



Cynulliad Cenedlaethol Cymru The National Assembly for Wales

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

**Dydd Llun, 6 Chwefror 2012
Monday, 6 February 2012**

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

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

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

Eraill yn bresennol
Others in attendance

Louise Gibson	Cyfreithiwr, Llywodraeth Cymru Lawyer, Welsh Government
Stephen Phipps	Y Tim Moseg a Rheoleiddio, Llywodraeth Cymru The Ethics and Regulation Team, Welsh Government
Carl Sargeant	Aelod Cynulliad, Llafur (Y Gweinidog Llywodraeth Leol a Chymunedau) Assembly Member, Labour (The Minister for Local Government and Communities)

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
Olga Lewis	Dirprwy Glerc Deputy Clerk
Owain Roberts	Gwasanaeth Ymwchwil 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, everyone and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I will start with the usual housekeeping arrangements. We do not expect a routine fire drill this afternoon, so, should we hear the alarm, please follow the instructions of the ushers who will help us to leave safely. These proceedings will be conducted in Welsh and English. When Welsh is spoken, the translation is available on channel 1 of the headsets. Channel 0 will amplify our proceedings. Please switch off all electronic equipment completely as it can interfere with our recording systems.

[2] I have received apologies from Julie James and Eluned Parrott. I welcome Vaughan Gething, who is substituting for Julie James. With Members' consent we will move straight to item 5 on the agenda.

2.30 p.m.

**Bil Is-ddeddfau Llywodraeth Leol (Cymru):
Sesiwn Dystiolaeth gyda Carl Sargeant AC, y Gweinidog Llywodraeth Leol a
Chymunedau
Local Government (Wales) Byelaws Bill:
Evidence Session with the Minister for Local Government and Communities,
Carl Sargeant AM**

[3] **David Melding:** It is a great pleasure to welcome the Minister for Local Government and Communities, Carl Sargeant, who will be giving evidence to us in looking principally at the use of some audit powers in the Bill. The Minister is joined by two colleagues, whom he will introduce if there is a need to follow up on any of the technical points. Minister, when the Bill was drafted, what sort of balance were you looking to strike between what is written on the face of Bill and what would be left to Welsh Ministers in terms of subordinate legislative powers?

[4] **The Minister for Local Government and Communities (Carl Sargeant):** Good afternoon, Chair and committee. Thank you for the opportunity to respond to questions this afternoon. We believe that the Bill fulfils our commitment to simplify the process for the making, amending and revocation of most bye-laws in Wales by removing the need for confirmation by Welsh Ministers. We believe that we have struck the appropriate balance between the level of detail on the face of the Bill and the correct and appropriate level of subordinate legislation. In general, subordinate powers will enable the Welsh Ministers, whoever they may be, to add practical detail to the framework. We believe that we have struck the right balance, Chair.

[5] **David Melding:** We are intrigued by the Government's intention to use our primary legislative powers to consolidate and make things clearer. I accept that a local government bye-laws Bill is probably a tough challenge to start with in this regard, because I notice in the Schedules that we are talking about some Acts of Parliament that created powers to make bye-laws that go back to 1847. You have not really taken any of them out of action, have you? You have left them in there and addressed them in Schedules rather than putting them all onto the face of the Bill. To do that would obviously have made the Bill longer, but it may have been more elegantly worded in terms of how the law is now understood, given that the language used mostly predates 1940.

[6] **Carl Sargeant:** I like your reference to an elegant wording for the legislative process. What we have tried to do, as I think you recognised in your contribution, is deal with the scale and wide variety of bye-laws that are still in statute. We have tried to take a baseline approach to moving forward. We recognise that there are still bye-laws in use, and we are now trying to create an opportunity for local authorities to be very clear in that process of making bye-laws and having the powers to revoke bye-laws. I would perhaps add to that that the scale of work required to consolidate the old bye-laws into this process would not have been practical. It would have been a huge task, and we have taken the line that this is about moving forward rather than looking backwards in terms of legislative competence.

[7] **David Melding:** I will ask Suzy Davies to take us forward with the next group of questions that we want to put to you, Minister.

[8] **Suzy Davies:** Thank you, Chairman. It is the issue of revocation that I would like to start with, Minister. In your opening remarks, you mentioned simplifying the processes that we are talking about. Therefore, can you explain why section 4 of the Bill acknowledges the powers of legislative bodies to revoke obsolete bye-laws while the Welsh Ministers are also

given that power?

[9] **Carl Sargeant:** Section 4 of that section refers to the general power for authorities to revoke specific bye-laws that they have created. Section 5 is a fallback power for Welsh Ministers. We recognised during the drafting process that there are some cases where the ownership is unclear. It would be wrong for us to create an environment where we move forward on bye-laws with an understanding that the people who made the bye-laws can revoke them, apart from where there is a loophole, for want of a better word—where there is a bye-law in place of which an authority does not have ownership and therefore cannot revoke the process. In that case, there is a fallback position for Welsh Ministers to be able to do that, should the subject become an issue, but it is not. I do not believe that that is a power that would be generally used. There is a process for the whole creation of bye-laws.

[10] **Suzy Davies:** So, it would be fair to call it a stand-by power. What if you have a situation where, let us say, a local authority and the Welsh Government disagree about whether something is obsolete? I only ask the question because, in the consultation replies, the majority view was that the Welsh Government's position was useful where there was a dispute between two other parties, but what if one of those parties is the Welsh Government?

[11] **Carl Sargeant:** Bye-laws are a local process. That is why we have created the powers for local bye-laws to be created by a local authority or a lead authority and to be revoked by that authority. The confusion comes, as I said, with the issue of ownership. I do not intend that future Welsh Ministers or I will be able to override a local decision as a result of the legislation that we have created. That is quite clear in the drafting of the Bill.

