



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

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

**Dydd Iau, 17 Mawrth 2011
Thursday, 17 March 2011**

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Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynnddi 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.

*Dechreuodd y cyfarfod am 9.29 a.m.
The meeting began at 9.29 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 this meeting of the Constitutional Affairs Committee. In an emergency, ushers will indicate the nearest safe exit. Headsets are available for amplification. I remind everyone to switch off all mobile devices completely. We have received no apologies for absence.

9.30 a.m.

**Offerynnau ac Offerynnau Drafft Na Fydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig iddynt o dan Reolau Sefydlog Rhifau 15.2 a 15.3, Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Negyddol), Offerynnau Drafft sy'n Agored i Gael eu Cymeradwyo yn Unol â Phenderfyniad gan y Cynulliad (y Weithdrefn Gadarnhaol) ac Offerynnau Nad Ydynt yn Agored i'w Cymeradwyo na'u Dirymu (Dim Gweithdrefn)
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[2] **Janet Ryder:** There are quite a number of items for consideration this morning, but there are no reporting points on a number of them. We will first look at CA547, the Recycling, Preparation for Re-use and Composting Targets (Definitions) (Wales) Order 2011; CA548, the Marine Licensing (Application Fees) (Wales) Regulations 2011; CA549, the Marine Licensing (Register of Licensing Information) (Wales) Regulations 2011; CA550, the Marine Licensing (Exempted Activities) (Wales) Order 2011; CA554, the Food (Jelly Mini-Cups) (Emergency Control) (Wales) (Revocation) Regulations 2011; CA555, the Official Feed and Food Controls (Wales) (Amendment) Regulations 2011; CA558, the Home Energy Efficiency Schemes (Wales) Regulations 2011; CA559, the Food Additives (Wales) (Amendment) Regulations 2011; CA560, the Cardiff and Vale College (Incorporation) Order 2011; CA561, the Cardiff and Vale College Further Education Corporation (Government) Regulations 2011; and CA562, the Higher Education Act 2004 (Relevant Authority) (Designation) (Wales) Regulations 2011. There are no reporting points on any of those pieces of legislation. Would Members like to raise anything on any of them? I see that you are content, so we will pass them.

[3] For now, we will leave CA569, the Tuberculosis (Wales) Order 2011, because there is another piece of legislation to do with tuberculosis; we will take them both together.

[4] Next, we come to CA544, the Marine Licensing (Appeals Against Licensing Decisions) (Wales) Regulations 2011; CA545, the Marine Licensing (Notices Appeals) (Wales) Regulations 2011; and CA546, the Marine Licensing (Civil Sanctions) (Wales) Order 2011. There are no particular points to note on those items. Are Members content? I see that you do not wish to raise anything.

[5] We will move on to CA556, the Sunbeds (Regulation) Act 2010 (Wales) Regulations 2011, on which there is a merits point.

[6] **Ms Roberts:** These regulations are subject to the affirmative procedure. It might be of interest to the committee to know that they were submitted in draft beforehand, which helped to erase any issues that might have evolved subsequently. There are no technical reporting points. These regulations make provisions for sunbed use. They impose a duty on a person who runs a sunbed business on domestic premises to prevent sunbed use, particularly in relation to persons who are under the age of 18, make it a requirement for a person who runs a sunbed business to supervise the use of sunbeds at all times, place a prohibition on the sale or hire of sunbeds for individuals who are under 18, and make requirements for the provision of information to sunbed users and protective eyewear. The regulations are made pursuant to powers contained in the Sunbeds (Regulation) Act 2010. There is nothing further to note in relation to these regulations.

[7] **Rhodri Morgan:** Should I declare an interest before speaking, because these regulations are the result of an Act of Parliament brought forward by my wife, Julie?

[8] **Janet Ryder:** I do not think that you need to declare an interest, but we were going to note that this came out of Julie Morgan's private Member's Bill.

[9] **Rhodri Morgan:** Subject to that, I wanted to note that it is frequently said—you fell into this trap—that these regulations relate to the use of sunbeds, but the purpose is really to restrict the use of sunbeds, by banning them for under-18s and so on. So, it is 'against the abuse of sunbeds', rather than 'for the use of sunbeds'. That is the key thing. For some reason, it is always described as being about the use of sunbeds rather than being against their abuse. That is the nature of law. You can only do one of two things in law: you make something compulsory or you ban it. This is more about the second than the first, but it is always described in such a way as to make it seem as if it is making bloody sunbeds compulsory. *[Laughter.]*

[10] **Janet Ryder:** This issue has received a lot of public attention and is quite significant, so, if Members are content, we will lay a merits report and draw attention to the issue that Rhodri has just raised. Are Members content with that?

[11] **Mr George:** We should possibly also note that it was the subject of an inquiry by the Health, Wellbeing and Local Government Committee, which pretty much recommended all of the things that these regulations contain.

[12] **Rhodri Morgan:** The point is that this is part of a public health agenda of huge importance. It is also a class-based issue, in that, unfortunately, it is, by and large, working-class girls who tend to think that the way to attract the opposite sex and so on is to go twice a week to unregulated sunbed parlours, which is fine, unless you happen to have blonde hair or red hair—especially red hair—and pale skin and green eyes: the Celtic skin type, although it is more common in Ireland and Scotland than in Wales, as it happens, which is fortunate. Even so, people do not understand that, with that skin type, you will be devastated by abuse of the sun bed. You may well attract the opposite sex, but you may develop cancer in the process. People must understand that, if you have pale skin, red hair and green eyes, and freckles, it is devastating. People just do not realise how huge a risk sun beds are.

[13] **Janet Ryder:** Thank you for that. We will try to encompass that in the merits report, which we will lay alongside this piece of legislation. If Members are content we will move on to CA563, which is another set of regulations arising from the Equality Act 2010—we will deal with all of them together. That takes us on to CA552, on the Welsh forms of oaths and affirmations, where there is nothing really of note. If Members are content with those, we will move on to CA553, the animal by-products legislation, on which I think there are a number of points, are there not, Bethan?

[14] **Ms Roberts:** On this occasion, no draft of the regulations was provided; Members might be interested in that. These regulations were made subject to the negative procedure on 2 March and came into force on 4 March. In Wales, these enforce Regulation (EC) No. 1069/2009, which is called the control regulation. It lays down health rules for animal by-products and derived products not intended for human consumption, and also enforces in relation to Wales and EC regulation called the implementing regulation, which brings the control regulation into force.

[15] First and foremost, I bring to Members' attention the fact that scrutiny of these regulations brought forward 23 reporting points. A substantial number are technical ones—there are about 19 of those—and there are about three merits issues. Some points are more contentious than others, and I do not intend to run through them all with Members. Probably the most important ones to highlight are the one where there is some doubt that the provision is *intra vires* and also ones of defective drafting in relation to powers of entry, regulation 24, and also regulation 25, which enables a person to apply for a warrant in front of a justice of the peace. Regulation 24 enables an authorised person to enter any premises at all reasonable times for the purpose of ensuring compliance with the EC regulations. However, regulation 24 is not made subject to regulation 25; there is no express provision in relation to regulation 25. In these regulations, 'premises' includes domestic premises, so the problem with this provision is that there could be a misuse of power, in that an authorised person does not have to apply for a warrant via a justice of the peace, but can enter domestic premises anyway. It might well be that the intention of the drafting lawyer was that a warrant should be applied for in the first instance. However, the way that the provisions are drafted, unfortunately, allows for a potential misuse of this power. This then also raises issues in relation to human rights, particularly article 8 of the European convention on human rights, which is the right to respect for an individual's private life, home and correspondence. There is also a particular breach of section 81 of the Government of Wales Act 2006, which prevents Welsh Ministers from making any form of subordinate legislation contrary to the European convention.

[16] Members may recall that similar issues have come before the committee on previous occasions, particularly in relation to the Plant Health (Wales) Amendment Order 2010 and the Eggs and Chicks (Wales) Regulations 2010. I will not go on, but the main concern, obviously, is with regard to entry to domestic premises, and the regulations make specific provision for that.

