Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

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

Dydd Llun, 16 Mehefin 2014
Monday, 16 June 2014

Cynnwys
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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

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

Eraill yn bresennol
Others in attendance

Keith Bush QC	Ymatebydd i'r ymgynghoriad Consultation respondent
Huw Lewis	Aelod Cynulliad (Llafur), y Gweinidog Addysg a Sgiliau Assembly Member (Labour), the Minister for Education and Skills
Simon Moss	Cyfreithiwr, Llywodraeth Cymru Lawyer, Welsh Government
Neil Surman	Pennaeth Addysg Uwch, Llywodraeth Cymru Head of Higher Education, Welsh Government

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

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

Dechreuodd y cyfarfod am 13:34.
The meeting began at 13:34.

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. Before we move to our first substantive item I will just make the usual housekeeping announcements. We do not expect a routine fire drill, so if you hear the alarm, please follow the instructions of the ushers who will help us to leave the building safely. Please switch off all electronic equipment completely; do not leave

it on silent mode, as, even then, it interferes with our broadcasting equipment. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there is a translation on channel 1, and should you need amplification of sound, you can get that on channel 0.

Tystiolaeth mewn perthynas â'r Bil Addysg Uwch (Cymru)
Evidence in relation to the Higher Education (Wales) Bill

[2] **David Melding:** I am delighted to welcome the Minister Huw Lewis to this afternoon's meeting. He is the Member in charge of the Bill. Minister, do you want to introduce your team before we proceed to questions?

[3] **The Minister for Education and Skills (Huw Lewis):** Thank you, Chair. I am joined by Neil Surman, deputy director, and Simon Moss from the legal team.

[4] **David Melding:** Thank you. First of all, can we just ask whether you have been informed that this Bill is within competence in any discussions that you have had to have with the UK Government?

[5] **Huw Lewis:** Yes, Chair. I am satisfied that the Bill does fall within the competence of the Assembly, and, to my knowledge, no-one has disputed that.

[6] **David Melding:** Secondly, we have something of an innovation in terms of the policy intent for regulations document, which has been issued under the Bill. I think that we just want to put out the flags and say what wonderful good practice that is. Was there any particular reason for you taking this excellent initiative?

[7] **Huw Lewis:** I think, Chair, that you are right to point out that this is probably the first time that this has occurred thus far in the still short life, I suppose, of the legislative competence of the Assembly. Members will be aware that the First Minister did make a commitment that where a Government Bill contained powers for Welsh Ministers to make subordinate legislation, and where it was not appropriate or possible for the draft subordinate legislation to be made available during the Bill process, a policy intent statement would be submitted. It is simply there to provide greater clarity for Members.

[8] **David Melding:** Thank you. I call Simon Thomas.

[9] **Simon Thomas:** Hoffwn ddilyn y pwynt hwnnw a chroesawu'r ddogfen sy'n datgan pam rydych eisiau cyflwyno rhai o'r rheoliadau yn dilyn y Bil. Fodd bynnag, yn gyffredinol, a ydych yn hyderus bod y cydbwysedd rhwng beth sydd ar wyneb y Bil a beth sydd yn debyg o ddigwydd mewn rheoliadau yn gymesur, a hefyd yn dilyn yr ymgynghoriad technegol y bu ichi ei gynnal tua blwyddyn yn ôl erbyn hyn?

Simon Thomas: I would like to follow up on that point and welcome the document that states why you wish to introduce some of the regulations that will emerge from the Bill. However, generally speaking, are you confident that the balance between what is on the face of the Bill and what is likely to happen in regulations is proportionate, and also follows the technical consultation that you staged around a year ago?

[10] **Huw Lewis:** Yes, I am, otherwise I would not be presenting things to you in quite this way, obviously. It is not a framework Bill, and I am very pleased that, during my appearance at the Children, Young People and Education Committee last week, that was broadly acknowledged by Members there.

[11] **Simon Thomas:** Mae'n wir fod mwy

Simon Thomas: It is true to say that there is

ar wyneb y Bil, ond os ydym yn dechrau craffu ar rai o'r pethau penodol yn y Bil, er enghraifft y pethau mewn perthynas â chynnwys rheoliadau ar gyfer cynllun ffioedd a mynediad, fe welwn fod y gair 'caiff' yn cael ei ddefnyddio yn y Gymraeg. Mewn lle arall—os caf roi dau gwestiwn at ei gilydd—yn adran 3, rydych yn nodi pa sefydliadau sy'n dod o fewn cwmpas y Bil ai peidio. Felly, eto, y pŵer sydd gyda chi yn hytrach na dyletswydd. Beth yw eich ymateb chi i'r ffaith nad yw'r Bil yn gweithio oni bai eich bod yn gwneud rheoliadau felly, ac, mewn dau ran o'r Bil o leiaf, nad oes dyletswydd arnoch chi i wneud y rheoliadau hynny?

more on the face of the Bill, but if we start to scrutinise some of the specifics contained within the Bill, for example the things in relation to including regulations for the fees and access plans, we will see the use of the word '*caiff*' in Welsh, with means 'may'. In another place—if I can put two questions together—in section 3, you state which institutions are included within the remit of the Bill and which are not. So, again, it is a power that you have rather than a duty. What is your response to the fact that the Bill does not work unless you actually make such regulations, and that in at least two sections of the Bill, there is no duty upon you to make those regulations?

[12] **Huw Lewis:** This is section 2 and section 3.

[13] **Simon Thomas:** Yes.

[14] **Huw Lewis:** The regulations would only deal with matters of technical detail relating to applications for approval of a fee and access plan. They would not prevent or inhibit the operation of the new regulatory system, which is what we are outlining in the Bill. So, a duty to make a regulation—

[15] **Simon Thomas:** But the system would not work very well if you did not have the regulations, would it?

[16] **Huw Lewis:** A duty to make regulations is appropriate with the regulations in question, and the duty is very limited in scope. That is the philosophy behind where we are with it.

[17] **Simon Thomas:** Os cymerwn y cyfan at ei gilydd, felly, ac os edrychwn ar y Bil yn ei ystyr ehangach cyn edrych ar bethau penodol, a ydych chi'n gysurus bod yr hyn rydych yn ei gynnig yn y rheoliadau—yn bennaf drwy'r dull negyddol, er bod y dull cadarnhaol yn cael ei ddefnyddio mewn ambell ran—yn ymateb i ofynion y Cynulliad i graffu ar oblygiadau y rheoliadau hyn a'r ffordd maent yn mynd i effeithio ar rai o'r prifysgolion a sefydliadau yng Nghymru?

Simon Thomas: If we take it all as a whole, therefore, and if we look at the Bill in general terms before turning to the specifics, are you confident that what you are proposing within regulations—mainly through the negative procedure, although there are a few areas where the affirmative procedure is used—responds to the requirements of the Assembly to scrutinise the impact of these regulations and the way that they will impact some of the universities and institutions in Wales?

[18] **Huw Lewis:** I do not think that any fair observer would take any view other than this. This is a technical Bill, and I think that that is reflected, really, in terms of the number of powers that are subject to the negative procedure. You are quite right to point out that there are a couple where we are talking about the affirmative procedure there, but then, as is established, and has been established, in previous legislation, this is all a question of whether those powers are narrow and technical, or whether they are broader. Of course, we rely then on the Counsel General's advice to make sure that we steer a correct path through that consideration.

[19] **Simon Thomas:** Roeddwn i'n

Simon Thomas: I happened to be a member

digwydd bod ar bwyllgor arall, sef y Pwyllgor Plant, Pobl Ifanc ac Addysg, ond byddai aelodau'r pwyllgor hwn, a phawb arall, wedi gweld y dystiolaeth ysgrifenedig gan Gyngor Cyllido Addysg Uwch Cymru i'r pwyllgor hwnnw. Roedd y dystiolaeth honno'n awgrymu bod yr amserlen ar gyfer gweithredu'r Bil hwn yn llawn, sef 2016-17, yn dynn eithriadol, ond yn '*doable*'—rwy'n meddwl mai dyna'r gair roedden nhw'n ei ddefnyddio. Cadarnhawyd hynny ar lafar i'r pwyllgor hwnnw hefyd.

of another committee, namely the Children, Young People and Education Committee, but members of this committee, and everyone else, will have seen the written evidence from the Higher Education Funding Council for Wales to that committee. That evidence suggested that the timescale for implementing this Bill in full, that is, 2016-17, was very tight indeed, but was 'doable'—I think that that is the word that they used. That was confirmed orally to that committee too.

[20] Fodd bynnag, o ystyried yr holl reoliadau sydd gyda chi—ac rydych yn dweud eu bod yn dechnegol, ac efallai fod hynny'n wir, ond maen nhw hefyd yn eithaf trwyadl a manwl, ac yn ymwneud â phrosesau ariannol a phrosesau gweithdrefnau mewnol, ac ati—a ydych yn hyderus eich bod wedi caniatáu digon o amser i weithredu'r Bil, drwy reoliadau, y tu fewn i'r amserlen honno?

However, given all of the regulations that you have—and you say that they are technical, and that may be the case, but they are also relatively thorough and detailed, and deal with financial processes, and internal procedures, and so on—are you confident that you have allowed enough time to implement the Bill, through regulations, within that timescale?

[21] **Huw Lewis:** I agree with HEFCW on this one, Chair. It is a tight timescale, but it is doable. We do intend to take a phased approach—we do want a smooth transition from the existing regulatory system, and we do not want to be causing disruption where we can avoid it. I would hope to have the regulations available in draft form for the Assembly to scrutinise at Stage 2, and the intention is also to consult stakeholders on the draft regulations at the appropriate time. So, that would lead us into a timescale where we are still confident that we can hit implementation, in full, for the 2016-17 academic year.

[22] **Simon Thomas:** Os ydych yn mynd i wneud y rheoliadau ar gael ar ffurf drafft i'r Cynulliad, wrth gwrs bydd hynny'n cyfoethogi'r drafodaeth, ac mae hynny'n rhywbeth yr ydym wedi ei groesawu yn y gorffennol fel pwyllgor, yn sicr. Ydy hynny, felly, yn ffordd o baratoi ar gyfer unrhyw gyfnod trosiannol sy'n gorfod digwydd rhwng y system bresennol—lle mae'r rheolaeth, wrth gwrs, yn dilyn, i bob pwrpas, gyfarwyddiadau uniongyrchol rhyngoch chi a HEFCW, ac ymlaen i'r prifysgolion—a'r cyfnod newydd hwn? Yr hyn rwy'n ei ofyn mewn ffordd yw: a ydych chi'n blaenoriaethu pa reoliadau y byddwch yn eu gwneud yn gyntaf, ac a fyddwch yn cyhoeddi rhyw fath o amserlen ar gyfer hynny?

Simon Thomas: If you are going to make the regulations available in draft form to the Assembly, that will of course enhance the debate, and that is something that we have welcomed in the past as a committee, there is no doubt about that. Is that, therefore, a means of preparing for any transitional period that would have to happen between the current regime—where the governance, of course, follows, to all intents and purposes, direct directives between you and HEFCW, and on to the universities—and this new regime? What I am asking in a way is: are you are prioritising which regulations you will make first, and will you publish some sort of timetable for that?

[23] **Huw Lewis:** Simon, could you take a look at the prioritisation issue particularly?

[24] **Mr Moss:** I think that it is fair to say that there are some regulations to be made under the Bill that are going to be required earlier than others, and that there are going to be some regulations that, effectively, form the cornerstones of the system—the maximum fee

limit, qualifying persons, and the qualifying courses, the courses that will attract the fee limit. It is likely to be the case that those will be made earlier than some of the regulations that are not as essential, if I can put it that way.

[25] **Simon Thomas:** Those are the ones that, hopefully, the Assembly will see in some sort of draft form.

[26] **Huw Lewis:** Yes.

[27] **Simon Thomas:** Okay. Diolch yn fawr.

[28] **David Melding:** Suzy, I saw you flinch when the Minister described the Bill as 'technical'. [*Laughter.*] Did you want to come in on this?

[29] **Suzy Davies:** Yes. Minister, I just wanted to raise something that I have already raised with you before, namely the use of the word 'may', and to amplify a question that Simon Thomas asked. Throughout the Bill, there are a number of instances of the use of the word 'may' for Ministers. I appreciate that it is better than usual, so I do want to thank you for that. However, there still is not, in my mind, a clear distinction between the use of the word 'may', when the Ministers may require a power to step in when something is not working, or whether you want to amplify something that already exists, or extend something that already exists—and I think that we have a reasonable example of that at section 3(1), if you wanted an example of that—or, conversely, the kind of power where, if you do not use it, for whatever reason, the Bill does not work, which is the point that Simon was making.

