

Y Pwyllgor Materion Cyfansoddiadol

The Constitutional Affairs Committee

Dydd Iau, 8 Gorffennaf 2010
Thursday, 8 July 2010

Cynnwys

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Cofnodir y trafodion hyn yn yr iaith y llefaryd 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
William Graham	Ceidwadwyr Cymreig Welsh Conservatives
Rhodri Morgan	Llafur Labour
Janet Ryder	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)
Kirsty Williams	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

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
Bethan Roberts	Cynghorydd Cyfreithiol Legal Adviser
Francesca Rowley	Dirprwy Glerc Deputy Clerk

"Dechreuodd y cyfarfod am 12.59 p.m.
The meeting began at 12.59 a.m."

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

Janet Ryder: I welcome you all to this meeting of the Constitutional Affairs Committee. We have received no apologies. I remind you that, in an emergency, ushers will indicate the nearest safe exit. Headsets are available for amplification and translation. I remind all Members and officers to switch off mobile devices completely. I welcome Kirsty Williams to her first meeting of this committee. I am sure that you will soon find out what we do and how we do things.

1.00 p.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)

Janet Ryder: We have CA458, the National Health Service (Miscellaneous Amendments Relating to Independent Prescribing) (Wales) Regulations 2010.	
Mr Griffiths: Nid oes dim i'w ychwanegu yn yr achos hwn.	Mr Griffiths: There is nothing to add on this occasion.
Janet Ryder: A yw pawb yn hapus gyda hynny?	Janet Ryder: Is everyone content with that?
I see that everyone is content.	

Offerynnau y Bydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog 15.2 a/neu 15.3 ac Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (Y Weithdrefn Negyddol) Instruments in Respect of which the Assembly is Invited to Pay Special Attention under Standing Orders Nos. 15.2 and/or 15.3 and Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (the Negative Procedure)

Janet Ryder: The only legislation under this item is CA459, the Eggs and Chicks (Wales) Regulations 2010. I understand that there are some issues about this. Is it Bethan or Gwyn who will talk about them?

Ms Roberts: There is a little more to discuss in relation to these regulations. These regulations revoke and replace the Eggs and Chicks (Wales) Regulations 2009.

As in the 2009 Regulations, they make provision for the enforcement and execution of directly applicable EU marketing standards relating to eggs for hatching and farmyard poultry chicks and directly applicable EU marketing standards relating to eggs in shell for consumption. They also make new provision for the enforcement of directly applicable EU controls for "Salmonella" serotypes with public health significance in relation to the marketing and use of eggs in shell for human consumption.

That is some background for the regulations. Having scrutinised the regulations, I have a number of reporting points. There are two reporting points for consideration under technical scrutiny under Standing Order No. 15.2, one of which I will expand upon a little later, which arises again as a merits point under Standing Order No. 15.3. The first point to draw to your attention is an inconsistency between the English and Welsh text. Given that it contains an inaccuracy over the dates, I have also raised it as a statutory defect and a failure to fulfil statutory requirements, because it would not be possible to enforce the regulations as they stand.

To give you a little more detail, regulation 24 allows for Welsh Ministers to issue directions to ensure compliance with record-keeping requirements under the regulations. The English version is the correct version, but the Welsh version is slightly different. The Welsh version states that Welsh Ministers can make directions on or before 16 January 2010 and that they can make further regulations on or after 17 January 2010. It would not be possible to do that on or before 16 January, because that date has expired. So, any issuing of directions could not happen. In addition, with regard to 'on or after 17 January', the date of 17 January has expired, but they could still issue directions after 17 January. The English version specifies 16 January 2011 and 17 January 2011 respectively, whereas the Welsh version specifies 'on or before 16 January 2010' and then 'on or after 17 January 2010'. So, for the purposes of enabling Welsh Ministers to issue directions under regulation 24 to ensure compliance with the record-keeping requirements of activities under the Schedules to the regulations, they probably would not, at the moment, be able to enforce those directions. That is the first point.

