Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol
The Constitutional Affairs Committee

Dydd Iau, 4 Chwefror 2010
Thursday, 4 February 2010

Cynnwys
Contents

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
Rhodri Morgan	Llafur Labour
Janet Ryder	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)

Eraill yn bresennol
Others in attendance

Huw G. Davies	Uwch Gwnsler Deddfwriaethol Cymru Senior Welsh Legislative Counsel
Stephen Laws CB	Y Prif Gwnsler Seneddol First Parliamentary Counsel
Nigel Rendell	Dirprwy Gwnsler Seneddol Deputy Parliamentary Counsel
Yr Athro/Professor Thomas Glyn Watkin	Prif Gwnsler Deddfwriaethol Cymru First Welsh Legislative Counsel

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

Stephen Davies	Cynghorydd Cyfreithiol Legal Adviser
Stephen George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Bethan Roberts	Cynghorydd Cyfreithiol Legal Adviser

Dechreuodd y cyfarfod am 9 a.m.
The meeting began at 9 a.m.

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

[1] **Janet Ryder:** I welcome you to the first meeting of the Constitutional Affairs Committee, as we are now named. I thank Members for attending and welcome members of the public, if there are any in the public gallery. I remind you that, in an emergency, ushers will indicate the nearest safe exits. Headsets are available to allow you to hear the translation. I remind you to switch off all mobile devices completely.

[2] We have received no apologies. Everyone is here this morning.

[3] The change to Standing Orders was agreed in Plenary yesterday, so this is the first meeting of the committee under its new name, the Constitutional Affairs Committee. Given some of the questions that we will be asking later on, perhaps it describes the role of the committee more aptly.

[4] Rhodri, do you have your questions?

[5] **Rhodri Morgan:** I was just wondering whether we get better coffee now. Do we now get organic or fair-trade coffee?

[6] **Janet Ryder:** It should be fair trade, if not organic.

9.02 a.m.

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

[7] **Janet Ryder:** We now come to consider CA385, the Private Water Supplies (Wales) (Amendment) Regulations 2010. Gwyn, do you have something to report on this?

[8] **Mr Griffiths:** Mae hwn yn offeryn syml iawn sy'n deillio o'r offeryn a ystyriwyd yr wythnos diwethaf. Fel y cofiwch, yr oedd y dyddiad ar goll o reoliadau yr wythnos diwethaf, ac mae'r Llywodraeth wedi gwneud yr offeryn byr hwn er mwyn mewnosod y dyddiad, sef 31 Gorffennaf 2010. Nid oes dim i'w adrodd amdano fel y cyfryw, dim ond pa mor gyflym mae'r Llywodraeth yn gallu cywiro pan fydd angen.

Mr Griffiths: This is a very simple instrument that stems from the instrument that was considered last week. As you will remember, the date was missing from the regulations last week, and so the Government has made this short instrument to insert the date, which is 31 July 2010. There is nothing to report on this instrument as such, only that it shows how quickly the Government can make corrections when necessary.

[9] **Janet Ryder:** Yes, the Government can move very quickly when it needs to. That reflects the evidence that we took last week. When we report points of note such as this one, the Government prioritises them and corrects them in accordance with need, as it sees it. It may not always reflect what we see as the need but, in this case, there was a need and it has brought it back this week with the corrections. Are Members content to accept that?

[10] **Rhodri Morgan:** Fel apêl Lee Byrne. [*Chwerthin.*]

Rhodri Morgan: Like Lee Byrne's appeal. [*Laughter.*]

[11] **Janet Ryder:** We will move on to CA386, the Valuation for Rating (Plant and Machinery) (Wales) (Amendment) Regulations 2010. Is there anything on this one, Gwyn? I see that there is not. Are Members content with these regulations? I see that you are.

9.03 a.m.

Offerynnau y Bydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhif 15.2 a/neu Rhif 15.3, ac Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol)
Instruments in Respect of which the Assembly is Invited to Pay Special Attention under Standing Order No. 15.2 and/or No. 15.3, and Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (the Negative Procedure)

[12] **Janet Ryder:** Under this item, we need to consider CA384, the Council Tax (Alteration of Lists and Appeals) (Amendment) (Wales) Regulations 2010.

[13] **Ms Roberts:** These regulations are equivalent to the 1993 regulations. I have picked up three minor reporting points. They are only typographical errors. These are being reported as defective drafting, under Standing Order No. 15.2(vi). The Government has responded and has said that, as they are minor typographical errors, it will issue a correction slip on publication. However, it also said that, if it is required to do so, it will bring forward an amending Order within three months.

[14] **Janet Ryder:** Thank you very much. Are Members content with that? I see that you are.

9.04 a.m.

Ymchwiliad i'r Datblygiadau yn Atodlen 5 i Ddeddf Llywodraeth Cymru 2006, gan Gynnwys Eithriadau i Faterion
Inquiry into the Developments in Schedule 5 to the Government of Wales Act 2006, Including Exceptions to Matters

[15] **Janet Ryder:** We have had three evidence sessions so far. In the first, we took evidence from the Law Society and University College London's Constitution Unit. We then met staff from the legal departments of Swansea University and Bangor University. Last week, we received evidence from Jeff Godfrey, the head of Legal Services in the Welsh Assembly Government. This week, we have two sets of witnesses in this evidence session. We have the First Parliamentary Counsel and then the First Welsh Legislative Counsel from the Welsh Assembly Government. The First Parliamentary Counsel will come in to join us now—we hope. Let us invite him in.

[16] Good morning and thank you for attending committee this morning. We are very pleased to welcome you here. This is the first meeting of this committee under its new name, the Constitutional Affairs Committee, and we are pleased to welcome you. For our inquiry, we have taken evidence so far, in four sessions, from some of the legal schools in universities in Wales and England, and we have taken evidence from the Welsh Assembly Government's Legal Services department.

[17] We are looking at a number of issues in our inquiry, including the development of legislation in Wales, the impact of fixed and floating exceptions, as well as the implications of legislation drafted at Westminster, how it affects Wales and how it is transposed into Welsh law. Could you please introduce yourselves for the record?

[18] **Mr Laws:** My name is Stephen Laws and I am the First Parliamentary Counsel, which means that I am in charge of the office that delivers the legislative programme for the United Kingdom Government in Westminster. We draft, we advise on handling, and we also have a function of vetting statutory instruments that amend primary legislation.

[19] **Mr Rendell:** I am Nigel Rendell, one of the drafters in the office, and I am described as a Deputy Parliamentary Counsel, so I am involved in all the functions that Stephen has described.

[20] **Janet Ryder:** Do you have anything that you would like to say before we ask questions? You have just given a brief introduction, but would you like to add to that or are you happy to go straight to questions?

[21] **Mr Laws:** It might be helpful to say a bit about Nigel's role in this. As you are aware, the Office of Welsh Legislative Counsel was set up in 2007 and, as it was new, there was a feeling in the Welsh Assembly Government that it would be helpful to be able to draw on the expertise of our office, so arrangements were made under which Nigel provides assistance to the Office of Welsh Legislative Counsel two days a week and, when he does, he wears a Welsh Assembly Government hat. However, for the other three days of the week, he is a member of our office, when he wears a UK Government hat. There are arrangements to ensure that we can deal with any conflicts of interest that might arise.

[22] **Janet Ryder:** We will not ask at this stage which hat you will be wearing on Saturday. [*Laughter*.] So, is it always Nigel who provides assistance to the Welsh Assembly Government? It is always the same Deputy Parliamentary Counsel, is it?

[23] **Mr Rendell:** Yes.

[24] **Janet Ryder:** I have the first question about the website of the Office of the First Parliamentary Counsel. The website identifies one of the functions of that office as being to seek to make legislation accessible both to parliamentarians and to the ultimate users of the statute book. Your aims are said to include the promotion of clear legislation written in plain language that can be easily understood. To what extent would you say that the way in which Schedule 5 to the Government of Wales Act 2006 has been developing meets the objectives of ensuring accessibility and clarity?

9.10 a.m.

[25] **Mr Laws:** It is probably as accessible as it can be having regard to the policy that it is trying to give effect to. There is always a balance to be struck with accessibility. All drafting is a matter of doing two things: finding out what is wanted, and expressing it as clearly and unambiguously as possible. However, in the process of expressing it, judgments need to be made to balance different things. An equilibrium has to be established between certainty and simplicity, between comprehensiveness and clarity. Different audiences have to be satisfied. There are those who want to read statutes so that they know, generally, what they are about the first time they read them. There are other people for whom statutes are working documents: when they have a case in front of them, they want to know the answer to their problem. There are people who want to know what change is being effected by a piece of legislation and there are people who want to know what the new law is. So, there is always a balance in legislation and one can see that that balance is being produced in Schedule 5, between certainty in some cases and simplicity in others. I think that it is a judgment that is made according to the demands of the policy that is being implemented.

[26] **Janet Ryder:** The Constitution Committee of the House of Lords has described the Government of Wales Act 2006 as a written constitution for Wales, in effect. Would you agree that, given its status as a constitutional statute, ensuring the accessibility and clarity of its provisions are, if anything, even more vital than in the case of other Acts of Parliament?

[27] **Mr Laws:** As you have indicated, our function is to ensure that all legislation is

accessible, and accessibility is an extremely important objective. I am not sure that I can agree that there is a particular obligation, from a technical, rule-of-law point of view, for a constitutional document to be more accessible than other legislation. Accessibility, from a technical point of view, is most important when what hangs on the comprehensibility of legislation are the rights of people or the way in which they conduct their day-to-day lives. Constitutional documents tend to work at a separate level, so they are not documents on which rights immediately depend. However, on the other hand, they are documents on which the validity of laws that have been made depends. What is really important to people is that the laws that they are looking at to govern their daily lives are valid, because if they rely on laws that turn out to be invalid, they will be in a very difficult position. The important aspect of a constitutional document is that it should enable certainty to be established about whether the laws enacted under some form of legislative competence are valid.

