



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

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

**Dydd Mercher, 14 Hydref 2009
Wednesday, 14 October 2009**

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

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

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

Keith Bush	Cyfarwyddwr, Gwasanaethau Cyfreithiol Director of Legal Services
Bethan Davies	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Lisa Salkeld	Cynghorydd Cyfreithiol Cynorthwyol Assistant Legal Adviser

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

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

[1] **Janet Ryder:** Good morning. I call the meeting to order. I welcome Members, officials and members of the public. In an emergency, ushers will indicate the nearest safe exit. Headsets are available for translation on channel 1 and amplification on channel 0. The ushers will explain how to use them if members of the public need it. I remind everyone to switch off mobile phones.

[2] We have received apologies from Joyce Watson, and there are no substitutions.

9.30 a.m.

Offerynnau ac Offerynnau Drafft na fydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reol Sefydlog Rhif 15.2, Offerynnau sy'n Agored i Gael eu Dirymu yn unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol), ac Offerynnau Drafft sy'n Agored i Gael eu Cymeradwyo yn unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Gadarnhaol)
Instruments and Draft Instruments in respect of which the Assembly is not Invited to Pay Special Attention under Standing Order No.15.2, Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (Negative Procedure), and Draft Instruments Subject to Approval Pursuant to a Resolution of the Assembly (Affirmative Procedure)

[3] **Janet Ryder:** SLC336, the Welsh College of Horticulture (Dissolution) (Amendment) Order 2009, is first.

[4] **Mr Griffiths:** Un peth sydd i'w ychwanegu, sef nodi bod hwn yn cywiro gwall a dynnwyd i sylw'r Cynulliad gan y pwyllgor hwn yn ei gyfarfod ar 23 Medi. Felly, mae'r Llywodraeth wedi cywiro'r gwall yn gyflym yn yr achos hwn. **Mr Griffiths:** There is one thing to add, which is that this is to correct an error that was drawn to the Assembly's attention by this committee on 23 September. So, the Government has, in this case, swiftly rectified the mistake.

[5] **Janet Ryder:** If you remember, it is one of the issues that we will be looking at under the statutory instrument review. It is good to see that amendment come through so quickly. Are Members content with that? I see that you are.

[6] Next is SLC338, the Council Tax and Non-Domestic Rating (Electronic Communications) (Wales) Order 2009. I see that Gwyn has nothing to add. Are Members content with that? I see that you are.

[7] With that, we move on to draft instruments subject to approval pursuant to a resolution of the Assembly. First is SLC334, the Local Authorities (Alternative Arrangements) (Wales) (Amendment) Regulations 2009.

[8] **Mr Griffiths:** Nid oes dim i'w ychwanegu. **Mr Griffiths:** There is nothing to add.

[9] **Janet Ryder:** Are Members content with that one? I see that you are.

9.32 a.m.

Eithriadau Symudol
Floating Exceptions

[10] **Janet Ryder:** This item has the fascinating title, 'Floating Exceptions'. We have Keith Bush, the Assembly's chief legal officer, joining us this morning. Welcome, Keith, to the committee. I remind Members that, during recent scrutiny of proposed legislative competence Orders, a new approach to exceptions to matters has become evident, and a corresponding new terminology appeared. Exceptions are now classified as 'fixed' if they are specific to a particular matter or to the matters in a particular field, and 'floating' if they apply across all fields.

[11] The House of Lords' Constitution Committee has expressed concern about certain features of the way in which this approach has been introduced, particularly as the draft LCO on carers and the proposed LCO on environmental protection and waste management both

contain floating exceptions that are at least primarily relevant to fields other than those that contain the matters to be added by the LCOs.

[12] Legislation Committee No. 4 considered the issue of floating exceptions and, following its report, Peter Black raised the issue of the appropriateness of floating exceptions in fields for which the Assembly does not yet have competence and their proper scrutiny in committee. In response, the Presiding Officer stated that the Business Committee might consider referring the issues that have arisen in relation to floating and fixed exceptions and the way in which proposed Orders are presented to the Assembly for scrutiny to the Subordinate Legislation Committee for examination, and that is where we are at now.

[13] Legislation Committee No. 4's paper to the Business Committee asks us to investigate the implications of the changes to the organisation of exceptions in Schedule 5 to the Government of Wales Act 2006, and in particular with regard to the scrutiny of future legislative competence Orders by legislation committees. This has been referred to us.

[14] You have all received a paper from Keith Bush, so today's item is to look at this issue, to hear further evidence from Keith, to question him, and then to consider the best way forward for this committee.

[15] Keith, would you like to introduce your paper?