[17] The second point that is fairly contentious is that these regulations were made in English only on this occasion. I will come on to why that has come about, and a few merits points. Another, perhaps unusual, aspect of this is that these regulations have amended the Waste (England and Wales) Regulations 2011, which are in draft form and have yet to be made or laid before Parliament or the National Assembly. So that is an unusual provision. Normally, the drafting lawyer could rely on a provision in the Interpretation Act 1978 that states that where an Act confers power to make subordinate legislation, it implies, unless a contrary intention appears, a power to amend any instrument made under the power. However, these regulations are in draft form only and have not been made, so I do not think that the drafting lawyer could rely on that provision on this occasion.

[18] I do not intend to go through all of the 15 remaining points of defective drafting—you will be glad to hear—but one of the most significant is in relation to offences. Regulation 17, Schedule 1, of these regulations, lists the animal by-product requirements under the EC regulation. If an individual does not comply with them, they could be committing an offence. In some cases, the titles of some of these articles are incorrect and, in others, the wrong EC regulations are referred to, and, as these refer to offences, it is of paramount importance that an individual is not misled and knows exactly what the requirements are and what they have to comply with. The other defective reporting points are in relation to amendments to regulations that have already been repealed and so on.

[19] Merits points also arise with regard to these regulations. First, the EC control and implementing regulations both came into force on 4 March. The control regulation dates back to 2009. You could argue that the Government has had two years within which to bring the regulations into force, especially in relation to Wales. The problem is that these regulations refer to offences but have not been published, so individuals could be committing offences unawares. I understand that the Government's legal advice was not to proceed at this time, but the client wanted to proceed, because she did not want any gap in enforcement proceedings. That is what has happened.

[20] **Rhodri Morgan:** Who do you mean by the client?

[21] **Ms Roberts:** The chief veterinary officer. In this instance, no persons can evade prosecution in relation to these regulations, but, because these regulations have not been published, people do not know that they could be committing offences. That is a rather worrying point.

[22] So, the 21-day rule has been reached, and, as a result of the regulations being rushed through, one could argue that that is why they have been provided in English only and not in English and Welsh. The Government accepts all the reporting points, and I believe that it intends to bring in bilingual regulations to revoke these regulations, which contain so many errors.

[23] **Janet Ryder:** Thank you, Bethan. That is an awfully long list of things that are wrong with these regulations. Unfortunately, we can trace a recurring theme in relation to regulations from this department.

[24] **Rhodri Morgan:** In your experience, Bethan and Gwyn, where does this stand in the league table of defective secondary legislation? Is it the worst example that you have ever come across? In my short membership of this committee, I have never heard such a devastating criticism of legislation. It is bad, rushed, it has not been translated and it is thoroughly defective—a Friday afternoon job, as they used to call it on the British Leyland production line back in the 1970s. Is it the worst piece of legislation or are there worse?

[25] **Mr Griffiths:** Gallaf gadarnhau mai hwn yw'r adroddiad mwyaf difrifol. Yr ydym wedi cael adroddiad gyda mwy o bwyntiau. Bydd rhai ohonoch yn cofio'r rheoliadau ynghylch grantiau myfyrwyr rhyw ddwy neu dair blynedd yn ôl, a oedd â mwy o bwyntiau, ond mân bwyntiau oedd amryw ohonynt. Mae pwyntiau mwy sylweddol yn yr achos hwn, felly, hwn yw'r adroddiad mwyaf difrifol.

Mr Griffiths: I can confirm that this is the most serious report. We have had a report with more reporting points. Some of you might remember the regulations on student grants two or three years ago, which contained more points, but some of those were only minor. There are more significant points in this instance. Therefore, this is the most serious report.

[26] **Janet Ryder:** We have had a Government response on this that suggests that one reason why this has occurred is that it had very little time between receiving the European legislation and having to draft the regulations, and that it could not have a gap in which the enforcing legislation was not in place. However, it appears that a gap was allowed in England. We can take a number of routes on this.

[27] **Rhodri Morgan:** I thought that Bethan had said that these were long-standing EU regulations.

9.45 a.m.

[28] **Janet Ryder:** Bethan can go over this, but it is my understanding that the Government has known that these were coming for about two years, and so it has had two years to prepare for them, but it has waited until now. So, given how these have been drawn up, you could assume that it has waited until the last minute to do them. However, that might be the wrong assumption to make.

[29] **Rhodri Morgan:** So, this did not come out of the blue, and, although you must wait for the final details in transforming EU regulations into British or Welsh domestic law, the Government has known for a very long time that this was coming. I assume that it would have been consulted on their shape, or would it have known nothing about what the content would be?

[30] **Ms Roberts:** There was a previous control regulation in force, which I omitted to mention, and these regulations revoke that. So, the Government has always been aware of the control regulation, and this one, dating from 2009, was implemented by a recent one up to 2011. Both of them came into force on 4 March, but, despite the EC regulation that implements the control regulation, it has known about the control regulation for two years—it dates back to 2009. Janet raised the point that England has an enforcement gap, so could be subject to possible infraction proceedings by the EC, which we could not, because we do not have an enforcement gap. However, individuals are affected if they do not know about the offences.

[31] **Rhodri Morgan:** To get a clear picture on this, then—this is not about the merits, just the technology of the law—what is the worst-case scenario for a farmer or a domestic smallholder, or anyone involved in the handling of animal by-products, not being aware of the law and carrying on to do something, thinking that it is legal, while all the time it is illegal, and then being subject to infraction proceedings through these regulations, which would, in effect, be retrospective law, because they did not know that it was illegal? What is the worst-case scenario?

[32] **Ms Roberts:** These regulations are currently in effect, but the defence of a farmer who was not aware of the particular offence could arguably be that he did not know that he was committing the offence because he was not privy to the information. So, he would have quite a case to argue in such a circumstance.

[33] **William Graham:** Surely it would not be capable of being enforced; no court in the world would convict on that basis.

[34] **Ms Roberts:** That is what I would have thought.

[35] **Janet Ryder:** The least that we can do is to write both a technical report and a merits report.

[36] **Mr George:** We have a draft report in front of us, which is nine pages long, and also contains the Government's response. We will obviously lay that before the Assembly and draw it to Members' attention. You might also want to write to the Minister asking for more urgent steps to be taken in revoking or replacing—whatever it is called—the regulations. I think that that is the Government's intention, but—

[37] **Janet Ryder:** I remind Members that the Counsel General will be coming before us in a few minutes' time. I do not know whether he would be willing to answer any questions on this, but we could raise it with him as a matter of concern.

[38] **Alun Davies:** I do not think that he is in a position to answer any questions on it at

all, frankly. However, we should bring this to the Minister's attention and write to her with our observations.

[39] **William Graham:** We should not minimise the importance of these regulations, because they arise out of the foot and mouth disease outbreak.

[40] **Kirsty Williams:** I understand why the Government does not want an enforcement gap, because these regulations deal with significant issues with regard to human and animal health. However, it has been in negotiations with the European Union for a long time about what these regulations would look like, and it is inconceivable to me how it has got itself into a situation of not getting all the ducks in a line. This has not happened overnight; the Government has been aware of this and has been sending people out into the field to explain to the unions the consequences of the changes in European law. So, I cannot see why the legal department in this particular division was not able to foresee what needed to be done. I can understand why, at the last minute, it is trying to avoid a gap, because they are serious issues. However, given the serious nature of the issues, it is even more incumbent upon that department to have everything lined up and ready to go. Potentially, someone could get away with doing something quite dangerous to human or animal health and avoid prosecution because of the gaps in this legislation.

[41] **Janet Ryder:** As well as laying the report and writing to the Minister, we will also have a debate in Plenary next Wednesday on the committee report that we have laid on drafting legislation. So, there will be an opportunity then to raise it in Plenary if we want to take this further. However, if Members are content, we will lay the report and write to the Minister and perhaps raise it with the Counsel General as a point of concern. We might also raise it in the debate next week. Are Members content with that? I see that you are.

[42] The next is CA570, the Badger (Control Area) (Wales) Order 2011, and we will take that with CA569, the Tuberculosis (Wales) Order 2011.

[43] **Mr Griffiths:** Mater eithaf ffurfiol yw hwn. Mae'r Gorchymyn Moch Daear (Ardal Reoli) (Cymru) 2011 yn diddymu rheoliadau blaenorol a oedd yn cynnwys materion sydd bellach yn yr offeryn sy'n ymwneud â thiwberciwlosis. Dyna pam yr awgrymais ein bod yn dod â'r ddau offeryn at ei gilydd. Nid oes dim o'i le yn dechnegol ar y naill na'r llall, ond mae'r mater o ragoriaethau wedi ei nodi oherwydd hanes yr achos hwn a'r achos llys yn benodol a arweiniodd at ddiddymu'r rheoliadau gwreiddiol, os nad yn ffurfiol, o ran eu heffaith. Dim ond mater i'w nodi yn unig sydd yma.

