



Cynulliad Cenedlaethol Cymru The National Assembly for Wales

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

**Dydd Llun, 7 Tachwedd 2011
Monday, 7 November 2011**

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Procedural Motion

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
Mark Drakeford	Llafur Labour
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
Eluned Parrott	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Simon Thomas	Plaid Cymru The Party of Wales

Eraill yn bresennol

Others in attendance

Richard Parry	Darllenydd mewn Polisi Cymdeithasol, Ysgol y Gwyddorau Cymdeithasol a Gwleidyddol, Prifysgol Caeredin Reader in Social Policy, School of Social and Political Science, University of Edinburgh
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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
Alys Thomas	Y Gwasanaeth Ymchwil The Research Service

*Dechreuodd y cyfarfod am 2.31 p.m.
The meeting began at 2.31 p.m.*

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

[1] **David Melding:** Good afternoon and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I will make the usual housekeeping announcements. We do not anticipate a routine fire drill this afternoon, so if you hear the alarm, please follow the instructions of the ushers, who will help us to leave the building safely. The proceedings will be conducted in Welsh and English. When Welsh is spoken, interpretation is available on channel 1 and, for anyone who is hard of hearing, headsets can also be used to amplify the sound on channel 0. Please switch off all mobile phones and electronic equipment completely, as they interfere with the broadcasting system.

2.32 p.m.

Offerynnau nad ydynt yn cynnwys Unrhyw Faterion i'w Codi o dan Reol Sefydlog Rhif 21.2 neu 21.3 ac Offerynnau sy'n cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reol Sefydlog Rhif 21.2 neu 21.3
Instruments that Raise no Reporting Issues under Standing Order Nos. 21.2 or 21.3 and Instruments that Raise Issues to be Reported to the Assembly under Standing Order Nos. 21.2 or 21.3

[2] **David Melding:** We will take items 2 and 3 together, because we do not have any resolutions to examine that either do or do not require reporting.

[3] I should have noted in my welcoming remarks that Mark Drakeford is substituting for Julie James. As Mark has done this before, he is almost an honorary member of the committee. [*Laughter.*] That is why I overlooked him; it was not due to any sense of not wanting to welcome him.

[4] Are Members content that there is nothing to report with regard to items 2 and 3? I see that you are.

Gohebiaeth y Pwyllgor
Committee Correspondence

[5] **David Melding:** The first item of correspondence is on CLA43, the Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011. That exchange seems to have come to its natural end.

[6] The next item is CLA31, the National Curriculum (Assessment Arrangements on Entry to the Foundation Phase) (Wales) Order 2011, and it raises a more difficult question of an unusual power, with regard to its legislative impact anyway, of a Government Minister being able to notify on the website his intention to bring in a certain Order. You will note that the Minister for Education and Skills has declined our invitation to inform us when this is done, and takes the view that, as it is going to be publicly available on the Government's website, there is no particular need for us to be informed specifically. He also points out that he would not use this power without consulting on it first and again he thinks that that means that there is no particular need to write to us.

[7] However, I have some misgivings about things just being promulgated on the Government's website. This is the legislature, and it seems that this is a remarkable power. That does not mean that it is wrong in any way, but it is unusual to, in effect, be able to pass law in this way, by notification, and so it seems to me that its potential use or actual use ought to be a matter for scrutiny. So, my view is that the committee should agree that I write to the Minister to invite him to reconsider. If not, we might want to take it up with the First Minister when he gives evidence next month. It is such an unusual power that it merits going the extra mile, in terms of notifying us of it. I am told by our officials that it is possible, given the amount of consultation that is going on, and the fact that we do not routinely sweep through all of the Government website, that this could be overlooked, or could pass without us noticing. So, Members will perhaps feel it appropriate to ask the Minister to have a rethink. We will draft the letter very diplomatically so that the Minister realises what our concerns are, and that we are not just trying to be awkward. Are Members content with that, or do some Members feel that that is being too fastidious? I see that Members are content with that. So, we will send him another letter and that exchange will go on.