[16] **Mr Bush:** Thank you. First of all, could I point out a mistake? [*Laughter.*] The paper was put together under pressure. In paragraph 3, in the second line, that should not be 'May 2005', but 'May 2007', of course. Time goes by quickly, but thankfully not that quickly. The point that I was trying to make there is that the LCO system has been in operation for only two years, but, even in that short period, it has seen some quite fundamental changes and developments. Among the most obvious is that which was originally intended to be given effect to by the proposed LCO on carers, but, as the Constitution Committee of the House of Lords pointed out, there was a provision in it that was not specifically to do with carers and that reorganised how exceptions to the competence conferred on the Assembly would be expressed in future. As a result, the Constitution Committee sought further information on why that was happening, and it pointed out that, on the face of it, some of the exceptions contained in the proposed Order—which come under the description of 'floating exceptions', because they apply across the board in relation to all matters and all fields—did not appear to have any relevance to the competence conferred by it. As a result, a separate legislative competence Order on exceptions to matters was drawn up, which has been considered by the Assembly, but has not yet been approved by Parliament. However, there is clearly a movement in the direction of this approach of having these floating exceptions, which apply across the board.

[17] In the paper, I have traced the history of how that approach has developed, but, in doing so, I was under a bit of handicap. To put it in another way, I am not necessarily the best person to explain the evolution of this approach, because, in essence, it is a Government matter. It has undoubtedly emerged from discussions between the Welsh Government and the UK Government on the exceptions and restrictions that it might be appropriate to impose when legislative competence is conferred on the Assembly. In looking for the origin of that approach, as I say in the paper, it seems to me that it was triggered by what appears to be—but, again, I am inferring rather than giving direct evidence—a very cautious approach by some Whitehall departments to the granting of legislative competence to the Assembly. That goes back to the time before the Assembly acquired its new powers.

9.40 a.m.

[18] In paragraph 15 of my paper, I have set out the list of exceptions that was attached to

the competence transferred to the Assembly, not by a legislative competence Order but by the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007, which dealt with the issue of travel to schools and other places of education, and which led to the Learner Travel (Wales) Measure 2008. At that stage, despite the fact that the Measure was about travel to school, a lengthy list of exceptions was attached to that competence, some of which one can readily understand the origin of, but some could be seen as being overly cautious. I am talking about making it clear that, in legislating on travel to school, the Assembly could not interfere with navigational rights and freedoms. Now, I am not sure how many people in Wales travel to school by ship, but—

[19] **Alun Davies:** I represent Caldey island. [*Laughter.*]

[20] **Mr Bush:** That is a good point, but, however they travel across the sound to Tenby, it seems to be overly cautious to imagine the Assembly wanting to ban ocean liners from navigating between Caldey island and Tenby to protect schoolchildren on their way to school. It is clearly a detailed approach to think of anything that could conceivably be legislated on by the Assembly under this matter and then to come up with a long list of exceptions, and this set a precedent. As for the next stage, it was developed into the table that we see at annex A, in which the same list applies but a few more have been added as well. Then there is the table identifying to which matters a particular exception applied.

[21] The latest approach, under ‘Exceptions to matters’, is over the page at Annex B. Instead of having to note against each of the exceptions the particular matters that they might relate to, they now apply across the board to every matter in Part 1 of Schedule 5. Subsequent LCOs, such as the proposed LCO on culture, have followed that approach and have added more in. However, the proposed LCO on the environment did it in a major way. Floating exceptions relating to economic development, highways, water and flood protection and so on were included in the proposed legislative competence Order without making it clear—and the members of the committee that scrutinised that particular one picked this up—why it was felt necessary to introduce those general exceptions at that stage.

[22] This committee will no doubt wish to consider investigating how this has emerged but also the implications. The possible implications that have been referred to include the fact that, if you add exceptions in a context other than that of the particular matter being added, any committee scrutinising the proposed Order may find it difficult to judge the significance of those exceptions, because they cannot be related to the case that has been put forward for that matter. That is one issue, and the Constitution Committee of the House of Lords raised that.

[23] Another related issue that that committee picked up was the way in which this major development has taken place, without any transparent or in-depth examination of its merits and disadvantages.

[24] The third issue, which relates to the first two, is how these floating exceptions relate to Part 4 of the Government of Wales Act 2006. Part 4, as I am sure you all know, deals with primary legislative powers across all the devolved fields, and each subject, which correspond to the fields in Part 3, has a number of exceptions to it. As far as I can see, the floating exceptions correspond to the exceptions that are in Schedule 7—in other words, in Part 4. So, on the face of it, it looks as though Part 3 is morphing into Part 4, which may or may not be a good thing. The members of the committee may feel that it ought to be explained and considered because it is a matter of considerable constitutional importance. So, that is the basic message that I hope I got over in the briefing, but I would be happy to answer any questions that committee members may ask.

[25] **Janet Ryder:** It is a complex issue, but you have certainly started to enlighten the way

slightly. I think that we have some questions for you. Although Mike wishes to ask a question, as Chair of Legislation Committee No. 4, William signalled that he had a question first.

[26] **William Graham:** First, I must say how pleasant it is to see Keith Bush performing. Thirty years ago, when he was the prosecutor on behalf of the council, I think, I remember him being equally helpful, as you might imagine. [*Laughter.*]

[27] **Mr Bush:** If I may say so, you were my star witness. [*Laughter.*]

[28] **William Graham:** I refer particularly to the action for this committee, and ask Keith to give us an idea of whom we should take evidence from. That is the critical part for this committee.