Mr Griffiths: This is a relatively formal matter. The Badger (Control Area) (Wales) Order 2011 revokes the previous regulations that included matters that are now included in the tuberculosis instrument. That is why I suggested that we should bring the two instruments together. There is nothing technically wrong with either of these, but there are matters of merits to note because of the history of this case and the court case specifically that led to revoking the original regulations, if not formally, then in terms of their effect. That is just a point to note on that.

[44] **Janet Ryder:** Are Members content with that? I see that you are. We move on to CA564, the Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011, and we will take that with CA563, the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011. Gwyn?

[45] **Mr Griffiths:** Mae'r ddau offeryn hyn yn gysylltiedig gan eu bod yn ymwneud â gweithredu Deddf Cydraddoldeb 2010. Mae'r Gorchymyn yn ymwneud â phennu

Mr Griffiths: These two instruments are linked as they both relate to the implementation of the Equality Act 2010. The Order relates to appointing authorities

awdurdodau sy'n ddarostyngedig i ddyletswyddau penodol. Mae'r dyletswyddau penodol hynny yn y rheoliadau. Nid oes dim yn dechnegol anghywir gyda'r naill na'r llall. Yr unig fater i'w nodi yw'r pwynt o ran rhagoriaethau sy'n ymwneud ag a ddylid cynnwys yr ombwdsmon ai peidio. Gwelwch fod yr ombwdsmon wedi ymateb i ymgynghoriad y Llywodraeth ar y mater hwn. Mae'r Llywodraeth wedi nodi nad yw'n derbyn y ddatl honno, ond ni roddodd esboniad llawn o'r ystyriaethau hynny. Felly, mae wedi ei ddrafftio fel adroddiad rhagoriaethau fel bod modd cwestiynu'r Gweinidog ar y pwynt hwnnw yn ystod y drafodaeth.

that are subject to specific duties. Those specific duties appear in the regulations. There is nothing technically wrong with either of these. The only issue to note relates to merits with regard to whether the ombudsman should be included or not. You will see that the ombudsman has responded to the Government's consultation on this issue. The Government has stated that it does not accept that argument, but it has not provided a full explanation of those considerations. So, it has been drafted as a merits report so that the Minister can be questioned on that point during the debate.

[46] **Janet Ryder:** So, this is a merits point. I suggest that we lay a merits report on this to note the issue concerning the ombudsman. Are Members content? I see that you are.

[47] We move on to CA557, the Recycling, Preparation for Re-use and Composting Targets (Monitoring and Penalties) (Wales) Regulations 2011. There is a technical point on this. Steve?

[48] **Mr Davies:** There is just one minor reporting point to note. These regulations have been made under the Waste (Wales) Measure 2010. There is an inconsistency between the Welsh and the English versions. It does not have any legal impact, but it could cause confusion. Therefore, a reporting point has been made and the Government has accepted that point and has said that it will correct the publication.

[49] **Janet Ryder:** Are Members content? I see that you are. The last piece of legislation to be considered is CA565, the Government of Wales Act 2006 (Commencement of Assembly Act Provisions, Transitional and Saving Provisions and Modifications) Order 2011. Gwyn?

[50] **Mr Griffiths:** Fel gyda nifer fawr o ddarnau o ddeddfwriaeth sydd wedi dod gerbron y pwyllgor yn y cyfarfod hwn, cawsom gyfle i edrych ar y Gorchymyn hwn mewn drafft ymlaen llaw. Unwaith eto, nid oes pwyntiau technegol i'w hadrodd. Mae'r Gorchymyn hwn yn un pwysig iawn o ran gweithredu canlyniad y refferendwm. Felly, yr ydym yn teimlo bod angen tynnu sylw at hyn. Mae un pwynt o dan ragoriaethau i'w nodi, sef bod y memorandwm esboniadol yn cyfeirio at adran 67 o Ddeddf Addysg a Sgiliau 2008, gan esbonio nad oes angen y pŵer hwnnw bellach. Nid yw'n mynd ymlaen i esbonio pam nad yw'r adran honno yn cael ei dileu, felly nodwyd hynny fel cwestiwn i'r Llywodraeth ymateb iddo.

Mr Griffiths: As with a large number of pieces of legislation that have come before the committee in this meeting, we had an opportunity to look at this Order in draft beforehand. Once again, there are no technical points to report. This Order is very important in terms of giving effect to the result of the referendum. So, we feel that we need to draw attention to this. There is one merits point to note, namely that the explanatory memorandum refers to section 67 of the Education and Skills Act 2008, explaining that that power is no longer needed. It does not go on to explain why that section is being deleted, therefore that was noted as a question for the Government to respond to.

[51] **Rhodri Morgan:** Diddorol.

Rhodri Morgan: That is interesting.

[52] Can somebody give us a range of possible explanations as to why that exception has been included? Is that the only exception?

[53] **Mr Griffiths:** Na, mae'r Gorchymyn hwn yn ceisio gwneud diwygiadau i ddarnau o ddeddfwriaeth. Nid oes ffordd o wybod a yw hon yn rhestr lawn. Caiff tua phum darn o ddeddfwriaeth eu crybwyll yn yr offeryn hwn, ond pe na bai'r Llywodraeth wedi cyfeirio at y peth yn y memorandwm esboniadol, ni fyddem wedi codi'r peth fel cwestiwn. Y cwestiwn i'r Llywodraeth yw pam ei bod wedi crybwyll y peth yn y memorandwm esboniadol ac yna wedi penderfynu gwneud dim amdano. Mae hynny'n edrych braidd yn od.

Mr Griffiths: No, this Order seeks to amend pieces of legislation. There is no way of knowing whether it is an exhaustive list. Around five pieces of legislation are mentioned in the instrument, but had the Government not mentioned it in the explanatory memorandum, we would not have put the question to the Government. The question is why the Government mentioned this in the explanatory memorandum and then decided to do nothing about it. It seems a bit odd.

[54] **Rhodri Morgan:** Mae'n edrych yn od.

Rhodri Morgan: It seems a bit odd.

[55] **Janet Ryder:** We can write to the Government to ask for an explanation.

[56] **Alun Davies:** We should do that.

[57] **Janet Ryder:** That is fine. It perhaps is worth a merits report to signify that this is a rather significant piece of legislation. Are Members content with that? I see that you are. That brings us to the end of the legislation that we have to look at.

9.57 a.m.

Tystiolaeth Lafar gan John Griffiths AC, y Cwnsler Cyffredinol ac Arweinydd y Rhaglen Ddeddfwriaethol
Oral Evidence from the Counsel General and Leader of the Legislative Programme John Griffiths AM

[58] **Janet Ryder:** Thank you very much for coming this morning, Counsel General. Welcome to the meeting. I apologise for the length of time that we have kept you waiting. There was a lot of legislation to deal with this morning, as I am sure you are aware. A large number of pieces of legislation need to go through before the end of this session.

[59] I welcome John Griffiths, the Counsel General and the Leader of the Legislative Programme, who is here to update the committee and answer Members' questions on a number of issues, including the Counsel General's review of Government legislative process and the Government's response to the committee report—Members are aware that there will be a debate on this in Plenary on Wednesday. There may be some issues about the Government's amendments to Measures, particularly in light of amendments made to the proposed Local Government (Wales) Measure. We would also like to discuss the implications of the Assembly's decision to withhold legislative consent in relation to the Police Reform and Social Responsibility Bill. Counsel General, would you like to introduce yourself and your officials for the record and make a brief opening statement?

[60] **Y Cwnsler Cyffredinol ac Arweinydd y Rhaglen Ddeddfwriaethol (John Griffiths):** Diolch yn fawr, Gadeirydd.

The Counsel General and Leader of the Legislative Programme (John Griffiths): Thank you, Chair. Good morning to you and

Bore da i chi a'r pwyllgor.

the committee.

[61] I will introduce Jeff Godfrey, the head of legal services, and Marion Stapleton, the head of the business unit. You will have heard my statement in Plenary this week, and the questions and answers in relation to that. You have also published your report, to which I have responded. Therefore, I do not intend to make any further remarks and would be very pleased to answer your questions.