[28] **Alun Davies:** Thank you for your written evidence, which I found fascinating in many different ways.

[29] You have just been discussing the transparency and accessibility of legislation, and the Law Society, when giving evidence to us a few weeks ago, came very close to saying that the current means of operating, with floating and fixed exceptions and lists of matters under Schedule 5, comes very close to being entirely incomprehensible.

[30] **Mr Laws:** I do not think that I would accept that. I think that it sets out as clearly as possible what is, admittedly, a very difficult and complex line to draw. The line between Welsh legislative competence and the things that are to be kept at UK level is very complex. It is complex for a number of reasons that are inherent—and I make no criticism of them—in a number of aspects of how the system operates. One is that Schedule 5 is an enactment that is being developed progressively, so each time it is changed, the drafter does not have a vision of how it will be eventually, and is building it up. It derives largely from executive competence that exists at the moment; legislative competence is not about things that exist at the moment but about things that might happen in the future. There is a tension there in how you describe it. It seems to me that there are provisions in Schedule 5 that satisfy the test of whether somebody wanting to work out what is possible can do so with the level of certainty that is necessary.

[31] **Alun Davies:** I have found the development of Schedule 5 to be quite fascinating in some ways. If you read the White Paper on which the legislation was based, and if you look at the parliamentary exchanges during the passage of the 2006 Act, particularly the debates in the House of Lords, you will see that Ministers gave assurances to Parliament that it would operate in a somewhat different way, in that LCOs would be quite short and wide-ranging. The example that is usually quoted from the White Paper is that of school examinations or the reform of the NHS. Now, that is not our experience, and I am still trying to find out what is going on with the proposed housing LCO. Is there a reason why LCOs have become so complex—a technical reason?

[32] **Mr Laws:** The policy that they seek to enact is complex because of the things that I have explained, such as the existing complicated relationship between the bits of law that, at the moment, are integrated across England and Wales. You have to draw quite a difficult line to separate them. This is not the same for Scotland and Northern Ireland, which have separate legal systems. What is required is something that unpicks the system, which at the moment is integrated, resulting in complexity. There is also something inherent in the process, which is that LCOs have their origin in a proposal to do something specific, to legislate in a particular area. So there is a short-term/long-term tension between asking what all the possibilities are, which we may choose to legislate on in the long run, and asking what powers we need to ensure that we can legislate on what we have in mind at the moment.

[33] **Alun Davies:** I appreciate that, but that is not what Ministers said to Parliament, is it? Graham Davies in the Lords was very clear when he said that there is one test, and one test only, for whether an LCO is politically or parliamentarily acceptable, which is to ask whether a law or a field is better dealt with in Cardiff or at Westminster. That is the test. So, however the enduring power might be used in future is irrelevant to a proposed LCO, because the test is whether a power should lie in Cardiff or London. A clear assurance was given to the Lords during debates on the Bill. I know that we are discussing Schedule 5 at the moment, but do you foresee a situation in which Schedule 7 could create similar problems in a post-referendum settlement?

[34] **Mr Laws:** I do not think that I can comment on that. Schedule 7 is drafted differently to how Schedule 5 is currently drafted. I cannot predict how it will work in practice, though. That is not a question for me; it is a question for Ministers.

[35] **Janet Ryder:** I appreciate that you do not want to comment on that, but can you just clarify something? If a referendum were to be successful, and if Schedule 7 is the ultimate destination—you have talked about drafting things for the ultimate destination—to what extent does that impact on how you draft proposed Measures now? Do you look at Schedule 5 as being what is in place now and draft to that, or do you look ahead according to the growing possibility that Schedule 7 will be the ultimate destination and cater for the impact that that will have in your drafting?

[36] **Mr Laws:** I am sorry, but I feel that that is probably a matter of policy. When you are drafting something, you do look ahead to what might be the eventual settlement, but what the drafter has to do is to give effect to the line that he is asked to draft for the moment.

[37] **Mr Rendell:** Can I come in at this point? I take on board what you are saying, that the purpose of an LCO is to give effect to a decision that has been made about what is best dealt with in Cardiff and what is best left in Westminster. Implicit in that is the decision as to what is best dealt with in Cardiff. That, essentially, is a policy decision, which requires agreement between Whitehall and the Welsh Assembly Government. Once agreement has been reached as to what is best dealt with in Cardiff, it then falls to us as drafters to give effect to that policy decision by means of an LCO.

9.20 a.m.

[38] It follows that if you have a relatively simple agreed policy, you are much more likely to be able to give effect to it in a simple way. If you have a more complicated policy agreement, it is more likely that the instrument that gives effect to that would be more complicated.

[39] **Janet Ryder:** I know that Mike has some questions on this. Do you have a question, Rhodri?

[40] **Rhodri Morgan:** I have a brief supplementary question.

[41] **Michael German:** I have a supplementary question on what Stephen has said.

[42] **Janet Ryder:** Mike, if you would like to ask your supplementary question and then we will come to Rhodri's question.

[43] **Michael German:** I was interested in what you said about LCOs being based upon what you want to legislate upon in the Measures that you want to put in place. That has become the practice—LCOs are becoming narrowly defined on areas which the present Government wishes to legislate upon. My understanding is that that was not necessarily the

intention, and that the original intention was that LCOs could, in general terms, be about powers of transfer, which you might want to legislate upon at some stage in the future; they would not necessarily pick up on immediacy, but could be for something in the slightly longer term. What is the basis on which you understand that to be the truth? In other words, you have made a statement that LCOs are based solely upon the immediate primary legislation that you want to bring forward. Is that codified in a document somewhere? Is it written down as a guidance note to you? Has it been communicated to you by Ministers?

[44] **Mr Laws:** It partly derives from observation, but also from the way in which the Welsh Affairs Committee and the Lords Constitution Committee look at their role in relation to Wales, in that they are interested in what the power and the competence is being taken for.

[45] **Michael German:** That was explicitly ruled out when the Government of Wales Act 2006 was being put in place. There are many statements to Parliament which say that it is not the job of Parliament to scrutinise the intentions of the Welsh Assembly Government in this respect. Are you saying that this has now become the practice?

[46] **Mr Laws:** I think that it is a fact of life that the immediate tends to push out the hypothetical. This is an example of that principle.

[47] **Rhodri Morgan:** I want to pick up on some of your previous answers. I wish to establish very clearly that this committee is completely neutral on policy matters and has no views on such matters, and neither do you. So, we are all agreed on that. We are looking at whether the development of the law as currently occurs produces what you would call 'good law'—not 'good' in the policy sense, but 'good' in the sense of not being messy or being easy to understand—and that is what we were trying to engage you on, as was Alun. In other words, have you formed a view—Nigel, in particular, as you are here two days a week—on whether you could improve the quality of the law's comprehensibility from the point of view of the lawyers who have to use it, or even the general public who occasionally attempts through the internet, and so on, to read a bit of law to see whether it thinks that this is some sort of escape route or reason for being able to sue someone or something? Is messy law being produced, or is it good comprehensible law, not in policy terms, but in terms of looking like statute book law to which you would give a mark of nine out of 10?

[48] **Mr Laws:** Like all lawyers, I am afraid that I am going to say that it depends. There is a tension between simple and comprehensible law to someone who wants to read it and get a broad idea of what it means. You can probably say that there are bits of schedule 5 that do not satisfy that test, but they do satisfy the test if you read them carefully to decide exactly what is in the legislative competence of the Welsh Assembly, to which you would get a clear answer. There would be high marks for clarity and certainty, but lower marks for immediate readability. There would be high marks for clarity and certainty, but lower marks for immediate readability. However, that is part of the balance that always exists in drafting.

[49] **Janet Ryder:** We will move on to the next section. Mike has some questions.

[50] **Michael German:** I would like to look at what we can do to find solutions to this balance between comprehensibility—I will not ask you about the difference between clarity and comprehensibility because we would be getting into semantics, but I understand what you mean: the ability to understand something from reading it and certainty on the other side. Our chief legal adviser has told us that he regards this as a jigsaw with bits and pieces of UK responsibility and Welsh responsibility that have to be put in place. I have understood it as being a zig-zag line; you have used the word 'line' this morning, and it is a difficult line to follow. One of the problems might be that in the UK Bills that are coming forward, there is no clarity on what is currently devolved, what is an executive responsibility and what is the responsibility of the UK Parliament. Is there a better way of clustering together when you

draft your Bills, whatever they may be, when they touch on devolved competencies, to make that line clearer or straighter between what lies where?

[51] **Mr Laws:** I am having some trouble. Are you talking about having different provisions for Wales and for England?

[52] **Michael German:** I am trying to find a way in which UK Bills could be drafted in a different manner by clustering or segregating issues, so that the areas that are devolved and the areas that are not devolved, both through legislative competence and executive powers, are clear. It would then be easier when you come to write an LCO because you will know which part of an Act you are addressing.

[53] **Mr Laws:** That would be difficult, because it would mean looking ahead to what an LCO would provide. At the stage that you are doing it, you may not be able to do that. Where there are provisions for Wales and for England that are discrete and not tied up, and there is not a lot of cross-border activity so they do not need to be run as an integrated system, there is a case for ensuring that those provisions are separated from each other. There are sometimes factors to do with time and Parliamentary handling and so on that might lead to them being combined in a way that is not ideal from the point of view of setting them out in a piece of legislation, but if you have discrete rules for discrete areas, it is better to set them out separately because we find that, when we come along later to try to amend something where the Welsh and English provisions are in one place, it is difficult to operate on that piece of legislation. The national health service consolidation legislation is one example. So, for us, it is much easier to have two separate regimes on which to operate. However, sometimes, you cannot have a separate regime, because it is an integrated whole and the executive competence and the competence that is retained in London overlap and cover the same areas, or, as I said, there are cross-border implications of which you need to take account.

[54] **Michael German:** So, segregation is not being used fully yet, but would be an improvement if it could be adopted. What are the barriers to doing it now?