[29] **Mr Bush:** I think that there are two sources of information. The first is the Welsh Assembly Government, because it responsible for the drafting of Orders, and it seems to me that the starting point would be the Counsel General, although I assume that the First Legislative Counsel or one of his team who is responsible for the drafting of these Orders would be the best person to invite as a witness, subject to ministerial approval, to provide you with the necessary information. The second source is the group of people involved in monitoring the growth of Welsh legislation, and I am thinking of academics, those involved in the Wales Legislation Online project, who I know are very interested in this kind of development, as well as those representing the legal profession. I know that the Law Society takes a keen interest in these matters, and I have little doubt that it would be prepared to help you and give you a view on the matter.

[30] **Janet Ryder:** Would it be worth our seeking a meeting perhaps with the Constitution Committee of the House of Lords to discuss this matter?

[31] **Michael German:** May I intervene at this point? I do not know whether you remember, Chair, but, as Chair of Legislation Committee No. 4, I wrote to Peter Hain jointly with the Chair of the Welsh Affairs Select Committee on this very matter of floating exceptions, and we have yet to receive a reply.

[32] **Janet Ryder:** For the record, can you clarify whether you wrote as Chair of Legislation Committee No. 4?

[33] **Michael German:** I wrote as Chair of Legislation Committee No. 4 following the proposed legislative competence Order on the environment, which was mentioned in Keith's paper. The second letter that we wrote was to the Chair of the Constitution Committee of the House of Lords seeking a meeting. We have not had a reply to that letter either, as I understand it. I was going to say this later, but my impression is that the work that was done to start this ball rolling in that legislation committee really ought to pass to this committee now, for us to pick up the response from the UK Government, which I think will be crucial in this and to which there has been a lead-in with that joint letter signed by us both, and from the Constitution Committee of the House of Lords. Neither of those can be compelled to give evidence here, but that would be very valuable. We may want to consider how we do that. I will come back in later, if I may.

[34] **Janet Ryder:** Alun, did you want to come in on this point?

[35] **Alun Davies:** Yes. I agree very much with what has been said previously. It is important that we speak to, and invite, Wales Office Ministers. You suggested the Secretary of State for Wales, but a Minister of State would be an alternative, because, in many ways, they are the gatekeepers of our legislation at Westminster, and the Wales Office is the

department responsible for the relationship with Whitehall. So, I think that there is an issue for us to explore.

9.50 a.m.

[36] Although we are looking at the exceptions issue here this morning, there is a wider issue about the nature of legislative competence Orders, and how they are developing. While we can argue that they are not developing very quickly, which is an argument that I have a lot of sympathy with, they also seem to be developing very much as a minimalist approach, devolving increasingly narrow areas of legislative competence to the Assembly. As someone who was involved in the debate around the White Paper and the manifesto in 2005, I know that there was an intention that LCOs would devolve sometimes quite large areas of legislative competence to the Assembly. There was certainly the sense of moving the balance of legislative competence from Westminster to Cardiff bay—that was written into the White Paper—and I think that the legislation gives life to that. However, the way in which the legislation is operating in practice is not reflecting the ambitions of the people who drafted the policy. There are issues there for us to discuss, and I think that the Constitution Committee of the House of Lords is a good place to have some of those more technical discussions. However, in terms of the Wales Office, it may be useful to have a discussion on this issue and also on a wider issue that we have addressed at different times in this committee on the way that the LCO process is developing.

[37] **Janet Ryder:** There may be other aspects of other reviews that we have flagged up that we can bring into those discussions as well.

[38] **Mr Bush:** My paper is solely directed at the issue of fixed and floating exceptions—floating exceptions, essentially—because, as a good lawyer, I only answer the question that I am asked. However, Alun Davies raised a very significant point, because Legislation Committee No. 4, when it scrutinised the Proposed National Assembly for Wales (Legislative Competence) (No.2) Order 2007 (Relating to Environmental Protection and Waste Management), considered not just floating exceptions, but the general complexity of the way in which the matters were being conferred. That included the complexity of the fixed exceptions, because, when that proposed Order was first considered by the Assembly, back in the autumn of 2007, it was quite simple and easy to understand, but by the time that it was further considered earlier this year, the volume and complexity of the exceptions attached to it had grown enormously.

[39] The Minister came to that committee and explained why that had happened. It was made quite clear that it was generated by concerns in Whitehall departments about the possibility that the Assembly might legislate on matters that were not intended to be devolved, which may have been the case. However, it raised an issue about the ability of everyone—lawyers, specialists and so on, let alone the general public—to understand the extent of the Assembly’s legislative competence when faced with that level of detail. Therefore, one issue that Legislation Committee No. 4 raised was whether it was possible to express these exceptions more simply, or whether it would be possible to rely, instead of having detailed exceptions, on the fact that the Act itself prohibits a Measure from interfering with matters that are functions of Ministers of the Crown without the consent of the Secretary of State; there would be a general restriction on trespassing on non-devolved areas. So, by the time that you have taken that, together with the detailed fixed exceptions and floating exceptions, one has a belt and braces and elasticated-waist approach, which does not really aid understanding of exactly what it is that the Assembly can legislate on. The point that I am making is that you may want to think about whether you should broaden this out, rather than simply confine any investigation to floating exceptions, to look at the complexity of exceptions in general.

