



Cynulliad Cenedlaethol Cymru The National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol The Constitutional and Legislative Affairs Committee e

Dydd Llun, 3 Hydref 2011
Monday, 3 October 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.

Aelodau'r pwyllgor yn bresennol

Committee members in attendance

William Graham	Ceidwadwyr Cymreig (yn dirprwyo ar ran Suzy Davies) Welsh Conservatives (substitute for Suzy Davies)
Julie James	Llafur Labour
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
Eluned Parrott	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Simon Thomas	Plaid Cymru The Party of Wales

Eraill yn bresennol

Others in attendance

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

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol

National Assembly for Wales officials in attendance

Steve George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Joanest Jackson	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk

Dechreuodd y cyfarfod am 2.30 p.m.

The meeting began at 2.30 p.m.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datganiadau o Fuddiant Introduction, Apologies, Substitutions and Declarations of Interest

[1] **David Melding:** Good afternoon, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I also welcome the members of the public who are watching or are in attendance. In an emergency, please follow the instructions of the ushers, who will lead us to the nearest safe exit. These proceedings are conducted in English

and Welsh, and when Welsh is spoken, interpretation is available through the headphones, which you need to put on channel 1. Channel 0 will amplify our proceedings if you need that service. Please switch off all electronic equipment completely as it interferes with the recording system. I have received apologies from Suzy Davies, and I am delighted that William Graham is substituting for her this afternoon. Welcome, William.

2.31 p.m.

Offerynnau nad ydynt yn Cynnwys Unrhyw Faterion i'w Codi o dan Reolau Sefydlog Rhifau 21.2 neu 21.3
Instruments that Raise no Reporting Issues under Standing Order Nos. 21.2 or 21.3

[2] **David Melding:** These statutory instruments laid during the fourth Assembly are listed for us: CLA41, the Education (Information About Individual Pupils) (Wales) (Amendment) Regulations 2011, and CLA42, the Protection from Tobacco (Sales from Vending Machines) (Wales) Regulations 2011. Does anyone want to make any comments on those?

[3] **Eluned Parrott:** On CLA42, I am aware that this is a law that is also being applied in England at the moment and the enforcement date was 1 October, I think. Is that correct? Is there a particular legislative or legal reason why the enforcement date is different in Wales to England?

[4] **Mr Griffiths:** I am not aware of a reason, but there presumably is a reason why they have not been brought forward on the same date. The best thing would probably be to write to the Minister to ask why there has been that much difference, because I do not know.

[5] **Eluned Parrott:** That is helpful, thank you.

[6] **David Melding:** We will issue that correspondence.

2.32 p.m.

Offerynnau sy'n Cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reolau Sefydlog Rhifau 21.2 neu 21.3
Instruments that Raise Issues to be Reported to the Assembly under Standing Order Nos. 21.2 or 21.3

[7] **David Melding:** First, there is an instrument that is subject to a negative resolution, CLA38, the Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011. Do Members have any comments or are you happy for that report to be laid?

[8] **Mr Griffiths:** Gadeirydd, dyma'r diweddaraf mewn cyfres o offerynnau ar gyfer Cymru a Lloegr sydd wedi eu gwneud yn Saesneg yn unig. Ymddengys ein bod yn edrych ar un o'r rhain yn bron bob cyfarfod. Fodd bynnag, yr ydym wedi cael ymateb positif gan y Gweinidog yn yr achos hwn. Mae'n dweud yn gyntaf ei fod yn bwriadu trefnu cyfieithiad cwrteisi pan fydd hynny yn rhesymol ac, yn bwysicach o'n safbwynt ni,

Mr Griffiths: Chair, this is the latest in a series of instruments for Wales and England that have been made in English only. We seem to be looking at one of these at nearly every meeting. However, we have received a positive response from the Minister in this case. First, he says that he intends to arrange for a courtesy translation when it is reasonable to do so and, more importantly from our viewpoint, he also says as regards

mae'n dweud hefyd ynglŷn â'r memorandwm esboniadol ei fod am edrych yn y dyfodol at ddarparu memorandwm wedi ei addasu ar gyfer Cymru neu fod mewnbwn Cymru i'r memorandwm sy'n cael ei osod yn San Steffan yn llawer amlycach. Felly, mae dau gam i'w croesawu mewn ymateb i'r adroddiad drafft yn yr achos hwn.

[9] **Simon Thomas:** Mae gennyf ddau gwestiwn. Os oes cyfieithiad sydd yn gyfieithiad cwrteisi, fel y dywedasoch, faint o bwys a ddylid ei roi arno o safbwynt rhywun yn ceisio dilyn y cyfieithiad yn hytrach na'r Saesneg, er enghraifft, achos mae hynny'n bwysig, fel yr ydym yn gwybod? Yn ail, os yw'r Gweinidog hwn wedi dweud y bydd yn fwy pendant yn y dyfodol ynglŷn â pha ran y mae swyddogion y fan hon wedi ei chwarae wrth ffurfio memorandwm, a yw hynny'n wir am y Gweinidog hwn yn unig? Yr wyf yn cymryd mai John Griffiths yw'r Gweinidog hwn. A yw'n wir am y Llywodraeth yn gyffredinol? Oni ddylem fel pwyllgor fynd ar drywydd hwn gyda'r Prif Weinidog, gan ofyn iddo sicrhau bod y cam hwn—achos mae'n gam ymlaen—yn cael ei gymryd gan bob Gweinidog sy'n rhan o'r Llywodraeth?

[10] **Mr Griffiths:** O ran cyfieithiad cwrteisi, nid oes ganddo statws cyfreithiol, felly mater o wybodaeth ydyw yn hytrach na mater o gyfraith. Er enghraifft, o'r cychwyn cyntaf, bu cyfieithiad ar gael o Ddeddf yr Iaith Gymraeg 1993, ond bu erioed statws cyfreithiol i'r ddogfen honno.

[11] Ynghylch yr esboniad, mae'n ymddangos mai mater i'r Llywodraeth yn gyfan gwbl ydyw. Er enghraifft, yn rhan gyntaf yr ymateb, dywed:

[12] 'Yn y dyfodol, mae'n ddymuniad gennym bod cyfieithiad cwrteisi i'r Gymraeg o offerynnau cyfansawdd fel hyn yn cael ei ddarparu gan Lywodraeth Cymru'.

[13] Felly, nid yw'n sôn am ein swyddogion ni. Fodd bynnag, gellir dehongli'r peth—

[14] **Simon Thomas:** Yr wyf yn edrych ar yr ail ran, gan mwyaf, ynglŷn â'r memorandwm. Mae'r memorandwm yn dweud y byddai'r Gweinidog yn sicrhau ei

the explanatory memorandum that, in future, he will look to provide a memorandum that has been adapted for Wales or that Welsh input to the memorandum that is laid at Westminster will be much more evident. Therefore, there have been two welcome steps in response to the draft report in this case.