13:45

[30] I think that section 2(4) is a very good example of that. I just want to use section 2(4) as a test. For example, this is about the application for approval of fees and access plans, and regulations may be made about how applications for approval of fee and access plans may be made. If, for whatever reason, you do not use that power, you are going to be in a position where potential providers will not know how to make an application to you. So, that is an example where, even though you do not put the process on the face of the Bill—and I do not have a problem with that—there has to be a commitment that you will make those regulations. So, I am curious as to why there is not a duty on you to bring those regulations in at some time—I am not even asking you to say what they might say. However, at the moment, a Minister still has the option to sit on their hands and make it impossible for someone to apply for approval for a fee plan. I know that that is not your intention. Are you able to give us a commitment to go through the Bill and pick out the different types of the use of the word 'may', because some of them are permissive and empowering, shall we say, but others are actually enabling and the regulations to which they refer will need to be brought in to make the Bill make any sense? So, I am wondering if you could agree to do that for us, without us having to go through every single one in committee today.

[31] **Huw Lewis:** Okay—

[32] **Simon Thomas:** She has highlighted them. [*Laughter.*]

[33] **Suzy Davies:** The reason I have not written to you before is because I cannot tell the difference between some of them.

[34] **Huw Lewis:** Suzy Davies is quite right to point to the very technical nature of this Bill. I think that we are seeing evidence of that in terms of the issues that she raises. It bears repetition: a duty to make regulations is appropriate, of course, where the regulations in question and the duty are very limited in scope. You are absolutely right to home in on

section 2(4) as being an interesting example to illustrate all of this. I will ask Simon to throw some technical light on the various types of ‘may’.

[35] **Suzy Davies:** I am happy to listen.

[36] **David Melding:** The point is that ‘may’ and ‘must’ cannot be used interchangeably to give narrative variety; they carry hugely different implications.

[37] **Huw Lewis:** I do grasp that, Chair.

[38] **Julie James:** [*Inaudible*.]—for ‘may’ and ‘shall’.

[39] **David Melding:** I am not a lawyer, so I sit corrected.

[40] **Suzy Davies:** There are different uses of ‘may’.

[41] **Mr Moss:** It is worth bearing in mind that there is a distinction, as I mentioned earlier, between those regulations that we accept will be needed up front and to be made first, if you like, and other categories of regulation. For example, on section 2(4), from my own perspective, I am not sure that the section could not operate without regulations. There is nothing preventing an institution from making an application to HEFCW.

[42] **Suzy Davies:** It does not tell you how.

[43] **Mr Moss:** I think that HEFCW could, of its own volition, indicate a preferred method, but I take the point that the regulations would make it a more efficient and more effective system if institutions know what sort of supporting information they need to provide with an application, or what sort of supporting information they may provide if they are a particular category of institution. We have taken into account the ‘may’ versus ‘must’ question.

[44] **Suzy Davies:** HEFCW has got quite a lot of ‘musts’, but Ministers seem to be doing okay with ‘mays’ throughout this Bill.

[45] **David Melding:** Maybe we could make these points in our report eventually.

[46] **Suzy Davies:** I am making a general point. Honestly, I really do not expect you to go through them all. That is fine, but it struck me as an early example and, unfortunately, I think there might be more.

[47] **David Melding:** May I say, before I call on Eluned Parrott, that on two occasions now you have called this Bill a ‘technical Bill’? We do not like the description ‘technical’, because the bodies and individuals affected will not be affected technically; they will be affected in law and will have substantive obligations. So, in this committee, there is not much that we see that we can simply designate as technical. That is just a warning.

[48] **Eluned Parrott:** Finally from me, on this particular point on Part 2 section 2(4) and the use of the word ‘may’ in this case, as regards the application for the approval of the fee and access plan, to what extent do you think that if the regulations were not brought forward under this section that you would be opening HEFCW up to legal challenge were it to decline a fee and access plan that has not been subject to any regulated procedure in terms of the application process?

[49] **Huw Lewis:** It is a hypothetical question, but a hypothetical question worth a response.

[50] **Mr Moss:** In principle, HEFCW, as a public body, could be susceptible to judicial review in respect of any of its decisions. In the absence of regulations, if HEFCW were to issue some guidance to institutions or prospective applicants then it would have to follow that, but I accept that if the regulations are made then there will be clarity for all in terms of whatever supporting documentation institutions should be providing with their applications.

[51] **Eluned Parrott:** Indeed, but the law, as written here, does not make provision for an either or situation. It is the 'regulations may make provision', so I think that this is one particular case where, perhaps, we need to just nail down whether it is 'may' or 'shall'.

[52] I want to move on, however, to Part 2, section 4, which is regarding the period to which the fee and access plans must relate. You say in your accompanying information that the policy intention for the maximum duration of these fee plans will not be extended beyond the current two years in the first set of regulations and that you would not look to extend that until the long term. May I ask why, in which case, you chose not to fix a time period on the face of the Bill with a power to amend that subsequently?

[53] **Huw Lewis:** You are quite right to say that the current maximum duration of a fee plan is prescribed in regulations as being two years. While the new system embeds itself, I have no intention of changing that duration. However, it remains important for Welsh Ministers to have flexibility and a power to prescribe the maximum duration of those fee plans. I am hesitating slightly here, Chair, now because I have become slightly paranoid about the use of the word 'technical'. [*Laughter.*]

[54] **Eluned Parrott:** Oh, good.

[55] **Huw Lewis:** I will have to think of a euphemistic replacement. [*Laughter.*]

[56] **David Melding:** You could say 'limited in scope' or 'consolidating existing practices'. There are all sorts of things.

[57] **Huw Lewis:** That flexibility is necessary here in order to accommodate changes that might be presented to us in the future. We could, for instance, in the future wish to extend things to five years, but I think it is important that while the system embeds, we do not have any sudden shift. Essentially, I do not want the system to be shaken up unduly by the passage of the legislation, except in those terms when we really are talking about a shift in policy. Did you want to add anything, Neil?

[58] **Mr Surman:** I would only just add, Minister, that I am aware from discussions with Higher Education Wales and the letter that it submitted to committee, which I have had sight of, that there is a line of argument around this Bill that I think is about the level of flexibility that needs to be available to Ministers to respond to a potential change in circumstances going forward. One question is what those circumstances might be. My response to that is that we have to bear in mind that we are entering a period—in fact, we have entered it already—when the higher education system across the UK is changing very rapidly. The future, both within Wales and outside Wales, in relation to HE and the types of providers, the way in which higher education is funded and the flows of students around the system are all very uncertain. So, it is likely, in this case, that if we were to set a maximum fee duration on the face of the Bill, any one of those circumstances could change in such a way that it would have to be brought back before the Assembly. We hope very much that the system will embed in such a way as to give us assurance that everything is working and we could seek then to extend the timescale for fee plans, perhaps to three or five years. However, in the current environment, certainly, I would not advise that. We do need a level of appreciation for just how volatile or uncertain the HE landscape is at present.

[59] **Eluned Parrott:** I do appreciate how volatile the HE landscape is, and I would suggest that with the Diamond review working on a much broader policy area than this, that this is one area where you could give some certainty and stability in a sector in which you are concerned about the change. Why, given the fact that the Diamond review is potentially going to report on these kinds of issues next year, would you not wish to just nail one detail down, which is by no means as significant as some of the other things that are already being looked at?

[60] **Huw Lewis:** It is important, you are quite right, that we get good read across between what Diamond presents to us for us to consider and what is going through in terms of the thrust of this Bill. The points that we have made still hold water. We must have a certain fleetness of foot in order to deal with what can be quite unpredictable changes in individual institutions. Some of those may not even exist currently—we could be talking about new institutions that may appear on the horizon, delivering courses in a very different way and handling themselves with a very different mission to what we are used to. There is an issue in terms of what partners like HEW are saying, which, with the greatest of respect, continually refers back implicitly to the way things are or the way things have always been. We have no way of being able to assume safely that things will essentially remain operating roughly the same around the same sorts of institutions that we have always had. Ian Diamond is very well aware of that. It will be my job to ensure that we have compatibility between what Ian Diamond is proposing and what we might accept from those proposals and what this legislation is doing.

[61] **Eluned Parrott:** I need to move on. Section 6 of Part 2 is perhaps the crux of the Bill, looking at the promotion of equality of opportunity in higher education. That being the case, can you tell us why you believe the negative procedure is appropriate for regulations under this section, given that it is so important in policy terms?

[62] **Huw Lewis:** It is flexibility, again. There is no difference in that regard. Section 6, as you say, sets out the detail on the scope of the regulation-making power. It contains restrictions on the use of Welsh Ministers' power, but the power itself is of a detailed nature. It is relatively minor in terms of the overall scheme of the fee and access plan approval process. The negative procedure makes sense in that regard.

[63] **Eluned Parrott:** Minister, you have given this priority status as an issue within this Bill, but perhaps it is an area where consultation with the sector, schools, colleges, careers professionals and all of those things could be helpful in guiding the detail of this particular piece of regulation. Why are you resistant to a form of affirmative procedure that would give you much more ability to consult and involve those individuals before a regulation is brought forward?

[64] **Huw Lewis:** On changing it to the affirmative, I do not think that that really gives us much more in the way of scope. Over time, we will have evidence becoming available about just what is effective in terms of activities and interventions and good ideas that institutions might come up with that we might want to include in fee and access plans. That underscores the point that I am making about flexibility.

[65] **David Melding:** You do not get additional flexibility because you use negative over affirmative, unless you want that one vote difference to get the Bill through the Assembly. Strictly speaking, subordinate legislation is subordinate legislation. If you want to use that to fill out the detail, that is fine—we understand that argument—but all that affirmative does is increase the scrutiny powers of the Assembly. It is curious that you do not think, on this very important issue, that that is merited.

[66] **Huw Lewis:** There are practicalities here.

[67] **Mr Moss:** It might be worth putting the negative procedure in context. Even under negative procedure, the regulations under section 6 will be subject to consultation and could, in principle, include all those stakeholders that you mentioned. Also, turning to the flexibility point again, HEFCW, under this Bill, has a new duty to evaluate the effectiveness of fee plans. As information comes through from HEFCW in terms of what is being done well by institutions in terms of fee plans and what is working not so well, I think that the negative procedure would allow Welsh Ministers to make regulations to react more swiftly to include provisions in the detail of the regulations so that fee plans are working as well as they might in terms of ensuring fair access for students.

14:00

[68] **Eluned Parrott:** Indeed, but it does not allow for the Assembly to scrutinise those regulations as of right. We would have to call those in. As the Chair has already mentioned, it then becomes the issue of the role of the casting vote of the Presiding Officer, in this instance. Does this fit, would you say, with the guidance that the Welsh Government uses in deciding what is negative and what is affirmative? We are told that it is minor and technical things that are left to the negative procedure, but I would say that this is a substantive issue. It is a major point of policy and by no means technical in terms of its detail; it is something that would have wide public interest.

[69] **Huw Lewis:** It is minor in terms of the technicalities of how the fee and access plan is approved. As you say, there are bigger policy questions within that, but we are not dealing with policy; we are dealing with legislation. Neil wanted to comment.

[70] **Mr Surman:** I was going to pick up the point that Simon made about consultation, Minister.

[71] **Huw Lewis:** All right.

[72] **Suzy Davies:** I am slightly bemused by the answer that the creation of the detail of what might be in a fee plan is left to the negative procedure, but that deciding on what constitutes failure to comply with that is open to the affirmative procedure. Why the difference there?

[73] **Huw Lewis:** Failure to comply, according to those issues of level of detail and breadth of scope again—this goes back to the Counsel General's advice—takes us to a different place.

[74] **Suzy Davies:** Does it?

[75] **Mr Moss:** There are three regulation-making powers in the Bill that are subject to the affirmative procedure, but that is where the regulation-making power enables the regulations to amend provisions in this Bill or make consequential provision to other Acts—

[76] **Suzy Davies:** No, what I was saying was that section 13 is subject to the negative procedure, and that is the creation of the detail of the fee plan—

[77] **Mr Moss:** Section 13—

[78] **Suzy Davies:** Section 6; but section 13 is about how you identify failure to comply with section 6, basically. That has a completely different procedure. I would say that they are of even importance, effectively.

[79] **Mr Moss:** We have sought to apply the Counsel General's guidelines in respect of each and every subordinate-legislation-making power here. In respect of section 6, the affirmative procedure guidelines were not appropriate, whereas we could have—. That is not just where a set of regulations is technical in nature. We have regard to the amount that the regulations might need to be updated, from time to time, in the light of HEFCW's new functions—

[80] **David Melding:** Ah, but there is a way around that. You can do affirmative in the first instance, followed by negative. I think that we are in territory that we will determine in our report as not being convinced.

[81] **Suzy Davies:** Okay. That is fine. It is just that—

[82] **David Melding:** Shall we move on? Otherwise, we will drown in the detail.

[83] **Eluned Parrott:** I want to move on to section 7 of Part 2, which is on the approval of the fee and access plans. We have another negative power enabling Welsh Ministers to provide additional details to matters that HEFCW is to take into account in determining applications. Can you tell us why you believe that the negative procedure is appropriate for this?

[84] **Huw Lewis:** I am sorry, Eluned, but could you refer me back to the specific section?

[85] **Eluned Parrott:** Section 7, 'Approval of fee and access plan'.

[86] **Huw Lewis:** Section 7 as a whole.

