



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

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

**Dydd Llun, 28 Mai 2012  
Monday, 28 May 2012**

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cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

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

**Aelodau'r pwyllgor yn bresennol**  
**Committee members in attendance**

Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
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**

Leighton Andrews	Y Gweinidog Addysg a Sgiliau, Llywodraeth Cymru Minister for Education and Skills, Welsh Government
Anthony Jordan	Pennaeth Llywodraethu a Threfniadaeth Ysgolion, Llywodraeth Cymru Head of School Governance and Organisation, Welsh Government
Elfyn Llwyd	Arweinydd Grŵp, Plaid Cymru, Tŷ'r Cyffredin Group Leader, Plaid Cymru, House of Commons
Simon Morea	Cyfreithiwr, Llywodraeth Cymru Lawyer, Welsh Government
Ceri Planchant	Cyfreithiwr, Llywodraeth Cymru Lawyer, Welsh Government
Amina Rix	Cyfreithiwr, Llywodraeth Cymru Lawyer, Welsh Government

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

Steve Davies	Cynghorydd Cyfreithiol Legal Adviser
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser

Olga Lewis	Clerc Clerc
Owain Roberts	Y Gwasanaeth Ymchwil Research Service
Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Adam Vaughan	Dirprwy Glerc Deputy Clerk

*Dechreuodd y cyfarfod am 2.29 p.m.  
The meeting began at 2.29 p.m.*

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

[1] **David Melding:** Good afternoon, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I will start with the usual housekeeping announcements. We do not expect a fire drill, so if you hear the bell, please follow the instructions of the ushers, who will help us to leave the building safely. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there is a translation on channel 1 via the headset. Channel 0 will amplify our proceedings. Please switch off all electronic equipment completely as it can interfere with our broadcasting equipment. I have not received any apologies.

### **Offerynnau nad ydynt yn Cynnwys Unrhyw Faterion i'w Codi o dan Reol Sefydlog Rhif 21.2 neu 21.3 Instruments that Raise No Reporting Issues under Standing Order No. 21.2 or 21.3**

[2] **David Melding:** Item 2 is on statutory instruments under the negative resolution. They are listed. The first ones, 2.1, 2.2, 2.3 and 2.4 are subject to the negative procedure, and 2.5 is subject to the affirmative procedure. Are there any comments? I see that Members are content.

2.30 p.m.

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

[3] **David Melding:** There is nothing under item 3.

### **Gorchmynion a Wnaed o dan Fil Cyrff Cyhoeddus 2011 Orders Made under the Public Bodies Bill 2011**

[4] **David Melding:** The papers are listed.

[5] **Mr Griffiths:** Nid oes llawer i'w ddweud oherwydd bod hwn yn Orchymyn eithaf cryno. Yr unig beth y byddwn yn tynnu sylw'r pwyllgor ato yw'r ffaith nad ydy'r peth mor glir ag y gallai fod oherwydd bod dau gorff nad ydynt yn gysylltiedig â'i gilydd

**Mr Griffiths:** There is not much to say because this Order is quite concise. The only thing I would draw the committee's attention to is the fact that it is not as clear as it could be because two bodies that are not related to each other are included in the same Order. It

wedi eu cynnwys yn yr un Gorchymyn. Buasai'n daclusach pe bai Gorchymyn ar wahân ar gyfer y ddau gorff. Fodd bynnag, o ran cymeradwyaeth y Cynulliad, nid oes dim yr wyf am dynnu eich sylw ato.

would be neater if there was a separate Order for the two bodies. However, in terms of the Assembly's approval, there is nothing that I want to draw your attention to.

[6] **David Melding:** As a result, I do not think that there is any reason to refer it to a committee. Are we content with that?

[7] **Suzy Davies:** On page 23, under 'Legal Advice Note', paragraph 3, the last but two sentence reads

[8] 'The Instrument has not yet been considered by the Joint Committee on Statutory Instruments'.

[9] Are we slightly ahead of Parliament on this, then? That cannot be right, can it?