[8] Another long-running issue is the question of Welsh-language versions of statutory instruments made jointly by UK Ministers and Ministers here. In fairness to the First Minister, he is quite sympathetic. However, you will see from the exchange of information that he feels, ultimately, if Westminster has this convention that it operates only through the medium of English, we cannot insist on these instruments being issued bilingually if they have effect in Wales. I am advised by the secretariat that it is possible for us to explore this with officials in Westminster to see whether this is as set as it seems to be, and whether there may be a way of finding a practical solution. So, rather than extend the correspondence, we could note that this is what the First Minister has been advised at this stage. I do not think that we have any reason to question that, but it might be worth us, legislature to legislature, seeing whether we can push things on a bit. As the First Minister said, ideally, they should be issued in Welsh. So, that may be an appropriate way forward.

[9] **Simon Thomas:** I ategu hynny, mae'n werth ystyried y posibilrwydd. Yn sicr, rhaid i unrhyw beth sy'n mynd drwy'r Senedd yn San Steffan fod yn Saesneg—nid oes amheuaeth am hynny. Fodd bynnag, os oes rhywbeth yn ddwyieithog, nid wyf yn gweld bod unrhyw beth yn y Rheolau Sefydlog yno a all atal ystyried is-ddeddfwriaeth ddwyieithog. Nid oes unrhyw beth ar bapur; arfer ydyw. Pe bai rhywbeth yn ddwyieithog, gyda'r Saesneg a'r Gymraeg gyda'i gilydd, nid wyf yn gweld unrhyw reswm pam na ddylai Tŷ'r Cyffredin ei ystyried. Felly, mae'n werth inni edrych ar hynny. Er bod llawer o'r pethau yma'n dechnegol, efallai daw rhywbeth mwy pwysig yn y dyfodol, pan fyddwn yn teimlo'n gryfach fod ei angen yn Gymraeg hefyd.

Simon Thomas: To endorse that, it would be worth exploring the possibility. Certainly, everything that goes through the Parliament in Westminster has to be in English—there is no doubt about that. However, if something is bilingual, I do not see anything in the Standing Orders there that would prevent bilingual subordinate legislation from being considered. There is nothing written down; it is the practice. If something were bilingual, with English and Welsh together, I do not see any reason why the House of Commons could not consider it. Therefore, it is worth us exploring that. Although many of these things are technical, something more important might arise in future, when we would feel more strongly that it is also required in Welsh.

[10] **David Melding:** Are Members content with that? I see that you are. That deals with all the items of correspondence.

2.38 p.m.

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

[11] **David Melding:** This is the fifth oral evidence session that we are taking. I am delighted to welcome Mr Richard Parry, who is reader in social policy at the school of social and political science at the University of Edinburgh. We are very grateful to you for travelling to Cardiff on this Monday afternoon.

[12] **Mr Parry:** It was an easy journey.

[13] **David Melding:** It is still a kindness to make the journey and to help us with our inquiry. I think that you are experienced at giving evidence to various parliamentary committees, and we operate in a fairly standard way. We have a range of subjects that we want to examine, and questions that we want to cover. Members will put these to you and

some Members may pursue supplementary questions as is appropriate. We are grateful to you for your written evidence, on which much of our questions will be based.

[14] I will start with a general question. It is fair to say that we are quite interested in how Scotland deals with some of the challenges that we have before us, in terms of how Ministers acquire their powers, and in identifying best practice in Scotland; if we are not following it, it is a timely lesson, but there may be some instances where what we think is a concern has turned out not to be such a problem in Scotland and we should not be overanxious. So, we are grateful to you for the knowledge that you are going to provide on practice in Scotland. You say that, in the Scottish Parliament, the use of legislative consent motions has usually been restricted to smaller consequential matters. Is it your general view that, if they are restricted to such things, they are fairly unproblematic, and that where we have difficulties is where they become more substantial, and then how they are scrutinised in detail becomes a much more telling question?

[15] **Mr Parry:** Yes, indeed. There is a difference between action and reaction on this. There has been action in certain cases where the decision of the Scottish Parliament has been that it would work through the UK Parliament and UK Bill on things that it wanted to do. These issues are not easy. However, on the whole, it is a matter of reaction to a Bill presented in the UK Parliament. All the Bills are looked at, and if there is anything in those Bills that is to do with either the legislative competence of the Scottish Parliament or—and this is the important thing—the executive competence of Scottish Ministers, that is within the legislative consent ambit, as it were, once it is in there, it is all done with the consent of the Parliament. That is the key thing.

[16] **David Melding:** I think that we are going to follow up some of these issues to do with the executive and legislative powers and how they are acquired. Suzy Davies is first.

