commission that will deal with major infrastructure projects. The Bill is intended to be devolution-neutral and so only those major projects that have already been determined outside Wales will continue to be determined outside Wales through the infrastructure planning commission. What that means is that a statutory instrument will have to be made that, effectively, disapplies a raft of the powers of the infrastructure planning commission in relation to the small number of projects that apply in Wales. From Wales's perspective, that is absolutely key to the protection of the devolution settlement. I read the Bill and I could not find the provision that does that. In the end, I spoke to the Assembly lawyer in the Bill team, who pointed me in the direction of the provision. It is buried in clause 147 for those of you who are sufficiently interested. It is not flagged up anywhere as a devolution provision.

8.40 a.m.

[46] It is not mentioned in the explanatory memorandum, and the latest one dates from the introduction of the Bill from the House of Commons to the House of Lords, by which time the Minister had already flagged this point up in her written statement to the Assembly, but it still does not appear in the Westminster explanatory memorandum. That is a classic example of the devolution significance of provisions in Westminster Bills not being adequately flagged up. There is still a way to go, and, although it is not within the remit of this committee at the moment, an Assembly committee should be taking an interest in it.

[47] **Eleanor Burnham:** I am pleased that you went into so much detail, because I asked that question yesterday, based on our wonderful briefing, and our wonderful research team had come to the same conclusion as you. We discussed it, but we did not really get an answer. Which committee are you talking about when you talk about another Assembly committee?

[48] **Mr Williams:** I am conscious that a precise analysis of the existing powers of this committee is needed, because—forgive me—I am not entirely certain whether your remit currently extends to investigating this aspect of secondary legislative powers, namely the point at which they are allocated to Wales at Westminster. That may emerge in other questions, but it seems to us that there is a gap in the scrutiny that the Assembly, as a legislative body in Wales, is giving to the whole legislative sphere.

[49] **David Lloyd:** That is the fundamental issue, but doubtless we will come back to it.

[50] **Eleanor Burnham:** So, what is your view on how useful the delegated powers memoranda are for identifying the implications of UK Bills for Wales?

[51] **Mr Williams:** I think that my lengthy answer covers that. You have the list of delegated powers, but, sometimes—and that was a classic example—the fact that certain powers may well be used to protect the devolution settlement does not emerge.

[52] **Mark Isherwood:** You have expressed concerns that the Assembly Government continues to seek executive powers in UK Bills rather than using its powers to make Assembly Measures, which would enable Assembly scrutiny. Why do you think that that is the case? Why does it cause you concern? How do you think the Assembly could cope with the potential volume of Measures that could result if the situation were changed?

[53] **Mr Williams:** The observation in the written submission is an expression of our ‘disappointment’, although I hesitate to use that word. When we were looking at the Government of Wales Act 2006, we were aware that Westminster could continue to confer powers directly on the Welsh Assembly Government in legislation, but much of the attention was focused on the legislative competence Order process that would lead to Measure making. I appreciate that it is still early days, but the extent to which Westminster has continued to legislate directly for Wales, conferring powers on the Assembly Government, and its enthusiasm for it has taken us aback slightly. That may simply be the way in which the legislative programme has happened to turn out. For example, the draft marine Bill will probably be in the Queen’s Speech, and it is a massive piece of planning and environmental legislation that will confer a massive sphere of competence on the Assembly Government, and yet the scrutiny that it will receive from the Assembly will be relatively slight. The subject committee will look at it, but there is a massive conferment of power, and I am not sure where that issue of the transfer of power will be looked at.

[54] The other aspect of our concern is that, if one is looking forward with regard to the ultimate implementation of full law-making powers for this National Assembly, it tends to indicate that there is some way to go in terms of building up the legislative capacity. Regrettably, it harks back to a point that The Law Society and many others advocated about the fact that a great deal is being asked of a National Assembly of 60 Members, but that is probably a subject for another day.

[55] **David Lloyd:** We are made of stout stuff though. [*Laughter.*]

[56] **Mark Isherwood:** Based on your previous answers, how do you propose that we fill the legislative vacuum?

[57] **Mr Williams:** Broadly, the Assembly must think about moving from having this kind of committee, which is based on a Westminster model and was set up to be the guardian of the process of delegating powers to Ministers, to developing a committee that has a remit for looking at how the legislative process—the body of legislation as it affects Wales—is developing as a whole. Whether it is this committee or another body that does that is another matter, but there is a job to be done in trying to come to a view about the coherence of what is developing, because, realistically, you will never move entirely away from Westminster legislating for Wales. It is interesting to see what has happened with the Sewell convention in Scotland, and it is surprising, when you read reports on what happened there, that what started as a principle of not legislating for Scotland unless Scotland consented has similar features to what we are used to in Wales, where Westminster confers powers directly on the Scottish Government. So, Scotland has a similar problem, although it is perhaps not as intense.

