



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

**Y Pwyllgor Materion Cyfansoddiadol
The Constitutional Affairs Committee**

**Dydd Iau, 25 Mawrth 2010
Thursday, 25 March 2010**

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

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Alun Davies	Llafur Labour
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

Keith Blake	Tîm Gorfodi Cyffredinol, Asiantaeth Safonau Bwyd Cymru General Enforcement Team, Food Standards Agency Wales
Ceri Breeze	Pennaeth y Gyfarwyddiaeth Tai Head of the Housing Directorate
Neil Buffin	Uwch-gyfreithiwr Senior Lawyer
Jane Davidson	Aelod Cynulliad, Llafur, (y Gweinidog dros yr Amgylchedd, Cynaliadwyedd a Thai) Assembly Member, Labour (the Minister for Environment, Sustainability and Housing)
Jocelyn Davies	Aelod Cynulliad, Plaid Cymru (y Dirprwy Weinidog dros Dai ac Adfywio) Assembly Member, the Party of Wales (the Deputy Minister for Housing and Regeneration)
Prys Davies	Dyfodol Cynaliadwy Sustainable Futures
Elisabeth Jones	Dirprwy Gyfarwyddwr y Gwasanaethau Cyfreithiol Deputy Director of Legal Services
Mark Partridge	Dirprwy Gyfarwyddwr yr Adran Gwasanaethau Cyfreithiol Assistant Director, Legal Services Department
Rob Wilkins	Arweinydd Tîm, Gorfodi Cyffredinol, Asiantaeth Safonau Bwyd Cymru Team Leader, General Enforcement Team, Food Standards Agency Wales

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

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

*Dechreuodd y cyfarfod am 9.02 a.m.
The meeting began at 9.02 a.m.*

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

[1] **Janet Ryder:** I welcome everyone to the committee. I remind Members to switch off all mobile devices completely. We have not received any apologies—everyone is here this morning, which is great.

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 Orders Nos. 15.2 and 15.3 and Instruments Subject to
Annulment Pursuant to a Resolution of the Assembly (the Negative Procedure)**

[2] **Janet Ryder:** The first instrument is CA417, the Federation of Maintained Schools and Miscellaneous Amendments (Wales) Regulations 2010.

[3] **Rhodri Morgan:** Is there any way of turning the temperature down in this room? It is ridiculously hot.

[4] **Janet Ryder:** We have made inquiries.

[5] Gwyn, is there anything on CA417?

[6] **Mr Griffiths:** Mae'r rheoliadau'n werth eu nodi, gan eu bod yn galluogi ysgolion i gael eu gweithredu gan un corff rheoli, yn hytrach na bod angen i bob ysgol unigol gael corff rheoli. Caniatawyd hynny yng Nghymru yn unig o dan Ddeddf Addysg 2002. Dyma'r rheoliadau sy'n deillio o hynny, sy'n rhoi ychydig bach mwy o hyblygrwydd i ysgolion yng Nghymru.

Mr Griffiths: The regulations are worth noting, as they enable schools to be run by one management board, rather than each individual school needing its own management board. That was permitted in Wales only under the Education Act 2002. These are the regulations that emanate from that, which give a little more flexibility to schools in Wales.

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

[8] The next instruments are CA420, the Local Authorities (Capital Finance and Accounting) (Wales) Regulations 2010, and CA422, the National Health Service (Primary Medical Services) (Miscellaneous Amendments) (Wales) Regulations 2010.

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

[10] **Janet Ryder:** We move on to CA423, which is the National Health Service (Charges to Overseas Visitors) (Amendment) (Wales) Regulations 2010. There were reporting points on this, but there are also other issues relating to it. A revoking Order was laid this week, but too late to come before the committee. We will look at the revoking Order on 22 April. The regulations would lead to overseas visitors being charged for receiving medical support, and the Isle of the Man would be most affected.

[11] **Michael German:** There has been considerable disquiet about the regulations, and, as a result of pressure in all sorts of places, the UK Minister has put the matter of not allowing Isle of Man residents to have medical attention in the UK—and I say ‘UK’ carefully, because I think that there is some confusion in the Department of Health as to where the responsibility lies, and I have a letter here from a UK Government Minister that says that—on hold for six months, which means that the necessary legislation in respect of England has not been put forward in the UK Parliament. However, the Minister here has put it forward in respect of Wales and the revocation is to fall in line, presumably, with what has happened in England. I am not aware of what has happened in Scotland, but I do not understand why the legislation could not be withdrawn, instead of our having to go through a second process.

[12] I am interested to know whether the timetables for this mean that this Order will come into effect on 1 April, while the revoking Order will not come into effect, presumably, until some time after that and so there will be a gap. I am not certain whether or not that is the case.

[13] **Janet Ryder:** I understand that Bethan has been dealing with this.

[14] **Ms Roberts:** Yes. There is no legal reason why the new, revoking regulations could not be brought into effect before these regulations come into force. I have asked the Government drafter for the rationale behind this, but I have not yet had a response. These regulations and the new regulations that revoke them come into effect at the same time, so, in effect, they cancel each other out. So, there should not be any point in time when the regulations before you come into force. I think that that is the idea behind this, or so I am given to understand.

[15] **Michael German:** I received a letter this morning from the Government spokesperson for the Department of Health in the House of Lords on the relevance of this piece of legislation to the devolved administrations. The letter states that

[16] ‘Department of Health officials did liaise with their counterparts in the devolved authorities around the decision to end the agreement’—

[17] that is, to bring into force this legislation—

[18] ‘and I understand that they had no substantive concerns about the decision. The bilateral agreement predates devolution, of course, and was entered into as the UK. If the Isle of Man Government wishes to enter into negotiations with the Devolved Administrations, or vice versa, with a view to putting in place a new agreement, that would be a matter for the parties concerned.’

[19] I get the impression, therefore, that this is a devolved issue now and I would like some clarification as to why the UK Government proceeded with this agreement. The Government has said that it has had discussions with the devolved administrations, but there is obviously some confusion about who takes responsibility, who takes the lead in this matter and who brings forward this legislation. Am I right in saying that this is a devolved matter and something that the Welsh Assembly Government has to deal with in its own right?

[20] **Rhodri Morgan:** Does this regulation apply only to the Isle of Man?

[21] **Michael German:** Apparently, we have already passed legislation in this Assembly to ban people from the Channel Islands from receiving medical assistance in Wales.

[22] **Janet Ryder:** It has not banned them; it makes them pay.

[23] **Michael German:** Yes, sorry, it makes them pay.

[24] **Janet Ryder:** Bethan or Gwyn, can you shine more light on that or will we have to write to the Minister for further clarification?

[25] **Mr Griffiths:** I probably have an advantage over Bethan on this, as I have a copy of the letter from the Minister to the Presiding Officer with regard to the breach of the 21-day rule. The letter states that

[26] ‘as the UK Government recently decided not to end the reciprocal agreement with the Isle of Man, we now need to revoke those Regulations, which were recently laid, once they come into force...Failure to do this will result in Isle of Man visitors being chargeable for treatment in Wales, but not in England.’

[27] That explains the regulations that are to come before you later. So, it is a strange position, because, as the letter states, the agreement was entered into by the UK before devolution, but now it is devolved, so I suppose, technically, it is a matter for the UK Government as to whether or not it ends the present agreement, but it is then a matter for the devolved administrations as to whether or not they put something else in its place.

[28] **Janet Ryder:** This could become quite complex, so I suggest that Mike’s and Gwyn’s letters are handed to the Clerk so that we can circulate them to everyone. We will also pull out the key issues and write to the Minister, seeking clarification. We will, hopefully, have all of that ready to discuss on 22 April, which is the date of our next meeting and the date when the revoking Orders will come before the committee.

9.10 a.m.

[29] **Rhodri Morgan:** As an addendum to that, I presume that everyone accepts the simple principle of intent, which is that we want to have reciprocal arrangements with the Channel Islands, the Isle of Man and so on. So, if someone from Wales falls sick in the Isle of Man, they are treated, but they are not charged; likewise, if someone from the Isle of Man falls sick in Wales and are treated, they would not be charged either. However, if the Isle of Man is going to charge Welsh people who are there on holiday or on business, then we cannot have a unilateral relationship whereby we treat people from the Isle of Man, but they do not treat people from Wales free of charge. Is it something of that sort that is the intent, but is not being achieved in practice?

[30] **Janet Ryder:** The issue is that we have already passed the regulations regarding the Channel Islands, so, unless the Government chose to bring forward a further revoking Order having negotiated an agreement with the Channel Islands, visitors from the Channel Islands will be charged for medical care. Visitors from Wales would presumably be charged for medical care in the Channel Islands.

[31] This Order relates, I think, solely to the Isle of Man.

[32] **Rhodri Morgan:** However, the same principle applies. If they charge us, we charge them; if they do not charge us, we do not charge them. It is something of that sort, is it?

[33] **Michael German:** This matter has been raised and dealt with by the British-Irish Parliamentary Assembly. Paul Murphy has taken a strong lead on this matter, largely because the UK Government decided unilaterally to withdraw the bilateral arrangements, removing the quid pro quo, so that any person from the UK visiting the Isle of Man or the Channel Islands would require medical insurance to have cover for medical care if they were taken ill.

It caused considerable uproar in the parliamentary assembly, and a motion was passed unanimously by the parliamentary assembly and supported by all Members of the National Assembly for Wales. It stated that this arrangement was not satisfactory. As a result of, I think, parliamentary pressure regarding the UK Government's decision to apply this unilaterally—in other words, without the agreement of the Channel Islands or the Isle of Man—it has temporarily been withdrawn in respect of the Isle of Man. However, the arrangements for the Channel Islands are still in place. There is no relationship now and if any person from Wales visits the Channel Islands, they will have to have medical insurance.

[34] **Rhodri Morgan:** As it is not in the European Union, it is not covered by the E111.

[35] **Janet Ryder:** No.

[36] So, we will follow that course of action. We will copy the letters and write to the Minister. We will continue this discussion on 22 April.

9.13 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)
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[37] **Janet Ryder:** Bethan, I understand that the Government has accepted the points on CA418, the Accounts and Audit (Wales) (Amendment) Regulations 2010.

[38] **Ms Roberts:** Yes. There are two reporting points. One is minor in nature. The second is that regulation 2 of the regulations states that the definitions of certain words, such as 'senior employee', 'relevant police officer', are provided in regulation 7A(3) of the new regulations, but they cannot be found there. They are in the regulations, but they are found somewhere else. It is just a case of someone looking for the definitions having to look further into the regulations. They are not where the Government stated that they could be found. However, the Government has accepted the reporting point.

[39] **Janet Ryder:** Will the Government correct it?

[40] **Ms Roberts:** It will correct it on publication.

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

[42] Gwyn has been looking at CA421, the Valuation Tribunal for Wales Regulations 2010.