[12] **Suzy Davies:** My final question is to do with the revocation standing alone. I can admit that there will be examples where a simple revocation stands alone, but revocation will also be part of new legislative ideas, which include amendments or other changes. It would not necessarily be a stand-alone situation. Where there is an amendment, the usual process is to proceed by affirmative procedure rather than negative resolution. Would you say that that would be same where you have a combination of amendment and revocation rather than revocation stand alone? I hope that is clear.

[13] **Carl Sargeant:** It is sort of clear. I think that I know what you are saying. Throughout the consultation period, we had a very positive response to taking this forward. We have tried to allow, within the Bill, some flexibility so that we can change to circumstances. So, where there is a need for changes to the Bill through the revocation process or where authorities may present a different case or reasoning for making such a law, there is enough flexibility within the Bill so that we can make changes easier through affirmative or negative resolution of the Assembly. We have not tried to create something here that is not custom or practice.

[14] **Suzy Davies:** Right, so the chances are that a revocation that is part of a wider piece of work, which includes amendments, might actually just be dealt with by affirmative resolution anyway.

[15] **Carl Sargeant:** Yes.

[16] **David Melding:** I am sorry if this has already been covered, but I did not quite grasp it if it was—these are complicated areas. When no ministerial confirmation or involvement will be required—those will probably be not very technical matters—and an authority revokes a bye-law, you still propose for the Assembly to have some control over that through the negative procedure. Am I right in saying that? I wonder why, if there is no ministerial involvement, you still think there should be Assembly involvement. You may think that the legislative function should override and that it is the ultimate safeguard, but I thought that it

was interesting that we have this slight disconnect between ministerial and legislative powers shadowing each other.

[17] **Carl Sargeant:** The clear dividing line is ownership. Where the creation of a bye-law is within the gift of a local authority, the revocation power in relation to that bye-law is with the local authority and not with ministerial consent. Confusion arises with the ownership issue; when a Welsh Minister is asked to revoke a bye-law, it is reasonable to go through a legislative process of the Assembly to make that decision. Is that clear?

[18] **David Melding:** I am still not sure whether I understand the technicalities. There is a circumstance in which something will be revoked that does not require your involvement, but will still require an instrument that is subject to negative procedure.

[19] **Carl Sargeant:** That is not the case. Chair, may I offer technical assistance in terms of the detail, because I do not believe that that is the case?

[20] **Mr Phipps:** No, it is not the case. When a local authority wishes to revoke a bye-law, if that process is not subject to the Minister's confirmation, then it will just get on with it. However, if the Minister is requested to revoke an obsolete bye-law, there is an Assembly procedure attached to that, in that the Minister will make the revocation through an Order, which would be subject to the negative Assembly procedure. So, in effect, it will be open to Members to call that in.

[21] **David Melding:** Okay, I trust that our lawyers will have understood what you have just said. Simon Thomas will lead us on the next set of questions.

[22] **Simon Thomas:** Hoffwn droi at y trefniant ar gyfer is-ddeddfau. Yn ôl yr hyn a ddeallaf, mae'n eithaf clir yn y Bil beth sydd i ddigwydd os oes awdurdod cadarnhau wedi'i enwi yn y Deddfau sydd wedi mynd o'r blaen. Ond, os nad oes awdurdod wedi'i enwi, rydych chi neu Weinidogion Cymru, drwy ryw fath o *default*, yn dod yn awdurdod cadarnhau ac yn ymwneud â hynny ar y cyd â'r Ysgrifennydd Gwladol. Credaf ein bod yn deall hynny. A fedrwch esbonio paham rydych yn gwneud hynny ar y cyd â'r Ysgrifennydd Gwladol, oherwydd byddai rhai'n synnu gweld rôl i'r Ysgrifennydd Gwladol yn y fath gyd-destun? A yw hyn oherwydd bod rhai o'r Deddfau hyn yn dyddio'n ôl i gyfnod cyn datganoli, neu'n ymwneud â meysydd gwahanol?

Simon Thomas: I will turn to the procedure for bye-laws. My understanding is that it is quite clear in the Bill what is to happen if a confirming authority has been specified in the Acts that have gone before. However, if an authority has not been specified, then you or Welsh Ministers, through some sort of default, become the confirming authority, and deal with those issues concurrently with the Secretary of State. I think that we all understand that. Can you explain why you would work concurrently with the Secretary of State, because some would be surprised to see the role of the Secretary of State in this context? Is it because some of these Acts date back to a pre-devolution age, or involve different fields?

[23] **Carl Sargeant:** You are right with regard to the revocation element of that, and the relationship with the Secretary of State. This stems from the 1999 Act that came through, with regard to the transfer of functions to the Assembly and the relationship then between the Secretary of State and Welsh Ministers. We believe that we have preserved that process in drafting this. Even if pressed, I could not answer on the logic behind that, so bear with me, Chair. We are yet unsighted as to the effect of the revocation of a bye-law that may concern a non-devolved function. Under normal practice, with regard to the relationship with the Secretary of State, that application would come to a Welsh Minister. However, subject to a non-devolved function being raised in a bye-law that is obsolete, it would be only right for the Secretary of State to be involved in the process, which is why that status quo has remained in

taking this process forward.

[24] **Simon Thomas:** Am I to understand from that that, basically, you have not looked at all of the bye-laws that have been passed?

[25] **Carl Sargeant:** That is correct.

[26] **Simon Thomas:** You therefore do not know what might be lurking in the undergrowth.

