



Cynulliad Cenedlaethol Cymru The National Assembly for Wales

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

**Dydd Llun, 10 Hydref 2011
Monday, 10 October 2011**

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Procedural Motion

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**

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

Eraill yn bresennol**Others in attendance**

Dr Paul Cairney	Uwch-ddarlithydd mewn Gwleidyddiaeth a Chysylltiadau Rhyngwladol, Prifysgol Aberdeen Senior Lecturer in Politics and International Relations, The University of Aberdeen
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Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol**National Assembly for Wales officials in attendance**

Steve George	Clerc Clerc
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Bethan Roberts	Cynghorydd Cyfreithiol Legal Adviser
Owain Roberts	Y Gwasanaeth Ymchwil Research Service

Dechreuodd y cyfarfod am 2.29 p.m.

The meeting began at 2.29 p.m.

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

[1] **David Melding:** Good afternoon. I welcome everyone to this meeting of the Constitutional and Legislative Affairs Committee. We do not expect a routine fire alarm this afternoon, so if it sounds please follow the instructions of the ushers, as they will help us to leave the building safely. These proceedings will be conducted in English and Welsh; when Welsh is spoken, translation is available on channel 1. If you need to amplify the proceedings, channel 0 will provide the amplification for you. Please switch off all mobile phones. There is an apology from Julie James—Mick Antoniw is substituting—and I understand that Simon Thomas is en route.

2.30 p.m.

**Offerynnau nad ydynt yn cynnwys Unrhyw Faterion i'w Codi o dan Reolau Sefydlog
Rhif 21.2 neu 21.3**

Instruments that Raise No Reporting Issues under Standing Order Nos. 21.2 or 21.3

[2] **David Melding:** Are Members content with CLA44, the Trade in Animals and Related Products (Wales) Regulations 2011, and CLA45, the Poultry Health Scheme (Fees) (Wales) Regulations 2011? I see that they are.

2.31 p.m.

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

[3] **David Melding:** There is just one instrument under this item: CLA43, the Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011. Before I ask Members if they are content, is there a brief report?

[4] **Ms Roberts:** These regulations revoke and replace the Animal By-Products (Enforcement) (Wales) Regulations 2011. In brief, these regulations enforce, in Wales, the European Commission regulation No. 1069/2009 on laying down health rules as regards animal by-products and derived products not intended for human consumption. The earlier regulation contained a power of entry provision that the legal advisers to the constitutional committee at the time stated infringed on article 8 of the European convention on human rights. The power of entry provision in the earlier regulations allowed for admission as of right to a dwelling house, thus our argument centred on an individual's privacy, correspondence, and family and so on being infringed upon under that article. There were also other issues, for example, there was no enforcement gap in the earlier regulations, which meant that there was a breach of the 21-day rule. The previous regulations created legal rights and obligations and criminal offences, therefore, there was quite a serious implication because of the breach of the 21-day rule. Individuals were not properly informed of the legal obligations that they were potentially subject to. These regulations seek to rectify that. There is a power of entry in these regulations, but the legal advisors to the committee on this occasion are content that there is not a breach of article 8 of the European convention on human rights, as far as these regulations are concerned. For your information, the legal advisers to the committee found approximately 20 reporting points in relation to the earlier regulations. There were a number of drafting errors, and those combined with the main issue of the power of entry provision led to the Welsh Government, on this occasion, revoking and replacing those earlier regulations with the ones that are before the committee today.

[5] **David Melding:** What we are charitably suggesting to the committee is that, since the original regulations were such a dog's dinner, they have been withdrawn and replaced in response to a report by our predecessor committee. We will just commend that good practice so that the Government will not feel quite so embarrassed if it has to have recourse to that sort of action again; sometimes, when something is so deficient, the best thing to do is to just replace it. So, are we happy to report on that in that manner? I see that we are.

2.33 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**

[6] **David Melding:** This is the second oral evidence session for our inquiry and, last week, the committee heard evidence from the Wales Governance Centre, Cardiff Law School.

Today, I am delighted to welcome Dr Cairney from the University of Aberdeen as our second witness in this inquiry. I remind Members to stay as focused as possible in questioning, as we have a limited amount of time and we are also doing it by video link. I would appreciate it if we could be as crisp as possible. I will try to get us off to the best possible start with questioning. Dr Cairney, could you outline how the legislative consent motion is used in Scotland, give us an introduction to this particular way of proceeding, and, I suppose, reflecting on Lord Sewel's remarks that he now thinks it is used in a way that probably was not intended initially, say how constitutionally worrying is that?

[7] **Dr Cairney:** I am not as worried. Certainly, the practice has grown up to be a relationship between the UK and Scottish Government, and the relationship between the parliaments is almost non-existent. I suppose that was not anticipated to some extent because there was so much focus on the new parliament and institutional arrangements. It is not surprising that most legislation is produced by Governments, by the Scottish Government and the UK Government. It makes sense on a day-to-day basis for them to be dealing with the details with each other. Sewel motions, by and large, refer to the details of legislation and parliamentary consent. It is much like the consent they give for legislation as a whole. They have a broad scrutiny function without necessarily producing the details of the legislation themselves.