[43] **Mr Griffiths:** Unwaith eto, mae gwall bach, sef anghysondeb rhwng y Gymraeg a'r Saesneg. Mae'r Saesneg yn sôn am 'clerical error' a'r Gymraeg yn sôn am 'benderfyniad clerigol'. Mae'r Llywodraeth yn derbyn mai camgymeriad yw hwn ac wedi cael cydsyniad Swyddfa Gwybodaeth y Sector Cyhoeddus i gywiro hwn wrth argraffu. **Mr Griffiths:** Once again, there is a small error, namely inconsistency between the Welsh and English versions. The English speaks of a 'clerical error', while in Welsh it reads '*penderfyniad clerigol*' or 'clerical decision'. The Government accepts that this is a mistake and has agreed with the Office of Public Sector Information that it will be corrected on publication.

[44] **Janet Ryder:** A yw pawb yn hapus gyda hynny? Gwelaf eich bod. **Janet Ryder:** Is everyone happy with that? I see that you are.

[45] Next, we have CA424, the Independent Review of Determinations (Adoption and Fostering) (Wales) Regulations 2010.

[46] **Mr Griffiths:** Yr un math o beth sy'n codi yma. Mae pwerau anghyson rhwng y Gymraeg a'r Saesneg. Mae un yn sôn am is-adran 8 a'r llall yn sôn am is-adran 7 o adran 118. Mae'r Llywodraeth yn derbyn y gwall ac wedi cael cydysyniad i gywiro wrth gyhoeddi. **Mr Griffiths:** A similar sort of thing arises here. There are inconsistencies between the powers in the Welsh and English versions. One mentions sub-section 8 and the other mentions sub-section 7 of section 118. The Government accepts the mistake and has agreed that it will be corrected on publication.

[47] **Janet Ryder:** A yw pawb yn hapus gyda hynny? Gwelaf eich bod. **Janet Ryder:** Is everyone happy with that? I see that you are.

[48] That brings us to CA425, the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) (Amendment) Regulations 2010. We shall be dealing with this matter separately under item 5 of the agenda, so if Members are happy to do so, we shall delay the discussion of the matter and move on.

9.15 a.m.

Ymchwiliadau'r Pwyllgor: Ymchwiliad i'r Datblygiadau yn Atodlen 5 i Ddeddf Llywodraeth Cymru 2006, gan gynnwys Eithriadau i Faterion—Tystiolaeth y Panel: Y Gweinidog dros yr Amgylchedd, Cynaliadwyedd a Thai a'r Dirprwy Weinidog dros Dai ac Adfywio, Llywodraeth Cymru
Committee Inquiries: Inquiry into the Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters—Panel Evidence: The Minister for Environment, Sustainability and Housing and the Deputy Minister for Housing and Regeneration, Welsh Government

[49] **Janet Ryder:** For this evidence session, we are joined by Jane Davidson, the Minister for Environment, Sustainability and Housing, and by Jocelyn Davies, the Deputy Minister for Housing and Regeneration.

[50] **Rhodri Morgan:** As you are doing that, can you tell me, how do Gwenda Thomas's responsibilities, and those of her team in social services, differ from those of the environment, housing and regeneration team in respect of bottled water?

[51] **Mr George:** There is no difference. Gwenda Thomas is the Deputy Minister with responsibility for public health issues, and the labelling regulations are part of those responsibilities. This session is part of the inquiry into Schedule 5, and the Ministers are here to give evidence of their experience of that.

[52] **Rhodri Morgan:** Fine.

[53] **Janet Ryder:** We have a couple of evidence sessions today, and we were just trying to separate them.

[54] **Rhodri Morgan:** They just happened to be on the same day.

[55] **Janet Ryder:** We were not going to talk about bottled mineral water this morning, but that is the next evidence session.

[56] We welcome Jane Davidson and Jocelyn Davies to the committee. We have had a number of evidence sessions as part of our inquiry. We are looking at Schedule 5 to the Government of Wales Act 2006, including exceptions to matters. We are running a separate inquiry to monitor the outcome from our report on statutory instruments. This session will look mainly at the development of the legislative competence Order system and the development of exceptions and floating exceptions. We would like to gain from your experience as two Ministers who have taken through LCOs, and discuss the process. We have taken evidence from a number of people to date. Please introduce yourselves and your officials for the record.

[57] **The Deputy Minister for Housing and Regeneration (Jocelyn Davies):** I am Jocelyn Davies, the Deputy Minister for Housing and Regeneration. With me is Ceri Breeze, head of the Housing Directorate, and Neil Buffin, a lawyer.

[58] **The Minister for Environment, Sustainability and Housing (Jane Davidson):** I am Jane Davidson, Minister for Environment, Sustainability and Housing. I have with me Elisabeth Jones, a lawyer, and Prys Davies, head of legislation for the department.

[59] **Janet Ryder:** Thank you. We have some questions, but members often have supplementary questions, too. I will start.

[60] You have both had to consider, as you have developed your LCOs, the inclusion of exceptions as they have progressed. At what stage in the legislative competence Order process did questions about the need to include exceptions arise?

[61] **Jane Davidson:** With the environment LCO, we realised right from the beginning that there would need to be exceptions, so, in fact, the first draft of the environment LCO that we laid before the Assembly's committee back in June 2007, or thereabouts, contained eight initial exceptions, where it was clear that those matters would be outwith the Assembly Government's responsibilities. Consideration of exceptions is also a feature of the discussions with the UK Government, and as part of those negotiations, the UK Government can request that an exception be included on a particular topic. I asked Elisabeth this morning to have a look at exactly where we ended up in the number of exceptions, and from the work that was undertaken in the process of the environment LCO, we have eight new fixed exceptions, nine new floating exceptions, and some amendments to floating exceptions. They came in as a result of discussions with eight UK Government departments and a corresponding number of Ministers and officials.

[62] **Jocelyn Davies:** There are no exceptions, as you probably know, within the proposed housing and local government legislative competence Order. The first draft that I saw of this particular version had no exceptions in it, but Neil might be able to expand on other discussions that had gone on prior to it coming to me. It certainly had no exceptions at that point. When we had the very first housing legislative competence Order and the Assembly committee reported, the committee report's suggestion was that the LCO should just try to take competence over all affordable housing. Had we done that, we would have been in a situation where we would have had to list exceptions. However, for this particular one, there are no exceptions. Perhaps Neil could expand on the discussions that had gone on prior to me seeing the first version.

[63] **Mr Buffin:** On the discussions in the development of the sustainable housing LCO, we were focusing on specific policy areas. We considered whether exceptions would be

necessary, but it did not arise.

[64] **Jocelyn Davies:** I draw your attention to matter 11.6 in my LCO, where it refers to the provision of advice and non-financial assistance. As it is non-financial assistance, you did not need an exception for housing benefit, for example. It is just that the way that it is expressed in fact means that you do not need to list an exception.

[65] **Janet Ryder:** Would I be right in saying that, because the housing LCO is very narrowly drawn and specific, it was not considered necessary to include any exceptions?

[66] **Jocelyn Davies:** Had we had something as broad as affordable housing, there would have been a need to know what was in and what was out; you would be making legislation that affected people, so you would have to know where the edges were. However, because it is very specific—I would not say that it is narrow—and phrased in a way that mentions non-financial assistance, you do not need the exception, which would obviously be housing benefit.

[67] **Jane Davidson:** If we go back to the environment LCO, what we did there, at the very beginning, was to replicate, almost word for word, Schedule 7 in relation to the environment. That was quite deliberate, on the grounds that there were areas where we had executive competence and in-principle agreement from the Department for Environment, Food and Rural Affairs—Hilary Benn, in particular—about moving forward on that basis, and therefore, although we knew that there would be exceptions because of where those matters interlinked with other departments, we knew that we had in-principle policy agreement using terminology that was in the Government of Wales Act 2006.

[68] **Janet Ryder:** So, were you expecting exceptions to your LCO?

[69] **Jane Davidson:** Absolutely. We must remember that this was the very first LCO. Initially, we outlined eight exceptions ourselves in the full knowledge that, in discussion with the UK Government, there would be more in order to ensure that territorial boundaries of UK Government departments were adequately reflected in the outcome. It was a big learning curve, because it was a big and broad legislative competence Order covering those matters expressed in Schedule 7.

[70] **Janet Ryder:** You outlined the initial exceptions; they were not outlined to you from—

[71] **Jane Davidson:** We outlined the initial exceptions and put them in front of the first committee that considered this issue.

[72] **Janet Ryder:** You said in your submission that putting exceptions that would apply to all matters in a separate list of floating exceptions means that the Schedule is less cluttered and repetition is avoided. As I said, we have taken evidence from a wide range of people and one of those people was David Lambert from the Law Society and the Wales Governance Centre. David Lambert said in his evidence that he would find it extraordinarily difficult to understand exactly the legislative powers of the Assembly, particularly given that you now have three parts to Schedule 5. Part 1 covers the matters, for which there are exceptions. Then, there are exceptions to the exceptions. Part 2, which covers general restrictions also, has general exceptions and then exceptions to the general exceptions. Part 3 covers exceptions from Part 2. May I ask you both to what extent do you agree that, despite listing all floating exceptions in one place, Schedule 5 remains complex and difficult for users to understand?

[73] **Jane Davidson:** The precise details of the LCOs are the product of detailed discussions with Whitehall departments. If we look at the policy intent, which is what I am

interested in as a Minister, the outcome has not changed from the initial LCO and the expression in relation to using Schedule 7, although the way that it is now drawn satisfies the lawyers. As a Minister, I am interested in making sure that it satisfies our lawyers in the context of the legislative process, but we are in a new legislative territory. I am keen to work towards a simplified legislative settlement, but that will require a shared interpretation between the Assembly Government and the departments in Westminster.

[74] Earlier, I made the point that we had to deal with eight departments. The Department for Environment, Food and Rural Affairs was the lead department and the relationship and the ease with which we have related to DEFRA has been clear, both in official and political terms. We had to deal with DEFRA, the Department for Transport, the Department for Business, Enterprise and Regulatory Reform, the Ministry of Defence, the Department for Work and Pensions and the Department of Communities and Local Government. BERR separated into the Department for Energy and Climate Change and the Department for Business, Innovation and Skills, so we then had to deal with DECC and BIS.

[75] Every time an exception, or an exception to an exception, was proposed, it had to do a Jarndyce versus Jarndyce run inside the Whitehall departments. There were different Ministers, and Ministers and departments changed responsibilities during this process. To some extent, this LCO was a victim of being the first LCO to be taken forward. The arrangements that were instituted with guidance note 16 in July 2008 were not in place then, and although there was a policy agreement between myself and Hilary Benn, he could not speak on behalf of the other departments. It meant that the Wales Office had to do some active work in talking to departments and taking the elements forward.

[76] It is worth noting that, once we reached agreement on a Government-to-Government level, which was not until May 2009—that is what took the time—the process, from the time that it went to the Welsh Affairs Committee in June 2009 until it came out of the parliamentary process, was as quick as any other LCO. The issues regarding this LCO were about the Government-to-Government engagement and the complex issues in relation to the need of the UK Government to protect its responsibilities

[77] **Janet Ryder:** Before I ask Jocelyn Davies to respond, I would like to ask a question. You have stated that the process became swifter once there was an agreement on a Government-to-Government level. You also stated that having a shared interpretation was important. Can you explain what you mean by shared interpretation? At which point in the process do you think that shared interpretation needs to be reached in order to improve the system?