[27] **Carl Sargeant:** These bye-laws go back an awful long way—there are some for horse-driven carriages and such things, which might have been appropriate at the time, but are less appropriate now. We are unsighted as to some of the elements that may come through, and, as I said in my opening remarks, because we are moving forward with regard to the creation of bye-laws and allowing local authorities to make those choices, it would have been hugely complex to try to build into that process what we already have and what we may require for the future. This is just a position that we are used to in terms of the devolved and non-devolved functions of the Assembly. I am very comfortable with that.

[28] **Simon Thomas:** Have you had any conversations with the current Secretary of State as to whether there would not be a more convenient way of doing this? This is an opportunity, after all. We know that these bye-laws are, in effect, defunct. So, is this not an opportunity to tidy up more generally? It seems to me that, generally throughout the Bill, you are leaving lots of Schedules, lists and other things and saying, ‘We know they’re out there somewhere and there could be undiscovered things, so let’s tidy them up as we go along’, rather than taking the opportunity to do it all in one go now.

2.45 p.m.

[29] **Carl Sargeant:** I would not present it in the same way as you presented it; it is untested. We perceive that there will be, at some point, a non-devolved function in relation to these bye-laws. Have I had a discussion with the Secretary of State about that? No, I have not. However, we have tried to maintain the status quo. We recognise that there is a process for delivering this already. Where there is a Welsh function we would do that—that is normal procedure—and where there is a confused, or a non-devolved, function, that would be either for discussion by both of us, or for discussion by the Secretary of State. I do not think that that overcomplicates this. Rather than tying the procedure down too tightly, this gives us an open-ended opportunity to make procedural decisions as and when the need arises.

[30] **Simon Thomas:** To clarify, with regard to what you say about the relationship—that you will carry on with the arrangement that has existed since 1999, in effect—are you referring to the general arrangements between Welsh Ministers and the Secretary of State, or are you referring to specific issues around bye-laws?

[31] **Carl Sargeant:** I was referring specifically to bye-laws.

[32] **Simon Thomas:** If this Bill becomes law, how would you expect that exercise to take place? What is the past experience, and what would you expect to happen, going forward? Has it been seamless? Has there been a need to engage in a memorandum of understanding? How have you done it to date, and how would you expect to do it in the future?

[33] **Carl Sargeant:** I have not had experience of the need to do this, but I can drop the committee a note, if that is helpful, giving the detail of the procedure that is expected. As we are aware, even within transfers of functions now, this is already in existence. Where local authorities see that this is a devolved function, the application will go to a Welsh Minister as

opposed to the Secretary of State. That has just been the norm, but I am happy to provide the committee with a note on the detail if that is helpful.

[34] **Simon Thomas:** Finally, you mentioned earlier the potential in the Bill to create lists or not to create lists, as the case may be. One example of that is the power that you have under section 9 to amend Schedule 1, which would add or take away from the list of bye-laws that do not require Welsh ministerial confirmation. So, there are powers in the Bill to amend lists that we, in effect, do not see. I think that you said a little bit about why you might need such powers, and that is because you have not surveyed the land, as it were. Are you convinced that you need that power in the Bill?

[35] **Carl Sargeant:** I think that it offers enough flexibility for local authorities. These are often about very local issues of nuisance and so on that they need to deal with. Subject to there being a lack of existing provision, this is an opportunity for local authorities to deal with an issue. We should bear in mind that the powers to make those changes are subject to affirmative resolution, so there is a fall-back position. This has not been widely used in terms of creation of bye-laws, and I hope that this more streamlined approach will help the process of the creation of bye-laws.

[36] **Simon Thomas:** On that point, as a matter of interest, now that the Bill is being considered, have you any suggestions from local authorities already? Are they already coming forward with some suggestions? I accept that it has to go through the affirmative procedure.

[37] **Carl Sargeant:** I have not had any direct engagement on the creation of new bye-laws. However, we are seeing an enthusiasm for the Bill in that they are saying that it gives them more local determination. I am very supportive of that. So, I am not saying that it is going to be used week in, week out—in fact, I am probably hoping that it will not.

[38] **Simon Thomas:** You are still convinced that you need it, though.

[39] **Carl Sargeant:** Absolutely. This is a local decision, subject to affirmative resolution of the Assembly, if that is required.

[40] **David Melding:** It sounds almost like a *Passport to Pimlico* provision, where there may be things out there that no-one realises are there, and then you suddenly have to deal with them. Is it as obscure as that, potentially, and so you need to ensure that the legislation can capture all possible eventualities?

[41] **Carl Sargeant:** It is about building a legislative framework that allows sufficient flexibility for local determination. If we were to be more specific, I do not believe that we would have the flexibility in the Bill for local authorities from Flintshire to Cardiff to make significantly different bye-laws according to local need; it would be too onerous. This gives us sufficient flexibility for an authority to make a local determination and for us is to adapt quickly to changing circumstances.

[42] **David Melding:** We will now move to the general area that potentially causes the most controversy. It relates to fixed penalties. Suzy Davies will lead the charge.

[43] **Suzy Davies:** On the fixed penalties and the notices, initially, I can see that a number of bodies are permitted to give notices, including community councils. However, in the case of community councils, but not the other legislating authorities, Welsh Ministers have a power to set the form of the notice in other guidance. Is there a particular reason why community councils have been singled out for more intervention, shall we say?

[44] **Carl Sargeant:** I would not say that it was intervention, but support. The reason why

we have done that is capacity. We recognise that there are some very small community councils and the ability to apply and enforce bye-laws could be more onerous for a parish council. That is why we have tried not to place an extra burden on those councils. We have mirrored the Local Government Act 1972 provision in terms of support for parish councils. I believe that it is a strengthening provision, enabling them to work with other leading authorities to deliver a local bye-law. So, if we look at it the other way around, we see that it enables parish councils to deliver bye-laws through a different method, without it being too onerous.