[40] **Janet Ryder:** I remind Members that we can look at this matter under Standing Order No. 15.6, which allows us to consider and report on:

[41] ‘any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers’.

[42] However, we cannot look at any LCOs; we are prevented from doing that by Standing Order No. 15.7. However, we can look at this general issue, and everything that I have heard so far from Keith would suggest that this instance is very general, and does not involve specific issues or LCOs that might need to be drafted, or that are being drafted at the moment. This would come under Standing Order No. 15.6, so we could have the confidence to do this.

[43] **Michael German:** I intervened to tell you about the letter to the House of Lords’ Constitution Committee. Keith could not have put it better, I do not think; for those who do not know, the LCO as originally presented was about three pages long—this is the environmental LCO—and when it eventually reappeared for us to consider it was eight pages long, and the additional pages consisted of a variety of exceptions.

[44] It seems to me that there are three issues here. First, it is crucial that we make complex legislation as clear as possible. If we are not to create a lawyer’s paradise, which we may already have done, legislation needs to be clear, and understood by as many people as possible. The second point is that the process of scrutiny within the National Assembly is frustrated if we are given this kind of list of exceptions relating to areas that we are not considering. At the moment, those kinds of things tend to get left in the hope that someone else will scrutinise them. The third point is whether there is the potential to frustrate Schedule 7 if a floating exception exceeds the exceptions listed in Schedule 7, which are post-referendum. I do not know whether we have got that far—I do not think that we have—but there is the potential to do that, which is something that we need to guard against.

[45] So, it seems to me that we have a kind of double-plated armour here. We should look at examples of previous LCOs where scrutiny has demonstrated a lack of clarity, affecting our ability to scrutinise, as well as the issue of possibly affecting Schedule 7. We could take examples from previous LCOs and ask whether, fundamentally, this process is allowing us to achieve our policy aims. It is interesting that the environmental protection and waste LCO was the broadest LCO, so came back with this huge list of exceptions. If we are to look at this with a group of people, as Keith has suggested—there may be more detail on that later—I think that we need to look not just at the history, but also at the direction of travel for the future. If it has happened once, it becomes a precedent; if it happens twice, then it becomes the standard practice. We need to drill down to find the root of the problem. It may well be that we need to examine the protocols that exist between the Welsh Assembly Government and Whitehall departments, and consider whether they need to be amended as a result of what we have discovered to enable easier drafting.

10.00 a.m.

[46] **Janet Ryder:** Keith, would you like to respond to that last point?

[47] **Mr Bush:** It would not be easy for the committee to inquire into discussions within Government but, clearly, at some stage, a decision has been taken to adopt this new approach, and it seems to me that it would be productive, potentially, to explore the thinking behind that. It is not a matter of negotiation over a particular LCO; it is a very important, fundamental decision that has been taken at some stage about the drafting of these matters. At present, there is no clear understanding of how and why that happened.

[48] **Janet Ryder:** Alun, would you like to come in at this point?

[49] **Alun Davies:** The point that I initially wanted to raise was more a question to Keith, but, if possible, Keith, I would like you to outline what you mean by the ‘cautious approach’ that you described Whitehall departments taking. I was interested in the fact that you said that they seem to be taking, at different points, a similar sort of approach to that taken before the Assembly acquired its new powers. The impression that I gained is that you feel that some Whitehall departments are still in Welsh Office mode, if you like, and I am going back not just two or three years, prior to the current legislative framework coming into being, but back to pre-1997 days. I would be interested to hear your response to that.

[50] The other issue that I wanted to raise is that, when I was a Labour candidate in the 2005 general election, it was not intended that there would be LCOs that were three-pages long, and it certainly was not intended that we would have exceptions that were four pages long. That is not what we debated and discussed as a party in terms of policy approach, and if the policy that was adopted at that time is now not being delivered by the legislation enacted to deliver it, we need to have a profound discussion, notwithstanding the wider discussion that we need to have. We probably need to move more quickly towards a referendum but, until we get to that point, it is important that we have a discussion about how the policy is being delivered in terms of the legislation that we now have on the statute book.

[51] **Mr Bush:** I am sure that there is a parallel between the way in which Whitehall departments approach the issue of LCOs and the way in which they have had to approach the issue of the transfer of executive powers to the old Assembly and now to Ministers. It is inherent in those kinds of negotiations that those whose job it is to protect what they see as being the functions of their department and Ministers will be very careful to do that, although the argument is that they are being over-careful and that that is causing a problem of complexity, bearing in mind that Parliament has approved Part 4 of the Government of Wales Act 2006, subject to a referendum. However, the principle that there could come a day when the Assembly would not have to look for a specific matter but would legislate over the whole field of, let us say, the environment, is part and parcel of the devolution settlement, subject to a referendum and taking that approach at the appropriate time. So, it could be said—and it is not for me to judge on these matters—that there ought to be a recognition that, when looking at LCOs, one ought to adopt a broader approach and accept that the Assembly is the right body to legislate in relation to quite a broad area and that it will do so responsibly and not look for a means of identifying every conceivable thing that the Assembly might choose to do and then exclude something if it does not fit in with UK Government departments’ understanding of the devolution settlement. That is, obviously, something that you need to investigate. I would classify that as a matter of approach and as a mentality; it is the idea of protecting what are perceived to be the functions of Whitehall.

