



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

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

**Dydd Mercher, 24 Tachwedd 2010  
Wednesday, 24 November 2010**

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

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

**Aelodau'r pwyllgor yn bresennol**  
**Committee members in attendance**

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

**Eraill yn bresennol**  
**Others in attendance**

Manon George	Cynorthwy-ydd Ymchwil, Ysgol y Gyfraith, Prifysgol Caerdydd Research Assistant, Cardiff Law School
David Lambert	Cymrawd Ymchwil, Ysgol y Gyfraith, Prifysgol Caerdydd Research Fellow, Cardiff Law School

**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 9.30 a.m.*  
*The meeting began at 9.30 a.m.*

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

[1] **Janet Ryder:** I welcome Members, officials and members of the public to the meeting. In an emergency, ushers will indicate the nearest safe exit. Headsets are available for interpretation and amplification. Please switch off all mobile devices completely. We have received no apologies—we have a full house this morning.

9.31 a.m.

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

[2] **Janet Ryder:** We are looking at CA503, the Education (Specified Work and Registration) (Wales) Regulations 2010. Do you have any comments, Gwyn?

[3] **Mr Griffiths:** Mae'r rheoliadau hyn yn dirymu ac yn cymryd lle rheoliadau blaenorol a wnaed yn 2004 er mwyn diweddarau'r cyfeiriadau at y gwaith y gall pobl ar wahân i athrawon cymwysedig ei wneud mewn ysgolion. Nid oes dim i adrodd arno'n benodol.

**Mr Griffiths:** These regulations annul and replace the previous regulations that were made in 2004 to update the references to the work that can be undertaken by people other than qualified teachers in schools. There is nothing specific to report.

[4] **Janet Ryder:** A yw pawb yn hapus â hynny? Gwelaf fod pawb yn hapus.

**Janet Ryder:** Is everyone content with that? I see that everyone is content.

[5] We now move to CA505, the National Health Service (Travelling Expenses and Remission of Charges) (Wales) (Amendment) (No.2) Regulations 2010. Do you have any comments, Gwyn?

[6] **Mr Griffiths:** Mae'r rheoliadau hyn hefyd yn diweddarau'r prif reoliadau a wnaed yn 2007. Maent yn rheoliadau sy'n cael eu diweddarau'n rheolaidd, wrth i ddeddfwriaeth arall y cyfeirir ati newid. Yn yr achos hwn, gan fod cyfeiriad at newidiadau mewn trefniadau ar gyfer taliadau i fyfyrwyr, mae angen diwygio'r rheoliadau hyn am yr ail dro eleni.

**Mr Griffiths:** These regulations update the main regulations that were made in 2007. They are updated regularly, as the legislation to which they refer changes. In this case, as reference is made to changes to the arrangements for payments to students, these regulations need to be amended for the second time this year.

[7] **Janet Ryder:** A yw pawb yn hapus â hynny? Gwelaf eich bod.

**Janet Ryder:** Is everyone content? I see that you are.

9.32 a.m.

**Offerynnau ac Offerynnau Drafft y caiff y Cynulliad ei Wahodd i roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhif 15.2 ac/neu 15.3, ac Offerynnau Drafft sy'n Agored i gael eu Cymeradwyo yn unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Gadarnhaol)**

**Draft Instruments in Respect of which the Assembly is Invited to pay Special Attention under Standing Order Nos. 15.2 and/or 15.3, and Draft Instruments Subject to Approval Pursuant to a Resolution of the Assembly (the Affirmative Procedure)**

[8] **Janet Ryder:** We have one item to draw to people's attention, namely CA504, the National Assembly for Wales (Disqualification) Order 2010. Steve will introduce this.

[9] **Mr George:** Before I do, there are two issues to consider. One is a technical reporting point, which, perhaps, has wider implications, and there are also some merits points. Gwyn

has some comments on the technical points.

[10] **Mr Griffiths:** Mae'r pwynt technegol yn un syml iawn. Mae'r Gorchymyn hwn, sydd i'w wneud gan y Cyfrin Gyngor, wedi'i wneud yn Saesneg yn unig. Felly, mae'n ofynnol inni adrodd arno. Yn bwysicach, mae'n werth nodi bod hwn yn Orchymyn anarferol iawn. Fel arfer, mae Gorchymynion y Cyfrin Gyngor yn cael eu cyflwyno gerbron y Senedd, felly nid ydynt yn dod i'r pwyllgor hwn. Fodd bynnag, mae hwn yn unigryw gan ei fod yn cael ei gymeradwyo gan y Cynulliad ac wedyn yn cael ei wneud gan y Cyfrin Gyngor. Dyna pam mae'n dod gerbron y pwyllgor hwn.

**Mr Griffiths:** The technical point is a very simple one. This Order, which is to be made by the Privy Council, has been made in English only. Therefore, we are required to report on it. More importantly, it is worth noting that this is a very unusual Order. Orders in Council are usually laid before Parliament, so do not come to this committee. However, this is unique as it is approved by the Assembly and then made in Council. That is why it is before this committee.

[11] **Janet Ryder:** However, the reason given for it being in English only is that it applies beyond the borders of Wales.

[12] **Alun Davies:** That is not a reason for it to be in English only—it is a reason for it to be available in English but not for it to be available in English only.

[13] **Rhodri Morgan:** Quite right; a bit of logic.

[14] **Janet Ryder:** Gwyn, would you like to respond to that point?

[15] **Mr Griffiths:** That is a perfectly valid point to make. If the committee wishes to take the matter up with the Government or the Privy Council Office, it can be done.

[16] **Janet Ryder:** Is it the view of the committee that we should draw this to the attention of the Counsel General?

[17] **Mr George:** The First Minister is formally responsible for this particular Order.

[18] **Janet Ryder:** There are merits points as well. We are agreed that that is one issue that we would like to pursue further with the First Minister. We will now go through the merits points.

[19] **Mr George:** There is a draft, which you have seen, that contains a number of merits points. You also have in front of you this morning an informal draft response from the Government to some of those issues. I should stress that it is informal and that it has not been cleared by Ministers.

[20] **Rhodri Morgan:** Which one is that?

[21] **Janet Ryder:** It is the loose piece of paper that was on your desk as you arrived.

[22] **Mr George:** There is that response to some of these merits points, and a new piece of paper that sets out exactly what changes this Order makes. To move on to the merits points that we identified, the first was that the explanatory memorandum was somewhat lacking, because it did not explain what changes were being made by the Order, namely who was and was not being disqualified. We also had concerns that the explanatory memorandum said that the intention was not to disqualify people who were elected officials but that one of the unforeseen consequences of this is that it disqualifies local councillors who are members of

national park authorities, of whom there are some 40 across Wales. There was also a discrepancy over why the staff of some office-holders were specified as being disqualified, whereas the staff of some other office-holders were not so specified. The explanation that has been given to us—I stress that it is informal—is that, in some cases, they are already disqualified because they are civil servants and so on. I stress that the response that you have had is not a formal Government one, and we do not know whether that is the final response.

[23] For those various reasons, we thought that it was worth drawing those issues to the attention of the Assembly. The information that is now being provided might have mitigated the need for an explanatory memorandum, and it is possible that the explanation that you have in relation to the staff of office-holders means that you do not need to report on that. There is an issue that you need to consider about elected members of national park authorities and whether, as a consequence of this Order, they should be disqualified from being Assembly Members.

[24] **Janet Ryder:** This disqualifies people from standing for election to the National Assembly. So, this is the list of people who—

[25] **Rhodri Morgan:** From my experience, the difficulties come with the detailed operation of the disqualification Order—in other words, the precise timing at which resignation from a previous office must take place. A friend of mine, who is now, unfortunately, dead, was elected to Cardiff city council while on a Manpower Services Commission scheme back in the bad old days of the mid 1980s. He was disqualified, after being elected a councillor, although he had absolutely no intention of continuing as a Manpower Services Commission community programme employee, because he did not resign on the day of his election or at midnight after the result of the election was declared. He was ruled as disqualified by the chief executive of the council. That was all due to a misunderstanding. It is terribly important that people should know, if they are employees—even indirectly, as in the Manpower Services Commission example—of a body such as a council, when they must resign. Whether that is on election day, before the result is declared, before midnight on election day or whenever, it is terribly important that it is absolutely clear to everyone. It was not clear when my friend fell foul of it, and he never recovered.