[45] **Suzy Davies:** That could include them working with the larger unitary authorities—

[46] **Carl Sargeant:** Absolutely. That was also the position of One Voice Wales in the evidence that it submitted. It is the lead body for town and community councils, so we are in line with their views.

[47] **David Melding:** Before you move on, Suzy, I will bring in Simon.

[48] **Simon Thomas:** I want to follow up that point. I thought, for a moment, Minister, that you might be suggesting a consortium of local community councils, but you do not seem to have gone down that path.

[49] **Carl Sargeant:** Yet.

[50] **Simon Thomas:** Yet. You mentioned the 1972 Act and said that this was modelled on the basis of that. I am aware of previous constituency work that I have undertaken in relation to a case where a local community council has wanted to enforce a bye-law, and a local unitary authority has not wanted that bye-law to be enforced. Dogs on beaches is one of the obvious examples. There has been a clash and a lack of progress there, because two bodies are basically unable to agree. Is there anything in the Bill that would strengthen what I think that the Bill as a whole is about, namely local accountability? Many people feel that community councils should have much more local strength in the Bill and they will look to the Bill for an opportunity for that to happen.

[51] **Carl Sargeant:** That is an interesting point in terms of parish or local community councils disputing and asking a unitary authority to be the power to action enforcement. I do not know whether we can offer any detail on that now; perhaps I can write to you. Steve?

[52] **Simon Thomas:** To add to that, several examples come to mind: one is where a community council can be in disagreement with the unitary authority, but you can also have two community councils looking after a similar stretch of coastline with two different views about what to do. I have come across the issue of dogs, but there could be similar examples. You would expect the Bill to strengthen the resolution of those disagreements as much as possible through local accountability, albeit within the context that you have already set out—to help local accountability to be realised, especially in the case of small community councils. So, if we could have some thoughts on that, they would be extremely useful.

[53] **David Melding:** Does the official want to say anything now? Mr Phipps?

[54] **Mr Phipps:** I may be on the wrong tack, but if we are talking about enforcement, then even if—

[55] **Simon Thomas:** We are talking about even agreeing that there should be such a bye-law.

[56] **Carl Sargeant:** I will certainly take note of your comments; we will give them some

thought. However, to extend the discussion, it may be useful to note that the consultation process in the creation of bye-laws is an important part of this in terms of community engagement. I would not expect a parish council or a local authority to create a bye-law because it wants to; there is a process to enable that in the first place, one of which is to do with community consultation.

[57] **Simon Thomas:** I have seen competing petitions, Minister: one for and one against. How do you resolve that?

[58] **Carl Sargeant:** I recognise the complexities involved. I will give some further thought to procedure and the potential for disputes between bodies in that regard, and I will write back to the committee about it.

[59] **David Melding:** We are wandering creatively into wider policy, which is arguably a little beyond our narrow focus. However—

[60] **Simon Thomas:** Well, when you have a Minister in front of you. [*Laughter.*]

[61] **David Melding:** It is with the intention of improving the legislation, which is a very noble intention. Suzy will now take us further.

[62] **Suzy Davies:** Can we stick with fixed penalties, then? The Bill gives an opportunity for a legislating authority to set the precise amount of any fixed penalty. There are also powers for the Welsh Ministers to set the range within which a fixed penalty must fall, but there is a default position of £75. First of all, why £75? Secondly, is there really any need to set a range, when the figure of £75 sends such an obvious signal to the local authority, and, of course, the Welsh Ministers retain the opportunity to change it from £75 anyway? I can break that down if that makes it easier.

[63] **Carl Sargeant:** I get the theme of the question, which is around the default payment and the flexibility around that. With regard to the default payment, this is not a figure that we have come up with arbitrarily; it comes from section 237B of the Local Government Act 1972. We have mirrored that. There is also a default penalty under the Clean Neighbourhoods and Environment Act 2005. So, again, this provision mirrors what is already in existence. It is consistent. It is not a new figure. We believe that it is a reasonable starting point and one that local authorities recognise currently.

[64] In terms of the range and the scope to move the default payment, that will be subject to consultation, and about need; that is, what are we creating the bye-law for, and what are we creating the fixed penalty for? There are unknowns around that, as I would not even like to hazard a guess as to what a bye-law may or may not consist of, but it would be about whether the £75 default penalty is appropriate or not. There has to be some consultation around the process, about what the maximum and minimum limits would be, to give a framework for authorities delivering bye-laws to work within.

[65] **Suzy Davies:** Would the local authority, for example, be doing that consultation anyway before deciding what limit it is going to set?

[66] **Carl Sargeant:** Authorities have to consult on bye-laws and whether they should attract a penalty notice or not. This is about the scope within the Bill and at what levels the minimum and maximum are set, so that there is no scope to go beyond those through the consultation on a local issue and so there is still control over what a fixed penalty may or may not be in terms of the maximum level and the default figure.

[67] **Suzy Davies:** As it is almost an algebraic formula, could it not appear on the face of

the Bill, rather than being retained for secondary legislation?

[68] **Carl Sargeant:** There is no reason why it could not. I would suggest, however, that the whole ethos of the Bill is about flexibility for local determination. Once you start writing on the face of the Bill, you prevent change through a relatively simpler process.

[69] **Suzy Davies:** If you are looking for a simpler process for changing things, which is admirable, the default figure of £75 still needs to be changed by Welsh Ministers through the affirmative procedure, which is not exactly simple. Is there any particular reason why you have chosen the affirmative process for that? I appreciate that it is about amendment, rather than the initial setting up of a range.

3.00 p.m.

