



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

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

**Dydd Mercher, 1 Rhagfyr 2010
Wednesday, 1 December 2010**

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Alun Davies	Llafur Labour
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

Ceri Breeze	Pennaeth y Gyfarwyddiaeth Dai, Llywodraeth Cynulliad Cymru Head of Housing Directorate, Welsh Assembly Government
Jocelyn Davies	Aelod Cynulliad, Plaid Cymru (y Dirprwy Weinidog dros Dai ac Adfywio) Assembly Member, the Party of Wales (the Deputy Minister for Housing and Regeneration)
Nia Evans	Cwnsler Deddfwriaethol, Llywodraeth Cynulliad Cymru Legislative Counsel, Welsh Assembly Government
Margaret Frith	Yr Adran Gwasanaethau Cyfreithiol, Llywodraeth Cynulliad Cymru Legal Services Department, Welsh Assembly Government
Jeff Godfrey	Cyfarwyddwr yr Adran Gwasanaethau Cyfreithiol, Llywodraeth Cynulliad Cymru Director, Legal Services Department, Welsh Assembly Government
John Griffiths	Aelod Cynulliad, Llafur (y Cwnsler Cyffredinol ac Arweinydd y Rhaglen Ddeddfwriaethol) Assembly Member, Labour (the Counsel General and Leader of the Legislative Programme)
Helen Kellaway	Yr Adran Gwasanaethau Cyfreithiol, Llywodraeth Cynulliad Cymru Legal Services Department, Welsh Assembly Government
Marion Stapleton	Pennaeth Is-adran Busnes y Cynulliad a Rheoli Deddfwriaeth Head of Assembly Business and Legislation Management Division

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
Gareth Howells	Cyfreithiwr dan hyfforddiant Trainee Solicitor
Olga Lewis	Dirprwy Glerc Deputy Clerk

*Dechreuodd y cyfarfod am 9.33 a.m.
The meeting began at 9.33 a.m.*

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

[1] **Janet Ryder:** Good morning. I welcome Members, officials and members of the public to this meeting of the Constitutional Affairs Committee. In an emergency, ushers will indicate the nearest safe exit, and headsets are available for translation and amplification. I remind everyone to please switch off all mobile devices completely.

[2] We have received no apologies. We do not have any pieces of legislation to consider, so we will move straight into our evidence session.

9.34 a.m.

**Ymchwiliadau'r Pwyllgor: Drafftio Mesurau Llywodraeth Cymru: Gwersi a Ddysgwyd
o'r Tair Blynedd Cyntaf—Y Cwnsler Cyffredinol ac Arweinydd y Rhaglen
Ddeddfwriaethol, John Griffiths AC
Committee Inquiries: Drafting Welsh Government Measures: Lessons from the First
Three Years—The Counsel General and Leader of the Legislative Programme, John
Griffiths AM**

[3] **Janet Ryder:** I am pleased to welcome the Counsel General and Leader of the Legislative Programme, John Griffiths AM. Members have received the paper that the Counsel General has submitted, and have had time to look at it. Counsel General, could you please introduce yourself and your team for the record?

[4] **Y Cwnsler Cyffredinol ac The Counsel General and Leader of the Arweinydd y Rhaglen Ddeddfwriaethol Legislative Programme (John Griffiths): (John Griffiths):** Diolch yn fawr, Gadeirydd, Thank you, Chair, and good morning, a bore da i bawb. everyone.

[5] On my left is Marion Stapleton, who is the head of our business and legislative unit, although I am sure that Marion could give you the correct, official title. Jeff Godfrey is director of Legal Services, and Nia Evans is one of our draftspeople. I am sure that, collectively, Chair, we will be able to contribute some useful information to your work and inquiry.

[6] **Janet Ryder:** Thank you, Counsel General. As you said, this is one of the last sessions of evidence that we will take in this inquiry. We have had some very interesting sessions with a number of different people, and we are looking forward to your contribution this morning. Would you like to say anything to begin with, or are you happy to go straight into questions?

[7] **John Griffiths:** Very briefly, Chair, we very much welcome the work that your committee is doing in this area, and I feel, as Counsel General, that it very much complements the review that I am undertaking into our legislative processes—we are both coming at it from the same direction. Three and a half years into this Assembly, we have some useful experience of the Government of Wales Act 2006, and, hopefully, we are set to become more of a legislature after the referendum, so it is very timely to look at experience and lessons learned and to improve processes for the future. We are very much, hopefully, on the same sort of territory.

[8] **Janet Ryder:** Yes, I hope so. It would be nice to see it all come together with some strong recommendations for the incoming Assembly after the elections next year. If it is okay, I will start with the first question. To what extent do you agree with the Law Society's contention that most Measures do not represent a major break from Westminster legislation, and that it is only with the proposed Welsh language Measure that we have started to see more distinct Welsh law making?

[9] **John Griffiths:** I would not agree with that, Chair. Obviously, one of the primary purposes of devolution is to develop a distinct Welsh agenda for our distinctive circumstances and needs, and I think that we would all sign up to that. One way of addressing those distinctive needs and creating a distinctive governmental agenda here in Wales is through legislation. We have been doing that, and we are doing that, and the proposed Welsh language Measure is one example that has been quoted in previous evidence to you, but there are many other examples, such as the protection of children, for example. We will not always diverge markedly from what is happening in Westminster in any particular area, because, sometimes, our thinking will be similar and there will not be a huge difference. So, it is not being different for the sake of being different, but where there are distinctive circumstances and needs in Wales, they should be addressed, and one way of doing that will be through legislation, and that is what we are committed to do.

[10] **Janet Ryder:** Thank you. I suppose there are two ways of looking at this. We have taken evidence on the language and the way in which proposed Measures are drawn up. That is one way, and another is to look at what you are dealing with. Given what you have just said, were your comments directed more towards the topics that have come through, rather than the way the legislation is drawn?

[11] **John Griffiths:** Yes, but in drafting style, Chair, we would seek to be as good as we can be in Wales. We would obviously look at experience elsewhere and draw on good practice, but we would want to ensure that our own drafting is top quality. If we could, for example, use plain English and be as clear as possible in our drafting style and technique—and more so than drafting elsewhere—then we would be very pleased with that situation. So, we want to establish best practice here, and I hope very much that, increasingly, that is what we will be able to do.

9.40 a.m.

[12] **Janet Ryder:** I think we might touch on drafting matters in a little while. If we could move on slightly, to what extent are you satisfied that all Welsh Government Measures and proposed Measures have been necessary and proportionate? Are you satisfied that the objectives in some could not have been achieved in some other way, such as through administrative action? We have taken some evidence, particularly from Daniel Greenberg, to suggest that certain Measures did not need to be Measures, as their objectives could have been achieved in other ways.

[13] **John Griffiths:** I think that we are all very conscious, and none of us more so than the Government, that the legislative processes are very demanding on the resources and time of the Executive and the legislature. Law making is not something to be embarked upon lightly. Therefore, obviously, in the process of Ministers making bids for legislation, it is necessary for them to satisfy the Government collectively that there is a real need for that legislation and that the objectives could not be better achieved in some other way. I absolutely accept the point that there must be a robust mechanism to ensure that legislation really is necessary to achieve policy objectives and Government strategy. If there was some other way of doing it, through administrative functions, then that would be the course we would follow.

[14] **Janet Ryder:** In light of that, how would you respond to Mr Greenberg? In giving evidence, he told us that he could not see any legislative proposition in the Carers Strategies (Wales) Measure 2010 from start to finish and that the issue could have been dealt with by effective administrative arrangements on the part of the Welsh Government. How do you respond to that particular point?

[15] **John Griffiths:** The Government's view is that ensuring top-quality services and appropriate responsibilities for those providing services to carers in Wales is very important. Sometimes, an area of governmental responsibility and service delivery is so important that legislation is needed to send a message to all of those involved in providing the services that priority has been given to that area, and certain provisions need to be enshrined in legislation to ensure effective delivery and to ensure that duties are imposed. Legislation serves various purposes. Sometimes, it is necessary to embed provisions because of the huge importance of the subject area, and we would certainly regard issues around carers, as dealt with by that legislation, as being of that nature.

[16] **Janet Ryder:** A couple of people want to ask supplementary questions to that.