[55] **Mr Laws:** One of the barriers is that it requires a prediction of what the area of devolved legislative competence will be in some areas. In those areas in which there is existing legislative competence, we would strive to keep separate the things that ought to be kept separate.

[56] **Michael German:** Is there no way that you could look at executive competence or Schedule 7 as a guide for the future?

[57] **Mr Laws:** The difficulty is that if you had a provision that was saying the same thing for Wales and England, which would be in relation to something that is not yet a devolved competence, you would be saying the same thing twice, but allowing room for—

[58] **Michael German:** But that would make it easier for an LCO. That is the point that I was originally trying to get at.

9.30 a.m.

[59] **Mr Laws:** I am afraid that it is another case of the immediate pushing out the hypothetical.

[60] **Michael German:** If you were to make your own suggestions—obviously the committee would be interested in any suggestions that you might have—to help the situation for the future in the segregation area, in the sense of making it clearer, how would you phrase them in a way that is easy to understand?

[61] **Mr Laws:** In areas where there is a clear distinction between English and Welsh provisions, I would encourage the way that UK legislation is drafted to take opportunities to separate them out. It would be unrealistic to expect UK legislation to take up parliamentary time and drafting in legislating to separate the laws of England and Wales, without that being as a result of an opportunity where there is legislating in any case.

[62] **Michael German:** Would this make your job easier?

[63] **Mr Laws:** It will make our jobs easier when Welsh and English provisions that are distinct appear in separate provisions. I think that it is how we get there that is the issue.

[64] **Janet Ryder:** Do you have a supplementary question on this, Alun?

[65] **Alun Davies:** Yes. What prevents that from happening today? I would have thought that it would be quite easy, technically at least, to present a Bill to Parliament where clause 1 applies to England, clause 2 applies to Wales, clause 3 applies to England and Wales, and clause 5 applies to the whole of the United Kingdom. I would have thought that that would be quite a simple process.

[66] **Mr Laws:** I think that it can be done and would be done. If we were amending the national health Acts, we would have one provision that amended the English Act and one provision that amended the Welsh Act.

[67] **Mr Rendell:** If you are making new law in an area where the law of England and the law of Wales are currently the same, and you are changing those laws in such a way that they will obviously be different from how they are now but will be the same as each other in the future, you could do that in such a way that you had a run of clauses that were about England and a run of clauses that were about Wales, so that you would end up with a law of England and a law of Wales. One consequence of that is that you would end up with legislation that was twice as long, which leads you to the question of whether that would be a good use of parliamentary time and whether the Government would be happy to go along with that. The other question is whether it is worth doing that in an area where legislative competence will be devolved to Wales at some time in the near or more distant future. In other words, it is a question of whether the effort will provide benefits to those who are drafting legislative competence Orders, or to those who are operating in that area of the law within the near or more distant future.

[68] **Alun Davies:** May I ask a question?

[69] **Michael German:** I will just finish my set of questions. If we are describing an improved system—I hope that is what we are working our way towards in what you are suggesting—while it may have the downside of having two separate parts, which means that you will have a long longer piece of legislation, would it mean that we would have fewer floating exceptions, carve-outs, and fixed exceptions? Would it be easier in that sense, because it would be easier to understand?

[70] **Mr Laws:** I do not think so, because the floating exceptions and the carve-outs are about the line where legislative competence is. They do not affect how you draft what results from them.

[71] **Janet Ryder:** Do you still wish to ask another question, Alun?

[72] **Alun Davies:** Yes. My objectives here would be twofold: constitutional stability and clarity, so that we know who is responsible for what, so that the public knows, so that even

the lawyers understand it, and so that we as members of the legislature here understand our role in that and stability underpins the whole thing. What suggestions would you make to enhance the current settlement and process?

[73] **Mr Laws:** I am sorry, but that is a question about policy.

[74] **Alun Davies:** I meant from a technical point of view. My purpose is to cut through a lot of this, because I think that we are making it more complex than it need be. It appears to me that, every time we try to move things forward, there is a reason why things cannot change. From your point of view as parliamentary counsels, with the experience and knowledge that you have, you must, surely, be able to make suggestions for improving the process, and making things easier for all of us, whether we are in London, Cardiff, or are members of the public. At the moment, we are making things a bit too difficult.

[75] **Mr Laws:** I am afraid that I do not have a suggestion, because that would be a suggestion about how the settlement develops, and I cannot answer that question.

[76] **Janet Ryder:** That is a fair point. Your role is to draft what you are given to draft, and perhaps we need to invite other people in to answer that question. Rhodri, you have the next set of questions.

[77] **Rhodri Morgan:** You mentioned this business of the rationing of parliamentary time being a possible reason for not wanting two separate Acts, one for England and one for Wales. However, until 1999, and for 270-odd years before that, that is exactly what happened in the case of Scottish legislation. Sometimes there were rock-solid reasons for that, namely, that the structure of the criminal law was different, so you could not have had one Bill for England, Wales and Scotland together. In other cases, most famously in the case of the National Health Service Act 1946 for England and Wales, and the National Health Service Act 1947 for Scotland, there was no difference in the structure of the law, but Scotland insisted on separate legislation, which delayed the introduction of the NHS for a year. The Treasury thought that was wonderful, and everyone else thought it was dreadful, but that is what happened. In 2006, 60 years later, there were two major Acts dealing with the NHS, but one was for England, and one was for Wales, which would have been unimaginable in 1946. Of course, you no longer legislate for Scotland at all in the House of Commons, but do you think that we will get to a stage where, as in the period between 1707 and 1999, when you had separate Acts of Parliament for Scotland—sometimes for good reasons, sometimes because Scotland wanted a separate Act—we might see that happen for Wales, simply because of the divergence in the body of law?

[78] **Mr Laws:** It is a different sort of development, because once a settlement is complete, as it is in Scotland, there are almost no Scotland-only Acts at Westminster, because the areas where there were Scottish Acts previously are now devolved and the legislation is all done in Scotland. You would expect that, eventually, in relation to Wales—that there will be a completed settlement, with some things done in Cardiff and therefore no need for them to be done at Westminster. In the meantime, we have a system where the law that applies to England and Wales as a single jurisdiction is lumped together in single bits of legislation. There is a long process of separating them out in order to produce separate legal materials. Eventually, things will be done in Wales and the Welsh aspect of English legislation will disappear, because it will it be replaced by what is done in Wales, and there will be a separation. I do not know how much of that separation will be done at Westminster and how much done under devolved competence in Wales, but that must be the way that things will develop.

9.40 a.m.

[79] **Rhodri Morgan:** I have one supplementary question on that. The Prime Minister made a very interesting speech yesterday about the vision that he has of a written constitution for Britain. Obviously, you would have to sort out the House of Lords before you could try to have a written constitution. However, in terms of the Welsh settlement, if you had a written constitution, would you first have needed to have arrived at a fixed state of distinction, as you have with Scotland, between what is devolved and what is reserved or could you still have the LCO system? Alun Davies, I think, used the phrase 'fixed state of stability' but the LCO system is based on the opposite principle, namely that you can transfer powers on a rolling basis from Westminster to Cardiff as frequently as the Assembly and Parliament agree on that. Is that compatible with having a written constitution in which certain laws are laid down as being constitutional laws and other laws are just ordinary laws? It is a difference that we wrote for the Germans in having a Grundgesetz, which is constitutional law, which cannot be changed except by referendum, and ordinary laws, which can be changed by an Act of Parliament.

[80] **Mr Laws:** I think that it is perfectly compatible with a written constitution to have a system of rolling devolution. It would not be compatible with a system that entrenched the current division of competence between Westminster and Cardiff. If you entrenched the devolution settlement it would obviously be more difficult to change it, but there is no reason why you could not entrench or not entrench the part that provides for rolling devolution. You could have a fundamental law that allowed for certain areas to be devolved.

[81] **Rhodri Morgan:** If you had a written constitution—I will probably be dead before that happens—

[82] **Michael German:** I thought that the House of Lords was—[*Inaudible.*]

[83] **Rhodri Morgan:** Let us not speculate. [*Laughter.*] I think that it will take 10 years, but I think that it will be a good thing. Do you not think that that would crystallise the issue? In other words, at that point, do we not have to say what it is that Wales must determine and what is still reserved?

[84] **Mr Rendell:** Not as a matter of necessity, no.

[85] **Janet Ryder:** Are you satisfied with those answers, Rhodri?

[86] **Rhodri Morgan:** Yes.

[87] **William Graham:** You kindly outlined the arrangements in place and how you support the work of the Office of Welsh Legislative Counsel. Can you describe how that relationship works in practice and describe any advantages?

[88] **Mr Rendell:** I do two things. I provide advice and assistance to the drafters in the Welsh legislative counsel's office. I give general advice on drafting and particular advice on things that they have drafted themselves. I also provide them with some primary drafting services. Over the two and a half years I have been in this role, my general advisory role has taken up more of the time, although, over the past few months, I have done more primary legislative drafting. The advantage for the Office of Welsh Legislative Counsel has, I hope, been the advantage of the experience of my office—not just my experience, but the more general experience that I am able to funnel through. From the point of view of the Office of the First Parliamentary Counsel, it has resulted in a better use of our resources. I am able to do the work that our office needs to do vetting LCOs, for example, at the same time as providing drafting assistance to the office in Wales. It has also enabled me to be a central resource in our office on questions about Welsh devolution.

[89] **William Graham:** You will know that the number of parliamentary counsels increased between 2000 and 2004 to overcome the perceived bottleneck with Government legislation. Has the advent of the Government of Wales Act 2006 caused any significant change in the capacity of our office to deal with additional novel demands?

[90] **Mr Laws:** No. Nigel works for those two days, which means a small reduction in our capacity, but it is something that we were able to offer, so we did.

[91] **Janet Ryder:** You just used the phrase 'vetting LCOs'. Can you explain what that means?