[70] **Carl Sargeant:** That is only for the process of creating this Bill and the scrutiny elements of creating a default payment. I think that it is important that we get a baseline. If a bye-law attracts a penalty and there is not a designated amount for that penalty, there has to be a default position, which is £75. I think that that is a reasonable process that we are going through for the Assembly to scrutinise and set it into statute. There is no reason other than that, really.

[71] **Suzy Davies:** It just struck me as being slightly odd that it is a more complicated process to change the default position than to introduce a range in the first place.

[72] **Carl Sargeant:** Yes. However, we have to have a baseline. Once again, I refer you to the origin of these figures. This is not a Welsh concept or a Welsh idea of what we think the right figure should be; this is a general figure that has been used appropriately. We think that, if that is subject to change, then it is a matter for the Assembly to make that decision. We think that, once it is set, it is set.

[73] **Suzy Davies:** Okay, thank you.

[74] **Carl Sargeant:** We were not trying to trick anyone.

[75] **Suzy Davies:** No, I appreciate that. I think that I had better let someone else get a word in edgeways.

[76] **David Melding:** I would like to follow up the issue of not having the fixed penalty on the face of the Bill. I think that we would all understand why you have decided not to do that, because it will be easier to amend it, or to set a higher or lower penalty in response to circumstances as they develop, and to do that still with Assembly approval. However, this is probably what the public would consider the most controversial or the most important part in terms of its potential impact on individuals—the setting of the fixed penalty. Did you think about using the superaffirmative procedure to change the level of penalty, whereby you would have to consult and submit your intended amendments to a committee here for their possible amendment again? It seems to me that this involves the public quite directly in the potential liability that it may face for any future breach of bye-laws.

[77] **Carl Sargeant:** ‘No’ is the answer to your question regarding whether we considered that. The only explanation I can give for that is that we believe that the procedure for the creation of a bye-law is, in essence, about the consultation of local people, understanding the reasons why an authority, whatever that authority may be, has to consult with the people affected by the particular issue they are trying to combat, whatever the subject may be—whether it is about dogs on beaches or something else. Within that process, the consequences of non-compliance will be detailed. If there is a fixed penalty attached, it will also include

details of what the fixed penalty would be.

[78] **David Melding:** I understand that, but if, in four or five years' time, the Government thinks that £75 is no longer a deterrent and it should be £150, perhaps the super-affirmative procedure would give a full and thorough legislative scrutiny of such a decision. I accept that the affirmative procedure gives a fair level of protection, because it could be overturned and it requires the Government to defend a motion in the Assembly, but I wonder whether, given that the sums are not trivial, the super-affirmative might be more appropriate.

[79] **Carl Sargeant:** I am not sure that I entirely agree with the argument in terms of the process. We are introducing bye-laws and fixed-penalty notices, which may be popular in some cases, but I imagine that, for those who are on the receiving end of a penalty for breaching a bye-law, it would be particularly unpopular. Generally, bye-laws are created on the basis of a localised problem. I am not convinced that public consultation on the level of the fine is the most practical way of taking this forward. Governments sometimes have to make difficult decisions and we have to have a baseline regarding where we are. We should bear in mind that the variance beyond the default payment could be low or high, through the consultation period. So, there is enough flexibility, and the affirmative powers provide sufficient scrutiny of that process.

[80] **Simon Thomas:** I want to ask about one thing in particular to see if I understood correctly. You have set out the case for why the £75 should be varied by Ministers through the affirmative procedure, but you said that the £75 was set in relation to two different Acts. From what I understood, it is set on the face of those Acts, one of them being the Clean Neighbourhoods and Environment Act 2005. So, you have taken a reference point from the face of an Act, but you have decided to do it flexibly in this Bill. So, there is a little bit of tension there, is there not? Your baseline has been on the face of an Act, and yet you are going to take the powers to vary the figure. That is where the question arises as to whether this is the right sum or how we go about it. That is all.

[81] **Carl Sargeant:** I am reliably informed that the same provisions are in the Act, and Stephen may be able to explain that in more detail.

[82] **Simon Thomas:** It would be useful to know how they all relate to each other.

[83] **Mr Phipps:** Primarily, our model for this part of the Bill is the Local Government Act 1972, which introduced very similar provisions in relation to England. So, we have used that as the base model. As I understand it, that Act, in its turn, used the Clean Neighbourhoods and Environment Act, and both have similar provisions around setting the default amount, but providing Ministers with the power to vary that default amount, albeit with National Assembly approval.

[84] **Simon Thomas:** So, to understand this, is the £75, which is your sum and which is based on those previous Acts, a sum set by English Ministers, or by Welsh Ministers in the past?

[85] **Mr Phipps:** By Parliament.

[86] **Carl Sargeant:** I think that Ms Gibson might have something to offer as well, Chair.

[87] **Ms Gibson:** I support what Stephen said. Also, the £75 is specified on the face of the Bill. With regard to its reference in the clean neighbourhoods Act, that applies in relation to Wales as well. So, it is a sum that is understood and widely used and viewed as reasonable. So, that is why we deemed it appropriate for this Bill.

[88] **Suzy Davies:** On a matter of practicality, if there are going to be any new bye-laws, which will have to go to public consultation anyway, is it not highly likely that the sum for any fixed penalty will be discussed at the same time in a consultation? We are talking about these default settings pretty much as default settings, are we not? The actual need for the default position will be very minimal, surely.

[89] **Carl Sargeant:** That is accurate, and we believe that you must have a default position because you must have a starting point. However, you are absolutely right: the consultation process give the lead authority flexibility around the default payment, or to have the default payment.

[90] **Suzy Davies:** So, the range will not necessarily be imposed on them at that stage. As long as they come up with something sensible they are unlikely to hear from Welsh Ministers.