[26] **Janet Ryder:** Do these regulations clarify that, Steve?

[27] **Mr George:** As far as I am aware, these regulations apply only to disqualification in relation to membership of the National Assembly.

[28] **Rhodri Morgan:** Of course, but the latest point at which you can resign from a job or an office has to be absolutely clear.

[29] **Janet Ryder:** It is not just about who cannot stand, but when you have to resign if you want to stand.

[30] **Mr George:** I do not know. I would have to ask Gwyn. What I can say from my experience as a civil servant is that, if people wanted to stand for election, they would normally be expected to resign their post before the election was announced, or at the point that it was announced, so that, for the campaigning period, they were not employed. Whether that is an informal arrangement within the civil service or whether it is a requirement of the law, I am not sure. I would have to turn to Gwyn on that.

9.40 a.m.

[31] **Janet Ryder:** Gwyn, do you have a comment to make?

[32] **Mr Griffiths:** I can read the precise provision to you. It is section 18(1) of the Government of Wales Act 2006:

[33] ‘If a person who is disqualified from being an Assembly member is returned as an Assembly member, the person’s return is void and the person’s seat is vacant’.

[34] **Rhodri Morgan:** Yes, but that does not tell you what causes the person to be disqualified, does it? It is because he or she will not have resigned in time—but what is that time?

[35] **Mr Griffiths:** It is when the person is returned as a Member.

[36] **Rhodri Morgan:** Returned? So this is not about commencement, but the return. That is when the election is declared, then?

[37] **William Graham:** When the result is declared.

[38] **Rhodri Morgan:** So, in other words, if you are at the election count and you realise that you will win, because you can see that your pile of votes is getting higher and higher, you then write your letter of resignation and hand it to the chief executive of the council—no, of course, it is not a council; in a council you could do that. Perhaps you would have to e-mail your resignation.

[39] **Janet Ryder:** Would it be better to seek further clarification on this point in particular? Alun is next.

[40] **Alun Davies:** I agree with that. I had not read about this issue about the national park authorities, although it has been explained this morning. I think that it would be outrageous for an elected member of any body, be it a national park or a local authority, or whatever, to be disqualified for standing for election to this place. There is a constitutional and philosophical difference between a member of staff who works for an organisation—you would have to take a decision about them—and an elected member. I would have significant problems with accepting any disqualification or bar on an elected member of another body seeking election to this place.

[41] **Janet Ryder:** I take that point. Steve, do you want to comment?

[42] **Mr George:** That is the current situation. This does not make a change in that respect, although now, the Assembly Government is responsible for this particular Order.

[43] **Janet Ryder:** Can we—[*Interruption.*] Sorry, Rhodri, but nothing that you are saying will go on the record, unless you are called, because it will not be picked up by the microphone.

[44] There is a point about elected Members, which we will clarify. There is also the issue about when you have to resign a post to stand or take up your place here. What intrigued me was that, if you worked for the Forestry Commission in any role, you are disqualified. If I think of the number of people in north Wales who work for the Forestry Commission, that is a significant number.

[45] **William Graham:** The Forestry Commission is wholly owned by the Assembly Government. That is the reason.

[46] **Janet Ryder:** Some of these groups have quite significant numbers of people employed in them, and therefore there are wide ramifications.

[47] **Rhodri Morgan:** I was going to say that William is quite right—I do not know whether Forestry Commission staff are designated as civil servants, but it is definitely a wholly owned subsidiary of the Assembly Government. There is no anomaly about that; it is absolutely clear, even though it hurts a lot of people who might have legitimate political ambitions. However, on the question of the national parks, we have to get a common-sense solution, because they are one-off, anomalous bodies, and are very peculiar. I agree with Alun that, philosophically, an elected member of such a body should not be disqualified from seeking election to the Assembly. I can understand why an officer of a national park might be seen as a quasi-civil servant, and be treated similarly to a civil servant, but it seems absurd to treat an elected member in that way.

[48] **William Graham:** I have a point of clarification for Gwyn. Why is appointment by a Welsh Minister a disqualification?

[49] **Mr Griffiths:** That is really a matter of policy. That is the way that it has always been.

[50] **William Graham:** In that case, I withdraw the question. [*Laughter.*]

[51] **Alun Davies:** These are regulations, are they not?

[52] **Mr Griffiths:** Yes—an Order in Council.

[53] **Alun Davies:** And the ownership lies with the First Minister?

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

[55] **Alun Davies:** We can therefore write to the First Minister on the points that have been raised this morning and ask him to review these matters. I propose that we do so. You spoke earlier, Gwyn, about these being UK regulations.

[56] **Mr Griffiths:** Yes. It will be an Order in Council.

[57] **Alun Davies:** So, this is under the ownership of the Welsh First Minister, but is UK legislation. Okay. We could ask for a review of these regulations, and they could be amended, and they would then need to be produced bilingually, in my view, and then would need to go to Parliament for acceptance.

[58] **Mr Griffiths:** They would not go to Parliament.

[59] **Alun Davies:** Would they not?

[60] **Mr Griffiths:** No, these are very peculiar in that they do not go to Parliament; they go from the Assembly to the Privy Council.

[61] **Rhodri Morgan:** I declare an interest as a member of the Privy Council, otherwise I will be disqualified. [*Laughter.*]

[62] **Mr Griffiths:** The First Minister could review them and bring a revised draft before the Assembly before they are submitted to the Privy Council, subject to the time limit.

[63] **Kirsty Williams:** I agree with the proposed course of action, but we are getting dangerously close to an election period, and I can think of at least one candidate from my party who would fall foul of these rules as they are currently drafted. Therefore, we need



clarity as quickly as possible, because candidates have been selected who need to make decisions about the bodies on which they currently sit or the employment they currently have. There is nothing worse than someone falling foul of the rules, having legitimately secured a place in the Assembly, only to have that taken away because we have not been clear about the rules around candidature. We should impress upon the First Minister that he needs to deal with this quickly as a matter of urgency, given how close we are to an election period. It is not as if he has three years to sort this out.

[64] **Alun Davies:** I agree with that.

[65] **Janet Ryder:** Steve wants to come in on this.

[66] **Mr George:** My understanding is that these rules will be debated in Plenary next week, so I will ensure that the Chair has a draft letter to send to the First Minister this afternoon on this.

[67] **Janet Ryder:** We will send a draft and we will lay a merits report so that there is definitely discussion on this in Plenary next week.

[68] **William Graham:** Could we ask in the merits report why the regulations include an appointment by a Welsh Minister? That is surely consequent to the elections, is it not?

[69] **Janet Ryder:** Is everyone satisfied with that course of action?

[70] **Rhodri Morgan:** On this question of resignation, let us say that you are a member of a national park authority and you are going to win the election because you can see the way in which the votes are piling up. You now need to bloody resign pretty quickly before the final result is declared. Is it acceptable to send an electronic message to whoever it is that you have to hand in your resignation, such as the chief executive of the national park authority or presumably the chair of the authority if you are an elected member? Is it acceptable for you to send a message via a BlackBerry to the person concerned and for them to accept your resignation at 1 a.m. just before the election result is declared at 2 a.m.? It does not have to be in writing, because it could be done electronically. We would need to know that, would we not?

[71] **Kirsty Williams:** That works only if you are a constituency Member. If you are a list candidate, you cannot see the votes piling up, and you cannot make a judgment.

[72] **Janet Ryder:** We need further clarification on a number of these points. It is unlikely that we will get this clarification before the Plenary debate, but we will ensure that the letter and the merits report goes to the First Minister today and we will circulate any response to Members. If we receive a response before the Plenary debate, we look forward to Members contributing to that Plenary debate when the legislation is laid.