[62] **Janet Ryder:** I will start with the first question. In your evidence to the committee on 1 December, you said that

[63] '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.'

10.00 a.m.

[64] Counsel General, in light of that comment and certain recent events, why were issues relating to the inclusion of amalgamation powers in the Proposed Local Government (Wales) Measure not identified at an earlier stage in the process?

[65] **John Griffiths:** I am here to deal with constitutional and legal issues. I have previously described the mechanisms that are used to determine whether legislation is necessary and should be allowed to proceed. Those mechanisms were applied to the Proposed Local Government (Wales) Measure as it was initially introduced, so there would have been consideration by a Cabinet sub-committee of the need to legislate. Officials would have been mindful of the guidance that is applicable to these matters; a case would have been made and accepted on the basis on which it was first put forward.

[66] **Janet Ryder:** Thank you for that answer, Minister. In response to the question that I raised with you on Tuesday, during your statement regarding any guidance that might be given, can you clarify whether the Cabinet sub-committee functions in the same way as the Cabinet committee in Westminster, in that it reviews amendments that are put forward as well as the original piece of legislation?

[67] **John Griffiths:** Yes; it deals with amendments.

[68] **Janet Ryder:** In your response on Tuesday, you also intimated that it operates according to guidelines; is that the case?

[69] **John Griffiths:** Yes; the guidance that we use is applicable to primary legislation, amendments and secondary legislation.

[70] **Janet Ryder:** Would the Government be willing to publish that guidance? You might have answered that question in the affirmative on Tuesday.

[71] **John Griffiths:** I think that I answered in the affirmative in relation to some guidance. I have said that we want to publish guidance on what scrutiny procedure is used for subordinate legislation, drafting principles and practice. As we go through this Assembly, we are constantly working up these sets of guidance. We are currently working on guidance on whether there is a need to legislate and whether legislation should be introduced, including amendments to legislation. We want to reflect on the experience of this Assembly, as we have done with all of the guidance, practice and procedures that we have developed. It will be for the next Assembly and the next Assembly Government to make definitive decisions on

publishing that guidance on the internal workings of the Government and how that determines whether legislation or amendments to legislation are allowed to proceed.

[72] **Kirsty Williams:** John, having reflected on the experience of the substantive amendments coming at such a late stage in the process of considering the Proposed Local Government (Wales) Measure, would your advice to an incoming Counsel General in the fourth Assembly be that this is an appropriate way to deal with amendments of that kind in future legislation? Is it an example of good practice or should it be avoided?

[73] **John Griffiths:** As I said, I deal with the constitutional and legal issues only.

[74] **Kirsty Williams:** With all due respect, this is a constitutional and legal issue.

[75] **John Griffiths:** There will always be matters of judgment for Ministers and the Government collectively, which they will exercise within the parameters of practices, procedures and guidance; the Standing Orders of the Assembly are also relevant here. There will always be differing views on whether late amendments, for example, are warranted or not. All of that was played out when the Minister, Carl Sargeant, appeared before this committee, and in Plenary this week.

[76] **Kirsty Williams:** I am not looking at the specifics of the Proposed Local Government (Wales) Measure. I am thinking of future amendments to legislation that are very substantive in nature and may be inserted late in the process. In your view, as Counsel General, is that an appropriate way for the Welsh Assembly Government to deal with its legislation, and is it an example of good practice? I am not talking about the specifics. I am talking about the practice of allowing substantive amendments to be inserted so late in the process. You said that you would reflect on this. Having reflected on it, would you advise an incoming Counsel General next term that that situation should be avoided wherever possible?

[77] **John Griffiths:** It seems to me that there must be provision for introducing late amendments at Stage 2. All of us can easily imagine circumstances in which that would be appropriate. It is then a matter of judgement, in any particular case, as to whether late amendments are warranted or not. The Government takes a collective view. Particular Ministers have ministerial responsibility. The legislature scrutinises in committee and in Plenary meetings, and it makes a decision. That is the way it must be. So, there has to be provision for late amendments. In terms of our own internal guidance, we would be seeking to develop this process not only for primary legislation where that is required on a particular matter, but also for amendments. As I said, the process exists here at the moment and we will draw on our experiences in this Assembly.

[78] **Janet Ryder:** Rhodri, I believe that we have strayed into the field of your questions.

[79] **Rhodri Morgan:** Yes, we have, and I want to clarify something. The Cabinet Office guidance splits Government amendments into four categories, three of which are acceptable and one that is not acceptable. Is that the practice that would normally apply here as well or is there different guidance? For example, there are cases where concessions are made to the opposition or to scrutiny committees. I am talking about concessionary amendments, minor and technical amendments that everyone accepts because there has been bad drafting that has been picked up, and essential amendments that come up due to unforeseen circumstances. Then, there is the desirable category, where the Cabinet Office says to departments in the Westminster Government, 'We are not having it, if all you want are desirable things. Please use a handout Bill and a backbencher who has done well with private Members' Bills ballots and so forth.' Roughly speaking, does that four-way split of categorisation of Government amendments apply here? Alternatively, are you applying different guidance, and if so, is that wise and should it be published?

[80] **John Griffiths:** We do not apply the guidance that the Cabinet Office has developed, Rhodri. However, the factors to consider are generally of a similar nature. Even with the Cabinet Office guidance, there are circumstances in which it would allow late amendments, even in the category that is considered 'desirable'. What we will do, and what we have already done, is to look at the Cabinet Office guidance in taking forward our own guidance. In general, it is good practice to publish guidance and I have tried to signal that I will be doing that—I hope very much that the next Assembly Government and the next Counsel General will take that view. However, it is an issue as to whether the guidance that we are developing will reflect the Cabinet Office guidance in its final formulation, and the issue of whether it will be published or not would be one for the next Assembly Government. We obviously note that Cabinet Office guidance has been published and I believe that it is generally good practice to be open and transparent. However, that will be a matter for the next Assembly Government.

[81] **Rhodri Morgan:** Obviously, you cannot do it now.

[82] **Janet Ryder:** I believe that Kirsty would like to come in on this point before we move on.

[83] **Kirsty Williams:** I take your point that, so late in the day, you are not in a position to publish the stuff that you are currently working on. However, given that we have had four years of dealing with LCOs and Measures, you must have been working to some set of principles—I hope that you have been working to some set of principles. Why did the Government feel that it was not desirable to publish the principles to which it has been working as a precursor to ongoing work that would relate and be updated at a later stage? As you said, it is good practice to publish them. You must be working to some set of criteria. Why has the Government not done that over the past four years?

[84] **John Griffiths:** We have been quite clear—and this has been acknowledged by the committee and in my review—in saying that it has been important to draw on the experience of this Assembly in working up final versions of guidance on various aspects of practice and procedure. We want to present something that is the final version, as it were, in terms of drawing on that experience, and something that will last and stand the test of time. We are very new as a legislature, particularly with regard to the 2006 Act. It is the right approach to take, to learn as you go along, to draw on that experience and then produce something that will stand the test of time, and that is what we are seeking to do. Obviously, we have been working to guidance all along. Internal guidance has been followed and I have described that in previous appearances before the committee and today.

[85] **Rhodri Morgan:** If you were trying to explain to someone outside in the community that guidance probably will be published by you or your successor in the fourth Assembly—presumably early on, we hope, because of moving into Part 4 and the likely increase in the amount of legislation to be processed efficiently by the Assembly—in the absence of such guidance, would you say that you have been applying something that is close to the Cabinet Office's guidance, or has it been more a case of 'suck it and see' while working towards Welsh Assembly Government guidance, which will be published maybe later in 2011, but not before 5 May 2011?

[86] **John Griffiths:** A commonality of factors would be considered in relation to the Welsh Assembly Government and the UK Government, and indeed other Governments and executives, as to what tests are appropriate for whether legislation or amendments are required. What we want to do, and we have been quite clear about this, is to have our own, Welsh model—

[87] **Rhodri Morgan:** Nobody is against that, but in the absence of that, if, for instance, we are trying to judge the amendments to the Proposed Local Government (Wales) Measure, we go by the Cabinet Office's guidance, while knowing that it is not your guidance. You have not produced your guidance yet, so the nearest thing that we have to published guidance is that of the Cabinet Office, although you are not bound by it. Is that fair?