[91] **Carl Sargeant:** Within the range of consultation, yes.

[92] **Suzy Davies:** Okay, thanks.

[93] **David Melding:** Is that all? The range, if you alter that, will be subject to the negative procedure. I do not know whether you want to tell us why that is less sensitive than the affirmative in terms of the need for scrutiny. Obviously, it can still be scrutinised, but it places the emphasis on the Assembly wanting to scrutinise it rather than being required to do so, if I can put it that way.

[94] **Mr Phipps:** As far as the default amount was concerned, we thought that was important because it sets the reference point, if you like, for the range that Ministers would set. So, the default amount comes under the affirmative procedure, but, as a reference point, we felt that it was entirely appropriate for Ministers to set the range through the negative procedure; it seemed less controversial, if that is the right word.

[95] **David Melding:** Can you remind us what the range is proposed to be? I am sorry that I do not have it to hand.

[96] **Mr Phipps:** We do not have figures for the range; that will be subject to consultation.

[97] **David Melding:** Okay. However, a sum of £500 may be the upper limit.

[98] **Mr Phipps:** It could be £50 to £90, but contrast that with enforcement through the courts, which is level 2, and it will be more like £500, so it is of a different order entirely.

[99] **Carl Sargeant:** It would be fair to say that, again, we will cross-reference other Acts with regard to what is already in use or reasonable. Perhaps I could provide the committee with a note on that, setting out what we believe is reasonable in that regard.

[100] **David Melding:** It is time for the last set of questions, which Vaughan Gething will ask.

[101] **Vaughan Gething:** This is the final part on fixed penalties. Clause 16 would enable Welsh Ministers to amend, using the affirmative procedure, the list of bye-laws in relation to which a fixed penalty may be issued. Can you explain why you think that is necessary? I appreciate that there is a balance to be struck with regard to how this legislation comes forward and making it easier to create bye-laws. However, why is it necessary for Welsh Ministers to retain the ability to amend the list of bye-laws in relation to which fixed penalties would apply? Can you give us examples of where that power might be used?

[102] **Carl Sargeant:** In answer to your last question, probably not, because we do not know what the bye-law may be. I suppose that this is about a situation where an authority creates a bye-law without a fixed penalty that has little or no effect. It might therefore seek from the Welsh Minister the ability to attach a fixed penalty to that bye-law. I cannot preempt what that may or may not be. This creates flexibility within the system for a lead body to look at levels of appropriateness and consider whether the bye-law is having an effect. Creating a bye-law is one thing; having an effect is another. Sometimes, it might be the trigger of a fixed penalty that makes the bye-law work. Unless we have a provision to add to the system, it seems a very strange exercise.

[103] **Vaughan Gething:** Okay, so it is about built-in flexibility. I do not intend to carry on with that, but I am interested in the next part of the Bill. Section 18 is on guidance. In my previous career, I looked at statutory guidance in the employment field. I am interested in the circumstances in which we would expect Welsh Ministers to issue statutory guidance and what type of guidance that would be. We have heard about alternatives already. Earlier, Simon Thomas was discussing potential enforcement disputes. Is that something you would expect to issue guidance on? In the consultation responses, some of the community councils said that they may want guidance to include model bye-laws. Is that something you would consider? Perhaps you would provide additional guidance on the subject of community consultation. Are these the sorts of things you have been looking at or do you have an alternative purpose that you see statutory guidance fulfilling?

[104] **Carl Sargeant:** We welcome the thoughts of community and town councils and their support for guidance. We are currently drafting guidance. We believe that we will be able to support them with models for the drafting of bye-laws so that they will be consistent across Wales. We will provide that. These are strange circumstances because, sometimes, people say that we get far too much guidance from the Government and, the week after, they are seeking more guidance. I hope that my team can offer the appropriate level of guidance for authorities seeking to create bye-laws. We are working on that already. As I mentioned, we will be issuing guidance on model bye-laws. Provision with regard to public consultation goes beyond bye-laws and the scope extends to the Local Government (Wales) Measure 2011 with regard to community engagement and so on. There is a raft of programmes on consultation and support, which I do not believe we will be shy of. However, if it is noted in evidence during the committee stages that we have missed something that would be beneficial to authorities, I am sure that my team can assist with that.

[105] **Vaughan Gething:** The issue of guidance is an important one. Although statutory guidance does not equate to being the law, it is certainly important with regard to how the law is created in this area and, potentially, how the law can be challenged and struck down if subject to review. Therefore, I guess that the follow-up question is why, given the importance of the guidance for the creation of bye-laws, you have chosen not to make the powers in the Bill to issue that guidance subject to any form of Assembly scrutiny. There is no provision for any procedure. You could decide after the Bill is passed to issue guidance as if you were issuing a written statement, and that would be that—statutory guidance with no opportunity for scrutiny or comment from backbench Members of the Assembly. I wonder why that power has been chosen, and whether you would indicate how you expect to issue guidance in the future.

3.15 p.m.

[106] **Carl Sargeant:** We are not trying to create something that has not been established before, in terms of the executive functions of Welsh Ministers in issuing guidance. That is not new; it is the usual practice. It is a duty of Government to provide such guidance and to create law. The element of scrutiny and debate around what that guidance could or should be, from an Assembly perspective, is interesting, and through this consultation period, I would be

interested to see how we could further engage Members in terms of some of the guidance that we may wish to issue. However, I would point to what I said earlier about this being custom and practice: the executive function of Ministers is, and has always been, to issue statutory guidance. If there is a broader, more inclusive way that Members are trying to impress upon me, I will see if there is an opportunity for that during this process of the bye-laws.