[17] **Suzy Davies:** Yes, that is exactly where I would like to start, if that is okay. When you mentioned the Public Bodies Bill in your paper, you suggested that it might be something of a perception that the UK Parliament is granting powers directly to Welsh Ministers and implicitly bypassing the Assembly. However, turning to the Welfare Reform Bill, we have a classic case of the way that this affects the Assembly in that it is the consent of Welsh Ministers that is sought, whereas, in Scotland, it is the consent of the Scottish Parliament that is sought. Can you see there being a problem there?

[18] **Mr Parry:** This is an interesting change. I believe that this was altered because the Scottish Government asked for it to be altered. In evidence to the Scottish Parliament Finance Committee in March this year, John Swinney, the Cabinet Secretary for Finance, Employment and Sustainable Growth in Scotland, said that he asked for this change and that the original draft was going to be along the same lines for Scotland as in Wales. He said that he asked for the change that any action would be taken by the Scottish Parliament. That is a very interesting illustration of the way that this legislative consent process works. It is to do with the integrity of Scottish devolution as a whole. That is the reason why it was asked for. Whether it will make any difference, we will see, although I think that the whole of the action on the Welfare Reform Bill at present in the Scottish Parliament is interesting because this is a big Bill and it will make big changes. For example, it involves the abolition of council tax benefit, which, in England, is being transferred to local authorities, but, in the devolved system, is being transferred to Scotland and to Wales. In turn, they will decide whether it is done by local authorities or any other means. There has been action on this in the Scottish Parliament. It will be looked at by the Health and Sport Committee. There have already been two legislative consent memoranda on it, but there has not been a motion tabled so far by the Scottish Government. It has issued two rather long memoranda on this. So, there is a lot of action on this and a great deal of interest in it as well.

[19] **Suzy Davies:** So would you say that there is scope for the Assembly to ask for something very similar?

[20] **Mr Parry:** I think that it is about the reasons why it would be asked for, because there will have to be Order-making powers under this Bill. There is certainly an interaction between all these changes in the Welfare Reform Bill and services and functions that are devolved. So, in the end, it will be in the form of action taken by Ministers. However, I suspect that it is more of a symbolic thing than anything else.

2.45 p.m.

[21] **Suzy Davies:** You mentioned the Scottish Bill earlier. In your submission to us, you also mentioned that you thought that it was rather controversial. Is it in this particular area that you think that it is at its most controversial?

[22] **Mr Parry:** Which Bill were you referring to? Do you mean the Public Services Reform Act Scotland 2010?

[23] **Suzy Davies:** The Scotland Bill itself.

[24] **Mr Parry:** The one that is passing through. Indeed. This is the extra bit of devolution, first of all. This was the result of the Calman commission. It is the anti-SNP version of further devolution, with Labour, Conservative and Liberal Democrats on this. It was a fairly anti-devolution commission in some ways, because it threw things at Scotland and said that it had looked at all of the areas where devolution could be extended and that there were all sorts of good reasons why it was not good to extend devolution. The big thing under this Bill is the aim of reducing the block grant, thereby forcing the Scottish Parliament to activate its income tax powers, which have been there since devolution but without ever having been used. They will, of course, need to be used when this Bill becomes an Act.

[25] So, this has been highly controversial, and it is being looked at by a committee of the Scottish Parliament. It has a committee set up just for the purpose of examining this Bill. It looked at it at the end of the last Parliament, when the committee was chaired by Labour, by Wendy Alexander, the former leader of the Labour Party in Scotland, who made political hay on it, I think you could say. This committee is under SNP convenership following the election, and it is looking at it again. What will happen in the end with this Bill is that the Scottish Government will have to decide whether it is interested in what is on offer from Westminster or whether it is going to reject the whole thing. In the end, I think that everybody believes that it will accept it. However, there is all sorts of traffic on this. All sorts of questions are being asked and all sorts of clarifications are being demanded. The interesting thing is the richness of the action on this. All sorts of evidence is being taken and all sorts of hot politics are being used as well.

[26] **Suzy Davies:** Of course, and the hot politics element of it that I am specifically interested in is the consent element and who does the consenting—whether it is Ministers or Parliament. To bring it back to the Assembly, we have a different situation in Wales to that in Scotland. The National Assembly can give consent on only those matters that relate to the areas of policy on which we can legislate here. In Scotland, it is not quite the same. Ministers can be granted Executive powers outside those areas. Do you think that that is a reasonable state of affairs, or should the Scottish Parliament be commenting on that?