Simon Thomas: I have two questions. If there is to be a courtesy translation, as you mentioned, what kind of weight should be given to it if someone were trying to follow the translation rather than the English, for example, because that is important, as we all know? Secondly, if this Minister has said that he will be more definite in future regarding what role officials here have played in the drawing up of a memorandum, is that true of only this Minister? I take it that John Griffiths is the Minister in question. Is it true of the Government as a whole? Should we not, as a committee, follow this up with the First Minister and ask him to ensure that this step, which is a step forward, is taken by all Ministers who are part of the Government?

Mr Griffiths: With regard to the courtesy translation, it has no legal status, so it is for information only rather than being a matter of law. For example, from the very beginning, a translation of the Welsh Language Act 1993 has been available, but that document has never had any legal status.

With regard to the explanation, it appears that it is a matter for the Government as a whole. For example, the first part of the response states:

'It is my preference that, in future, a Welsh language translation of such composite instruments should be made available by the Welsh Government'.

Therefore, it has not mentioned our officials. However, it is possible to interpret it—

Simon Thomas: I am looking at the second part mostly, in relation to the memorandum. The memorandum states that the Minister will ensure that he is clearer with regard to

fod yn fwy clir o ran y rôl y mae ei swyddogion ef wedi cymryd. Hoffwn wybod a fydd hyn yn wir am y Llywodraeth i gyd. Gwelaf fod modd dehongli'r geiriau yn y fath fodd, ond hoffwn gadarnhad.

the role that his officials have played. I would like to know whether this is true of the Government as a whole. I see that it is possible to interpret these words in that way, but I would like confirmation.

[15] **David Melding:** Once again, we will correspond with the Minister on this. It is an important point.

[16] **Eluned Parrott:** May I ask a question on the way in which the impact assessments were carried out? I understand that, on this piece of work, it was largely done by the UK Government. Has a specific impact assessment of the costs been done from a Wales-specific perspective? My concern is that, if there are particular local areas that are dependent on farming for particular species of fish or shellfish, this might have a disproportionate impact on a particular geographical location, which would not necessarily have been taken into account from a UK perspective.

[17] **David Melding:** I am not sure. That relates to policy in terms of how these things are drafted, rather than the specific duty that we have in terms of reporting on it. If you feel that it is deficient enough, there is a procedure that Assembly Members can use to require this to be dealt with by the affirmative procedure, which would then allow you to make a statement in the Chamber if you have concerns. The Minister may listen to those and ensure that any future secondary legislation of this type reflects your concerns, or you may invite Members to vote against the proposal if you feel that the impediment is too great. However, I am not sure, and I look to Gwyn to confirm the extent of our reporting duties with regard to the drafting of this secondary instrument and the extent to which this is a matter for us.

[18] **Mr George:** To some extent, the explanatory memorandum covers consultation arrangements. From what I can see, it has been conducted on a UK basis, although England and Wales seem to have been separated from the Scottish aspect of things. It does not seem to drill down to a lower level. If the committee wants to include in the letter to the Minister a question asking about the extent to which specific Welsh concerns were taken into account, I do not think that it would be out of kilter with what we have done on previous occasions.

[19] **Eluned Parrott:** That would be really helpful; thank you.

[20] **David Melding:** Does that satisfy your question?

[21] **Eluned Parrott:** Yes, definitely.

[22] **David Melding:** Under this item, there are two affirmative resolution instruments: CLA39, the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011 and CLA40, the Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011. Are you happy with the reports? Do Members have any points that they would like to clarify? I see that they do not. Therefore, are we content? I see that we are. Thank you very much.

2.40 p.m.

**Ymchwiliadau'r Pwyllgor: Ymchwiliad i Roi Pwerau i Weinidogion Cymru yn
Neddfau'r DU**
**Committee Inquiries: Inquiry into the Granting of Powers to Welsh Ministers in
UK Laws**

[23] **David Melding:** I welcome the witnesses. The National Assembly for Wales's Constitutional and Legislative Affairs Committee is carrying out an inquiry into the granting of powers to Welsh Ministers in UK laws. The public consultation for the inquiry took place during the summer recess and finished on 30 September. I thank everyone who responded to the consultation for their contribution to our work. The responses have been published on the committee's website and were distributed to Members before the meeting. Today's meeting is the first oral evidence session. We have further evidence sessions planned in November and December before we start to deliberate on our report.

[24] I am delighted to welcome the representatives from the Wales Governance Centre at the Cardiff Law School. I ask David Lambert to introduce himself for the record—he is well known to most of us. I ask his colleagues to do likewise. Welcome, David.

[25] **Mr Lambert:** I am David Lambert, and all of my professional life I was a Government lawyer in the Welsh Office. I became the first legal adviser to the Presiding Office. I now lecture and tutor in the Cardiff Law School.

[26] **Ms Navarro:** I am Marie Navarro. I am the editor and chief researcher of Wales Legislation Online, based in Cardiff Law School and the Wales Governance Centre. I am also a professional trainer. I train Assembly staff for the National School of Government. I also monitor legislation for the Law Society.

[27] **Ms George:** My name is Manon George. I also monitor legislation for the Law Society with Marie and I have been working for Wales Legislation Online for two years. I tutor public law in Cardiff Law School, and today is also the official start date of my PhD on legislating under Part 4 of the Government of Wales Act 2006.

[28] **David Melding:** Thank you. It is a great honour that your great new studies have commenced here. I hope that you find the session valuable. As a committee, we have discussed broad areas on which we would like to question you, reflecting on your written evidence. We will concentrate on your initial written evidence. I know that that has been taken further in a subsequent document, but I think that the second document really just gives further detail on what was contained in the response that we received last week. However, the full submission of written evidence will be part of the committee's record—you can be assured of that. When we as a committee ask for evidence, we hope to be challenged and stimulated to look at a particular area in ways that we had not anticipated.

[29] David, I think that it is fair to say that you get off to a very vigorous start by questioning the very principle of the matter at hand. In your opening statement you refer to the committee's statement that we will be guided

[30] 'by the general principle that powers should only be granted to Welsh Ministers in devolved areas with the informed consent of the National Assembly which should be able to exercise appropriate scrutiny over the process concerned.'

[31] We thought that that was a very valid constitutional point to make in the devolved Britain that we are now in with our Part 4 powers and a more robust legislative process. However, you have told us that we are not getting this whole question quite in proportion and that you have problems with the precedent of some of these powers being contained in an Act

of the Westminster Parliament, and then being passed to another legislature to determine the nature of the subordinate legislation. Do you want to elaborate on that? Why do we seem to have got it slightly wrong, in that you say that you do not have a precedent—so, presumably, this has not happened anywhere else?

2.45 p.m.

[32] **Mr Lambert:** I am not sure if my two colleagues share my interpretation, but I base this on the statements in the interesting research advice that accompanies your request for evidence. It is Lord Rowlands, speaking on the Public Bodies Bill, on page 10 of the research service document. He asked whether it was not strange that, in UK legislation giving powers to Welsh Ministers, it is Parliament that decides which procedure the exercise of those powers will be subject to. In other words, he said that

[33] ‘we are writing into Welsh Ministers’ responsibilities the super-affirmative procedures that we are applying to UK Ministers’.