[87] **Eluned Parrott:** No; Part 2, section 7.

[88] **Huw Lewis:** All right. We are in the right place. Again, I cannot say anything that is different in response to what is essentially the same thrust of the question than what I have offered before, Chair, I do not feel.

[89] **Eluned Parrott:** Again, I would suggest to you, Minister, that this is an area, in changing circumstances, for the input of others involved and for this Assembly to scrutinise and to make representations on behalf of individuals, perhaps, who feel that something has been missed out in terms of the initial regulation, or for a regulation that you lay down. This is not technical. It is not minor. It is something that would be of broader significance. It is something that, in terms of the Welsh Government's guidelines, which it has shared with us on the procedure that it would follow, would be more appropriately put through the affirmative procedure. Can you tell me why you did not feel that that was the case on this occasion?

[90] **Huw Lewis:** Well, for the same reasons that have already been offered in terms of the previous answers. I am hearing very clearly, however, what committee members are saying in this regard. This may not be the place but, in terms of responses and feedback and so on, this is obviously something that I need to be concerned about in terms of how I respond to your worries around this. Simon, there is nothing essentially different about this compared to the previous one, is there?

[91] **Mr Moss:** Again, one issue that we had with regard to the Counsel General's guidelines was the need for regulations to, perhaps, change from time to time in terms of the new system that is being developed. There could be new entrants coming into the system, new providers of HE, so it may be that we have to change the regulations as new providers come

into the system. So, that was another aspect of the Counsel General's guidelines that we had regard to there, as well as the fact that we felt that it was technical and that it would not fall within the affirmative resolution guidelines.

[92] **Eluned Parrott:** However, in terms of what is to be included and what is to be considered in terms of equality of opportunity, surely those kinds of provisions are not changeable between different institutions. They are reasonably fixed, surely—

[93] **Huw Lewis:** We could be talking about delivering equality of opportunity in very different circumstances and by different means. For instance, if we have a sudden massive explosion in online learning, what does that mean in terms of delivering equality of opportunity in the online world? As has been mentioned, we could be dealing with a new institution or an institution that currently exists that decides to change its mission—it might go off to be a liberal arts college, for instance—instead of the traditional pattern that we have been used to here in Wales where we specialise in terms of teaching as opposed to research. What does that mean in terms of delivering equality of opportunity? We could be talking about a landscape that has shifted considerably from the traditional pattern of the six or seven universities, as we are used to. A great deal of what you are concerned with, I think, is important, as you say, but is also about policy.

[94] **David Melding:** I think that I am going to move us on. There is a difference here in what you have to do in regulations, and pretty much what you have just argued for there is that you need to do this in regulations. What we have really been interested in in this section is why you have chosen negative over affirmative. I have to say, from the chair, that I have been less convinced by that aspect of the response. However, we will make our report and that is the way we will take it forward.

[95] **Julie James:** Good afternoon, Minister.

[96] **Huw Lewis:** Good afternoon, Julie.

[97] **Julie James:** We are turning now to what is and is not on the face of the Bill and so on. I am looking at section 8(1) just as an illustration of this. You have a permissive requirement for a governing body of a regulated institution to publish an approved plan. It seems to me that that ought to be on the face of the Bill, because, if you have a plan, there is no point not publishing it. However, is this not part of the same conversation that we were having earlier with Suzy Davies about 'may', 'shall' and 'must'? It seems to me that the only reason that you cannot put that on the face of the Bill is that you only may put the first requirement in, so you cannot put the publication of it on the face of the Bill because you have allowed yourself the possibility of not making the regulations in the first place. I suppose, Minister, that what I am trying to suggest is that, if you went back through with a flow diagram of what really you are going to do—although it says 'may', you actually are going to do it—and then had another look at what the consequences of that are—. You have to put this as 'may' at the moment because the first bit is 'may', but you might slightly change some of the consequences of that. It seems to me completely mad that you have to have a regulation to say that an approved plan must be published. That is just part of the same issue, it seems to me. I do not know whether that is part of the same discussion that we were having earlier.

[98] This is a composite question, so just while you are thinking about that—

[99] **Huw Lewis:** I think that I will need to think about that.

[100] **Julie James:** We have the same thing in section 9(1) for the plan to be varied with regulation. However, again, it seems to me that, if you have guidance to HEFCW about the

way that these things ought to be done and you have section 46 saying that the guidance must be followed, making it statutory guidance, then to have another thing that is regulated as well seems—. I do not understand why you cannot have statutory guidance setting that out, as opposed to needing it to be in regulation. I think, again, that this flow diagram of where you are going once you have started—well, I would find that very helpful—was something that seemed to me to be on the face of the Bill, and others are not, and then some things are in the HEFCW guidance, and others are in regulation. I think that that is quite a difficult maze to follow through. If you use that as an example, you can see that you could do that just as statutory guidance, for example.

[101] **Huw Lewis:** In terms of your second point, I will try to handle that as best as I can, first of all. I do not think that it is advisable to provide, on the face of a Bill, that an approved plan may be varied—that is the point that you were making, I think. If we did that, we would remove the ability for institutions to be able to vary their plans without primary legislation, would we not?

[102] **Julie James:** No, it is for the approved plan to be published, rather than varied. It seems to me that, if you have an approved plan, you sort of have to publish it, really.

[103] **Huw Lewis:** I beg your pardon; I thought that you were referring to it being varied.

[104] **Julie James:** No, published.

[105] **Huw Lewis:** I will ask Neil to come in on that.

[106] **Mr Surman:** I think that, in practice, we would expect the institutions to publish their fee plans. I cannot see a reason why an institution would not want to make known what it is doing to promote equality of access to HE. After all, it is part of the contract, in effect, that they have with students as to what they are doing, at least in part, in return for the higher fee income that students are generating. So, we would expect, in practice, institutions to publish. Not having this on the face of the Bill does not mean that there is an intention therefore to have fee and access plans hidden and not published—the presumption is that they will be. However, Ministers might need to regulate to ensure that they are, and this provision makes allowance for that.

[107] **Julie James:** I accept that point. However, you took the point that I was making earlier about whether it ought to be in guidance or whether it should be—. I do think that that needs to be looked at again. I did try to do myself a little diagram of what I would have to do if I were HEFCW or the institution, and it is quite complicated as to where you would look—in the regulations, or in the guidance, or in the Bill. I suppose that what I am asking, Minister, is that you just have another look at that, and see whether you have the optimum layout for the Bill.

[108] **Huw Lewis:** I think that is a very interesting way of putting things, Chair. I take that point.

[109] **Julie James:** The last point that I wanted to make was just a similar point, at section 11.4: why are regulations necessary to deal with something so simple? However, it is really the same point again. Do you have the optimum layout for this? We are not arguing—I am certainly not arguing—that these things are not necessary, and I take the point that Neil just made entirely. However, I suppose that the question that I am asking is: have you got it exactly right between regulations, guidance, and the Bill?

[110] **Huw Lewis:** All right, fair enough. Chair, I think that Julie James does put things in a very succinct and thought-provoking way. I suppose that much of the concern around the way

that we are setting out things here—. I mean, a great deal of the Bill is about ensuring continuity, actually, in terms of the way that things have been done under the terms and conditions of grant, and transferring that into a new regime, which is a regulatory regime. I suppose that, in terms of the way that this is being constructed and communicated, it is about picking out those elements that already exist, and trying to ensure continuity, in the main, in large part. However, I think that the way that you talked about this in terms of following it through in a flow diagram is probably something—

[111] **Mr Surman:** Yes, certainly, we can try to produce that, if it would be helpful to the committee. I suppose that we could also try to lay out more precisely, alongside the statement of policy intent, the thinking underneath the treatment of the different regulatory-making powers—the difference between affirmative and negative procedure.

[112] **Julie James:** I would find that very helpful myself, Chair. I have come to the end of my questions.

[113] **David Melding:** Suzy Davies is next.

[114] **Suzy Davies:** May I suggest a flow chart for section 36 as well? I have questions about failure to comply and refusal to approve a plan in the first place. Section 36 is 'Notice of refusal to approve new fee and access plan'. So, presumably, via this mysterious process, an application has gone in, and HEFCW is going to refuse it. What I cannot understand is the conditions under which refusal would operate, because, if you read further into the whole section—it is quite a lengthy section—it refers to 'failure to comply'. However, we are talking about a plan that has not even been put in place yet, so I am not sure how you would be failing to comply. Can you just take me through this, because I genuinely do not understand the order of events in it? I am looking particularly at section 36(3)(b), which definitely refers to existing plans.

14:15

[115] **Huw Lewis:** I will hand over to Simon on this.

[116] **Mr Moss:** The new sanction under section 36—I say 'new', but actually there is a similar sanction in place under the current 2004 legislation—enables HEFCW to refuse to approve a future plan, if you like. So, if, during the lifetime of a current plan, a regulated institution fails to comply with the fee limits or the general provisions in its plan or with a direction from HEFCW, one option for HEFCW in terms of implementing a sanction for that failure would be to refuse to approve a new plan when the current plan comes to the end of its life.

[117] **Suzy Davies:** But a new plan would be overcoming the problems of the old plan. Sorry, this is slightly straying into policy, but I genuinely do not understand this. Why would you refuse to approve a new plan if it is better than the old one, and overcomes the problems?

[118] **David Melding:** They would not—[*Inaudible.*]

[119] **Suzy Davies:** But if it is overcoming the problems—

[120] **Mr Moss:** If, for example, a regulated institution fails to comply with its fee limits towards the end of the lifetime of its current plan, one option for HEFCW would be to say, 'Well, you failed to comply with the fee limits' and the sanction at HEFCW's discretion would be that, when the time comes for a new fee plan to be approved, it would say, 'No, we are not approving a new fee plan for you for 12 months, for example'.

[121] **Suzy Davies:** Oh right, so, it is a sort of naughty-boy punishment sort of thing.

[122] **Mr Moss:** Yes.

[123] **Suzy Davies:** Right, okay. At least I understand what it is for now, so thank you for that. The whole of this process is done through the negative procedure, if I understand it correctly. We have our old friend here at section 36(7), which states that regulations may make provision about what the period in which the notice to be served on the ailing institution is to be. More importantly, 36(7)(b) states that regulations may make provision about

[124] 'matters to be taken into account by HEFCW in deciding whether to give or withdraw notice under this section'.

[125] So, while we have quite a lot of the section that says, 'Here are some things that we are going to definitely say that you are in trouble on in future approval of any new plans' but it is also saying, 'We are also reserving the power to think up some other things as well, but we are not going to tell you what they are'. Why have you got this kind of mixed approach to this particular issue?

[126] **Huw Lewis:** This concerns the narrowness or otherwise of what we are talking about, I think.

[127] **Mr Moss:** It is not the intention under section 36(7)(b) to allow Welsh Ministers to add new failures. The list is set on the face of the Bill, and that is the intention there under section 36(3). Under section 36(7), the intention is that regulations will set out those things that HEFCW is to take into account in deciding whether to refuse to approve a new plan. I imagine, although any regulations will be subject to consultation, that the policy for those regulations might be that HEFCW is to have regard to the impact of the failure if there is a failure to comply with a direction. So, with regard to quality assessment, did that failure have an impact on the education of students or something along those lines? That is the sort of detail that we would include in those regulations.

[128] **Suzy Davies:** Okay, but, with respect, that is additional to what is in 36(3). What I was expecting you to say is that there are basically four reasons why you can refuse, which are set out in 36(3), and that 36(7) would add a bit more detail to each of those four, but it sounds to me as though there might be more than four.

[129] **Mr Moss:** The intention is that those are the four conditions that are set, and we cannot add to those.

[130] **Suzy Davies:** But you can just make them more detailed—

[131] **Julie James:** I am desperate to ask why, in that case, it is not in guidance. This is the same point I was making before. If you cannot change the face of the regulations and what you are talking about is really the weight given to something or the way you want to approach it, that should be in guidance, should not? I think that this is the same point, Minister, that I made earlier about what is in regulations and what is in guidance. I will also just point out, if I may, because I am a very pedantic lawyer, not dissimilar to Suzy here, that in 36(7)(a) you actually have a double 'may', which is startling. So, you may make regulations about a period that may be specified. We are getting into the realms of fairy stories.

[132] **Suzy Davies:** That leads quite nicely, actually, to my question on section 37, which basically states that HEFCW has a duty, if something has gone wrong under section 36—or otherwise possibly—to withdraw its approval of any existing fee plan, and yet that has to be done in accordance with regulations that only 'may' be introduced. I think that it is pretty

dangerous to impose a duty on a body to do something when you are not telling it in what circumstances it is to do it. Again, you can put your detail in the regulations, but surely there has to be a commitment on the face of the Bill to bring those regulations in—and early, in these circumstances. So, if you can have a look again at 37(2), I think that that would be very helpful, particularly as it is an affirmative process, which, for the right reasons, will be a longer process.

[133] **Huw Lewis:** Okay. I will take that away and take a look at it, Chair. I feel that you can never quite have enough pedantic lawyers in the room for my liking. [*Laughter.*]

[134] **David Melding:** We take our duties very seriously.