[78] **Jane Davidson:** My understanding is that, before an LCO is put forward now, there is a shared interpretation between the Assembly Government and the UK Government. That starts a process that will then go through the proper parliamentary and Assembly scrutiny process. With this LCO, although there was a shared interpretation between myself and Hilary Benn of the fact that we were looking for legislative competence in areas that were specified under Schedule 7, when lawyers in other departments started looking at what that meant in relation to their Ministers' responsibilities, there were a number of hold-ups.

9.30 a.m.

[79] The UK Government was supportive of the intent all the way through; that never stopped. The issue was about looking at the implications of the intent. There were particular issues for BERR and DECC, because they were acutely conscious that, as an Assembly Government, we have continued to seek powers on energy. They wanted to make absolutely sure that there were not any back-door powers on energy coming through the LCO.

[80] **Janet Ryder:** I suspect that we will have to put an appendix to this report with all the abbreviations that people are using. Jocelyn, would you like to add anything?

[81] **Jocelyn Davies:** From a ministerial point of view, when you decide to make a bid for legislative competence powers for the National Assembly, the number one aim, as the Minister said, is to be able to do what you want with regard to policy. The question of whether it will make Schedule 5 more complicated is not your top priority; it is getting the powers to do the things that you want in order to develop policy. If you saw the technical guide to the National Assembly for Wales (Transfer of Functions Order) 1999, it was substantial. Maybe not many people in this room looked at it. I know that some Members did and, I have to admit, I had my own copy. It was very complicated and it did not allow you to guess whether something was included. However, now, we have more of a feel of the situation, but when you are talking about passing legislation that affects people's lives, you need clarity about what is in and what is out. Otherwise, if it is complicated for lawyers to work out whether things are in or out, it is even more complicated if you are going back and forth to the courts because there are challenges to whether things are in or out. You need to have clarity. This is not perfect and it is not a creation of the Assembly, but we manage with it; we have to. We have no choice. You want to get your policies through, you want the Assembly to have a fair amount of legislative powers, and the way in which the Schedule is being populated and how complicated it is is not your top priority.

[82] **Jane Davidson:** The Deputy Minister referred to powers being conferred on the Assembly. Conferring powers through legislative competence Orders on the Assembly is a different process, as opposed to conferring executive competence on Ministers. That was a completely new concept for the UK Government in the context of our LCO on the environment. We had the executive competence and we were deliberately looking to ensure that there was legislative competence in areas where we had executive authority already.

[83] **Michael German:** I want to pursue the problem about the other Government departments. To put it in the context of Schedule 5, field 5 is on education, it has 18 matters in it, and it runs to four pages. Field 6, which is on the environment, has five pages but has only four matters in it because there are so many exceptions. You have explained the difficulties in the past and today about having to deal with different departments. Can you tell us about the difficulties that you experienced? Were they difficulties between civil servants, or were they about civil servants in other departments not understanding? What were the principal objections or difficulties that you had to overcome with other Government departments, apart from those in relation to the environment LCO?

[84] **Jane Davidson:** As I have said on a number of occasions, the first LCO that we put forward to the UK Government was, as it turned out, a complex one as regards the number of departments that needed to be engaged in signing it off. This meant that the absence of a previous working arrangement for how one would resolve any issues—whether they were ministerial or official—meant that they were often put into a 'too-hard' box when being discussed by officials or lawyers. As Minister, I would then have to seek a ministerial meeting to reopen negotiations. However, it is important to say that at no point was the UK Government hostile to the principle of devolving these powers. We had an in-principle agreement from Hilary Benn, which will have been authorised through the Cabinet; it was the mechanism for delivery that had to be teased out. There were also a number of active issues being pursued by all of those departments, which were priorities for officials. Sometimes, I had to use ministerial engagement to put the subject back on the agenda. However, we succeeded and got the outcome that we wanted, which was the LCO that enabled us to move forward with the proposed Measures. We have, of course, put the proposed Measure, in its first stage, before the Assembly. As the Deputy Minister said, Ministers want to be satisfied that the proposed Measure works legally, but the issue is of policy intent and of having the legislation in place to enable us to carry out our policy imperatives as Ministers.

[85] **Michael German:** We are trying to investigate the ‘too-hard’ box that you mentioned, and we had an interesting discussion on this issue last week with the Permanent Secretary. Could you explain how you arrive at something being put into a ‘too-hard’ box, and whether that has altered as a result of taking this LCO through? What changes have there been in the relationships between civil servants to make this process smoother?

[86] **Jane Davidson:** Taking the latter point first, I definitely think that it has altered, in the sense that the experience of taking this complex multidepartmental, multimministerial and multi-official LCO through has contributed to the development of devolution guidance note 16. This note was developed halfway through our process by the UK Government, with input from the Assembly Government, to make sure that a number of issues were resolved prior to the LCO going through the scrutiny processes. Our LCO was also scrutinised serially and not at the same time, which is the intention now. So, in a sense, we took through a practice LCO. However, I am confident that, were we to put the same LCO forward now, the process would operate according to adopted procedures that are working far more effectively. I ask Elisabeth and Prys for their comments, because there were issues when dialogue between officials and between lawyers became time consuming, not least in departments that had no experience of working with a devolved government.

[87] **Mr Davies:** In some discussions with the UK Government and other partners, there was not always a full understanding of the current powers that Welsh Ministers have. We spent a bit of time trying to amplify and explain the current functions that Welsh Ministers either undertook or could undertake under their current executive powers. It took a while for some departments that were approaching an issue from their particular perspectives—not necessarily a waste or pollution perspective, but, say, an energy perspective—to understand the breadth of powers that Welsh Ministers currently have and the things that they could do. Some departments took a while to understand that, within the context of the discussions on the LCO that would then confer competence on the Assembly. So, there were factual issues that took a while to bottom out.

9.40 a.m.

[88] **Michael German:** I move on to one of the methodologies for trying to improve matters in relation to exceptions. The only problem with a floating exception that I can conceive is that sometimes an exception is applied to a matter that does not exist, or to a field in which there is no matter. That means that an exception is put in before you have any legislative competence in the area. In a reply to a joint letter that I wrote with the Chair of the Welsh Affairs Committee to the First Minister at the time, who is sitting down the road from me here, he referred to a sequence of considerations that needed to be gone through before a floating exception was added to Schedule 5. Can you talk us through the sequence of considerations as you see it, and whether that made an improvement to the process before you would accept a floating exception into your LCO?

[89] **Jane Davidson:** As the First Minister outlined in that letter, which I have subsequently talked through in the Welsh Affairs Committee and also in Plenary session, the first step is that if a new matter that is proposed to be added to Schedule 5 creates a need for a new exception, and if that exception is relevant to more than one matter—and an example would be the transport exceptions contained in the environment LCO—and if it is clear that that exception should apply across the board because the exception describes something that remains the responsibility of the UK Government and Parliament in all circumstances, and will remain so for the foreseeable future—and one might use social security as an example there—if all of those principles apply, the exception should logically be a floating exception, which means that you do not have to repeat it in every single context and make the exceptions in Schedule 5 very bulky and detailed.

[90] The issue around exceptions generally in the context of my LCO was a matter of great interest during every process of the democratic debate, not least because of the way in which we had to engage with so many departments. At the other end of the spectrum, we had a proposition that agricultural and forestry tractors should be included as a specific exception, which we ultimately removed. However, it showed the range of areas that people were looking at to see what the appropriate mechanism was to define an exception in the context of the LCO. From a non-legal perspective, if we are in those areas where that sequence has been described and we know that it is absolutely clear where the legislative competence is firmly seated in the UK Government, and will remain so for the foreseeable future, the floating exception becomes an easier way of acknowledging that rather than using fixed exceptions.

[91] **Michael German:** Are the three sequences ‘and’, ‘and’, ‘and’? In other words, do you have to fulfil all three sequences before you can get to a floating exception?

[92] **Jane Davidson:** Absolutely.

[93] **Michael German:** In which case, on the last one, which says that it is agreed that this responsibility is one of the UK Government and Parliament’s responsibilities in all circumstances, does the ‘all circumstances’ relate to the current settlement or to a referendum on Schedule 7?

[94] **Jane Davidson:** It is in the current settlement, and will remain so for the foreseeable future. Legislation can always be changed, but you can only operate from where you are in the context of legislative competence. If it was an area where we were seeking legislative competence and were likely to gain it, you would not put floating exceptions on those areas in a legislative competence Order. However, where it was clear in the immediate future—which is all that we can look at as politicians—that we were not going to get an area devolved, and therefore it remained as an area of competence for the new Government, and would remain so for the foreseeable future, then floating exceptions seem to me the most sensible approach. I will ask Elisabeth if she has anything to add to that.

[95] **Ms Jones:** No, nothing at all, except that the committee will see in the environment LCO that there are fixed exceptions that apply to more than one matter. So, illustrating what the Minister said, all three principles have to apply cumulatively.

[96] **Michael German:** On the issue of ‘all circumstances’, you were originally applying for the Schedule 7 competence in the competence that you were seeking, but ‘all circumstances’ meant those prior to a referendum. Given that Schedule 7 was a foreseeable circumstance, you might have said that we should have it because it would happen anyway if Schedule 7 comes into force. I presume that ‘all circumstances’ does not apply if there is a referendum and Schedule 7 is put in place.

[97] **Jane Davidson:** I would be interested to hear Elisabeth’s view, but I would just say that my understanding is that those words outlined in Schedule 7 will still need to be legally clarified in the context of what powers come to Wales post referendum. In a sense, what we have done through this environment LCO is clarify those elements of Schedule 7.

[98] **Ms Jones:** From a detailed, technocratic point of view, we had regard to Schedule 7 and to the potential future transfer of fuller primary powers to the Assembly when we were negotiating this LCO. We did not want to advise the Minister in a way that would create problems for that future competence. We had regard to the way that exceptions were phrased in Schedule 7, and where we were deviating from that wording or adding more detail to that wording, that was carefully thought through. So it was regarded as a foreseeable circumstance.

[99] **Jane Davidson:** The clearest answer is that we have protected a post-referendum situation in the way that this LCO has been drafted.

[100] **Alun Davies:** Thank you for the evidence that we have received. In the process that we have been through, the decisions taken, and where we are today, you have both been through some pretty horrific experiences, as far as I can see, in this legislative process. Three years into the third Assembly, we still do not have any Measures deriving from this area of legislative competence. We all have views on the process, which we have expressed elsewhere, but, as for the Ministers, Jocelyn, you were very clear in an earlier answer that you were talking about outcomes, and wanting to deliver manifesto commitments and that the process was something to be gone through to reach that objective. I would like to test, if I could, the role that you both played in that. You both said in your evidence, in your different ways, that you do not wish to comment on the details of negotiations with Ministers and others in London. I accept that, and I would not seek to ask you to do so. However, could you in more general terms explain the roles that you both played as Ministers in the negotiations with Whitehall, and how you would characterise those negotiations?