Janet Ryder: The Government has responded on this, but its response was very late. As there are two issues on this, we will deal with this first. Has the Government responded on this particular issue?

Ms Roberts: Yes. It accepts the inconsistency, and says that it will correct the mistake on publication of the regulations. We have discussed this, and given that the mistake is significant, and might entail the Welsh Ministers not being able to enforce the regulations properly, we think that the Government should correct it by amending regulations. As it has not suggested that as a possibility, it has not given any timescale for it.

Janet Ryder: We will first deal with the technical point about the dates, which could be crucial if someone sought to enforce these regulations. Would committee be content for us to write to the Government requesting that it bring forward amending regulations, or do we need to do something else?

Ms Roberts: It would be acceptable to write to it to ask it to bring forward amending regulations, quite soon—

Janet Ryder: As early as possible. Are Members content with that? We will write asking that those amending regulations be brought forward as soon as possible.

<p>Mr Griffiths: Mewn perthynas â'r pwynt hwn, efallai y dylwn ychwanegu ei fod yn dueddiad cynyddol gan y Llywodraeth wneud cywiriadau i ddeddfwriaeth drwy'r broses o gywiro wrth gyhoeddi. Byddwn yn edrych ar hyn dros yr haf i weld i ba raddau y mae'r tueddiad yn amlygu ei hun, ond canlyniad hynny yw bod deddfwriaeth yn cael ei gwneud sy'n wahanol i'r fersiwn a gafodd ei chyflwyno i'r Cynulliad ac y cawsoch gyfle i gyflwyno cynnig yn ei chylch. Gallech wneud hynny gyda'r eitem hon, ond ni fydd cyfle i drafod y rheoliadau cywiro fel y byddai modd ei wneud o dan y drefn draddodiadol.</p>	<p>Mr Griffiths: In relation to this point, perhaps I should add that it is a growing tendency by the Government to make amendments to legislation by means of making corrections at the time of publication. We will look at this over the summer to see to what extent this tendency manifests itself, but the result is that legislation is being made that differs from the version introduced to the Assembly, namely the version about which you have had an opportunity to table a motion. You could do that with this item, but there will not be an opportunity to discuss the correcting regulations as can be done under the traditional system.</p>
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Janet Ryder: So, if a law is to be made that is not the correct law, does that imply that the committee should take a different course of action?

Mr Griffiths: The degree to which the Government is making corrections upon publication is a matter that the committee will need to consider at some stage. I sense that it is an increasing trend, but it also means that there is no opportunity for this committee or the Assembly as a whole to scrutinise the correcting regulations, as there would be under the traditional approach. The advantage is that the correction is made immediately rather than at the end of three months.

Alun Davies: I suggest that we write to the Government in the terms outlined by the legal adviser, and then perhaps we could have a more substantive discussion on this in committee following the summer recess. That would enable us to take a much wider view of whether this is an increasing trend from Government and the consequences of it for the Assembly as a legislature.

Janet Ryder: Last week, we touched on the possibility of holding a review next term on the lessons to be learned, which would lead into a legacy report, and this could be one issue for us to look at.

Kirsty Williams: I am loath to say anything, having only just got here, but what strikes me is that we used to have conversations about sloppy drafting back in the day when the Business Committee used to look at all this. We were constantly having to send things back. If we constantly let the Government amend its sloppy drafting by changing it on publication, there will be no incentive for people to get it right first time. We need legislation to be drafted correctly in the first place. There was clearly no ill intention as regards these dates, as it is just sloppy workmanship, but if we tell the Government not to worry about it, as we will amend it on publication, there will be no incentive for it to get it right from the beginning.

Janet Ryder: We have picked up on that issue in just about every review that we have carried out, which is why requesting an amending Order will make it put it right straight away. However, we need to return to it in the review that we will start in September, to see whether we can trace any improvement and, if we cannot, to make some recommendations for the next Assembly. If Members are content with that bit of it, we need to deal with other issues in this piece of legislation.