[8] **David Melding:** If that sort of fairly benign analysis is accurate, how concerned should we be about its over use or about the fact that, in terms of your vivid phrase, it can indicate a certain political cowardice? Where does your real concern about what is happening lie, I suppose, is what we want to explore.

[9] **Dr Cairney:** There have been roughly 100 Sewel motions produced in 10 or so years. When they were controversial in Scotland in the first few years, the suggestion was that there were as many Sewel motions being passed as there were pieces of Scottish Parliament legislation. That, in itself, was misleading because the motions referred to small parts of larger Bills. It was not that Westminster was constantly legislating on Scotland's behalf. There have been a handful of cases where it seems that the Scottish Government has deliberately passed the issue back to Westminster because it seems too controversial. I would not say that those things were clear.

[10] The best example and a topical one, as it is coming back again, was about civil partnerships in 2003. Some opposition parties were claiming that instead of having the debate in Scotland the Executive passed a Sewel motion so as not to discuss the issue. That sums up the processes involved, because the Scottish Executive was saying that this involves lots of reserved issues such as pensions and so forth, which we cannot deal with. However, the Faculty of Advocates suggested that it would be a simple process to just amend marriage laws in Scotland, instead of seeking a Sewel motion. Those things were never clear.

[11] Most of these examples relate to sexuality in some way. The other example is the age of consent for gay sex, when it was raised from 16 to 18. That involved a Sewel motion. In that case, the UK Government's argument was that it intended to use the Parliament Act to override the House of Lords so it had to have exactly the same wording that was used in the past. Therefore, it had to have a Sewel motion because it could not amend anything according to the wishes of the Scottish Government or in terms of its legislation. Those examples are fairly infrequent. I present the view that almost all of these motions are innocuous. The numbers do not give a sense of the size of the process.

[12] **David Melding:** I infer from what you have just said that, if we look at the issue of civil partnerships, that is a significant issue and one that, if the Scottish Parliament ducks it, it could result in a charge of political cowardice. However, presumably, everyone knew what was happening. It was the parliamentarians themselves who were colluding with the

Government to pass the issue back to Westminster. Is that a fair analysis?

[13] **Dr Cairney:** Certainly, at the time it was a Labour-Liberal Democrat coalition and it had to vote in favour of the motion to allow the UK Government to legislate, so, in that sense, it supported the process, just in the same way that a majority would support almost all legislation passed by the Government. There were probably a few dissenting voices, and there was certainly opposition dissent. The opposition then was the SNP and the Greens. So, it resembled the normal process in that sense.

[14] **David Melding:** However, there were clearly not concerns that people were unaware that this was happening. In the general debate about how Ministers get powers and use powers, sometimes a legislative power goes back and forth between Westminster and the devolved institutions, but it can be a fairly covert process, unless you are very dedicated and read the huge amount of detail involved. With regard to the possible overuse of powers or use where not originally intended, as Lord Sewel might put it, the examples that you gave must have been fairly big in terms of the press coverage and the discussion in Holyrood. It would not have been something that was done in secret.

[15] **Dr Cairney:** That is right, yes. In fact, there is an almost direct relationship. The examples of alleged political cowardice are the ones that have received the most attention. There is no doubt that there were debates in Parliament because those issues were large. The ones that are not discussed are the ones that are so innocuous that you wonder why they would even bother to pass a motion. The one that always sticks with me is that, when devolved emergency services workers leave the country to engage in international relief efforts, the UK Government has to ensure that their pension arrangements are properly in place. They pass motions for that sort of thing. Those are the sorts of things that go under the wire, but they are valence issues—I cannot see anyone objecting to them.

[16] **David Melding:** Coming to my final question, would you say that you find evidence for the fact that a great deal of the use of the LCM process is innocuous in the fact that the SNP Government did not really behave very differently to its predecessors in its use of the system?

[17] **Dr Cairney:** That is right. It passed fewer motions, but it is not the case that it passed none. I have written down the average somewhere, but it has gone down from, say, 10 to eight per year—it is that sort of difference. As far as possible, it has tried to produce its own legislation, and it has rejected one or two motions. However, it did not reject them all. In fact, in opposition, the SNP did not oppose them all. It opposed about 50 per cent.

[18] **Suzy Davies:** The Scottish Parliament Standing Orders state that the Parliamentary Bureau shall refer any legislative consent memorandum to the committee within whose remit the subject matter of the relevant provision falls. Can you clarify whether every legislative consent memorandum is subject to committee consideration? If so, how does that affect the timing of Parliament's consideration of LCMs?

[19] **Dr Cairney:** Yes, as far as I am aware, they are all now subject to committee consideration. It is a routine process in that sense. However, the amount of time dedicated to that process varies from a few lines in the Official Report to many pages. With regard to how that affects the legislative process, I have never got the sense that the consideration of these motions has slowed down any UK legislation. There is now fairly good advance warning of what is going to happen, and there is plenty of time for them to report before anything goes any further.