[101] **Jocelyn Davies:** I have met a number of UK Ministers and I have had absolutely no problem in arranging meetings. However, I have had a similar experience to Jane in that there have been a number of housing Ministers in the last three years at UK level, and that obviously causes delays, and you have to build up relationships over time. We started with Yvette Cooper, and then we had Caroline Flint, and then Margaret Beckett, and now there is John Healey; I have had no problem in having discussions with any of them—it has not been difficult, but it does take time, and you have to explain things all over again. There have also been changes at the Wales Office in that time; I would say that there have been three Secretaries of State, but one of them has done the job twice. In the very early days, my discussions were with Huw Irranca-Davies, and now they are with Wayne David, but even though I am in a slightly different position from Jane, because these people are not members of Plaid Cymru, that has made absolutely no difference, and I would give anyone my assurance that I have had full co-operation, but it takes time and you have to take a few steps backwards in order to start explaining again.

9.50 a.m.

[102] I imagine that the officials would back me up on that as regards having to start again. On housing, in the very early days, there was a major piece of legislation that was, obviously, the focus of officials' attention. In the same way, if I had a major piece of legislation to deal with here, that would be the focus of my attention and that of my officials. So, there have been diversions, I suppose, but, on the whole, I have no complaints at all on a political level with the co-operation that I have received from the UK Government or the Wales Office.

[103] **Jane Davidson:** I would add to Jocelyn's list of Ministers John Hutton, Malcolm Wicks, Ed Miliband, Phil Hunt and Joan Ruddock. Huw Irranca-Davies was a key figure, because he moved from the Wales Office to the Department for Environment, Food and Rural Affairs and so was able to help to explain to DEFRA officials the context of what we were looking for. He also was important because he took the Marine and Coastal Access Bill through, which had a very important interrelationship with our legislative competence Order. Had we not had Huw in that position, we would have had further delays with the issues that had to be resolved around the very substantial powers that Wales has acquired as a result of that Bill. The fact is that we changed what we were doing in the LCO to put our efforts into getting the additional powers and responsibilities articulated properly through the Marine and Coastal Access Bill.

[104] **Alun Davies:** Thank you. I am assuming that your role as Ministers was an ongoing

role rather than simply one of giving an introduction to a new Minister. I am assuming that your role was also that of a troubleshooter when a difficulty occurred that could not be resolved by officials. I assume that you would both speak to your opposite numbers in Westminster, saying, ‘We are having these negotiations; this is what we are trying to achieve’ and so on. Am I right in that interpretation?

[105] **Jocelyn Davies:** I do not know about being a troubleshooter, but explaining things on a political level was certainly important—because politicians are always interested in policy, are they not? Politicians are always interested in the basis of policy and the reasons for it. I would not use the word ‘troubleshooter’, but we certainly helped in explaining things.

[106] **Jane Davidson:** I think that the Wales Office was crucial, because, when we were in a situation where resolving a delay was proving to be complex, it was very easy to have a word with the Wales Office and ask it to look at whether the delay could be addressed and at whether it could be addressed just by Wales Office intervention or could be better addressed by a ministerial meeting. So, I absolutely agree with Jocelyn that it was not so much a case of troubleshooting, but that it was important to have a relationship with each of the Ministers who had the direct responsibility for agreeing to the particular element of the LCO. Given that there were substantial numbers of UK Ministers and substantial numbers of departments involved, it was a long process. That is why I think that the new arrangements are so important in clarifying a number of these issues early on, setting out the proposition for consideration in both Houses.

[107] **Jocelyn Davies:** When you have discussions with officials about the detail in which they are negotiating with their opposite number—over the use of perhaps just one word—you realise that the detail they get down to is quite extraordinary. That can take a very long time. If someone comes into the Wales Office during this process, you cannot expect him or her, unless he or she has been a Minister for, say, housing, to know about the subject in the level of detail that is sometimes required in these discussions. Explaining all of that takes time. If you are the Minister responsible for housing in the UK Parliament, you may not have been following very closely the developments in housing in any of the devolved administrations; you would probably have enough on your plate to be following in detail. All of the explaining required takes time.

[108] **Jane Davidson:** There were big Bills going through Parliament at the time, not just in housing, but in DEFRA, and, in the Department of Energy and Climate Change, there was the Climate Change Bill and lots of legislation on energy. The point about detail is critical. I said a few moments ago that we had removed the exception about agricultural and forestry tractors, but I am told that we did not, and that that remained in the legislation. We raised the issue with the UK Government, but it proved to be too intractable in light of the timetable for agreeing the LCO. Even though the recommendation was for that to be taken out, once it went to the Welsh Affairs Committee, I did say that it would involve another set of write-arounds, which would delay the process again. It was a small price to pay, which now means that you have a proposed Measure in front of you, which is what I was aiming to achieve.

[109] **Janet Ryder:** You have both mentioned the difficulties or issues that can be created when Ministers at the other end change frequently. From what I understood, Jocelyn was saying that it was the background knowledge of the subject of the person coming in that was important to how the negotiations went. As well as that, to what extent does the whole negotiating system rest on the personal relationship that you can create between you and the relevant Minister at Westminster?

[110] **Jocelyn Davies:** I have had no difficulty in discussions with those individuals. We have not had a close relationship, exactly, because they are not people whom I know personally, but there is a feeling that it is an environment in which we can have full and frank

discussions and that they will do their best to facilitate what we want. I do not know whether others have had the same experience, but I have had no problems at all, even though we are not from the same political party. When going to the Wales Office to sit down and have discussions with, for example, Wayne David, I have never felt that there has been any barrier to having discussions that will be as helpful as they possibly can be. You do not have a lot of time to create relationships if you have a meeting with a UK Minister, for example. In fairness, John Healey was prepared to come here to meet with me, and we spent some time together, but he had come from the Treasury and so had good knowledge of housing finance and so on. So, we were not starting from scratch on day one, explaining what everything was. I do not think that you need to have prior friendships with people, but you need to go with the right approach, Chair. I have honed these skills over the past three years by having discussions with the leaders of local authorities in Wales, and I am prepared to put a great many things to one side if the intention is to facilitate the process—as are other people, once you start having the discussions.

[111] **Janet Ryder:** Given what you have just said, if there were to be a change of Government at the other end of the line, would you anticipate any problems occurring?

[112] **Rhodri Morgan:** That is a very unnecessary question. [*Laughter.*]

[113] **Jocelyn Davies:** If there were to be a change of Government, I would do my level best, and I would keep turning up to try to do my level best.

[114] **Janet Ryder:** You have said that it is a relationship, and so it relies on both sides of the table—

[115] **Jocelyn Davies:** Yes. I would go and do my level best. For example, in my relationships with leaders of local authorities and cabinet members for housing, I care not what colour rosette they wear in our discussions, and that can get you a long way. So, to answer your question, until that happens, I am afraid that we will not know.

[116] **Jane Davidson:** The critical issue is whether we are engaging with a Government that, in principle, wants to support the devolution of powers to the Assembly, and what we have experienced so far is a Government that is content in principle to devolve certain powers to the National Assembly. I say ‘certain powers’ because we have been very clear about our wish to have the energy powers devolved, but we were unsuccessful. However, in the context of the process on the LCO, the UK Government was entirely content to devolve the powers, as the letter from Hilary Benn at the beginning of the process made clear, but there needed to be mechanistic, legalistic and technical negotiation for delivery. If we were operating in an environment in which there was support for devolution, I cannot see there ever being a problem with Assembly Government Ministers of whichever party working with a UK Government of whichever party. However, if the Government were to be obstructive about the devolution of powers, it would fall at the first hurdle—in fact, there would not even be a hurdle because it would be clear that there was an antagonistic view taken of Wales acquiring extra powers.

10.00 a.m.

[117] **Janet Ryder:** I apologise for interrupting your question, Alun.

[118] **Alun Davies:** I want to keep us here until after lunch. [*Laughter.*]

[119] My question is about the role of the Wales Office, which you have both referred to this morning and in your written evidence. It is not often that we receive written evidence from two Ministers, and the danger of reading them both side by side is that we will

overinterpret them. Jocelyn, you described the Welsh Office as having a ‘useful facilitating role’, and Jane said that it had an ‘important facilitating role’. The papers are very different in their tone. Was that borne out of your experiences of the role of the Wales Office? Perhaps you could characterise the way in which the Wales Office works alongside the Assembly Government and Whitehall departments in cutting through some of the difficulties that you described.

[120] **Jocelyn Davies:** Most people assume that housing is already devolved, and so there is probably less difficulty with devolving housing powers than was Jane’s experience, perhaps, as she was going bravely where others had not gone before. I have absolutely no complaint about the Wales Office. Jane mentioned the word ‘critical’ and perhaps we should have decided that we would use the same word earlier. It had an important role to play, and I knew that if I had any problems I could pick the phone up and speak to Wayne David or the Secretary of State, and there would be no problem at all with that. They understood clearly what we wanted to do within housing in Wales, because, to be fair, they also represent Welsh constituencies. In fact, constituency MPs also write to me from time to time about housing matters. So, they knew exactly what we wanted to do and why we wanted to do it. It was an important role in ensuring that, when this write-around happened, things had been smoothed over.

[121] **Jane Davidson:** I also saw it as having an important role. I would describe exactly the same experience as Jocelyn’s but, because my LCO related to so many UK Government departments, it was very important for me to have the Wales Office involved, because of its engagement with the other departments, as we did not have that relationship.

[122] **Jocelyn Davies:** I do not know whether the officials have anything to add to that, because there is communication at official level with the Wales Office and other departments. Alun, do you want to hear from them?

[123] **Alun Davies:** I think that we should keep going because I am aware that time is moving on. Hywel Francis gave us some fascinating evidence last week, and his committee has been taking evidence on the relationship between Wales and Whitehall. It is fair to say that the Welsh Affairs Select Committee as a whole has been critical of ‘Whitehall’ in this process and has identified it as being almost obstructionist. The experience that you describe this morning seems to be a frustrating one, created by a process rather than a deliberate sense of obstructionism. Is that fair? How would you respond to what the Welsh Affairs Select Committee has been saying?

[124] **Jocelyn Davies:** I have not read anything that the Welsh Affairs Select Committee has been saying, but I have been aware of dialogues that go on for a seemingly long time between officials about wording, for instance the meaning of something, and sometimes we can end up back where we started. Perhaps Neil could add to that. The situation may be slightly different for me, because of the relationship between officials here in housing and those in the Department of Communities and Local Government, which has been well established over many years.

[125] **Alun Davies:** Sorry, but can I just stop you there? In a previous legislation committee, we discussed the fact that the LCO that you were responsible for piloting came up against some real obstacles. I understand that officials might have an almost personal familiarity from regular working relationships, but I think that it is the only LCO that we have lost because of the process. As a participant and as an observer of the process on the other end of the M4, in Whitehall and Westminster, my impression was that there was almost—and I will try to choose my words carefully—a disciplined opposition to elements of it in both those places.

[126] **Jocelyn Davies:** The discussions about the words were sometimes tortuous, especially when we ended up back where we started. We could say that we were right to begin with, but I am not quite sure whether we ended back where we started because we had been led a merry dance, or because that was just how it turned out and we were right to begin with. I suppose that I will never know.