[52] There is a different issue, namely that up until 1999 all UK legislation emanated from Westminster, and other than the fact that there was separate legislation on some matters in relation to Scotland and Northern Ireland because of their different legal systems, there was no need for Ministers, when they were legislating on something, such as the environment, to look at the legislation and make sure that it was organised logically so as to distinguish between what was appropriate to be dealt with at a UK level and at a devolved level respectively. Therefore, the statute book, as we have it—if you take, for example, the Environmental Protection Act 1990—is a jigsaw of what is devolved and what is not devolved. Over time, things may change, but it is still the case that a lot of legislation, for example in an area such as education, contains a mixture of what is devolved and not devolved. So, it is very difficult. It is not a case of saying that Act of Parliament A relates entirely to non-devolved matters, and Act of Parliament B deals with devolved matters, and that one can therefore safely transfer the power to the Assembly to legislate in the same area as Act of Parliament B; it is still a question of trying to divide a single piece of legislation and working out what is devolved and what is not devolved. One would hope that, as time goes

by, a more logical and user-friendly approach would develop that would keep things separate, so that everyone knows whether something is to be dealt with on a devolved basis. Unhappily, we are not in that position, and as a result legislative competence Orders have very ragged edges, and people are not sure where the boundary lies. Therefore, there is scope for the way in which the limits of the Assembly's legislative powers are defined to be very complicated.

[53] **Janet Ryder:** You have suggested that we invite the Counsel General in, but you have also suggested that we try and discuss matters with the First Welsh Legislative Counsel, which draws up legislation for the Welsh Assembly Government. Are you saying that we should also be talking to those who draw up legislation in Whitehall to see how their work has evolved over 10 years?

[54] **Mr Bush:** I know that the Counsel General has a few other things on his mind at the moment—

[55] **Janet Ryder:** This is of higher importance, I am afraid; you cannot listen to what happens elsewhere.

[56] **Mr Bush:** I was suggesting that, as a matter of courtesy, the Counsel General could be approached, but the committee might indicate that the First Welsh Legislative Counsel could come along to discuss the matter in detail.

[57] **Janet Ryder:** You seem to be suggesting that it is not only we who have had to evolve our systems and our capacity for developing legislation, as London has also had to evolve. If we are going to do this, do we need to see how we are being dealt with there? Given the interface between the two Governments, should we also be asking to have interviews with people in London?

10.10 a.m.

[58] **Mr Bush:** Alun Davies made the point that the natural point of contact is the Wales Office. One can indicate that one would like to see some information coming from the Whitehall perspective generally in order to see its take on this. In practice, however, you might find it quite difficult to persuade someone from Whitehall to come along to talk about these matters. However, the Wales Office is the guardian, or the gatekeeper, as Alun put it, of the devolution settlement. It is involved in these discussions and may be able to provide quite a bit of information about the attitude to them, which has to be applied.

[59] **Alun Davies:** Could I be a little less reticent? We should include the Wales Office. However, the Wales Office now sits in a new department: the Ministry of Justice. Seeing both sides of this coin is quite important. We have the perspective of the Wales Office as the gatekeeper, or sponsor, of much of the legislation going through Westminster—whether Welsh clauses in public Bills or legislative competence Orders—which is all fine and good. However, it would be interesting to see how a representative of the process—and I will couch it in those vague terms—would perhaps have a different perspective with regard to the way in which they understand the process. Someone who works in the Wales Office will certainly understand the process, or at least we would anticipate and hope that they would. They would have an experienced voice and would understand the position of the Assembly, the evolution of the legislation and of the devolution settlement. I speak as someone who has experience of working in Whitehall departments, where the understanding of the devolution settlement could be imperfect. It will be interesting to see and to understand the perspective of someone who does not come from this Welsh place.

[60] **Janet Ryder:** I will bring in Mike on this point.

[61] **Michael German:** I absolutely agree; in an ideal world, it would be great to have Welsh Ministers and Welsh officials from the Wales Office and to have the clerk to the Constitution Committee of the House of Lords. However, I sometimes wonder whether we need to have a bit of a backstop. We may not get, as formal witnesses, the Welsh Affairs Committee and other UK Government Ministers, as they have previously resisted the opportunity to come and bear witness, but it might be sensible for us to have a meeting with relevant bodies. That is, not to take it as a formal meeting, but more of an informal exercise to gather information.

[62] Alternatively, another approach would be to use the Welsh Affairs Committee, which co-wrote this letter, which might be prepared to have a joint evidence session on this matter. This might help us as it could call in whomever it wanted to from Whitehall and they have a duty to come. If we were to have an informal session, it would also enable us to have an informal joint meeting with the Constitution Committee of the House of Lords.

[63] **Janet Ryder:** We will have to explore all avenues to achieve the outcome.