[20] **Suzy Davies:** As a result of the 2005 review, a more systematic consideration of each motion was introduced. However, at the same time, the processes available for scrutiny of

LCMs, such as evidence gathering and a vote, for example, are not generally used by MSPs. How can you square the circle that a more systematic consideration of each motion is taking place, when some of the more obvious means of scrutiny are not being used? Are there ways that the scrutiny of LCMs could be enhanced further?

2.45 p.m.

[21] **Dr Cairney:** In most cases, the committee considers the motion and then the Minister comes along to explain its content. The committee is then generally content that it is a straightforward matter and recommends the adoption of the LCM, without it going to a vote; it goes through on the nod. So, when that happens, in almost all of those cases, it does not receive any discussion in Plenary, because, by then, everyone is agreed that it does not merit parliamentary time. So, it is still introduced formally in plenary and the motion is produced as normal, but no-one objects to it, so that is it.

[22] **Suzy Davis:** So, the time given to scrutiny is very short at every stage, given that there is a short conversation with the Minister at the committee stage and that plenary more or less puts it through on the nod. I note that you said earlier that these matters are generally innocuous, but how do you distinguish between those and the ones that are less innocuous, say, and how is time distributed for the discussion of those at committee stage? Is there an easy way of distinguishing between them?

[23] **Dr Cairney:** The committees decide how important they are. If a committee decides that there is nothing really to discuss, then it will have a discussion with a routine meeting once and then recommend that it go through. If it decides that it is worthy of more discussion, then it will occasionally invite evidence from other people and have two or three committee meetings before it goes to plenary.

[24] **Jocelyn Davies:** Do you not agree that, if the policy proposal was agreeable to everyone anyway, it would save resources if each Parliament was to do exactly the same thing? One instance that comes to mind, which you may remember, is the banning of fur farms in England. Scotland produced legislation on that, as did the National Assembly for Wales and, I think, Northern Ireland, but the legislation was exactly the same. So, it seems to be a waste of time and resources to produce separate legislation that is identical.

[25] **Dr Cairney:** You were breaking up a little there, but I got the gist of your question. Executives increasingly took that approach. I remember the fur farm legislation very well, and there was also census legislation that was quite similar. Those Acts were passed in the early years when no-one was quite sure how to pursue uniform legislation, and Sewel motions were used increasingly when it was realised that these things were fairly straightforward.

[26] **Jocelyn Davies:** So, in effect, if that had been UK-wide legislation, and the UK Parliament had been allowed to legislate on everyone's behalf, there would have been one piece of legislation that would have banned fur farms throughout the UK, instead of us here in Wales, and Scotland and Northern Ireland, banning fur farms when we did not actually have any.

[27] **Dr Cairney:** We banned them in Scotland before they could come, because we knew that as soon as they were banned in England, then they would travel to the devolved territories. I suppose that those are the sorts of innocuous issues that I am talking about. If I was arguing against myself I would say that it is difficult to know or decide when these are important or not and when parliamentary scrutiny might be important. A complete ban, such as on fur farms, means very simple legislation. However, with some Acts, there will be differences in approach that might only arise during different scrutiny processes. That is a real judgment call that would be up to parliaments to make.

[28] **Mick Antoniw:** You referred in your evidence to a lack of parliamentary involvement in legislative consent. It seems to me that this process has been going on in the UK Parliament for decades, where powers have been transferred to Ministers, and then, when they choose to implement them, there is no or very little scrutiny. In many cases, you could say that it does not really matter too much. From the Assembly's position—I suppose that it is the same in Scotland—our concern is that things could arise that you are not happy with, or they may go in a different direction to which you want to go. To what extent is this really just an issue of scrutiny and the quality of scrutiny in Parliaments, be it at the UK Parliament or at Cardiff or Edinburgh? Do you have any particular examples where the lack of that scrutiny has resulted in policy problems arising?

2.50 p.m.

[29] **Dr Cairney:** This is almost entirely a question of scrutiny. In my submission, I said that Scotland was a bit different in a sense, in that, when controversy about Sewel motions came up, the exception was this executive devolution. I read a great quote that sums this up—I have it written here somewhere. It was by a MSP who said, essentially, that he welcomes a Sewel motion giving more powers to the Scottish Government, but that he would like to know, at some point, what the substance was. It had a tone that suggested that anything giving more powers to Scottish Ministers was good, and there was no real consideration of the relationship between Scottish Ministers and the Scottish Parliament; it was all about devolution.

[30] It is difficult to track problems that have arisen, because the process largely comes down to subordinate legislation and circulars to organisations and such, and they are always difficult to track. Executive devolution is the sort of thing that might be picked up by the Parliament's subordinate legislation committee similar to the routine way they look for subordinate legislation in Scottish Parliament legislation. I am not convinced that anyone is sure how well that process works and the extent to which problems could have arisen or been addressed if the process was more open.

[31] **Mick Antoniw:** Is it the case that things have been nodded through, almost through convenience? With some of the motions that we have had, we have transferred some responsibilities back to Westminster as a consequence. Has that also occurred in Scotland?