[27] **Mr Parry:** In the end, it will be able to do that through the legislative consent motion, because, ultimately, everything will be in there—whether it is legislative or executive.

[28] **Suzy Davies:** Yes, they can do that in Scotland, but we cannot do that in Wales at the moment. I am talking about areas where consideration is being given to granting Ministers powers outside our normal areas of legislature.

[29] **Mr Parry:** Absolutely. If you look at the wording of the Standing Orders of the Parliament you can see what the difference is. They are very broad in Scotland, which means that everything is certainly looked at. They are not broad in Wales. There seem to be two tracks on this. The first one brings in the Assembly in the usual way and then there is the track that is activated and used by Ministers only. I think that the Scottish system is preferable.

[30] **David Melding:** Am I right in assuming that, in a way, the Scotland Bill is so exceptional that it probably does not have wider lessons for us with regard to the use of legislative consent motions? In effect, the legislative consent motion on the Scotland Bill would come after the Bill had completed its stages, rather than at the beginning when you almost give a free franchise to Westminster. Is it difficult to see how that system would operate here, or is it better to do it that way so that, instead of just signing a blank cheque, you wait to see what is going to be produced in a particular Westminster Bill before you consent to it?

[31] **Mr Parry:** Yes, it is an interesting one, because the legislative consent motion that was passed in March this year was under the name of Iain Gray, the leader of the Scottish Labour Party. The SNP's motion, which was along the same lines but had SNP words in it about what the SNP was ultimately aiming to do, was treated as an amendment to Iain Gray's motion. All that it said was that it wanted to look further at certain aspects of the Bill, and particularly at the financial implications, and that, then, they wanted to look at the Bill once again, early next year. So, it was an interim legislative consent motion, enabling them to deal with the fact that, in the end, this was extra devolution being offered by Westminster and it is hard to reject it.

[32] **Eluned Parrott:** I want to follow up on something that you have just mentioned. You talked about the fact that the Minister for finance in Scotland had asked for powers to be devolved to the Scottish Parliament rather than to the Scottish Executive. You described that as being symbolic rather than practical. Can you give me an idea of what kind of symbolic message that was intended to send and why it would not be considered a practical step?

[33] **Mr Parry:** I think that the message was that this was not any sort of grab by Ministers. That was the message that they wanted to send. In fact, in his evidence, John Swinney said that he hoped that, if there was any action in the public bodies area—which, in fact, is not a big area for Scotland, because almost all the bodies are devolved—it would be done by an Order under the Scotland Act 1998, the original devolution Act, rather than by the Public Bodies Bill. It is all an aspect of everyone looking after the system as a whole. It is not Ministers on one hand and the Parliament on the other. I think that there is an interest in looking after the system as a whole.

[34] **Eluned Parrott:** You state in your written evidence the view that it is more plausible to see the Public Bodies Bill as clearing up the legislative legacy of bodies that were cross-border or that were specified in UK statute rather than as a way of trying to bypass the Assembly in some way. Can you talk a bit more about that?

[35] **Mr Parry:** There is such a big legacy of England and Wales business, as it were. There are all the agencies, all the laws and institutions that have been there for a long time. We are not aware of how big this England and Wales area is. It is certainly a lot bigger than England and Northern Ireland, and it is particularly bigger than England and Scotland, where we have had hundreds of years of distinct law, even before devolution. What use Welsh

Ministers will make of the Public Bodies Bill we will ultimately see. As I understand it, they decided to further their objectives in the environmental protection area under this Bill. However, I think that this was decided in the autumn of last year, was it not? It was a pre-referendum decision on their part that they would use this Bill for this purpose. Whether, after the referendum, they would not use Bills like this for this purpose remains to be seen. You can ask them, I suppose, whether they are going to use the Bill for anything else.

[36] **Eluned Parrott:** You said in your statement that the powers given to Welsh Ministers are to make Orders in respect of public bodies, so the question becomes the way in which these Orders are scrutinised in the National Assembly. Can you expand on that, and give us your views on ways in which the Orders might be effectively scrutinised?