[10] **Mr Griffiths:** We were at the time when this note was prepared, and I have not checked since whether it has now considered it.

[11] **Suzy Davies:** If it is behind us in the timetable and it makes some decisions about amendments, we will not have a chance to go back to look at it.

[12] **Mr Griffiths:** No, because it is an Order it will not be amended.

[13] **Suzy Davies:** Yes, of course.

[14] **Mr Griffiths:** Also, it requires our consent before it can go ahead and make it.

[15] **Suzy Davies:** I thought that that was quite unusual, that is all.

[16] **David Melding:** Are Members content? I see that they are.

2.32 p.m.

**Canllawiau Statudol i Awdurdodau Rheoli Perygl—Deddf Rheoli Llifogydd a Dŵr 2010 (CLA150)**  
**Statutory Guidance to Risk Management Authorities—Flood and Water Management Act 2010 (CLA150)**

[17] **David Melding:** There is an issue here for the committee in terms of how we want to treat statutory guidance and whether we consider that to be subordinate legislation. I do not know whether you want to elucidate further on that point, Gwyn?

[18] **Mr Griffiths:** Fel y mae'r nodyn yn esbonio, mae'r broses sydd ynghlwm wrth y canllawiau hyn yn broses anghyffredin. Mae gofyn a yw canllawiau statudol yn is-ddeddfwriaeth yn fater sydd wedi bod yn destun trafodaeth ymysg cyfreithwyr ers blynnyddoedd, ac mae'n dibynnu i raddau helaeth ar gynnwys yr is-ddeddfwriaeth ac ar ba un y mae'n ddeddfwriaethol ei natur ai peidio. Yn yr achos hwn, byddai awgrymu eu

**Mr Griffiths:** As the note explains, the process involved in these guidelines is an unusual process. The question of whether statutory guidance is subordinate legislation has been the subject of debate among lawyers for years, and it depends largely on the content of subordinate legislation and whether it is legislative in nature. In this case, to suggest that they are legislative in nature would be going a bit far, in terms of content.

bod yn ddeddfwriaethol eu natur yn mynd braidd yn bell, o ran y cynnwys. Fodd bynnag, mae'r broses yn awgrymu eu bod yn ddeddfwriaethol eu natur oherwydd mae'r broses yn rhoi cyfle i'r Cynulliad bleidleisio yn erbyn gwneud y canllawiau hyn sydd wedi eu gosod.

However, the process suggests that they are legislative in nature because the process allows the Assembly to vote against making these guidelines that have been set.

[19] Hoffwn i'r pwyllgor ystyried a yw eisiau ystyried canllawiau statudol sydd â phroses ddeddfwriaethol yn perthyn iddynt fel is-ddeddfwriaeth, beth bynnag yw cynnwys y canllawiau hynny. Mae'r cwestiwn yn un perthnasol hefyd oherwydd fe welwch fod dwy enghraifft yn y Bil y byddwch yn ei drafod ym mhellach ymlaen yn y cyfarfod hwn yn berthnasol i'r drafodaeth. A ydych chi'n teimlo bod hon yn broses ddefnyddiol ai peidio, lle mae canllawiau yn cael eu gosod gerbron y Cynulliad cyn cael eu gwneud?

I want the committee to consider whether it wants to consider statutory guidance that has a legislative process attached to it as subordinate legislation, regardless of the content of that guidance. The question is also relevant because you will see two examples in the Bill that you will be discussing later in this meeting that are relevant to this discussion. Do you feel that this process is useful or not, where guidelines are laid before the Assembly before they are made?

[20] **David Melding:** It is a fairly simple question. As a committee, do we want to deal with statutory guidance as constituting subordinate legislation—unless there is good reason not, such as being of a fairly trivial nature, perhaps—or not? We could be more discriminating if you wish, but we need to set a precedent as to how we will regard statutory guidance, as this could become more of an issue for us.

[21] **Mr Griffiths:** I am not suggesting that we should treat all statutory guidance in that way, merely that which is subject to an Assembly procedure.