[32] **Dr Cairney:** It is more difficult to find those examples, especially in the first eight years of devolution in Scotland, because the opposition parties were so focused on that question. Anything that looked like passing responsibilities back received a large amount of attention. It was when the reverse was true that there was limited scrutiny.

[33] **Mick Antoniw:** Moving on a bit, has Scotland experienced any problems whereby there has been approval, or even some scrutiny, of legislative consent motions and, as the debate continues in the Westminster Parliament, there have been further amendments that have an impact? Is this something that you have had to accommodate in your own procedures?

[34] **Dr Cairney:** It is certainly something that has been talked about a lot since devolution. People used to say that, when you passed a LCM too early, you are essentially giving Westminster a blank cheque to do all sorts of things on Scotland's behalf. My impression is that that has not really happened in a controversial way. Occasionally, the Scottish Government will ask the Parliament to pass a further motion if the Bill has been extended or changed. I think that that happened with the energy Bill recently. An example of what the Parliament can do, if it asserts its right to pass more than one motion, is the Scotland Bill that is currently going through to extend devolution in Scotland. That is one that was

passed with conditions and with a request for a second motion to be passed before proper permission was given. However, that is very unusual. I cannot think of another example like that.

[35] **Mick Antoniw:** Carrying the process on a bit further, when the Queen's Speech takes place and the legislative programme and Bills are announced, a number of them—particularly in Scotland—will require the consent of the Scottish Government, and that may increasingly be the case in Wales. I understand that the procedure now, as far as Scottish Bills are concerned, is that these are accommodated by a supplement to the Queen's Speech. Has that been implemented? If so, does it work in practice? Is it a simple solution to the responsibilities of the Scottish legislature?

[36] **Dr Cairney:** It seems to be working in the sense that it is very easy not to notice it going on. It is a very low-profile issue. There were perhaps two significant phases. Until 2007, when there was a Labour-led coalition Government, the sense was that this was now the Scottish Government giving more notice of its intent to use motions. From 2007, when there was an SNP Government, that was perhaps a bit more interesting, because it was then the Secretary of State for Scotland standing in Westminster giving a list of the motions that should be given consent. That seemed more significant, because it gave more of an impression that the UK Government was signalling to the Scottish Government. In contrast, for the first six or so years, this was a problem of the relationship between the Scottish Parliament and the Scottish Government. From 2007, it could be more about the relationship between the Scottish Government and the UK Government. However, even then, the relationship between the two since 2007 has been remarkably smooth, and the process of asking for consent has rarely produced any problems.

[37] **Mick Antoniw:** Do you think that we are moving to a situation in which the Queen's Speech is changing constitutionally, in the sense that you have a Queen's Speech that deals with the Westminster Government's programme, and it then also deals with the respective Governments in Scotland and Wales and their programmes—of course, there may be variations. So, in actual fact, the Queen's Speech is moving to a situation where it is becoming three parts, or four parts if we take Northern Ireland into account.

[38] **Dr Cairney:** Yes, although, the Queen's Speech is ceremonial and it does not seem worrying in that respect, because the Queen's Speech ceremony is followed by statements by the Secretaries of State in the devolved territories. It changes it in that sense, but I never got a sense that that was the centre of policy making.

[39] **Mick Antoniw:** I will move to my final point. As I understand it, in Scotland, there have been recommendations with regard to the annotation of Scottish legislative consent motions to the UK Westminster Bills. An issue that has concerned us in recent weeks is that of people knowing the law and knowing the variations in the law in different countries, where they have access to it, and so on. That is, it is about the way that you build up the composite jurisprudence of the various legislatures. Has that been implemented with regard to Scottish LCMs, and has it served that purpose—or does it serve any purpose? What is the benefit and what is your experience of that?

[40] **Dr Cairney:** I had a look at this recently, and I saw that the Standards, Procedures and Public Appointments Committee made that recommendation, but it also stated that it was not within its remit and that it could not ensure that it happened. I think that that says it all. The Scottish Parliament report affected what happened in Scotland, but I do not get the impression that it affected what happened in Westminster. I have not found evidence that the Westminster Bill process is now different after that recommendation. The sections that say whether or not they relate to Scotland have been relatively clear compared to the discussion of what applies to Wales. Since Scotland had a distinct legal system before devolution, they had

to be relatively clear about what was ‘Scotland only’ and what was ‘England and Wales only’, and the ‘England and Wales’ or ‘England or Wales’ problem is much more of a problem to Wales than Scotland.

3.00 p.m.

[41] **Mick Antoniw:** In practice, it has not actually happened. Do you think that it is desirable for it to happen?

[42] **Dr Cairney:** Sorry, the sound broke up there. Could you repeat that?

[43] **Mick Antoniw:** I have never noticed any supplements to UK Bills, and I agree with you that the references to the sections that apply to Wales are quite oblique in legislation. However, as I understand it, you are saying that the recommendation has not been pursued and has not happened as far as you are aware. Do you think it would be desirable for it to happen and that it would make understanding law and the legislation that has been passed clearer to practitioners and members of the public?