[17] **Kirsty Williams:** John, nobody would disagree that carers are very important. However, there are many ways in which the Government can place priority on a particular policy area. You can have hypothecated grants, which require service providers to spend a certain amount of money. You can issue statutory guidance, requiring authorities to work in a certain way. The question that the Chair was asking was: what was the legislative proposition in the Carers Strategies (Wales) Measure 2010?

[18] **John Griffiths:** I take the point that there are various ways to achieve things and that, sometimes, Executive administrative action might be appropriate and adequate. However, I think that the Government is entitled to take the view that a particular subject matter is one that requires legislation. It is then a matter for normal legislative processes to deal with that. If the legislature passes a Measure, as it has in this case, the process shows that the legislature was of the view that the Government was right to put forward the proposals, and that the legislation—as suggested and enacted—was required. So, it is difficult to see that criticism as valid, given that we have gone through the appropriate process and have seen the results.

[19] **Kirsty Williams:** I do not know whether he was being critical. As you say, the Government has the right to act in a way that it sees fit. You could kill off his criticism once and for all if you could identify for us this morning what the legislative proposition was within that proposed Measure. If you cannot, maybe you could ask your colleague to write to us.

[20] **John Griffiths:** Would anybody like to flesh this out?

[21] **Kirsty Williams:** You can write.

[22] **John Griffiths:** Well, perhaps we can provide some—[*Inaudible.*]

[23] **Mr Godfrey:** I will go back to the legislation. If you require parties to produce strategies, you can use administrative guidance. However, legislating—effectively prescribing what you want—takes things to a higher level. It is a formal requirement, as distinct from behind-the-scenes activity between the Government and the individual authorities that are the subject of the proposed Measure.

[24] **Janet Ryder:** William, do you have a question?

[25] **William Graham:** Yes, Chair; thank you. To further the evidence, the point was

made that all that was in that particular Measure, and in another eight cases, were powers that were already available to the Government. So, why was it necessary to introduce a new Measure, with the attendant time that it takes and the administrative expenses, when it could have been done in doublespeak, through administrative arrangements, which really means poor government? If you had the power to do these things that you were not doing, why did you need a new Measure?

[26] **John Griffiths:** Obviously, there is often a difference of opinion between the legislature and the Executive on whether legislation is necessary. This is a clear example of that. I can assure you that Government does not lightly embark on legislation; we go through procedures whereby Ministers are required to satisfy their ministerial colleagues that legislation really is required. It is then a matter for the legislature to decide whether it accepts that and to pass the legislation or not. Part and parcel of having the separation between the Executive and the legislature that we now have is that there will be differences of opinion. However, we have scrutiny processes in place, and it is a matter for the legislature to decide whether to pass legislation or not.

[27] **Alun Davies:** I believe that asking what the proposition in this legislation was is a fair question. It is also perfectly reasonable for the Government, or Executive, to seek to impose additional duties on local authorities, health bodies and others. It is a reasonable approach to take, and one that can only be achieved through legislation.

[28] I would like to move the discussion forward, if possible, and take you back to your previous answer, John. You said that processes are in place within Government to identify areas where legislation is needed. Could you give us examples of how that works, and where the Government has sought to avoid legislating by use of administrative arrangements instead of introducing a proposed Measure?

[29] **John Griffiths:** I believe that our processes are the same as those that are well-accepted and used elsewhere. That is the first point, Alun. Internally, there would be a write-around, requesting Ministers to make bids for legislation, to use the powers that we have to give effect to Government strategy and policy.

9.50 a.m.

[30] When Ministers come forward with those bids, as it were, they have to be evaluated. One of the most important parts of that evaluation is to determine whether existing powers are sufficient and whether the policy can be properly effected and implemented with those administrative functions, rather than passing legislation. As with any Government, a myriad Government activity takes place in Wales that is based on using those administrative powers and functions rather than passing legislation. So, week in, week out, a huge amount of Government activity to implement policy effectively takes place without new legislation being passed. Legislation is probably the more unusual way of giving effect to Government policy and strategy. That must be right because of the resource that it takes to pass legislation, and because law making is a serious matter and should not be embarked upon lightly.

[31] I do not know whether there are any obvious examples that officials could cite, illustrating when we might have taken legislation forward that used existing administrative powers.

[32] **Mr Godfrey:** It is a difficult one to argue, because most of the work that crops up is from Ministers who want to achieve a particular objective, and so, working within the current powers that we have, we advise on how that objective could be achieved. If you get to the point at which you cannot achieve a particular objective, that is when you tend to go into the potential for new legislation. I guess that the examples that might crop up are things that are

achievable by collaboration or co-operation with bodies and individuals. However, that may not be working, so you may want to look at legislation in that context, or you may want legislation as a back-up device to try to compel behaviours. As the Counsel General has said, the production of legislation tends to start from a need for legislation, and it is then worked up through policy officials and lawyers to the drafters. If there are other ways of dealing with things within existing powers, that is what always happens.

[33] **Janet Ryder:** For my own clarification, with the carers' strategy, what could you achieve after the legislation that you could not achieve before it?

[34] **Mr Godfrey:** I hesitate to answer that question, because I was not involved in that, and I do not think that Nia was either.

[35] **John Griffiths:** Shall we write to you on that?

[36] **Janet Ryder:** That would be useful. I have two more people wishing to come in on this point. I will call on Rhodri first, and then we will come back to you, Kirsty.

[37] **Rhodri Morgan:** To widen it slightly, over the past three years, and, in a way, over the past 11 years in an attenuated form, do you think that there was a cultural issue—almost the converse of the proposition put forward by Daniel Greenberg in criticising the carers' strategy as being empty of any real necessity for legislation? That is, compared with the incoming Scottish Parliament, the incoming National Assembly did not have a culture of looking for legislative solutions because there was no previous need for it, while the Scottish Parliament was building on separate Scottish law, although there had been no devolution previously. Therefore, in general, although perhaps not in the case of the carers' strategy, the inclination of the inherited body of civil servants was to seek an administrative solution rather than a legislative solution to a problem. If you then tried to get the pendulum to swing back by saying, 'Look, lads and lasses; here is the problem—you now need to be thinking that we could have a legislative solution here, not just an administrative solution', they might say, 'Oh, perhaps we should, because the Assembly now has the right to do that, and it might be new for us, but we must scratch our heads and think that perhaps there could be a legislative solution'. Perhaps the pendulum has now swung almost too far, having told the civil servants to think of legislative solutions, which they did not have the right to do before.

[38] **John Griffiths:** There is a danger of that, Rhodri. It is our strong view as a Welsh Assembly Government that we now have these legislative powers under the 2006 Act, so we should use them, showing that we have ideas and energy and are capable of using them, and using them to good effect. So, I can see that there could be a mindset of pressure along the lines that you suggest, but that is why we need these robust mechanisms to test whether legislation really is required or whether policy could be effected by other means. We have to guard against that tendency, because I understand the rationale for your saying that that could be the case. Hopefully, our mechanisms are robust enough to ensure that that does not happen. We have many more ideas for legislation than are allowed to proceed, so that shows that there is a mechanism that acts as an effective check.

[39] **Janet Ryder:** Would you like to come in on this point, Kirsty, or would you like to move on to your questions?

[40] **Kirsty Williams:** I think that we have flogged this particular horse.

[41] **Janet Ryder:** Would you like to move on to your questions, then?

[42] **Kirsty Williams:** On your robust procedures that filter out areas where there is no need for legislation, can I take it that every proposal for a Measure goes through that

procedure? Is there a set procedure for every proposal to go through, or is the procedure ad hoc depending on which department is looking at a piece of legislation? Does it all go through the same procedure?

[43] **John Griffiths:** Yes.

[44] **Kirsty Williams:** The Wales Governance Centre and the Law Society have suggested—and I suspect that anyone who has sat through a legislation committee would suggest it, too—that the contents of some proposed Measures introduced to date seem to indicate that the law was drafted first and the policy defined later. The Wales Governance Centre was particularly critical of the tendency to leave the detail of policy to regulations that are drafted at a later date. To what extent do you accept that criticism?