[58] On the point of what you do about it, consideration needs to be given to charging a committee of the Assembly with looking at this question of how the legislative statute book as

it affects Wales is developing. I suppose that that goes right back to the first answer that we gave; it is a question of how you allocate your resources and create time to be able to do that.

[59] **David Lloyd:** Symudwn ymlaen at **David Lloyd:** We will move on to European faterion deddfu Ewropeaidd. Mae gan Joyce legislation issues. Joyce has a few questions ychydig o gwestiynau ar y mater hwn. on this matter.

[60] **Joyce Watson:** You state in your paper that it is imperative that statutory instruments implementing European Union directives are accompanied by clear and thorough explanatory memoranda to explain how the statutory instrument gives effect to the directive and what factors in Wales were taken into account. Can you expand on what kind of information you believe should accompany these statutory instruments and whether you consider that the Assembly should be provided with transposition notes?

[61] **David Lloyd:** That is a nice, simple question. [*Laughter.*]

[62] **Ms Powell:** I will try to answer the question, but I will also explain why we were looking at the explanatory memoranda. We want to have the confidence that Wales has an input at EU-legislation level as well. We are aware that the National Assembly has a representative in Brussels, but we want to be aware that, in addition to the Welsh Assembly Government's influence—through the UK Government having influence—our legislature also has an eye on what is happening and is keeping an eye out, as we mentioned. It is about developing our own legislation here and ensuring that matters that are unique to Wales and that need to be taken into consideration are considered at that level.

8.50 a.m.

[63] In that way, when the explanatory memoranda come to be produced, and explanations come to be included, we will have, as we mentioned in relation to the UK Bills, a specific section and a reasoning for any concerns that came through Wales, any accommodations that were made, and any issues relating to how an implementation might occur through Wales. So, it is a matter of continuing the process so that we are confident that the process is occurring, and, through the explanatory memoranda, we are seeing confirmation that matters are being considered and that they are being explained to people outside of the legislature so that they can see why and how things are happening.

[64] **Mr Williams:** To amplify that, from the point of view of legal practice, if you are asked to assess, or advise on, a piece of statutory legislation that has a European origin, you will start with the Wales statutory instrument. If there are issues concerning interpretation, you may need to go behind that and look at the directive and, if it is a directive affecting a public body, that directive is directly enforceable against the public body in its own terms and not just through the Welsh statutory instrument. Therefore, you get into arguments about whether you have correct transposition from the directive into the domestic legislation. In general terms, the drafting convention that has developed over 30 years or so is a fairly direct reflection in terms of the domestic legislation of the provisions of the European directive, simply with necessary amendments, and gold-plating has tended to be avoided.

[65] Nevertheless, transposition issues do arise and, in the fullness of time, the Assembly may want to try to implement a directive but take some of its provisions further. I see that one of your previous witnesses, for example, drew attention to what happened with the strategic environmental assessment directive and its implementation in Scotland. Scotland decided to use it as an opportunity to enhance its plan-making and environmental assessment there. If that is done, transposition notes are essential, because the main reason a practitioner would want to look at background notes would be because there was a transposition issue. So, from a purely legal perspective, that is very much the main function and use of these things. I

appreciate that that is looking at it purely from a lawyer's professional perspective and that there is the wider issue of making it explicable to the public but, as a technical document, it is the transposition stuff that is really of use.

[66] **Joyce Watson:** You have explained the need very well, but could you explain what you wish to see in supporting explanatory memoranda and, more importantly, who should be responsible for providing those?

[67] **Mr Williams:** If we are talking about the making of secondary legislation by either Welsh Ministers or the National Assembly, clearly, the explanatory memoranda are the responsibility of the draftsmen of the statutory instrument—of the secondary legislation. It is the function of the drafter of the legislation to set out in the memorandum the view that he or she took of the directive's requirements and what it required the National Assembly for Wales, in the case of devolved functions, to do to give effect to the underlying European requirements. So, it goes hand in hand with the drafting of the instrument.

[68] **David Lloyd:** We will now turn to matters of general transparency and access to information. Mark will ask a question, and he will be followed by Eleanor.