[44] **Dr Cairney:** Yes, I do, but I recognise that I am biased. As a Scot studying Scottish politics, I would like to see it happen, but I do not expect anyone in Westminster to care. If I had to think about how to spend my time, I would not spend a lot of it trying to push that one.

[45] **David Melding:** We appreciate your candour, Dr Cairney. Jocelyn, did you have a question?

[46] **Jocelyn Davies:** Yes, I have a supplementary question on the point about the Queen’s Speech that my colleague was making. You said that the Queen’s Speech is not central to policy making, but it does have constitutional significance because, in the Queen’s Speech, the Queen says something like, ‘My Government will’—that is not my impersonation of the Queen, by the way. Do you think that the time will come when she may say, ‘and my other Governments will do this’, and list things that may be going on in Scotland and Wales?

[47] **Dr Cairney:** I had never thought about it before, I must admit. I cannot see it happening. I would not put any money on it. I do not think that there would be any particular demand in Scotland for it to happen. I know that the SNP, for example, says that it would retain the Queen, but I do not think that there is much of an appetite for the Queen to be involved in Scotland’s legislative affairs. In the equivalent process in the Scottish Parliament, the First Minister stands up and announces his legislative programme. I think they are much more content with that.

[48] **David Melding:** Thank you. That was an interesting suggestion from the Plaid Cymru Member. [*Laughter.*]

[49] **Jocelyn Davies:** It was not a suggestion, only a hypothetical scenario.

[50] **David Melding:** We could have the Prince of Wales do it.

[51] **Eluned Parrot:** Good afternoon, Dr Cairney. I hope that you do not mind if I back away swiftly from talking about the role of the Queen. I would like to ask about a comparison between the situation in Northern Ireland and the situation in Scotland. As I understand it, the Committee on Procedures at the Northern Ireland Assembly has recommended in the past that its Assembly’s standing orders should contain provisions for backbench Members to table LCMs. Do you know whether a similar practice exists in the Scottish Parliament? If so, is this a desirable development? I think I can guess your answer to that based on the weight of these LCMs, but what is the exact situation?

[52] **Dr Cairney:** I checked this out. I consider myself a bit of a train-spotter on this issue, but this was beyond even me until this morning. The procedures committee of the Scottish Parliament recommended in 2005 that backbench MSPs could introduce LCMs. That is now in the standing orders of the Scottish Parliament, but, as far as I know, no backbench MSP has ever successfully passed a motion since this change was introduced.

[53] I think that that is largely because it is a Government-led rather than a Parliament-led process. The most realistic scenario that could have taken place was that we had a UK Government led by Labour and a Scottish Government led by the SNP. Therefore, Labour MSPs may have produced legislative consent motions to support UK Government policy, if the SNP did not do so. As far as I know, that did not happen, in part, because the UK and Scottish Governments were well able to negotiate that legislative process without any Labour MSP involvement. Outside of that, in particular now, and at least until 2016, none of that will happen because a backbench MSP would have to get the support of the Scottish Parliament and the SNP has a majority now. So, I do not think that it will arise.

[54] **Eluned Parrott:** Do you think this is a situation that is unnecessary if the working relationship between the two Governments is effective?

[55] **Dr Cairney:** I do not want to go too far. I would say, quite similarly, that it has not been deemed necessary since the Governments are so effective. There is probably a symbolic importance at least to have this measure. Scottish Parliament committees can produce their own legislation and that is important as a backstop, a sort of last resort. It may be the case with this process. There might be issues that we have not anticipated that could require it.

[56] **Eluned Parrott:** As far as you are concerned this is a question of balancing the power of the Executive and the Parliament itself, and giving the Parliament an opportunity to do something that is different from the Executive.

[57] **Dr Cairney:** Yes. You can interpret the relationship in two ways. First, that the Government almost always dominates Parliament in some sense. Secondly, Parliament devolves the details of policy-making to the Government and asks it to work on its behalf and then scrutinises the results. In that latter sense, the ability of backbenchers to produce their own legislation and motions is quite important, even if it rarely used and rarely successful.

[58] **David Melding:** Before you go on, Eluned, I will call Mick and then Jocelyn to probe this area further.

[59] **Mick Antoniw:** I am very interested in that, because I recognise the importance of this and the practical difficulties within our devolved Governments with regard to backbencher powers. You referred to Scottish committees having the power to initiate legislation. How does that operate and are there any examples of legislation that has been initiated in that way? That seems to be one mechanism that provides a broader consensus basis for the initiation of legislation not necessarily initiated by the Government.

[60] **Dr Cairney:** You will like this. The only example of a committee in Scotland initiating legislation on a public policy matter was when it imported the Welsh policy of establishing a children's commissioner. That is the only example that there has ever been. In a sense, Wales did that for Scotland. In all other cases, and it is a small number of cases, committees have produced legislation on the Parliament itself. For example, the ethics and standards of MSPs and such things as pensions and allowances for MSPs are the only issues that they have legislated upon. It looked initially like they might have a policy-making role, but it has not happened.

