



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

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

Dydd Llun, 26 Ionawr 2015
Monday, 26 January 2015

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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd.

The proceedings are reported in the language in which they were spoken in the committee. In addition, a transcription of the simultaneous interpretation is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Alun Davies	Llafur Labour
Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
William Powell	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Simon Thomas	Plaid Cymru The Party of Wales

Eraill yn bresennol
Others in attendance

Siwan Daniel	Cyfreithiwr, Tim Addysg (Ysgolion) a'r Gymraeg, Llywodraeth Cymru Lawyer, Education (Schools) and Welsh Language Team , Welsh Government
Huw Lewis	Aelod Cynulliad, Llafur (y Gweinidog Addysg a Sgiliau) Assembly Member, Labour (the Minister for Education and Skills)
Catherine Lloyd	Cyfreithiwr, Tim Addysg (Ysgolion) a'r Gymraeg, Llywodraeth Cymru Lawyer, Education (Schools) and Welsh Language Team, Welsh Government
Cassy Taylor	Pennaeth Cangen Sefydlu Cymwysterau Cymru, Llywodraeth Cymru Head of Qualifications Wales Transition Branch, Welsh Government

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Stephen Davies	Cynghorydd Cyfreithiol Legal Adviser
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Ruth Hatton	Dirprwy Glerc Deputy Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 13:29.
The meeting began at 13:29.

**Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
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 just start with the usual housekeeping announcements. We do not expect a routine fire drill, so if we hear the alarm, please follow the instructions of the ushers, who will help us leave the building safely. Switch all mobile devices to silent, please. These proceedings will be conducted in Welsh and English. When Welsh spoken, there is a translation on channel 1. Should you require amplification of our proceedings, then you can have that on channel 0.

13:30

**Tystiolaeth mewn perthynas â Bil Cymwysterau Cymru
Evidence in relation to the Qualifications Wales Bill**

[2] **David Melding:** Item 2, then, is evidence in relation to the Qualifications Wales Bill. I'm delighted to welcome Huw Lewis, Minister for Education and Skills, and the Minister in charge. Minister, do you want to introduce your team?

[3] **The Minister for Education and Skills (Huw Lewis):** Thank you, Chair, yes. I'm joined by Catherine Lloyd, one of our legal team; Cassy Taylor, who's head of transition, in terms of the move towards Qualifications Wales; and Siwan Daniel, who is another member of our legal team.

[4] **David Melding:** Well, welcome to you all, and I'll ask Suzy Davies to start our questioning.

[5] **Suzy Davies:** Thank you, Chair. Afternoon, all.

[6] **Huw Lewis:** Afternoon.

[7] **Suzy Davies:** Just an easy one to start with: can you tell us whether you are 100% certain that this Bill falls within the competence of the Assembly?

[8] **Huw Lewis:** I'm very confident, yes, that this is within competence. We've received no comment or correspondence of any kind, and that includes the UK Department for Education at Whitehall, that has questioned competence in any way.

[9] **Suzy Davies:** Thank you. It's quite a detailed Bill. I'm just wondering whether you could explain why you think legislation is the best way of achieving the aims of this Bill, particularly as there are, strangely, quite few secondary regulation-making powers.

[10] **Huw Lewis:** Well, yes. Essentially, the Bill is about, I suppose, the Ministers divesting themselves of powers and, of course, the transition to an independent body with oversight of qualifications in Wales. I think everyone, or all commentators whom we've spoken to, is agreed that the present situation is less than adequate, that we have, essentially, political oversight of a qualifications system, which is not ideal, and that therein lies the critical need for the legislation. The legislation also opens up, of course, the opportunity to simplify and streamline the system, and get rid of ambiguities, for instance in terms of cross-border issues, to pursue opportunities around quality, and to combat proliferation, of course, which has been accepted, I think, as a problem, by most people for really quite a long time, now.

[11] **Suzy Davies:** And legislation is needed to divest yourself of those powers, and with existing legislation, you couldn't do that.

[12] **Huw Lewis:** No, we need primary legislation, really. The current legislation, Cassy, is—?

[13] **Ms Taylor:** The Education Act 1997.

[14] **Huw Lewis:** The Education Act 1997. It's under my pillow. [*Laughter.*] Of course, we would need, in terms of this shift, to make primary legislation to ensure that the powers were transferred.

[15] **Suzy Davies:** Thank you.

[16] **David Melding:** Simon.