[69] **Mark Isherwood:** You comment on the Assembly Government website and refer to poor maintenance of legislation and confusion caused by mixing policy, legislation and consultation. How should that issue be addressed to ensure more transparency for the general public?

[70] **Mr Williams:** I will ask Kay to take that first, because she is a regular consumer of the service. [*Laughter.*]

[71] **Ms Powell:** There is a new consultation section on the Welsh Assembly Government's website. The website is now far easier to use because it is well laid out. However, with regard to consultation, it is separated into headings. At one stage the headings followed ministerial portfolios, but they now tend to follow directorates. There is no coherent system for titling those headings—considering all of the new consultations that have taken place—and there is no separation between early and late policy consultations and legislation. So, where there are consultation papers on subordinate legislation—which are vital, particularly in relation to negative procedure matters—it is not apparent from the titles that they use that it is legislation as opposed to policy.

[72] Our suggestion is that the Government should separate consultation on legislation from consultation on policy on its website, because they operate for different markets in a way, but also because it is important from a scrutiny point of view for everyone who is involved in legislation that they are separated. I believe that it was the Proposed Learner Travel (Wales) Measure that proceeded without a committee of the Assembly, because the policy had been worked up to such a level with stakeholders at an Assembly Government level. Therefore—particularly if that were to happen regularly—it is important that people are aware and know with what they are dealing when they come to those consultations. It is to ensure that everyone is engaged in the process.

[73] **Eleanor Burnham:** Following on from that, you suggest the use of fields in the Government of Wales Act 2006 to categorise legislation. Is it preferable to categorise legislation according to the Minister or the Government department with responsibility, because we have a bundle of portfolios and it can be confusing, beyond what you have just said? What is your view?

[74] **Ms Powell:** For policy, the categories would naturally fall with the Ministers, but if we are talking about legislation, legislation will ultimately relate to our devolved areas, which

are currently the fields under schedule 5. However, they will survive into part 3, so when we come to schedule 7, the subjects for Assembly Acts have the same titles. So, I consider those to be the best headings for the legislation, and if there is an overlap between subject areas it is possible under the heading to make reference back, rather than have these pieces of legislation—

[75] **Eleanor Burnham:** Can you give an example of what is going on at the moment that would pinpoint what you mean for anyone listening or watching?

[76] **Ms Powell:** On the Assembly Government website, I discovered that, under the heading ‘environment and countryside’, there were 11 items for consultation. Only one item stated that it was a consultation on legislative proposals; there were six items relating to new legislation and five other items related to policy consultation, and they are all under the heading of ‘environment and countryside’, which is not as specific as being under a field. Therefore, we suggest that those six items of legislation should be taken out and placed under the current relevant field heading, which we could use as the titles.

[77] **Mr Williams:** To amplify the point, the fields are relatively fixed and stable, whereas in the past 10 years I have lost track of the number of different titles of Ministers and directorates within the Assembly Government, because there is no fixity to those titles. That has a role in the confusion.

[78] **Eleanor Burnham:** Some contributors have suggested scope for improved communication on proposed legislation, and you have suggested a legislative co-ordinator. Can you expand on what the role might entail and with whom the responsibility for this post might lie? How else might we be able to improve communications between legislatures? As we found yesterday, it is definitely needed.

9.00 a.m.

[79] **Ms Powell:** Absolutely. In terms of the Welsh Assembly Government co-ordinator role that we have suggested, we see that as fixing all legislation on someone or on a unit within the Assembly Government, so that where there are negotiations through the Wales Office or through other Whitehall departments on new Bills, someone at the Welsh Assembly Government would be responsible for ensuring that that information was made public and that there would be a formal reporting system, although I understand that Paul Murphy reports following the Queen’s Speech; that is now developing.

[80] On the legislative co-ordinator, we would see that co-ordination happening at all levels. So it would be in relation to Government-sponsored Measures, in terms of LCOs, and in relation to UK Bills. That would also be a way in to new subordinate legislation. As practitioners, we find that it is difficult to find out about not the statutory instruments themselves, because they are published by the Stationery Office, but about other subordinate legislation, which is difficult to access. We still have the pre-January 2006 subordinate legislation that was not recorded and published in a coherent way, which we are still pursuing. However, I see that a legislative co-ordinator role would fix, in an Assembly Government department, a responsibility for legislating.

[81] **Eleanor Burnham:** Would that mean that your previous point about planning and the Marine Bill would be clarified, so that everyone knew where we stood in Wales?