[45] **John Griffiths:** We do not accept that criticism. As I have said, there are mechanisms to go through and a Cabinet committee deals with bids for legislation to ensure that the policy is properly thought out and that legislation is required. If there has been no hard thinking about the policy that the legislation is required to give effect to, the proposals would not be allowed to proceed. So, it is a matter of policy officials working with Legal Services and the drafters to make sure that there is a team approach and that policy has been worked up sufficiently for the drafters to understand what is required of them and what they are required to achieve through the legislation. So, there are processes to ensure that it is not a matter of introducing legislation and then thinking of the policy afterwards. That would be putting the cart before the horse.

[46] **Kirsty Williams:** That is quite an extraordinary answer, John, given that the legislation committees reporting on proposed Measures have drawn Ministers' attention on many occasions to the lack of detail. There have been examples from this committee. We have written reports to bring to the Assembly's attention the gaps that we perceive to exist in the legislation. The most obvious one that I can think of is the Proposed Waste (Wales) Measure, for which masses of detail had not been decided on by the Minister. Even as it was passed by the Assembly in the Chamber, the Minister still could not tell you who would be affected by the legislation, who would police the legislation, or what the consequences of not meeting the requirements of the legislation would be. How can you sit here and, to all intents and purposes, ignore the reports of legislation committee after legislation committee, drawing people's attention to this particular problem, and the evidence of the Law Society and the Wales Governance Centre? You are sitting here saying that that is not a fair criticism at all. Really, John. Any objective view of what we have been through in trying to improve our processes ready for next time would surely accept that. That is the feeling of many people who have worked through this process.

10.00 a.m.

[47] **John Griffiths:** I think that what you are referring to, Kirsty, is the inevitable tension between what is on the face of a proposed Measure and what is left to regulations. That tension always exists in any legislature, and we are becoming more familiar with those issues as we go forward with our increased powers. The fact that a lot of the detail is left to regulations does not mean that a policy has not been thought through. It is often necessary to leave a lot of the detail to the regulations, for example where particular flexibility is required as there is likely to be a need for regular change. You would not want to introduce further proposed Measures every time you had to amend the initial Measure; you would want to deal with those changes through regulations, because of the time and resource constraints involved. So, it is often necessary to leave a lot of the detail to the regulations. I understand that that creates frustrations for the legislature in the scrutiny process. As I said, it is familiar territory. The UK Government is often criticised on a similar basis over framework Bills and so on. So, we understand that this is difficult territory and that there is always tension between

the Executive and the legislature, but there is often good reason for much of the detail to be dealt with in regulations.

[48] **Kirsty Williams:** With all due respect, does the fact that Westminster gets it wrong not give us an excuse to improve our systems? That hardly seems to be a robust reason: Westminster does it like that, so we should not strive to be any better.

[49] **John Griffiths:** On that point, this is common territory. These issues are common to any legislature and Executive anywhere in the world, and not just Westminster. Those issues will always be a part of the law-making process.

[50] **Kirsty Williams:** John, as the chief legal officer for the Government and as someone who is legally trained and therefore, I guess, would have spent many hours studying principles of good law, do you feel that the tendency to leave these details out of proposed legislation—and I mean basic things such as those whom it will affect, who is to police it, or what would be the consequences if the law were broken—makes it nigh on impossible for this legislature to do its job of scrutinising the Government? Even more importantly, it makes it nigh on impossible for members of the public to have a true understanding of the law of this land. Surely that should be the basic premise of what constitutes good law, namely that it is easily understood by those whom it will affect.

[51] **John Griffiths:** As I said initially, we want to be as effective as we can be as an Executive and legislature. We want to establish good practice in Wales, but we will not magically be able to solve all the inherent tensions between Executives and legislatures, because sometimes there will be competing pressures on the Executive compared with the legislature. We have to recognise that. Governments will want to get their legislation through quickly and effectively, and legislatures will want to ensure robust and proper scrutiny. Daniel Greenberg stated in his evidence that it will sometimes be necessary for a lot of the detail to be dealt with in regulations, but what is really important then is for there to be robust scrutiny of those regulations. So, we must ensure that those mechanisms are in place to allow for that. We must also ensure that the layperson is able to understand what the Government is seeking to achieve through legislation, and that the explanatory memorandum and regulatory impact assessment are clear and effective. We think that we have some good examples of those, which clearly explain and help laypeople to understand what the legislation is about and what policy it seeks to achieve and implement. So, again, I understand what you are saying, Kirsty, and I think that we must constantly strive for improvement. We have seen improvement over the course of this Assembly, but I am not saying that there is no room for further improvement, and that is why you are conducting this exercise and why I am conducting my review.

[52] **Janet Ryder:** I will comment on two things that you mentioned. A lot of the evidence that we have received has suggested that we have seen an improvement. We are not where we want to be yet, but we have seen an improvement this year, and we look forward to your review. However, can we therefore take from what you have just said that your review will point to a new way of reviewing subordinate legislation?

[53] **John Griffiths:** I am constrained in what I can say, Chair, because my review will go initially to the Cabinet and that will happen very soon. However, the review will certainly concern itself with those issues.

[54] **Janet Ryder:** Alun, I believe that you have something that you wanted to come in on.

[55] **Alun Davies:** Yes, thank you. John, I am sorry that you disagree with the point that has been made, because it is fundamental to the investigation that this committee is currently considering. The evidence that we have received and the experiences of those of us who sit on

legislation committees drives us to the conclusion that there is tension—it is a very real thing and I do not think that anybody would seek to deny that—between the legislature’s demand for clarity and for some meat on the bones of the proposed Measure, and the Government’s wish to have more flexibility in order to move things forward afterwards. All too often, we find ourselves in an impossible position—and I speak as a Government backbencher who attempts to support the Government—in that we cannot provide effective scrutiny of the governmental position because we do not have the ability to understand what the proposed Measure seeks to achieve. From a political point of view, private briefings do not address that issue, because we are asked to agree law that is not clear on the impact that it will have when enacted.

[56] I understand completely the Government’s wish to have this level of flexibility, but the point made by Kirsty and Janet is absolutely clear: just because Westminster does things badly is not a precedent for us to do things badly. I hope that we are trying to do things differently and better here in Wales. I hope that the experience of law making here in the past three years or so will drive a different approach to it, whereby we will create Measures that contain the detail of what the policy seeks to achieve and what the Ministers’ objectives are, which will enable us to scrutinise it and enable others to understand what the Government hopes to achieve. All too often, the Government has failed to achieve those objectives in the way that Measures have been presented to us.

[57] **Janet Ryder:** I do not know whether you want to respond to that, Counsel General. I do not know whether that was a question or a statement.

[58] **John Griffiths:** I would respond in very similar terms to those that I used in responding to Kirsty, Chair. I very much accept that we do not wish to slavishly follow any other executive or legislature, but there are tensions inherent in a law-making process of the nature that I outlined earlier. We want to achieve good practice in Wales. We are making improvements, as we mentioned, and we can continue to do that. We certainly do not wish to replicate bad habits from elsewhere. There is a debate to be had as to whether we are moving along on the right lines. Wherever possible, I accept that it is better to have the ‘meat’, as Alun put it, on the face of the Measure, but, for various reasons, it is not always possible or appropriate. That has been recognised by some of the evidence that you have taken previously, including that of Daniel Greenberg.

10.10 a.m.

[59] **Janet Ryder:** I will let you come back briefly, Alun, but I am mindful of the time. We will have to move along considerably.

[60] **Alun Davies:** Does the Government appreciate that, over the last few years, we have been establishing a new legislature and a new way of making law, and that it is therefore essential that we do it properly, that we set precedents of good practice, not poor practice, and that we do not rely on those precedents of poor practice to perpetuate poor practice? Secondly, will the Government reflect on the weight of evidence that we have seen and the experience of those of us who sit on the backbenches and are expected to scrutinise legislation? I will not go through them all now, but we have had examples where it has been entirely impossible to conduct proper parliamentary scrutiny of legislation because the detail of the impact of what is written in a proposed Measure is not laid out in it and is left to regulations. I can think of a number of examples when we have had to sit back and say, ‘We can’t effectively scrutinise this’.

[61] **John Griffiths:** We intend to learn as we progress, and I believe that we have been doing that. We have mentioned the general view that there have been improvements as we have gone through this Assembly. We want to continue to make improvements and listen

carefully to this committee and Assembly Members. As part of my review, I am considering the possibility of moving towards a four-year programme of legislation that is set out at the outset of a new Assembly. It would be updated annually by the First Minister's statement, but it might allow a greater degree of planning and consultation with external stakeholders and interested bodies, in addition to Assembly Members and the Assembly's committees. If we were to move to that, and it is being considered, we would hope that it would allow all these issues on legislation being proposed in a manner that is timely and for there to be adequate opportunity for scrutiny to be thrashed out. I hope that that and other improvements that might come out of my review will help to address many of the issues that we have discussed this morning and enable the Welsh Assembly Government as the Executive and the National Assembly for Wales as the legislature to show good practice as we move forward.