[17] **Simon Thomas:** Diolch, Gadeirydd. Fel sydd newydd gael ei grybwyll, nid oes llawer o bwerau fan hyn i wneud rheoliadau yn y Bil, ond un o'r achosion hynny yw cymal 21, lle mae'r pŵer i bennu gofynion statudol. Roeddwn i'n tybied, yng nghydestun yr hyn rŷch chi newydd ei ddweud wrth Suzy Davies—fod y Bil yma yn ymwneud â'r Gweinidog yn gollwng pwerau—pam ŷch chi wedi cadw hwn, felly, y tu mewn i'r Bil, sef yr hawl yma i bennu gofynion sylfaenol? **Simon Thomas:** Thank you, Chair. As has just been mentioned, there aren't many powers here in the Bill to make regulations, but one of those occasions is clause 21, where there is a power to specify statutory requirements. In the context of what you've just told Suzy Davies—that this Bill relates to the Minister divesting himself of powers—I was wondering why you have retained this within the Bill, namely this right to specify minimum requirements.

[18] **Huw Lewis:** Well, at heart, it's a simple reason. Although Ministers would divest themselves of responsibility for the regulation of qualifications, we would still retain responsibility for the curriculum. So, in terms of that, we would need this power to specify minimum requirements in order to have that fallback position, in that, for instance, it may be felt by the Welsh Government or the Welsh Assembly as a whole that certain things were necessary in terms of their need to be examined upon, and that we could not have awarding bodies running around, essentially completely ignoring the Welsh curriculum. Of course, Members will be aware that we are moving towards a distinctive Welsh curriculum over the next few years, although even if we weren't, there would be a necessity for this sort of fallback position. An example, actually, that Cassy has used to illustrate this has been the history curriculum, perhaps, with an awarding body that's ignoring Welsh elements to a history curriculum. Now, that, at the moment, would probably be possible, but we need this fallback position with these minimum requirements to ensure that we do have the ability to ensure that young people are examined upon the proper content of the curriculum.

[19] **Simon Thomas:** Rwy'n deall y pwynt rŷch chi'n ei wneud, ond mewn cydestun lle y bydd Cymwysterau Cymru wedi'i sefydlu fel rheoleiddiwr annibynnol, bydd yn dal Weinidogion Cymru gyda chi, ac wrth gwrs, rŷch chi'n sôn am y bwrdd arholi, ac mae yna fwy nag un o'r rheini hefyd. Onid oes modd gwneud hynny drwy gyd-drafod a chytuno? Pam ydych chi'n teimlo bod rhaid cael y grym yma yn y Bil? Pa mor aml, felly, a fyddech chi'n tybio y byddech chi am **Simon Thomas:** I understand the point that you make, but in a context where Qualifications Wales has been established as an independent regulator, the Welsh Ministers will still be in place, and of course you mention the examining board, but there is more than one of those. Isn't there a means of doing that through negotiation and agreement? Why do you feel that this power needs to be within the Bill? How often do you anticipate that you would want to use

ddefnyddio'r grym yma?

these powers?

[20] **Huw Lewis:** I'd remind Members that these regulations will be subject to the affirmative procedure, so there would be Assembly oversight of this. So, any kind of potential abuse of those powers, I think, is mitigated against. It's also worth bearing in mind that, currently, we have a qualifications landscape that is, frankly—I was going to say 'multifaceted'; it is enormous. There's a very complex qualifications landscape, and that's actually one of the problems at the moment. So, my feeling would be that, although we would hope to resolve any problem by close co-operation and co-working, it may be that a qualification could end up being offered in an institution somewhere where the awarding body, perhaps, was unaware or unwilling to take on board the necessary distinctiveness of a Welsh qualification based on a Welsh curriculum.

[21] **Simon Thomas:** I assume that you have the power at the moment within the various Acts, or whatever, to do this. What I'm just trying to get to is why you've not decided to divest this power also to an independent regulator, because presumably they could also act in this way if the power were divested to them. So, I'm just trying to understand why you've retained this power.

[22] **Huw Lewis:** Because there has to be a democratic input into this. I mean, this is one area, in my view, where you still need political input since, as I say, the curriculum and its contents are not going to be down to Qualifications Wales. That's a matter for public debate, and that is therefore a matter for publicly elected representatives.

[23] **David Melding:** Alun.

[24] **Alun Davies:** I'm very content with the position the Minister's taken on all of these, in terms of the position on secondary powers and the way in which secondary powers may be exercised. I will ask you, if I could, Minister, just a single question: how do you anticipate exercising your powers in Part 6 of the legislation, in section 33(3), 'Power to impose monetary penalties'? I'd be grateful for a note on those, but otherwise I'm generally very content with this.

[25] **Huw Lewis:** That's good to hear, Chair.