[88] **John Griffiths:** With regard to late amendments, we would say that we have our own constitution and rules and if they fall within the constitution and rules, I as the Counsel General am satisfied with their constitutionality. So, if the Presiding Officer has ruled that they are within the ambit of the proposed Measure—

[89] **Rhodri Morgan:** I am trying to get at whether the inclusion of those late amendments comes under the essential category, that is, roughly speaking, category 3 of the Cabinet Office's guidance, and whether they were, for example, to deal with a situation that might not be dealt with sufficiently that would cause major problems if the proposed Measure went onto the statute book unamended. You could say that their inclusion comes under that category or you could say that it does not come under any of those categories. You said earlier that there is a doctrine of exceptionality that applies to all legislation and that would apply in Westminster as well as here. The argument put forward by Marie Navarro, the star of Radio 4 and so on, from the Wales Governance Centre, was that, if it was done under the exceptionality doctrine, it might have been desirable, as you or your successor will publish guidance in a few months or a year's time, to say that it is exceptional, it does not set a precedent and will not fit in within the guidance. The other option is that you say that it came under the essential common-sense bit of the Cabinet Office guidance, category 3, in which case you do not need to say that it is exceptional and that it does not set a precedent. Which of these two would it be?

10.15 a.m.

[90] **John Griffiths:** In that event, Rhodri, I do not think that it is particularly helpful to look at those late amendments within the framework of the Cabinet Office guidance, because we would not have considered them in terms of those guidelines. We would have looked at them in terms of constitutionality—whether they were within the constitution of the Assembly—and the Assembly Government's guidance. We would then have looked at the need for the amendments in terms of developments since the introduction of the proposed Measure and at whether those developments were such that the late amendments were required to give effect to the purpose of the legislation. It would have been more general rather than considered within the terms of the Cabinet Office guidelines and the categories that it uses.

[91] **Rhodri Morgan:** So, in effect, what you are saying is that you do not need to say that this will not set a precedent and that this is not an exceptional circumstance: this is a normal, essential, latecomer amendment that fits into the Cabinet Office doctrine or something similar that we apply in Wales. In other words, it is not to correct a major error in a proposed Measure, but to deal with a situation that may not be dealt with sufficiently and would cause major problems if the proposed Measure went onto the statute books unamended. It is something similar to that and not exceptionality.

[92] **John Griffiths:** I think so. Yes, that is right.

[93] **Rhodri Morgan:** In which case, presumably, you would reject Marie Navarro's comment that they would also want a statement that this is not a precedent and it should not be treated as a precedent.

[94] **John Griffiths:** I think that it is clear that late amendments would have to be dealt

with on their own merits. It is a matter for governmental judgment and then scrutiny and, effectively, verdict by the legislature. Obviously, that is what we have gone through with regard to these late amendments.

[95] **Janet Ryder:** Kirsty has a quick point and then we need to move on.

[96] **Kirsty Williams:** I am still having trouble understanding why you have not been in a position to publish the principles by which the Welsh Assembly Government operates the system. I appreciate that you may well want those to be different to the Cabinet Office guidance. When you took over the job, how advanced was this work on establishing these principles?

[97] **John Griffiths:** We have worked to principles all along, but, as I said, Kirsty, we have drawn on experience, added to those principles and reconsidered them as we have moved through the Assembly. There has always been guidance, obviously. There have been principles underlying that guidance, but we wanted to publish something that draws on the experience of this Assembly and takes us forward. It will now be a matter for the next Assembly. I have always taken the view that publication of guidance is a good thing and that transparency is a good thing. In some ways, I can account only for my time as Counsel General.

[98] **Kirsty Williams:** Exactly. That is the point I am getting at: you can account only for the work that you have been able to do rather than the work of the previous Counsel General. Thank you.

[99] **John Griffiths:** I am not making any criticism of my predecessors in any way.

[100] **Janet Ryder:** I do not think that we will explore that route. Rather than speaking as an ordinary Assembly Member, given your experience as Counsel General and the new era that this Assembly will embark on next term with full law-making powers, would you advise an incoming Government to publish the guidance to which it is working?

[101] **John Griffiths:** I think it would be wrong and presumptuous of me to do that, Cadeirydd. I can speak only from my present position about where we are at this stage of this Assembly. It must be a matter for the next Assembly Government to finally decide those matters.

[102] **Janet Ryder:** That is fair enough. Rhodri?

[103] **Rhodri Morgan:** I want to move on to legislative consent motions, a favourite subject for debate in every pub in the land. My first question is on the recent hoo-hah over the Home Office's setting up of police and crime panels and the rejection of the legislative consent motion by the National Assembly. In the devolution guidance notes, it is stated that there should be consultation early on if an issue is within the purview of a devolved administration. So, can you give us any information about at what stage the discussions started with the Home Office about the contents of the new Government's Police Reform and Social Responsibility Bill?

[104] **John Griffiths:** It would not be appropriate for me to talk about confidential negotiations between the Welsh Assembly Government and the UK Government, Rhodri, but what I can say is that there was early engagement on these matters. It is quite clear how the LCM process works, and it has worked as it is designed to, in accordance with devolution guidance, in this case.

[105] **Rhodri Morgan:** Is it fair to say that the content of the part of the Bill that applies to

the National Assembly in setting up the appointments procedure for the police and crime panels emerged clearly, as it is stated that it should in devolution guidance notes, from early consultation with the Welsh Assembly Government and the Wales Office? Was that adhered to in the case of the police and crime panels part of this Bill?

[106] **John Griffiths:** I would not like to give a definitive verdict on the stage at which those proposals were put on the table, Rhodri, because I am not aware of that. I do not know whether Jeff or Marion can assist.

[107] **Mr Godfrey:** There were discussions about the clause as it emerged, and there was some development of the clause as it was discussed, but I was not close to the particular negotiations, and so I would not want to say in what way it has changed and so on.

[108] **Rhodri Morgan:** Okay. Let us try to work this out. What are the consequences of the Assembly voting against a legislative consent motion, as it did in relation to the one on police and crime panels? I think that was the first time it had happened. Nick Herbert, the Minister of State with responsibility for policing and criminal justice at the Home Office, said that the vote was us cutting off our nose to spite our face, which, I suppose, is what you would expect a Home Office Minister to say in those circumstances. What he was saying was, 'You're going to get these policing and crime panels anyway, because this is a reserved responsibility, not a devolved responsibility, so it's just that you will lose all your rights to help appoint them'. Is that interpretation by Nick Herbert, the Minister of State at the Home Office, of what will now happen shared by you and the Assembly Government?

[109] **John Griffiths:** It is a matter for the UK Government as to how it now proceeds. What has happened is entirely in keeping with the way that LCMs are designed to work and devolution guidance. The ball is now back in the UK Government's court as to how it wishes to proceed.

[110] **Rhodri Morgan:** What is the default option, then, if the Assembly rejects a legislative consent motion? So the Home Office's 'offer' for the Assembly Government to provide an appointing procedure for at least one member of the panel—or perhaps it is just one member—is rejected. The Assembly says, 'No, thank you. We do not want it and we are voting against it.' The Home Office has two choices. One is to ignore the vote and to say, 'You're going to be given the right to appoint anyway, even though you do not want it', and the other is that the English model will apply, in which case there will be no decision made by Welsh Ministers, or by the Assembly should Welsh Ministers decide to let the Assembly appoint, or whatever. That almost makes the whole thing meaningless, does it not?

[111] **John Griffiths:** It is quite clear that the doctrine of supremacy of Parliament means that the UK Government could legislate on these matters in any way that it saw fit, including proceeding with its original plans, but devolution guidance notes are quite clear that that should not and will not happen. We have no reason to believe that the UK Government will not abide by that devolution guidance—

[112] **Rhodri Morgan:** Yes, but what does that mean in this particular case? Does it mean that the default option of the English model of appointment, with no involvement of the Assembly Government, would apply, or will the default option in the Home Office's mind be, 'Never mind the vote of the Assembly, we are still going to give Welsh Ministers the ability to participate in this, because we think it is more appropriate, regardless of the vote', and then the Assembly Government has the difficult job of deciding whether that means that it has to ignore the vote of the Assembly and accept the offer from the Home Office, because the supremacy of Parliament applies, and if it says that the Ministers have that right to appoint, then they do, regardless of the vote of the Assembly? The Assembly would then be up in arms, asking, 'Hang on a minute, what was the point of the vote?'