[62] **Janet Ryder:** Have you finished, Alun? I see that you have. We will move on to William who has some further questions.

[63] **William Graham:** John, looking at some of the evidence that we have had, can you provide further explanation as to why negative or affirmative procedures were being used in different cases? What are your criteria for determining the inclusion of the negative, affirmative and superaffirmative procedures?

[64] **John Griffiths:** We need to spell out publicly in future—again, I hope that this is something that might come out of my review—the criteria that we will use, as an Executive, in deciding which procedure is the most appropriate. There are various suggestions that we want to consider as a Government, as part of my review, and we will then state publicly that view and those criteria and establish guidance for our officials in respect of that. It would then be up to Members and others to state their opinions as to whether those were the right criteria. It is very important, as I said earlier, that if it is the case for particular reasons that much of the detail of a particular Measure is being dealt with by regulations, that there is an opportunity for robust scrutiny of those regulations. Again, that is something that Daniel Greenberg was quite clear about in his evidence, and I know that his evidence was found to be very interesting by this committee. It is important to get the criteria right, and I hope that we will be able to do that.

[65] **William Graham:** You will be well aware, John, that this committee is very keen on the superaffirmative procedure, and we recommend it whenever we can. The House of Lords is equally keen. Do you think that increased usage of the superaffirmative procedure in scrutinising Orders made under Measures would be something that you would support in the future?

[66] **John Griffiths:** It would have to be exceptional, for reasons of time and resource. That is the way that it tends to operate at Westminster, although I obviously take the point that we do not slavishly follow Westminster, and I certainly would never suggest that we should. However, because time and resources are limited, for both the legislature and the Executive, we have to ensure that the procedure is used exceptionally. It is absolutely right that there should be an enhanced affirmative procedure so that we can achieve that robust scrutiny that is required when appropriate.

[67] **William Graham:** You have touched on the drafting style. Do you think that there is much to be gained from having a consistent style? We have heard evidence both for and against that suggestion, to be frank. What are your views on that?

[68] **John Griffiths:** In the evidence that you have had, there is a balance to be struck in seeking to achieve good practice in Wales, which, as was mentioned earlier, we want to achieve. I would like to think that we could establish good practice on using plain English and making it comprehensible to the lay person because that is important in order to engage the

people of Wales in the legislative and policy-making process. However, I am mindful of the need for flexibility, and I know that some of the evidence that you have received in previous committee meetings did stress that need for flexibility. Every subject matter and piece of policy is different and individual, and once the drafters have understood the policy that the Minister wishes to implement, they really must be free to ensure that that is enacted through the legislation without having too many constraints imposed upon them. I do not know whether Nia might wish to give a drafter's viewpoint on these interesting matters.

[69] **Ms Evans:** That is absolutely right. I agreed entirely with what Daniel Greenberg said. The important thing for us is that, although we can have overarching principles, such as clarity, what we want to do is ensure that the end user can use that legislation effectively. What we do not want is a rigid set of rules that tell us how we must go about doing that. So, for instance, it would not be of any use for me to have a rule saying that all the definitions have to go at the beginning, or that I am not allowed to use a table in the middle; we have to look at the subject matter and, sometimes, it might be appropriate to put a definition at the beginning, and sometimes it might be appropriate to put it at the end. You have to look at the subject matter and work out how you best convey that concept to the end user, and the key there is to have the flexibility to do that properly.

[70] **William Graham:** As part of your review, are you likely to publish the guidelines that you issue to civil servants in respect of instructing draftspersons?

[71] **John Griffiths:** Sorry; in respect of what?

[72] **William Graham:** Are you likely to publish the guidelines that you issue, or that you agree at least, so that everyone is aware of the sorts of general instructions that you give?

[73] **John Griffiths:** There are some things that we can publish, which I mentioned earlier—for example, the criteria used to decide whether legislation is required or not—and there is this team approach between officials and Legal Services and drafters. However, I do not think that it would be appropriate to publish the instructions that are given to drafters by Ministers and policy officials, because that is very much part of the internal workings of the Executive. Does that answer your question?

10.20 a.m.

[74] **William Graham:** It is not helpful. We are asking what are the criteria that you would normally adopt? That does not mean that you would have to publish what you are saying in each individual case; I accept that that is the reserve of the Executive. Nia was suggesting that she would not be comfortable with having general criteria, whereas the Wales Governance Centre said in evidence that it would recommend that.

[75] **John Griffiths:** Sorry, I may have misunderstood you, William. On the extent to which the drafters are constrained and the extent to which we would want general principles to be applied by drafters, we could state what we would require, such as the use of plain English, as I said earlier, and user-friendliness, as Nia said. We would have no problem with that at all.

[76] **Janet Ryder:** Rhodri, could we move on to your questions, as Alun has just had to go out?

[77] **Rhodri Morgan:** Certainly. The point about clarity is very interesting. Sometimes we assume that clarity is an adjunct to, and complementary to, legal certainty. I derived the impression from Daniel Greenberg's evidence that, occasionally, clarity is the opposite of certainty, strange as that may seem. For instance, on the current burning issue of the official

status of the Welsh language, if there is one single declaratory statement that Welsh and English shall have official and equal status, full stop, that is clear and you would assume that it is certain. However, Daniel Greenberg said that that is absolutely not the case, and that the solution chosen in the reformulation of the proposed Welsh language Measure, which is quite complex—it is almost like the DNA molecule’s double-helix type of format—is in fact the way in which to achieve certainty, even though it may not be clear to the layperson reading it. What are your thoughts about the fact that clarity is the opponent of certainty in certain circumstances?

[78] **John Griffiths:** Kirsty mentioned the fact that I am a lawyer, and those sorts of questions take me back to my legal studies. We were told that the golden rule is that there are no golden rules.

[79] **Rhodri Morgan:** That is what Nia was saying earlier; we should not overdo the common format issue.

[80] **John Griffiths:** Exactly. When it comes to black-letter law, purpose clauses, how a court might interpret legislation in respect of the black letter—which is really the starting point—or some method of discerning the purpose of the legislation, that is a matter for an individual court with respect to an individual piece of legislation. I would be interested to hear from Nia, because there are no easy answers to those questions, and I think that Daniel Greenberg recognised that in his evidence.

[81] **Rhodri Morgan:** He said that it is no good having legal certainty for its own sake, which was a little shattering for most of us—we thought ‘Cor, blimey’.

[82] **John Griffiths:** It is a little counterintuitive.

[83] **Rhodri Morgan:** Yes, it is.

[84] **Ms Evans:** I do not know to what extent I could be drawn on that particular example with regard to the official status, but the point is that sometimes the language can appear simple, but that does not mean that the meaning is clear in legislative terms. That would be an example of that kind of thing, where perhaps a statement is written in simple language, but what it means is a different matter.

[85] **Rhodri Morgan:** So, the objective would always be to try to solve that in the legislation, and not by having lots of cases go to court and the judges making law in the end. That is what you want to avoid.

[86] **Ms Evans:** That would be your objective, as a drafter, in general terms. It comes down to policy at the end of the day and I know that the Minister has spoken at length about that policy decision.

[87] **Rhodri Morgan:** Legislatures should make law, not judges through the lack of clarity. Okay. Let me ask you about regulatory impact assessments and financial assessments. There have been lots of moans that you cannot scrutinise the cost implications of a Measure, and that you sometimes cannot get a feel for the regulatory impact, because people do not feel that there is enough meat on the bones to be able to see what the financial or regulatory impacts are. There is a duty on the Assembly, including its Finance Committee, to probe, but it feels that there is not enough real stuff there to be able to make a proper assessment. Do you agree that that can sometimes happen, and is there something that you can do about it?