[37] **Mr Parry:** This committee would need to act as a subordinate legislation committee. There is a committee of the Scottish Parliament that deals only with subordinate legislation, and it would look at Orders made under an Act. It would then bring in the subject committee—health, education or whatever it might be—and would issue a report. It would ask the other committee to look at the matter. First of all, there would be interaction between the subordinate legislation committee’s lawyers and the Scottish Government’s lawyers on the matter, and they would answer questions that were raised. The action would then be passed over, and the Minister would often be asked to give evidence—that would be the normal thing—either on his or her own or with officials, who will often chip in. It is an informal thing, and that is the advantage of doing this through an Order: there is room for interaction. The big disadvantage is that the Parliament is not able to amend the Order. At the end of the day, you will often find Members of the Scottish Parliament saying on their committees: ‘We are not entirely happy with this, but we can see what you are after and we are prepared to resist our feelings’; that is difficult here. It is a rather different way of undertaking the business that this committee is always undertaking. There will be reviews of how much less accountability there is when it is a matter of secondary rather than primary legislation.

[38] **Simon Thomas:** I understand that the point that you are making, in a sense, is that legislation affecting England and Wales has a long history, and that this is a practical way of dealing with it. However, is there any reason, in principle, why we in the Assembly should not legislate on these public bodies in a separate way to England?

[39] **Mr Parry:** Not at all. I am just wondering whether the Welsh Government is interested in having an Act on the same lines as the Public Services Reform (Scotland) Act 2010, which gives the Scottish Government a broad range of Order-making power in respect of bodies that are usually brought into being by primary legislation. This is all in the name of reducing quangos and things like that, and there is a clear strategy on the part of the Scottish Government on this. The Scottish Government said that it needed to do this by Order, because that was a way in which it could have some action on the matter. That was a pretty controversial thing, and a lot of people—particularly lawyers—said that it was not a good way of doing business. Scotland was the first jurisdiction in the UK to do it in this way. The matter has now been picked up in Westminster by the Public Bodies Bill. If you think that the big need is to deal with all of these organisations easily, I suppose that you would agree that this is what ought to be done. The question is whether the Welsh Government will use the UK Bill if it becomes an Act, as I think that it can, or whether it would wish to have its own Bill in respect of the organisation for which it is responsible and what its view would be. As there is a long history of the Welsh Government deciding to reabsorb quangos, I would think that it would support anything that makes it easier.

3.00 p.m.

[40] **Simon Thomas:** I appreciate that, and I am trying to focus on the scrutiny of those

decisions. You mentioned decision-making around environmental bodies and the Welsh Government's intention to create a new, single environment body for Wales. As public policy, you might be for or against that, but I get concerned constituents contacting me because they are employed by some of the bodies that are now in existence. We, as Assembly Members, have not been able to scrutinise the steps that might be taken to do that, which is one concern. You also mentioned, in reply to Suzy Davies, the twin-track approach that we have in the Assembly at the moment in the way that we scrutinise consent motions and the way in which the powers given to our Ministers are not really scrutinised. Given all those different movements, a scrutiny gap could emerge. Do you agree?

[41] **Mr Parry:** Yes, I do. Looking at this from the outside, I ask myself what will change after the referendum. Will the existence of Standing Order No. 30 alongside Standing Order No. 29 mean that a lot of business will be done through Standing Order No. 30? You will need to see how big the volume of business will be in the first year or two. If it seems that a lot of things are being done under Standing Order No. 30 and that you as AMs are being told by the Government that it is doing things using UK law, that is that, and that there is no other opportunity, the argument—which I think has been advanced in relation to the two ways of doing it under the Standing Orders—will be that the volume of business will be too big if it is all done in the Scottish way, with everything coming under legislative consent motions. It will be evident if that is true. If it is not true, and if the Assembly is able to handle all of that, there would be a strong argument for bringing everything under the same broad procedure.

[42] **Simon Thomas:** It has been mentioned to us in other evidence that a lot of this is fairly technical, and that it can be swept away in an effective manner once a committee is up and running that knows how to deal with it. Is that your experience from observing the Scottish scheme?

[43] **Mr Parry:** There were 118 LCOs and LCMs in the first three Parliaments. They are often on really small things but they can be on big things. I think that there is one a month. It is not unreasonable that, in the UK Parliament, there is one Bill a month that has implications for devolution. We can say that that is a big burden for us to deal with but, on the other hand, I believe that the integrated way of doing things in Scotland makes it easier to handle the interaction between the two Governments. It means that, at an early stage, it becomes obvious if anything in the UK Bill is within the ambit of legislative consent. Therefore, one group of civil servants can say to another that it is within the ambit of legislative consent and that a legislative consent memorandum will be needed to look at all the issues. The civil servants will be asked by Members of the Scottish Parliament what the implications will be and they will have to have answers. They will have to say that they have had a detailed discussion with the UK Government and that various things have been offered. It is an easier way of doing business, because there is no need to ask whether the issue is a big deal, which in Wales would be under Standing Order No. 29, or whether it is a less important issue, which in Wales would be under Standing Order No. 30.