[34] That is quite extraordinary. Lord Rowlands continues:

[35] ‘I respectfully suggest that that should be the decision of the Assembly’.

[36] That is the reason for my interpretation, and my outpouring towards the end of my evidence in paragraphs 20 to 34, where I say that I have never seen on the face of a Bill—and I have worked on a couple of Bills in my time—a power given to someone else over whether delegated legislation will be approved by affirmative resolution, negative resolution or anything else. It always appears on the face of the Bill. That is because the House of Lords Delegated Powers and Deregulation Committee, in particular, always wants to see what that power will be. It would find it completely unacceptable if someone said, ‘We will not tell you on the face of this Bill what the power is; it will be delegated to the Assembly’. That was my interpretation of that, following Lord Rowlands. I was probably wrong.

[37] **David Melding:** It sounds as if you were right. What I do not understand is, if we have devolution, and, for whatever reason, a Government here in Wales wants to make use of a UK Bill, or a UK Bill has to have some reference to Wales, why is there a difficulty in allowing the Assembly to deal with the nature of the subordinate legislation and the categories that will attach to that? Do you imply that, if it is on the face of the Bill, it is best to have a uniform, UK-wide policy so that all the parts that require the negative resolution procedure get it, and so on with the affirmative, superaffirmative and whatever? That seems to go against the principle of devolution, does it not?

[38] **Mr Lambert:** It is because, as I understand it, the House of Lords committee, in particular, expects to see what the procedure is. This is just my supposition, but I think that it would find it rather strange if wide powers were given to Welsh Ministers—for example to amend Acts of Parliament—and it said in the Bill that it was a matter for the Assembly to decide as regards the procedures. For Whitehall Ministers, the procedure is set out exactly. The committee, I think, would argue that it had to know what was involved because Welsh Ministers were being given powers to amend its Acts. It would want to know that there is a proper, sustainable procedure whereby the Acts will be subject to proper scrutiny.

[39] **David Melding:** The implication of what you are saying is that the Assembly will not be as rigorous as Westminster in these issues, particularly with powers to amend primary legislation that currently require the superaffirmative procedure. Are they sometimes called Henry VIII powers? Am I on the right track there? Devolution involves trusting the devolved institutions to make the appropriate decisions.

[40] **Ms Navarro:** I think that we took the point from devolution guidance note 9, annex one, paragraph 7, where it is stated that it is for Westminster to decide the procedures accompanying executive powers. As the Bills are made in Westminster, you need to keep some coherence between how UK Ministers' powers and Welsh Ministers' powers are scrutinised. Under all the devolved subjects, the Assembly can then pass its own legislation to change the procedure if it wants to do so. From what I understand of DGN 9, it wants to keep coherence. The other argument is that you need to have a procedure on the face of the Bill. The legislation on the face of the Bill is about a need for coherence, which is decided first at Westminster; then the Assembly can change it as it wishes, once the Act is made. That is how it is compatible with devolution.

[41] **David Melding:** I am trying to understand the motive, because I find the responses slightly surprising, or not what I would have anticipated. Are you concerned that we could develop a culture whereby Welsh Ministers use UK vehicles more and more to get soft powers that do not require a lot of scrutiny, then have a secondary procedure that they can control in the Assembly? Is that your fear?

[42] **Mr Lambert:** No, my concern is that everything at the moment points to the procedure being on the face of the Bill. I can understand all the arguments for the Assembly saying 'We would like to have the power', but it seems that you would be fighting against every possible convention, even after 10 years of devolution. Marie quoted a particular part of DGN 9, and here is another one—I am sorry to keep quoting from DGN 9:

[43] 'The procedures for the Welsh Ministers to make subordinate legislation will be similar to those applying to UK Ministers, with the Assembly in a similar position to Parliament'.

[44] You have to somehow explain to Parliament, the House of Lords committee and the equivalent House of Commons committee why that is no longer right, even though this has been going on since 2006. What suddenly changes DGN 9, which was issued in 2006-07? Why is it no longer right? I understand the argument, but it seems that you are fighting against a mountain. There is nothing in the documents that Manon, Marie and I have looked at that gives you any light for this. I am not saying that that is right—I am just saying that you have a tremendous amount of convention and principle to argue against, and I cannot see anything that allows you to enter into a contrary argument.

[45] **David Melding:** We might touch on DGN 9 later anyway, so I do not want to draw out further remarks on that. To get back to your motive and to Marie Navarro's earlier remark, it still seems that you feel that Westminster's current procedures—the ones to which we would continue to be subject—are likely to be more robust than if there were substantial powers over secondary mechanisms to be determined by the Assembly, which may be controlled by the executive more and more here.

[46] **Mr Lambert:** They have not said anything about that—all that they have said is 'We want to be in control in the UK Bill'. They have not commented at all about whether it would be robust. They just say 'We want to see that procedure on the face of the Bill, because we want to be assured about what the procedure is, otherwise how can we assess the adequacy of it?' It may be perfectly adequate—I am sure that it would be at the Assembly—but they say that they want to see it on the face of the Bill; there is no precedent for anything else.

[47] **David Melding:** I suppose that what we are really asking is this: why would Parliament's scrutiny be better than the scrutiny that we would apply to these decisions?

[48] **Ms Navarro:** The only thing that we say is that the way in which UK Bills have been drafted so far means that you always need to have the procedure specified in them. The only

way that you could allow the Assembly to decide on the procedure is to have a clause that would say ‘In relation to the exercise of powers by Welsh Ministers, it is for the National Assembly for Wales to decide on the procedure that would apply’. It is this wording of that particular clause in the Bill that we cannot see being accepted by the committees in Westminster. That is about the only thing to say on it. We think that you would have scrutiny in the Assembly at least as robust as in Westminster.

[49] **David Melding:** Okay. That is very clear. Just to finish my remarks, you also implied that if Welsh Ministers do want the full scope, they should bring in their own legislation and not use the UK Bill. That was part of what you were getting at, was it not?

[50] **Ms Navarro:** Yes, that is what I was saying. And we have insisted in our evidence that there is a very important distinction that needs to be borne in mind throughout, namely that there are devolved areas and non-devolved areas, and our answers are different according to whether or not you are within the competence of the Assembly.

[51] **Eluned Parrott:** There is a quote in the report from you, David, in November 2010. You stated that

[52] ‘the Assembly Government has continued to acquire very wide powers directly by Acts of Parliament and not through the Assembly, which worries us a little bit.’

[53] I want to drill down into that and find out which bit of that worries you. Is it that the Government here is acquiring very wide powers; is it that it is acquiring them directly by Acts of Parliament; or is it that it is not coming through the Assembly that worries you? Which bit is the concern?