[92] **Mr Rendell:** The Office of the First Parliamentary Counsel has a general role of looking at subordinate legislation. Our office does not draft subordinate legislation; it is drafted within departments. Where subordinate legislation amends primary legislation, it is still drafted within the departments, but it comes to our office for us to consider the amendments to be made to the primary legislation. So, if an Order seeks to amend an Act, it will be drafted in the department, but it will come to our office and we will look at the amendments that are to be made to the Act. That is because our office has an overall responsibility for the integrity of Acts of Parliament. So, because an LCO is a type of subordinate legislation that amends an Act of Parliament, the application of that rule means that someone in our office has to scrutinise it to consider the amendments that it seeks to make to Schedule 5. That is what we mean when we talk about vetting. In the normal course of events, someone in the Office of the First Parliamentary Counsel would have to vet a proposed LCO because it would amend Schedule 5 to the Government of Wales Act 2006. However, as I will have been involved with the Office of Welsh Legislative Counsel in the drafting of the proposed LCO, there is no need for me to vet it separately.

[93] **Mr Laws:** Perhaps I should explain that, when Nigel assists the Office of Welsh Legislative Counsel, he is wearing his WAG hat. When he vets the proposed Order, he does so wearing a UK hat, essentially for the Wales Office.

[94] **Rhodri Morgan:** Who will he be supporting on Saturday? [*Laughter.*]

[95] **Janet Ryder:** There is no need to answer that. Mike has a supplementary question.

[96] **Michael German:** I am interested in the two hats concept. Can you describe for me what you are vetting for? What are you looking at? What are you testing?

[97] **Mr Rendell:** In the normal process of vetting, we are looking at whether the amendments that would be made to an Act of Parliament are effective, and whether they will cause technical problems for the Act as amended. For example, we will be on the lookout for any consequential amendments that may have been missed. If you are putting in a new sub-section, we will be on the lookout to make sure that any references that ought to include that sub-section are amended accordingly. We will also, usually, if we have time, offer advice on the drafting. If we think that the drafting needs to be altered in some way, we will offer that sort of advice. So, we give a combination of technical and professional advice.

[98] **Rhodri Morgan:** That last answer is very interesting. With the National Assembly for Wales (Legislative Competence) (Housing) Order 2009, there was a rather bizarre situation in which the Department of Communities and Local Government at Westminster decided to expand the remit of the proposed LCO on the grounds that, as originally requested from Wales, it would leave a messy dividing line and it would be much better for us to have all the power because there would then be a nice, clean box that everyone could understand, as opposed to there being a ragged line. Is that a matter simply for civil servants and Ministers, without having regard to your advice, or was that the kind of thing to which you

were referring in your previous reply? Might you advise that a clean break is better, and that, rather than transferring 50 per cent of the box to Wales, it is far better to transfer 100 per cent, as everyone would then know where the whole area of legislative competence resides in the future? Is that a matter for you or purely for the civil servants advising the Minister on policy?

[99] **Mr Rendell:** I will answer that in a general way at the beginning. It is part of our role as drafters to give advice to the people who are instructing us if we think that difficulties might arise from the policy to which they are trying to give effect. Our job does not consist merely of producing a document to give effect to a policy. In the early stages, we will be going into the policy in depth and asking departments what they want to achieve, and we will, on occasion, ask, 'Do you not think that this is a little complicated, and might you not simplify it in some way?'

[100] **Rhodri Morgan:** That is when the words 'dog's breakfast' might come up, or whatever.

[101] **Mr Rendell:** Well, that particular expression would probably not come up, but that might be the sentiment behind what we say, yes.

[102] **Michael German:** Would straightening the line be an issue? You have given me four things, would that also be an issue?

9.50 a.m.

[103] **Mr Rendell:** Yes, it could be. If the result of wanting to cover four things and not the fifth is that you end up with an exceedingly complicated form of words, I would ask whether they were sure that they really want to exclude the fifth thing at the expense of producing a complicated result. However, if they came back to me and said that they did want to exclude the fifth thing, even if it produced complicated results, I would do what I could to simplify it, as much as possible.

[104] **Michael German:** It is the difference between advice and instruction.

[105] **Janet Ryder:** Are there any more supplementary questions on this particular point? I see that there are not. We move on to Alun.

[106] **Alun Davies:** I want to pursue the issue of the role of your office. Do you see it as your role to advise UK Government departments if a particular Bill appears not to have addressed devolved issues, if that was your perception of it and of the demands made upon you?

[107] **Mr Laws:** Yes, we are a centre of knowledge about devolution, because it affects almost everything that we do in Whitehall. As Bills come to us, we think about the devolution issues and, if we think it necessary, we draw the attention of the department to the issue that has arisen.

[108] **Alun Davies:** Does it happen regularly?

[109] **Mr Laws:** Departments are increasingly aware of the devolution aspects. There was a time when devolution—it was true, actually—to most Whitehall departments meant Scotland. However, they are all increasingly aware of the fact that there are three devolution settlements and that they need to deal with them all in the process of formulating policy and legislation.

[110] **Alun Davies:** So, is your role as an adviser to Government becoming increasingly easy?

[111] **Mr Laws:** Yes, but we have our own perspective on this process and our own contacts with the Office of Welsh Legislative Counsel and the corresponding offices in Scotland and Northern Ireland. We have our own network that deals with the issues that are within our specialisms.

[112] **Janet Ryder:** Those are all the set questions that we have. I will raise just one point relating to what you have said. It came up in evidence that we took last week. You have said already that you get the legislation already drafted from the different departments, and there was clear evidence last week that there may be some departments in Whitehall or Westminster that are more attuned to the devolution agenda than others. Have you noticed that in your work? If so, what can be done about it?

[113] **Mr Laws:** There are different areas of knowledge of all sorts of issues across Whitehall. Some departments legislate every year, and some departments, such as the Ministry of Defence, legislate every five years. The Foreign and Commonwealth Office legislates relatively infrequently, too. They all require different services from us according to their experience and familiarity with what is going on. The same is true of devolution. Some departments are dealing with devolved matters all the time. Some, because they do not deal primarily with an area that is devolved, may come across devolution issues and they will be less familiar with them.

[114] **Janet Ryder:** The evidence that we took last week implied that even some departments that have quite a lot to do with legislation and that have drafted a number of pieces of legislation that have touched on Wales may not be as acutely aware of the different needs of Wales and England, as regards devolved responsibilities, as other departments. The Department for Environment, Food and Rural Affairs may have been held up as a good example.

[115] **Mr Laws:** I have no personal evidence of that. I am afraid that I cannot think of an example.

[116] **Janet Ryder:** Okay, thank you. We have finished our formal questions, unless any other member of the committee has a supplementary question.

[117] **Michael German:** I have one. In your relationships with the various departments, would it be fair to say that the devolution settlement for Wales is the most complex of the three that you have to explain to everyone else?

[118] **Mr Laws:** There is quite a lot of complexity in the Northern Ireland settlement, for different reasons.

[119] **Michael German:** What about as far as drafting legislation is concerned?

[120] **Mr Laws:** There are separate legal systems in Scotland and Northern Ireland, but there is not a separate Welsh legal system so one always has to invent the boundary.

[121] **Michael German:** ‘Invent’ the boundary—sorry, I am afraid that I do not understand. [*Laughter.*]

[122] **Mr Laws:** Perhaps ‘create the boundary’ is a better expression.

[123] **Janet Ryder:** That is probably just as interesting a word.

[124] Have you anything that you would like to add at the end of this session, or any

supplementary remarks to make in response to the questions that we have asked?

[125] **Mr Laws:** I do not think so.

[126] **Janet Ryder:** Thank you very much for giving your evidence. It has been an interesting session. A transcript will be made available for you to check its accuracy. However, it cannot be added to or changed. Thank you for giving us your time this morning.

[127] We have other witnesses coming in for the next session, but Members may like to take a two- or three-minute break while the witnesses settle down.

Gohiriwyd y cyfarfod rhwng 9.56 a.m. a 9.59 a.m.
The meeting adjourned between 9.56 a.m. and 9.59 a.m.

[128] **Janet Ryder:** We resume our public meeting and welcome the next two witnesses to committee. I welcome Professor Thomas Watkin, the First Welsh Legislative Counsel to the Welsh Assembly Government, and Huw Davies, the Senior Welsh Legislative Counsel. Thank you for attending committee this morning and for the useful written evidence that you have submitted. Would you like to introduce yourselves for the record?

[129] **Professor Watkin:** Indeed. I am Thomas Watkin, First Welsh Legislative Counsel. My office is responsible for drafting the legislative programme for the Welsh Assembly Government, which includes, as well as Measures made under the powers, as they currently exist, for the Assembly to legislate, the drafting of LCOs to obtain fresh powers from Westminster. We also perform the same role with regard to the vetting of statutory instruments that amend primary legislation, Acts of Parliament and Measures, where those emanate from the Assembly Government.

10.00 a.m.

[130] **Mr H. Davies:** I am Huw Davies, Senior Welsh Legislative Counsel. I work in the office with Thomas and I draft LCOs and Measures; I have drafted most of the LCOs.

[131] **Rhodri Morgan:** You have notches on your belt then.

[132] **Janet Ryder:** That should lead to an interesting evidence session. Thank you for coming along. I will start with the first question, unless there is anything that you would like to say at the beginning. Are you happy to go straight to questions?

[133] **Professor Watkin:** We are happy; you have had the written evidence.

[134] **Janet Ryder:** Thank you. In your evidence, you state that the Government of Wales Act 2006 did not make any provision for the listing of exceptions in Schedule 5 for fixed and floating exceptions. Instead, you state that it became apparent, when drafting, that there was a clear need for these two distinct types of exceptions. Will you explain to the committee why it was deemed necessary to have both fixed and floating exceptions, and what benefits did you perceive would be gained from their use?