Ms Roberts: We have not finished yet—nearly there. The second technical reporting point arises from regulation 19 and is to do with powers of entry for inspectors. I will read the regulation out to you first, as I think that it will probably make more sense then.

'Admission to any premises used only as a private dwellinghouse may not be demanded as of right unless 24 hours notice of the intended entry has been given to the occupier or the entry is in accordance with a warrant granted under this regulation.'

Our concerns arose initially because of the words 'private dwellinghouse' and the fact that 24 hours' notice could be given as of right. Therefore, the worst-case scenario would be if the occupier was on holiday or absent for some reason or other and did not receive notice. My reading of it is that, on the expiry of the 24 hours, an inspector could go to the property and gain entry, which could lead to an argument over an intrusion of somebody's privacy, as there would be with any private dwelling-house.

1.10 p.m.

The other concern highlighted was the inclusion of the word 'or', as it seems to suggest that the inspector has a choice between providing 24 hours' notice or opting to apply for a warrant via a justice of the peace. We have highlighted our concern to the Government, as we have some doubts whether it is *intra vires*. Just by way of background, the 2009 regulations that these regulations revoke did not contain this provision previously, but there was a provision under section 32 of the Food Safety Act 1990, which provided a safeguard. In other words, if you wanted to give 24 hours' notice but you were not sure whether notice had been given, you could then apply for a warrant. It gave that back-up. In this situation, the use of the word 'or' seems to suggest that, after 24 hours' notice, you may use reasonable force and gain entry, not that, after 24 hours' notice, you should go to a justice of the peace and get a warrant. Are we content for these regulations not to contain a safeguard like that in the 2009 regulations?

Rhodri Morgan: Could you explain, please, in the privacy protection that we all hold dear, what the difference is between going to a private dwelling-house for the purposes of gaining entry to the house itself, and going to a private dwelling-house in the legal meaning of a house plus garden plus chicken run and what have you, perhaps for the purposes of gaining entry to the chicken run? Is there a distinction at all?

Ms Roberts: I think that this provision would apply to all premises, so it could include business premises. I suppose that it would depend on the information that was sought. It might be records, documents or machinery, or they might want to inspect eggs, or conduct experiments. It would depend on their intention before they enter the premises.

Rhodri Morgan: Okay, but what I am asking is whether a legal distinction is made in privacy protection by any precedent that you are aware of to distinguish between the implications of having to give 24 hours' notice, after which you can go to a private dwelling-house and inspect the eggs in the chicken run, or wherever it is the chickens are laying the eggs, as well as the chickens themselves, as distinct from breaking the door down to get to the records, if you think that something improper is going on as regards the maintenance of the business. Is there such a distinction?

Mr Griffiths: I think I am right in saying that these provisions in the regulations are to do with access to documentary evidence rather than looking at the chicks or the eggs themselves. Therefore, it is access to the house that is relevant.

Rhodri Morgan: So, it is intended to deal with the fraudulent reselling of eggs as farm fresh, organic or laid yesterday when in fact they have been imported from Brazil and they are four weeks old or that kind of thing, as in the recent, well publicised case.

Ms Roberts: I think so, yes. The main reason for entering would be to ascertain whether an offence had been committed, to gather evidence.

Rhodri Morgan: It is the house, though.

William Graham: That is the importance of being able to apply for a warrant—the immediacy, so that you do not have to give people 24 hours' notice in which evidence could be destroyed.

Mr George: I do not want to intrude on my learned friends too much, but there seems to be a distinction in regulation 19 between the general power of entry to any premises and the arrangements for admission to a private dwelling-house in regulation 19(4). So, there are specific provisions relating to a private dwelling-house, as well as a general right of entry to premises. Am I correct in thinking that?