[26] **David Melding:** The rest of them might not be. You'll have to wait and see. *[Laughter.]*

[27] **Huw Lewis:** Yes, but Alun's by far the most important. At least that's what he tells me, Chair. *[Laughter.]*

[28] These powers in terms of monetary penalties already exist. They are pretty much transferred in terms of their essence and their scope from the English situation. So, in other words, Ofqual in England and Welsh Ministers in Wales—the powers are pretty much the same. They relate to about 10%—is it 10% of turnover, or income?—of a potential awarding body.

[29] **Ms Taylor:** Turnover.

[30] **Huw Lewis:** Turnover. That's quite far-reaching stuff, and we feel that, particularly in terms of the relative sizes of the Welsh exams market and the English exams market, it would be unreasonable, potentially, for Qualifications Wales to exact penalties of up to 10% of, say—well, I don't want to name an organisation, but, you know—an organisation that had 95% of its business happening across the border. This is a matter for some consideration and debate, I think. I'm not coming forward as yet with proposals about the scope and scale of

this, but it does seem that the situation that pertains at the moment could be construed as unreasonable.

[31] **Alun Davies:** Okay. I'm content.

[32] **Huw Lewis:** And we will consult on this, of course.

[33] **Suzy Davies:** Can I come in there?

[34] **David Melding:** Yes, you may.

[35] **Suzy Davies:** I just wondered whether there might be a potential competence problem on this particular point, because, as you said, some of these awarding bodies operate cross-border, and, in fact, their primary locus and work might be across the border, as well. Presumably, any power under this couldn't really stretch as far as the turnover that related to their activities over the border. It could only be their turnover within Wales, couldn't it?

[36] **Huw Lewis:** Well, I mean, we'll need to establish exactly what the scope of this needs to be. I'm not pretending that I've got the full and final answer to this question. Qualifications Wales, of course, will be overseeing qualifications that are delivered in Wales, and they'll be licensing those, if you like. So, the point you make may well be a reasonable one, but I wouldn't like to pre-empt any consultation that we need to undertake.

[37] We do have to remember, as well, that the awarding bodies do work in the opposite direction, and the WJEC delivers in England and elsewhere, and we have to make sure that we cover all the eventualities. Cassy, did you want to make another point on that?

[38] **Ms Taylor:** No. I think Siwan might.

[39] **Ms Daniel:** It's just a matter that we would take into consideration, and, as the Minister said, we need to think about and determine the scope of any penalty.

[40] **David Melding:** William.

[41] **William Powell:** Diolch, Gadeirydd. Good afternoon, Minister. Members are certainly going to be reassured in terms of the powers of affirmative procedure over the wider regulation, but when it comes to the commencement order, the text reads,

[42] 'Commencement Orders do not change policy, they simply allow the policy in the Bill to be given effect'.

[43] That's the reason for there being no scrutiny procedure in terms of the commencement order. I wonder whether you could expand upon that to give Members a fuller understanding of why that's the case.

[44] **Huw Lewis:** I suppose it's just a question of the administrative, practical consequences of shifting from one regime to another. Section 55 talks about Ministers having the power to commence sections of the Bill, and that is not necessarily a question of simply signing a simple, single piece of paper. It's quite a complex matter and would require some flexibility in terms of how we carry that through. William, am I not hitting the point of your question?

[45] **William Powell:** No, no—

[46] **Huw Lewis:** You looked very quizzically at me, then. [*Laughter.*]

[47] It's about minimising disruption to learners, also, making sure that the transition is a smooth one, that we get this right and that there aren't delays, that things are done in a timely fashion.

[48] **William Powell:** Okay.

[49] **David Melding:** Suzy?

[50] **Suzy Davies:** Yes. Section 54 allows the affirmative procedure to be used whenever primary legislation is likely to be amended with these consequential and transitional provisions. Bearing in mind that the Bill, at the moment, provides for so few secondary legislation powers, which is, you know, from one extreme to the other in some respects, do you think it is likely that you might use these powers a little more frequently than perhaps might be envisaged, in order to amend the primary legislation as time goes on? During the course of scrutiny, you might be adding amendments to the Bill to give yourself more powers? Sorry, to give the Welsh Ministers more powers.

[51] **Huw Lewis:** It's conceivable, although the safeguard is there that the affirmative procedure would be necessary, I think I'm right in saying. So, that safeguard is there, with that higher level of scrutiny, yes.

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

[53] **David Melding:** Do we have any further questions? Simon.

13:45

[54] **Simon Thomas:** Yes, one detailed one and one general one, if I may. Just following on from Suzy's point there about any further provisions, do you believe that this Bill could be used to deliver your stated policy intention of this body becoming an examining body as well, or do you think that's another piece of legislation?