[64] **William Graham:** I endorse the remarks made by Keith Bush. It reminds me that, in the Business Committee of the first Assembly, when we considered the statutory instruments, we were very keen—and perhaps it would be worth looking again at the arguments made at the time—wherever possible, for it to say on the face of the Bill, or the statutory instrument as it was in those days, that it was to apply to England and Wales. A lot of time was wasted as a result of our legal adviser having to trawl through these to find out whether they applied to Wales. I do not think that it ever happened. That must have been eight or nine years ago. I would like to know what happened with that request, to whom it was made and why nothing was followed through.

[65] **Janet Ryder:** Keith, would you like to venture an answer on that one?

[66] **Mr Bush:** We can see what we can dig up.

[67] **William Graham:** It was some time ago, unfortunately.

[68] **Michael German:** What are our restrictions, Chair? We cannot call Ministers of the Crown or their officials; is that right? So, it is a matter of finding an approach that might work.

[69] **Mr Bush:** You can call them, but you cannot compel them to come. You can invite them.

[70] **Janet Ryder:** We can invite them, but we may also need to explore a more informal way of discussing things to begin with, or we may need to try both.

[71] **Mr Bush:** The Wales Office should be the route through which one could attempt to access Whitehall. However, I do not know whether anyone would be prepared to come and discuss these types of issues. One difficulty is that although many departments had devolution units 10 years ago, whose task it was to ensure that the departments were alive to the implications of devolution regarding the work that they undertook, those have tended to wither away somewhat over the years and, at present, there is no single focus of expertise in Whitehall on devolution issues. This is very much a matter for the territorial ministries like the Wales Office. So, that is the natural way of getting access to whatever learning, knowledge or experience there may be in Whitehall.

[72] **Janet Ryder:** Do Members have any further questions? We have certainly confirmed the fact that we should take this further. There is much to explore. There are many aspects

that we wish to consider and a number of different people that we want to call in as witnesses.

[73] **Alun Davies:** We seem to be launching a new inquiry every time we meet.

[74] **Janet Ryder:** I know, but this will probably impinge on the other reviews that we are undertaking and there will be connections between all of them.

[75] **Alun Davies:** You are right and I agree that we should look at this area. Before we do, I would like more information on this. I think that the paper that Keith wrote is great. You constantly give me sleepless nights, but it is important that we read through and understand these issues because they are fundamental to the operation of the Assembly. While I understand and would not seek to second guess the legislation committees that scrutinise proposed LCOs here or the work of other committees elsewhere, I would like to better understand how the floating or fixed exceptions work in practice. I would like to see another paper that outlined each of our proposed LCOs or framework powers—whichever method is used to devolve legislative competence to the Assembly—and how exceptions work in each case. I have not had the opportunity to look at the Proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009. I was not on that committee, and what we find, as Members, is that unless we are a member of a proposed LCO committee or unless it is of particular significance to a constituency or to a particular region, we do not see the detail of the scrutiny of those proposed LCOs. So, there is a need for us to gain further information and a deeper understanding of this subject.

[76] **Janet Ryder:** We need to ask people to submit some written information first. We could ask for a written submission from many of the groups that we have listed today. I happened to be a substitute on Legislation Committee No. 4 for the two meetings that considered the proposed environment LCO. So, I am aware of the complexity that those exceptions caused. We are not looking at the subject of the proposed LCO; we are looking at the general issue, which relates to the floating exceptions. According to Standing Orders, we can ask to look at those proposed LCOs and we can assess them on those grounds. However, if we have not attended those proposed LCO committees and are not familiar with the background of those proposed LCOs, then it would be worth looking at some of the transcripts of those meetings because the discussions and the report were complex at times.

[77] **Alun Davies:** I would like to know what led to the conclusions of the report, so that would be useful.

[78] **Mr Bush:** There is a bit of complication here in that if you take that particular proposed LCO, the relevant legislation committee here and the Welsh Affairs Committee made recommendations that will have been taken away by the Minister, therefore, you do not know what the outcome will be because these have not been laid before Parliament or the Assembly as draft Orders. The ability to look at Measures to see how the exceptions in the relevant LCO have affected them faces the difficulty that because of the time it takes for the process to work its way through, we are only now, as it were, seeing the Measures that correspond with the LCOs that were considered a couple of years ago. So, the evidence is limited at the moment, and some of it could lead to the criticism that you are repeating the scrutiny.

10.20 a.m.

[79] **Janet Ryder:** The time has been limited, and the number of LCOs is limited, but, as you have highlighted in your paper, a new approach has developed, and it is one that does not seem to have undergone public scrutiny of its development, how it should be developed, and how it operates. The purpose of this committee should, as you outlined, be to look at how that approach has evolved, why it has evolved, and its implications. If we are finding this complex

and unfathomable, then the many lobby and interest groups that want an input into legislation as it is being developed will find it extremely difficult to see how the process works. We owe it to those groups, which have a huge impact on how Wales operates, to make this as clear as we can.

[80] I take your point that these pieces have not been completed yet, especially that one piece, but it is your original premise that it is the process and the evolution of what could be seen as a new system, which does not seem to have been publicly and openly acknowledged as yet; it has just started to appear. That is perhaps where we should be concentrating our efforts.