[135] **Professor Watkin:** At the outset, section 94 in Part 3 of the 2006 Act refers to Measures being made, the provisions of which must relate to matters within Schedule 5. There is no reference there to exceptions in the way that there is in the similar provision relating to Schedule 7, to be found in Part 4 of the Act, section 108, where there is a specific test that refers to exceptions, as well as matters. It could be read into that that the expectation was, therefore, that the matters that would be inserted into Schedule 5 would, as it were, almost be stand alone, in the sense that they would confer powers and would not require any

other apparatus, other than those supplied in the Act itself—the general restrictions in Part 2 and Part 3 of Schedule 5—to gloss them in any way. However, virtually from the outset, it was clear, partly as a result of the exceptions that existed in Schedule 7, that there would be certain areas that would always be outside the remit of the Assembly Government, where powers would not be sought or, if sought, they would probably not be granted.

[136] Therefore, we decided initially that we would attempt to draft the matters so that they would be self-standing, cutting out from the definition of the matter itself those areas that had to be excepted. Sometimes, this could be done just by the defining of the matter—one could define the matter in such a way that you excluded the area over which competence was not sought or granted. Sometimes, there would have to be a clear statement that the matter did not include a certain area. You find that sort of statement, for example, in the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009. It states that 'this matter does not include' a certain area and that cuts it out.

[137] Equally, at the start, it was clear that, if one was going to have an area that was always going to be outside of the competence, you would be repeating this sort of provision in every single matter that you introduced into Schedule 5, lengthening the schedule and the matters in it, and arguably, therefore, not making the Schedule as economical and as clear as possible. So, we looked for a method of being more economical in the presentation of these exceptions while at the same time, reflecting the fact that there was no provision for a test for exceptions in the way that there was with Schedule 7. The initial method that we came up with was having the table of exceptions with references to the matters, or the numbers of the matters, inserted alongside. However, equally with our table, it became clear over the first year or so of working the system that this was becoming cumbersome—that the number of matters to which the exceptions related were so numerous that a more economical method still was needed. The obvious approach was to move to the method used in Schedule 7, but, in doing that, introducing the sort of test that already existed in section 108 by amending section 94 in that manner, so that you would test whether or not a provision of an Assembly Measure was within competence, both by reference to the matter, in relation to the matter, but also testing whether it fell under an exception, determining that according to the purpose of the provision.

[138] **William Graham:** On that point, I ask you to illustrate for my benefit, if you would, why the original draft National Assembly for Wales (Legislative Competence) (Environment) Order 2010 left here as three pages and came back as eight by the time that all of the exceptions and the floating exceptions had been included. Where was your test there? Why did you not include those in the first place?

[139] **Professor Watkin:** The original draft of the environment LCO reflected the instructions that we received from the policy department. As always, we drafted according to those instructions. We began by seeking to express the competence that the Assembly sought in as broad and clear terms as possible. The Assembly Government proposed that LCO to the Assembly and the Assembly accepted it. Negotiations with Whitehall had not been completed at the time that that particular LCO was presented to the Assembly. The second version of the LCO—the draft version that came back to the Assembly, which has now passed through the Assembly and Parliament—came later as a result of those negotiations.

[140] **William Graham:** Thank you.

[141] **Janet Ryder:** Given that answer, is it fair to assume that the Government needs to look at the way that it is timetabling Measures here, so that what happened with the environment LCO does not happen at a future date, where an LCO is laid and subsequently has to come back in a drastically changed form?

[142] **Professor Watkin:** The circumstances that attended the original introduction of the environment LCO were fairly exceptional, because it was in the period immediately after the 2007 election, the powers were being used for the first time and it was the initial business of that Assembly. So, I do not think that one could look at the events surrounding that LCO as being typical. Indeed, the events that subsequently followed the introduction of LCOs have already made the change that you are describing.

[143] **Janet Ryder:** So, we are seeing a maturing of the system.

[144] **Professor Watkin:** Yes.

[145] **Janet Ryder:** Alun, I think that you have a supplementary question on this.

[146] **Alun Davies:** Yes, thank you. If I am right in my understanding of your initial answer, you are guided by Schedule 7 in defining this list of exemptions.

[147] **Professor Watkin:** That is one of the points that we steer by, certainly. If you go back to the original LCOs, the draft National Assembly for Wales (Legislative Competence) (Environment) Order 2010 in particular, the content of that original LCO reflected the wording in Schedule 7. There was a clear aspiration, a shared aspiration at that time, that Schedule 5 would develop in the direction of Schedule 7. The analogy that I drew in my paper was that, really, Schedule 7 is the picture and Schedule 5 is almost a jigsaw that you use to create the picture by pulling down pieces from Schedule 7 piece by piece. That was the approach that was adopted there.

[148] As things have developed, we have learnt through experience that there are some difficulties with that process, partly as a result of the bargaining that has to go on with the achievement of competence, but partly also perhaps as a result of a certain legal conservatism that has nothing to do with political bargaining. That is speculation. However, it has clearly affected, to some measure, the way in which policy departments would expect us to draft and the way that we draft—the former because there is clearly a wish to ensure that LCO applications are successful and that they can progress quickly. If you are aware of where the pitfalls lie, you will seek to avoid them in what you ask for initially. That can skew it. However, I still regard Schedule 7 as one of the stars that guide us on the journey.

10.10 a.m.

[149] **Alun Davies:** I am interested in that, because the holy grail for me would be far more simplicity in this process. I am reminded of the evidence that Nick Ainger gave to the Welsh Affairs Committee when it looked at the LCO process back in 2006 and 2007. The expectation there was that LCOs would consist of a paragraph or so and would be very short. We had the examples of one or two sentences, which was probably an optimistic view of it. However, certainly the essence that the Welsh Affairs Committee considered at that time, and the evidence of the Government, was that it would seek LCOs that would be short and would not encompass the totality of a matter, as defined in the legislation, but broad areas of competence across policy fields. That is not what happened. For those of us who have to scrutinise them, we find them to be extraordinarily complex instruments; why is that the case?

[150] **Professor Watkin:** For those of us who have to draft them, the experience has not been dissimilar. I will ask Huw to comment on that in a moment, because he has drafted a number of LCOs. The simplicity that you describe, which was, if not anticipated, at least desired at the start of the process, was something that was shared and which informed the drafting of those first LCOs. That is why I have included the proposed environment LCO as an annex to the evidence that I submitted. One has to ask the question: how can you maintain that simplicity? What context is needed to maintain that simplicity? To maintain it, you would

need a shared vision of how Schedule 5 will develop. That vision would have to be shared by the Assembly Government in Cardiff, the UK Government in Westminster, the Assembly in Cardiff and the Parliament in Westminster, and not just at one time—the vision would have to be shared even when there were changes of Government in Cardiff and Westminster and changes in the composition of Parliament.

[151] I regard it as a legitimate aspiration to attempt to achieve that, but the practical side of my nature would tell me that the chances of managing to achieve it in that pure form were minimal, because there would inevitably be moments when that shared vision would be affected by the considerations on particular issues of the policy needs at either end of the M4 and the particular wishes of Governments at either end of it. It will erode that vision and make it more difficult to achieve. In a sense, that is what has been happening. We started with a pure vision of where we wanted to go, which is laudable, but time and chance caught up with it.

[152] **Alun Davies:** So are you saying that that was never achievable?

[153] **Professor Watkin:** I would not say never achievable; I still regard it as a legitimate aspiration, but I think that the chances of success are minimal.

[154] **Janet Ryder:** Huw, do you want to come in at this point?

[155] **Mr H. Davies:** I will just pick up an example from the proposed environment LCO. Originally, we had very simple statements of what the competence of the Assembly would be and then we moved on to the second proposed environment LCO, which is difficult to get to grips with. There is a lot of material in it, because the policy that that document represents is different. You still have, in the second proposed environment LCO, very broad statements of competence, such as protecting and improving the environment in relation to pollution, which is a very broad notion. However, what makes that complicated is the number and range of exceptions that are fixed next to the matters themselves.

[156] The only way in which you could simplify that is to change the policy. You need to have a different policy on where the line should be drawn between the Assembly and Westminster. I could give you an example of the provisions in the proposed environment LCO in relation to the sea. Quite a lot of the complexity is about removing operating in the marine environment from the Assembly's competence. So, the question is not a drafting question about how you, the drafter, could make that simpler, but whether it is the right policy.

[157] **Michael German:** I chaired the committee, as you know, that scrutinised that proposed LCO and I accept your point about legal conservatism and about policy conservatism in being able to achieve clarity of line. You started with Schedule 7 as your star, and I am using this proposed LCO as an example, but what will happen in Schedule 7, given that, as I understand it, the UK Government can propose, on the first occasion only, to amend Schedule 7 without the consent of the National Assembly for Wales? Subsequent amendments to Schedule 7 would require the consent of the National Assembly. With regard to that first amendment to Schedule 7, which a UK Government can do alone, after a referendum, would there be, in your view, a move to include all these carve-outs, amendments and so forth in that way? I am using the draft environment LCO as an example, but there are others. Are we likely to see all those exceptions being attached to Schedule 7 simply because they are already there in Schedule 5? As the UK Government wanted them there, there must be logic in Schedule 7 being 'tidied up' in that manner.

[158] **Mr H. Davies:** May I clear up a technical point first? The UK Government has already used that power to amend Schedule 7. Any future change to Schedule 7 will therefore

have to be approved by the Assembly.

[159] **Alun Davies:** When was that?

[160] **Mr H. Davies:** In 2007, an Order was made under Part 4 to amend Schedule 7, and so the next Order amending Schedule 7 will have to be approved by the Assembly.

[161] **Janet Ryder:** So that we can have this clearly on the record, the situation that Mike has just described cannot now happen. Is that right?

[162] **Mr H. Davies:** Well, Schedule 7 can be amended.

[163] **Janet Ryder:** But only with the agreement of the Assembly.

[164] **Mr H. Davies:** Yes, unless it were done by Bill, of course.