[88] **John Griffiths:** I would certainly agree that we have to keep working at it, making sure that we are improving our explanatory memorandum and regulatory impact assessment

approach. We have made improvements. The Proposed Mental Health (Wales) Measure, for example, is one that we view as involving good practice in the explanatory memorandum and the regulatory impact assessment. What we need to ensure is that, where we identify good practice, that becomes the norm and is replicated across the piece. I mentioned earlier that it is a matter of policy officials working with our lawyers and drafters in Legal Services to ensure that we are effective in the way in which we take legislation forward, and that very much applies to explanatory memoranda and regulatory impact assessments. If those three component parts are involved early on in the process, and that involvement is maintained through the process of working up the content, we will have the quality that we require. We have seen improvement and we have examples of good practice, and we need to ensure that that becomes the norm.

[89] **Rhodri Morgan:** What about this criticism by the Law Society that, given the accumulative process of law making, whereby law is made by amendment of previous laws rather than by starting off with a completely clean sheet, there is divergence between Welsh and English law, where it was previously one common England-and-Wales law? If you are a practitioner trying to establish the position with regard to Welsh law, you will find it buried in amended old England-and-Wales law, and, similarly, if you are a lawyer in England trying to advise a client about an English case, little bits of Welsh law will pop up in the middle of an England-and-Wales law and you will ask ‘What on earth is this about?’, and try to go back to what is now England-only legislation. Is there anything that you can do about that? It is deeply ingrained in the accumulative way in which the law of England and Wales, I suppose, rather than the UK, is made.

[90] **John Griffiths:** Consolidation is an important part of legislating for any legislature. You have to balance the time taken in achieving the consolidation with how that time could be used to take forward future legislation and policy—

[91] **Rhodri Morgan:** The only example that I can think of is the consolidation of children’s law. It has been suggested by the Law Society that it is time that we had a big consolidation Act for education and local government. Have you got in mind any big consolidation measures of that nature to try and clear up this problem?

[92] **John Griffiths:** Thought has been given to that in those sorts of subject areas, Rhodri, because people’s ability to understand and easily find out what the relevant law is in any particular area is crucially important. For example, we have discussed, as an Executive, consolidation in general terms with the Law Commission, and we intend to give further consideration to that, including the resourcing issues as and when proposals for consolidation come forward, either from Ministers or from outside bodies. So, it is something that has been considered.

10.30 a.m.

[93] **Rhodri Morgan:** Would that require you to have an agreement with not just the Law Commission, but your opposite numbers in Westminster as well? You could not move on the consolidation of, say, local government law for Wales unless they were keen on having a consolidation measure for local government law in England, so that it separated the Wales-only bits and the England-only bits and, presumably, the continuation of those bits that are still applicable to England and Wales.

[94] **John Griffiths:** We are very much intertwined, in the England and Wales jurisdiction, with the UK Government and Parliament, so it would be very useful if we could take forward that consolidation with a mutual understanding regarding what we sought to achieve and what is required. There is a lot of scope for discussion around that.

[95] **Rhodri Morgan:** My last question, which might be as much for Jeff as it is for you, relates to the resource implications of what would happen following a potential 'yes' vote in a referendum and Part 4 coming into force. What would the cutting of that particular apron string with the Houses of Parliament mean in numbers of drafters and lawyers, and the retraining of administrators to think more freely about legislative solutions to problems rather than just administrative solutions?

[96] **John Griffiths:** Obviously, we would be more of a legislature and it would be easier, quicker and less costly for us to legislate were we to get the 'yes' vote in the referendum. However, we would need to reconsider at that point our internal organisation and the resources available. It is double-edged, because, although we would be more about passing laws, which has resource implications, we would find huge savings in not having to go through the legislative competence Order process. Officials have told me, Rhodri, that, in the first two years of this Assembly, more than half of the time of our drafters and lawyers was spent taking legislative competence Orders forward rather than Measures, although that has changed in the second half of this Assembly. However, it shows the huge savings and efficiencies that we could make were we to get that 'yes' vote in the referendum.

[97] **Janet Ryder:** Alun, I think that you have one further question on explanatory memoranda.

[98] **Alun Davies:** I do not want to detain the Counsel General for much longer on this, but in relation to explanatory memoranda, your experience is that there has clearly been an improvement. That is fair to say and I think that people would accept that. The explanatory memorandum attached to the Proposed Local Government (Wales) Measure has been commended by a number of different people. Can you tell us whether the Government now has a clear policy, a template or an approach to explanatory memoranda that means that we will see explanatory memoranda in the future that are based around that of the Proposed Local Government (Wales) Measure and that are designed in a way that aids the reader?

[99] **John Griffiths:** That is the case now, Alun. We have examples, as you and I have both mentioned, of good practice, so we have a template that can be followed. As I said earlier, we also know that, when we bring together the policy officials, lawyers and drafters initially and then maintain that team approach throughout the working up of the explanatory memoranda and the regulatory impact assessment, it produces the results that we have seen in these examples of good practice. So, we have a method of working and good practice that we can follow. Again, I hope to address that in my review.

[100] **Janet Ryder:** On that issue, people who have given evidence have pointed to the Proposed Local Government (Wales) Measure as an example of really good practice in that its explanatory memorandum clearly explained, or attempted to explain, the rationale behind the policies. To probe a little further on what might come out in your review, is that the pattern that you would be seeking to employ in the future? That would answer a number of issues that have been raised this morning and it would allow Members to see the rationale behind the policy to have it clearly explained in the explanatory memorandum.

[101] **John Griffiths:** Yes, absolutely. That is an important part of what the explanatory memorandum can do, and that is what we would want to see generally applied.

[102] **Janet Ryder:** Thank you very much for your time this morning, Counsel General. It might be cold outside, but that was quite a heated question session. Is there anything else that you would like to add? You have promised to give us one further piece of information on the carers' strategy.

[103] **John Griffiths:** Yes. I will just conclude by echoing what I said initially, which is

that, although there are these inevitable tensions between the Executive and the legislature, in many ways, we want the same things, and that is top quality, effective legislation and the processes that can produce that. So, I very much hope that your work and my work in my review will achieve those ends.

[104] **Janet Ryder:** Thank you very much for your time. There will, as always, be a record for you to check as soon as possible.

[105] I know that we have the Deputy Minister for Housing and Regeneration waiting outside and that she has very limited time today. We are now dwindling in numbers, and if we lose any more Members, we will become inquorate. I will allow you a two-minute break before we bring the Deputy Minister in. I also bring to your attention the note that Gwyn put on the table at the beginning of the session.

*Gohiriwyd y cyfarfod rhwng 10.37 a.m. a 10.41 a.m.
The meeting adjourned between 10.37 a.m. and 10.41 a.m.*

**Ystyried y Mesur Arfaethedig ynghylch Tai (Cymru)—Sesiwn Dystiolaeth gyda Jocelyn Davies AC, y Dirprwy Weinidog dros Dai ac Adfywio, Llywodraeth Cynulliad Cymru
Consideration of the Proposed Housing (Wales) Measure—Evidence Session with Jocelyn Davies AM, Deputy Minister for Housing and Regeneration, Welsh Assembly Government**

[106] **Janet Ryder:** Thank you for joining us this morning, Deputy Minister. I am sorry that we are running a little late. We had a lengthier session than we had anticipated in questioning the Counsel General. We are warmed up and ready for you now.

[107] **The Deputy Minister for Housing and Regeneration (Jocelyn Davies):** I was hoping that the Counsel General would soften you up, not warm you up. [*Laughter.*]

[108] **Janet Ryder:** Thank you very much for making time for us. I know that you are pressed for time, so if it is okay with you, we will push on. This is the only opportunity that we will have to look at this piece of proposed legislation. Could you start by introducing yourself and your officials for the record?

[109] **Jocelyn Davies:** I am Jocelyn Davies, the Deputy Minister for Housing and Regeneration. I think that the officials can introduce themselves.

[110] **Ms Frith:** I am Margaret Frith, one of the Welsh Assembly Government's lawyers. I have been working on the intervention side of the proposed Measure.

[111] **Ms Kellaway:** I am Helen Kellaway from Legal Services. I have been working on the right-to-buy part of the proposed Measure.

[112] **Mr Breeze:** I am Ceri Breeze, head of the Housing Directorate.

[113] **Janet Ryder:** Thank you very much. Today, we are looking at the long-awaited Proposed Housing (Wales) Measure. Is there anything that you would like to say, Deputy Minister, to start the discussion?