[135] **Huw Lewis:** The more the merrier, I say. [*Laughter.*]

[136] **David Melding:** Yes. This is our one shot at helping to improve the structure of legislation.

[137] **Suzy Davies:** I have two slightly unconnected questions now, and then I will come to the end of my questions. Section 17 leaves some power with HEFCW and imposes a duty on it—that is perfectly in order—to assess or make arrangements to assess the quality of education in Wales provided by and on behalf of regulated institutions and external providers. The Bill defines an external provider, and section 17(4) empowers the Welsh Ministers to make regulations about the circumstances in which a person is or is not to be treated as responsible for providing the course. That is to be done under the negative procedure. Is there any particular reason why you chose the negative procedure for identifying whether a person is a course provider or not, when you already have a definition of an external provider?

[138] **Huw Lewis:** It is limited, technical, narrow and of a procedural nature, is it not, Simon?

[139] **Mr Moss:** Yes. Section 17(4) is really there for futureproofing in fairly unlikely circumstances, I think. In terms of external providers, what we are expecting is that the external providers will be franchisees and institutions operating in conjunction with other regulated institutions. We would regard this, according to the Counsel General's Welsh Government guidelines, as particularly technical. What we want to ensure is that, in the unlikely event that there is a tutor giving lessons from home once a week under some sort of franchise arrangements, that is not caught by the quality assessment and that we do not go too far. It is technical futureproofing, and that is the only intention there—hence the negative procedure.

[140] **Suzy Davies:** I only raised that because there was a more general concern about unusual entrants into the market, if you want to call them that, which might not be caught or be subject to such onerous quality assurance regimes.

[141] **Mr Moss:** It is a very narrow scope; section 17(4) aids that.

[142] **David Melding:** It does not alter what is on the face of the Bill.

[143] **Suzy Davies:** No, I do not think so.

[144] **David Melding:** The futureproofing is not intended for that.

[145] **Suzy Davies:** I was not so worried about this one, to be honest.

[146] **David Melding:** Okay.

[147] **Suzy Davies:** My final question is about the financial code. It is fantastic that you will be bringing a draft code for us all to have a look at in the Assembly, but we have no say in it at all. It is a no-procedure activity. Is there any particular reason why you would seek to tease us by bringing a draft code to our attention and then not letting us do anything about it? [*Laughter.*]

[148] **Huw Lewis:** Sorry, Chair—I think that that is probably the first time that I have laughed out loud in committee. I am sorry. [*Laughter.*] It is pure practicality. I think that if Members consider the alternative to this, and you consider yourselves in the situation—we have a round of approvals going on, we have academic years clicking in, and timescales going by—these codes have to be approved in a timely manner. I do not see that there is any other place to put this other than in the lap of the Welsh Government. I think that if we did anything other than that, the level of detailed scrutiny and oversight that would be required would end up overwhelming the Assembly, basically.

[149] **David Melding:** It is not unprecedented to actually have to lay something before us, but that is it, basically. It depends on how important it is.

[150] **Suzy Davies:** There is a reason why I asked this question. It is just to draw a distinction between this and my previous question, where we have HEFCW assuming total responsibility for the quality assurance element of things, but yet it does not have the same on the financial code—well, they may through consultation. I will leave that open for observation at some point. That is it, thank you.

[151] **David Melding:** Are there any further points?

[152] **Simon Thomas:** A gaf fi ddod yn ôl at y pwynt y cododd Julie James gyda chi? Heb droedio gormod i'r maes polisi, ond os wyf yn deall y Bil hwn yn iawn, ei bwrpas a'i holl raison d'être yw nad yw cyfarwyddiadau bellach yn ddigonol i wneud yr hyn yr ydych am ei wneud yn y sector hwn—oherwydd sawl peth, ond arian yn benodol. Felly, dyna pam yr ydych wedi mynd am broses reoleiddio a phroses sydd, yn ei thro, yn seiliedig ar reoliadau. Hoffwn ddeall mai dyna'r bwriad ac, os felly, rwyf yn awgrymu efallai nad yw cyfarwyddiadau'n ddigonol mewn mannau. Credaf fod pwynt Julie dal yn wir, sef bod rhannau yn y Bil lle rydych yn cyflwyno rheoliadau sy'n ddibynnol ar sefyllfa arall lle nad ydych wedi gwneud rheoliadau. Felly, credaf fod y *flowchart* yna yn dal yn ffordd dda o edrych ar y peth, ond rwyf hefyd am i chi gadarnhau, os mai dyna'r gwir, mai un o'r rhesymau nad yw rhai o'r pethau hyn yn cael eu gwneud drwy'r CCAUC, drwy'r cyfarwyddiadau a roddir iddo, yw'r ffaith eich bod yn gorfod symud, neu eich bod yn teimlo eich bod yn gorfod symud, at sefyllfa fwy seiliedig ar reoliadau.

Simon Thomas: May I return to the point that Julie James raised with you? Without treading too much on policy here, but if I understand this Bill correctly, the purpose and the whole raison d'être of the Bill is that directions are no longer sufficient to achieve what you want to achieve in this sector—for a number of reasons, but finance specifically. So, that is why you have gone for the regulatory process and a process that, in turn, is based on regulations. I would like to understand that that is the intention and, if so, I suggest that directions are probably not sufficient in certain areas. I think that Julie's point remains, which is that there are sections of the Bill where you are introducing regulations that depend on another situation where you have not introduced those regulations. So, I think that that flowchart would still be a good way of looking at this, but I also want you to confirm, if that is the case, that one of the reasons that some of these things are not done through HEFCW, through the directives given to it, is because you have to move, or you feel that you have to move towards, a more regulated system.

[153] **Huw Lewis:** Yes, that is the basic raison d'être behind the whole thing. We could

theoretically be in danger of drifting towards a situation where, for some institutions that we know and love and are well used to in terms of the Welsh higher education landscape, it could be financially and practically possible, if they wished to, to simply cut themselves adrift from the family of Welsh HE, as we are used to it, and essentially walk away from HEFCW. There would be some institutions out there that would barely have 10% of their income coming through HEFCW—although their income remains largely public, less than 10% of it would actually flow through HEFCW. That, to my mind, is not a situation conducive to the public good in Wales, where essentially we could be having self-privatised HEIs that operate on public money. No-one wants that; I do not believe that the sector wants that, but obviously we need change here and primary legislation, to my mind, is the only way we can do that.

[154] **Simon Thomas:** I think, in that case, that that underlines some of the earlier points that Members have made about the parts of the Bill that need to be clearer, and that you actually will be introducing regulations rather than allowing this permissive thing that you have. If that is your policy intent, which you have stated in the Chamber, it all has to flow from that for everyone to understand that, because if there is any doubt or room for manoeuvre or room for delay, then that may call into question the policy intent itself. That is another matter, I know, but I think that that is why Members are concerned about the architecture in parts of the Bill.

[155] **Huw Lewis:** Yes, and these are questions of architecture; I will, of course, as I always would, take Members' comments away and ponder over them very seriously.

[156] **David Melding:** We have no further questions for you. We have had a full session, so unless you wish to make a final statement or bring something to our attention—

[157] **Huw Lewis:** No.

[158] **David Melding:** I will just thank you and your officials, therefore, on behalf of the committee. Thank you very much, Minister.

14:29

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

[159] **David Melding:** The instruments are listed before you. First, on the negative resolution instruments, I know that Members will be pleased to see the return of the Potatoes Originating in Egypt (Wales) Regulations 2004. Are we content? I see that we are.

[160] Are there any comments on the affirmative resolutions? Are we content? I see that we are.

14:30

Tystiolaeth mewn perthynas â'r Ymchwiliad i Anghymhwyso Person rhag bod yn Aelod o Gynulliad Cenedlaethol Cymru
Evidence in relation to the Inquiry into Disqualification of Membership from the National Assembly for Wales

[161] **David Melding:** I am absolutely delighted to welcome Keith Bush, who is very well known to us with his greatly distinguished service to the National Assembly. I welcome you this afternoon and thank you very much for your written evidence. You will know the

procedure backwards, I think, as to the way the committee works. We will now put a range of questions to you.

[162] We were very grateful for your clear note, Keith, particularly highlighting how all this started back in the seventeenth and eighteenth century, or whatever, and then the key legislation in the 1950s and 1970s. The organising principles seem to be offices that carry significant financial benefit that emanate, in our case, from the Welsh Government or an organisation that is subject to Assembly scrutiny. Is it your view that those continue to be the vital principles that we need to examine and organise the work around?

[163] **Mr Bush:** Thank you very much for the kind welcome; it is very nice to be here. As far as that question is concerned, my answer is 'yes'—I think that those are absolutely the core principles to do with the separation of powers and the avoidance of conflicts of interest. I would qualify that slightly in that, in recent times, another factor has begun to become apparent in relation to disqualifications, namely the issue of double-jobbing, if I can use that phrase. I know that some of the evidence that you have heard has related to that particular issue.

[164] **David Melding:** We will explore that specific issue with you as well.

[165] **Mr Bush:** I would draw attention to the fact that the Wales Bill, which is before Parliament at the moment, is very pertinent to that point. How far and what principles you should base other grounds of disqualification on is a matter of policy, but I did not want to leave the impression that I am ignoring the fact that one can go beyond the issue of conflicts of interest.

[166] **David Melding:** Thank you. I call Simon.

[167] **Simon Thomas:** Hoffwn hefyd ddiolch i Keith Bush am y dystiolaeth gynhwysfawr a chlir iawn. Rydych newydd gadarnhau i'r Cadeirydd y pwynt hwn ynglŷn â gwahanu pwerau ac ati. A ddylid parhau gyda'r egwyddor hwn y tu mewn i gyrff unigol? Er enghraifft, mae swyddi yn cael eu hanghymwyso ar hyn o bryd, fel Comisiynydd Pobl Hŷn Cymru, ond mae staff y comisiynydd hefyd yn cael eu hanghymwyso ar hyn o bryd. Fodd bynnag, yn ôl yr egwyddor rydych wedi ei gosod allan, efallai fod y lefel anghymwyso yn stopio gyda'r comisiynydd a bod y staff mewn sefyllfa wahanol. A wyf yn iawn i ddehongli pethau fel hynny?

Simon Thomas: I too would like to thank Keith Bush for the very comprehensive and clear evidence. You have just confirmed to the Chair this point in relation to the separation of powers and so on. Should we continue with that principle within individual bodies? For example, there are positions that are being disqualified at present, such as the Commissioner for Older People in Wales, for example, but the commissioner's staff are also disqualified. However, according to the principle that you have laid out, perhaps that level of disqualification stops with the commissioner and that that the staff are in a different position. Am I correct in my interpretation?

[168] **Mr Bush:** Os yw hi'n amhriodol bod comisiynydd yn medru bod yn Aelod Cynulliad, rwy'n credu bod yr un egwyddor yn ymestyn i'r bobl sydd yn gweithio i'r comisiynydd. Mae angen rhywfaint o eglurdeb, rwy'n credu, o ran y cyrff hynny lle nad yw'r aelodau o staff wedi cael eu hanghymwyso.

Mr Bush: If it is inappropriate for a commissioner to be an Assembly Member, I think that the same principle applies to the people who work for the commissioner. There is a need for some clarity, in my opinion, in terms of those bodies whose staff are not disqualified.

[169] **Simon Thomas:** Mae gwahaniaeth,

Simon Thomas: There is a difference, is

onid oes? Nid yw'n glir pam fod rhai wedi eu heithrio, a pham fod rhai wedi eu cynnwys.

there not? It is not clear as to why some have been disqualified, and why some have been included.

[170] **Mr Bush:** Yn hollol. Yn achos awdurdodau lleol, er enghraifft, yr unig rai sydd yn cael eu hanghymwyso o blith y staff yw'r rhai sydd yn dal swyddi lle mae cyfyngiad gwleidyddol ar y swydd. Felly, mae rhywun wedi meddwl a yw'n angenrheidiol i rywun sydd yn casglu sbwriel, er enghraifft, gael eu hanghymwyso rhag bod yn Aelod Cynulliad. Nid yw'n glir a yw'r un broses o feddwl gofalus ynghylch lle y dylid tynnu'r llinell wedi cael ei wneud ym mhob achos, ac mae'n amlwg y dylai fod cysondeb rhwng y rheolau o ran pob corff neu swydd sy'n cael ei hanghymwyso.

Mr Bush: Exactly. In the case of local authorities, for example, the only ones disqualified among the staff are those holding positions where there are political restrictions in place for the role. Therefore, someone has considered whether it is necessary for someone who collects the bins, for example, to be disqualified from being an Assembly Member. It is not clear that the same process of careful consideration as to exactly where to draw the line has been undertaken in all cases, and it is clear that there should be consistency in terms of the rules in relation to all bodies or offices disqualified.

[171] **Simon Thomas:** Nid wyf yn gwybod a ydych am ddiffodd y ddyfais gyfieithu sy'n gwneud sŵn o'ch blaen. Os ydych yn hapus, mae hynny'n iawn, ond mae'n mynd ar fy nerfau i.