[165] **Michael German:** Are we likely to see, in your view, a proposal from the UK Government to amend Schedule 7? I am using the draft environment LCO as a starting point. You started with Schedule 7, and you now have Schedule 7 plus, with a very long list of exceptions. Are we likely to see a proposal from the UK Government to amend Schedule 7 even further to match what it has already done?

[166] **Professor Watkin:** That would depend entirely on the policy of the UK Government of the time. You may have a better idea than I have as to what the UK Government would be at that time.

[167] **Janet Ryder:** It goes back to your previous answer, I presume, that all parties have to be in agreement and share a common vision to get that outcome.

[168] **Mr H. Davies:** I would add that, in relation to the floating exceptions, the sort of exceptions that you would see in Schedule 7, and now included in Schedule 5, are broadly the same. The floating exceptions in Schedule 5 are really drawn from Schedule 7. In some respects, the exceptions in Schedule 5 will allow the Assembly to do more things than those in Schedule 7. For example, in relation to child trust funds, that was amended in relation to the LCO on vulnerable children to allow the Assembly to do more things under Schedule 5 than it could under Schedule 7.

[169] **Michael German:** So, when we get to Schedule 7, we will have fewer powers in that area.

[170] **Mr H. Davies:** It is one of the issues that people will have to think about when we lead up to Schedule 7.

[171] **Michael German:** Could you expand on how many issues like that there will be?

[172] **Mr H. Davies:** There is the one that I mentioned, on child trust funds.

[173] **Janet Ryder:** Is that the only one that you have been able to identify to date, or are there others?

[174] **Mr H. Davies:** It would mainly relate to policy issues about what happens under Schedule 7 rather than technical things that are different between the two. Broadly, the floating exceptions in Schedule 7 are the same as in Schedule 5, but that one—

[175] **Michael German:** This is the first that we have heard that there is a Schedule 5

power that will be taken away by Schedule 7.

[176] **Janet Ryder:** Would it be possible for you to submit a further paper on this? This is a new aspect.

[177] **Mr H. Davies:** On the differences between the two Schedules in relation to exceptions? Yes.

[178] **Janet Ryder:** Thank you. Perhaps you could contrast what exists now against what may not exist if Schedule 7 comes in. That would be extremely helpful.

[179] **Professor Watkin:** There is another instance of that, where the floating exception in Schedule 7 is to be introduced to Schedule 5 as a fixed exception, and that is in relation to the proposed Welsh language LCO, where the use of the Welsh language in the courts has been specifically linked to matter 20.1, which is, in the view of everyone who has dealt with the proposed LCO, where it properly belongs. Again, that would become a floating exception if one moved without alteration to Schedule 7.

[180] **Janet Ryder:** That is interesting.

[181] **William Graham:** My question is broadly on the same matter. In paragraph 14 of your evidence, you say that:

[182] ‘It was never envisaged that the school transport Matter should enable the Assembly to legislate on shipping, but there was an alternative view (which prevailed) that unless shipping was specifically excepted, a Measure could contain provisions about shipping.’

10.20 a.m.

[183] Can you explain whose view prevailed and why?

[184] **Professor Watkin:** I was not party to the negotiations on that particular Order, because it was the Conversion of Framework Powers Order 2007. My understanding of what occurred is that what is now matter 5.10 in part 1 of schedule 5 relates to school transport, giving the Assembly powers to legislate in that area. In the process of the negotiation, the question was raised about whether or not dealing with the transport of children living on islands off the coast of Wales who had to travel to schools on the mainland would mean that shipping matters would be legislated upon by the Assembly. As a consequence, I think that it was the Department for Transport that raised the issue and it was agreed that the floating exception in Schedule 7 should be brought into Schedule 5 as a fixed exception. However, I think that it has now returned to being a floating exception.

[185] **Mr H. Davies:** Yes. The origin of that is the Education and Inspections Act 2006, which was running as a Bill at the same time as the Government of Wales Bill. If you cast your mind back to the period, we were creating framework powers at the same time as looking ahead to Schedule 5. The Education and Inspections Act 2006 had a framework power in relation to a number of education matters, including school transport. That was the point at which it became clear that there might be a need to deal with exceptions that applied across the board at some point. There, you had a very broad statement of what the Assembly could do in relation to school-related transport. The solution that we reached in consultation with the DfT was to make a direct reference across to Schedule 7 of the Government of Wales Bill, as it was at the time. The power to make law about school transport could not include doing anything that was an exception under the transport heading in Schedule 7. So that was a fix to deal with the fact that we could not reach agreement on the particular things that should be applied. The DfT would come up with a scenario—it was an unlikely scenario, and

something that the Government would never do, but, technically, it was something that might be caught within the scenario that it was putting forward. It was that kind of difficult negotiating process that led to the idea that we needed to deal with floating exceptions to remove these difficult, and probably pointless, technical negotiating points.

[186] **Michael German:** I want to look at paragraph 22 of your evidence, which I think that you have already alluded to in what you have just mentioned, and the statement that

[187] 'the resulting draft can only be as clear and transparent as the resultant policy permits.'

[188] If I translate that into what is clear speech for me, it means that it is down to the negotiating skills of Welsh Assembly Government officials versus department officials in Whitehall. Who does the negotiating? You have just talked about negotiating, but is it your department that does the negotiating or the policy department? Are you engaged in the negotiations? Do you have a role to play? Do you go to face-to-face meetings? How does it work? Explain it to me.

[189] **Professor Watkin:** We are not involved in the negotiation of the policy, or with Whitehall departments. It is extremely rare that a member of this office would attend such a negotiation. The negotiation takes place primarily between the policy departments, with the assistance of legal advisers from Legal Services. We would only see the fruits of that negotiation when we are asked to reflect what has been agreed in the form of drafts.

[190] **Michael German:** Do you give advice to Legal Services and the policy department before a conclusion is reached? Can you influence that decision?

[191] **Professor Watkin:** There would be a moment in the process when an LCO is being developed where a draft would have been achieved, and where it would be decided to share that draft with the relevant Whitehall department in order to advance negotiations. That is the moment that we would be aiming for.

[192] **Michael German:** To go back to my example of the draft environment LCO—you have attached it here—it had four pages of exceptions as a result of the negotiations. How deeply were you involved in the negotiations that resulted in those four pages of extra drafting?

[193] **Mr H. Davies:** We were not involved in those negotiations at all, at the table. Our involvement would be in commenting on the fruits of those negotiations. What happened to our correspondence after that would be a matter for those instructing us—the policy department—to deal with. There have been instances where we have been involved directly in discussions. There was one instance with regard to the proposed transport LCO recently, where we were involved in a discussion directly with the Department for Transport. There is an awkward process issue here, because we are the legal advisers to the Welsh Assembly Government, and so there is a desire to maintain privilege around the discussions that it has with us. That is a double-edged sword, because one of the advantages of having an independently minded drafter look at the legislation as a whole is that you can bring people together. If they can see everything that you are saying about a particular text, and the comments that you are making in relation to a particular policy, then they can understand your explanation as to why something has been drafted in a particular way. However, that is quite a difficult thing to manage where you have two independent entities trying to work towards a single outcome.

[194] **Michael German:** Are you saying that there would be merit in giving you access to the negotiations at an early stage, so that you can influence them, and for purposes of clarity?

[195] **Mr H. Davies:** If you imagine the way that things work on a Bill, if Wales has a general policy interest, then the instructions to parliamentary counsel are funnelled together. You would have the Whitehall department with its set of instructions, and the Welsh Assembly Government with its own set of instructions. Those are agreed together and sent on to parliamentary counsel, and the correspondence is between the lawyer and parliamentary counsel. Everyone sees it, is involved, and understands what has been going on and why. The lines of accountability for us are different. We are not giving advice directly to Whitehall departments—it is being funnelled through the instructing lawyers in the Welsh Assembly Government, and there are advantages and disadvantages to that approach.

[196] **Michael German:** That is what I am testing. If we are trying to improve the system, how can we maximise the advantages and minimise the disadvantages?

[197] **Mr H. Davies:** My personal view is that it would be better if the instructions to us on LCOs were agreed at the start with the Whitehall department. From the drafting and handling perspective, that would enable you to get to the conclusion quicker.

[198] **Professor Watkin:** It may come back, in a way, to a particular instance of what I spoke about earlier, namely, the possibility of achieving a shared vision. Agreed instructions would be a shared vision on the basis of which we could draft. It also goes back to a question that you asked earlier about the role of parliamentary counsel; I think that it was Mr Rendell who gave the example of where you can see that four issues have been put into a matter and a fifth would make the line tidier. That is the sort of thing that we would comment on currently.

[199] **Michael German:** I refer you to paragraph 26, again for purposes of clarity. It probably reinforces the point that you have just made. It states:

[200] ‘A comparison of the two versions is salutary, and should indicate whence the extensive list of fixed and floating exception arises.’

[201] That is a nice way of putting it, but does it also reinforce the point that you just made, or is it making a different point?

[202] **Professor Watkin:** As I understand it, one issue that is currently causing some vexation is clarity, in the sense of understandability to the public, and whether Schedule 5 has developed in the way that was anticipated. I put up the draft environment LCO as an example because it is one of the few instances in which you have a version that was in existence and in the public domain before the Whitehall negotiations were concluded, as well as a version that emerged from those negotiations. So, it gives you a pointer as to where the complexity has arisen. Is it during the drafting—it is often stated that the drafting is complex, and so on—or is it that the underlying policy has become complex in the process of the negotiations? As there are two versions of the draft environment LCO, you have evidence on which to draw a conclusion. That is the point that I am making by saying that that is salutary.

10.30 a.m.

[203] **Michael German:** Yes, it was quite clear that the committee that I was referring to identified that it was the process of negotiation with Whitehall departments that made it more complex, not the Welsh Government’s intention.

[204] **Professor Watkin:** There is bound to be a certain sensitivity when the House of Lords Constitution Committee states that a product of this office comes perilously close to the borderline of what is constitutionally acceptable. That should not be felt to be purely the responsibility of the drafters at this end of the M4. The draft reflects the policy that resulted

from that lengthy period of negotiation.