[81] **Mr Bush:** I am not saying that there is no concrete evidence; there is certainly some, because, on the issue of exceptions generally, we go back to the first Measure that the Assembly looked at, the Learner Travel (Wales) Measure 2008, in relation to which issues arose about seat belts in buses and the extent to which the exceptions that were in the Order, which I refer to in my paper, meant that that could not be addressed. So, there is that, and there are other examples that I can think of—I am sure that there are several more—where it might be possible to show how particular exceptions have had an impact on the ambition of the Assembly to legislate on a particular matter. However, for the reasons that I have explained, that evidence at the moment is likely to be fairly limited.

[82] **Michael German:** I suggest, Chair, that we need terms of reference, which I think that you outlined just now—I hope that the clerk was writing them all down. We need those terms of reference and a list of people whom we would seek to take evidence from, formally and informally. How quickly do you think we might be able to have those, Chair?

[83] **Janet Ryder:** As Alun pointed out, we have a number of other pieces of work ongoing, so perhaps the first meeting after the half-term recess would suit.

[84] **Ms Davies:** I could probably get those things by next week.

[85] **Janet Ryder:** That is even better. Excellent. I was being very generous to you with the time.

[86] **Alun Davies:** If we have them next week, perhaps we can have a small session on how we could structure this work.

[87] **Janet Ryder:** We need to look not just at that, but the impact, because it will have an impact. All these things are parts of the whole, are they not? The other reviews that we have started will impact on each other. We need to see how we make the links between all the different reviews that we have talked about, and either roll everything into one review or take them as different parts of a larger whole and decide next week how we want to structure our approach.

[88] **Alun Davies:** That is exactly the discussion that I would like to have.

[89] **Janet Ryder:** Right. Would Members like to invite people back, or are you content for us to do that work on our own?

[90] **Alun Davies:** I think that Keith's input to that discussion would be very useful.

[91] **Janet Ryder:** Would we be imposing on you too much, Mr Bush, to invite you back next week?

[92] **Mr Bush:** I would need to check my diary, but I am at your disposal.

[93] **Janet Ryder:** Thank you very much. Do you have anything else that you would like to add this morning?

[94] **Mr Bush:** No, thank you.

[95] **Janet Ryder:** I see that Members do not have any further questions. Thank you very much for what has been a very interesting discussion. The last report that this committee produced made some far-reaching recommendations and I suspect that this report, when it is completed, may make similarly far-reaching recommendations.

[96] **Michael German:** It begs the question, Chair, as to whether the title of this committee is now appropriate.

[97] **Janet Ryder:** One thing that we need to do is to revisit the recommendations in our original report and changing the title of the committee was one recommendation. We need to revisit those recommendations, the responses that we have received from the different groups to which they were made and how to progress. As I understand it, that report is not timetabled for discussion in Plenary until 9 December. I have just been told that we are getting a paper on that next week as well, so it would be apt to look at that as a whole.

[98] **Michael German:** The reason why I suggested it, Chair, is that if you are going to seek to engage with the Law Society, academics, the Wales Office, Government Ministers, Uncle Tom Cobley and all, having a suitable title for this committee would give an impression to those people of the nature of the work that you are asking about, otherwise they might think that it is all about subordinate legislation, and it is not.

[99] **Janet Ryder:** We will pick that up in next week's discussion, I am sure. Thank you very much, Keith. We will leave that there.

10.27 a.m.

**Adolygu'r Mesurau sydd gerbron Senedd y Deyrnas Unedig (a Mesurau Drafft)
ar gyfer Craffu arnynt o Bosibl o dan Reol Sefydlog Rhif 15.6(ii)
Review of Bills before Parliament (and Draft Bills) for Possible Scrutiny under
Standing Order No. 15.6(ii)**

[100] **Janet Ryder:** You have had a paper on this from Gwyn and I ask him to introduce this item.

[101] **Mr Griffiths:** Fel y gwelwch, yr wyf wedi paratoi nodyn cymharol byr ynglŷn â'r Mesurau Seneddol sydd naill ai gerbron Senedd San Steffan neu sy'n cael eu hystyried ar gyfer y sesiwn olaf o'r Senedd bresennol. Yn naturiol, bydd honno'n sesiwn fer iawn ac felly mae'n annhebygol y bydd unrhyw Fesur o faint sylweddol—yn hytrach nag o bwysigrwydd sylweddol—yn cwblhau ei daith drwy'r Senedd yn ystod y cyfnod ansicr hwnnw, ond cyfnod sy'n sicr o ddod i ben cyn diwedd mis Mai. Mae crynodeb byr o'r sefyllfa yn y papur. Yr unig un ohonynt sy'n arbennig o berthnasol i waith y

Mr Griffiths: As you can see, I have prepared a relatively short note about the Bills that are either before Parliament or are to be considered during the last session of the current Parliament. Naturally, that will be a very short session and therefore it is unlikely that any Bill of significant length—as opposed to significant importance—will finish its journey through the Parliament during that uncertain period, which is certain to end before the end of May. There is a brief summary of the situation in the paper. The only one that is especially relevant to the work of the Assembly is the flood and water

Cynulliad yw'r Mesur rheoli llifogydd a dŵr ac, yn yr achos hwnnw, nid yw'r wybodaeth ar gael eto ynglŷn â'r cymalau Cymreig. Buaswn yn argymhell, yn enwedig o ystyried llwyth gwaith y pwyllgor, ein bod yn cadw golwg ar y Mesur hwnnw ac yn dod â'r mater yn ôl at eich sylw pan fydd y cymalau Cymreig ar gael.

management Bill and, in that case, the information on the Welsh clauses is not yet available. I would recommend, especially considering the committee's workload, that we keep an eye on that Measure and bring the matter back to your attention when the Welsh clauses are available.