[61] **Jocelyn Davies:** You mentioned that there was not a living example, yet, of a backbencher using this procedure. I guess you probably would agree that it is possible it could be politically useful for somebody to table legislation at some point, even if has not been used yet and even if it is unlikely to be successful. We know, for example, that, in Westminster, Members of Parliament who may win the ballot for a private Member's Bill do not always expect them to be successful, but they are used for a range of things, including just supporting campaigns.

[62] **Dr Cairney:** Yes, I could imagine that that might come up. I should say that whenever private Members' Bills have come from Westminster that might need a motion, they have always been dealt with by the Scottish Government as well. So, they have been initiated by an MP but then are dealt with through the usual channels. I agree that that could come up, but I have not seen it as yet.

[63] **Eluned Parrott:** I want to talk about the scrutiny of Executive powers that are conferred on Scottish Ministers by UK-wide Bills. You state in your evidence that, particularly during the early years of Scottish devolution,

[64] 'few commentators were worried about the lack of parliamentary scrutiny involved'.

[65] Can you give me some idea of why you think that has been the case and whether that is changing and there is now greater concern?

[66] **Dr Cairney:** At least in the first parliamentary session and, to a large extent, up to 2005, the tone of the debate was all about handing powers back to Westminster. That was the key phrase. The process by which you seem to reverse that, and give powers to Scottish Ministers, was always seen in that light, namely that it was an extension of devolution and, therefore, a success. All the parties could get behind that. The Labour and Lib Dem Scottish Executive promoted those motions and the SNP would probably struggle to oppose them. It would struggle to oppose a motion that gave power to Scottish Ministers rather than to UK Ministers. So, that was the tone and is probably still the tone: that the territorial issue is more important than the parliamentary one. I cannot think of any occasion when someone has said in Parliament that they oppose a motion because they are not sure that enough scrutiny is in place to look at what Ministers will do with the powers.

[67] In my submission, I was trying to suggest that this is a general approach in which few MSPs or committees go beyond the level of primary legislation. They have the ability to monitor subordinate legislation and the use of ministerial powers, but there is not an incredibly effective process to look at that.

[68] **Eluned Parrott:** Is there a problem in that there has been a lack of differentiation between devolving powers to a Scottish Parliament and devolving powers to Ministers of that Scottish Parliament, and whether the general feeling of nationalist pride, if you like, in the re-establishment of the Scottish Executive has drawn a veil over some of these powers going in an inappropriate direction perhaps?

[69] **Dr Cairney:** Yes, there is a problem there, in that almost no-one could appreciate the difference. Those people who could appreciate the difference do not find it particularly important. The only thing that I would say against that is, again, a practical point, which is that few motions come to the Scottish Parliament that are solely to do with ministerial powers. They tend to be a combination of ministerial powers, expediency and entangled responsibilities. So, those issues tend to be rehearsed as part of the normal process. I say this all the time, but the powers given to Ministers in most cases are fairly innocuous and you would know if things had gone badly wrong. I am trying to think of an example of even one of those powers. Early on, powers were given to Scottish Ministers to regulate the healthcare

professions, just in case there were differences in Scotland that were not anticipated. It is that sort of level, not things that would cause huge disasters.

[70] **Eluned Parrott:** In your evidence, you have also said that

[71] ‘there has been no systematic study of the use of these powers by Scottish Ministers.’

3.15 p.m.

[72] There is a perception in Wales and perhaps elsewhere that your devolution settlement has been cleaner and much less tangled in the way that it has developed than our own has. So, why has it been necessary to include the devolution of extra powers to Ministers within UK Bills, given that your powers were complete with the exception of certain things, as opposed to our own, which were such that we were only being able to act within a narrow series of fields, which have changed over time? One of the things that we struggle to understand is how this dividing line has not been a clean cut-off.

[73] **Dr Cairney:** One reason why it still happens is because there is this long history of this process of Executive devolution—long before 1999—in the sense that the Scottish Office, as it then was, was seen as the means to implement UK policy, given that there were so many differences involved in the legal system and in institutions. So, there was a tradition of devolving powers to Ministers, because it was always anticipated, even if it was a UK issue, that there would be Scottish issues in the implementation. The second reason is that, no matter how clean the lines are between devolved and reserved powers, there will always be issues where the line is blurry, and that problem was solved with that discretion. So, for example, anything to do with equalities legislation is reserved, but it can relate to almost all public services delivered in Scotland, so Ministers might be given the responsibility to apply equalities legislation in schools or universities or in the healthcare service. So, it is quite a sensible process in that respect.

[74] **Eluned Parrott:** Would it be useful to Scotland, assuming that this system does not exist already, that these powers, when they come through on a piecemeal basis, are monitored and recorded in a central place? Generally speaking, would that be necessary to the understanding of the way that the ministerial powers work?