[114] **Jocelyn Davies:** Yes, there is. This is a long-awaited proposed Measure, so we have had a great deal of time to consider the right-to-buy provisions. There is a slightly different style to the intervention measures, which amend other pieces of legislation, as the committee will have noticed. Members will probably remember that I said in committee and in the

Chamber that I had told officials not to work on such measures that might arise out of the proposed legislative competence Order when there was no certainty that we would get that competence. That is why we have chosen to use that style for Part 2. However, for Part 1, we were fully expecting to gain the competence, and so we have had a considerable length of time to look at that.

[115] **Janet Ryder:** I will ask the first question. What factors did you take into account in deciding on the balance between the powers on the face of the proposed Measure and the powers conferred to Ministers to make subordinate legislation?

[116] **Jocelyn Davies:** We wanted to include as much as possible on the face of the proposed Measure, because this is a contentious area and we are talking about rights that tenants already hold. The legislature would then be able to see exactly what the policy intention was and how it was being delivered. I feel that the only things that are not on the face of the proposed Measure but are in the gift of the Minister are things that could change frequently, or require so much detail that it would not be appropriate to include them on the face of the proposed Measure.

[117] **Janet Ryder:** Is that why you have decided to give the Welsh Ministers relatively few powers that allow them to make legislation?

[118] **Jocelyn Davies:** I thought that it was important for the proposed Measure to lay out exactly what we intend to do and how we intend to do it. I gave many reassurances during the journey of the legislative competence Order, and those reassurances are on the face of the proposed Measure. I thought that that was important. In talking of secondary legislation, I suppose that that refers to directions. We felt that there would be too much detail if those were on the face of the proposed Measure, although the proposed Measure states what will be in the directions. So, we wanted to put as much as possible on the face of the proposed Measure, and everything else, I feel, are things that it would be inappropriate to have on the face of the proposed Measure.

[119] **Alun Davies:** We welcome this legislation, Deputy Minister. As someone who spent a number of years on the original legislation committees, I very much welcome the fact that the proposed Measure is being brought forward at this time. On the right to buy, sections 6, 13, 17 and 22 empower Welsh Ministers to issue a ministerial decision to a local housing authority on the authority's application to suspend the right to buy. You are doing this by issuing directions, but directions do not have parliamentary process attached to them. Can you explain why you are using directions to implement the policy, rather than using another process that might be subject to scrutiny?

[120] **Jocelyn Davies:** It is stated clearly on the face of the proposed Measure exactly what a local authority would have to do in submitting an application. The proposed Measure also lays out the things that Ministers would have to take into consideration, and it also states that if all those criteria are met, they cannot reject the application. So, there is very little ministerial discretion there. Section 6, on the issue of a direction, clearly states what the direction will include. It will include the area, the homes affected, and the period of time. Therefore, it is clearly stated on the face of the proposed Measure what the direction will contain. So, even though there is a direction function there, the proposed Measure clearly stipulates everything that will be in that direction.

[121] **Alun Davies:** I appreciate that—there is no question of us having a political disagreement over the issue; the subject of my question is how these matters are dealt with. You said in your opening remarks, Deputy Minister, that this was a somewhat contentious piece of proposed legislation, and this particular part of it has attracted considerable debate. As a consequence of that, each direction you make will be subject to a level of public interest,

shall we say. When the Deputy First Minister made Orders relating to permanent speed limits on the M4, he recognised that there would be a similar public interest element in those directions. He could have issued directions in the way that you are proposing, but, instead, he used a process through the Assembly that meant that there was a far greater level of scrutiny. Did you consider any alternative, Deputy Minister?

[122] **Jocelyn Davies:** We lay out on the face of the proposed Measure that a local authority would have to explain why it is making the application, and so it would have to supply evidence that the housing pressure condition existed. Local authorities would also have to say why, in their opinion, the direction is appropriate. Authorities would have to consult those affected, including organisations that represent tenants, and they would have to say what they would do while the suspension existed so that the supply issue was addressed. I do not know the exact reasoning for why the Deputy First Minister decided to take a slightly different tack, but this proposed Measure is about people's homes and the local authority having the strategic housing function making the application, perhaps not just with regard to their own stock, but those of other registered social landlords. Authorities would also have to consult those registered social landlords. We felt that this was the best way for us to achieve this. I do not think that the Assembly in Plenary would thank us if we brought every application before it. The proposed legislation says the application can only be granted if all the conditions apply, and not that the Minister 'may' grant, but that the Minister 'must' grant if those conditions apply. I suppose, therefore, that you would be presenting the Assembly with a debate that, if the conditions are met, it would have to agree with, so this seems to be the most appropriate way of dealing with it.

10.50 a.m.

[123] **Alun Davies:** Certainly, I do not disagree that there would be pressure on the Assembly to do that, but it would at least be subject to some scrutiny. I think that the reason for the Deputy First Minister's decision on this was that it was seen to be quite a local issue on the M4, but it was also seen to be a significant issue, which had wider policy implications. However, you do not believe that these directions would be significant in that wider political sense. Is that a correct understanding?

[124] **Jocelyn Davies:** This might affect certain house types within that area, but not all social rented homes. This also allows for the local authority to apply for variation, enlarging, making smaller and bringing to an end. I suppose that, if you ask the Assembly to endorse a decision that it would have no choice but to endorse if the criteria were met, any variation to that would also have to be brought back. I feel that this is the most appropriate way of doing it; I do not think that this gives the Minister huge discretion, because the face of the proposed Measure does not allow that. I do not know if Ceri wants to add to that.

[125] **Mr Breeze:** First, this consultation was built into the process deliberately, which is fundamental, and local authorities have a particularly important role in this. Scrutiny of the local authorities' application will also take place at a local level, before it gets to Ministers.

[126] **Alun Davies:** There is a difference between scrutiny and public consultation. However, on the other powers that you take with regard to the right to buy, section 34 of the legislation enables you to make consequential provisions connected with the right to buy issue. Will you explain how you see that and what sort of issues you see included in that? Will you also explain why you are doing that through the negative procedure rather than the affirmative procedure? Clearly, as you said in an earlier answer, this is about people's homes and it is a very important issue—as well as having political salience—for many people. Would it not have been more appropriate to attempt to implement any further changes or consequential changes using the affirmative procedure, so at least then there would be a greater opportunity for scrutiny?

[127] **Jocelyn Davies:** Section 34 is connected with the right related to the right to buy. There are a number of rights in this area—there is the right to buy, the right to acquire and the preserved right to buy—and it is a catch-all of anything related to that, depending on which piece of legislation you find those rights in. Housing associations currently have a right to acquire, whereas if you are in a council-owned property, you have the right to buy and some have the preserved right to buy. Also, it could be that the Welsh Assembly Government could introduce other rights in the future that might be called something different, but are related to this.

[128] **Ms Kellaway:** Going back to the Deputy Minister's point, there are regulations related to the proposed Measure that we may want to amend as a consequence of what we are doing in the proposed Measure. The negative procedure would be the most appropriate way of doing the consequential amendments.

[129] **Janet Ryder:** Did you understand that answer, Alun?

[130] **Alun Davies:** Yes.

[131] **Kirsty Williams:** I will move to section 35, which provides Ministers with the power to set standards for the performance of registered social landlords. Could you explain how this process will work in practice?

[132] **Jocelyn Davies:** Following the Essex review, we have already made considerable changes and we have a new regulation framework for housing associations. This gives us statutory force for that, and was something that we developed with the sector over the last few years. We already have performance standards. We have already agreed with them that there will be delivery outcomes, which we developed with Community Housing Cymru, and they have already been adopted and launched. So, this gives that statutory framework.

[133] In the last few years, lenders have indicated that they want to decrease their risks as much as possible. They have also helped us to develop the new regulatory framework, and they were keen, as was the sector, for it to be clear that lending to registered social landlords in Wales is as low-risk as possible, because not only does that affect whether you can borrow, but how much you pay for that borrowing. If there is a perceived risk, it will cost you more. So, this backs up what we are already doing with the statutory framework. We have undertaken two consultations on the delivery outcomes already, and the standards will be developed in exactly the same way. It is a sort of co-production of a regulatory framework. It was seen as being important in the current economic climate that Wales was seen as being as low-risk as possible. So, there are early-intervention powers and proper standards, and we have an appropriate regulatory framework for RSLs.