Simon Thomas: I do not know whether you want to switch off the translation device that is making a noise in front of you. If you are content, then that is fine, but it is getting on my nerves.

[172] **Mr Bush:** Mae llais yn dod o rywle.

Mr Bush: There is a voice coming from somewhere.

[173] **Simon Thomas:** Credaf fod un o'r setiau cyfieithu ymlaen.

Simon Thomas: I believe that one of the translation headsets is on.

[174] **David Melding:** I believe that two of them are on. We will attend to the technicalities.

[175] **Simon Thomas:** Gan ein bod yn diffodd ein ffonau symudol—

Simon Thomas: As we have to switch off our mobile phones—

[176] **David Melding:** I cannot hear it from here, but I can appreciate how irritating it must be.

[177] **Simon Thomas:** Dyna'r ateb technegol, felly: tynnu'r *plug* allan. [*Chwerthin.*]

Simon Thomas: So, that is the technical answer: pull out the plug. [*Laughter.*]

[178] I fynd yn ôl at y pwynt blaenorol, felly, nid ydych yn gweld ffin i'r egwyddor hwn. Os yw'r corff, y bwrdd gweithredol, y comisiynydd neu beth bynnag yn cael eu dal yn y broses oherwydd eu bod yn atebol i'r Cynulliad neu ynghlwm â gwaith y Cynulliad, mae pawb i mewn. Deallaf fod trafodaeth i'w chael o ran pryd y mae hynny'n digwydd, ond, o ran egwyddor, mae pawb i mewn. A yw hynny'n iawn?

To go back to the previous point, therefore, you do not see a boundary to this principle. If the body, the executive board, the commissioner or whatever is captured by this process because they are accountable to the Assembly or are tied to the work of the Assembly, then everybody is included. I understand that there is another discussion about when that should happen, but, in principle, everybody is captured. Is that correct?

[179] **Mr Bush:** Os cymerwn un o'r comisiynwyr fel enghraifft, nid wyf yn credu bod unrhyw amheuaeth bod y Comisiynydd Pobl Hŷn Cymru, fel person y mae'r Cynulliad yn craffu arni, yn anghymwys i fod yn Aelod Cynulliad. Byddai pobl sy'n ei chynghori hi yn agos—y prif weithredwr, cyfreithwyr ac yn y blaen—yn amlwg yn yr un sefyllfa. Ni fyddai'n gwneud synnwyr o gwbl iddynt fod yn Aelodau Cynulliad ac ar yr un pryd—a dyma'r hyn rydym yn sôn amdano—iddynt fod yn gweithio i'r comisiynydd. Fodd bynnag, beth am rywun sy'n cynnal a chadw'r adeilad lle mae'r comisiynydd yn gweithio ac yn y blaen? Rwy'n derbyn fod rhai swyddi lle y gallech ddweud nad oes gwrthdaro o ran buddiannau, er, wrth gwrs, yn ymarferol, ni fyddai rhywun yn disgwyl i rywun a oedd yn gweithio mewn unrhyw ffordd i gorff neu swyddog o'r fath ddymuno bod yn Aelod Cynulliad ar yr un pryd.

Mr Bush: If we take one of the commissioners as an example, I do not think that there is any doubt that the Commissioner for Older People in Wales, as an individual scrutinised by the Assembly, should be disqualified from being a Member of the Assembly. Her close advisers—the chief executive, lawyers and so on—would clearly be in that same position. It would not make any sense for them to be Members of the Assembly while simultaneously—and this is what we are talking about—working for the commissioner. However, what about someone who maintains the building where the commissioner works and so on? I accept that there are certain posts for which you could say that there is no conflict of interest, although, on a practical basis, one would not expect someone who worked in any way for a body or an official of that kind to wish to be a Member of the Assembly simultaneously.

[180] **Simon Thomas:** Os ydym yn derbyn y pwynt hwnnw, mae hefyd yn agor i fyny rhywbeth arall rydych yn sôn amdano yn y dystiolaeth sy'n edrych yn rhyfedd i rywun sy'n darllen y Gorchymyn fel y mae ar hyn o bryd, sef cynnwys nifer o gyrff yn y Gorchymyn sydd a wnelo dim byd â'r Cynulliad. Er enghraifft, mae'n cynnwys Ymddiriedolaeth y BBC, tribiwnlysoedd a chyrff yn ymwneud â budd-daliadau, ac ati. Hynny yw, meysydd nad ydynt wedi eu datganoli o gwbl ond sy'n rhan o'r sector cyhoeddus ac yn ymwneud â bywyd cyhoeddus yng Nghymru. Ym mha ffordd y gallwn ymdrin â'r rheini, felly? A ddylid eithrio'r rheini yn llwyr o'r rhestr, os nad ydynt yn ymwneud â'r Cynulliad? Sut y gallwn wneud yn siŵr, fel y mae'r Cynulliad yn datblygu, bod pawb yn glir beth yw'r broses o ran symud i mewn neu allan o fod yn gymwys ai peidio?

Simon Thomas: If we accept that point, it also leads to another issue that you mentioned in your evidence that looks strange to someone reading the Order as it stands at present, namely including a number of bodies in the Order that have nothing to do with the Assembly. For example, it includes the BBC Trust, tribunals and bodies relating to benefits, and so on. That is, areas that have not been devolved at all but are part of the public sector and involved in public life in Wales. Therefore, in what way can we deal with those? Should we exclude those from the list completely, if they are not involved with the Assembly? How can we then ensure that, as the Assembly develops, everybody is clear about the process and how you move in and out of being qualified or not?

[181] **Mr Bush:** Nid wyf yn rhagfarnu o ran ar ba ochr y llinell y dylai cyrff fel hynny fod. Yr hyn rwyf yn ei ddweud yw bod angen bod yn glir ynglŷn â'r peth. Y man cychwyn, rwy'n credu, yn unol â'r egwyddorion cyffredinol sydd y tu ôl i'r syniad o anghymwyso yw mai'r bobl ddylai fod yn anghymwys yw'r bobl y mae'r Cynulliad yn craffu arnynt neu sy'n cael eu hariannu

Mr Bush: I am not going to pre-empt what side of the line such bodies should be on. All I am saying is that we need clarity on that. The starting point, in my view, in accordance with the general principles underpinning the idea of disqualification is that the people who should be disqualified are those people who are scrutinised by the Assembly or who are funded through the Assembly. That is, where

drwy'r Cynulliad. Hynny yw, lle mae gwrthdaro buddiannau.

there is conflict of interest.

[182] Os oes dadl dros fynd ymhellach na hynny, a chynnwys rhai cyrff nad yw eu swyddogaethau wedi cael eu datganoli yn swyddogol, ond bod eu perthynas â'r Cynulliad mor agos fel eu bod fwy neu lai yn yr un sefyllfa—rwy'n meddwl, er enghraifft, am gyrff sy'n ymwneud â darlledu yng Nghymru—digon teg; mater o bolisi fyddai gwneud hynny. Ond, fy ofn i yw, ar hyn o bryd, nad oes datganiad pendant a chlir am yr egwyddorion.

If there is an argument for going further than that, and including certain organisations where their functions are non-devolved officially, but their relationship with the Assembly is so close that they are virtually in that same position—I am thinking, for example, of organisations involved in broadcasting in Wales—then fair enough; it is a matter of policy to do that. However, my fear is that, at present, there is no definitive and clear statement of those principles.

[183] Mae'n rhaid i mi ddweud bod y sefyllfa lawer iawn gwaeth cyn belled ag y mae Tŷ'r Cyffredin yn y cwestiwn. Mae eu Gorchymyn anghymwyso nhw yn cynnwys rhestr hollol afresymegol, maith ac anodd o wahanol gyrff a swyddi heb reswm yn y byd, am wn i, dros gynnwys rhai ohonynt. Er enghraifft, mae cyrff sydd a'u swyddogaethau wedi cael eu datganoli, ond maent dal yn anghymwyso pobl rhag bod yn Aelodau Seneddol. Nid oes cyfiawnhad, hyd y gwelaf i, am wneud hynny.

I have to say that the situation is far worse as far as the House of Commons is concerned. The disqualification Order there includes a totally irrational and lengthy list, which is difficult to understand, and includes all sorts of different bodies and posts with no reason at all why some of them were included in the first place. For example, there are organisations where their functions are now devolved, but that still disqualifies them from being Members of Parliament. As far as I can see, there is no justification for doing that.

[184] **Simon Thomas:** Felly, mae gennym sefyllfa lle mae'r ddau ben, fel petai, yn rhannu hyn, er bod y cyfrifoldebau wedi newid dros y blynyddoedd. Hefyd, mae patrwm yn ymddangos i mi o belen eira, lle dechreuodd y Gorchymyn hwn gyda rhyw fath o egwyddor ond, oherwydd ei fod wedi magu gwahanol gyrff dros gyfnod, mae nawr yn anodd gweld beth oedd ei siâp i ddechrau, a beth oedd egwyddor wreiddiol y peth erbyn hyn.

Simon Thomas: So, we have a situation where the two sides share this issue, although the responsibilities have changed over the years. A pattern has emerged of a snowball effect, where the Order started with some kind of principle but, because we have adopted other bodies over a period of time and those were added, it is now hard to see what the principle was at the beginning.

[185] **Mr Bush:** Mae'r rhestr, mewn cysylltiad â Thŷ'r Cyffredin, wedi tyfu yn ofnadwy ers 1957, adeg y rhestr gyntaf.

Mr Bush: The list, in relation to the House of Commons, has grown far lengthier since 1957, when the first list was drawn up.

[186] **Simon Thomas:** A yw hynny'n rhannol oherwydd cwangos?

Simon Thomas: Is that partly because of quangos?

[187] **Mr Bush:** I raddau, ond pob tro mae corff neu swydd newydd yn cael eu creu, y duedd yw chwarae'n saff a dweud y dylid cael anghymhwysedd mewn perthynas â'r swydd honno. Rwy'n siŵr bod yr un duedd yn medru digwydd yma hefyd, oni bai bod egwyddorion pendant a chlir yn cael eu sefydlu.

Mr Bush: To a certain extent, but the tendency is that each time a new organisation, body or post is created, the tendency is to play it safe and say that there should be a disqualification in relation to that office or post. I am sure that the same thing could happen here too, unless there are clear and definitive principles put in place.

[188] **Simon Thomas:** Yn y dyfodol, pe na fyddai'r BBC yn cael ei chynnwys yn y broses hon—felly, byddai modd i rywun sy'n aelod o ymddiriedolaeth y BBC sefyll etholiad a chael ei ethol i'r Cynulliad—mae'n amlwg y byddai gan y cyhoedd ddiddordeb o ran na fyddai'r person yn dal y ddwy swydd gyda'i gilydd, felly a fyddech yn gweld fod y broses wleidyddol, ddemocrataidd a chraffu cyhoeddus ar gyfer rhywun yn gwneud y fath beth yn ddigonol yn ei hunan, fel nad oes angen i'r gyfraith fynd yno? Dyna fyddai rhan y broses drafod gyhoeddus ynglŷn â dyletswyddau a pha mor briodol yw hi i rywun wneud y fath beth. Ai dyna beth rydych yn ceisio anelu ato?

Simon Thomas: In the future, if the BBC was not to be included in this process—so, somebody who is a member of the BBC trust could stand for election and be elected to the Assembly—and it is clear that there would be a public interest that that person should not hold both posts at the same time, so would you see that the political, democratic and public scrutiny process for somebody doing something like that would be sufficient in itself, and that there would be no need for legal intervention? That would be the role of the public debate regarding the duties and how appropriate is it for somebody to do that. Is that what you are trying to grasp?

[189] **Mr Bush:** Rwyf wedi gwneud y pwynt ei bod yn bur annhebyg y byddai rhywun yn dymuno bod yn Aelod o'r Cynulliad ar yr un pryd a bod yn aelod o ymddiriedolaeth y BBC. Ond, dewis pwy yw hynny? Ai dewis yr unigolion neu dewis yr etholwyr ydyw? Mae perygl, os nad ydych yn cael rheolau ac egwyddor bendant, y bydd ychwanegu at y swyddi a bydd yr holl system yn cael ei chymhlethu'n ddiangen.

Mr Bush: I have made the point that it is quite unlikely that anyone would wish to be an Assembly Member while simultaneously being a member of the BBC trust. However, whose choice should that be? Is it the individuals' choice or the choice of the electorate? There is a risk, if you do not have a definitive principle in place and clear rules and regulations, that posts will be added and the whole system will be made far more complex than is necessary.

[190] **Suzy Davies:** We have dealt, to some degree, with 'who?', so I think that 'when?' is the next question. Briefly, for the record, can you explain to us how disqualification operates under the 2006 Act and its relationship with the 2007 Order?

[191] **Mr Bush:** The Act is very clear: the return of a person who is disqualified is void. So, that means that, at the point at which the returning officer formally submits to the Presiding Officer notification that a particular person has been elected, that has no effect—that return is void because of the disqualification.