[102] **Janet Ryder:** Does anyone wish to comment on that?

[103] **Alun Davies:** I understand that we have already scrutinised the Child Poverty Bill and the Equality Bill and, as a member of the scrutiny committee, I have had an opportunity to look at the flood and water management Bill. I would like us to take a close look at some of these Bills, not simply because of where Welsh clauses might exist at present, but because of where Welsh clauses should perhaps exist. I understand that that is sometimes quite a difficult subject to approach because it involves wider policy questions that are beyond the scope and remit of this committee and I accept that in its entirety. I am interested in the digital economy Bill, the energy Bill, the policing, crime and private security Bill and the Constitutional Renewal Bill and in looking at those areas. We have already discussed the approach of the Welsh Assembly Government in seeking legislative competence and the policy approach that it takes, and I understand that we will look at that again, but it would be useful to have a look at this legislation and to look at areas where competence may be devolved to the Assembly.

10.30 a.m.

[104] **Janet Ryder:** When you say that you want us to look at these areas, do you want us to call people in to give evidence, or give a written submission?

[105] **Alun Davies:** I want us to consider the approach that we take to each individual piece of legislation—one might be different from another. I am not suggesting that we hold evidence-taking sessions on each one of those Bills, but I am suggesting that we have a discussion with our legal advisers about what the Bills contain, the descriptions of the legislation and the policy objectives that the legislation seeks to deliver. If we understand that level of background for the Bills that I have outlined, we can decide whether we wish to take any of those issues forward. We might well decide to take none of these issues forward, but I would like to come to that decision as a result of a discussion and debate, rather than by default.

[106] **Michael German:** Is the process of the Health Bill and the Local Democracy, Economic Development and Construction Bill too far advanced for us to have a meaningful input?

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

[108] **Michael German:** They are the Bills that we have missed, obviously.

[109] **Alun Davies:** I am always suspicious of any piece of legislation with the word 'democracy' in it—it makes me wonder what it is seeking to do. I do not know very much about this legislation, but if it is too late to influence it, then so be it. However, with the Third Reading in the House of Lords in the next few weeks, it would be interesting to see what it is considering.

[110] **Janet Ryder:** Although we cannot influence the Bills, it has struck me in the past that this is the only committee before which any of these Bills get a public airing and are assessed

for their possible impact on Wales. In the case of those two Bills, it is too late to have an input into them, but sometimes it is worth looking at such Bills so that we can flag up any possible potholes. I am going to ask for your advice, Gwyn, because this is going to fall on your shoulders. Do we have the capacity to have a briefing on those two pieces of legislation and on the pieces of legislation that Alun flagged up, which are still at a stage where we might be able to have an input into them?

[111] **Mr Griffiths:** There is a general issue in that, according to current Standing Orders, which you may wish to revisit, the role of this committee is to look at the delegated powers to Welsh Ministers in a Bill, rather than the policies behind the Bill. That may be something that needs to be changed.

[112] As far as the Bills that are currently before Parliament are concerned, the Members' research service may have already prepared a background briefing on the content of those Bills, in which case the information could be delivered reasonably quickly. However, we would have to make some inquiries. As far as the draft Bills mentioned in paragraph 7 of my paper are concerned, three of them have not yet been published. Therefore, there is nothing that we can get to grips with. The only Bill that has been published is the Constitutional Renewal Bill, which is currently going through Parliament, but I suspect it is not likely to complete its passage. It deals mainly with the composition of the House of Lords and also with the nature of the civil service, rather than devolved matters. We can provide you with more detailed information on that Bill, but not on the other three Bills as yet.

[113] **Janet Ryder:** Would Members be content for us to ask the Members' research service what is available at the moment, and base a further discussion on that? I see that you would. William, did you want to come in on this?

[114] **William Graham:** To pick up on the point that Gwyn made, I do not think that the Bill that he mentioned is likely to go through.

[115] **Alun Davies:** William is likely to know more about that. [*Laughter.*]

[116] **Janet Ryder:** We will leave that comment as it stands. We will ask Gwyn to co-ordinate with the Members' research service, and we will look at what is available on those Bills and see whether we want take it forward. Are Members content? I see that you are.

10.34 a.m.

Cynnig Trefniadol Procedural Motion

[117] **Janet Ryder:** I propose that

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

[118] I see that the committee is in agreement.

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 10.34 a.m.
The public part of the meeting ended at 10.34 a.m.*