[113] **John Griffiths:** It is clear, under devolution guidance, as I said, that the UK Government should not proceed with its initial intentions, and I have no doubt that it will not. It is now entirely in its court to find an alternative that does not impinge on devolved competence. So, we wait to hear from it as to what it intends to do. As far as I am aware, Nick Herbert has not made a definitive statement on that. Jeff, do you want to come in here?

[114] **Mr Godfrey:** To clarify, it engaged the legislative competence of the Assembly because the structure that it was using was a committee of the local authority. It is that which engaged legislative competence rather than the appointment. So, bringing back clauses that avoid the Assembly's legislative competence would mean using some structure other than a committee of the local authority as the panel.

[115] **Janet Ryder:** I know that William wants to come in at this point, but he has the next set of questions on these issues, so, if Rhodri has finished, would you like to take over, William?

[116] **William Graham:** To remind you, Counsel General, devolution guidance note 9 states that

[117] 'the UK Government would, subject to collective agreement being secured,'—

[118] which would seem to be the pertinent phrase—

[119] 'need to table an appropriate amendment removing the relevant provisions before the Bill reaches its final stage in the House of introduction.'

[120] What do you think that 'collective agreement' means in practice?

[121] **John Griffiths:** I think that it means collective agreement at a UK Government level. So, the policy Minister involved and the UK Government's equivalent of our Cabinet sub-committee on legislation would agree, and, in practice, that would constitute collective agreement, I think.

[122] **William Graham:** So, 'collective agreement' does not mean consulting again with us.

[123] **John Griffiths:** Not necessarily.

[124] **William Graham:** Do you think that the Bill is likely to be amended to take account of the Assembly's refusal?

[125] **John Griffiths:** I do. As I said earlier, I expect the UK Government to abide by devolution guidance.

[126] **William Graham:** So, it raises important constitutional matters.

[127] **John Griffiths:** What has happened is entirely in line with devolution guidance and how these matters should be dealt with and how they should work. So, I see no problem in that regard. It has been entirely proper and legitimate.

[128] **William Graham:** It clearly sets a precedent, so do you not think that it has particular consequences?

[129] **John Griffiths:** No. As I said, what has happened is entirely in line with how it was

envisaged that this mechanism of a legislative consent motion would work.

[130] **Janet Ryder:** Another issue that has raised some questions has been the proposed Order relating to presumed consent on organ donation. Kirsty has some questions on that.

[131] **Kirsty Williams:** This particular example throws up another set of questions about the interaction between the Welsh Assembly Government and Westminster. Can you confirm that formal discussions were held between the Welsh Government and counterparts in the UK Government prior to the proposed Order relating to presumed consent being laid?

[132] **John Griffiths:** Yes. Officials at both ends of the M4 were involved in the working group that dealt with these matters, which is part of the normal procedure.

[133] **Kirsty Williams:** Given what was subsequently said, why was confirmation not received by the Welsh Government from the Attorney-General about the legality of the proposed Order prior to its being laid?

10.30 a.m.

[134] **John Griffiths:** As I understand it, the Attorney-General was content for this proposed Order to proceed to pre-legislative scrutiny, which is where we are at present. Obviously, the Attorney-General's role in this is a matter for the UK Government. My role is to decide whether it is within our possible competence, and I am quite clear that it is.

[135] **Kirsty Williams:** You are quite clear that it is, but issues have been raised subsequently and, potentially, there is another view. What I am asking you is why was that not nailed down at both ends of the M4 prior to the proposed Order being laid. Would that not seem a logical and sensible way to proceed?

[136] **John Griffiths:** We are not aware of the Attorney-General having a view that this proposed legislative competence Order is not within the Assembly's possible competence. As I say, the UK Government has been content for it to proceed to pre-legislative scrutiny. I can only say that we are quite clear that it is within competence. If there are any opposing views, we would be interested in them, but we are quite clear about it, and this has proceeded to pre-legislative scrutiny at the Westminster end.

[137] **Kirsty Williams:** I appreciate that, but I am sure that you would want to avoid a situation where an Attorney-General would refer what would now be an Assembly Bill to the Supreme Court, which he or she is allowed to do. Therefore, I will ask you again: would it not seem logical and sensible to proceed in these matters not just by having your own view, but by nailing down the view of the Attorney-General? We could then proceed in the absolute assurance that we will not find ourselves in a position where a Bill would be referred to the Supreme Court. You say that you are not aware of the Attorney-General holding such a view; have you asked that question formally, and have you had a formal response?

[138] **John Griffiths:** I cannot go into discussions and negotiations between the Attorney-General and the Counsel General—whether there have been any, or about their nature. Convention prevents that. All that I can say is that we are quite clear in our own view. The mechanism to refer to the Supreme Court is there, both at our end and at the Westminster end, but we are quite clear that it is within competence, and we would make that case to the Supreme Court were it to proceed to that level.

[139] **Janet Ryder:** Let us move on to the statement that you made on Tuesday—Kirsty, are you content with that?

[140] **Kirsty Williams:** Yes, I am. In that statement, you stated the need to ensure

[141] ‘earlier and more innovative stakeholder engagement, including the use of Green and White Papers’.

[142] You added that

[143] ‘whenever possible, the Welsh Assembly Government should seek to publish draft Assembly Bills for consultation’.

[144] Is it your intention to publish Green and White Papers for every future legislative proposal introduced by the Welsh Assembly Government?

[145] **John Griffiths:** No, not for every legislative proposal. Green Papers and White Papers are properly the province of substantial policy proposals that might or might not require legislation. White Papers, obviously, are primarily about legislation, and Green Papers are more about emerging thinking. I do not think that we would envisage using them every time primary legislation is proposed. That would be unwieldy in terms of resource, time and energy. Certainly, for appropriate legislation—and it is always a matter of judgment—they would be a valuable tool in engaging externally with Wales. To some extent, I think that it is important that Wales steps up to the mark, as it were, in terms of input to legislation and policy development, because the new powers that the Assembly has represent a challenge to the whole of Wales, not just to Assembly Members and major stakeholders. So, I very much look to forward to opening up the process and to a much greater feeding in through Green Papers, White Papers and draft Bills.

[146] **Kirsty Williams:** You used the word ‘appropriate’, in that they would be published when it was deemed appropriate, and you seemed to suggest that it was a matter of scale. Could you describe other circumstances in which you would not consider publishing a Green Paper and White Paper? What would you deem as being ‘appropriate’ and ‘not appropriate’? Can you give a clearer definition of what ‘appropriate’ would be?

[147] **John Griffiths:** If the legislation was of a fairly technical nature, for example, I do not think that it would be appropriate to deal with that by way of a Green Paper or White Paper. It is not just a matter of scale but also a matter of the importance of substance. It is easy to imagine circumstances where policy proposals and proposals for legislation are matters of real importance and substance that stakeholders and the general public feel strongly about. They would be obvious candidates for a Green Paper and a White Paper, but, essentially, it is a matter of judgment for the Government.

[148] **Kirsty Williams:** Can you give us an example of a piece of legislation that we have dealt with over the last four years that would be subject to a Green Paper and a White Paper in the next Assembly?

[149] **John Griffiths:** A big part of the Welsh Assembly Government’s role is the delivery of public services, and anything that is substantial in terms of public service delivery would rightly be the subject of a Green Paper and a White Paper. For example, the Proposed Safety on Learner Transport (Wales) Measure will have a substantial impact on service delivery and provision, and will also impact significant stakeholders in a very practical way in terms of resource and cost.

[150] **Janet Ryder:** We have taken evidence from groups concerning why they have not, to date, interacted with Government consultations on proposed Measures going through the Assembly. Many have said that they cannot initially see how the proposed Measure will affect them. They can see the consultation being published, but they cannot visualise the end of the

line and what the impact will be. How would this process overcome that, in order to engage such groups? You said that you wanted to see more engagement, so how will you convey the impact that a proposed piece of legislation or a policy idea will have on different groups?

[151] **John Griffiths:** The Green Paper and the White Paper would explain what is proposed and what the consequences and effects would be, as would draft Bills. So, it is just a matter of making sure that the documentation and the information around it are clear and properly communicated to people. We are revamping the website to try to make sure that it is clearer and better in providing information, but that is only one tool for engaging and communicating. Given that we will soon have the new powers, I would like to think that everyone in Wales will be aware of them. Green Papers, White Papers and draft Bills are new ways of doing things and will capture people's attention. They will make it easier to communicate what is going on and provide opportunities to engage and influence.