[205] **Michael German:** I understand that; what I was asking you was whether there was a better way of doing it so that you did not become the butt end of the House of Lords Constitution Committee's response and to avoid the feeling that it was our end that was at fault. I think that you have said that you want clarity of instruction and that joint working would be a way of improving that. Would that be fair?

[206] **Professor Watkin:** It goes back to the point that I made earlier in response to Mr Davies's question. If there is a shared vision, we will be able to achieve that, but if the shared vision is in any way upset, it will be less possible to achieve it. I am not sure that processes alone can create the sort of shared vision necessary to achieve that end.

[207] **Alun Davies:** So, we can have clarity only if we have angels—

[208] **Professor Watkin:** It is not quite like that, but you have to have an agreed concept of where devolution in Wales is meant to lie. That is the shared vision that I am speaking of. It is not necessarily an angelic vision, but it is an agreed vision.

[209] **Michael German:** Do you think that Schedule 7 would give us much more of that clarity of vision?

[210] **Professor Watkin:** Schedule 7 is a statement of where the lines are drawn. Schedule 5 is not; it is a working document that enables the lines to move as time goes on. It is not designed to give one that sort of statement. In a sense, that is where part of the problem lies. Schedule 5 serves two purposes. Some people want to look at it and say that it is a statement of where the line between the UK and Wales currently lies for the purposes of devolution, but it is not a static line—it is a moving line. For us, and probably for most people involved in working the devolution settlement, it is a working document. It is a method of bringing down powers so that powers can be used, and the aim in doing that is to get powers that can be used for the benefit of the citizen. The aim is not to produce a constitutional statement that is aesthetically pleasing; it has to work. It is the tension between those two things that is the issue. There is tension between a clear constitutional statement and the methodology that allows the powers to be delivered for the purposes for which they are required. It is that tension that is producing some of the difficulties; it is trying to do two things with the same document.

[211] **Michael German:** I do not wish to put words into your mouth, but, in that case, although you talk about having a clear, easy, comprehensible draft or law in paragraph 27, that is not really achievable given our current Schedule 5 method. You have talked about an exact draft, and I assume that this is a case of certainty versus clarity or comprehensibility, but it will not be possible to make it comprehensible or easy to read or understand with our current system, will it?

[212] **Professor Watkin:** 'Clarity' can have more than one meaning here. There is the sort of clarity that is generally being spoken about here, which is the comprehensibility of a document to a general reader. However, the clarity that we are primarily interested in is the conceptual clarity that will define the matters and exceptions in such a way that when a Measure is passed in the Assembly and someone looks at a provision of that Measure, they or anyone, including the courts, will be able to say with certainty that the provision is or is not within competence. At the end of the day, that is the more important clarity when you are drafting constitutional provisions. As I think was said earlier, you have to have that conceptual clarity that allows people to know whether a provision is within or without the competence. If you had a simple wording that the general reader might feel that they understand but that lacked that conceptual clarity, you would have far more confusion and a

worse result than if a degree of complexity were to be introduced into the matter.

[213] **Michael German:** Would it be useful to use the words ‘certainty versus comprehensibility’?

[214] **Professor Watkin:** Yes.

[215] **Janet Ryder:** Are you satisfied that your questions have been answered? I see that you are. We will, therefore, move on to Alun’s questions.

[216] **Alun Davies:** If you have been following the committee’s inquiry, you will have been interested to hear what the Law Society had to say in its evidence to this committee some weeks ago. I put this point to the Deputy Parliamentary Counsel earlier in this meeting, and I want to put it to you now. Briefly, the Law Society said that Schedule 5 is becoming opaque and confusing, and runs against the principle of the rule of law. Do you recognise that?

[217] **Professor Watkin:** I am puzzled by the reference to the principle of the rule of law in relation to this—other than its possible use as a rhetorical flourish. I have read the rule of law described as a principle of incontestable importance with no defined, or possibly definable, content. Everyone seems to know what it means, but nobody can say what it means. My understanding—and this is the classic understanding of it, which comes from the late nineteenth or early twentieth century—is that any punishment or imposition of damages can be done under the law only. I do not quite see how Schedule 5 offends against that. The rule of law also means that a citizen’s rights can always be determined by the courts. I do not see Schedule 5 going against that. Finally, it means that the constitution of this country is a reflection of the rights of the citizen rather than the granting of rights for the citizen. Again, I do not see how Schedule 5 goes against that. So, I am puzzled by the reference to the rule of law here.

[218] If what the evidence is driving at—and we are merely speculating here—is that, because of the complexity of Schedule 5, the citizen is not aware of the overall competence of the National Assembly and, therefore, any citizen affected by Measures made by the National Assembly who wished to challenge that competence would find it difficult to do so, I am not convinced by that. If a citizen is minded, with his legal advisers, to challenge a provision in an Assembly Measure that affects him, the path does not lead to the totality of Schedule 5. What has to be shown is whether the particular provision affecting the citizen does or does not relate to a particular matter or matters. The attention goes to the pieces that make up Schedule 5, not to the Schedule as a whole, so I am not convinced that a lack of what I called an ‘aesthetically pleasing form’ to the whole of Schedule 5 produces the result that has been suggested by some commentators.

[219] **Alun Davies:** It would appear from the Law Society’s evidence that the average lawyer finds Schedule 5—and I am paraphrasing here—to be almost entirely incomprehensible.

[220] **Professor Watkin:** I find that difficult to believe. I ought to resist the temptation to say that I cannot speak for the average lawyer. [*Laughter.*]

[221] **Alun Davies:** Do you reject the concept that the way in which the process has developed over the last five years has led to unnecessary complication?

[222] **Professor Watkin:** It is clear from what I have already said, and written, that most of us would have hoped for, if not anticipated, greater simplicity in how the Schedule has developed, particularly in the light of the remarks that you quoted earlier, made before the

Government of Wales Act 2006 was passed. However, I am not aware that the way in which the Schedule has developed has in any way prevented the Assembly from legislating in the manner that it wanted to over the issues for which it sought powers. That has to be the real test of whether the matters in Schedule 5 are delivering.

10.40 a.m.

[223] **Alun Davies:** As a politician who was elected on a manifesto commitment relating to affordable housing, I can say to you that that is not how it feels, given that I have to face the electorate next year. What do you envisage happening if Part 4 of the 2006 Act comes into force and Schedule 5 ceases to exist? Would you regard that as adding more clarity to the issue?

[224] **Professor Watkin:** As I said earlier, Schedule 7 is, as it stands—and not depending on whether it is amended—a clear statement of where the line is drawn. You are not constantly re-drawing the line and debating how the line should be drawn: there is a line.

[225] **Rhodri Morgan:** On this point of the Law Society's criticism of the complexity or incomprehensibility of the settlement as it stands, that was rebutted by the two previous witnesses, the First Parliamentary Counsel and Deputy Parliamentary Counsel. They accepted that it might look complex from the point of view of Joe Public, or Josephine Public, but that any competent lawyer who was willing to spend an hour or so with their nose in the statute book would be able to figure it out, as they would with other laws. You have also said very strongly that you agree with that view. A competent lawyer should be able to determine whether something is, to all intents and purposes, devolved via the Schedules and so on. However, I think that you will accept that the general public might be a bit baffled by the settlement and that it is pretty complex in that sense.

[226] Do you not think it quite odd that it is the Law Society that has raised this point? In the trade union sense, it might be quite happy if something were incomprehensible to the public but comprehensible to a trained lawyer, as that would help to preserve its monopoly of wisdom on the law. It would be good for lawyers, in the narrow vocational, financial and pecuniary sense, if the public could not understand it. Can you think of any reason why the Law Society would be having a bit of a go at Schedule 5? Do you have any idea of what you could put that down to, given that that is almost working against its own pecuniary interests?

[227] **Professor Watkin:** Perhaps I have a higher opinion of lawyers generally than the question may imply to be the case. All lawyers have a commitment to ensuring that the law is clear and that the citizen is served well by legislation and the processes of litigation. There is also a general interest in seeing the current devolution settlement develop in a way that is beneficial to Wales and its people. I cannot speak for the Law Society, and this is purely speculative on my part, but I think that there is a 'shared vision', to go back to that expression, of what lawyers would like to see in the development of Schedule 5.

[228] **Rhodri Morgan:** So, this is the line-up so far. From your evidence and that of the Office of the First Parliamentary Counsel, you both seem to be on one side of the argument, namely that competent lawyers should be able to grasp that there is a purpose to the fluid nature of Schedule 5 and that it is quite clear that it is a process by which it is possible to accrete the powers that are transferred to the Assembly. On the other hand, the Lords' Constitution Committee, with its use of the famous phrase 'perilously close'—whatever that means—and the Law Society both say that this is a messy process. The Lords and the Law Society are on one side, and you and the Office of the First Parliamentary Counsel are on the opposite side, flatly contradicting the criticisms. Can you expand on that, and say why you think that your opponents—the Law Society and the House of Lords Constitution Committee—are wrong?

[229] **Professor Watkin:** We are not flatly contradicting what they are saying. As I have said, we had hoped that Schedule 5 would develop in a clearer manner, but the manner in which it has developed has reflected the process by which negotiations have reached a conclusion as to what powers should be granted. It is about the drawing of the line. The line has not been drawn as clearly and as distinctly as might have been hoped, but, nevertheless, it is being drawn, and, to that extent, the process is working. It is entirely beneficial that there are those who are saying that it could be clearer, and that it could be possible to get back to the shared vision, as I called it earlier. Equally, from our point of view, we have to be clear that what we have done has served the purpose that Schedule 5 is meant to serve and that it has brought powers down to the Assembly. The LCOs and the UK Bills have done that, and, ultimately, the Assembly is able to legislate and exercise the primary law-making powers that it has under Part 3 of the Act. It is for others to decide whether or not the overall conclusion, which is still ongoing, is entirely satisfactory and whether it requires a change to the system.