[73] **Rhodri Morgan:** Is the general thrust of the legislation against the philosophical background—to use Alun's phrase—that you are looking for a reason to disqualify more people, or are you looking to protect the rights of the people that you wish to encourage not to be disqualified, that is, that the more people that stand, the healthier and better it is? That is the philosophical point. I am speaking as someone who was a civil servant at the European Commission when I first stood for Parliament. The rules that the British wrote for the Germans after the war encouraged the maximum number of people—including civil servants—to stand for office after the Nazi period was over. The rules protected the rights of civil servants, including schoolteachers, in order to maximise and speed-up the de-Nazification of Germany. It leaves me with that philosophical viewpoint, because it benefited me that I was encouraged to stand even though I was a public servant of some description.

That is my general philosophical background, based on my experience, but other people take a different view that the more people you can disqualify, the better. So, we need to establish what is the philosophical background against which these regulations are being made—is it encouragement or discouragement?

[74] **Janet Ryder:** We will certainly try to pose that question in the report and the letter as they are drafted. Are Members satisfied with that way forward? I see that you are.

9.50 a.m.

**Gohebiaeth y Pwyllgor: Ymateb John Griffiths AC, y Cwnsler Cyffredinol ac Arweinydd y Rhaglen Ddeddfwriaethol i lythyr y Cadeirydd ynghylch adroddiad drafft y Pwyllgor ‘Monitro Canlyniad Adroddiadau’r Pwyllgor Materion Cyfansoddiadol ar Is-ddeddfwriaeth (mis Medi 2009-mis Gorffennaf 2010)’**

**Committee Correspondence: Response of the Counsel General and Leader of the Legislative Programme John Griffiths AM to the Chair’s letter regarding the Committee’s Draft Report ‘Monitoring the Outcome of the Constitutional Affairs Committee’s Reports on Subordinate Legislation (September 2009-July 2010)’**

[75] **Janet Ryder:** I remind Members that this report was the cause of a bit of concern last year, as we could not agree with the then Counsel General on a number of reporting issues; we have since resolved that issue. Gwyn or Bethan, do you want to comment on this?

[76] **Mr Griffiths:** Mae’r paragraff olaf ar dudalen gyntaf llythyr y Cwnsler Cyffredinol dyddiedig 9 Tachwedd yn cyfeirio ar y Rheoliadau Bwyd Anifeiliaid 2010 (Cymru). Gallaf gadarnhau bod y pwyllgor hwn wedi edrych ar y rheoliadau hynny’r wythnos diwethaf, felly mae’r hyn y mae’r Cwnsler Cyffredinol yn ei ddweud yn ei lythyr eisoes wedi digwydd.

**Mr Griffiths:** The final paragraph on the first page of the Counsel General’s letter dated 9 November refers to the Animal Feed (Wales) Regulations 2010. I confirm that this committee looked at those regulations last week; therefore, the action that is described in the Counsel General’s letter has already happened.

[77] **Janet Ryder:** We are, therefore, in a much more satisfactory position this year, as there is a degree of agreement on this matter. In the response, you can see where the pieces of legislation that we have reported on are at. Does anybody have any comments on this?

[78] **Alun Davies:** We are in agreement only on the nature of the problem, are we not?

[79] **Janet Ryder:** Yes; last year’s issue was caused by the difference between what we and the Counsel General were taking as reporting points.

[80] **Alun Davies:** I understand that. In the last sentence of the second paragraph of the Counsel General’s letter, he says that,

[81] ‘The Government is continuing to take steps with the aim of further improving the position’.

[82] It would be interesting to know what steps the Government is taking.

[83] **Janet Ryder:** We will send a further letter to ask him what those further steps are; is everybody content with that? I see that you are.

9.52 a.m.

**Ymchwiliadau'r Pwyllgor: Drafftio Mesurau Llywodraeth Cymru: Gwersi a ddysgwyd  
o'r Tair Blynedd Cyntaf: Ysgol y Gyfraith, Caerdydd**  
**Committee Inquiries: Drafting Welsh Government Measures: Lessons from the First  
Three Years: Cardiff Law School**

[84] **Janet Ryder:** We have been joined by David Lambert and Manon George of Cardiff Law School, who have been waiting very patiently; thank you both for giving evidence today. This is the fourth session of this inquiry; last week, we took evidence from Stonewall Cymru, and we have previously taken evidence from Daniel Greenberg. We have taken a great deal of evidence already. Before we move on to questions, I wonder whether you would like to introduce yourselves for the record and make a few opening remarks.

[85] **Mr Lambert:** I am David Lambert from Cardiff Law School, and this is Manon; we are also legal members of the Wales Governance Centre. The reason that we would like to contribute to this particular inquiry is that we operate Wales Legislation Online, which I dare say is the only database that attempts to set out all the powers of the Welsh Assembly Government and the legislation made by the National Assembly. In so doing, we analyse every line of every Act of Parliament and every Measure giving powers. Our evidence contains the sort of things that have occurred to us over a number of months. As always, we welcome the opportunity to make these representations to the Constitutional Affairs Committee; this is a very interesting inquiry, as were your other inquiries. We are always interested in what you have to ask us. We have answers to 25 questions.

[86] **Janet Ryder:** Yes, we have many questions to ask you.

[87] **Mr Lambert:** We may take time to find the examples to answer your questions; Manon will find them while I do the talking, but there may be gaps now and again.

[88] **Ms George:** I am responsible for the Welsh version of Wales Legislation Online. I also work at Cardiff Law School and am a member of the Wales Governance Centre.

[89] **Janet Ryder:** If we are ready, I will start with the first question. What are your views on the standard of drafting of proposed Measures and their accompanying explanatory memoranda to date?

[90] **Mr Lambert:** We have some questions and concerns. I will list some of them, and then Manon can give examples. One of the fundamental problems is that there still does not seem to be any agreement with the Assembly Government as to what is acceptable to put into a Measure and into delegated legislation. We have analysed every Measure in relation to wide powers and specific powers. While there are wide powers in every Measure, there are sometimes specific powers. However, we still cannot see any principles laid down by the Assembly Government, in presenting its Measures to the Assembly, as to why it has chosen one or the other.

[91] The second one is the difficulty, which I have always had as a Government lawyer, of trying to find definitions in the legislation. That was always a problem in Acts of Parliament, and the same problem exists with Measures. A section in a Measure titled 'definitions' is not the only section dealing with definitions, but one of possibly eight or nine other sections lurking in the legislation. Wales Legislation Online has lived with that problem with ever since devolution, with Parliamentary Counsel—although they are marvellous people whom I have worked with for years—seeming to refuse, for example, to use one word or a phrase in an Act of Parliament for the Assembly Government. We have sometimes found seven or eight different definitions of the Assembly Government in the same Act of Parliament. That has

nothing to do with the flexibility of drafting; it is just nice to have a structure, so that the reader knows where to go.

[92] We have also found difficulty in understanding, when powers are given by delegated legislation to the Assembly Government, why some are subject to negative, affirmative or superaffirmative provisions, which is one of the questions that you have asked. We have only found one example of the superaffirmative, although we think that there are a number of cases where the powers delegated in the Measures are so wide that they should have been subject to the superaffirmative provisions.

[93] In relation to explanatory memoranda—it sounds like a terrible list, but we have had to live with these Measures over the past four or five years—they are getting much better, which is wonderful, because the first six or seven were pretty bad, in that they were just four lines long, stating, for example, ‘This Measure gives delegated powers to the Assembly Government.’ [*Laughter.*] If you were desperately trying to understand why, you could not get much further than that. They are getting much better, but we still cannot find out why the Assembly Government has presented proposed Measures to the Assembly that give wide powers or sometimes specific powers of delegated legislation, or why it has asked for delegated legislation at all, and why the provisions did not appear on the face of the proposed Measures. Those are our problems. However, it is getting there, although it is slow.

[94] **Janet Ryder:** We will touch on a number of these issues in later questions, but the first issue that you raised was about having no agreement with the Government about where things should go. Do you have any examples of where that has happened?

[95] **Mr Lambert:** Section 25 of the Proposed Welsh Language (Wales) Measure states that:

[96] ‘The Welsh Ministers may, by regulations—

[97] ‘specify one or more service delivery standards,

[98] ‘specify one or more policy making standards,

[99] ‘specify one or more operational standards,

[100] ‘specify one or more promotion standards’.