Ms Roberts: Our point has been raised solely in relation to an intrusion into a private dwelling-house, and the implications deriving from that under article 8 of the European convention on human rights, which I will mention briefly. The Government has responded by stating that there is no express power in the regulations to enable an inspector to use reasonable force on the expiry of the 24 hours' notice. The Government has said that, after the 24 hours' notice has expired, the intrusion of somebody's privacy would not be a cause for concern because the inspector could then apply for a warrant, so the provision is *intra vires*. We are saying that, because the regulations give a choice, our interpretation of the wording is that it would be one or the other. So, our response differs from the Government's in relation to that.

Janet Ryder: So, it is an interpretation of the terms—

Ms Roberts: Yes, and there is also a lack of clarity. The Government says that there is no express power allowing or enabling an inspector to use reasonable force on the expiry of the 24 hours' notice, which is true, as it does not specifically say that there is the power for an inspector to use reasonable force. However, why have 24 hours' notice if, after its expiry, you cannot enter the premises? So, there is that point.

Moving swiftly on, a merits point has arisen in relation to the proportionality of an intrusion of privacy in seeking to secure a legitimate aim. We suggest that the legitimate aim in this case would be to secure the prevention of a crime and to ensure compliance in respect of the activities carried out, for example, through the gathering of evidence and documentation. I understand that the penalty for obstruction under this provision is a fine on the standard scale. We argued that it could be disproportionate, but the Government has come back on that and argued that it does not believe that it is. It says that seeking to ascertain documentation to prove offences in relation to consumer protection and the prevention of fraud would make it a legitimate aim to intrude into someone's dwelling-house.

Janet Ryder: Members, you have heard the technical and the merits issues in relation to that and you have the Government's response in front of you—although I am sorry, as it did not come through until very late last night, so you have not really had long to consider it. You have heard an explanation from the lawyers as to how they might interpret it. Are there any responses?

Mr Griffiths: May I perhaps assist the committee by drawing attention to a relevant Standing Order? The Standing Order that we are referring to is Standing Order No. 15.2(i) and the precise wording is:

'that there appears to be doubt as to whether it is *intra vires*'.

So, you do not have to come to a firm view on that. All that you have to say, if you are satisfied that it is a point on which you wish to report, is that there appears to be doubt. Frankly, if two sets of lawyers disagree, there must be some doubt.

Janet Ryder: Yes, but that would not stop the regulations going through; this could be us laying a report to say that we still have concerns even though the Government has responded in these ways, and outlining our concerns. Alun, were you going to say something?

Alun Davies: I think that that sort of narrative approach could be appropriate. I have to say that I am not in a position to make a judgment on this; I really am not. Having seen these papers today, and not having had an opportunity to seek additional advice on the issue, I am simply not in a position to take any informed view on it. If you wish to create a reporting point on the simple narrative of the situation, I would be content with that.

William Graham: I would also be content.

Kirsty Williams: There is obvious doubt, so I am happy to have a paper that points that out.

Janet Ryder: We will therefore lay a report saying that there may be an alternative interpretation. Would that satisfy everyone?

Mr George: What we will do is lay the report as drafted, including the Government's response and probably a paragraph at the end just to explain that the committee believed that there were doubts as to whether it was *intra vires*, but stating that we did not take a firm view on that. Are you content with that?

Janet Ryder: I see that we are.

1.19 p.m.

Adolygiad o'r Rheolau Sefydlog—Y Pwyllgorau: Y Pwyllgor Materion Cyfansoddiadol
Review of Standing Orders—Committees: Constitutional Affairs Committee

Janet Ryder: I am sure that all Members are aware of the fact that a review of Standing Orders is being undertaken, as it has been mentioned on a number of other committees. We have received a letter asking whether there is anything that this committee would like to raise on this, and you have an informal note from the committee clerk to consider. Would Members like to add anything over and above that, or is there anything that Members want to query?

1.20 p.m.

Alun Davies: As we have only had this today—

Mr George: It was circulated on Tuesday.

Alun Davies: I have only seen it today, so I am not in a position to give much of a view on it.

Janet Ryder: The Business Committee has extended the deadline on this to 23 July, I think.

Mr George: It has extended the deadline for comments from the general public. I am assuming that that probably applies to us, but I am not absolutely sure.