[127] **Jane Davidson:** The focus has to be on the outcomes. If the process that the LCO on the environment underwent were to start now, it would not be repeated in the same way. If it started now, we would already have the UK Government's agreement to the text before it was laid before the National Assembly, in line with devolution advice note 16. Therefore, it would follow the democratic legislative approach. Previously, officials sometimes just did not have Wales on their radar, particularly in those departments that were not used to dealing with devolved issues. That is where it took ministerial meetings sometimes just to put things back on track. It was clear, from my experience, that there was no opposition from the UK Government to the devolution of these powers, and, once we used ministerial meetings to get things back on track, they did go back on track. Before the Department for Business, Enterprise and Regulatory Reform became the Department of Energy and Climate Change, we thought that we had got there, but, with the change of responsibilities and another set of UK Government Ministers, we had to go back. That was a particularly difficult area of negotiation.

[128] **Jocelyn Davies:** You said that the original legislative competence Order on housing failed, but this one is broader. It contains everything that was in the first one and much more. However, an overwhelming case was put, with the two and a half years of policy work that had gone into it. We said, 'We want these powers and this is the evidence for it', instead of, 'These are our manifesto pledges'. You would imagine that that would be a very powerful argument, but it was not as powerful as solid policy work and the support of the entire housing sector in Wales.

[129] **Alun Davies:** You would normally regard a democratic mandate as sufficient.

[130] **Jocelyn Davies:** You would.

[131] **Janet Ryder:** We will move on to William Graham's questions now.

[132] **William Graham:** Jane, in your evidence, you gave several reasons for the delay in the passage of the LCO on the environment, including the novelty of the process, the need to negotiate with a number of Whitehall departments—and you have touched on that today and told us that there were at least eight—and the need to resolve technical and legal matters arising from the

[133] 'complex interface between devolved and non-devolved issues'.

[134] Can you explain how the novelty of the process slowed the progress of that LCO, particularly in respect of Whitehall departments wanting to ensure that they understood what was being proposed?

[135] **Jane Davidson:** We have rehearsed this at some length before this committee. I remain convinced that the novelty of the LCO had an impact on the length of time, in the context of that large number of UK Government departments dealing with the issues. It was also about the scope of the LCO, because there was a large number of technical legal issues about the scope of the competence. As Elisabeth Jones has already said, sadly, our officials had to spend many hours explaining to their colleagues at Whitehall exactly what powers the Assembly Government had in these areas before they could consider how the devolved competence would operate.

10.10 a.m.

[136] **William Graham:** Someone had to be first, as it were.

[137] **Jocelyn,** what impact did the novelty of the legislative competence Order process have on the passage of the housing Order and what differences, if any, can you recall between your experiences with the affordable housing Order and the current Order?

[138] **Jocelyn Davies:** I would not disagree with some of the things that Jane said. Perhaps the explanatory memorandum for our first Order went into far too much detail about what we might do in the Measures and, because it did, invited scrutiny on the Measures. This time, we decided to outline what powers we already had, which clearly demonstrated where the ones we were asking for fitted in. From our point of view, that was more logical and it was easier to see why we were asking for these powers. If you were the Deputy Minister for housing, and you were sitting in front of a committee of MPs who represent Welsh constituencies, the temptation for them is bound to be to question you on policy and what your intentions were, in the same way as the Assembly committee did. So, much of the discussion was about what we intended to do rather than whether it was appropriate for these powers to come to the Assembly. That was a temptation that we all fell into.

[139] **William Graham:** Finally, what is your experience of seeking approval of the LCOs in Parliament generally?

[140] **Jane Davidson:** As I said earlier, once it went through the Welsh Affairs Committee, the process was very quick. In addition to what Jocelyn just said about how we were scrutinised, it is worth saying that I remember clearly that, when I was scrutinised for the first time that I put the LCO in front of the committee in 2007, the Chair had to be clear to members that members of the opposition were to look at the issues around the scope of the competence, not to continue to ask questions about what Measures the Assembly Government would bring forward on the back of the LCO. By the time that I got in front of the Welsh Affairs Committee, although it was the first LCO, it was not the first LCO to be debated by the Welsh Affairs Committee, so the scrutiny was clearly about the scope of the competence. We gave a broad indication of the initial areas in which the Assembly Government would present proposed Measures for the Assembly's consideration, but we made it clear that they were illustrative examples of legislative proposals. The committee did not look at the merits of those proposals, but properly looked at the issues around competence. However, it found that approach useful. Earlier on, the Welsh Affairs Committee might well have scrutinised the potential Measures, in the same way as was experienced with other LCOs.

[141] **Jocelyn Davies:** I do not think that that was confined to the Welsh Affairs Committee. My second Order has not passed yet, so I cannot tell you whether it will be successful or not, although I understand that it has been to the Joint Committee on Statutory Instruments, which raised no points this time. You will remember that, last time, we withdrew it after points were raised there. However, the timing of debates at Westminster is not a matter for us; it is completely out of our control, because of the general election. So, the only way that this could now proceed would be if it goes into the wash up and I suppose that I should put the question to you, William, rather than you putting the question to me, because it will be a matter—

[142] **William Graham:** See me after.

[143] **Jocelyn Davies:** Okay. I believe that the UK Government will be pleased for this to go into the wash up, so it will be a matter for the opposition parties in Westminster. If it fails to go into the wash up, we will start negotiating with the new Government after the general

election.

[144] **Janet Ryder:** The final set of questions is from Rhodri Morgan.

[145] **Rhodri Morgan:** On the question of the tidiness and intelligibility of Schedule 5, I am interpreting an earlier remark by Jocelyn Davies—correct me if I am wrong—in which you said that, so long as you as a Deputy Minister get the powers that you want, keeping Schedule 5 simple, intelligible and so on is not at the top of your priorities. The contrary argument that has been put to us is the one that Janet Ryder, the committee Chair, quoted to you earlier from David Lambert. We could use the very harsh criticisms of the LCO procedure of Emyr Jones Parry, chair of the All-Wales Convention, based on his experience and the evidence that the convention had taken that Schedule 5, as the crux of the LCO procedure, is not really a suitable vehicle because you are describing the constitution of a country—in other words, what powers the Assembly has and does not have.

[146] How do you resolve this issue that each Minister may get what they want via the housing LCO or the environment LCO, but that there is a cumulative Heath Robinson contraption effect building up within Schedule 5 and that, one way or another, this committee should at least be trying to look to the issue of tidiness, intelligibility and user friendliness for lawyers and other people who want to look at the powers in a particular Bill and Schedule 5 to see what is devolved and what is not?

[147] **Jocelyn Davies:** Obviously, the top priority is to try to achieve your policy aims or any promises that you have made. With legislative competence Orders, you should always ask for more powers than you actually need, because you are getting those powers for the Assembly and the Assembly would have absolutely no choice but to either agree or disagree with you, rather than being able to suggest anything else. You do try to futureproof it. The system is not simple. I can imagine what would be said if you were having those meetings with UK Ministers and you said, ‘I want these powers because I want to keep the Schedules neat’. There is no way that you can have law without some politics in it. We are a long way from having a discussion where the argument for powers to keep the Schedule neat would carry any significant weight with UK Ministers.

[148] We would not want to go back to the 1999 settlement, with the technical guide that I mentioned earlier, when we ended up with Schedules that were as complicated as they had been in the past. That was one of the reasons why we have moved on to reach this point. I guess that it would not be my top priority, but if I could put the argument that we wanted to keep the Schedules neat, knowing that it would fall on fertile ground, I would be very happy to do so. However, I do not think that I am in that position.

[149] **Jane Davidson:** I think that the clarity of law is a matter for lawyers. The issue for us is about making sure that we have the policy intent enshrined appropriately in law and that we have an explanatory memorandum that people can understand. We are a way from that as well. I have not seen completely positive comments about our explanatory memoranda to date, but I think that that is the mechanism whereby we can be clearer about bringing together the political purpose and the legislative outcome.

[150] **Rhodri Morgan:** I think that everybody accepts that an explanatory memorandum is definitely a memorandum, but is very rarely explanatory of anything, because people are fearful of creating doubt. Our lawyers are fearful of creating doubt, so they do not say anything much at all, or the memoranda are unhelpful. They always have been and probably always will be.

[151] I do not know whether you have read any of the other evidence that we have taken. The Welsh Affairs Committee gave evidence in writing, but that was also backed up in the

oral evidence given by Hywel Francis, chair of the committee, and Paul Evans, principal clerk to the select committees. They were almost dismissive of the criticisms of Sir Emyr Jones Parry and David Lambert who had said that Schedule 5 was far too complex, even lawyers could not look at Schedule 5, and that there were exceptions to the exceptions and exceptions to the exceptions to the exceptions and so on.

10.20 a.m.

[152] It is not more complex than other legal processes, and if you want Schedule 5 to read simply, like the 10 commandments, then you are in fairy land. You must expect this to be a fairly complicated area. It will not be like the 10 commandments, so live with that, and get on with it, and stop complaining. A decent lawyer will be able to comprehend whether something is devolved or not.

[153] **Jane Davidson:** The critical area for us is that the process is not complicated; the complication relates to Orders requiring agreement in two legislatures. In the context of the way that the House of Commons interrelates with the House of Lords, there are long-established procedures governing their relationship. We do not have a long-established procedure for our relationship with Parliament. You could say that there are three legislatures involved, because you have the House of Lords element, the House of Commons element and the National Assembly element, as well as the Government perspective. We are in complex territory given the interrelationships between elements of the process, but the process is laid out very clearly now.

[154] In the context of the environment LCO, once we had got ministerial agreement, the process itself moved extremely quickly. We had useful and authoritative recommendations from both the Constitutional Committee of the House of Lords and the Welsh Affairs Committee.

[155] **Rhodri Morgan:** As for this business of having discussions at official and ministerial level to clarify what Wales was asking for, Prys Davies, as an official, mentioned that one of the difficulties was that Whitehall Ministers did not always understand what was already devolved as executive powers to the Welsh Ministers. I wanted his further observations on why Whitehall Ministers would find it difficult to comprehend what was already devolved to Welsh Ministers, so that we could then argue that the legislative powers fit with what is devolved. They seem to not be aware of the fact. Secondly, there is the point that Jocelyn made—that the frequency of reshuffles, promotions and so on in Whitehall causes difficulties because it means re-explaining the policy intent to new Ministers roughly once a year. Ministers for housing are almost like FA chief executives in the rate of turnover. However, if the officials can explain to the incoming Minister more clearly what is already devolved by way of executive functions, it should not matter too much, provided that there is not an attitude problem towards Wales. You are saying that, on no occasion, despite the frequency of reshuffles, did you encounter an attitude problem.

[156] **Jane Davidson:** No.

[157] **Jocelyn Davies:** No.

[158] **Rhodri Morgan:** So, no-one was thinking that they did not want to be bothered with devolution because it is a boring topic, and there are no votes in it for Westminster politicians.

[159] **Jocelyn Davies:** What I would say, Rhodri, is that when a new Minister comes in, they have their own priorities. I doubt that any incoming Minister at Westminster will have a detailed knowledge of what has been going on in any particular devolved area in Wales. They might do if they represent a Welsh constituency, but otherwise, they might not, and that takes

time. You go forward a few steps and then back one, and so you start again. However, I have not detected any barriers; it is just that it takes time to explain exactly where you are going.