14:45

[192] There is a separate issue about the fact that, before you can be nominated, you have to declare that you are not disqualified to the best of your knowledge and belief. So, you might simply be mistaken about it. However, that is an added test that comes in several weeks in advance. I have looked into the history of the matter, and that goes back to the House of Commons Disqualification Act 1957, so somebody clearly thought it was a good idea at the time for the election rules—it was the parliamentary election rules that they were concerned with—to be carried over into the Assembly's election rules through the 2007 Order, to have that kind of bar on being a candidate.

[193] I dare say that the thinking behind that was that it would be a waste of everybody's time to have somebody elected who was disqualified. However, nobody seems to have thought about the possibility that somebody could be subject to a disqualification when they are nominated, but cease to be disqualified by the time the election takes place. In the case of pretty well all of the disqualifications—other than the one that disqualifies certain people who

have been sentenced to terms of imprisonment for more than 12 months, and so on—there are disqualifications that can change, and you can rid yourself of the disqualification. That is one of the problems and, if there was to be any change, one would have to look at both aspects of how disqualifications operate.

[194] Incidentally—again, I do not want to jump ahead of things—the Wales Bill changes that rule in relation to Members of Parliament. So, if the Wales Bill is enacted in its present form, it will not be necessary for a Member of Parliament who wishes to stand for the Assembly to declare that they are disqualified or that they are not disqualified. What they have to declare is that they are not disqualified other than because they are a Member of Parliament. So, at the moment, in the 2007 rules, this is already having to be modified to allow for this new provision dealing with the disqualification of Members of Parliament. So, the principle that it is essential that you have that bar at nomination stage is already being eroded.

[195] Coming back to the issue of looking at things from the point of view of disqualification from being a Member of the Assembly, that itself takes effect at the time of return. I have discussed some of the practical consequences of that, but it is not the only way in which you can do things. It is interesting that with police and crime commissioners, which are a fairly recent invention, some disqualifications apply where they cannot even be nominated for election, such as having been convicted of an offence punishable with imprisonment, so there is no way that they could stand. However, there are all sorts of other disqualifications, such as being a Member of the House of Commons, which means you cannot be a police and crime commissioner.

[196] However, the point at which it bites—the point at which the disqualification takes effect—is not at the time of the return, but at the time of accepting office. So, the person who is elected has to make a declaration after being elected—I think it is before the returning officer, and it would normally take place several days later—to say that they are not disqualified. So, that provides a space in which somebody who might be unexpectedly elected—everybody, I suppose, is unexpectedly elected in the sense that nobody can be 100% sure that they are going to be elected—as a successful candidate, can say, ‘Now I need to deal with that disqualification and get rid of it’.

[197] In the case of the Assembly, the machinery that one could use is very much there because all of you, having been elected, do not effectively become Assembly Members until you take the oath of allegiance or affirm. I know that everybody does so very quickly because they want to, and they cannot do anything by way of Assembly proceedings until they have done so, but there is provision for that being deferred. It has to be done within two months. If you go longer than two months, the seat is declared vacant, although there is machinery for extending it. So, if you had a person that was very ill and they were not able to take the oath, you can extend the period. However, there comes a point in time when if you have not taken the oath, the seat becomes vacant and you have to have another election. Very similar machinery applies to police and crime commissioners.

[198] So, you could very easily have a system that said that a person that is elected, before the oath of allegiance can be administered and before they can function as an Assembly Member, would have to make a similar declaration saying that they are not disqualified. Before they did that, they could resign from any offices that disqualified them.

[199] **Suzy Davies:** Thank you very much; that was very succinctly put. What it does not quite deal with, for me, is the issue of conflict of interest, which is the whole reason for having disqualification anyway. If it were the case that you were not formally disqualified until taking the oath, for example, there is still a period of campaigning in there where somebody would, to the public’s mind, perhaps be in a conflict of interest position—

putatively disqualified, if you like. If that were to continue, how long do you think that period should be? We have taken previous evidence that some candidates stand as prospective candidates sometimes years in advance; it is not just a couple of months before the election is called.

[200] **Mr Bush:** Quite, but there is nothing preventing them from doing so. A person who would be disqualified when elected is not prevented from running for election, so why should what they do during the election campaign be treated any differently from what they do before the beginning of the election campaign? It might be inappropriate for other reasons for somebody to be a candidate; it may be because of the terms of appointment of various people to offices or to employment, as in the case I referred to of politically restricted local government posts. That would prevent you from engaging in party politics. However, if there is no situation like that, there is no reason at the moment to prevent a person from actively campaigning to be elected.

[201] The question that I pose is this: why should that change at the beginning of the election? It may be that the party political element of it gets greater, but they are not elected so there is no conflict of interest arising out of being an elected Member and discharging the functions of an Assembly Member. We have to weigh against that issue, if it is one, the other one, which is: why should one deter people who are involved in public life in Wales from even putting themselves forward as candidates? Why should you say to them, 'You have to give up this job or position that you have, without any certainty that you are going to be elected, before you can even be a candidate?'

[202] **Suzy Davies:** I take your point completely. So, you would not hold with the Electoral Commission's view that there could be different categories of disqualification, with some on nominations for candidature and some from the moment that they are asked to take up office? Is there a purpose to that?

[203] **Mr Bush:** I think that that is another way of looking at the point that I make about the fact that there are some jobs where it is incompatible with the job to be a candidate. If one was to think about the Electoral Commission itself, because it has functions relating to the oversight of elections and so on, I do not know what the terms and conditions of employment with it are, but I would be very surprised if there was not a prohibition that said, 'If you want to be a candidate, you have to give up the job'. I think that that is fine. That would cover that kind of situation. So, one way or another, one needs to think about that. However, as a general principle, I do not see why there is any greater conflict of interest in being a candidate for election than there is about the situation before you formally become a candidate.

[204] **Julie James:** May I ask that question from a slightly different angle? I wholly agree with what you have said, just for the record, but it seems to me that there is a simpler way of doing it. I think that there are some posts, which everyone agrees, that should be politically restricted. We can all think of them—the Electoral Commission, the returning officer and various other people. I was quite startled about the high sheriff's position the other day. It seemed to me that it would be an awful lot easier for the Assembly to direct that various contracts of employment of people, or appointments' terms and conditions of people that the Assembly can control, ought to contain that prohibition, rather than have this list of various different sorts, which is very complicated and, as you say, entirely unnecessary. I also do not see the—. It seems completely anomalous to me that you can be a member of the x commission for Wales while being a selected candidate for the let's-do-it-better party, but at the point of nomination you have to—. That is an obvious nonsense, it seems to me. However, if the x commission terms of appointment stated, 'If you are a commissioner of this body you are politically restricted; you cannot hold office or be a selected candidate in a party et cetera', that would solve the problem without having this complicated list. It seems to me that, for the vast majority of posts affected, the Assembly has the power to do that.

[205] **Mr Bush:** Yes. I think that that is probably going beyond what I understood the committee would—

[206] **Julie James:** I understand that.

[207] **Mr Bush:** I agree entirely, and I think that that is really what I have just been saying, effectively.

[208] **Julie James:** I was just putting the other end—

[209] **Mr Bush:** Clearly, where there are conflicts of interest between being a member of a particular organisation and being involved in party politics, that is a matter that can and should be dealt with by the internal governance arrangements of that organisation.

[210] **Suzy Davies:** [*Inaudible.*]

[211] **Julie James:** Actually, it is as a surprising number that we have competence over. I agree that it is not all.

[212] **David Melding:** I think that you have pretty much covered all the territory that you wanted to. So, it is now with you, Julie.

[213] **Julie James:** Following that on, I wonder whether you could comment on whether you think that the position for regional list seats should be different to that for constituency seats, bearing in mind that the arrangements have changed twice. I think that, at the moment, I am right in saying that, for a regional list, you are elected as the party banner without the candidate's name being present, whereas for the constituency you have the candidate's name. I wonder whether that makes any difference to whether you are—

[214] **Mr Bush:** The current law does not distinguish in any way, of course, in relation to the operation of disqualification.

[215] **Julie James:** Indeed. I understand that.

[216] **Mr Bush:** I have not really thought about any ways in which one might distinguish between them. As I have mentioned, the operation of the list system in Wales and Scotland perhaps aggravates the situation. In the case of constituency candidates, in many constituencies one can predict fairly accurately who will be elected. In others, one cannot. In the case of the list, it is a very difficult situation because it depends on what happens in the constituencies as to whether a particular person is elected. I think that it is perhaps a particularly difficult choice for those people who are on lists, if they are forced to give up employments or offices before they can even allow their names to go on the list, even if their chance of being elected is negligible.

15:00

[217] **Julie James:** I take that point entirely. I suppose that, just for the record, I ought to ask whether it would make a difference according to where on the list you allow your name to go forward. So, if you are fourth on the list, would that be different to what would happen if you were first on the list?

[218] **Mr Bush:** Well, again, the system assumes that all four candidates could get elected, so it is difficult to see how you could distinguish between them.

[219] **Julie James:** I take the legal point. I suppose I am wondering whether, philosophically speaking, you think that that matters. The other issue I would just put on the table is the non-legal argument that is made about whether the individual identity of a list Member affects the outcome of the election. Is it therefore affected by the fact that Julie James is top of the list and she is terribly popular in the area? That has been argued at great length in various organs and so on across Wales, as a result of what happened at the last election, for example. That is the argument about whether people's names ought to be on the ballot paper and so on as well.

[220] **Mr Bush:** Again, it is not something that—

[221] **Julie James:** It is not a legal point, I know.

[222] **Mr Bush:** —I have really thought about, because my approach has certainly been that the present system that applies disqualifications generally irrespective of the kind of Member and how they are elected is basically a sound approach. However, it certainly is the case—and I have made this point—that it can be particularly hard, and illogically hard, on somebody who might want to be fourth on the list that they are treated as though they are the candidate in a dead cert, safe constituency.

[223] **Julie James:** I take that point entirely. Turning to—

[224] **David Melding:** They do remain, of course, potential Assembly Members. I often watch *Kind Hearts and Coronets* and shudder. [*Laughter.*] I think that those lower on the list are very law abiding.

[225] **Mr Bush:** I would just underline this point: what we are talking about here of course is not disqualification from being a candidate, although that does arise because of the electoral law aspect, but disqualification from actually serving as an Assembly Member.

[226] **Julie James:** Indeed and, on that point, you outlined two possible ways of achieving the removal of the disqualification. One is the automatic, 'I'm elected and therefore I've resigned without any volition of my own', and the other is to give the period of grace that you talked about. Would you like to say which of those would be your preference?

[227] **Mr Bush:** I have reflected a bit more on that, particularly in the light of some of the evidence that you heard. I know that you have heard evidence from lawyers in local government. As I recall, one of the points they stressed was that people have periods of notice and so on. Now, of course, if you wish to resign from any employment, you can do it on the spot. Your employment will cease. It may be a breach of contract. You might be sued by your employer, but, nevertheless, if you want to say to your employer, 'I am no longer employed by you; bye, bye', as a matter of law, you can do that. So, there would be no legal obstacle to somebody who has unexpectedly been elected resigning then and there and then taking the oath thereafter, as I suggested would be one alternative. With the other alternative, which is automatic divestiture of any disqualifying offices or employment, that issue would not arise. However, having thought about it, it is clearly a matter that concerns some people, who have raised the issue of whether you would need to allow someone to give notice, clear their desk and hand over their job to somebody else. I think that there is a lot of force in that. So, I think that, probably, of the two, I would tend towards the more conservative approach, which is to say that you give people, in effect, up to two months in which they can get their act in order. In that time, they cannot vote and they cannot take part in proceedings. So, that is a burden. If they have not cleared things with their employers beforehand, then they will incur that burden and their parties will incur that burden. However, it seems to me that that would be less disruptive of people's employment and so on than a system whereby somebody might wake up one morning to find that one of their employees had suddenly ceased to be an employee

without any kind of effective warning whatsoever. So, of the two, I think that if they were to be considered further, clearly they would require careful consultation and discussion and so on, my feeling is that the period-of-grace approach—which would then leave it to people and their employers and so on to sort matters out from a practical point of view and, hopefully, they would in any event have done it before they got that far—would be the better of the two alternatives.

[228] **Julie James:** May I ask you one last question on that? I do not disagree with anything that you have just said, particularly for the employees of a small company, because it could be very burdensome to have someone suddenly leave.

[229] **Mr Bush:** But, of course, we are not dealing with employees of businesses.

[230] **Julie James:** No, I know that; I understand that, but it goes wider than that, does it not? It could happen to a private small and medium-sized business for which it would be a big burden to have somebody leave. Would you change any other provisions? Would you give people protection against being sued for damages, for example, if they took the two-month provision when they had a six-month-notice provision in their contract?

[231] **Mr Bush:** Again, I think that that is a matter of policy, because you have to weigh the interests of employers, and we are generally talking about public sector organisations. However, if it were a commissioner, let us say, who had a small number of staff and who suddenly lost somebody, then, yes, it could be very disruptive and it would be the interests of the public that could be harmed. On the other hand, there can be no higher service to the public in Wales than to be an Assembly Member, so it is not really all one way. Therefore, what one wants to encourage is people to put themselves forward for election.