Janet Ryder: Next Friday is 16 July, so there would be time, if Members wished, to put a final response together next week.

William Graham: I am happy with that.

Janet Ryder: Are you happy with this, or are you happy to finalise it next week?

William Graham: I am happy to finalise it next week.

Janet Ryder: Is that possible within the timescale?

Mr George: That is fine. If that is the case, the informal note will probably become a formal committee paper. We settled on this particular mechanism only because we received it so late in the day. However, we will put both papers on the agenda so that everyone has a chance to look at them.

William Graham: Are there any specific things that the clerk wants to draw to our attention?

Mr George: There are a number of suggestions for possible changes to Standing Orders, most of which are a reflection of the inquiry that the committee carried out last year, on things such as allowing the committee explicitly to consider draft statutory instruments, certain parts of Westminster Bills, and so on. There are also a few other suggestions that follow on logically from that. If the committee is to look at Westminster Bills, for instance, there needs to be some mechanism by which relevant clauses are drawn to our attention. Perhaps there should be some requirement on the Government to inform the committee when it is told of these things, and so on. There is some stuff in there about legislative consent motions—Sewel motions—which I know the committee was concerned about a while back. However, if the committee is content to wait until next week, we can have this discussion at that time, and I can elaborate.

Janet Ryder: I will not be here next week, but I think it important that we get to see those draft Orders. If we can make any recommendations early on, it makes the process swifter, in a way, because things go through more quickly. We need to look at statutory instruments, as has come through clearly in previous reviews. At the moment, we cannot really look at legislative competence Orders, which is inflexible, so we need to see more flexibility in the system.

I agree with the other issues being raised. I know that the committee is looking at who is responsible for scrutinising subordinate legislation, which was originally the work of this committee. There are a number of ways in which the Assembly might look at this. It might consider that subject committees should revert to looking at subordinate legislation. If that is the case, we must consider how much knowledge and officer resource is needed to support that. By doing it in one committee, we have built up an expertise in looking relatively swiftly at instruments and proposed Measures, picking out the points that need to be considered. If all Assembly committees needed to come up to that standard, there would be resource implications. I think that the system is working all right. We get some weeks when there are many pieces of legislation to look at, and we get some weeks when there are not many. However, if we had an indication of a Government forward work programme, we could timetable the committee's work better and work reviews into the possible gaps in considering legislation. That would balance things out. That is just my view, and I only say that now as I would like it to be reflected in any discussion held next week. However, we will lay those papers for the agenda next week.

1.24 p.m.

Gohebiaeth y Pwyllgor Committee Correspondence

Janet Ryder: We have received a response from the Deputy First Minister and Minister for the Economy and Transport to my letter regarding CA448, the Civil Enforcement of Parking Contraventions (City and County of Cardiff) Designation Order 2010. This was an issue that you raised, Rhodri. Are you content?

Rhodri Morgan: I am not sure that I should be content. In other words, where does this leave us? The council has stated that it does not propose to sub-contract the clamping to private contractors at this stage, but, in legal terms, we are giving it the power to carry out the clamping or to sub-contract it. That makes no difference, in legal terms. Public concern has been expressed about the activities of certain clamping contractors, but the Deputy First Minister's letter does not indicate anything of that sort. It simply states the legal position that if we give our consent and this goes through—and, in fact, it started on Monday—the council will be fully entitled to change its mind at any time and sub-contract the work to private clamping contractors. It makes no odds. Therefore, that may be the legal position, but is it possible for us to suggest to the Deputy First Minister that he write to Cardiff Council to ask it to ensure, if it decides to sub-contract the clamping to a private clamping contractor at any stage in the future, that the contractor complies with a code of conduct?

I do not know whether there is a national federation of clamping sub-contractors that has its own code of conduct. The tidy or 'legit' contractors may already have a code of conduct, but it is the not-so-legit ones that are notorious for their bad conduct—and I am not aware of terrible problems in Wales, but there are in Birmingham and London, for example. So, should we try to require the council to notify us if at any stage it decides to sub-contract the work, to require it to ensure that it appoints a sub-contractor that abides by a code of conduct? Is that possible?