[107] **David Melding:** You could issue draft guidance, of course, and invite comment quite actively by sending it to the relevant committee.

[108] **Carl Sargeant:** I will certainly consider that, as well as consultation through the library, or something like that. It is certainly a different approach to the development of law and guidance than we have used in the past.

[109] **Vaughan Gething:** We are in a new era that is open and transparent. I am interested in moving forward and looking at what we have done in the past, and how you want to update the way in which bye-laws are made. It is this point about language, and where bye-laws come from. The way that your guidance limits interpretation is interesting, because there may be an opportunity to provide guidance on a range of concepts. The examples that we have are ‘good rule and government’ and ‘nuisance’. Of course, if you asked people what a ‘nuisance’ was, you would get a range of responses, and when you then tried to put that into legislation, and define what it meant in a bye-law, it is difficult. It is the same with ‘good rule and government’. I would imagine that, when those concepts were first introduced on to the statute book, they meant very different things to what people may expect today, and there may be differences in the balance between the state being active and having greater respect for the rights of individual citizens. Is there not an opportunity missed here to provide a more uniform explanation of where these archaic concepts come from, because they do not mean what most people think they mean? I say that having practised law for a number of years.

[110] **David Melding:** The law has kept two of these Members in employment, I think, not to mention our advisers.

[111] **Carl Sargeant:** You are going to have to stop all this, Chair. [*Laughter.*]

[112] I recognise the point that the Member makes in terms of ‘nuisance’, when drafted many years ago, being different to what may be considered a ‘nuisance’ now. I offer the argument that, in 10 or 15 years’ time, a ‘nuisance’ will be something different again. That is why we are not minded to be more definite about what ‘nuisance’ or ‘good rule’ means. You would of course be very aware, given your previous employment, that local authorities have always dealt with this appropriately in terms of what they understand. There are common definitions of ‘nuisance’ that are appropriate at the time. What I did not want to do is time-limit this Bill so that ‘nuisance’ is defined as what constitutes a nuisance now, but maybe not 15 years ago, or in five, 10, or 15 years’ time. This Bill would then become obsolete, because of different definitions. Local authorities are fully capable of dealing with definitions as found in the dictionary, which is open to everyone. We have never had to provide a definition for these under the 1972 Act, and I do not intend to provide a definition in this case.

[113] **Vaughan Gething:** If it is a matter of guidance—of trying to provide a consistent explanation and interpretation of what things are, as we discussed earlier—you could issue new guidance tomorrow, on a range of subjects. So, if you were minded to say, ‘Look, the way in which these definitions have been used needs to be refreshed’, you could do that with guidance.

[114] **Carl Sargeant:** Yes. Are you asking me to do that?

[115] **Vaughan Gething:** I am saying that there is an opportunity to look at how and where

you issue guidance on some of these definitions.

[116] **Carl Sargeant:** As you also recognise, the guidance element is not the Bill, and that is why I am saying that we do not want to tie the Bill down to definition when it may be more appropriate to deal with the issue that you raise through guidance. However, I do not believe that we are acting—

[117] **Vaughan Gething:** I think that it is about the scope for issuing guidance.

[118] **Carl Sargeant:** As I said earlier, we are looking for consistency in the guidance that we will issue to the authority seeking to create a bye-law, and we are looking for clarity, so that everyone who has the ability to create a bye-law fully understands that process. That could be part of the guidance, in terms of what the current definition is perceived to be. However, as you pointed out, the issue around ‘nuisance’ changes between years. I do not want this Bill to be outdated before it becomes an Act.

[119] **David Melding:** I am sure that we would give you every encouragement to use clear and accessible language. That is sometimes a challenge, but it is something that one should strive for. Members, do you have any other issues that you want to put to the Minister?

[120] **Simon Thomas:** I have an issue arising from some of Vaughan Gething’s questions. In looking at your power to issue statutory guidance in this matter, section 17 contains some interesting details on community support officers and others who might be empowered to levy the fines or the designated levies that arise from bye-laws. So, you might be looking at neighbourhood wardens, park keepers and so on. Is that an area on which you would issue statutory guidance, as it could be a contentious issue for members of the public—who is allowed to fine them for breaking a bye-law?

[121] **Carl Sargeant:** It is really important that the public knows who is able to issue fixed-penalty notices.

[122] **Simon Thomas:** It might vary from area to area.

[123] **Carl Sargeant:** Of course, and that is my point about consistency. I am already in discussion with chief constables in Wales, because there is quite a variance between what community support officers can and cannot do, particularly when there are cross-border issues—you could have a competent person being able to deliver a fixed-penalty notice in one area but, a couple of hundred yards away over the border, that is not the case. Therefore, I am trying to create a list of a group of individuals who can issue fixed-penalty notices, which is fully understood across Wales. So, subject to a bye-law with a fixed-penalty notice being created, those designated persons could issue the penalty. There would be no confusion about it. Rather than people saying, ‘You can tell me I can’t do this but you can’t issue me with a ticket’, these designated people could issue the ticket. That is about clarity, and it is something that I would seriously consider doing in statutory guidance.

[124] **David Melding:** That concludes the questions that we want to put to you, Minister. Is there anything that you want to bring to the committee’s attention, or have we covered all matters that we should be looking at in relation to this Bill?

[125] **Carl Sargeant:** I hope that I have been able to answer your questions effectively. My team and I have noted a few items of further information that may be useful in your deliberations. Chair, thank you for agreeing to postpone this discussion to this meeting; it was remiss of me not to mention that earlier. I thank the committee for the questions asked today. If there are any further issues on which you need clarification, please drop me or my officials a line, and we will be happy to respond.