[101] Section 4 of the Proposed Waste (Wales) Measure states that:

[102] ‘The Welsh Ministers may by regulations—

[103] ‘specify waste targets to be met by a local authority in exercising its functions’.

[104] They may specify indicators, and, this is one that makes your hair slightly stand on end, they may

[105] ‘impose liability on a local authority to pay a penalty to the Welsh Ministers’.

[106] There are no conditions whatsoever. Another example is the power to make provision about appeals and claims by a child in the Education (Wales) Measure 2009:

[107] ‘The Welsh Ministers may by order make provision about—

[108] ‘the rights of a child to appeal to the Welsh Tribunal in respect of matters for which a

parent has a right to appeal’.

[109] Why not set that out on the face of the Measure?

10.00 a.m.

[110] **Janet Ryder:** So, there are still several issues involved and we will come on to them in further questions. Having listed all of those issues, do you believe that the standard of drafting Measures and memoranda has improved? You said that the explanatory memoranda have improved, but do you think that the drafting of Measures has improved since 2007?

[111] **Mr Lambert:** Insofar as we have identified no agreement as to what is acceptable to put in the Measure and what in delegated legislation, we would say ‘No, not really’. It is still at large; you are getting more of a reason as to why something is being put in delegated legislation, but it is still at large. These principles have only just come in the explanatory memoranda of the last four months, and it is therefore early days as to whether the Assembly Government, in putting its draft Measures to you, will keep to those principles. For example, we very much like the Proposed Local Government (Wales) Measure, which sets out what is considered to be suitable for delegation to the Government, and, furthermore, what is considered, if power is delegated to the Government, suitable for negative and affirmative resolution. That is the first time that we have seen something like that. It is a marvellous structure. Whether it will be kept to, we do not know. At the moment, it is not necessarily being kept to, but it is in this proposed local government Measure.

[112] **Janet Ryder:** So, would we be right to say that, as far as you can see, every piece is drafted separately, no pattern is emerging and there is no improvement, but it may be still too early to judge whether that improvement can come through?

[113] **Mr Lambert:** Yes, indeed. At the moment, exactly as you said, the Measures are being drafted on their own, and my experience of working with Parliamentary Counsel over the years is that they are like monks living in a cell. They do not seem to come together, even over a cup of coffee, to decide fundamental matters, such as, in post-devolution legislation, a section in an Act of Parliament that sets out the powers delegated to the Welsh Ministers in that Act. Even that seems difficult for them to achieve. It has nothing to do with what goes into the Act, namely the flexibility, which is what that Parliamentary Counsel was talking to you about. Why can we not have somewhere, as readers, where we can go and say ‘Ah, now we know, because here is a set of definitions about Wales’? At the moment, the Measures are rather like Acts in that sense, I am afraid, but we live in hope.

[114] **Rhodri Morgan:** What was that last phrase again, please?

[115] **Mr Lambert:** The Measures are still very much all on their own, so you look at one and think, ‘Ah, now we can understand why they have given this delegated power to the Ministers; I can understand why they have given this delegated power to the Ministers for the negative resolution procedure’. You then look at the next one, and it is quite different.

[116] **Alun Davies:** That is interesting evidence. It appears that you are identifying a systemic problem with the production of all Measures, and in the structure by which Measures are produced within the Government.

[117] **Mr Lambert:** Yes, we are. We hope that it is getting better because, suddenly, the explanatory memoranda are very interesting and better than those that we get from Parliament in relation to United Kingdom Acts of Parliament.

[118] **Alun Davies:** Are you therefore saying that this systemic problem is being resolved

within Government? You say that explanatory memoranda are improving, but is that also true of Measures?

[119] **Mr Lambert:** There is no indication that this will be a general approach, unfortunately. The way in which the last four explanatory memoranda that we have looked at are now set out relates only to their particular Measures. There is no statement on the face of any of those explanatory memoranda that these are the principles that will be applied to everything in future.

[120] **Janet Ryder:** I will turn to Kirsty now instead of you, Rhodri, because her questions relate to this issue.

[121] **Kirsty Williams:** You have given us some examples of bad practice, and you have explained that progress has been made. As you said, it seems that individual efforts have been made to improve the explanatory memoranda rather than there a systematic approach being taken to consider what an explanatory memorandum should look like in future. What principles should form the basis of a good explanatory memorandum?

[122] **Mr Lambert:** I will read out some of the bullet points in the explanatory memorandum for the Proposed Local Government (Wales) Measure. It says that regulations are suitable if they provide

[123] ‘administrative detail which follows the intent of the Measure’.

[124] This is the point that Manon and I would like to emphasise, namely that, there must be substance in the Measure, and then you add to that substance, but you do not create the substance in the subordinate legislation. That is the problem in the examples that we have just given from the Education (Wales) Measure 2009, the Proposed Waste (Wales) Measure and the Proposed Welsh Language (Wales) Measure. The regulations are creating the substance, not the Measure or the proposed Measures.

[125] The explanatory memorandum for the proposed local government Measure then says that regulations are suitable: if they add to a list that is already in the proposed Measure; if they add prescribed provisions to those already in the proposed Measure; if they provide details of schemes, the structure of which is already set out in the proposed Measure; and if they put into effect a default power, which would be used only if authorities refused to carry out a statutory requirement. What we do not like, and I will give a couple of examples from some explanatory memoranda, is an explanatory memorandum that says that delegated powers have been put into a Measure because:

[126] ‘It is not possible at this stage to identify all cases where it may be appropriate’

[127] That is in reference to provision being made—and I see, to my horror, that that is in the explanatory memorandum of the proposed local government Measure. We would therefore ask, ‘Why are you presenting the proposed Measure to the Assembly if you have not identified at this stage the cases where it may be appropriate?’.

[128] There is another example, not in the proposed local government Measure’s explanatory memorandum, where it is said that delegated legislative powers are establishing a new rule of law. You think ‘Good heavens above, why has the Assembly Government not introduced its proposed rule of law to the Assembly?’. Another says that amendments can be made by delegated legislation relatively quickly, the impression being that the Assembly takes ages, so why bother with it? Another example is in the explanatory memorandum of the Proposed Rights of Children and Young Persons (Wales) Measure, which says that

[129] 'it would not be appropriate for the Assembly to be able to prevent...the Measure being updated'.

[130] You think, 'Just a minute, this is the legislature, and that lot up there in Cathays park are the Executive, but they are laying down rules as to when the Assembly can make law'. As can be seen in the first set of principles, we want to see the substance in the Measure, because then you can amend it.

[131] **Kirsty Williams:** Can you spell out the consequences of that? As someone who now spends his life trying to make Welsh law accessible to the citizens of Wales and the people who need to use the law in Wales, can you explain the consequences of such an approach for the accessibility of that legislation?

[132] **Mr Lambert:** Yes. There are two points. The first relates to when provisions are not in a Measure but are being put in subordinate legislation. Under your Standing Orders, you have an extremely good system for considering proposed Measures as they go through the Assembly. There are four Stages, which are laid down, not only in the Standing Orders, but in the Government of Wales Act 2006. We, like everyone, welcome this marvellous opportunity, which is not usually available in Parliament, for a committee to look initially at the policy and to invite people to submit representations and appear before it. Then, the proposed Measure goes through the Assembly and all the procedures in relation to proposed Measures. Two or three pages of the Standing Orders of the Assembly relate to proposed Measures, while the negative procedure for a statutory instrument is contained in two small paragraphs; that is in comparison with four.

10.10 a.m.

[133] So, straight away, it can be seen that something that goes into subordinate legislation cannot possibly be subject to the same scrutiny, certainly not when the negative procedure is used. Even the affirmative procedure is only three paragraphs long, and there is no procedure at all for inviting representations first. It has to be debated—it is presumably debated in Parliament for an hour or so—and that is it. Compare that with the two and a half pages of procedure relating to proposed Measures.