William Graham: It seems to me that that is a policy matter.

Mr George: As far as I am aware, those regulations have already come into force.

Rhodri Morgan: Yes, on Monday.

Mr George: So, they have been made. As William says, it is a matter of policy. The purpose of a merits report on these or any other regulations is to draw to Assembly Members' attention any concerns or issues that they may want to highlight. So, I suggest that it is for individual Assembly Members to pursue this with the Deputy First Minister or to try to table a motion to annul the regulations, if they feel that strongly about it.

Janet Ryder: Could we not lay a merits report?

Mr George: We have already done that, and we did it within the time available.

Janet Ryder: Can we do it in response to the Deputy First Minister's letter?

Mr George: There is no reason whatsoever why we cannot write to the Deputy First Minister to flag up the issue, but it would be for individual Members to decide whether they wanted to make more of it than that.
Alun Davies: We can write to the Deputy First Minister, though, can we? It is a significant issue.
Mr George: There is no reason why we could not that, if you want to.
William Graham: Yes, let us do it, because there are an awful lot of implications to this.
Janet Ryder: We must be careful not to cross the boundary into developing policy instead of ensuring that a piece of legislation is technically sound. There is certainly a merits issue, which we have reported on. Are you content to pursue that as an individual Member, Rhodri?
Rhodri Morgan: I should therefore pursue this in another way, should I?
Janet Ryder: Yes.
Rhodri Morgan: Okay.

1.29 p.m.

Unrhyw Fusnes Arall

Any Other Business

Janet Ryder: The only piece of other business that I have is that I will not be in committee or in Plenary next week. The Proposed Mental Health (Wales) Measure, on which we have laid a report, will be going through Plenary, and so we will require someone to speak about that on behalf of the committee. I know that Dai Lloyd will be attending next week's committee meeting in my absence, but he chaired the legislation committee that considered that proposed Measure and therefore he will be addressing Plenary in that capacity.
Rhodri Morgan: Two for the price of one? ["Laughter."]
Janet Ryder: He will not have time, unfortunately, Rhodri. We have to have someone from the committee. There is also a likelihood that William will be in the Chair for those Plenary proceedings.
William Graham: I am not told until the day.
Janet Ryder: So, we do not know, but that is a possibility. Kirsty is new to the committee, so we have narrowed it down to two people.
Rhodri Morgan: I nominate Alun on the grounds that he has been a member of this committee far longer than I have.
Janet Ryder: There is also another piece of legislation going through on the same day.
Mr George: Two pieces of affirmative legislation and regulations are going through next week, on environmental civil sanctions, which we also produced a merits report on last week. The Minister is likely to respond in writing on the points before the debate. I am not absolutely sure about that, but I believe that she is likely to do that. So, her response may answer all the points that needed to be made anyway.

Janet Ryder: What if that is not the case?

Mr George: If there are still some points that need clarification, it would be helpful if someone from this committee could speak in that debate to raise those points formally.

Kirsty Williams: Alun could do that, too.

Janet Ryder: Alun, are you content to do that as well?

Alun Davies: Absolutely. It is a great honour to have been chosen in this way. ["Laughter."]

Janet Ryder: Yes, it was a pretty unanimous nomination.

Mr George: The committee clerk will ensure that Alun has speaking notes to assist him.

Rhodri Morgan: Give that man a Cadbury's Dairy Milk. ["Laughter."]

Janet Ryder: There is no other business.

1.31 p.m.

Dyddiad y Cyfarfod Nesaf

Date of the Next Meeting

Janet Ryder: Next week's committee meeting will be held in committee room 2 in the Senedd. I now conclude the committee. Thank you for your attendance.

"Daeth y cyfarfod i ben am 1.31 p.m.

The meeting ended at 1.31 p.m. "