[160] **Rhodri Morgan:** Could Prys make an observation on why he thinks that Ministers in Whitehall do not get a proper briefing? Are they just reluctant to concede that some executive functions have been devolved?

[161] **Mr Davies:** Just to clarify what I mentioned earlier, I do not think that it was a question of Ministers necessarily not understanding—it was at an official level.

[162] **Rhodri Morgan:** Indeed.

[163] **Mr Davies:** There are official-level discussions that we have in negotiating the Order. As to why they did not understand, this issue had not been raised with them before—it was a new issue for them to be asked to consider whether powers should be conferred upon the National Assembly. Some of the departments were coming at this Order from their own particular agenda—I am not talking about DEFRA here, but other departments with an interest in the Order. They were not very familiar with the process—it was a new process—and they were not necessarily very familiar with the extent of the powers that Welsh Ministers already had. They are probably asked to cover a whole range of issues in their portfolios, so it is a matter of us explaining to them and clarifying the range of powers that we could have, so that they could then better brief and understand their own position.

[164] **Rhodri Morgan:** However, housing is the longest lasting devolved area of responsibility. When the Welsh Office was formed in 1964, it was almost a branch office of the Ministry of Housing and Local Government. Housing has been a devolved matter in administrative terms for 46 years.

[165] **Mr Davies:** I think that the discussions on the most recent housing LCO were much quicker and clearer on this matter. The same was not necessarily the case with the environment Order or with the whole range of Government departments.

[166] **Janet Ryder:** Thank you, Ministers, for coming in this morning. Is there anything that either of you would like to add that you think we have not touched on today? I see that there is not. Thank you very much for your time. It was a very interesting session. There will be a transcript for you to check for accuracy. We have not asked for any further information, so thank you very much for your time this morning.

10.26 a.m.

CA425—Rheoliadau Dŵr Mwynol Naturiol, Dŵr Ffynnon a Dŵr Yfed wedi'i Botelu (Cymru) (Diwygio) 2010
CA425—The Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) (Amendment) Regulations 2010

[167] **Janet Ryder:** We now move on to item 5. We will be joined by representatives of the Food Standards Agency. The questions have not be allocated, Members, so you should just indicate that you wish to join in.

[168] I thank the witnesses for joining us this morning. I am sorry that we have kept you waiting and started a little later than anticipated. We return to the issue of the Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) (Amendment) Regulations 2010, which is the crux of what we want to discuss with you this morning. This impinges on discussions that we had last year on these same regulations. May I ask you, first of all, to

introduce yourselves for the official Record? I will then ask Gwyn Griffiths, our lawyer, to introduce the item.

[169] **Mr Partridge:** My name is Mark Partridge; I am the deputy director from the Legal Services department with responsibility for the team that deals with these regulations.

[170] **Mr Wilkins:** My name is Rob Wilkins and I work at the Food Standards Agency's Cardiff office in the general enforcement team.

[171] **Mr Blake:** My name is Keith Blake and I work for Rob on the general enforcement team, and I deal with the bottled water regulations.

[172] **Janet Ryder:** Thank you. Gwyn, would you like to set the scene for us?

[173] **Mr Griffiths:** Diolch, Gadeirydd. **Mr Griffiths:** Thank you, Chair. As you see Fel y gwelwch o'r adroddiad— from the report—

[174] **Janet Ryder:** I should have mentioned to the witnesses that the translation is on channel 1.

[175] **Mr Griffiths:** Fel y gwelwch o'r adroddiad drafft sydd ger eich bron, dyma'r trydydd tro i reoliadau ar y pwnc hwn ddod gerbron y pwyllgor. Ystyriwyd y prif reoliadau yn 2007 a'r pwynt a adroddwyd ar yr achlysur hwnnw oedd bod y Gymraeg a'r Saesneg yn anghyson yn sgîl y ffaith bod y rheoliadau yn yr iaith Saesneg yn dweud bod yn rhaid defnyddio termau Saesneg tra bod y golofn Gymraeg yn dweud y gellid defnyddio'r termau Saesneg neu'r termau Cymraeg.

Mr Griffiths: As you can see from the draft report before you, this is the third time that regulations on this subject have been brought before the committee. The original regulations were considered in 2007 and the point that was reported on at that time was that the Welsh and English texts were inconsistent, in the sense that the English-language regulations said that the English terms had to be used while the Welsh column said that the English terms or the Welsh terms could be used.

10.30 a.m.

[176] Fel y gwelwn nawr o ddeddfwriaeth Ewrop, nid oedd y rheoliadau hynny yn y golofn Gymraeg yn gyson ag erthygl 16, sy'n dweud bod yn rhaid i'r aelod-wladwriaeth bennu pa un, neu fwy, o ieithoedd swyddogol y Gymuned Ewropeaidd y gellir eu defnyddio i labelu y math yma o ddŵr. Gan nad yw'r Gymraeg yn un o'r ieithoedd swyddogol, byddai labelu yn Gymraeg yn unig yn groes i'r hyn sydd yn y gyfarwyddeb.

As we see now from the European legislation, those regulations in the Welsh column were not consistent with article 16, which states that the member state must determine which one, or more, official languages within the European Community could be used to label these types of waters. As the Welsh language is not one of those official languages, labelling in Welsh only would go against what is contained in the directive.

[177] Daeth y rheoliadau yn ôl gerbron y pwyllgor y llynedd, pan wnaed newidiadau. Effaith y rheoliadau hynny oedd tynnu'r term Saesneg allan o'r golofn Gymraeg a nodi bod angen defnyddio'r termau Saesneg yn unig yn y ddwy iaith. Adroddwyd eto, a gwnaed y pwynt bryd hynny fod y gyfarwyddeb yn caniatáu defnyddio ieithoedd ychwanegol;

The regulations came back before the committee last year, when changes were made. The effect of those regulations was to withdraw the English term from the Welsh column and to note that only the English term should be used in both languages. It was again reported, and the point was made at that time that the directive permitted the use

mae paragraff 3 o erthygl 16 o gyfarwyddeb 2013/EC yn dweud nad yw'r paragraffau blaenorol yn gwneud i ffwrdd â'r hawl i labelu manylion mewn amryw o ieithoedd.

of additional languages; paragraph 3 of article 16 of the 2013/EC directive states that the previous paragraphs do not remove the right to label in several languages.

[178] Ar yr achlysur hwn, mae'r rheoliadau wedi dod yn ôl gan ddiwygio rheoliadau 2007. Yn benodol, maent yn ail-wneud rheoliad 20 yn rheoliadau 2007, gan unwaith eto ei gwneud yn drosedd peidio â chydymffurfio â rheoliadau blaenorol, gan gynnwys rheoliad 8, sydd yn pennu'r termau Saesneg yn unig. Felly, er bod hawl o dan deddfwriaeth Ewrop i ddefnyddio mwy nag un iaith, gan mai cyfarwyddeb yw honno ac nid rheoliad, nid yw deddfwriaeth Ewrop yn effeithiol yn uniongyrchol yn y Deyrnas Gyfunol; mae'n dibynnu ar gael ei rhoi ar waith gan reoliadau domestig. Dyma'r rheoliadau domestig yr ydym yn eu hystyried heddiw, sy'n ei gwneud yn drosedd defnyddio unrhyw derm ac eithrio'r termau Saesneg yn unig sydd wedi'u pennu yn y rheoliadau hyn. Y cwestiwn gerbron y pwyllgor felly yw: pam nad yw'r rheoliadau hyn, sydd wedi'u gwneud gan Lywodraeth Cymru, yn caniatáu defnyddio termau Cymraeg cyfatebol, fel mae'n ymddangos y mae deddfwriaeth Ewrop yn caniatáu?

On this occasion, the regulations have come back again to amend the 2007 regulations. They specifically rewrite regulation 20 of the 2007 regulations, once again making it an offence not to conform to the previous regulations, including regulation 8, which sets out the English-only terms. Therefore, although there is a right under European legislation to use more than one language, because it is a directive and not a regulation, the European legislation is not directly effective in the United Kingdom; it depends on being enacted by domestic regulation. We are considering those domestic regulations today, which make it an offence to use any term except for the English-only terms as set out in these regulations. The question before the committee therefore is: why do these regulations, made by the Welsh Government, not permit the use of corresponding Welsh terms, as European legislation seems to permit?

[179] **Janet Ryder:** It would be of value for the committee if the witnesses could explain for us briefly the relationship between the Food Standards Agency and Welsh Ministers in relation to policy development.

[180] **Mr Partridge:** I am happy to respond, if you are content, and I will ask my colleagues to chip in as necessary. The relationship between the Welsh Assembly Government and the Food Standards Agency is slightly unusual and is not one that is repeated across other functional areas. Constitutionally, the Food Standards Agency is a UK non-ministerial Government department. It has its own board, and its chief executive and staff are accountable to the board rather than directly to Welsh Ministers. Having said that, the FSA has responsibility for the development of food safety, standards and nutrition policy and has a statutory role under the Food Standards Act 1999 to provide advice to Government, including the Welsh Assembly Government, on matters of food safety or other interests of consumers in relation to food. In relation to Wales, there is also a Welsh food advisory committee, established under the 1999 Act, which consists of members who have a particular interest in the Welsh position. When policy is developed, the FSA is able to take account of any views expressed by that committee in putting forward any policy proposals, or proposals regarding legislation, that come to Welsh Ministers for consideration.

[181] The other point is that the Welsh Assembly Government provides substantial funding to the FSA, which is principally applied to its Welsh operation, and there is also a concordat between the FSA and the Welsh Assembly Government that sets out a framework for their co-operation. That deals both with policy development and the bringing forward of proposals for legislation. In relation to legislation, there is a close working relationship between my office of the Legal Services department and the Food Standards Agency in Cardiff, and also with the

lawyers serving the Food Standards Agency across the UK, who are principally based in London. One of the questions that has been suggested is how the relationship applies to the development of legislation. Essentially, that involves proposals being brought forward by the Food Standards Agency informed by advice from across the FSA where necessary, and the legislation is clearly made under Welsh Minister powers, so the ultimate responsibility is with the Minister. However, that is heavily informed by the advice both of the Welsh Food Advisory Committee, where relevant, and also of the FSA more widely.

[182] **Janet Ryder:** In the light of what you have just said about the relationship with Welsh Ministers and the drawing-up of regulations, I am sure that you will be aware that the committee has expressed concerns on this issue, particularly about the approach being taken to Welsh-language labelling, as Gwyn has outlined, in these regulations. We have expressed that concern. On the last occasion, the Minister wrote to us in a letter of 20 October to say that:

[183] ‘the addition of the Welsh text is both feasible and possible and within the remit of the Regulations’.

[184] Given that, can you tell me why these regulations were drafted in a way that not only does not include Welsh, but which might actually make the use of Welsh terms a criminal offence?

[185] **Mr Partridge:** It might be worth recounting, as Gwyn has done, a little of the history. It is not the most glorious of histories, I have to say. The 2007 regulations did provide certain descriptions that could be used in Welsh and English in relation to the particulars on water bottles. Unfortunately, they were only placed in the Welsh text of the regulations, and, in policy terms, my understanding is that it was not the intention at that stage that the use of Welsh terms should be in the 2007 regulations. It was therefore important, particularly as Welsh and English texts have to be of equal standing under the Government of Wales Act 2006, that that was put right. Unfortunately, in the 2009 regulations, that job was not done satisfactorily, and the 2010 regulations have finally put right the original intention, which was that there should be only English terms in the regulations.