[44] **Simon Thomas:** To go back briefly to the Public Services Reform (Scotland) Act 2010, which you mentioned, is there anything in the way that the Orders are proposed to be made by Ministers in Scotland that raises a scrutiny concern or issues that we should be looking at in the Assembly context?

[45] **Mr Parry:** I think that there is an issue here. The only big action on this has been on an Order to reform the General Teaching Council for Scotland, to make it an independent arm's-length body not so much under the control of Government. This raised the issue of whether legislative functions were being conferred on this body under the Order that would not be legal, the reasoning being that, if this body could say who is or is not eligible to be a teacher, it would raise bigger issues than the internal regulation of the profession. It was a big argument. There was a big report of the Subordinate Legislation Committee on this issue. It

said that it was not happy. Then it went to the then Education, Lifelong Learning and Culture Committee, which interviewed the Minister. The committee said that it was not happy. The Minister said that everything was absolutely fine. [*Laughter.*] They tend to do that. They say that the Order is *intra vires* and that it is just fine. However, in March this year, at the end of the last Parliament, they really had to concede that this Order needed to go through, following years of consultation and so on on the way that the GTC should be reformed. So, in the end, the committee said, 'Okay, we aren't happy but you can have it'. Really, if you read the debate you will see that that is what it said. Then, it went to Plenary and, of course, there was no debate in Plenary.

[46] The nub of this is that MSPs on the Subordinate Legislation Committee and their advisers wanted to raise all the issues that, ultimately, were not the big issues. You can look at that. However, what was interesting in that particular case was the need to have this all done at the end of the last Parliament. That was the biggest single issue, because everyone said that, if it was not approved then, it would need to be reintroduced after the election and a whole year would have been wasted. It was an argument of that kind.

[47] **Simon Thomas:** There is mention of reform of the General Teaching Council for Wales, so we will watch that one with interest and not do it at the end of an Assembly.

[48] **Mark Drakeford:** I want to take us back to the point at which a Westminster Bill is proposing to transfer powers directly to Welsh Ministers. Do you have any views or advice for us on how, on the parliamentary side of the Assembly, we might try to take an interest in scrutinising that proposal? If we were to take an interest in it, how might we best communicate views that we might develop on that proposal? How do we feed those back into the Westminster process in the most effective way?

[49] **Mr Parry:** An important issue is when you receive the written statement from Ministers on this, as you would have to receive it in the end under Standing Order No. 30. This has been an issue in Scotland, namely how early on it is all happening, basically. There are rules that, within a few days of the Bill being introduced to the UK Parliament, a memorandum has to be issued. I think that that may be more in the breach than in the observance. The interesting thing is the amendments. That is always the interesting thing. As Bills go through, various things are done. Amendments are often made in response to devolved interests. I think that it would depend very much on when you perceived it was a big issue. Would you learn of it through looking at the Bill or would you learn of it only when the Minister says that this is what they are doing and that they have asked for whatever it was under the Bill? Would you learn of it through normal parliamentary channels or would it be a surprise, as it were? You would have to judge all of that.

[50] How it would be fed in is where we hit the obstacle. There is no need for a legislative consent motion on it, but if there was a general feeling that it was unwise, other aspects of Assembly procedure could be engaged. If something is a big issue, it becomes a big issue, and this committee and other committees are not constrained as to whether it is done under one SO or another from deciding that it is worth looking at an issue. So, I think that that would be the way forward. All this is quite political, and if something becomes an issue, it will be raised. What I am seeing in this debate and in the other evidence that you have received is the sense that things would happen without people being aware of them—that it would be inadvertent for them to be raised after they had happened, and that there would be no opportunity for debate. That would indeed raise scrutiny issues.

[51] **Mark Drakeford:** Some witnesses have suggested to us that, not in cases where things have become an issue, but at a more routine level, it ought to be possible to set up informal arrangements between a committee such as this one that would be a vehicle for passing views from the Assembly to a committee at Westminster that was more directly

responsible for scrutiny. Other people have said to us that they do not think that that mechanism would work well in practice.