[54] **Mr Lambert:** This is from another inquiry about Standing Orders. Again, it reflects the House of Lords committees, in that it is always preferable—and they consider this to be a general principle—that such legislation should be on the face of the Bill. This allows much more scrutiny to be undertaken by the Assembly or by Parliament as to what the powers are. Instead of having very wide discretionary powers, the principles at least should be set out on the face of the Bill, otherwise how do you debate it? The great example for my colleagues and me was the NHS Redress (Wales) Measure 2008, which was reflecting an NHS Bill, but there were no principles at all on the face of the Bill. How do you debate whether there is sufficient protection on the face of the Bill if there is nothing there? It is all ‘Welsh Ministers may do this or that’; there is no benchmark by which they can decide, or principles as to what legislation should be made.

[55] **Eluned Parrott:** Okay. You have also expressed concerns about the Public Bodies Bill and the Localism Bill, and I presume that that is for similar reasons.

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

[57] **Eluned Parrott:** What are your specific concerns in those cases? Are there any other worries, or is it specifically about the breadth and lack of boundary, if you like, of the powers granted?

[58] **Mr Lambert:** Yes, indeed. This is from this excellent report by the Assembly research department, on page 10. Again, it is the House of Lords Delegated Powers and Deregulation Committee saying that powers given to Welsh Ministers, and also, presumably, to English Ministers, to transfer functions between themselves, the Countryside Council for Wales, the Environment Agency and the Forestry Commission, or to set up an entirely new body without any principles at all, is completely unacceptable from a constitutional point of view.

[59] **Eluned Parrott:** Thank you. I will move on to the question of how the procedures we use compare with similar procedures in Scotland. Can you clarify the differences between the two?

[60] **Ms George:** We should stress that we are not experts on Scotland and Northern Ireland, but we have looked into the differences. Under the Standing Orders in Scotland, Rule 9B.1 provides that a Bill under consideration in the UK Parliament, which makes provisions applying to Scotland for any purpose within the legislative consent of the Scottish Parliament, or which alters that legislative competence, or the executive competence of the Scottish Ministers, requires the consent of the Scottish Parliament. In Wales, on the other hand, the Assembly's consent is only required if the UK Bill makes provision for any purpose within the legislative consent of the Assembly, or if it has a negative impact on the legislative competence of the Assembly. Therefore, UK Bills that make provisions that have an impact on the functions of Welsh Ministers, or that add to the legislative competence of the Assembly, only require notification to the Assembly. They do not need the Assembly's consent.

3.00 p.m.

[61] Another significant difference is the committees procedure. In Scotland, the business committee must refer any legislative consent memoranda to a committee. That committee then considers the memorandum, takes evidence from stakeholders and the public and reports on the legislative consent motion. Where a Bill contains provisions that confer powers on Scottish Ministers to make delegated legislation, the provisions are subject to the Subordinate Legislation Committee. There are no such compulsory committee stages in Wales and we recommend that there should be a compulsory stage under Standing Order No. 29.

[62] **David Melding:** Simon, you were going to raise this issue later. It is fine that it has come up now—it is not a problem—but you might also want to return to something that was said earlier.

[63] **Simon Thomas:** I hope that this will come up later, as I want to return to something that you said regarding principles on the face of Bills, and your concerns around powers being given to Welsh Ministers. You suggested that they were without principle because they were simply being transferred. Could you elucidate on the relationship between the powers that may be given in such Bills and the principles that are on the face of the Bills themselves? My understanding is that there may well be principles on the face of the UK Bill, but your concern is that that is not necessarily reflected when the powers are given to Welsh Ministers. Is there no constitutional link between the two?

[64] **Mr Lambert:** Yes, there is, very much so. When Manon, Marie and I gave evidence to the Constitutional Affairs Committee for its report of February 2011 on the drafting of Welsh Government Measures, we took all the principles from the House of Lords committee. The principles were a criticism of very general powers in UK Bills and we therefore accepted and recommended that the principles that the House of Lords committee brought out should be applied to Measures. That, rather nicely, was accepted by the Constitutional Affairs Committee, and it set out carefully all the principles: that delegated legislation should be on the face of the Measure; that it should only be allowed, if it is very wide, to make emergency provisions; and that there should be exceptional reasons for using delegated legislation to make amendments to other legislation, rather than identifying such amendments on the face of the legislation. This was in no way a criticism of Welsh Ministers—it was a general criticism of the extraordinarily wide powers that are given to the Executives in England and Wales.

[65] **Simon Thomas:** I was half expecting you to say that we want to be clear about this. As you say, this is not a specifically Welsh issue. It is certainly reflected in Scotland, and I am sure that many MPs would complain that they do not get to know how powers will be used in future. In that context, do you recommend any further steps, in addition to the things that you set out for the previous version of this committee? You suggested earlier that the scope of our committee is a little wide, because we set out to do something, but that convention was stacking the cards against us. I would reverse that and say that you are now almost suggesting a similar thing—that is the way that the constitution in the United Kingdom is going, and trying to do something different in Wales would be swimming against the tide.

[66] **Mr Lambert:** Before Manon came to Cardiff Law School, Marie and I gave evidence in around October 2009 that emphasised that the relevant Assembly committee—which I think would be you—when picking up these wide powers, needed to set out its concerns and send them to the equivalent committees in the House of Lords and the House of Commons, such as the Constitution Committee of the House of Lords, for example, which then would be picking up these sorts of problems in English powers in the Bill, because the Bill usually does not give a different type of function and powers to Welsh Ministers to those given to UK Ministers. All these principles that we set out were put forward by the committee in relation to UK ministerial powers. These committees are superb, because they have so much background in these sorts of matters. However, they seem to lack any input at all from the Assembly. To us, it would help your work considerably, and assist in giving a wider sort of spectrum to the House of Lords committee and its equivalent in the House of Commons, if they knew your concerns. Together, it seems to me, you could put a lot of pressure on the Government.

[67] **Simon Thomas:** I believe that we have had other evidence that suggested something similar. How could that work practically when you consider the timing of legislation being taken through the House of Commons, the House of Lords and here? Most Members here complain that we do not have enough time to scrutinise to affect these outcomes as it is. If you add another layer of going back and forth between the two Houses at the other end of the M4, is there not a danger that we lose the ability to influence the outcomes at all? Is there not a more effective way to try to put pressure on Ministers here—I think that you have suggested somewhere that that is not particularly effective; nevertheless, that is the way it is done at the moment—to influence the outcome of UK legislation?.

[68] **Mr Lambert:** Our arguments have always been that you are a Parliament and that you have a UK Parliament. The UK Parliament takes considerable consideration of the House of Lords and House of Commons committees. In fact, they have agreements, as I understand it, between the Executive and the relevant committees that they will not take any legislation forward until the Executive in Whitehall has fully considered the representations that have been made by the House of Lords and the House of Commons committees.

[69] When I was the legal adviser to the Presiding Office, my colleagues and I visited a committee in the House of Commons—I think that it was the deregulation committee—and its members were pleading with us to meet with them regularly to exchange documentation and all the background papers that they had. However, because of parliamentary Standing Orders, we could not be part of the committee, but they were very happy to work with us. The impression that I gave was that, if only they could take on board our concerns, they would be able to give a much more rounded report to the Government. The Government always takes full account of these reports. It may not follow them, but if it does not, it has to give full reasons, and that is a good example of one Parliament working with another. It saw no problems with that at all, and that was even before the Government of Wales Act 2006; it was under the Government of Wales Act 1998, when we did not have any legislative powers. It said, ‘You are a Parliament’.