[126] **David Melding:** Thank you for that. You have indicated a couple of items that you will be clarifying via correspondence, which we look forward to receiving. I advise you that a transcript of these proceedings will be sent to you for you to check for any inaccuracies that need to be corrected. That concludes our session. That was an extensive, candid and clear contribution, which has helped us in the work that we do in relation to the secondary legislative aspect of the proposed Bill. Thank you, Minister.

3.26 p.m.

**Offerynnau nad ydynt yn Cynnwys Unrhyw Faterion i'w Codi o Dan Reol
Sefydlog 21.2 neu 21.3**

Instruments that Raise no Reporting Issues Under Standing Order 21.2 or 21.3

[127] **David Melding:** We need to get back to the agenda, and jump back to the items that we left at the beginning. The negative resolution instruments are listed on the agenda. They all seem to be on the same subject. Gwyn will elaborate on why that is the case.

[128] **Mr Griffiths:** Mae hynny'n gywir. Maent i gyd yn ymwneud â Chyngor Addysgu Cyffredinol Cymru. Yr hyn sy'n ymddangos yn od yw bod angen pum offeryn i ddiwygio deddfwriaeth ar yr un pwnc. Mae rhai ohonynt yn Orchmynion a rhai yn rheoliadau—nid yw'n beth da i geisio'u huno. Wedi dweud hynny, byddai modd creu un Gorchymyn ac un set o reoliadau o ddiwygiadau amrywiol yn hytrach na gorfod gwneud pum offeryn. Fodd bynnag, mater i'r Llywodraeth yw hynny, a dyma'r ffordd y mae wedi dewis cyflwyno'r ddeddfwriaeth i ni.

Mr Griffiths: That is correct. They are all in relation to the General Teaching Council for Wales. It seems strange that five instruments are needed to amend legislation on one subject. Some are Orders and some are regulations—it does not do to combine them. Having said that, it would be possible to create one Order and one set of regulations of miscellaneous amendments rather than having to create five instruments. However, that is a matter for the Government, and this is how it has chosen to present the legislation to us.

[129] **David Melding:** That apposite comment will now rest on file and will be available to read in the Record of Proceedings of this committee. The Government is committed to clarifying the statute book and making it more succinct, and one way would be not to issue so many statutory instruments when they could combine many of them. Are there any further comments on that? I see that there are not.

3.28 p.m.

**Gohebiaeth y Pwyllgor
Committee Correspondence**

[130] **David Melding:** You will see that we have received correspondence from Christine Chapman in relation to the legislative consent motion on the welfare reform Bill; that has since been discussed in Plenary. Christine made a powerful speech, outlining some of the deficiencies—albeit relatively inadvertent—that impede the potential to fully scrutinise items. While that is relatively noncontroversial, at some point we will have an LCM that generates genuine political division, and it could be a matter of public controversy as well. So, the Government needs to be reminded of that. You will note that Christine, in her committee's report, commends this issue to us to be addressed in our report on how Ministers receive their powers. I think that I speak for everyone when I say that we fully intend to ensure that this whole issue is adequately dealt with.

[131] The Minister's response to this issue was interesting, as it indicated the Government's tendency to think that it can introduce a late LCM, after it has finished all its negotiations. It will have to look at that. The Government needs to be a bit more candid, early in the process, about what it wishes to achieve, and perhaps, to, almost, use the Assembly as part of the case to achieve it, and to have its intentions properly scrutinised. So, I thought that that was interesting. Are there any comments on that? I see that there are not.

3.30 p.m.

[132] The other item of correspondence was a helpful note from the Counsel General, Theodore Huckle, on their reasoning when choosing affirmative or negative procedures in relation to subordinate legislation. We should reply to say that we welcome this note, but that it could perhaps be taken a little further. We raised the issue of the superaffirmative procedure earlier, and that is something that is sometimes quite useful. So, again, a little more substance with regard to the methods used and the reasoning behind choosing the affirmative, negative or superaffirmative would be useful.

[133] So, we should draft a reply to thank him for his initial contribution to clarifying this area, but we could perhaps urge the Government to go further. We want to be as transparent as possible, and I do not think that the Government loses anything in this process. It will help everyone understand the processes of Government, which often get slightly misunderstood and cause needless controversy, which we want to avoid, and to have an efficient a system as possible. Do Members have any views on that?

[134] **Vaughan Gething:** The note is quite dense and helpful, but is not really something that you would expect members of the public to be reaching for.

[135] **David Melding:** It was written for us, I think.

[136] **Vaughan Gething:** It is one of the problem issues when dealing with the law—the desire for precision, from a lawyer's point of view, and the ability to communicate what you are trying to say. For example, you need to read the fifth point in the last paragraph more than once to understand what it means. It does make sense, but there is a point to be made about language and clarity. I do not think that Carl Sargeant would have written a note in this particular way.

[137] **David Melding:** Okay, we can make a broader point about the importance of having the systems made as clear as possible. His scope could have been a bit wider, although we are drawing him into quite a constructive relationship in terms of setting out how the Government operates.

[138] **Vaughan Gething:** The note is supposedly there to increase transparency, so it would help if the language were more transparent. If you do not make the point early, then at some point you may get something else that is more important or more controversial that has been drawn in a way so as to confuse.

[139] **David Melding:** Point taken.

3.32 p.m.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[140] **David Melding:** The date of the next meeting is 20 February, given that it is the half

term recess next week. There is a paper to note, which is the report of the meeting that we held on 23 January.

Cynnig Gweithrefnol
Procedural Motion

[141] **David Melding:** I now resolve to meet in private to consider the evidence that we heard from the Minister. I therefore move that

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

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

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 3.33 p.m.
The public part of the meeting ended at 3.33 p.m.