[52] **Mr Parry:** It is not a mechanism that is being used in Scotland. You often have interesting action in the House of Lords on these matters. It is interested in these issues, and it is perhaps easier to get things into the House of Lords, but I also wonder whether the best channel is for AMs to convey concerns to the Welsh Government and it, in turn, conveying concern to the UK departments. That is the easiest way for amendments to be made. Whether the Welsh Government would be responsive to the views of AMs on an issue that I presume would have been an initiative of the Welsh Government—it would have been an action rather than a reaction—is the interesting issue in this whole debate. Would the Welsh Government or Ministers choose to use the creative freedom that they seem to have under the procedures in Wales as opposed to the procedures in Scotland, and would that cause them any political trouble?

[53] **Mark Drakeford:** To move on, is it worth trying to devise a system in which, post facto, we keep a comprehensive record of where powers are being transferred directly to Welsh Ministers? Does such a system exist in Scotland? Is it a practical proposition and is it even worth doing?

[54] **Mr Parry:** I am unaware of a system in which everything that is transferred is recorded in any particular place. There are always changes to the devolution statute; that is one of the most interesting things of all. You think that you are reading the devolution Act, but the original Scotland Act 1998 has been altered in all sorts of ways. It is easier to keep track of the action on an issue, and if it is highlighted as an issue that is worthy of attention, it becomes simpler. That is where the system in Scotland becomes an easy system to operate, because everything is brought within the ambit of legislative consent.

3.15 p.m.

[55] **Mark Drakeford:** Finally from me, a question that is more about the nitty-gritty of the way that relations between Wales and Westminster are negotiated—they have been navigated, really. It has been suggested to us that, at the civil service level, concordats and memoranda of understanding and so on do not percolate directly into the consciousness of people who work in Whitehall every day, but that the devolution guidance notes are more important and there is a greater awareness of them, and they have a bigger part to play in oiling the wheels of relations between the two sides. Does that reflect the Scottish experience? Do you think that the DGN system is one that works effectively?

[56] **Mr Parry:** Because it is an operational matter, in a sense, if a civil servant needs to ask what they should do in a certain situation, they will look to the DGN, which is meant to say that they should do this first, followed by that or the other. For civil servants, that is an easy thing to use. The memoranda of understanding and the concordats are highly political, actually; they derive from the circumstances of 1999 and the early days of devolution in which all three devolved administrations were led by the Labour Party. So, they said, ‘We have devolution, but we are all part of Labour, so we need to work together and we need to have rules and ways of doing that’. This then got merged with the general principle that everyone ought to know what everybody else is doing and that there should not be surprises—that was a very important feature of working between civil servants. This was then written into it as well. However, it took years to renegotiate the memoranda of understanding before the one issued earlier this year, and this illustrates that, on the way, people were not interested in them. Certainly, certain concordats were not being used; things that ought to have happened did not, and there was not any appetite to look at them again as part of a constant process of renegotiating them.

[57] What is very interesting is the ongoing traffic in all of this. If you look at the action in Scotland and the Welfare Reform Bill, you will see that there is always interaction going on between the Department for Work and Pensions and the Scottish Government on these issues. There is a kind of track by which there is an understanding that this is ultimately a UK Government Bill and it will be enacted, so you need to make the best of it, as it were. There are all sorts of ways in which this Bill will have to be made operational. It is not so much what is written down as the expectation of how civil servants working for their Governments ought to act in a particular situation. That is the bigger issue, in fact.

[58] **David Melding:** I would like to put a question to you and ask you to reflect on some evidence that we have heard from witnesses that the use of secondary legislation, and the powers that Ministers get to make Orders, is something that a legislature ought to be a bit more relaxed about, in that the last thing you want is primary legislation stuffed to the gunwales with the minutiae of law. So, it is not a bad thing that a lot of that has been stripped out. Do you agree with that general proposition? If you do, how often, in your experience, does a committee in Scotland really look at a piece of secondary legislation for its likely policy impact? You have already reflected that it cannot usually be amended, unless it is in draft form. Are we getting the balance right, in that, even if we think that more flexibility is needed, so that we do not see so much detail in primary legislation, there has to be a way then of perhaps amending more effectively the more significant pieces of secondary legislation? Sometimes, they can be very significant indeed.