[70] **Ms Navarro:** We think that there should be some form of informal link between Assembly committees and Westminster committees in both Houses of Parliaments. We have also suggested taking evidence from the Scottish review of the Sewel convention and the Northern Ireland guidance on legislative consent motions, so that an early-warning system would be put in place, this time on the Government's side. In Northern Ireland, it was suggested that the Executive should bring a legislative competence memorandum as soon as it is aware of proposals, which is much earlier. In the Scottish Parliament report, we found that some MSPs suggested that that Parliament should be made aware of such proposals for draft Bills in any case, or at the stage when consultation documents are being published. We would suggest a dual approach: liaising between Parliament and committees, and ensuring that the Executive warns you in advance or as early as possible in the system. We think that the current two-week delay after introduction is a little too late for efficiency.

[71] **Julie James:** I want to follow up on what you said there about the link between various procedures and our existing procedures for legislation in general. There is the issue of whether we would have a committee stage—which is up for consideration, it seems to me—and how that committee stage would work, and the link between whether we do that and our ability to feed into the sort of committee stages that you are proposing. Do you see those things as being connected or not?

[72] **Mr Lambert:** We consider that, whatever the nature of the powers in the UK Bill that gives powers to Welsh Ministers, whether it is subject to a legislative consent motion or is an area where we do not think it should be, there should always be a committee stage first of all in order to fully inform the Assembly as to what powers are being sought—whether there will be a legislative consent motion or not. Once the Assembly has given its opinion, it seems as if its views are lost. They are sent to the Welsh Ministers, but what do they do? What sort of machinery can you enforce on Welsh Ministers so that they tell their Westminster opposite numbers? My view is that you should tell the Welsh Ministers, certainly, but you should also tell your opposite numbers in Parliament. Why do you only go to Welsh Ministers? Why do you not also go to Parliament and say that you have debated a legislative consent motion, or debated powers, and you are unhappy?

[73] Welsh Ministers, remember, will have asked for those powers in the first place. I do not think that a UK Bill giving powers to Welsh Ministers would ever give powers without the consent of the Welsh Ministers. That is the way we used to work in the Welsh Office. We did not get powers for the Secretary of State for Wales unless we asked for them in the Bill. Welsh Ministers are not going to move heaven and earth and say, 'Good heavens, yes, we must have second thoughts about that'; I do not think that they would do that. They will just say that that is what they want, and that will be that. So, it seems to me that you have to go to the committees in Parliament, and they will then have full knowledge of your views, as you will have debated it in committee and in Plenary.

[74] **Julie James:** Is that for circumstances where the matter under consideration is within the powers of the Assembly, as well as if it is additional—or is there no difference?

[75] **Mr Lambert:** In both circumstances, yes. For me—and I believe that I speak for my colleagues also—it is not so much about legislative consent motions, although I am sure that they are very important, it is just about the powers. If you are concerned about the powers then—irrespective of whether you have a legislative consent motion, because they do not seem necessarily to have any binding effect—it does not matter what is the nature of the powers in the Bill, you look at it, you debate it, and then you tell the House of Lords or the House of Commons committee. If you do not like something in the Bill, there is no undertaking that, just because you refused a legislative consent motion, anything is going to be done about it. From my experience of talking to my opposite numbers in 2001-02, a better system would be to let the parliamentary committees know. They have lots of powers, and

they have agreements with Whitehall departments that they always liaise with them. Whitehall departments will explain to these committees why they are not accepting the comments, if that is the case. It is a much more established machinery than even legislative consent motions.

[76] **Julie James:** Is that why you said in your paper that the legislative consent motions are not appropriate for considering the conferral of powers on the Ministers? Is it because it is your argument that liaising with parliamentary committees is a better route?

[77] **Mr Lambert:** Certainly, legislative consent motions are very useful, with the exception that they should not be extended to the extent that Manon has described for Scotland. The reason for that is that far more powers are likely to be given to Welsh Ministers in UK Bills that are not within your legislative consent powers, because Schedule 7 is much better than Schedule 5 but, my goodness me, there are tremendous exceptions to it, and that may not be so much the case in Scotland. That is the only reason. I think that we would deal with taking account of the breadth of the powers separately to those motions. Motions are important, but they are separate to liaising.

3.15 p.m.

[78] **Ms Navarro:** Motions apply only to devolved subjects.

[79] **Julie James:** To put it very much in a layperson's language for a moment, because the devolution settlement for Wales is much narrower than that for Scotland, we have concerns, where the powers lie outside the devolution settlement, about whether these processes work.

[80] **Mr Lambert:** Indeed, absolutely. As a result, we think that Welsh Ministers will probably be given more powers that are outside the legislative competence of the Assembly than is the case in Scotland. If you are going to look at all of these and vote on them, that could land you with quite a lot of work. There are only 45 backbench Members here, compared to 109 in Scotland. Given that we are also recommending that you go to committee, you are going to be overwhelmed, because I am sure that you are bound to have far more powers that are outside your legislative competence.

[81] **David Melding:** I think that a lot of people would have assumed that, moving to Part 4 of the Government of Wales Act 2006 would clear all of this up, but you are saying that it is still a huge issue, that more functions can come to us, or at least to our Ministers, than we realise, particularly compared to Scotland and possibly Northern Ireland.

[82] **Mr Lambert:** Yes, indeed.

[83] **David Melding:** So, we should not take our eye off that particular ball. Is that what you are saying?

[84] **Mr Lambert:** Yes. Scotland and Northern Ireland can legislate on anything unless they are stopped, as you know. With us, we cannot legislate on anything at all unless we have the powers. When you look at all of the exceptions in Part 1 of Schedule 7—I was looking at this this morning—you realise that not all of those exceptions are on the face of Part 1 of Schedule 7, because you have this magic provision in Part 2 of Schedule 7, which says that, generally, the Assembly will have no legislative competence in relation to pre-commencement provisions of this Act. Therefore, if you look at the subject of the environment in Part 1 of Schedule 7, for example, it looks very nice—it has very few exceptions. However, we know that there are six pages of exceptions because they were all there in the legislative competence Order that dealt with the environment, and they are still

there.

[85] The fact that we do not have LCOs any more does not stop all of those exceptions because there are those six pages of exceptions where powers were given to central Government Ministers in relation to Wales. To me, and I think for my colleagues, that is extraordinarily complicated. You have an Act, which seems to set out the legislative competence of the Assembly with exceptions, but, behind a closed door, there is a whole raft of other exceptions, and no-one realises what they are.

[86] **Simon Thomas:** I would like to ask for more clarity on that. Many people would have assumed that the exceptions within an LCO applied before the referendum and were part of the deal making between this legislature and the other legislature regarding what was and was not allowed to be legislated upon. You can look at the Welsh Language (Wales) Measure 2011 in a similar way. There were a number of exceptions in that, with regard to small businesses, for example. You are saying that those exceptions remain. Are you saying that they cannot now be changed by legislation passed afresh in this place under Part 4?