[230] **Rhodri Morgan:** I am trying to get at the unhappiness that you are manifesting on the jigsaw or messy line regarding the way in which the LCOs have transferred powers and put them into Schedule 5. Nevertheless, a good competent lawyer or judge will not be struggling too much—if they are willing to spend the time, nose in the statute book, they will be able to make a clear determination on whether something is either intra or ultra vires for the Assembly to legislate upon. This is not a problem, except for the public. However, does the essential difference of view between the House of Lords Constitution Committee, the Law Society here, and the Office of Welsh Legislative Counsel, stem from excessive use of exceptions, fixed and floating, or carve-outs, and so on? Is it the case that we have too many exceptions, and too many exceptions to the exceptions, so that it starts to get messy? Or is it about the much simpler issue of having a nice clean box of legislative competence transferred from Westminster to Whitehall via an LCO, as distinct from one with an awful lot of fine distinctions in it?

[231] **Professor Watkin:** It is important to bear in mind that the House of Lords Constitution Committee's comments are directed at one development alone and not the entirety of Schedule 5, whereas the Law Society's comments, about the general direction of development, are not quite addressing the same thing. What you are describing now goes back to what I mentioned earlier on the dual nature of Schedule 5. Can it both develop as a constitutional statement that serves the needs of the public in terms of their understanding and develop as a suitable vehicle for bringing down powers to allow the Assembly—

[232] **Rhodri Morgan:** So, it is a pipeline, in effect.

[233] **Professor Watkin:** Yes, a working pipeline that requires constant maintenance if the flow is to be unrestricted. The tension arises in the division between the two goals of Schedule 5, namely what we are trying to achieve—and which, with the assistance of parliamentary counsel, I hope we are achieving—and what people would ultimately like to have.

[234] **Rhodri Morgan:** It is the difference between a stock of law and a flow of law, or flow of legislative competence.

[235] **Professor Watkin:** In relation to the Constitution Committee's comments—and I refer to this somewhere else in the evidence—the problem partly lies in the fact that there is a Janus-faced element, whereby some are looking to the future and seeing Schedule 5 as set to develop towards Schedule 7, while others are looking to the past at where ministerial functions have been transferred from London to Wales. If you look to the future and to Schedule 7 as your guide, you will draw some clear lines and say you can have clearly defined areas of competence over subjects. However, if you look to the past, you are, in

effect, laying a sheet of tracing paper over where the ministerial functions have been transferred, and are then seeking to draw the boundary of legislative competence on the tracing paper and transfer it over into primary law-making powers for the Assembly. In my view, that is not the direction in which people would have liked to have seen things developing, nor was it the direction that we attempted to move in when we began drafting. So, there is that tension as well, and I detect that this is not purely the result of a negotiating process on policy, but that it may show a degree of legal conservatism with a small 'c' in certain areas.

10.50 a.m.

[236] **Michael German:** To be absolutely clear, would you like to define what those certain areas are?

[237] **Professor Watkin:** No. I could not. In a sense, it is speculative to say that, but it is clear that it is not general. That is the point that I would make. It is clear that there are many areas where there is an understanding of the nature of the current settlement, possibly because of greater familiarity with it, and that there are other areas where there is not.

[238] **Janet Ryder:** Rhodri, are you satisfied with those answers?

[239] **Rhodri Morgan:** I am not a lawyer. I have drafted thousands of amendments as a legislator during my time as a Member of Parliament, but I am not a lawyer. The difference between a lawyer and a non-lawyer is that lawyers are trained to be able to grasp exceptions to exceptions, and even exceptions to exceptions to exceptions, while the general public gets lost once you go past exceptions—you cannot do it; your brain will not handle it. However, are there any constitutional or practical objections to the whole apparatus of exceptions, exceptions to exceptions and carve-outs, or are they a necessary condition of most legal drafting, and certainly the drafting of LCOs with a view to sets of Measures that might follow?

[240] **Mr H. Davies:** I think that it is an inherent part of all of the settlements in the UK. All of them have exceptions to exceptions when describing the competence. In some cases, you will find exceptions to the exceptions to the exceptions. There are a few in the Scotland Act 1998. It is actually quite easy to overstate the complexity, if you are looking only at what is happening in Schedule 5. If you look at what is happening in Schedule 5 and compare it with, say, the Scotland Act, you will see that there is lots of complexity in that Act, and other aspects of complexity. So, reservations are described in the Scotland Act, for example, not by reference to a topic, broadly stated, but by reference to the subject matter of an enactment as it stood in 1998. No ordinary member of the public could really access the detail of that and understand it. So, there are inherent complexities in all of the systems.

[241] People criticise carve-outs as a method of describing competence, but they should ask the question of what the alternative would be for representing that particular idea. For example, if you say that you are devolving aviation with the exception of certain things, what would the alternative be to that particular carve-out? The alternative would be to go into a great deal of detail about what you positively are saying is excluded. You would have to go into an enormous amount of detail about the sorts of aviation-related activities that fall outside the competence. Where we have used carve-outs and exceptions to exceptions, it has generally been because it is the most economical and simple way of expressing the idea.

[242] **Rhodri Morgan:** So, 'keep it as simple as you can' is not the same thing as 'keep it simple'?

[243] **Professor Watkin:** No.

[244] **Mr H. Davies:** No.

[245] **Janet Ryder:** Are you satisfied with those answers, Rhodri? Is there anything else?

[246] **Rhodri Morgan:** No, there is nothing else.

[247] **Janet Ryder:** I have a final question, not on exceptions or other Schedules, but arising out of evidence that we took last week about the possible training of people here in future. I wonder whether you would be willing to answer this. We heard about the possibility of developing a qualification of legal translator in Wales. Could you briefly summarise the latest developments in that regard? Is there a realistic prospect of such a course becoming available in the not-too-distant future?

[248] **Professor Watkin:** I think that the reference made last week was to something that I have referred to in my written evidence, which is that, during my first year in this post, I spoke to other public bodies in Wales, such as local authorities and others, about how they set about the work of producing bilingual regulations, Orders and so on. One of the things that came out of those conversations was the feeling that there should be some sort of training or qualification for those who are engaged in the work, which would mean that there was a common standard in Wales with regard to the provision of such services.

[249] I am a co-opted member of the universities of Wales panel on Welsh-medium education on the law, which generously provided funding for a research officer to work in our office for a year, interviewing the legislative translators working for the Welsh Assembly Government, and those working in other areas of government, local and national, in Wales. The officer looked at the needs and at what the universities felt they were able to provide. A report has been prepared, but has not yet been discussed by the panel, partly because I was on sick leave for the last three months of last year following an operation. It is likely to be discussed in the coming months. That report recommends a postgraduate part-time qualification that could be used by those in employment, and that would have specific elements relating to the preparation of texts to be used as basic texts for bilingual legislation; how to check the equivalence of two versions; and how to write explanatory notes on legislation in a manner that is accessible to the public. It brings together those particular skills not just for the benefit of translators, but for lawyers who work with translators.

[250] A year ago, when we had the funding, I was hopeful that this would produce a result within the universities and that courses would be offered within a year or so. Two universities in Wales expressed an interest in running such a course. I sound a note of caution because the financial situation, including that of universities, has changed, and quite dramatically in some ways, in the year that has gone by. Nevertheless, I remain hopeful that the course will be validated and will eventually be delivered, to the benefit of all working in this area in Wales.

[251] **Janet Ryder:** Will it concentrate purely on matters of translation, or will it include elements of devolved law?

[252] **Professor Watkin:** The course would be available to both lawyers and translators, and would be structured in such a way that the lawyers would improve their linguistic skills in some of the modules, but the translators would not require that, so the equivalent parts of their course would give them a sufficient introduction to the law and legal system of the UK, Europe and Wales, allowing them to understand the context in which they are working, increasing their appreciation of the meaning of fundamental legal concepts, and so on.

[253] **Janet Ryder:** That clarifies what we heard last week. Have Members any other questions to ask? I see not. Is there anything that you would like to add, Professor Watkin?

[254] **Professor Watkin:** No, I am quite happy. I do not know if Huw would like to add anything. I feel that we are all prisoners of the current situation, to a certain extent. We are looking to the light in one direction but can feel shackles around our feet in another. I hope that does not make this sound too much like the last act of *Fidelio*; perhaps that is where we are.

[255] **William Graham:** It all turns out well in the end.

[256] **Janet Ryder:** Huw, do you have anything to add?

[257] **Mr H. Davies:** Nothing at all.

[258] **Janet Ryder:** This is an apt point at which to draw the discussion to an end. I would be grateful if you could let us have that further paper that you mentioned.

[259] **Mr H. Davies:** I will.

[260] **Janet Ryder:** That will make things much clearer. Thank you for your time today. A copy of the transcript of the meeting will be sent to you for checking as soon as it is ready.

10.59 a.m.

Unrhyw Faterion Eraill
Any Other Business

[261] **Janet Ryder:** We have a couple of matters to deal with under this item before we move into private session. Would Members be content to invite the Deputy Minister for Social Services, Gwenda Thomas, to attend a meeting of the committee to answer questions about the subordinate legislation aspects of the carers strategy? You will remember that it is the strategy that will bring these into being, and there might be a gap in scrutiny around these elements of the strategy. So, are Members content to invite the Minister? I see that you are. We will, therefore, invite the Minister to come in on 11 March. Although we had pencilled in an earlier date, it unfortunately includes some very heavy evidence sessions.

11.00 a.m.

Dyddiad y Cyfarfod Nesaf
Date of Next Meeting

[262] I remind you that the next meeting will be in committee room 4 of Tŷ Hywel on 11 February at 9 a.m., when we will take evidence from the Welsh Council for Voluntary Action and the Chair of Legislation Committee No. 5, Mark Isherwood.

11.01 a.m.

Cynnig Trefniadol
Procedural Motion

[263] **Janet Ryder:** I move that

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

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

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 11.01 a.m.
The public part of the meeting ended at 11.01 a.m.