[55] **Huw Lewis:** I think that would be another piece of legislation. I mean, we would be dealing there with a much more medium to long term issue, which would impact on all sorts of other areas of law really. Essentially, this Bill, stripped down to its simple essentials, takes my powers and transfers them to another organisation. In terms of awarding powers, that's a whole different kettle of fish, and we would—. I've made no secret of the fact that I do envisage, over time, a Scottish-style solution to issues around the Welsh system being sufficiently robust to service a very distinctive curriculum, and not relying on a market that, frankly, is very much biased in terms of volume of business towards England and away from Wales. We will need to make sure that there is an absolutely bullet-proof system in Wales that can't be destabilised by, for instance, the collapse of an awarding body or some kind of withdrawal on the part of a private enterprise, which is, essentially, what they are. Sorry, I'm wandering a little bit, but, clearly, that's going further than simply transferring powers from Ministers to elsewhere.

[56] **Simon Thomas:** Okay. That's clear and that's what I was looking for, that assurance, in a sense, that the powers were not being used to go in that direction. As a final, general question, from me anyway, I just note that this is the fourth Bill that I think that you've brought to the Assembly, which is one a year, which is pretty good going so far. And you've got another one, so you'll have five—you will have one a year. This Bill, however, as has already been noted, is another progression: it seems to me that much more is stated on the face of the Bill. It's very clear and it is possible to understand what's going on when you read the Bill, which isn't always the case. The regulatory powers, which are secondary powers, are

clearly set out and they have justification, it strikes me, to be done by regulations, and there's affirmative procedure to make sure that there's proper scrutiny of them. So, do you think this is your best Bill to date? *[Laughter.]*

[57] **Huw Lewis:** I'm trying to find a hidden agenda, Chair, within this question. *[Laughter.]*

[58] **David Melding:** In a complimentary question—*[Inaudible.]*

[59] **Huw Lewis:** Didn't Lyndon Johnson have something to say about complimentary questions? It's probably far too adult to repeat here.

[60] I'm glad; I'm really genuinely glad, that that is the impression gained because I think there's substance behind it. I think everyone learns as they progress, and I hope, in terms of the Welsh Government, that we are accommodating ourselves to the voice of the Assembly, which is a positive shift. I wouldn't like to rate this Bill alongside any other, however.

[61] **Simon Thomas:** I'll say that I think this is your best Bill.

[62] **David Melding:** We'll write in our report, but there we are, that's up to us.

[63] **Alun Davies:** I think we should—*[Inaudible.]*

[64] **David Melding:** Do we have any other questions or are we content? It's a short session because you haven't quite made us redundant, but obviously the structure of this Bill is not typical in our experience. But, is there anything else you want to add?

[65] **Huw Lewis:** No, except that, of course, Chair, if any further information, or follow-up questions arise from your deliberations, we're more than happy to—.

[66] **David Melding:** And we appreciate your co-operation and thank you for your attendance this afternoon.

[67] **Huw Lewis:** Thank you.

13:49

Offerynnau nad ydynt yn cynnwys Materion i gyflwyno Adroddiad arnynt o dan Reol Sefydlog 21.2 na 21.3

Instruments that raise no Reporting Issues under Standing Order 21.2 or 21.3

[68] **David Melding:** Item 3 is on instruments that raise no reporting issues. There is one and it is listed there. Are we content?

[69] **Simon Thomas:** A gaf jest ofyn ar hwn ai dyma'r un sy'n dod gerbron y Cynulliad yr wythnos hon? Mae yna drafodaeth, rwy'n meddwl, onid oes? Nid oeddwn wedi sylweddoli beth oedd y—. Mae rhywbeth ynglŷn â'r—. Mae yna ddatl yfory, rwy'n meddwl, onid oes, neu ymhen wythnos, ar yr *education workforce council* yma? Océ, wel dyna fe 'te.

Simon Thomas: Could I just ask about this whether this is the one that is coming before the Assembly this week? I think there's a debate this week, isn't there? But I didn't realise what—. There's something on regarding the—. There's a debate tomorrow, isn't there, I think, or within a week, on this education workforce council? Okay, well, there we are then.

[70] **Suzy Davies:** Yr wythnos wedyn, **Suzy Davies:** Maybe next week. efallai.

[71] **Simon Thomas:** Yr wythnos wedyn, **Simon Thomas:** Maybe next week, yes. efallai, ie.

[72] **David Melding:** We'll check.

[73] **Simon Thomas:** Diolch. **Simon Thomas:** Thank you.