[87] **Mr Lambert:** That can happen only with the consent of the Secretary of State.

[88] **Ms Navarro:** Then they can be changed.

[89] **Mr Lambert:** Without that consent, they cannot be changed if they were there when Part 4 started. For me, the nightmare is the National Assembly for Wales (Legislative Competence) (Environment) Order 2010. We gave evidence on that. There were three matters. Under each matter, there were exceptions. Then, when you read it, you found that, sometimes, there were exceptions to the exceptions to the exceptions. My colleague and I presented the previous committee with a sort of multi-coloured chart showing all the various exceptions and it was terrible. Sadly, that has been carried forward to Part 4 of Schedule 7 because of these three interesting little provisions in paragraph 1 of Part 2 of Schedule 7, which just say that you cannot legislate on anything that was within the purview, or a function of, a central Government Minister before Part 4 started without the consent of the Secretary of State.

[90] **Simon Thomas:** Of course, there are floating exceptions as well.

[91] **Mr Lambert:** Indeed. There are many layers. Then, you have Part 3 of Schedule 7, which sets out exceptions to what you have just read. So, you have exceptions to exceptions to exceptions.

[92] **David Melding:** I am keen to move on, because we have a lot of important material to cover, but you can come in on this, Marie.

[93] **Ms Navarro:** Basically, I believe that the exceptions are fewer under Part 4 than they were under Part 3, but, nonetheless, they are still there and are still important. It is important not to undermine or underestimate the exceptions that are still there under Part 4; most people had thought that they had completely disappeared and had therefore forgotten about them. They remain and, on top of that, because of our system, which is the other way around to Scotland, there are all of these other things that do not appear in the Government of Wales Act 2006, such as things to do with the police and so on, but which still exist, and for which you cannot have legislative consent motions. Nonetheless, because the Executive competence does not match the legislative competence, you must ensure that you look at both separately.

[94] **David Melding:** Before we press on, can I confirm what I understood you to say, David, about the Public Bodies Bill? You make the point that Welsh Ministers know exactly where they are going because they form a list of powers that they want to get through a

particular Bill. So, you could have an earlier process subject to some scrutiny here without great difficulty. Am I right in assuming that the ministerial powers to pass functions onto the Countryside Council for Wales, the Environment Agency, the Forestry Commission, or any successor that may be established in time, are matched by powers for UK Ministers over English matters, or is this very much an aspect of Welsh law that is likely to emerge, rather than what will prevail in England over similar organisations that have those functions?

[95] **Mr Lambert:** I am sure that the provisions are the same. The House of Lords committee, as is mentioned in paragraph 10 of the Assembly's Research Service's report, drew particular attention to the National Assembly for Wales, but I recollect that there are similar very wide powers. It is an extraordinary power, really. There are powers, without any sort of principles behind them, to 'alter', 'abolish' and 'add to the functions of', but by reference to what? What are the principles that apply? However, I think that there are equivalent powers in England.

[96] **David Melding:** Thank you for clarifying that. Julie, have we covered all the areas that you wanted to cover? I see that we have. William is next.

[97] **William Graham:** You referred to the extent of the current National Assembly scrutiny of delegated powers given to Welsh Ministers through statutory mechanisms other than UK Acts of Parliament. Can you enlarge on that?

[98] **Ms Navarro:** Do you want to talk about EU designation Orders and transfer of functions Orders? We looked at the different procedures for those and we saw that an Order in Council to amend Schedule 7, so to amend the competence of the Assembly, is subject to the affirmative resolution procedure. EU designation Orders are subject to the negative resolution procedure, and we were quite surprised to find that TFOs were, under section 58, paragraph 4, only to be approved by each House of Parliament and by Welsh Ministers. We thought that it might be an anomaly in the procedure, and we suggest that it should be for the Assembly to exercise the power, in parallel with the provision whereby both Houses of Parliament approve the Order in Council. So, in Wales, it should be the Assembly. For the sake of consistency within the procedure, EU designation Orders can also be outside of the competence of the Assembly but are, nonetheless, subject to the negative resolution procedure, so we suggest that TFOs should at least be subject to the negative resolution procedure, but preferably to the affirmative resolution procedure in the Assembly.

[99] **William Graham:** Thank you. Under Standing Order No. 30, the Assembly is not given any part to play at all in relation to UK Bills making provisions that come within the remit of the Standing Order. Can you enlarge on that?

[100] **David Melding:** Of course, we have already discussed the issue that more powers can still get passed to Welsh Ministers than we realised, even under Part 4.

[101] **Mr Lambert:** Indeed, yes. That is exactly the problem that we consider. I think that it is Standing Order No. 30.2 that says that

[102] 'A member of the government must lay a written statement in relation to:'

[103] powers given to Welsh Ministers in UK Bills, which are outside the legislative competence of the Assembly.

[104] I know, from years of dealing with Bills in Parliament, that laying a document in Parliament is nothing at all; you just lay it. There is no procedure for a debate and I do not know whether it is noted or anything. However, these can be very wide powers, particularly in relation to the settlement in Wales, where, as you so rightly said, there are far more ragged

edges in which it is quite likely that Welsh Ministers will have powers that cannot be amended by the Assembly. The Assembly, at least, should know about those and be able to debate them.

[105] **William Graham:** Can you suggest a mechanism by which that could come about? I can see your concern, but how about a mechanism for a remedy?

[106] **David Melding:** That would presumably be to strengthen Standing Order No. 30, would it? Do you have specific proposals?

[107] **Ms Navarro:** We would suggest that there should be a way to have a debate in Plenary under Standing Order No. 30 and, so that that debate was enlightened, that there would be a committee stage before that, in which a committee could look at the memorandum, or that the same documents should be provided by the Government for both Standing Orders. They should both be looked at by a committee and then there should be a debate in Plenary. The only difference that we would make between the two Standing Orders is that only for the devolved matters would you get a formal legislative consent motion, which you would not have under Standing Order No. 30. Otherwise, we suggest having parallel procedures.

[108] **David Melding:** That is very clear. I think that we have covered all the areas that you wanted to raise, William. Simon, is there anything further that you want to raise?

[109] **Simon Thomas:** We touched on a lot of the areas that I wanted to ask about, but on this point, you have helpfully said clearly that you suggest the same procedure to deal with the transfer of powers, just with a different mechanism at one stage, namely the Sewel motion or the legislative consent motion. However, the same procedure would apply. Two things strike me as arising from that. One comes back to an earlier point, but to press it a little more, how does that fit in with the timetabling of all this? What effect would this have on a UK Minister who is taking through a Bill? I know from previous experience that it was sometimes difficult to get UK Ministers to pay sufficient attention to Welsh Ministers' needs, let alone Assembly needs, which would be even further down the pecking order for a UK Minister. So, how can we ensure that that is built into the system? I do not quite have the same level of trust on that; it might exist in principle, but maybe not in practice, in terms of UK Ministers paying attention to Westminster committees. The second question that comes out of that is: how on earth can we do it with 60 Assembly Members?