[152] **Kirsty Williams:** You also said in your statement on Tuesday that this new approach could, potentially, lead to a streamlining of scrutiny at Stage 1. I would like to understand what you mean by that. You will also be aware that this committee recommended in its report that the Government should set out very clearly in a White Paper system why a new law is needed, and why the policy it seeks to achieve cannot be achieved through other means. Will such information be included in your White Paper system?

[153] **John Griffiths:** 'Yes' is the answer to the last point, Kirsty. I will deal with the points that you raised in the order that you raised them. Stage 1 scrutiny might be streamlined if there was much better and more effective early engagement and consultation through Green Papers, White Papers and draft Bills, because there would be an already accumulated body of evidence of stakeholder views and, to some extent, a consensus reached as to the best way forward and the value of what is proposed. I am not saying that that would necessarily shorten Stage 1 committee considerations. That would be a matter for the committee, but it might take the view that much of the heavy digging had been done in terms of engagement, consultation and scrutiny, making their part of the process a little bit easier and smoother. However, it would be a matter for the committee.

[154] Green Papers are particularly significant in terms of whether legislation is needed, because they represent very early stage engagement and consultation. Stakeholders would address at that stage whether legislation was the best way forward to deal with the policy that is proposed. That would be valuable in the early assessment of whether legislation is the right route or not. Obviously, we have other mechanisms further down the track to deal with those issues, as we have discussed previously.

[155] Sorry, Kirsty, but what was your last question, to which I have already answered 'yes'? [*Laughter.*]

[156] **Kirsty Williams:** This is so reassuring. It was whether your White and Green Papers would state that there was a need for legislation. I think that you have answered it.

[157] **Janet Ryder:** In your statement, you touched on explanatory memoranda and regulatory impact assessments. They have caused some concern to this committee, and I know that the Finance Committee has expressed concern about regulatory impact assessments. What elements of the original internal guidance require updating and strengthening? Will that new guidance be published? If you are going to base any new guidance or recommendations on examples of good practice that you have seen, are you able to give an indication of what template you would be following?

[158] **John Griffiths:** One thing that we could do is to share templates, through our officials, at least in discussions with committee clerks. That would be useful in ensuring

fitness for purpose. We are keen to engage on this and we are keen to publish. We have made considerable progress in terms of the quality of explanatory memoranda and regulatory impact assessments, and that has been recognised by this committee, by my own review and by others. We have good practice to draw on; the Education (Wales) Measure 2009 and the Mental Health (Wales) Measure 2010, for example, are recognised as examples of good practice. We now have a body of information about what constitutes the sort of quality that we require for explanatory memoranda and regulatory impact assessments, and we can go forward quite effectively on that basis. Progress has been made and I think that we have also established how it is important to have a team approach within the Welsh Assembly Government that includes policy officials, drafters and Ministers at an early stage of policy development. That produces good results.

[159] **Janet Ryder:** One explanatory memorandum that received praise from this committee in its original form was the one that accompanied the Proposed Local Government (Wales) Measure. It gave a great deal of detail and was very helpful.

10.45 a.m.

[160] Turning to the use of the affirmative, negative and superaffirmative procedures, you said in your statement that you have commissioned the preparation of guidance for adoption and publication by the next Assembly on the criteria used to determine the appropriate procedures for the scrutiny of subordinate legislation. Can you give us some indication of what that guidance will look like? Will it set out specific principles for the use of the negative, affirmative and superaffirmative procedures introduced by the Welsh Assembly Government?

[161] **John Griffiths:** I am sorry, I did not catch the last part of your question, Chair.

[162] **Janet Ryder:** Will the guidance that you will set out contain specific principles that will guide the Government as to whether it should use the negative, affirmative or superaffirmative procedures? Will it be published?

[163] **John Griffiths:** Yes, Chair. As I said, I am keen to publish guidance whenever appropriate, and it will be important to publish this guidance. It will include the principles that apply—many of which are fairly well established in other legislatures—as to when the negative, the affirmative and, indeed, the superaffirmative procedure is the appropriate way forward. The negative procedure is often used when the subordinate legislation is largely of a technical nature, where there is a need to update the content on a regular basis and, sometimes, where there is a need to legislate swiftly for various reasons, because of the different timings involved in different procedures. Other than that, the affirmative procedure is often appropriate and the use of the superaffirmative procedure is seen, rightly, as almost exceptional. So, we want to set out the principles in our guidance in as clear a way as possible, and it will then be open to views from stakeholders, including, I am sure, this committee.

[164] **Janet Ryder:** In light of the enhanced powers that the Assembly will have in the next term, do you consider that there may be a need to rethink what goes through negative, affirmative or superaffirmative procedures? Will the extra powers in themselves have an impact on which procedure is followed?

[165] **John Griffiths:** The principles are largely the same, Chair, for Measures or Bills and Acts. The question of what is and what is not suitable for negative procedures is still about the sort of issues that I mentioned.

[166] **Janet Ryder:** You said in your statement that, in future, there should be a mechanism

allowing enhanced scrutiny of

[167] ‘significant items of subordinate legislation falling out of framework Acts’.

[168] Can you elaborate on that and on what you meant by ‘enhanced scrutiny’? Would it be referral to a subject committee?

[169] **John Griffiths:** We are very much still thinking about these issues and, again, it would be a matter for the next Assembly to take forward. However, we are quite clear that it would be valuable for there to be pre-draft legislative scrutiny by a committee. It would be a matter for discussion with the Commission as to which committee would be the most appropriate. However, we think that it would be another important and valuable scrutiny tool.

[170] **William Graham:** This committee recommended that the Welsh Government should explain in each case its reasons for choosing delegated legislation rather than having substantive powers in an Act. What is your response to that?

[171] **John Griffiths:** I am sorry, Bill. Can you repeat the question?

[172] **William Graham:** It is written before me, so there is no problem.

[173] **Rhodri Morgan:** I have never heard him called Bill before.

[174] **John Griffiths:** I am sorry; it is a Newport term.

[175] **William Graham:** It is a Newport council term. [*Laughter.*]

[176] This committee recommended that the Welsh Government should explain in each case its reasons for choosing delegated legislation rather than having substantive powers in an Act. What is your reaction to that?

[177] **John Griffiths:** That is entirely reasonable, William; we would be happy to do that.

[178] **William Graham:** We also recommended that the Welsh Government should provide the Constitutional Affairs Committee with memoranda on substantive legislation provisions, in line with the memoranda provided by UK Government departments to the House of Lords’ Delegated Powers and Regulatory Reform Committee. Are you agreeable to that?

[179] **John Griffiths:** Are you thinking about UK Bills and the provisions that they make?

[180] **William Graham:** Yes; something along those lines.

[181] **John Griffiths:** We would consider that to be appropriate; I would be happy to support that, as it is important to set out provisions clearly in that way.

[182] **Rhodri Morgan:** On the question of written statements, you have said that you would prefer these to be provided when Welsh provisions are included in United Kingdom Bills that then become Acts. You also said that you have asked officials to expand the use of written statements to set out executive powers in cases where particularly significant provisions are included and that a memorandum of devolved delegated powers should be laid before the Assembly once a Bill has been published in Parliament. The only issue that arises is how to define ‘particularly significant provision’. Can you illustrate for us an example as to when a written statement would be appropriate because the provisions are particularly significant, not just a boring technicality?

[183] **John Griffiths:** We envisage written statements as being appropriate when there is an important transfer of executive functions that might include powers to pass secondary legislation. The involvement of the so-called Henry VIII powers, so that there is a power to amend or repeal substantive aspects of UK or Assembly legislation, would be particularly significant and subject to a memorandum; that would be a clear example of the need for a memorandum setting out exactly what was involved.

[184] **Rhodri Morgan:** Is that because it would be using Henry VIII powers to confer on the Assembly a power to do something, or because the power that it is conferring is of Henry VIII character so that it produces an Order that cannot be amended as opposed to an amendable piece of legislation?

[185] **John Griffiths:** I am not sure that I follow the distinction between the two.

[186] **Rhodri Morgan:** You were making the Henry VIII power the basis of your comment—that it was likely to fit the description of particularly significant provisions—and I was not sure what you meant. Do you mean that Henry VIII powers were being used in Westminster to pass the ball to Wales or that the nature of the power passed to Wales was such that Welsh Ministers could then bring an Order that is not amendable before the Assembly via subordinate legislation?