[134] The second thing for the poor old consumers is where you see a power in a Measure—the worst example of all is the NHS Redress (Wales) Measure 2008—where there is nothing of substance at all, so you have to then go to the statutory instrument. You find out where the statutory instrument is, and you then have to find out whether it has been amended and to what extent. Even with the great LexisNexis and so on, you end up with a tremendous amount of extra information, as contrasted with having everything in the proposed Measure. I do not think that a proposed Measure should just be a skeleton; it should have flesh on it and clothes, and you should look at the regulations for the purpose of filling in. To us, regulations should not be a substitute for substance in a proposed Measure.

[135] **Alun Davies:** I agree very much with what you have been saying, and I understand what you are saying about the consequences of this; you have given a good explanation of those. Could you offer an explanation of it from a legal point of view? Looking beyond a potential referendum to having a body of Welsh law that creates its own principles and its own approaches, is there a legal explanation for why we would go in this direction, as we have over the past couple of years, rather than in the direction that you are proposing?

[136] **Mr Lambert:** Our explanation would be: your Standing Orders, and the adverse comments made by the House of Lords Constitution Committee in relation to matters such as the NHS Redress (Wales) Measure 2008, which reflected NHS legislation going through Parliament. The committee says that it is anti-democratic because it does not give Parliament

the proper basis on which to consider very important law. Effectively, the first section of the NHS legislation says that, by regulations, the Welsh Ministers may change the whole system of civil law in relation to redress for NHS negligence claims.

[137] You just blink, but that is what it says. There is nothing else of substance. It goes on, section after section, building on that, but, each time, it says that they can do it by regulations. That was criticised very much by the House of Lords. We would do so as upholders of democracy. I hope that that does not sound too terrible. Also, when I first saw your Standing Orders, when they first came out and you had powers for the first time to make primary law after the Government of Wales Act 2006, I thought, ‘Gosh, this is absolutely marvellous’. It is so much better than Parliament, because you have all of these stages in the Assembly for considering matters. However, you then see these sad comments from the Finance Committee, for example, and some legislation committees that they would love to be able to comment but asking how you can comment on a power that allows the Assembly Government to do anything to change the civil system of law in Wales. Straight away, the whole thing—the procedures—falls to the floor.

[138] **Kirsty Williams:** How can we address this issue? From an opposition point of view, it is very difficult to argue the point that you cannot support a piece of legislation going through the Assembly because of what you regard as inaccurate drafting, because your opponents—the Government—and the public will see only the policy issue and will not be particularly interested in the intricacies of how it is drafted. The option that we have is to table amendments, but the Government whips its Members through. You are then in the position either of voting for something or of wrecking the whole legislative process—in the end, it does not matter, because it will go through anyway with the Government’s majority. What can the National Assembly do to get to grips with this situation and put pressure on the Welsh Assembly Government to improve the way in which it drafts its legislation? Privately, no-one would be happy with the current situation.

[139] **Mr Lambert:** Manon and I would say that the Assembly Government has offered you the principles, so it is not about a fight between the Assembly and the Assembly Government. It has voluntarily offered you the principles in the Proposed Local Government (Wales) Measure, and in three or four very recent ones. If the Government has set out principles for certain individual proposed Measures, then a proposed Measure comes before you that does not follow those principles, the question for me is why it is not adopting its own principles. Why is it not going further by adopting those principles as general principles issued as guidance? I am not talking about drafting guidance, because I understand the evidence that you had from the Parliamentary Counsel on that. It would be guidance for all people, and particularly administrators—from my experience of the Welsh Office, I know that it is not about the draftspeople of the Assembly Government, but about administrators who try to rush things and say, ‘We have not quite thought all of this through yet, but we ought to put a proposed Measure forward in order to keep the production line going’. With all due respect, I do not think that that is the way that they should be approaching important pieces of legislation. It is possible for you, on a non-political basis, to quote the principles that are emerging in the explanatory memoranda and to ask the Assembly Government why it is not following them.

[140] **Janet Ryder:** Would it be beneficial to draw those principles together at any point?

[141] **Mr Lambert:** I think so.

[142] **Janet Ryder:** Who would be the appropriate body or person to do that?

[143] **Mr Lambert:** It would be the Assembly. You could also point out the principles in the latest memoranda that you think are unacceptable; for example, some of the things that I



have read out today. You could sort the sheep from the goats, pointing out what is okay and what is unacceptable. You could also say what tests you will apply in your legislation committees in future. It seems to me that you have a great opportunity, with the committee stages of procedure, to test these principles each time; you would not be commenting on the contents of the legislation, but on the structure of it.

[144] **Janet Ryder:** We might want to refer to this as we draw up our report. It would therefore be helpful if you could send us further written evidence on that point, and points for further discussion in committee, should you have the time and the inclination to do so.

[145] **Mr Lambert:** We can certainly do that.

[146] **William Graham:** I endorse your remarks, Chair; that additional evidence would be extremely helpful.

[147] **Rhodri Morgan:** David, you have expressed harsh criticisms, and they appear to cut completely across the evidence of Daniel Greenberg of Berwin Leighton Paisner LLP a few weeks ago. If I remember correctly, he said that the quality of drafting, the clarity and legal certainty—all of the general objectives of good legislation—achieved by the Assembly were, to the slight surprise of members of the committee, pretty good. Did he not award the process seven and a half out of ten, roughly? Did he not say that we were as good as Parliament? I cannot remember, but the general impression was that standards in drafting legislation were high, apposite and even, occasionally, elegant, according to the comments that he made about the official status of the language in the Proposed Welsh Language (Wales) Measure, much to our surprise as a committee. Do you have any comments on why you might have a much more downbeat view than an experienced parliamentary draftsman from inside the parliamentary structure who is now working for an external parliamentary drafting company?

10.20 a.m.

[148] **Mr Lambert:** We are not commenting on the content of proposed Measures—

[149] **Rhodri Morgan:** Neither was he.

[150] **Mr Lambert:** No, but what we are commenting on is the structure

[151] **Rhodri Morgan:** So was he.

[152] **Mr Lambert:** Yes, but we have lived with Acts of Parliament post-devolution. For example, why is it necessary to define the Welsh Ministers in different ways in the same Act of Parliament? That is not stopping the flexibility of the draftsman to set out what the law is, so why is the Assembly referred to in different ways? Also, if you have a heading in a Measure that says ‘interpretation’, why is it not only that section that refers to interpretation? Certain Measures include interpretation in 10 other sections, I think, and interpretation for a particular section—

[153] **Rhodri Morgan:** Let me stop you. I think that Mr Greenberg was saying—and I am relying on memory here, so please, someone, correct me if I am wrong—that the flexibility in the different structures of the legislation that has been passed was, by and large, apposite to the purpose. He said that each law has to have a different character, because it is building on pre-existing legislation that it is amending, scrapping or whatever. The example that I recall is the question of the official status of the Welsh language. To a layman or laywoman, it looks like a complete dog’s dinner. However, Mr Greenberg says that it is a highly elegant answer to a very difficult question. This amazed me, because I wondered why you could not just say something plain and simple in one line. So, the flexibility is there because of the structure of

the pre-existing law that you are trying to change or delete. You seem to be saying that that flexibility is being misused. On the definition of the Welsh Ministers, you seem to take a view that is almost like a point that I remember being put to me by newspaper editors; they said that they have a style guide, which is issued to all their journalists, so if they are going to call the National Assembly the ‘Welsh Assembly’, that is what it will be called. Similarly, if you are going to call it the ‘National Assembly for Wales’, then you will stick to that. That is a style guide. However, the implication is that you cannot issue a style guide to people who draft legislation; it must be flexible enough to take account of the circumstances of the law that you are creating. That is, it is based on another law, or half a dozen pre-existing laws, which are to be deleted or amended. Do you have any observations?

[154] **Mr Lambert:** A style guide is emerging with the explanatory memorandum of the Proposed Local Government (Wales) Measure, at least in relation to what goes into a Measure and what goes into regulations. I cannot see that that affects the drafting of the provision. That is entirely a matter for those instructing the draftsman as to whether they want the provisions to go on the face of the proposed Measure or into regulations.