[186] My understanding of the policy position is that, as Gwyn has stated, paragraph 16 of the relevant directive explains that if a particular European Community language is prescribed, that does not preclude the use of other languages. One of the issues for further consideration by the Government is the extent to which that provision deals with official community languages or other languages. Paragraph 3 of article 16 just refers to ‘several languages’, and it is a matter of interpretation that we need to clarify with the commission as to whether, across the whole of that paragraph, when languages are referred to, that encompasses languages other than the community languages—that is, including Welsh.

10.40 a.m.

[187] As for the absence of Welsh provision in the regulations, from a policy point of view, and regarding the offence provision that you talked about, my understanding is that the policy rationale for that was that these regulations did not prohibit the use of Welsh, but if Welsh was used, that would be on an extra-statutory basis outside the remit of these regulations. My understanding is that guidance has been given to the industry in Wales by the FSA to that effect, and that the enforcement policy is such that it would not consider this to be an offence, or would not take matters forward as an offence, if Welsh was used—provided that it did not contradict or make unclear to the consumer the English required particulars on the bottle.

[188] There are a number of competing factors here, I suppose. One is clearly the aspiration to allow the Welsh language to be used by businesses and to allow consumers to read labels in

Welsh if it is their native tongue, and so on, but one of the balancing factors relates to the regulatory burden on businesses, and as we read the directive, and the appropriate way to transpose it, we would be potentially gold-plating the directive, and going slightly beyond it by making provision to deal with the Welsh language in these regulations, if we are relying on the directive. There is the possibility of considering using our national regulations, which are not transposing the directive, but are adding something different to deal with the Welsh language. That is something that is under consideration at present.

[189] **Janet Ryder:** Mike, I think that you have a question.

[190] **Michael German:** Yes. There is a lot of concern in what you have said, but to get this clear for the record: the Minister, in her letter to us of 20 October, was legally correct in saying that the addition of the Welsh text was ‘both feasible and possible’ within the remit of the regulations—and she is referring to article 16(3) of the relevant directive.

[191] **Mr Partridge:** I am not sure that I can say clearly that I would necessarily agree with that statement, I have to say.

[192] **Michael German:** So, the Minister could be wrong, and the advice given to the Minister could be wrong.

[193] **Mr Partridge:** It is possible.

[194] **Michael German:** So, the legal advice given to the Minister could be wrong. Did you provide that legal advice?

[195] **Mr Partridge:** I did not, personally, no.

[196] **Michael German:** Do you know who provided that legal advice?

[197] **Mr Partridge:** I do not know today.

[198] **Michael German:** Would it have been legal advice from the FSA?

[199] **Mr Partridge:** There has been correspondence with the FSA legal team and internally within the Welsh Assembly Government, so it could have been a combination.

[200] **Michael German:** As you said, the ultimate responsibility is with the Minister, but you provide the legal advice. You are saying that that advice could well have come from the FSA, but you are not aware of which part of the FSA it has come from. Is that what I am trying to understand?

[201] **Mr Partridge:** The advice is more likely than not to have come from the WAG legal team, but it would probably have been informed by engagement with the FSA lawyers in London.

[202] **Michael German:** So, to be absolutely clear, you disagree with the FSA’s own legal advice to the Minister that the addition of the Welsh texts was both feasible and possible within the remit of the regulations. You disagree with your own lawyers, in other words.

[203] **Mr Partridge:** I am afraid that I do not have access to the specific legal advice that was given to inform that letter, so I cannot go that far. All I am saying is that it is a question of interpretation as to how far that directive would allow that to be the case.

[204] **Michael German:** I want to be absolutely clear here. Are you saying that you think

that this advice came from FSA lawyers, and that if you had seen that advice, you would have disagreed with it?

[205] **Mr Partridge:** I would certainly have questioned it.

[206] **Michael German:** Let us also bear in mind your comment that you are a non-ministerial department of the UK Government; does that mean that the FSA is bound by the devolution guidance notes issued by the Ministry of Justice?

[207] **Mr Partridge:** Yes, as part of one of the Whitehall departments.

[208] **Michael German:** I presume, therefore, that you are aware of the guidance that says that there can be policy divergence between Wales and the rest of the UK; I am sure that you do not want me to read it to you. Are you aware that it is possible for competence to be expressed differently in Wales, and that UK Government departments should not normally object to proposals where the Welsh Government pursues policies that differ from those of England?

[209] **Mr Partridge:** Yes.

[210] **Michael German:** To summarise, there is a legal dispute within the FSA on the advice that was given—the Minister’s advice is either suspect or incorrect, according to your position—and it is perfectly feasible for us to have our own position, according to the guidance that you are given by the Ministry of Justice. So, why do you persist in ensuring that we cannot have the addition of the Welsh text?

[211] **Mr Partridge:** It is not me personally who is doing this; I am acting as the mouthpiece of the Minister, but I do not have a brief to speak on her behalf. The position at the moment is that it is important to distinguish between transposing the directive and the provision that we can make outside it. Apart from the letter that you referred to, there has been a consistent line that the directive itself would not be the basis for making provision for Welsh-language labelling. Having said that, the fact that it made provision for English-language labelling does not result in a prohibition of the use of Welsh; that has been said consistently, and was indicated in the explanatory memorandum to the regulations. The use of our existing powers to make provision outside the scope of the transposition of the directive is something that is being considered actively at the moment. There would be potential issues around this, in handling terms. If, for example, the legislation enabled the Welsh language to be used as well as the English language on bottle labels, and specified the size of the lettering or the shape of the label, we would need to consider a notification to the European Commission under the technical standards directive, which would involve a three-month standstill period. This would cause some delay, and the question of consultation would also have to be considered. However, those are issues with handling rather than the substance of the directive.

[212] **Michael German:** I am struggling to understand the difficulties in which you find yourself, particularly regarding the explanatory memorandum. One issue that was reported to us was that the inclusion of the Welsh-language equivalents to the mandatory English-language terminology—something that I have noticed that you focus on all of the time—would not provide a clear food-label solution for the consumer; do you stand by that?

[213] **Mr Partridge:** That is a reflection of the focus of the directive itself, which requires clear labelling. It is merely a reflection of the principles of clarity for consumers that are contained in the directive, and also reflects aspects of safety for consumers; there is, therefore, a need for absolute clarity.

10.50 a.m.

[214] **Michael German:** Given that you keep falling back on paragraph 3 in article 16 not being clear, and that you are stating that you have sought clarity, when do you expect to receive clarity? Do you think that we should hold back this legislation until we have that clarity?

[215] **Mr Partridge:** My understanding is that colleagues in the Food Standards Agency are in discussion with the relevant people at the European Commission about labelling more widely. They have been made aware of the issue that the committee has been concerned about. My understanding is that there are ongoing discussions, and although I cannot say exactly when that would be actively discussed, we are talking about in the very near future.

[216] **Michael German:** I will leave it there.

[217] **Alun Davies:** Thank you for your evidence. I agree with you, Mr Partridge, that this has not been the most glorious episode for the Government or the FSA. I am bewildered as to where you are on this, and I am afraid that your answers have not really clarified the situation. This is not rocket science, but we seem to be having a debate that, at a political level, happened in the 1960s. Some of the arguments deployed in the written evidence were deployed in the 1960s, and dismissed at that time. The policy of the Government in Cardiff is clear that both languages should be treated on the basis of equality. I do not understand how we can, therefore, be implementing regulations that fly in the face of that policy and philosophy. It is not credible to argue that the use of more than one language on a label makes that label unintelligible. There are examples of bilingual labelling on numerous products in the marketplace at present. I do not think that this argument has any credibility, and I find your position quite difficult to follow.

[218] **Mr Partridge:** I am sorry about that. On the clarity issue, I was answering Mr German's question about where that derived from, and I was merely trying to say that it reflected the emphasis in the directive itself. I do not think that I said that having the Welsh language alongside the English language, as a matter of principle, would be unclear; I would not say that.

[219] **Alun Davies:** So, what is the problem then?

[220] **Mr Partridge:** My understanding is that the Food Standards Agency has adopted an approach that says that, if there is English only provision in the regulations, that does not prohibit bottle manufacturers from including Welsh on their bottles. That has not been said. It is down to the discretion of the industry to add Welsh to the labels, provided that it is not in conflict with the requirement for the English-language label that is prescribed in the regulations. So, I do not think that it is quite right to say that the position is that Welsh is proscribed at all, and I do not think that that has been the position in the correspondence either.

[221] **Alun Davies:** There is, of course, bottled water that does use the Welsh language in its labelling.

[222] **Mr Partridge:** Yes, I think so.

[223] **Alun Davies:** Is that contrary to law?

[224] **Mr Partridge:** I have not said that it was contrary to law. All I have said is that it is not contemplated by the directive, because the directive deals with community languages. The advice in the explanatory memorandum is that that does not prohibit the use of the Welsh

language. The argument really is about whether there should be provision in secondary legislation about the use of the Welsh language, or whether it should be extra-statutory and discretionary. That is where we are focused, and that is the issue that is being actively considered with a view to meeting that and meeting the Minister's own aspirations, as I understand it.

[225] **Alun Davies:** Clearly, the aspiration of the Welsh Government is that we create a bilingual environment and the conditions for that bilingual environment. There is a political debate going on at the moment about the extent to which business will be a part of that. That is a political debate happening at a political level. However, from a legislative point of view, surely we should be creating the circumstances in which an individual business is able to take the decision whether to use English-only or bilingual labelling and is not fettered in making that decision. We need to create a statutory framework to enable people to make those decisions. My reading of the regulations, and the advice that we received originally on the regulations, was that these labels would be available only in English and that the Welsh language would be prescribed on that basis. You are saying quite clearly this morning that that is not the case, so I assume that you need to produce secondary legislation that concurs with the Government's overall approach and with the approach that you seem to be moving towards describing this morning.

[226] **Mr Partridge:** Yes, I think that I would agree with that.

[227] **Alun Davies:** Right, let us go and do it then.

[228] **William Graham:** Does the FSA have a general policy on this matter? Clearly, you have to comply with legal obligations, but what is the agency's view on labelling generally? Why should it not be in two languages?

[229] **Mr Partridge:** I am not a spokesman for the Food Standards Agency. It may be that my colleagues can answer that one.

[230] **Mr Wilkins:** Yes, certainly. The FSA's policy on food labelling is that it must be in accordance with EC directives. However, there is absolutely nothing that we would want to do to prevent the use of the Welsh language or to make its use difficult. In fact, in accordance with our Welsh language scheme, we want to do everything that we can to promote bilingualism, not just in labelling, but in every aspect of our work.

[231] **Janet Ryder:** Rhodri, did you have any questions? I see that you do not.

[232] What would be the effect of this Order being revoked?

[233] **Mr Partridge:** You mean the 2010 regulations?

[234] **Janet Ryder:** Yes, what would be the effect if that was done and a new Order was laid?