[134] **Kirsty Williams:** Given the importance of the standards, especially in the current economic climate, as you said, and their importance in securing that investment, so to speak, to take policy forward, why did you not choose to put those standards on the face of the proposed Measure?

[135] **Jocelyn Davies:** That would have been difficult. We will be reviewing the delivery outcomes and the performance standards annually to make sure that they remain appropriate. It is seen as being desirable for them to be dynamic, so that they can be changed when it is appropriate, and that could be done frequently. So, there is flexibility to do that. In an environment of co-production, if they were on the face of the proposed Measure, we could be considering new legislation and amendments all the time. It is to allow them to be flexible and dynamic and to ensure that they can be reviewed annually.

[136] **Kirsty Williams:** The reason why we are asking these questions is that this approach to setting standards is different from that in previous legislation, although previous legislation had standards of a different kind. One thinks of the proposed Welsh language Measure, for example, which requires regulations to be made by Welsh Ministers, which are then subject to procedural control by the National Assembly. Could you explain why the powers that you are proposing to take are not subject to similar control? Is it simply because the world is too fast-moving in this area?

[137] **Jocelyn Davies:** Yes, and, as I say, they will be reviewed annually, and we have already developed a framework in which we work with the sector and there is a consensus on the way forward. These issues are non-contentious, and it is about good management of an association and the wellbeing of tenants. So, as you say, it is being done differently, but in this case it seems that that is the most appropriate way. I can see that the official who has been working on this side is keen to help me out.

[138] **Ms Frith:** We fully acknowledge that it is difficult to decide where to draw the line in this area. There are other examples such as the Care Standards Act 2000, in which standards are set in this way. I have discussed this matter with Welsh legislative counsel, who is strongly of the view that, in this case, the standards are not suitable for legislation. There is a degree of informality about them, which means that it would be difficult to put them in legislative terms.

[139] **Jocelyn Davies:** Ceri, I do not know whether you wanted to say anything.

[140] **Mr Breeze:** I would reassure Members that the regulatory approach is set on the basis of a broader, national set of standards. They are sufficiently non-prescriptive to allow for local circumstances, but they are key to driving up performance and standards for tenants and others. There are two parts: there is self-assessment by the association and an assessment by a regulatory team, so there is an element of control built in, with the emphasis on driving up standards.

11.00 a.m.

[141] **Kirsty Williams:** Thank you; I think that that is one of the more robust explanations that we have had in committee for why it is not necessary to put things on the face of the proposed Measure. Moving on to section 37 and issues around consultation before setting standards, there are very different consultation requirements under sections 37 and 40. Can you explain why such a difference exists?

[142] **Jocelyn Davies:** The consultation under section 37 would be with RSLs and umbrella bodies and so on that represent the interests of RSLs. The consultation under section 40 would be with a different audience. It is about RSLs, but also tenants and local authorities, and it is about making complaints. So, they are different audiences and there would be different consequences of the outcomes. That is why they are dealt with in slightly different ways.

[143] **Alun Davies:** With regard to some of the powers that you are taking under section 48 on an inspector's powers of entry and inspection, this is something that has exercised the committee on previous occasions. Can you outline how you see these powers being used in practice? Can you confirm that powers of entry contained in this legislation are not intended to allow, and will not allow, entry to housing stock occupied by tenants?

[144] **Jocelyn Davies:** No, it would not allow that. Although it refers to

[145] 'premises occupied by the registered social landlord'

[146] that does not mean people's homes. However, I think that the Assembly Government has powers relating to that, but those are certainly not contained here, and they can be used only for the purpose of surveying if repairs have not been carried out and, in those cases, you are obliged to give tenants notice. This has nothing to do with people's homes. These powers are for use in the very rare circumstances of an RSL not co-operating. It would allow inspectors to have access to computers, electronic storage and so on. Of course, the operation of registered social landlords is about tenants' wellbeing and people's living conditions, and there is the issue of the fact that there is considerable public investment. It is about the public purse and the conditions in which people live, and these powers would be for when there was a refusal to voluntarily allow an inspection to take place.

[147] **Janet Ryder:** Alun, are you happy with that?

[148] **Alun Davies:** Yes; I am just reading what the legislation says. It says:

[149] 'premises occupied by the registered social landlord which is being inspected'.

[150] Is that clear in precluding entry to a dwelling?

[151] **Jocelyn Davies:** Yes, because the registered social landlord does not occupy the dwelling. This is a reference to the business premises occupied by the landlord. This does not relate to tenants, although, as I said, I believe that there are powers elsewhere that would make it possible to enter a tenant's dwelling with notice, but, I think, only for the purposes of surveying where repairs have not been carried out.

[152] **Alun Davies:** I am content with that.

[153] **Ms Frith:** The Deputy Minister is absolutely right. Section 37 of the Housing Act 1996 gives powers to survey dwellings on notice.

[154] **Alun Davies:** I will take your word on that. *[Laughter.]*

[155] **Janet Ryder:** Thank you for that answer, Deputy Minister.

[156] **Rhodri Morgan:** With regard to the regulatory powers of Welsh Ministers included in Part 2, when the Assembly considered this in Plenary, you said:

[157] 'I hope that we will not have cause to use the powers, but if problems do occur, we need to be able to intervene quickly to protect services for tenants and the financial viability of the registered social landlord'.

[158] Could you give us some examples of where you would have cause or need to use such powers?

[159] **Jocelyn Davies:** There might be extreme cases, I suppose. As I mentioned, there are the interests of tenants to consider. As the regulator, we need to ensure the financial viability of RSLs—not just for the sake of a particular RSL and its tenants, but for the credibility of the sector as a whole. There could be very poor fiscal control. There could be mismanagement. We need to be able to ensure that we can protect public funds. In Wales alone, if you add up all the social housing grants that RSLs have received over the years, the figure stands at £2.2 billion. We therefore need to ensure that we can protect the investment that we have made. Also, in respect of the Welsh housing quality standard, we would have to ensure that funding was available to complete the whole programme. Otherwise, promises that had been made to tenants would not be maintained. I would imagine that the use of enforcement powers would

be incredibly rare; there has been a tiny number of examples where they may have been used. There is one housing association that has ceased to exist due to finance and management problems.

[160] **Rhodri Morgan:** You refer to the famous Corlan Housing Association case, do you not?

[161] **Jocelyn Davies:** Yes, that is right.

[162] **Rhodri Morgan:** We all remember Corlan.

[163] **Jocelyn Davies:** That is the only case in which a housing association has ceased to exist. We would imagine that we would be alerted very early to the fact that an association was getting into difficulties, and voluntary undertakings would be the norm.

[164] **Rhodri Morgan:** However, these powers—albeit to be used only in extreme circumstances—do not appear to be subject to any procedure in the Assembly. For instance, the power to amalgamate two RSLs or an RSL with another type of body is not subject to any procedure. Do you think that that is right and proper, or should there be some form of subordinate legislation?

[165] **Jocelyn Davies:** I am not sure that it would be appropriate for Assembly Members to debate in a Plenary meeting whether a housing association has reached that point. You would be looking at the finances. This obviously describes an escalation of enforcement from voluntary undertakings, and the amalgamation would be at the other end. The issue of board appointees is another matter.

[166] **Rhodri Morgan:** Nevertheless, as a minimum, do you not think that there should at least be a requirement for information to be laid before the Assembly? This would ensure that the Assembly was aware of the exercise of these powers, and that you could not just do something without telling anyone, without communicating formally to the legislature that the powers had been used, giving the reasons why and saying to whom the powers had been applied.

[167] **Jocelyn Davies:** What if we were dealing with an association that just needed a little bit of help for a short period of time in a voluntary undertaking? I certainly would not want to make that public and see confidence lost in an association.

[168] **Rhodri Morgan:** Like an Irish bank?

[169] **Jocelyn Davies:** It is important that, in extreme circumstances, it would be possible to take over the management of an association. I think that an association would find it very difficult to recover if the fact that it had experienced problems was in the public domain. You could escalate the problem rather than solving it by giving the association a bit of help.

[170] **Mr Breeze:** I cannot think of any circumstances where an association would not cooperate voluntarily if it were in difficulty. These powers are here just in case they are needed. The amalgamation issue could be a voluntary arrangement between associations, as part of a deal. In that case, it would not relate to the powers. However, the powers are there, should they be needed.