[155] **Rhodri Morgan:** We will come to that. You have used the analogy of the human body, in that a Measure should not be the skeleton only, but the skeleton plus meat, with the blood vessels or whatever being the regulations. I do not think that the human body analogy is the right and proper one. I would suggest the structure of a building as being more appropriate, in that the beams, floor and roof—that is, what holds the building up and what keeps it dry and so on—should be the Measure, and then the brickwork should be the regulations. I do not know whether you would accept that analogy. I see from your nodding that you do. So, there has to be some detail in the regulations to take account of the changing circumstances over the years; you do not want to come back and have another bit of primary-type legislation. So, what do you think is being avoided in some way? What is not on the face of a proposed Measure that you think should be?

[156] **Mr Lambert:** There should be an outline substance in the Measure. For me, an example would be section 1 of the NHS Redress Act 2006, which just states that it is for the Welsh Ministers to create a whole new system of civil procedures in relation to negligence. It is anti-democratic. Other formulae have started appearing in Acts of Parliament since 2002, and they are now beginning to appear in Measures, where, interestingly, the Welsh Ministers have powers to make Orders to further achieve the objective of the Measure. That means that, if they do not think that the Measure is fulfilling what they intended it to do, they can, by Order, change it. They could change small or large parts of it or they could substitute the whole thing. There is nothing of substance in the Measure by which you can then criticise them. These statements then come out, for example from the Finance Committee, which will ask, ‘Where is your policy? How can we possibly comment on this when we are not told how you see this operating, because you have just given yourself powers to operate this Measure completely?’ That is no basis at all.

[157] **Rhodri Morgan:** Are you saying that you think that an explanatory memorandum should specify the justification for the split in the structure of the legislation between what is on the face of the Measure and what is in the detailed regulations?

[158] **Mr Lambert:** Yes, and that is what we have had in the last two or three explanatory memoranda—in columns.

[159] **Ms George:** Yes, and there are tables. The Proposed Rights of Children and Young Persons (Wales) Measure, the Proposed Safety on Learner Transport (Wales) Measure, the Proposed Local Government (Wales) Measure and the Proposed Mental Health (Wales) Measure all have a table explaining the kind of power that is delegated, why and to whom,

and the procedure for that. There is also an extra column in both the Proposed Rights of Children and Young Persons (Wales) Measure and the Proposed Safety on Learner Transport (Wales) Measure that explains each power and whether that should be subject to the affirmative or negative procedure and why. That is an example of good practice. Also in the explanatory memoranda of the Proposed Local Government (Wales) Measure and the Proposed Mental Health (Wales) Measure, there is an annex on delegated legislation. We would suggest a combination of the tables in the first set of Measures and the annex in the second set; that would be perfect practice.

[160] **Mr Lambert:** We could, at your invitation, provide you with a summary of those and bring them together.

[161] **Janet Ryder:** That would be very helpful. Kirsty, do you have a supplementary question on this particular issue?

[162] **Kirsty Williams:** Mr Greenberg also said that we should also have to justify the appropriateness of the Measure in the first place, that is, why legislation is needed. Do you believe that that should be at the forefront of explanatory memoranda as well, so that there is an explanation as to why a Measure, the legislative route, is needed to enact a particular piece of policy, as opposed to taking other actions that could have enacted the policy?

[163] **Mr Lambert:** Certainly. We have to consider that the Assembly cannot exercise prerogative powers, so if the Assembly Government wants to do anything new, it has to have powers. I entirely agree; you have to justify them. The Assembly has powers under something like 700 existing Acts of Parliament and now, with this growing number of Measures, it has to say why it has not got a power under an existing Act. I agree entirely.

[164] **Rhodri Morgan:** Could you look at the written and oral evidence that was given by Daniel Greenberg to see whether you think that your views are different from his, and tell us to what extent you think that you agree with his evidence? That would be useful for us. As a lay person it is quite difficult, and you can get thrown a bit by sharply differing views. I get the impression that there are sharply differing views here, but I am not certain. I do not know whether other committee members would agree.

[165] **Janet Ryder:** Yes. We can probably send a copy of the Record to you for your further consideration and we would welcome a response on that.

[166] **Mr Lambert:** Yes, please. I am sorry that we have not read it before.

[167] **Janet Ryder:** I know that we are dotting around a number of issues. We now move on to Alun Davies's questions.

[168] **Alun Davies:** We have covered a lot of the issues of the balance between delegated powers, secondary legislation and primary legislation. Just to understand the conclusion of that discussion, you hint in your written evidence that there is an imbalance between secondary and primary legislation in the way that proposed Measures have been written in the Assembly. I assume that you are content with that position.

10.30 a.m.

[169] **Mr Lambert:** Yes.

[170] **Alun Davies:** Turning to how we control subordinate legislation, and how subordinate legislation is scrutinised, I think that you quote the Public Bodies Bill and the debate in the House of Lords on superaffirmative procedures. Are you proposing that the

Assembly should adopt some sort of convention or amendment to Standing Orders, or whatever process or instrument that we use to enact it, to create a superaffirmative channel, if you like, for particular streams of subordinate legislation that the Government would need to follow if it wished to enact such legislation?

[171] **Mr Lambert:** Yes; we are indeed. First, we would like to see powers as far as possible on the face of the Measure, but if you are satisfied with the Assembly Government's explanation in relation to a particular power that, for whatever reason it gives to you, which you accept, it is not possible to put it on the face of the Measure, but it is very wide, then I would certainly recommend it. We are interested that we have found only one superaffirmative procedure within a Measure. Therefore, we have 17 Measures—a mixture of Measures that have been passed and proposed Measures—and it is in one section of the Proposed Local Government (Wales) Measure only that you have a superaffirmative procedure. It is what I would certainly regard as a real candidate for the superaffirmative procedure; it is a power by which Welsh Ministers can modify any Act of Parliament or Measure if it appears to fall within a particular category. I suppose that we can say, as constitutional lawyers, that that really is the Assembly Government playing at being a Parliament; it is the Executive being Parliament because it can amend or repeal any Act of Parliament. I have done it a couple of times when I was a Government lawyer; I actually repealed the Wales Act of 1978, I am afraid, in just one line, such as 'The Wales Act 1978 is hereby repealed'. There was a reason for that.

[172] I always think of it as a precedent as a common law lawyer. If there is one precedent in the Proposed Local Government (Wales) Measure for using the superaffirmative procedure, why do you not have it in any other Measure where the powers are really exactly the same? What is so special about this? We did not exactly learn from the explanatory memorandum why it was being used. The one that gets us slightly boiled up is the formula that is beginning to be used in certain Measures—and we can give you a little list afterwards—where the Assembly Government is taking a power that, to put it bluntly, is to add to the Measure. On what basis can it add to the Measure or amend it? It is because it is to further the objective of the Measure. The first time that I saw that was in the Education Act 2002. There it was, suddenly, right at the end and rather cunningly described. I think that this happens now with Measures. It is there as a transitional power, under which there is a power to amend the objectives of the Measure. However, it turns out that it is not a transitional power; it can be exercised at any time at all, and it is rather a fundamental power. It is not really transitional and supplementary. The way that this was used in the Education Act 2002 was to add sections to the Education Act. At one time, I think that they might also have repealed some sections. It was subject to an affirmative resolution procedure that, in other words, was just an hour and a half debate in the House of Commons and the House of Lords instead of your procedure, to which I think that this should be subject, which is an amending Measure, and bingo, you are there. What a power.

[173] The vision that I have is that it is perfectly possible, legally, if you want to further achieve the objective of the Measure, to repeal the whole of the Measure so that all that you are left with is the title of the original Measure, and everything else is in inverted commas and has been inserted by an Order of the Assembly Government. Some may say that that is ridiculous, but I do not think that it is ridiculous because there is the power. I do not think that it could be subject to a devolution issue or anything. The Government says, 'Well, we cannot see that this is working, so we think that we should tidy it up a bit'. It is about those sorts of powers. If the Assembly Government has a reason for wanting delegated legislation, that should at least be subject to the superaffirmative procedure, because superaffirmative is two-columns long, compared with four paragraphs for an affirmative resolution and two for negative. In one piece, we saw a power that we thought should be subject to the superaffirmative procedure, but it is subject to the negative procedure.