[110] **Mr Lambert:** We would emphasise the need to liaise with Westminster committees, because there is a protocol with the relevant committees in the House of Commons and the House of Lords whereby the Government will wait to see what those committees have to say about the legislation. If they do not wait, the committees will report against the Bill in both Houses and that is pretty weighty. It would be much weightier if the parliamentary committees were also able to reflect the concerns of the Assembly, because they do not seem to be able to do so at the moment. So, this is not so much about the legislative consent motions as machinery. You have all the expertise, conventions and principles that these committees have established over the years, which we discussed in our evidence to one of the previous committees: use it.

[111] **Simon Thomas:** Other evidence that we have received has touched on this. I remember that a particular piece of evidence suggested a specific mechanism, namely the Welsh Grand Committee. You seem to be suggesting using committees that already report and exist. So, you are not suggesting that we try to set up a different mechanism, but use the committee mechanism that already exists there and here.

3.30 p.m.

[112] **Mr Lambert:** Yes, you use the mechanism that is there and available for you. As I say, if my meetings with committees in the House of Commons in 2002 are anything to go by, they will be very happy to receive that evidence.

[113] **Simon Thomas:** I can see that what you are proposing would give a greater level of scrutiny, and certainly a greater level of public awareness, which does not exist at all at the moment—there is barely any awareness among Assembly Members, because there is simply no procedure for that to come about. You suggest that there should be committee deliberation here. What sort of scrutiny do you think that that should entail and what kind of redress could a committee here have if it is seriously concerned about the proposals being examined?

[114] **Ms Navarro:** There is a precedent in Scotland. What the committees were saying is that they were seeking factual elements—things that they judged that Ministers had omitted to tell them. They wanted clarification and a further factual statement. That is what they asked of the Ministers.

[115] **Simon Thomas:** So, they would examine the Ministers.

[116] **Ms Navarro:** They would examine the legislative consent memoranda, which would be produced by the Minister, and that is why this works together with our other suggestion that there should be a duty on Welsh Ministers to lay these memoranda as soon as the powers are agreed with Whitehall. That is our suggestion. We looked at the question of when, and we think that, as soon as they are agreed, they should be laid formally to allow the rest of the machinery to work. You would scrutinise the memorandum and, if you were to follow our suggestion, because we are dealing with executive powers, there should be a committee involved. That could be any committee that the Business Committee might choose, but your committee should also be involved because you look at subordinate legislation and issues related to executive powers. That is the precedent in Scotland, where their Subordinate Legislation Committee looks at the legislative consent memoranda.

[117] **Mr Lambert:** You tell the House of Lords and House of Commons committees of your deliberations, and you say, ‘We are about to do it’.

[118] **Ms Navarro:** This is supported by the memorandum of understanding at paragraph 16, where it is said that devolved legislatures are entitled to debate non-devolved matters as well, and at paragraph 22, where it says that the devolved administrations ought to provide the UK Government with ‘factual information and expert opinion’ regarding their territories. If you build on that, that gives you a basis for having your views heard at both Whitehall and Westminster.

[119] **David Melding:** Julie, do you want to take us on to the devolution guidance note? That is the final area, really.

[120] **Julie James:** We touched on this earlier in the conversation, but I wanted to develop our understanding of the procedures used and so on. You say that it does not need substantial change, and it will be interesting to see what small changes you think that it does need. In particular, you talk about paragraph 17 and I must confess that I am in no way an expert on the contents of paragraph 17, so it will be interesting to hear what you have to say about the requirement for amendment that you briefly touch on in your paper.

[121] **Mr Lambert:** Generally, we do not think that paragraph 17 needs amendment, for the reasons that we give in our paper. The rest of devolution guidance note 9 certainly does, because it relates to Schedule 5 and Part 3 of the Government of Wales Act 2006.

[122] **Ms George:** I think that there is one—

[123] **Mr Lambert:** The one thing that we do point out is that, at the moment, DGN 9 recommends that, when powers are given to Welsh Ministers in Bills, it is only when those powers are within the legislative competence of the Assembly that they are subject to the Assembly's consent; strangely, it says that powers given to Welsh Ministers that add to the legislative competence of the Assembly are not subject to consent by the Assembly. We cannot understand why there is that distinction.

[124] **Julie James:** Do you think that it is a deliberate distinction, or is it an assumption based on the Scottish devolution situation? In other words, is it a mistake or deliberate?

[125] **Mr Lambert:** I think that it is very deliberate because that is what it says in paragraph 17. It is very carefully worded. Interestingly, unlike in Scotland, it starts by making a complete distinction between executive competence and legislative competence. Executive competence can be anything at all that is outside or inside the legislative competence of the Assembly. Therefore, they seem to be saying that something that adds to the legislative competence of the Assembly, as it is not within the existing legislative competence of the Assembly, does not come within a legislative consent motion, although the Ministers have to give consent. So, it is a very rigorously argued debate. It is terribly bureaucratic and of the civil service, but there is a strange logic to it.

[126] **Julie James:** Let me see if I have understood this. They are saying that because you do not have the power in the first place, you cannot be asked to consent to something over which you do not have competence, so they can give it to you in order to give you the competence, but without your consent.

[127] **Mr Lambert:** Yes, absolutely.

[128] **Julie James:** That is very convoluted.

[129] **Mr Lambert:** It is.

[130] **David Melding:** It is the legislative equivalent of a forced marriage, is it not?

[131] **Julie James:** It is, is it not?

[132] **David Melding:** It is very strange.

[133] **Ms Navarro:** It brings us back to what happened before we had devolution.

[134] **Julie James:** Once again, we are faced with the issue of the devolution settlement in Wales being narrow. Powers have to be gifted by the legislation as opposed to the more general competence arrangements in the other legislatures.

[135] **Mr Lambert:** Yes; Scotland can do anything, unless it is expressly prevented from doing so, but we cannot do anything unless we are given the power.

[136] **Julie James:** It is the elusive power of general competence.

[137] **Mr Lambert:** Yes, absolutely.

[138] **Ms Navarro:** We are saying that the second bullet point of paragraph 17 should be amended to include the words 'adding competence'. We find it a bit strange that you can have a legislative consent motion for things that take away from your competence, but not those

that add to it.

[139] **Mr Lambert:** You would then need to change DGN 9 and also Standing Order No. 29.

[140] **Julie James:** I would like to ask a further question. A more general fix—and I am not suggesting for one moment that we are going to suggest this, Chair—would be to change the Government of Wales Act 2006 to turn it around the other way.

[141] **Mr Lambert:** Yes, very much so. It would be much more flexible. It has so many strange areas—even Schedule 7.

[142] **Julie James:** A large number of these other things are to get around the fact that it is written the other way around.

[143] **Mr Lambert:** Yes, indeed; they are.

[144] **Julie James:** That explains quite a lot of the difference between Scotland and Wales.

[145] **Mr Lambert:** I think that Schedule 7 has already been amended twice. In the first amendment, the Order in Council under section 109 put in the word ‘fish’ under ‘agriculture’. The second amendment took it out. When I try to explain that to my students who study devolution as an undergraduate subject, they find it extraordinary—as do I. All of that has been done within two years.