[59] **Mr Parry:** I think that everyone has an interest in the division between what is primary and what is secondary being realistic and consistent. The real trouble is that when Governments try to do by secondary legislation what ought to be done by primary legislation, there will be a need for Orders laying down the detailed rules, detailed benefits scales and the like. There will be a need for Orders—that is understood.

[60] Usually, the issue has been that the handling of subordinate legislation in any legislature is an also-ran and that it becomes the province of legal experts and so on. In practice, you are just not able to look at certain Orders and they are just passed through. The informality of the system is interesting. I believe that you will have experience of that in this committee—you have your advisers and lawyers, and you can have a word with the lawyers and the advisers in the Government's office if you want to ask them things. That can sometimes work. You can also help them with their drafting errors, which happens from time to time. So, it is not always a real problem. However, I think that there was concern over the Public Services Reform (Scotland) Bill, because it looked like a whole area was being withdrawn from the consideration of primary legislation and we were being told, 'This is not important'. Everyone said that it was important, because if you make it too easy to constantly reorganise, merge and get rid of public bodies, it is not good. I would say that an active subordinate legislation committee working with the subject area committee can work well, because the legislation committee can say, 'This is a big issue for you and it ought to be looked at; you ought to have the Minister in'. I think that this works reasonably well in Scotland. I have certainly seen instances in which it works.

[61] **David Melding:** That is interesting. We move to Simon Thomas.

[62] **Simon Thomas:** I want to ask about the Scottish experience. One of the frustrations that we have here is the lack of time. A legislative consent motion comes to this committee and goes through Plenary within a week—there was a recent example of this. Even if we thought that the subject committee should examine it, there is no time to allow that to happen. Is that also an issue in Scotland or does the fact that you get—at least, in theory—this initial look at what needs legislative consent motions improve the system in Scotland and make it a bit more timely?

[63] **Mr Parry:** It all seems to work reasonably well, although there are issues of urgency. Usually, if it is a UK Bill, it has been trailed first and people know that it is happening. Then, if it looks like an area in which there would be an impact on devolution—as we have found, there are many Bills that you would not think would have an impact on devolved powers, but do—then it is raised. Often, you can have more than one legislative consent memorandum, and that can work. So, the question of how you handle the volume of business and how big the volume in Wales will be once the full provisions of the 2006 Act have taken effect, and just how big the burden on you in this committee will be, remains to be seen. There is also the question of whether the Government is trying it on a little bit on this. It would have known what it wanted to do, it would have been able to put the information to you earlier, to draft its memorandum earlier, but it decided that it would not. That is an issue that has to be considered politically.

[64] **Simon Thomas:** Indeed.

[65] **David Melding:** Do you want to add anything, Mr Parry, at this moment that would help our inquiry? Those are the subjects that we wanted to cover with you.

[66] **Mr Parry:** Thank you for the opportunity to give oral evidence. To me, the important thing is the action on any particular policy issue. After an Order has been laid and after a legislative consent memorandum has been achieved, how are things handled politically? The art is identifying which issues are worthy of being looked at in much more detail and which issues are not important. By treating this as too legalistic a thing, there is a risk that this important point would get overlooked, because you would certainly find that the majority of business is not controversial and everyone agrees with it. There are certain instances in which it is controversial and needs to be looked at. It is important to look at the actions of Ministers on this, because, in Wales, we have moved from a system in which Ministers are always looking to Westminster for action to make things happen. This has altered in a profound way, but the attitude of Ministers and the civil servants, I suppose, could still be, ‘Would it not be convenient to use the Westminster Bill to do this?’. I think that that will be a transitional thing. In the end, I would imagine Wales’s way of thinking about these matters would converge with Scotland’s. However, you are only in the first year of the new system, and I would not draw any hard and fast lessons from the first year.

[67] **Simon Thomas:** We are yet to pass a law. [*Laughter.*]

[68] **David Melding:** Thank you for that insightful reflection on which to end your evidence. We are most grateful for your attendance and for the interesting evidence you have given us. We have all furiously made notes on the ideas that you have, and have found this a practical contribution to the challenges that we face. You made a realistic comment at the end that encapsulated that approach. So, we are grateful to you, Mr Parry. Have a safe journey back.

3.26 p.m.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[69] **David Melding:** The date of the next meeting is 14 November. There is a paper to note, which is the report of the previous meeting.

Cynnig Gweithdrefnol
Procedural Motion

[70] **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).

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

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 3.26 a.m.
The public part of the meeting ended at 3.26 a.m.