[232] **Julie James:** Indeed. I wonder if you could outline for us the changes that we would have to make to legislation for disqualification to apply at the point of election or indeed at the point of taking the oath.

[233] **Mr Bush:** I think that it would certainly involve primary legislation. It would involve an amendment to section 16 of the Government of Wales Act 2006. It would be a fairly minor one and there would need to be some consequential amendments to other sections, but it would again re-model the provisions so that they were similar to those in the provisions relating to police and crime commissioners. So, we are not talking about anything radical; it would simply be substituting for the present provision that says that a return of a person is void. We would get rid of that and on the other hand say that a person cannot take the oath of allegiance or affirm unless they had first declared that they are not disqualified.

[234] **Julie James:** The last question that I wanted to ask you was about the removal of the power to ameliorate the disqualification, which, it seems to me, you would automatically want to do if we moved to the system that we have just discussed because there would not be any requirement for it. I just wondered if you wanted to say anything about the removal of the power.

[235] **Mr Bush:** The two are not exactly the same because what I suggest is that if you had the period of grace, then the risk of somebody inadvertently overlooking the fact that they are subject to a disqualification would be very much reduced. However, my feelings about the ability of the Members of the Assembly, and the Members of the House of Commons and the Scottish Parliament, to be able to relieve somebody of a disqualification are that it is a very unsound procedure. We can discuss why that might be, but the reason it exists at all is because it is something that the Assembly has inherited from the House of Commons, which, historically, had control over its own membership. That was coupled with this very vague test of an office of profit under the Crown. So, it quite often happened—I say 'quite often'; it

happened from time to time—that MPs were found to have been disqualified through no fault of their own. What had to happen then was an Act of Parliament to relieve them of the disqualification and to do away with any unexpected legal effects of somebody having acted as a Member of Parliament. So, you had things like the Arthur Jenkins Indemnity Act 1941 and so on, where a Member of Parliament was found, totally innocently, to have technically breached the rules.

[236] When, in 1957, a new system was brought in that was much more precise and involved a list of offices, I suppose that it is surprising that it was felt necessary to continue to have that kind of machinery, albeit in a more streamlined form. However, looking at it from general principles, if you have a clear and understandable list of disqualifications that are well publicised in advance and give people the opportunity to think carefully about them before they take the oath of allegiance, the rationale and the practical reason for having that power to disapply the disqualification seems to me to cease. Then, all of the arguments are in favour of getting rid of it, because, undoubtedly, it is constitutionally a very strange procedure indeed.

[237] **David Melding:** Simon, did you want to follow up on that?

[238] **Simon Thomas:** Cyn imi wneud hynny, rwyf eisiau datgan pa mor anghysurus oedd ymwneud â hynny a pha mor anodd oedd barnu a oedd yn briodol neu beidio derbyn rhywun fel Aelod Cynulliad pan oeddent wedi torri'r hyn a oedd yn ymddangos fel y gyfraith.

Simon Thomas: Before I do so, I want to say how uncomfortable that was and how difficult it was to judge whether it was appropriate or not to accept someone as an Assembly Member when they had broken what appeared to be the law.

[239] Fodd bynnag, mae mater arall rwyf am ei godi gyda chi yn benodol, sef busnes y rhestr. Rydym eisoes wedi cael—yn sicr yn y Cynulliad diwethaf—rywun a oedd yn rhif 2 ar y rhestr yn cymryd lle rhywun a oedd yn rhif 1 a adawodd y Cynulliad i fynd i rywle arall. Felly, symudodd rhywun i mewn i'r lle hwnnw. Wrth gwrs, os ydych chi'n sefyll ar y rhestr, mae'n bosibl i chi beidio â chael eich ethol, ac wedyn i feddwl, 'Oce, nid wyf yn Aelod Cynulliad, mi gymeraf un o'r swyddi hyn'—yn gomisiynydd plant neu yn aelod o dribiwnlys yn rhywle. Wrth wneud hynny, rydych yn anghymwys i fod yn Aelod Cynulliad, ond rydych yn dal i fod ar y rhestr. Os bydd rhywbeth yn digwydd, yn y cyd-destun ffodus o rywun yn gadael, neu yn y cyd-destun anffodus o rywun yn marw, rydych yn sydyn yn y sefyllfa lle mai chi yw'r person nesaf i gymryd swydd yn y fan hon.

However, there is another matter that I want to raise with you, which is the issue of the list. We have already had—certainly in the previous Assembly—someone who was second on the list taking the place of someone who first and who left the Assembly to go to another place. So, someone moved into that place. Of course, if you stand on the list, it is possible for you not to be elected and then to think, 'Okay, I am not an Assembly Member, I will go off and take another post'—as children's commissioner or member of a tribunal somewhere. In doing so, you are disqualified from being an Assembly Member, but you are still on the list. If something were to happen, in the fortunate context of someone leaving, or in the unfortunate context of someone passing away, you are in the position of being next in line to take up a position here.

[240] Felly, mae gennyf ddau gwestiwn. Beth fyddai'n digwydd yn y sefyllfa honno yn awr, gan nad wyf yn deall sut y byddai hynny'n gweithio? Yn ail, a yw'ch awgrym chi o gyfnod o ddau fis neu rywbeth yn ateb unrhyw broblemau a allai godi yn y cyd-destun hwnnw?

Therefore, I have two questions. What would happen now in that situation, because I do not understand how it works? Secondly, does your suggestion of a period of two months or so resolve any questions that could arise in that context?

[241] **Mr Bush:** Rwy'n credu ei fod. Beth sy'n digwydd ar hyn o bryd os oes rhywun sy'n Aelod rhanbarthol yn peidio â bod yn Aelod am unrhyw reswm, yw bod y sedd yn wag ac mae'n rhaid i'r Llywydd gysylltu â'r swyddog etholiadau ar gyfer y rhanbarth, gyda'r bwriad bod y swyddog hwnnw'n gwneud adroddiad swyddogol i'r Llywydd o ran pwy sydd i lenwi'r sedd wag. Mae proses, oherwydd nid yw'n awtomatig. Y peth cyntaf i'w ystyried yw a yw'r person yn dymuno cael ei ethol, oherwydd mae gan rywun ddewis; gallai rhywun ddweud, 'Nid wyf yn dewis, bellach, gael fy ethol'. Wedyn bydd yn rhaid mynd ymlaen at yr un nesaf ar y rhestr.

Mr Bush: Yes, I think so. What happens at present if a regional list Member ceases to be a Member for any reason, is that the seat becomes vacant and the Presiding Officer must contact the returning officer for the region concerned with the intention that that returning officer should provide an official return to the Presiding Officer on who is to fill that vacant seat. There is a process, because it does not happen automatically. The first thing to establish is whether the individual wishes to be elected, because one has a choice; one could say, 'I no longer wish to be an elected Member'. In such a case, the next on the list would have to be approached.

15:15

[242] Y cam cyntaf, unwaith mae'r swyddog etholiadau wedi cael gwybod bod y sedd yn wag, yw ei fod ef neu hi yn cysylltu â'r person sydd yn ymddangos fel yr un nesaf ar y rhestr, sydd â'r hawl i gymryd y sedd. Os yw'r person hwnnw yn fodlon gwasanaethu, mae'r swyddog yn dychwelyd y datganiad swyddogol. Felly, mae *return* yn cael ei anfon—nid yw'n digwydd ar ôl etholiad, ond mae'n digwydd ar ôl y broses amgen hon. Ar hyn o bryd, dyna'r pwynt lle daw'r anghymwyso yn effeithiol.

The first step, once the returning officer has been informed that the seat has become vacant, is that he or she contacts the person who appears to be the next on the list, who has the right to take up the seat. If that individual is content to serve, the officer provides the official return. So, the return is sent—it does not happen after an election, but it does happen after this alternative process. At present, that is the point at which the disqualification takes effect.

[243] **Simon Thomas:** Fodd bynnag, mae'n bosibl y gallai hynny ddigwydd mor glou na fyddai'r person yn sylweddoli ei fod yn anghymwys. Efallai ei fod wedi derbyn penodiad i ryw dribiwnlys neu gorff a heb sylweddoli hynny.

Simon Thomas: However, it is possible that that could happen so quickly that the person did not realise that he or she was disqualified. They might have accepted appointment to some tribunal or body and they would not realise that.

[244] **Mr Bush:** Mae hynny'n bosibl. Felly, yr hyn a fyddai ei angen, rwy'n credu, yw'r un rheol, sef bod yr anghymwyso yn effeithiol nid pan fo enw rhywun yn cael ei ddychwelyd at y Llywydd, ond pan fo'r person hwnnw yn cymryd y llw. Rydym wedi sôn am gyfnod o hyd at ddeufis. Wrth gwrs, rwy'n siŵr y byddai pobl yn awyddus iawn i gymryd y llw, fel ar hyn o bryd, ond gallai hynny gael ei estyn, os oes amgylchiadau arbennig, hyd at ddeufis, a hyd yn oed ymhellach na hynny. Felly, yr hyn rwy'n ei awgrymu yw yn union yr un rheol ar gyfer rhai sydd yn cael eu hychwanegu oddi ar y rhestr yn lle rhywun sydd wedi diflannu am

Mr Bush: That is a possibility. Therefore, what would be needed, I believe, is the same rule, namely that the disqualification takes effect not when an individual's name is returned to the Presiding Officer, but when that individual takes the oath. We have talked about a period of up to two months. Of course, I am sure that people would be very eager to take the oath, as at present, but that can be extended, in special circumstances, to two months, or even longer. So, what I am suggesting is exactly the same rule for those from the list who replace someone who has vacated their seat for whatever reason: that the disqualification should not take effect at

ryw reswm: nad yw'r anghymwyso'n digwydd pan wneir y penderfyniad mai'r person hwnnw sydd â'r hawl i lenwi'r sedd, ond pan fo'r person hwnnw'n dod yn Aelod o'r Cynulliad drwy gymryd y llw.

the point of return, but when that individual becomes an Assembly Member by taking the oath.

[245] **Eluned Parrott:** I want to ask questions about whether or not Orders in Council, such as the disqualification Order, can be made in Welsh as well as English. You discuss this in your paper. I am wondering whether you can tell us why it might cause difficulties to create the Order bilingually.

[246] **Mr Bush:** I cannot think of any difficulty that there would be other than resistance on the part of the Privy Council office, and, to be fair, I do not know whether anybody has ever asked it about that. Orders in Council are technically made by Her Majesty at a meeting of the Privy Council, but it is a piece of Assembly legislation, in effect. It will have been drafted by the Welsh Government, it will have been approved by the Assembly, and the fact that it is technically and formally made by the Queen instead of a Welsh Minister seems to me to have no practical difficulty whatsoever. Therefore, the Privy Council, in this regard, is being part of the governance of Wales, if you like. We could spend a lot of time talking about the interesting aspects of the Privy Council. It is odd, for example—perhaps that is not the word—but it is worthy of note that when devolution took place to Northern Ireland in the 1920s, there was a separate Privy Council for Northern Ireland.

[247] **David Melding:** Some people have notably called for a Welsh Privy Council, but I am not going to name them here. [*Laughter.*]

[248] **Mr Bush:** Logically, there is a lot to be said for it. Clearly, it has been thought that there is no point to it, practically, because it is a totally formal body with no practical powers, because the Queen, constitutionally, acts on the advice of her Ministers; which Ministers depends upon which particular bit of the constitution she is dealing with. In relation to a Welsh Order in Council, that would be the First Minister. That is why I say that the fact that it is the Privy Council for the United Kingdom does not mean that it is not actually functioning as the Privy Council for Wales in relation to a devolved matter. So, since Welsh is an official language—although the Government of Wales Act 2006 has not quite got round to putting it in those simple terms, Welsh nevertheless has official status, and the Welsh Language (Wales) Measure 2011 certainly says that—then it would seem to be logical that that part of the governance of Wales should be able to function bilingually. Now, I know that the Queen speaks many languages; she was in Paris last week and she was speaking very fluently in French and making speeches that went down very well in France, because I was in France for part of the visit, I have to say, and clearly, people were very impressed by that fact. However, she is the Queen of, I think, about 20 or 30 territories around the world, many of which have languages other than English. She is the Queen of Canada, for example. I can see no constitutional reason why the Privy Council, in relation to Welsh legislation, cannot operate bilingually.

[249] **Eluned Parrott:** Indeed, we have no problem getting Royal Assent on Bills that are made bilingually, so why there should be a problem with an Order that is bilingual, from a practical point of view, is obviously a moot point.

[250] With regard to a couple of other things, you suggest in your written evidence that it is important for that disqualification Order to be published as early as possible, presumably to enable it to then be properly communicated and disseminated. Can you explain why you think the timing of the Order is important, and are we running the risk of being too late with our next Order?