[174] **Ms George:** That is in the Healthy Eating in Schools (Wales) Measure 2009. Section 4 provides that Welsh Ministers may by regulations provide requirements for the food and drink for pupils in maintained schools, without setting any limits in the Measure as to the nature of such provisions. So, we think that that should definitely be superaffirmative, but it is negative.

[175] **Janet Ryder:** William, I believe that you have a supplementary question.

[176] **William Graham:** Yes. David, are the provisions that you described unique to this devolved administration?

[177] **Mr Lambert:** No, sadly. That is a very good question. With 50 Acts of Parliament going through Parliament every year, it is impossible when you have only 20 to 25 draftspersons, to draft Acts of Parliament adequately, to put it bluntly, because each draftsperson is drafting two or three Bills at the same time, and quickly, given that Parliament sits for only eight months of the year. The temptation to which I am afraid that Governments of whichever political colour give way is to have very general provisions in an Act of Parliament and lots of statutory instruments. For us, with the number of Measures increasing, why do we have to follow Parliament in this way, when it is being criticised by the Constitution Committee of the House of Lords and by your own committees? Your own committees are slightly in despair about some of these Measures, particularly the Proposed Waste (Wales) Measure.

[178] **Kirsty Williams:** Do not get me started on that. [*Laughter.*]

[179] **Janet Ryder:** We will not open up old wounds. [*Laughter.*] Are you satisfied with that, William? I see that you are. Alun?

[180] **Alun Davies:** I have shared experience of that despair; I recognise and understand it. David, what you just told us was quite an important piece of evidence in terms of the little list that you mentioned. It would be useful if you could pass that to the clerk for us to understand that. It may be about looking to establish a convention or a new way of operating that has an automatic function, so that if a Government looked to seek such powers, it would automatically have to go through that process to gain them.

[181] With regard to where we are now, I think that we have covered most of the ground on which I wanted to question you. To look beyond the referendum, and if we assume as a basis of this conversation that there is a 'yes' vote in March, would you see that as an opportunity to look again at some of these issues, because that would create a lot of space and resources if we did not have to bother with these devilish LCOs? We have an opportunity there to look again at how we legislate, which would allow us to spend more time on legislation and less time on legislative competence.

[182] **Mr Lambert:** I entirely agree with you. I am sure that you are doing it now. You look much more at a proposed Measure than Parliament looks at Bill as it goes through. I worked on the Education Bill of 1989, which created a national curriculum for both of my children in the local school Llandaf. It went through without the standing committee even looking at the provisions of the curriculum, because the Government said that too much time was being spent on that provision. A timetable motion was created and 10 clauses of the Bill were considered every two hours. So, it is only when you have more time to concentrate, as Manon and I and our colleague, Marie, find, and by looking at every clause, that things hit you.

10.40 a.m.

[183] They cannot hit the members of a standing committee in the House of Commons when they are looking at 10 clauses at a time. However, if you could slow down and really look at those provisions—I agree entirely that if we did not have LCOs, that would release time for you to do that. It must be terrible having to look first at LCOs, which are expressed in an entirely different way. That is the other thing, of course: LCOs are usually very general, but these are specific. So, if you do not have to worry about general things, but specific provisions that implement things, you can apply these tests.

[184] **Alun Davies:** Thank you very much for that. Perhaps we could put this forward to the review of Standing Orders.

[185] **Janet Ryder:** Yes, we can contribute to that. If you have finished your questions, Alun, we will move on to William.

[186] **William Graham:** To change emphasis slightly, you suggest that a single Welsh drafting style might be of benefit, but we also heard previously in evidence that:

[187] ‘Creating manuals or rules simply prevents the drafter from exercising his or her skill in the most effective way’.

[188] Do you have a comment on that?

[189] **Mr Lambert:** It is this old business, to take Rhodri’s point, of why, even from draftspeople who want to express themselves as they wish, we cannot have something that says, ‘Here’s the definition provision, here’s the delegated legislative provision, here is why we have got negative and affirmative’. It would not, in any way, say, ‘This is how you set out section 1 and we don’t like the way that you’re doing it now, because you have too many may’s instead of should’s’. It would be for the reader. The poor old reader finds it so difficult, speaking for myself and my colleague. We have to look through every line of every Measure, and we were hoping that we might not have to, because we have to do that with an Act of Parliament. If we try to summarise for our website what the functions of the Welsh Ministers are under an Act of Parliament, we have found that we cannot go anywhere for a central definition. So, we have to go through every line of every section and every line of every Schedule. The expletives that you get from Marie, who is French, are tremendous. You learn a lot of French from Marie.

[190] We are not trying to tell the draftspeople, ‘You can’t express it in this way’, it is just that provision. I used to manage to get a certain Parliamentary Counsel to agree, although I was saying just before we came in that when I gently suggested to a Parliamentary Counsel, ‘Here, in this previous Local Government Act, there is one central part about how it affects Wales’. The classic answer was, ‘Lambert, I draft and you instruct; you don’t draft’. So, I thought, ‘Well, that’s it’. He then almost deliberately scattered the definitions throughout the Act, and I thought, ‘You old devil’. [*Laughter.*]

[191] **Ms George:** There are a few other things that drafters should avoid, such as having substance in Schedules. When we are working on the website, we expect to see details in the Schedules. However, a whole Schedule to the Proposed Safety on Learner Travel (Wales) Measure is dedicated to amending the Learner Travel (Wales) Measure 2008. That kind of drafting style should be avoided.

[192] **Mr Lambert:** To add to that, all the other Measures have amended previous Measures and Acts of Parliament in the body of the Measure. So it is not something that we would have thought to find in a Schedule. The question is why it is there and not in the body of the Measure.

[193] **William Graham:** We also heard, again from Daniel Greenberg, that

[194] ‘there are no useful rules of legislative drafting, the only correct approach being to consider what is best for clarity of the law or the convenience of the reader on each occasion.’

[195] He also strongly supports

[196] ‘the flexible approach being taken by the drafters of Welsh Measures.’

[197] Are those in conflict or not?

[198] **Mr Lambert:** I do not think that they are in conflict, but in the first part that you quoted, he has enunciated exactly what our concerns are. For the clarity of the readers, please may we have one definition? The other thing is that if, then, a word that you come across is not defined, you do the normal business of applying the definition in the *Oxford English Dictionary* or in Manon’s equivalent Welsh dictionary. However, then you find, later on, that that word is defined six sections on, and you have to tear up something that you have been advising on, and you think, ‘Oh, good lord alive’. That is not for the convenience of the reader, and we would like to see substance in the Measure, in the first part, and peripheral or procedural matters in the second. The example that Manon has given is of very large, regulation-making powers in a Schedule.

[199] **Janet Ryder:** Kirsty, do you have anything that you want to ask about?

[200] **Kirsty Williams:** Yes, I think that we have not covered regulatory impact assessments this morning. You say in your evidence that there is a lack of proper RIAs at present. You also comment on the infamous Proposed Waste (Wales) Measure providing a worrying example of a lack of an RIA. Could you explain the basis of your concerns and suggest a way that the Government could improve its work in this area?

[201] **Mr Lambert:** We have quotations that, again, we could give you in a written submission, if we may. You have the infamous Proposed Waste (Wales) Measure, and we have the NHS Redress (Wales) Measure 2008, which was infamous among lawyers on the Wales committee of the Law Society. You looked at it and thought, ‘Good lord alive—this is changing civil litigation, but in what way?’, and here we have the Finance Committee report on the NHS Redress (Wales) Measure 2008 stating that due to a lack of any estimate of costs or policy we cannot continue any more. That comes up elsewhere. There was the Proposed Shipment of Waste for Recovery (Community Involvement Arrangements) Measure, where only limited information was provided on the costs, and it was therefore recommended that the Stage 1 debates on the general provisions of the proposed Measure should not continue until the Assembly had considered how it would operate. We could not have put it more clearly ourselves. How can you make a regulatory impact assessment without knowing the cost? As you know better than we do, I am sure, that is a requirement of your Standing Orders.

[202] **Kirsty Williams:** In the time that I was on the Finance Committee it was a source of significant frustration that we were required to comment on legislation, but were unable to do so given the lack of information brought forward—either in Member-proposed Measures or those proposed by the Government.