[146] **Simon Thomas:** Like the debate. [*Laughter.*]

[147] **David Melding:** David, are you surprised that DGN 9 has not been amended yet? It is more than six months since the referendum. Are you hearing on the grapevine that our Welsh Ministers are thinking about it, or that Whitehall feels that it is time to amend it? What is happening, as far as you can work out?

[148] **Mr Lambert:** That is what we have heard.

[149] **Ms George:** We are also awaiting details.

[150] **David Melding:** I am sorry, but what have you heard? Have you heard that they are working on it or have you heard nothing?

[151] **Ms Navarro:** We have heard nothing.

[152] **Mr Lambert:** No, we have heard nothing.

[153] **David Melding:** So, as far as you know, there are no plans, even.

[154] **Ms Navarro:** We were surprised, when reading DGN 9, to see that there is not that much that needs to be changed, because it is quite generally termed. It seems to be working within the current context and that was the biggest surprise for me. I expected to have to change everything, but when you read it, it seems to be working and we think that it is generally okay.

[155] **Mr Lambert:** One of the problems is that devolution is now part of the Ministry of Justice. If you look at its website, devolution is number 15 on a list that contains all sorts of interesting things. That was not the case before.

- [156] **Ms Navarro:** Other DGNs definitely need to be changed more than DGN 9.
- [157] **Ms George:** The Wales Office has announced that it is working on DGN 4, which relates to the role of the Secretary of State. That goes back to Part 3 of the Government of Wales Act, so it definitely needs to be updated.
- [158] **David Melding:** Which note needs most attention?
- [159] **Ms Navarro:** DGN 4.
- [160] **Mr Lambert:** That relates to the Secretary of State's role.
- [161] **Ms Navarro:** The note on legislative competence Orders needs to be repealed. I will be quite happy to see that one go.
- [162] **David Melding:** William, I have you down for a final question.
- [163] **William Graham:** Are you content with the information that you can gain about the powers of Welsh Ministers conferred through UK legislation?
- [164] **Ms Navarro:** Yes. For Wales Legislation Online, I simply do not collect any information on Bills. What I collect is information on Acts once they are made. This is what I summarise and put on the website. However, Manon and I are tracking legislation for the Law Society, and in that respect we are producing tracking reports and we have a section on UK Bills. What I then collect is the information about the Bills as they are introduced before Parliament, and I summarise them—I can leave the document here if you want to see it—to see whether they give executive or legislative powers. I also include legislation that I think has a big impact on Wales. For example, there was a change of constituencies in the last Parliamentary session, so I would also collect such legislation. However, I only track or flag them for the Law Society when they are first introduced. If powers are added later through amendments, I do not track that legislation.
- [165] **Julie James:** Before I became an Assembly Member, I struggled, in common with a large number of other people in the legal profession, to track what was in force in Wales. I am told that the Assembly's website is much improved, although I must confess that I have been far too busy to attempt to use it. Do you want to make a general comment about that, since we were talking about your work, of which I was very much aware?
- [166] **Ms Navarro:** The work with the Law Society is also available to the public; it is published on the Law Society's website, which is accessible to the public. With regard to the issue of accessibility of legislation and in-force provision, that takes us to Wales Legislation Online, which we are currently totally transforming. So, with the Assembly and the Welsh Government, we are trying to come up with a model of a Welsh statute book. We are in discussion as to what exactly it should contain, but we have worked out a prototype on which we would show all the legislation and Acts that apply to Wales, because I find it extremely difficult nowadays to read Acts of Parliament, as some of the sections are in parallel. For example, you can have three different versions of section 1—one of which applies to England, another as amended in relation to Scotland and the third amended in relation to Wales. So, we will get rid of all this interference and the legislation that is for England only. You would then click on an Act and only see what applies to Wales. So, we are in discussion and maybe things will change—the Government has told us that it might want more prose and more active documents. Civic society has told us that it wants an index or something that would enable non-professionals to navigate through the legislation. So, it is a very exciting project. We are working as a tripartite partner as an university with the Assembly and the Assembly Government to hopefully come up with a solution.

[167] **David Melding:** David, if there is anything that you want to add to your evidence, now is the chance, although I think that you have brought great clarity to a very complicated area. I invite you to respond to one thought: are you surprised that, not only in Wales but also in Scotland, UK Bills are still used so much? Even with the SNP Government in Scotland between 2007 and 2011, there was little reduction in the propensity to use Sewel motions. Is this a challenge for the process that we need to be particularly aware of so that our systems are robust? When a UK Bill is used, we need to be assured through formal and occasionally less formal, softer options, such as contact with parliamentary committees in Westminster, that effective scrutiny has taken place.

3.45 p.m.

[168] **Mr Lambert:** Speaking from my experience in the Welsh Office, it is so much easier to piggy back onto a Bill that has been done for you in Whitehall. Most of the work that was done in the Welsh Office was just to ensure that our Secretary of State had the necessary powers that were available to Secretaries of State in England. So, arranging the Bill teams, the instructions and everything else was done in Whitehall. I used to be the Welsh Office lawyer sitting, just as I am now, at the end of the table; I was the Welsh one and the rest were all from England. It was nice, but you could not put much of your own influence into it. I suppose that it is easy for Welsh Ministers to do the same; I must not criticise them, because that is what we did. It is easier, certainly speaking from my experience, than having to promote your own Bill through Parliament. Someone was doing it for you. Here you have all your marvellous legislative machinery to look at your Assembly Acts, but it is much easier for Welsh Ministers to be offered powers, which they can put in to Assembly Acts if they so wish. The powers are already there for them. They can get lots more through. You cannot criticise them; they just get more and more powers through. Your Acts will take a long time to go through, because we have great scrutiny, but if they want a quick power, it is already in a Bill. That is why, as I understand it, since the start of the Government of Wales Act 2006, there have been more UK Bills giving powers to Welsh Ministers than the devolution machinery here. That is not exactly as I would necessarily understand devolution.

[169] **David Melding:** That is a very thought-provoking note on which to end; I thank you for that. I also thank the team that has given evidence this afternoon. It has been very helpful.

[170] **Ms George:** Could I make one request? We were wondering whether it would be possible in future to receive our written questions via e-mail, or even by post. From my experience of the Welsh Affairs Committee, it sends its questions in writing.

[171] **David Melding:** Okay, we will note that. I do not think we have any objection to that; these things are usually prepared over a week in advance, so we will note that request and keep it in mind. Thank you.

3.47 p.m.

Dyddiad y Cyfarfod Nesaf a Phapur i'w Nodi Date of the Next Meeting and Paper to Note

[172] **David Melding:** The date of the next meeting is Monday 10 October. We have one paper to note, which is the report of the meeting on 19 September.

Cynnig Gweithdrefnol Procedural Motion

[173] **David Melding:** I move that

the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order No. 17.42(ix).

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

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 3.48 p.m.

The public part of the meeting ended at 3.48 p.m