[74] **David Melding:** If we are content then, we can move on.

15:50

Offerynnau sy'n cynnwys Materion i gyflwyno Adroddiad arnynt i'r Cynulliad o dan Reol Sefydlog 21.2 neu 21.3

Instruments that Raise Issues to be Reported to the Assembly under Standing Order 21.2 or 21.3

[75] **David Melding:** Item 4 is on instruments that do raise reporting issues, and there is one.

[76] **Mr Davies:** Yes, the Education Workforce Council (Additional Functions and Revocation) (Wales) Order 2015. This is one Order that is part of a suite of regulations that they are using at the moment to set up the education workforce council, in line with the provisions of the Education (Wales) Act 2014. There's nothing wrong with the Order itself, but, amongst other things, it does revoke the General Teaching Council for Wales (Additional Functions) Order 2000. This imposed functions on the GTCW in relation to the maintenance of records.

[77] Now, the replacement duties on the new education workforce council don't come in until a further regulation has been passed—the education workforce council (main functions) (Wales) regulations. It's anticipated that these will come in on 1 April this year, but there's no guarantee of that. The point I raised with the Welsh Government is that, if it doesn't come in on time, there'll be a gap in legal duties on that body to maintain records in a proper way. However, on discussion with the lawyers, they've since sent down a draft set of regulations, so it does look as if those will come in on time on 1 April, on the same date as the old regulations are being revoked, so there shouldn't be a problem. But, I thought it was worth highlighting that potential for a problem to the committee. The Government have responded, and they're also confident that those regulations will be in place, and will be passed at that time.

[78] **Suzy Davies:** Are they negative or affirmative? They will still have to come to us before Easter, then.

[79] **Mr Davies:** I think they're affirmative, and it's anticipated that they're going to come down next week, or even this week—sorry, this week.

[80] **Suzy Davies:** Oh, right.

[81] **Simon Thomas:** Wel, rwyf newydd tsiecio fy nodiadau; rwy'n meddwl mai'r wythnos nesaf rydym yn cael dadl ar y ddwy set sydd gerbron fan hyn—y rhai ynglŷn â **Simon Thomas:** Well, I've just checked my notes; I think that next week we're having a debate on the two sets that are before us now—those on fees, and those on the

ffioedd, a'r rhai ynglŷn â'r swyddogaethau— functions—and, therefore, we could ask the Minister some of the questions, just to check ac wedyn bydd modd gofyn i'r Gweinidog rai o'r cwestiynau yma, jest i tsiecio bod popeth everything is co-ordinated. yn cydlynu â'i gilydd.

[82] **Mr Davies:** Wrth tsiecio'r rheoliadau mewn drafft, nid oedd unrhyw bwyntiau'n codi lle roedd rheoliadau eraill. **Mr Davies:** In checking the draft regulations, there were no points arising in terms of other regulations.

[83] **Suzy Davies:** Wel, dyna rybudd 'te. **Suzy Davies:** Well, there's a warning, then.

[84] **David Melding:** Okay. Are we content? We are. Thank you.

15:53

Papurau i'w Nodi Papers to Note

[85] **David Melding:** Item 5—papers to note. We have a letter from David Rees, Chair of the Health and Social Care Committee, which includes a report that his committee has conducted on post-legislative scrutiny of the Mental Health (Wales) Measure 2010. It's there for us to note, but I think it's a most commendable piece of work, and it will be useful for us, perhaps, in evidence in our inquiry into the quality of law making in the fourth Assembly.

[86] **Suzy Davies:** Good practice as well.

[87] **David Melding:** So, shall I reply in kind, basically, saying that we were very pleased to note it? As I said, it does strike me as a very thorough piece of work.

[88] Other papers: a legal advice note on the Localism Act 2011, which I believe Members requested at the last meeting.

[89] **Simon Thomas:** Can I just thank you for that, because it was interesting to see that set out?

[90] **David Melding:** It's quite a long list. Okay?

15:54

Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod

Motion under Standing Order 17.42 to Resolve to Exclude the Public from the Meeting

[91] **David Melding:** I'd now like to move the relevant Standing Order that we conduct the rest of our proceedings in private, unless any Member objects.

Cynnig:

Motion:

y pwyllgor yn penderfynu gwahardd y cyhoedd o weddill y cyfarfod yn unol â Rheol Sefydlog 17.42(vi). *the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(vi).*

Cynigiwyd y cynnig.

Motion moved.

[92] **David Melding:** I don't see any Member objecting, so we will now meet in private. Please switch off the broadcasting equipment and clear the public gallery.

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 13:54.

The public part of the meeting ended at 13:54.