[203] **Mr Lambert:** Indeed. We have one comment, which I cannot find at the moment, which said that because all powers in a proposed Measure were given via delegated legislation, a regulatory impact assessment could not be done. That completely summarises our concern. It is nice to see that it is not a concern that just we are creating—it is a concern for Members of the Assembly.

[204] **Ms George:** I add that, where policy is left to subordinate legislation, it would be useful if the explanatory memorandum provided some examples of the kind of policy that the regulations would include.

[205] **Mr Lambert:** That is so that you have that in front of you when you are assessing the proposed Measure.

[206] **Kirsty Williams:** I would agree. Going back to the waste Measure, it became increasingly obvious that the policy had not yet been decided. The legislation was going through in the absence of any clear idea of what Government policy would be in that area.

[207] **Janet Ryder:** In your evidence you suggest that it would be useful to review the effect of the operation of Measures—in particular to have a review of the subordinate legislation made by Welsh Ministers to implement Measures. At what point should that happen, and what might that achieve?

[208] **Mr Lambert:** We made that point because of what we have just mentioned in answer to Kirsty, that is, the comments of the Finance Committee. It said that it could not comment on the financial impact of the legislation because there was no information to comment upon. Surely, the Assembly should be given the opportunity of commenting. It seemed to us that, where you have very wide powers, where there is nothing of substance in the Measure, you should be able to comment, once you have seen the subordinate legislation and how it operates. You are giving major powers to the Assembly Government. Part of your remit as an Assembly is to review what the Executive is doing, and it is making subordinate legislation to implement policy. You should see how it is implementing it by reference to the subordinate legislation. We thought that, a year after the subordinate legislation has been made in relation to the particular policy, you should ask, ‘Can you tell us how this is operating by reference to the subordinate legislation?’

10.50 a.m.

[209] **Janet Ryder:** That is interesting. A possible way forward may be that a committee such as this would set a date when a piece of legislation has been operating for a time, and then call the Minister back in to review that.

[210] **Mr Lambert:** Yes. We are always very interested in what your committee does, and we are very interested this morning in the way that you are commenting on subordinate legislation. That type of analysis is not possible under your affirmative resolution procedure matters, which, I am sure, will be debated in 20 minutes or so. The Assembly as a whole is not the forum for doing the forensic work that you do. As you have been denied that forensic work as the proposed Measure goes through, because there is possibly nothing on the face of it, this is the time to do the forensic work. You could say, ‘Here is your statutory instrument—it has for the first time prescribed the food that is subject to this particular Measure, so how is this working in operation, because you were not able to tell us that at the time that the Measure went through because we had no idea what food you would prescribe?’

[211] **Kirsty Williams:** We received evidence from Mr Greenberg that suggested that a convention has developed in the House of Lords whereby a specific committee makes recommendations about the procedure that subordinate legislation should go through. There are examples here of where we have suggested to the Government that the procedure that it intends to use needs to be changed to allow for greater scrutiny, but the Government decides to ignore that. It sometimes changes its mind and agrees to do it. Does such a system need to be developed in the Assembly whereby there is a convention established that should this committee or a subsequent successor committee recommend to the Government that a certain



procedure be used, the Government should adopt that?

[212] **Mr Lambert:** Yes, indeed. This was part of the written evidence that we submitted in relation to your last inquiry about the operation of Standing Orders. There should be a review carried out by the Assembly, and if the Assembly is unhappy as to how the Assembly Government is operating, it recommends a change of Standing Orders.

[213] **Janet Ryder:** That is interesting. Finally, I refer you back again to something that Daniel Greenberg said. He commented that if you are not satisfied with the effectiveness of the administrative arrangements, those were the only grounds on which you should be bringing forward legislation. In other words, he put forward an argument that we have seen a number of pieces of legislation going through that we did not need, as we could have achieved the objective without legislation. Do you have a comment on that?

[214] **Mr Lambert:** That is Manon's point; we would suggest that you need to know not only why it is subordinate legislation and why, if it is subordinate legislation, it is not done through the superaffirmative procedure, but also why the legislation is necessary in the first place.

[215] **Janet Ryder:** Have you picked up on any pieces of legislation that have gone through that might not have been necessary?

[216] **Mr Lambert:** We could have a look at that, because the Assembly Government has inherited a tremendous number of powers. There were 500 Acts in the National Assembly for Wales (Transfer of Functions) Order 1999. Since then, as we said in another piece of evidence that we submitted, the Assembly Government has continued to acquire very wide powers directly by Acts of Parliament, and not through the Assembly, which worries us a little bit, but that is another thing. So, we will have a look at that. On whether the explanatory memoranda are clear, I am not sure, but we can certainly look at that. I would have thought that you would need an explanation of why, among those 800 or so Acts of Parliament or Measures, there is not a power.

[217] **Janet Ryder:** I see that there are no further questions from Members. Do the witnesses have anything further to add? You have given us extensive evidence this morning and I know that you are going to give us some further written evidence.

[218] **Mr Lambert:** Yes, I would like to raise two points. The first is Marie's point, which is that it would be helpful—if it does not happen already—if the Assembly, when it is considering proposed Measures, has a summary of all of the reports made by the various committees about the proposed Measure in front of it in a folder. I do not know whether that happens, but it would allow you to see the comprehensive comments by the Finance Committee, your committee, and the committee that looked at it initially. It would also be useful to have a summary of what it would be helpful to ask about in debates as the proposed Measure is going through, because you have such a marvellous system of analysing proposed Measures.

[219] **Janet Ryder:** That may be a point for the Members' research service to pick up with regard to the way in which evidence is presented.

[220] **Mr Lambert:** The other point is whether, if you are not going to have the superaffirmative procedure for everything—and you cannot have the superaffirmative procedure for everything—you could think of tightening up your procedure on affirmative resolution procedures. As far as I can see, there is nothing in Standing Order No. 24 about telling people outside that you are about to consider a statutory instrument by affirmative resolution. You may do that as a matter of practice, but it might be helpful to those people

who are affected by the subordinate legislation, which can be very wide, as you can see at the moment, and who have not been given the opportunity to comment, because the proposed Measure does not contain substance. That is, they would have been given the opportunity to make representations, but would not have been able to make real representations, because there was nothing to make representations about. That might provide an opportunity for them to make representations before the statutory instrument is considered. Unlike with your Measures, it does not seem that you have a procedure for asking whether people want to make comments. As you can see, affirmative resolution procedure statutory instruments can be quite important, with a lot of substance in them.

[221] **Janet Ryder:** That is a very interesting point and we will give that consideration. Thank you very much for coming in and giving evidence this morning. It has been extremely useful. You have offered to provide us with quite a bit of extra supplementary evidence, which we await eagerly.

[222] **Mr Lambert:** Do you think that we could have a little summary of that, just in case? I have only scribbled down some notes.

[223] **Janet Ryder:** I am sure that the committee clerks can draw up a summary of the additional evidence that you have offered and which we have requested from you. Thank you very much for coming in. A transcript of this meeting will be available for you to look at and we will also ensure that you get a copy of the transcript of the meeting with Daniel Greenberg for your consideration. Thank you very much for coming in.

[224] **Mr Lambert:** Thank you very much for listening to us.

[225] **Janet Ryder:** Not at all. It was very useful and valuable evidence.

10.58 a.m.

### **Unrhyw Fusnes Arall Any Other Business**

[226] **Janet Ryder:** We have finished the evidence that we can take in open session, but we have one more item to consider in private session.

10.59 a.m.

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

[227] **Janet Ryder:** Next week, we will take evidence from the Counsel General for this report. Given the short timescale for it, we will also be taking evidence from Jocelyn Davies on the Proposed Housing (Wales) Measure. So, there will be two evidence sessions next week, I am afraid. That brings us to the end of the formal meeting.

### **Cynnig Trefniadol Procedural Motion**

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

*the committee resolves to exclude the public from the remainder of the meeting, in accordance with Standing Order No. 10.37.*

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

*Derbyniwyd y cynnig.  
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 10.59 a.m.  
The public part of the meeting ended at 10.59 a.m.*