[171] **Janet Ryder:** I turn finally, Deputy Minister, to sections 79 and 80 of the proposed Measure, and the issue of restrictions on dealings during an inquiry. Those two sections of the proposed Measure amend the existing Order-making powers included in paragraph 23 of Schedule 1 to the Housing Act 1996 by adding a requirement for Welsh Ministers to take all

reasonable steps to give notice to the registered social landlord before exercising the Order-making powers specified. Could you explain briefly why those amendments to the original Act were considered to be appropriate?

11.10 a.m.

[172] **Jocelyn Davies:** I will have to ask one of my officials to respond.

[173] **Ms Frith:** They are intended to modernise the drafting of the Housing Act 1986. It just specifies the people and bodies who ought to be told that an Order is proposed to be made. It is as simple as that.

[174] **Janet Ryder:** They do slightly limit the powers of the Welsh Ministers. Is there a reason for that?

[175] **Ms Frith:** In a nutshell, it requires Welsh Ministers to tell people what they are doing before doing it to them.

[176] **Janet Ryder:** Thank you very much. Unless Members have any further questions, that brings our questions to an end. Is there anything further that you would like to add, Deputy Minister?

[177] **Jocelyn Davies:** No. If there is anything else that you require, we would be happy to come to see you again.

[178] **Janet Ryder:** Thank you very much for your answers; you have answered all of our questions in full. Thank you very much for your time this morning. There will be a record of the proceedings for you to check through in due course.

11.11 a.m.

**Gohebiaeth y Pwyllgor: Ymateb gan y Gweinidog dros Faterion Gwledig i Lythyr y
Cadeirydd Ynghylch Adroddiad Technegol ac Adroddiad ar Ragoriaethau'r
Rheoliadau Wyau a Chywion (Cymru) 2010 (CA459) a'r Gorchymyn Iechyd Planhigion
(Cymru) (Diwygio) 2010 (CA469)**

**Committee Correspondence: Response from the Minister for Rural Affairs to the
Chair's Letter Regarding Technical and Merits Reports on the Eggs and Chicks (Wales)
Regulations 2010 (CA459) and the Plant Health (Wales) (Amendment) Order 2010
(CA469)**

[179] **Janet Ryder:** We will move on quickly because I know that we are very getting very close to the end of our allocated time. In this part, we take up again the long-running saga of the response from the Minister for Rural Affairs to my letter regarding the technical and merits reports on The Eggs and Chicks (Wales) Regulations 2010 and The Plant Health (Wales) (Amendment) Order 2010. I call on Gwyn.

[180] **Mr Griffiths:** Fel y gwelwch, yr ydym wedi cael llythyr pellach oddi wrth y Gweinidog yn sôn am y rheoliadau hyn. O'r diwedd, yr ydym wedi cael ateb clir i'r cwestiwn yr ydym wedi bod yn ei ofyn. Y rheswm dros newid geiriad y ddeddfwriaeth yw bod yr un grŵp o arolygwyr yn gorfodi'r ddeddfwriaeth hon yng Nghymru ac yn

Mr Griffiths: As you can see, we have received a further letter from the Minister regarding these regulations. Finally, we have had a clear response to the question that we have been asking. The reason for changing the wording of the legislation is that the same group of inspectors enforces this legislation in England and Wales, and therefore it

Lloegr, felly mae'n hwyluso gwaith yr arolygwyr os ydyw'r ddeddfwriaeth wedi ei geirio yn yr un ffordd. Mae'n fater arall a ydych yn cytuno bod angen i'r geiriad fod yr un fath â geiriad deddfwriaeth Lloegr, ond o leiaf y mae'n esboniad clir. Nid wyf yn deall pam na roddwyd hwn yn un o'r llythyron blaenorol neu yn y nodyn esboniadol. Serch hynny, mae'n esbonio'r sefyllfa. Yr ydym hefyd wedi cael cadarnhad gan y Gweinidog y caiff y ddeddfwriaeth ei gweithredu mewn ffordd dderbyniol. Felly, yr wyf yn argymhell ein bod yn derbyn hwn fel diwedd ar y mater.

facilitates the work of the inspectors if the legislation has been worded in the same way. It is another matter whether you believe that the wording needs to be the same as in the legislation for England, but at least it is a clear explanation. I do not understand why this was not stated in one of the previous letters or in the explanatory memorandum. However, it explains the situation. We have also had confirmation from the Minister that the legislation will be enforced in an acceptable way. Therefore, I recommend that we accept this as an end to the matter.

[181] **Janet Ryder:** A yw pawb yn hapus â hynny? **Janet Ryder:** Is everyone content with that?

[182] **Kirsty Williams:** It is amazing what the threat of an appearance before the committee can elicit, is it not?

[183] **Janet Ryder:** Yes, it was rather a long saga to get that answer in the end.

[184] **Alun Davies:** I think that we are happy with that.

[185] **Janet Ryder:** Yes, we have the answer, so we can write that up.

[186] **Alun Davies:** Amen.

11.12 a.m.

Unrhyw Fusnes Arall Any Other Business

[187] **Janet Ryder:** There are no other pieces of business.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[188] **Janet Ryder:** I remind Members that, next week, which is the last week of term, we will be taking evidence from the Minister for Children, Education and Lifelong Learning, Leighton Andrews. Unfortunately, Members, the only time that he can appear is 9 a.m. Therefore, we will have to start promptly at 9 a.m. next Wednesday. Steve wishes to add something.

[189] **Mr George:** The proposed education Measure concerned has not actually been introduced as yet. We understand that it will be introduced next Monday. We do not yet know whether there will be a Stage 1 committee procedure for it. If there is, it will be for a matter of two weeks only. If there is no Stage 1 committee procedure, it is an option for this committee to say that it does not want to consider it either. If that is the case, this will be the only committee that will look at it before the debate on the general principles.

[190] **Alun Davies:** Why do we need to do this next week? Surely this is something that we could slot into the first week back after the Christmas recess.

[191] **Janet Ryder:** I believe that we have to report back.

[192] **Mr George:** It depends on the reporting deadline or on when the general principles debate is held. Frankly, there is no point in us reporting after the general principles debate. Therefore, we need to do it early enough so that we can report, if need be, before that. I am afraid that the timescale is still a bit fluid.

[193] **Alun Davies:** Okay. Could we ask the clerk to confirm the timescales over the coming days, and agree that we will meet if necessary, but note that the preference of the committee would be to deal with this matter in the new year?

[194] **Kirsty Williams:** It is my understanding that the handling of the matter was being discussed by the Business Committee this morning. In the absence of any formal wash-up procedures at the National Assembly, this is relatively new. Personally, I would be unwilling for a piece of legislation not to go through the normal procedure simply because of the lateness of its introduction to the National Assembly. I think that that would potentially set a bad precedent. As Alun said, if it is possible to delay our consideration until the new year, that would be preferable.

[195] **Janet Ryder:** If it should transpire that that would be the only opportunity for such a meeting and that this would be the only committee that would have an opportunity to scrutinise the legislation at this stage, what would committee members' feelings be then? If it is possible, we will delay it until the new year, but if it is not possible to delay it until the new year, and if, because of the pressure of time, this happens to be the only committee that can review it, what would be your preference?

[196] **Alun Davies:** That would be a very poor state of affairs, would it not?

[197] **Janet Ryder:** It would, indeed.

[198] **Alun Davies:** It would be a very poor state of affairs. I think that many of us would share Kirsty's concerns about the parliamentary process being curtailed in that way, without any discussion or explanation. It does raise issues that go beyond the remit of this committee.

[199] **Kirsty Williams:** Indeed.

[200] **Janet Ryder:** Perhaps we need to wait to see what the deliberations of the Business Committee were this morning and have further discussions with Members on e-mail before next week.

[201] **Kirsty Williams:** Agreed.

[202] **Janet Ryder:** Are you satisfied with that, Rhodri?

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

11.16 a.m.

Cynnig Trefniadol Procedural Motion

[204] **Janet Ryder:** At this point, we need to bring the public part of the meeting to an end so that we may discuss the evidence that we have just taken. I ask a Member to move the appropriate motion.

[205] **Kirsty Williams:** I move that

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

[206] **Janet Ryder:** I see that the committee is in agreement.

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 11.16 a.m.
The public part of the meeting ended at 11.16 a.m.*