[75] **Dr Cairney:** Yes, that would seem useful. It is one of those things that seem quite obvious, and you wonder why people do not do it. The Scottish Government has a list of all Sewel motions passed, with links to the debates, and the committee meetings generally give a sense of what powers have been passed down and so on. So, yes, that seems sensible. However, by extension, it would also be sensible for that to happen when the Scottish Parliament passes its own legislation. Ministers often promise to address parliamentary concerns by saying that they will deal with certain issues in regulations and subordinate legislation, so it would be good to know that someone was monitoring whether they had kept their promises. However, it just is not done, largely because I do not think that parliaments have the resources to do it. The Government is responsible for so many issues and there are only so many people working in parliaments and assemblies, and they already have plenty to do. So, that is the general problem.

[76] **David Melding:** Thank you, Dr Cairney. I will now ask some concluding questions. I want to go back to this issue of the Scottish Executive getting powers that are not mirrored in the legislature. We also have that issue in Wales, but there is a big difference here because we cannot consent to the Executive getting the powers, while I understand that the Scottish Parliament still has to consent. So, first, should there be at least some form of involvement for, in our case, the National Assembly for Wales? The example that we are given, in terms of when this procedure is required—that is, when you do not want the legislative power to be

devolved but you want the Executive function to be devolved—has been the issue of equalities. So, I suppose, by extension, a lot of international obligations that the British Government enters into, in effect, have to be delivered by devolved administrations, and some people have raised that issue with us as well. However, I sense that have a quite benign outlook in that, once equalities issues are part of the political environment, they will inform the debates in the Scottish Parliament, and they will be used in the general way to scrutinise, despite the fact that Parliament does not have the legislative power to determine these matters. Is that how you think that it works? Therefore, we should be quite calm about this slight mismatch—or sometimes considerable mismatch—between the powers of the legislature and the Executive, because, in classic federal theory, some would say that, in any level of government, the executive and the legislative powers should mirror each other.

[77] **Dr Cairney:** There should be a process whereby any parliament or assembly is given a chance to approve these changes. At the same time, I think that they would always approve the changes. So there may not be any practical effect, but it is an important procedural issue that should not be ignored.

[78] With regard to ministerial powers matching legislative powers, if anything, it has showed us that we do not have a federal system, and that we have a messy quasi-federal system that has operated for a long time. I am not sure where to go with that. I tend to take the approach that it worries me if something goes wrong, but there has not been much going wrong with that in balance. However, it is often difficult to know. In a sense, we are saying that we are not aware of things going wrong because of this process, but we do not often have the resources to know whether that is the case.

[79] **David Melding:** I will use a concrete example, because I think that my question was too general. There is no doubt that equalities legislation has helped us to reshape the way that we deliver health services, for example. Therefore, access to health services is now seen as an essential thing where you would look at particular groups of people and have some kind of audit and determine whether they really have the level of access that is equitable. Generally, the Government in Wales and in Scotland has those duties imposed upon it by mutual agreement—I do not think that any of us would say that that is inappropriate. However, do you feel that, in a way, you do not need the legislature to have powers to mirror that? You could just rely on the general political debate to pick that up in the scrutiny of health services, whether it would be in the Scottish Parliament or the Assembly. Therefore, you could be fairly relaxed about this mismatch between the Executive powers and legislative function.

[80] **Dr Cairney:** By and large, if you are talking about equality of access to health services, that is something that the Health and Sport Committee would focus on in detail. In fact, the Scottish Parliament also has a mandatory Equal Opportunities Committee, which might consider that routinely. In that sense, you would not expect the fact that the Parliament does not have the responsibilities to stop it from looking at those issues. If anything, the history of the Scottish Parliament so far is that it has tended to go the other way. It spends a fair amount of its time talking about issues for which it is not responsible, and it does not make any apologies for that.

[81] **David Melding:** We have a similar culture here. Your evidence has been admirably clear, and it has focused our attention on the practicalities of a system and that we do not want to get too concerned about some of the minutiae, we want to look at how a system works and whether general scrutiny can be applied. It seems to me that you feel broadly that there either exists, or could exist, with fairly minor adaptations, a robust scrutiny system—in the Scottish Parliament it was brought in or improved after 2005—but that that is not always used very effectively, if we measure its effectiveness by the number of times something is debated or whether an LCM is not approved, or the Government has to go away and amend it significantly. Does that mean that the system is working well, because there are not many

problems and they are, presumably, anticipated and prevented, or is there a weakness and that we must be aware that, despite the general system working, significant things could go through that could come back to bite a legislature rather sharply? I will let you respond to that, and then I have a final question to which I will come back.

[82] **Dr Cairney:** I get the impression that the process is working well. I see the lack of discussion as giving a sense of how routine most of these matters are. Generally, what happens is that a consent motion will appear on a committee's agenda, the Minister will turn up, explain what it means, just like they would explain amendments to legislation, the committee will be quickly satisfied that the motion is innocuous and routine, committee members will agree, without voting, that it is okay to pass it and their colleagues in Plenary will accept that and not devote any debating time to it. So, in that sense, it works well.