[251] **Mr Bush:** I do not know the answer to the second one, but in relation to the first part of it, I note that the Electoral Commission said a minimum of six months. One can argue about what it should be. I mean, I have said 12 months, for this reason—. I certainly do not want, nor would I be able, to comment on specific cases that you have had to deal with, but, one of the points that emerged when we had some difficulty is that political parties select their candidates not in the last six months, and in many cases they do it a year, or two years or whatever, in advance. Somebody is deciding, 'Do I want to be a candidate? What would be the implications of that? What are the disqualifications that I need to think about?', and they need to know that at the time they are being nominated. I do not think that it is, from a practical point of view, satisfactory to say, 'Oh, it's okay now; you're not disqualified under the Order that applied to the last election, but we can't tell you whether or not you're going to go to be disqualified under whatever Order applies in relation to the coming election', because the Orders change. Again, we are only touching on a particular practical situation. The last time, there were certainly relevant disqualifications—certainly, one of them—that were added by the Order that was only approved by the Assembly in, I think, December 2010 and only came into force in January 2011 for an election in May 2011. So, you are expecting people to check on this Order whether there is now some added disqualification that may be relevant to them. I think that that is unreasonable; it should be possible, in my view, at least a year in advance, for somebody to sit down with the Order, go through it and work out whether or not they are disqualified.

[252] **David Melding:** In terms of the Order, are there issues about how it is disseminated and publicised? It is pretty much, insofar as it takes effect, via the political parties, really, is it not, when they presumably inform selected candidates that this legislation exists, or could we do that better, or could the Electoral Commission do it or what?

[253] **Mr Bush:** I think there is a general issue about the accessibility of Welsh legislation, I have to say. This particular piece of legislation is a good example of how the system really does not work well enough. If I wanted to stand for candidature for the Assembly, I would want to know what the rules to do that are and where I could find them. The one place I would probably go to would be the Electoral Commission's website, but, strictly, it is not the lawmaker. It is not its job, strictly, I do not think, to make the public aware of what the law is in Wales. It does an excellent job, but it is not primarily its job. The Assembly, of course, is a source of information, but, again, it is not primarily the Assembly's job to be making available to people the full range of Welsh legislation. The people whose job it is to do that are The Stationery Office, legislation.gov.uk, and so on. In other words, that organ of the UK Government whose job it is to publish legislation throughout the UK.

[254] However, there is a danger, because there are all sorts of people who feel that they should be doing something but do not have a very clear mandate and maybe do not have the resources to do it, that it slips through the cracks. If you now want to know what the current disqualifications are, you have to go through this process of finding it on one of those different sources. It obviously caused practical difficulties that this very important Order that goes to the heart of democracy in Wales was only approved a few months before the election. Then how do you get hold of it? Well, it takes time to get it put on to websites, et cetera, so, once again, you are narrowing very much the window of opportunity that candidates have to be aware of it. However, just to make this final point, I go back to the issue that this is an example—an extreme example, it may be, and a bad and important example, but nevertheless an example—of the lack of accessibility of Welsh law generally.

[255] **David Melding:** I take the point about notice and that publication six months before an election should be a minimum. I think that, broadly, we would all agree with that. As for the issue then of where it is publicised, should we not just separate it out? Let us assume that there was a wonderful statute book online and, with a bit of work, you could find the various pieces of legislation that were pertinent in your particular case, would it still not be better if

the Assembly, in its dealings with the political parties or the Electoral Commission, just said 'This is the Assembly site that takes you directly to the current Order—there it is'? It is all about being elected to the Assembly, so we could take ownership of it; it could still be on the statute book, when we eventually get one. However, there could be a link, and there it is. If you are unsure, there could be a list of people who could give further advice, or whatever. Should we not really be more active in this area?

[256] **Mr Bush:** Well, I do not think that that is a question that I need to express a view on.

[257] **David Melding:** You do not work for us now, Keith; come on, you can let your hair down. [*Laughter.*]

[258] **Mr Bush:** The difficulty, if I may say so, is this: it is knowing where to stop. What I mean by that is that, yes, we can all say that it is common sense for somebody to be able to go on to the Assembly's website and find a page that says, 'Standing for the Assembly?' and when they click on that, it gives a list of disqualifications. That would make so much sense; it is dead easy, and who would dissent from that being a way of doing things? However, what about the electoral rules? Should they be on the Assembly's website? What about the Government of Wales Act 2006 itself, which has information about who is disqualified, et cetera? So, I am a bit cautious about saying that it is something that the Assembly should undertake, because then you would have to ask yourself, 'Where does one draw the line and how does one avoid the risk that, by providing partial information, you might mislead people into thinking that there was not more that they needed to know?'

15:30

[259] **David Melding:** So, could it sit with the Electoral Commission? At the minute, it does not sit anywhere, because we do not even have a statute book.

[260] **Mr Bush:** Yes. Clearly, the Electoral Commission is obviously the body that people go to and look to in order to get that kind of information.

[261] **Julie James:** The other point that we have had put to us by various witnesses is whether the returning officer and his or her staff ought to be under some obligation to hand the disqualification rules to all candidates in any given election at the point before they sign the nomination forms, if they are about to commit an offence.

[262] **David Melding:** Belts and braces.

[263] **Mr Bush:** That is a very good point, if I may say so, because what it says on the nomination paper is, 'I have read section 16 of the Government of Wales Act 2006 and any Order in Council laid under it'. I will not embarrass anyone by asking how many people have done that, but you would think, would you not, that somehow, perhaps when you hand in your nomination papers, someone should say, 'Here you are, before you sign it and before you hand it to me, have a read of that'.

[264] **Julie James:** Or indeed actually at the point when the nomination papers are sent out, because people do not pick them up on the day and fill them in, do they? I have long thought it should be part of the Electoral Commission pack that goes out.

[265] **Mr Bush:** Yes.

[266] **David Melding:** Given that you were around when we faced these difficulties, what assessment did you make of the Electoral Commission's guidance, as this was said by some to have been part of the problem?

[267] **Mr Bush:** Again, I think it is difficult to say anything without getting involved in issues that I would not want to get involved in. I have every sympathy with the Electoral Commission, because it seems to me that it does a difficult job, and it is criticised. When things go wrong, it is criticised—having tried to do its best, possibly in doing things that are not really its job to do, perhaps for which it does not have as much resources as it should, and then failing in some way, or people not finding the information as helpful as it should be. So, I would prefer not to make any comment on past events.

[268] **David Melding:** It is fair to say that the difficulties here were fairly systematic: where you went, the lateness of the Order, and all that. However, was its guidance perhaps sub-optimum? I do not know what euphemism I can find. I think it is important for this committee to say something about what is available to people who need advice.

[269] **Mr Bush:** First of all, I think the late making of the Order was absolutely crucial, because had the Order been made even a few months earlier, people would have had much more time to understand, digest and disseminate it, and so on. From that, a lot of things flowed. The most important thing, from a practical point of view, short of changes to primary legislation, that this committee could do, would be to very much encourage early making of the disqualification Order.

[270] **David Melding:** Thank you. The final question takes us into an area of possibly extended discussion, although I think we need to limit it as much as we can. On the issue of double-jobbing, we now have, as I understand it, an exclusion on Members of the European Parliament serving in the National Assembly and an exclusion on Members of Parliament serving in the National Assembly, although there is an issue about when the offices are resigned. However, you are not permitted to hold dual mandates. What about membership of a local authority and whether we should now regard that as a dual mandate that is no longer appropriate in terms of being held with membership of the National Assembly?

[271] **Mr Bush:** I think, frankly, that that is not really a legal issue, if I may say so. Clearly, it is a matter of policy and it is a separate issue from that of conflicts of interest. The double-jobbing issue relates to people's feelings as to whether it is appropriate that people who are Members of the Assembly should be devoting their time to other activities. First of all, the House of Commons is clearly not scrutinised by the Assembly or vice versa. So, there is no conflict of interest there, but, on the other hand, obviously, there is a feeling that doing the job of a Member of Parliament and doing the job of an Assembly Member make demands that cannot be simultaneously discharged by the same individual. That is fine. It is more difficult I think when you come to local government, because there is a rather unclear relationship between the Assembly and local government. Local government is, in theory, autonomous, but, in practice, is financed almost entirely by funds that are provided under the supervision of the Assembly. So, there is a potential conflict of interest argument, I suppose, there.

[272] On the other hand, and I am not expressing any view on who is right and who is wrong, there are those who say that elected politicians and the public generally benefit from the involvement of Assembly Members in certain other activities. We know that, in the past, Members of Parliament very often had lots and lots of outside interests—dare I say it, many of them were lawyers. Some commentators have suggested that, when it comes to dealing with legislation, the input from people actively involved in the law can very often be beneficial. However, going back to the days when that did take place, the work of an elected Member was very different, in my view, from what it is now. It is now very much more demanding than it was. The days when somebody could occasionally turn up to vote in the House of Commons are gone; nobody could possibly hope to be an Assembly Member unless they were here and in their constituencies full time, and, indeed, more than full time in my experience. So, I see the arguments on either side and I think that it is a matter for public

debate and a matter of policy. It is not a constitutional issue in the same way that disqualification on the grounds of conflicts of interest is.

[273] **David Melding:** Do you see a particular problem potentially with, say, someone being not an ordinary member of a local authority, but a cabinet member, and then being an Assembly Member, if that particular authority is perhaps brought into special measures under the education provisions? The Welsh Government makes that decision—I do not think that it needs the decision to be endorsed by the Assembly, although I may be wrong on that; there may be a requirement for some resolution, but certainly it will make a statement, and it will be questioned on the statement as Assembly Members scrutinise the Government. Do you see there a real issue of a potential conflict of interest?

[274] **Mr Bush:** There, this is an even clearer conflict or potential conflict, as in the case of an ordinary Member, obviously. It is a question of degree in my view. Again, I am sure that there are strong views held on either side in relation to that. Of course, our system does not aspire to eliminate conflicts of interest altogether.

[275] **David Melding:** Some are managed, obviously, and people make declarations.

[276] **Mr Bush:** Exactly, so I cannot say that there is any obvious hard-and-fast rule. I think that it is something that is developing over time. I think back to the time when the first First Minister here was, as I recall, simultaneously Secretary of State for Wales for a fleeting, short period of time. So, this Assembly was not set up on a basis that means that it seeks to eliminate conflicts of interest altogether and, therefore, it is a matter that needs to be carefully thought about as to whether you single out certain kinds of conflicts of interest or the new kind, which have not been recognised in the past, and eliminate them.

[277] **David Melding:** Julie, did you want to follow up anything in this area?

[278] **Julie James:** I have a short follow-up question on that. I take your point entirely about it being a matter of policy, but in terms of those conflicts of interest, do you think that we ought to, possibly as part of this review, have a look at how our code of conduct deals with those sorts of conflicts of interest because there are some rules—I will put my cards on the table and say it—that I do not think are very clear at the moment?

[279] **Mr Bush:** They are notoriously unclear, I must say, particularly in relation to legislation. By all means look at their clarity and so on, but you may create other difficulties—there will be knock-on effects, undoubtedly. So, all Assembly Members may have conflicts of interest in relation to their everyday lives or whatever. If you are talking about imposing charges, for example charges for disposable carrier bags, some Assembly Members are quite happy with that and others may want to carry on using plastic bags or whatever. So, all of the time, you are having to manage your public functions as legislators with your individual situations as citizens affected by the legislation. It is not easy to draw a hard-and-fast line between those conflicts of interest, which have to be eliminated, those that you can tolerate and those in the middle, which you have to accept that you have to manage in some way.

[280] **Julie James:** I accept that point. For example, if you look at the local government code of conduct, you will see that it is a lot more explicit about what is and is not an acceptable level of conflict of interest and whether the councillor in question has the same conflict of interest as a member of the public or as all other councillors, for example, if they are a school governor or indeed if they have a personal one because of a circumstance. My own view is that that goes rather a longer way towards sorting it out than our present code of conduct does.

[281] **Mr Bush:** Yes, I am sure that you are right, but it is because, in this regard, as in so many others, the Assembly is the heir to the House of Commons.

[282] **Julie James:** Yes, indeed.

[283] **Mr Bush:** And it is a totally different environment and a totally different philosophy of government, which bodies like the Assembly and the Scottish Parliament and the Northern Ireland Assembly are gradually moving further away from as they grow in confidence. There are things that they regard in the House of Commons as being perfectly acceptable, and there are scandals, from time to time, about conflicts of interest and so on, but I think that the rules are probably much tighter here than they are in Westminster, and the fact that they are not tighter still is because you have inherited certain ways of doing things, which traditionally have been acceptable at Westminster.

[284] **Julie James:** I must say that that is not necessarily a way forward into the future, although I take the point entirely.

[285] **David Melding:** That concludes the range of questions that we want to put to you. Thank you, Keith. I am sure that I speak for everyone when I say that we found your oral evidence as insightful and illuminating as your written evidence. It has been a great help to our work. Thank you, once again. It is good to see you back.

[286] **Mr Bush:** It has been a pleasure.

15:45

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

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

the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42.

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

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 15:45.
The public part of the meeting ended at 15:45.