[235] **Mr Partridge:** The 2010 regulations deal with more than the issue of labelling. They have been brought into force partly to deal with a number of other issues, one of which was a recent opinion from the European Commission on certain aspects of the implementation of various directives. If we were to revoke these regulations in all respects at this stage we would be at risk. If the Minister gets to a point where we can make changes to the regulations, that will probably be done through amendments to the principal, 2007 regulations rather than through a revocation of the current regulations.

[236] **Janet Ryder:** Can you explain to me again why, given that these issues have been

raised for a number of years now and were very much emphasised at this point last year, none of the work that you have talked about has happened before now? Why have we reached another stage where the same piece of legislation is being laid with the same problem that we raised last year? I take on board everything that you have said in explanation to us this morning, but why was this work not done last year?

11.00 a.m.

[237] **Mr Partridge:** I will probably end up repeating myself, but I think that great reliance is being placed on the extra-statutory provision regarding the Welsh language. As I explained earlier, that is seen not to prohibit the use of the Welsh language by Welsh bottle manufacturers and, as has been said, there are bottles that have Welsh-language provision. The issue is how plain that is on the face of the legislation, and whether it is dealt with in legislation or on a non-legislative basis. Until now the emphasis has been on the non-legislative approach rather than the legislative approach.

[238] **Janet Ryder:** Surely, everything that we wrote from this committee last year, at this point, made it quite clear that it was more or less creating a problem in Wales that the legislation is written in the way that it is, and that we wanted to see the legislation altered to allow the use of the Welsh language. I will go back to the question. We had the response from the Minister, which said that she thought that it was feasible and possible, so why are we still in the same situation?

[239] **Mr Partridge:** I am not sure that I can add anything to what I have said, Chair.

[240] **Alun Davies:** This is very difficult, because I do not think that we are getting very far this morning. If there is a reliance on an extra-statutory approach, that is a choice. It is not one with which I particularly agree, but it is a choice and I understand and accept that. The statutory environment has to create a framework whereby that can happen, however. I think that the problem that we have here is that the current regulations, as they are written, are preventing that extra-statutory approach being taken and acting as a roadblock. I think that the point of view of the committee is that you should be taking away that roadblock, creating and enabling an environment whereby people and businesses may choose whether to use the language or not, and whereby the Government may take a more proactive approach in the future, if it so chooses, when that political debate has been had. The current regulations actively preclude such an approach, and so the committee is concerned that we are having regulations presented to us year on year that preclude such an extra-statutory approach, and we do not see any evidence of such an approach being attempted. I understand that that is not your responsibility, but, as regards these regulations, there surely needs an amendment to them, which, even if we do not go down the route of having secondary legislation to enable the Welsh language to be used in a more formal basis, enables people to take an informal decision to use the Welsh language.

[241] **Mr Partridge:** I can assure you that all of the issues that the committee has raised in recent correspondence and, indeed, the outcome of the committee's consideration today will be under very active consideration by the Minister, as you can imagine. Progress will be made on this, and I would expect that by the time that the next regulations come forward the committee will be satisfied as to the outcome. Some of these things are subject to discussions with the Commission to clarify the way in which paragraph 16 works. It would be remiss of me to make a specific commitment as to exactly how it would be achieved today. I can assure you that all of these matters are being considered seriously.

[242] **Alun Davies:** I come back to this, because I think that it is a serious point. As a legislature, when we have these regulations put before us, time after time, and we raise concerns, and we are told that those concerns are being considered, and then we have the

same regulations again, there comes a point in which we have to draw a line in the sand and ask, ‘How long have you had?’. We need to resolve this issue fairly quickly. I see no reason why you cannot simply move ahead in the spirit of and using the approach of the Assembly Government: that we want to treat both languages on the basis of equality; to enable that situation to occur on a statutory basis; and have discussions at a later date about whether or not or how that fits into a wider legal framework.

[243] **Mr Partridge:** I note what you say and I will convey that to those who make the decisions on these matters.

[244] **Janet Ryder:** Gwyn, is there anything that you would like to add at this point?

[245] **Mr Griffiths:** No.

[246] **Janet Ryder:** Thank you for your evidence this morning. A copy of the transcript will be provided for you to check whether it is correct. I suspect that the committee will now wish to ask the Minister to come and give further evidence to us. Unfortunately, she was unable to be with us this morning, although she had intended to attend. I suspect that we may now need to pursue this further with the Minister. Thank you very much for your time, gentlemen.

[247] We will return to this item when we are sweeping up the evidence at the end of this meeting.

11.06 a.m.

**Gohebiaeth y Pwyllgor—Ymateb y Gweinidog dros Blant, Addysg a Dysgu
Gydol Oes i Adroddiad y Pwyllgor ar Reoliadau Cyllido Ysgolion (Cymru) 2010
(CA397) ac Ymateb Elin Jones AC, y Gweinidog dros Faterion Gwledig i Lythyr
y Cadeirydd ynghylch CA390—Gorchymyn Pysgota am Gregyn Bylchog
(Cymru) 2010**

**Committee Correspondence—Response of the Minister for Children, Education
and Lifelong Learning to the Committee’s Report on the School Funding (Wales)
Regulations 2010 (CA397) and Response from the Minister for Rural Affairs
Elin Jones AM to the Chair’s Letter regarding CA390—the Scallop Fishing
(Wales) Order 2010**

[248] **Janet Ryder:** We have received a response from the Minister for Children, Education and Lifelong Learning to the committee’s report on the school funding regulations, which were debated in Plenary last week. Are Members happy to note this and do you have any comments?

[249] **Michael German:** I note the apology, and I hope that the Minister will put it right the next time and also ensure that there is the ‘either/or’ suggestion, which was the suggestion of this committee.

[250] **Janet Ryder:** We have also received a response from the Minister for Rural Affairs, Elin Jones, to my letters regarding CA390, the scallop fishing Order, in which I queried whether maps could be provided with such Orders for clarity. The response that we received is that most boats now use the global positioning system rather than maps, so it was not felt to be appropriate. Are there any comments?

[251] **Michael German:** I note the encouraging last paragraph of Elin Jones’s letter. Could we be of assistance here? It says

[252] ‘the use of maps is something that is considered on a case by case basis.’

[253] It may be that the Government wishes to use them for illustrative purposes only, but I wonder whether it would be possible for us to consider the Orders that have come before us and work out for which ones providing a map would be appropriate and see whether we can come to a general policy on this matter that may be of help to the Minister in the future.

[254] **Mr Griffiths:** Yr oeddwn yn mynd i awgrymu rhywbeth eithaf syml, sef bod y Llywodraeth yn dweud wrth y pwyllgor yn ei nodyn esboniadol a oes map neu siart ar wefan y Llywodraeth, fel y crybwyllar Gweinidog yn yr achos hwn. Hynny yw, ei bod yn tynnu ein sylw at fodolaeth map o'r fath.

Mr Griffiths: I was going to suggest something quite simple, namely that the Government should tell the committee in its explanatory note whether a map or chart is up on the Government's website, as the Minister does in this case. That is, that it draws our attention to the existence of such a map.

[255] **William Graham:** Can we emphasise the necessity of having accurate maps? Navigation at sea is not easy, by any means, and when you are trying to chart the areas that you may or may not dredge, it is vital that you have an idea of that, otherwise, as you well know, it leads to tremendous questions if a case is brought. If you cannot accurately say, ‘You shouldn't be there’, the person will say, ‘I was not there, because of this reason’. There may be a lot of this going on with dredging for sand in the Bristol channel, because the plans have not been as accurate as they might have been. We should draw to the attention of the Minister the necessity of having accurate plans for every piece of legislation—I doubt that indicative plans would be legally enforceable, frankly.

[256] **Janet Ryder:** Perhaps the pieces of legislation that you are thinking of may fall more under Jane Davidson's responsibility.

[257] **William Graham:** This legislation is from the Minister for agriculture and the point remains that the plan must be accurate.

[258] **Mr George:** We could write to the Counsel General, as he has the general responsibility for these issues.

[259] **Janet Ryder:** Are Members content with that? I see that you are, so we will write to the Counsel General.

11.09 a.m.

Y Mesur Arfaethedig ynghylch y Gymraeg (Cymru) The Proposed Welsh Language (Wales) Measure

[260] **Janet Ryder:** I will ask Gwyn to outline the subordinate legislation provision in the proposed Measure. I do not intend to discuss this today, but, after Gwyn has outlined the subordinate legislation provisions for us, we may want to consider inviting the Minister at a future date.

11.10 a.m.

[261] **Mr Griffiths:** Yn gryno, mae darpariaethau a phwerau i wneud is-ddeddfwriaeth eang o fewn y Mesur arfaethedig. Mae yma bwerau i Weinidogion

Mr Griffiths: To be brief, there are provisions and powers to make a wide range of subordinate legislation within the proposed Measure. There are powers for Ministers to

wneud rheoliadau a fydd yn pennu'r safonau sydd i'w gosod ar gyrff yr effeithir arnynt gan y ddeddfwriaeth. Felly, mae'n gwbl briodol gofyn i'r Gweinidog ddod gerbron y pwyllgor i esbonio y pwerau hynny.

make regulations that will determine the standards that will be set on bodies that are affected by the legislation. Therefore, it is appropriate to ask the Minister to come before the committee to explain those powers.

[262] **Janet Ryder:** Is everyone content that we invite Alun Ffred to the committee? I see that you are.

11.10 a.m.

Unrhyw Fusnes Arall Any Other Business

[263] **Janet Ryder:** The Proposed Mental Health (Wales) Measure was laid on Monday of this week. It contains substantial subordinate legislation provisions. Are Members content to invite the appropriate Minister to the committee to discuss that proposed Measure as well? I see that you are. There is no other business.

11.11 a.m.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[264] **Janet Ryder:** I remind Members before closing this session that, as of the new term, which starts on 22 April, the committee's slot changes to a Thursday afternoon. I propose to start the meetings at 1 p.m., if Members are in agreement. I know that it will mean tight changes in between committees.

[265] **Alun Davies:** My agreement is subject to knowing what I am going to be doing on Thursday mornings.

[266] **Michael German:** That is what we are doing on Wednesday mornings now.

[267] **Alun Davies:** I understand the need to start early in order to finish early, but I do not agree that committees should run into one another.

[268] **Janet Ryder:** I would not want committees to run into one another. However, if committees finish at 12 p.m., it would give Members an hour between committees.

[269] **Alun Davies:** My experience of these matters is quite unhappy. Therefore, my agreement is subject to knowing what else I will be doing on Thursdays after 22 April.

[270] **Janet Ryder:** We will bear that in mind. We will therefore aim to start at 1 p.m. on 22 April, because that will give us plenty of time.

[271] On 22 April, we will be taking evidence from the Counsel General and Leader of the Legislative Programme as part of our evidence session. A number of other things have also cropped up that we have agreed to add to that evidence session.

11.12 a.m.

Cynnig Trefniadol
Procedural Motion

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

the committee resolves to exclude the public from the remainder of the meeting and any future meetings where we will discuss the Stage 1 report of the proposed Measure, in accordance with Standing Order No. 10.37(vi).

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

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 11.12 a.m.
The public part of the meeting ended at 11.12 a.m.