[82] **Mr Williams:** Yes, the proposal is to have an identifiable single point of contact. My inquiry of yesterday is an example. However, it relates to the whole process, in terms of such a piece of legislation at Westminster conferring powers on the Assembly Government, or new legislative competence on the National Assembly for Wales. It also relates to the process of

implementing and developing the subordinate legislation. Just to amplify Kay's point, by subordinate legislation we do not only mean statutory instruments, but what we lawyers call 'the body of soft law'—the directives, circulars and other instruments of legal effect that also flow from legislation these days.

[83] **David Lloyd:** Diolch. Yr ydym wedi cyrraedd y diwedd. A oes unrhyw fater arall yr hoffech ei godi? **David Lloyd:** Thank you. We have reached the end. Is there any other matter that you would like to raise?

[84] **Mr Williams:** I wish to reinforce the point that I made earlier in response to Mark Isherwood's question about the need to have some overview on the coherence of what is developing, because, as I said, there are gaps. I would like to briefly give another example, because it illustrates the job to be done.

[85] I recently had occasion to look at the legislation relating to the powers of Estyn. As matters stand at the moment, the National Assembly has Measure-making powers in respect of inspections of post-16 education. Under the Education and Skills Bill currently in Parliament, you will shortly get legislative competence in respect of inspections relating to education in its various forms for under-16s. So, I thought that that was interesting—the National Assembly now has the ability to legislate by Measure over this field. However, I then discovered that there is also Estyn's power to inspect local education authorities, as distinct from schools. This has been of some concern because there has recently been an important LEA inspection in Denbighshire. The power to legislate by Measure in respect of LEA inspections is still non-devolved. It is in the Education Act 1997, which, as far as I can tell, has not currently been included in the education field. There is still this gap. That is precisely the sort of thing that a committee of this Assembly could usefully start to look at in terms of how the legislative process is unfolding, and draw lessons from it.

[86] **Eleanor Burnham:** If we had the same powers as they have in Scotland, would we be any further forward? Beyond that, if we had primary powers, would it simplify matters even further?

[87] **Mr Williams:** Yes, it would. If you look at the Government of Wales Act 2006, where primary powers are ultimately devolved and we see that set out, the field of education is covered in about four lines; I cannot begin to guess how many pages the education field of Schedule 5 to the Government of Wales Act 2006 already fills, with all the exceptions and qualifications and so on. Clearly, the example that I have just given would not be an issue. Inspection of education provision would be within that.

[88] **David Lloyd:** Mae'n hamser ar ben. Diolch am eich cyflwyniadau arbennig ac am drin a thrafod y cwestiynau mor ddeheuig. Bydd y clerc yn anfon trawsgrifiad atoch er mwyn ichi sicrhau nad oes gwallau amlwg ynddo cyn inni gyhoeddi'r cofnod terfynol. **David Lloyd:** Time is up. Thank you for your excellent presentations and for dealing so deftly with the questions. The clerk will send you a copy of the transcript for you to check for obvious mistakes before we publish the final record.

[89] I'm cyd Aelodau, cyhoeddaf y bydd y Cwnsler Cyffredinol ac Arweinydd y Tŷ, Carwyn Jones, yn bresennol yng nghyfarfod y pwyllgor fore Mawrth nesaf i roi tystiolaeth i'r un adolygiad. To my fellow Members, I announce that the Counsel General and Leader of the House, Carwyn Jones, will attend next Tuesday's meeting to present evidence to this same inquiry.

9.06 a.m.

**Unrhyw Fater Arall
Any Other Business**

[90] **David Lloyd:** Nid oes gennyf **David Lloyd:** I have no other business. I see faterion eraill ar hyn o bryd. Gwelaf fod that all are content, so we shall proceed. pawb yn hapus, felly symudwn ymlaen.

**Dyddiad y Cyfarfod Nesaf
Date of the Next Meeting**

[91] **David Lloyd:** Cynhelir y cyfarfod **David Lloyd:** The next meeting will be held nesaf fore Mawrth nesaf am 8.15 a.m.. Yr next Tuesday at 8.15 a.m.. The House of oedd y ffaith ein bod yn cyfarfod am 8.15 Lords was very impressed that we meet at a.m. wedi creu argraff fawr ar Dŷ'r 8.15 a.m.—none of its committees meet at Arglwyddi—nid oes ganddo'r un pwyllgor the crack of dawn. [*Laughter.*] Thank you all sy'n cwrdd mor blygeiniol. [*Chwerthin.*] and thank you for the interpretation. Diolch i chi a diolch am y cyfieithu.

*Daeth y cyfarfod i ben am 9.07 a.m.
The meeting ended at 9.07 a.m.*