[187] **John Griffiths:** I think that it is the nature of the power that is the crucial element and that is the approach that we will take.

[188] **Kirsty Williams:** Turning to the move to a four-year programme rather than the current annual legislative programme, do you envisage that this approach will allow more time for Assembly committees to scrutinise Acts in future? The upside is that there would potentially be more time for consideration, but the downside is that there could be a lack of discipline in getting things through in a timely fashion. Will this move allow more time, and how will you avoid a drift in the system?

[189] **John Griffiths:** I think that it will allow more time and will create a more structured, rational system to deal with the Government's legislative programme, because it can all be set out in a five-year programme in the case of the next Assembly. This will allow more time for scrutiny, because there is a tendency to 'shoehorn' items into an annual programme. Although the First Minister will still give an annual statement on the legislative programme, it will be within the four-year framework, which will facilitate better planning. It will allow more time and a better level of scrutiny. The dangers of not having a due sense of urgency and timeliness will be a matter for the Assembly Government to keep on top of. In its dealings with the Commission and the Business Committee, it should ensure that those dangers are avoided.

[190] **Kirsty Williams:** One of the issues that you did not cover in your statement on Tuesday was the development of guidance on general drafting principles and practices. Today, you have heard that we would like you to publish guidance—similar to that of the Cabinet Office—on when the affirmative and negative procedures should be used; however, more generally, the committee recommended being more open and transparent with regard to general drafting principles. Do you intend to develop and publish such guidance?

[191] **John Griffiths:** Yes, we do. I have seen early copies of substantial principles and guidance on drafting. We would indeed publish that and it is important that we do so.

[192] **Kirsty Williams:** You have given us a cast-iron guarantee that you are going to publish guidance on general drafting principles, but earlier this morning you could not give a

cast-iron guarantee that you would publish guidance similar to that issued by the Cabinet Office on dealing with amendments. What is the difference between saying that you are going to publish guidance on general drafting principles, that you have seen it, that it is substantive and that you are going to publish it, and what was being considered earlier this morning, when you said that it would not be appropriate for you to make such a commitment? What is the difference?

[193] **John Griffiths:** I should add to the answer that I have just given on publishing the principles on drafting by saying that it is obviously a matter for the next Assembly Government and I cannot give cast-iron guarantees that it will be published—I am not in a position to do so. It will be a matter for the next Assembly Government.

[194] **Kirsty Williams:** It is interesting that you can be very forthright with regard to this question, in saying that you have seen the work, that it is substantive and that you are going to publish it, as opposed to your earlier response to questions on other issues, where you did not seem to be in such a forthright position. However, I welcome the answer to this question.

[195] **Janet Ryder:** Rhodri, did you want to come on this issue?

[196] **Rhodri Morgan:** Not on this particularly, but there is an issue that I want to raise and I do not expect the Counsel General, or even Jeff or Marion, to have a prepared answer. As we will be having two further meetings of this committee, raising this issue today will give you more notice of the level of unhappiness that the committee evinced before you came in this morning as regards the Animal By-Products (Enforcement) (Wales) Regulations 2011. They have received close to a zero rating from the committee in its discussions. The constitutional point for you is—as we understand it, and I am not expecting a substantive answer this morning—that it seems to be a badly rushed piece of legislation. There is a reason for that rush, and that is the desperate wish to avoid having a gap in the enforcement provision between the expiry of the old legislation and the commencement of the new legislation. They would rather have a rushed, bad piece of legislation than have a gap in the enforcement of the regulations. The Department for Environment, Food and Rural Affairs has taken the opposite view, that it is better to have the legislation prepared and done properly and accept that there will be a gap in enforcement. It seems odd, constitutionally, for the Attorney-General, presumably, to say that it is okay to have a gap, but you had better get the legislation right, and for them to say here that it does not matter if you rush the legislation and get all sort of errors in it—which there are, or seem to be—but there must not be a gap.

11.00 a.m.

[197] Can you come back to us before we finish on 31 March with a view on why, in England, it was a case of saying, ‘Mind the gap’, or that it does not matter that there is a gap, but you must get the legislation right, whereas in Wales it was a case of saying that the legislation should be rushed to prevent there being a gap?

[198] **Janet Ryder:** I do not think that we would expect a response from you on that at the moment, Counsel General, but if you would like to add anything, please feel free to do so.

[199] **John Griffiths:** It is obvious that it is concerning for there to be a gap as the regulations are in place for good reason and the legal protection that they provide is not there while they are not in force. There are also EU-related issues with regard to infraction and so on. We do see the gap as a problem, but, obviously, it is not appropriate to fill the gap with bad-quality legislation.

[200] **Rhodri Morgan:** I am not a lawyer, so I have no idea, but the point that was made earlier was that if it is bad legislation, the likelihood of there being any successful prosecution

for infraction is very low anyway, because the defence lawyer, if they had anything about them, would be able to say, 'The law is defective in so many areas that you cannot possibly prosecute my client for the alleged infraction of this piece of non-law'.

[201] **John Griffiths:** The quality is obviously an issue that you have identified, but one with which I am not familiar, so we would want to look at that. Jeff, did you want to come in on this?

[202] **Mr Godfrey:** I would not want to comment in detail. There is a difference between the quality of regulations and whether they are ineffective. They may still be effective even if there are some deficiencies in them, without commenting on the deficiencies that have been identified. On the nature of the gap that may emerge, we have been working to develop the regulations alongside DEFRA and they have slipped into March. We have the problem that, if the final set is not ready by the end of March, we slip into the pre-election period, and so the gap would become bigger. There are important public and animal health issues that underpin the regulations. So, it is a balancing act.

[203] **Rhodri Morgan:** You are saying that it may be that the purdah problem and the fact that the Assembly is terminating business on 31 March are the causes of that; it is not a difference in attitude between the Attorney-General and the Counsel General, or the respective departmental Ministers, on whether a gap is a horrible thing or is acceptable provided you get the legislation right by the time you publish it. It is the case that, in England, they can publish the regulations later than we can in Wales.

[204] **Mr Godfrey:** As I understand it, they are working to get the regulations in force as soon as is practical in England, but the date has slipped, so there will be a gap in England. We are not sure how far that will go. We have the added problem that, if the regulations are not ready to be made in their final form by the end of March, we will enter the pre-election period, which will extend the gap in Wales.

[205] **Rhodri Morgan:** Given that they all arise from the fear of foot-and-mouth disease re-emerging, tidying up fallen stock and so on, are you saying that, during that month—or five weeks, from 31 March to 6 May—when there is no power to legislate here, that there is no emergency power to finalise legislation even though it may be required for compliance with EU legislation, not to mention for good public-health reasons?

[206] **Mr Godfrey:** It is not an absolute prohibition, but the view has been taken that, by getting effective regulations in now, we can come back after the election period, deal with any deficiencies and present the regulations in bilingual form.

[207] **Rhodri Morgan:** The issue will be whether the word 'effective' is the correct adjective to apply, or whether, as we have been advised, they are ineffective regulations because they are so defective.

[208] **Mr Godfrey:** I cannot give an answer to that.

[209] **Janet Ryder:** Perhaps we could send a copy of the letter that we will write to the Minister for Rural Affairs to the Counsel General and ask for a written response.

[210] **John Griffiths:** Yes, absolutely.

[211] **Janet Ryder:** That would give you more time to consider the issues that we will raise and perhaps you can consider the points that Rhodri Morgan has made this morning.

[212] Counsel General, thank you very much for taking part in a very lengthy session this

morning. I am sorry that we kept you so late. Is there anything that you would like to add that you think that we have not touched upon? I know that we will be enjoying a further debate on our committee report on Wednesday.

[213] **John Griffiths:** All that I would like to say in conclusion, Chair, is that my review and this committee's work are being conducted along the same lines and on the same footing, in many respects. Our verdicts, based on experiences thus far, are also along similar lines, in terms of improvement. That is very encouraging for us all. I look forward to next week's debate.

[214] **Janet Ryder:** Thank you for your time, Counsel General. As always, there will be a transcript for you to check for accuracy.

11.05 a.m.

**Cynnig Trefniadol
Procedural Motion**

[215] **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.

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

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 11.06 a.m.
The public part of the meeting ended at 11.06 a.m.*