[83] What I said to the procedures committee before was that there is a real opportunity cost to spending time on these motions in committees, because the more time that they spend looking at routine matters coming through this process, the less time they have to conduct inquiries that set the agenda for the Scottish Government. That was particularly the case in the first few years of the Scottish Parliament. Scottish Parliament committees were seen as a conveyor belt for legislation; all that they had time for was to consider amendments to legislation. Then the Sewel motions agenda came along and, suddenly, they had to spend the rest of their time scrutinising legislative consent motions, and found that they had no time for anything else. In that context, it works well when they do not spend much time on it, because it means that they can do other things.

[84] **David Melding:** I sense that you feel that the system that we have currently in Wales, whereby this committee, the Constitutional and Legislative Affairs Committee, deals with the vast bulk of this sort of work is a rational way of doing it, because we have a secretariat and a team of lawyers that give us extensive advice on those instruments and issues that may involve a significant amount of power going to the Executive with possible implications in terms of policy significance that the Assembly will want to reflect on. I sense that you feel that that is a good way of going about it rather than trying to improve the general scrutiny received in the parliamentary process, particularly across the committee structure. However, there is a slight sting in the tail when you reflect on the quality of the Members who are usually on these specialist committees. I am not saying that it is a fair reflection on my colleagues or myself, but do you feel that those involved in the specialist role should be the more senior politicians or are you fairly relaxed that it is sometimes—I think that you used the phrase 'not always a cherished role'? I am not quite sure what that would mean in practice, but would you like to expand on the quality or, to put it more positively, the experience of some of the politicians that you have observed scrutinising LCMs, secondary legislation or other matters?

[85] **Dr Cairney:** Whether or not you should have a separate committee or mainstream these issues is an interesting question. I remember that there was some disagreement in the Procedures Committee about what to do, namely whether a new committee should be introduced. I remember that the clerk of the committee was keen on a separate committee, as was one of my colleagues who was giving evidence at the same time, but the balance of MSPs was against it and they went for maintaining the status quo in that sense. That is probably what it comes down to in a lot of these cases. It depends on what your established system is when you consider how to deal with these things. I am quite relaxed about the idea of a separate committee if it is relatively established and works well. There is no reason to depart from that.

3.30 p.m.

[86] I suppose what might be different in the Scottish Parliament is that the motions are

sent to the relevant substantive committee, and they are generally given help by the Subordinate Legislation Committee. That is certainly what happens with normal legislation—the Subordinate Legislation Committee raises issues that other committees can consider. That works quite well.

[87] On the question about the quality of the people on the Subordinate Legislation Committee, whenever you talk to MSPs about it, it is described as the graveyard slot, or something like that. It is the one that you are given if you are being punished in some way. That will not apply to everyone, because some people will be keen on these issues. For example, if I was an MSP, I would be interested in subordinate legislation, but I do not think that it is a way for people to make a career. It tends to be staffed by people who really do not want to spend much time there, which is a problem in that it really requires dedication to get into the details of policy making; it requires someone to spend a disproportionate amount of their time looking at those issues. I get the impression in Scotland that there are very few people willing to do that.

[88] **David Melding:** Do any other Members want to come in here?

[89] **Mick Antoniw:** I just have one final question. Could I sum up what you have been saying as, in most cases, it is not a problem, and this is something that we can be relaxed about as being relatively efficient, but, somewhere along the way, there needs to be the right to some form of sanction in an exceptional case—perhaps it might never arise—and a mechanism to hold Government to account, or to question and sanction either the transfer of powers or their use?

[90] **Dr Cairney:** I think that that is a general point: parliaments should have the ability to exercise their power even if they never use it.

[91] **David Melding:** That completes our questions to you, Dr Cairney, and I am grateful to you for joining us all the way from Aberdeen via this videolink, which has worked pretty well—certainly, your evidence has come through very clearly. Before we say goodbye, however, is there anything you want to raise that we have not covered, but which may be of benefit to us as further evidence?

[92] **Dr Cairney:** I did have a sign-off statement. It is quite banal, but I think that almost all of this comes down to the respect that the Government gives to its legislature. Most of the issues that arose in the Scottish Parliament came down to that: how much scrutiny the Government would allow itself to be subjected to. If the parliamentary system works well, then I think that we have less to worry about with this process. If there is an antagonistic, secretive relationship between the Executive and the legislature, then that is when we need to get worried.

[93] The complication with this is that the antagonism or the respect may have to come from the UK Government, and that is an issue where most devolved actors feel dissatisfied, perhaps. They might feel that they can rely on their own Government to be respectful and sincere, but perhaps not someone else's Government legislating on their behalf. It is a real judgment call, and I do not envy you having to make it.

[94] **David Melding:** Thank you very much for helping us with our work. We are very grateful that you have given so generously of your time, and also for the written evidence that you submitted to us. From Cardiff, goodbye and thank you.

[95] **Dr Cairney:** Thank you.

3.34 p.m.

Cynnig Gweithdrefnol
Procedural Motion

[96] **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(vi).

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

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 3.34 p.m.
The public part of the meeting ended at 3.34 p.m