[22] **David Melding:** In other words, there has to be a reason for us not to. Our assumption would be that we would give it proper scrutiny as subordinate legislation if there was an Assembly procedure. Obviously, a lot of it will be of a trivial nature, and we do not need to filter that.

[23] **Julie James:** I would be inclined to agree that if there is an Assembly procedure attached to it, then it has legislative force as guidance, and we ought to be looking at it, really.

[24] **David Melding:** I think that sometimes we will still find that there is not much to scrutinise.

[25] **Simon Thomas:** Buasech yn disgwyl, gan fod rhyw fath o weithdrefn, bod disgwyl i'r Cynulliad, o bryd i'w gilydd, gymeradwyo, neu beidio cymeradwyo, fel rydych wedi'i amlinellu yng nghyswllt y Bil addysg. Mae hynny'n awgrymu y dylai fod proses yn y pwyllgorau hefyd i gyd-fynd â hynny, ac rydym ni'n un o'r pwyllgorau hynny. Mae'n ddigon posibl y buasem ond yn pasio heibio'r peth, ond mae'n bwysig bod hynny'n cael ei sefydlu—er mwyn i Aelodau wybod, wrth iddynt bleidleisio dros fesur yn y Siambr, fod trefn yn dilyn hynny.

**Simon Thomas:** You would expect, since there is some sort of procedure, that there is an expectation for the Assembly now and again to approve, or not approve, as you have outlined in relation to the education Bill. This suggests that there should be a committee procedure to correspond with that, and this committee would be included. It could well be that we just pass quickly over these things, but it is important that the procedure is established, so that when Members vote on a measure in the Chamber, they know that a specific procedure will follow.

[26] **David Melding:** Okay. I think that we will treat such statutory guidance as if it were subordinate legislation. There have been no technical or merit points identified on this particular example, so are we happy with that? There is nothing of substance to report. I see that Members are agreed.

[27] We need to invite the Minister responsible for the Food Hygiene Rating (Wales) Bill for a similar session to the one that we will have with Leighton Andrews this afternoon. Do we have a prospective date for that, Olga?

[28] **Ms Lewis:** Yes. It is 2 July.

[29] **David Melding:** Are Members content with that? I see that you are. We will therefore issue that invitation.

2.38 p.m.

**Ymchwiliad i Sefydlu Awdurdodaeth ar Wahân i Gymru: Elfyn Llwyd AS  
Inquiry into the Establishment of a Separate Welsh Jurisdiction: Elfyn Llwyd  
MP**

[30] **David Melding:** Good afternoon, Elfyn. You are very welcome, and it is splendid to see you this afternoon. I will just put on record that this is the sixth oral evidence session in our inquiry into the establishment of a separate Welsh jurisdiction. I am delighted to welcome Elfyn Llwyd MP, who is group leader of Plaid Cymru in the House of Commons. I am sure that you will be well aware, Elfyn, of the way these committees work. We have a range of questions that we want to put to you, and we will ask them in turn. Proceedings are obviously conducted in Welsh and English. Right at the end, should we have not covered everything, I will give you an opportunity to respond if you feel that there is an aspect of evidence that we really need to capture.

[31] I will start with a general question that we are asking witnesses. To what extent is there already a Welsh jurisdiction?

[32] **Mr Llwyd:** First of all, thank you for the invitation to come and give evidence here today. I regard this as an extremely important piece of work and I hope that, in some way, I might be able to assist the committee in its deliberations. With regard to the question you just put to me, Mr Chairman, I would argue that there has already been an ad hoc development of a legal jurisdiction in Wales. I believe that this is evidenced by the fact that, post devolution, laws have been created in Wales to serve the people of Wales. To that extent, it is fairly plain that the development has begun. The Welsh legal institutions that have grown up, if not as a direct result of devolution then certainly contemporaneously with it, are also testament to the process having begun.

[33] I would argue that, over the past five or six years, the process has accelerated somewhat, as you will see if you look at current legislation, post-Part 4 of the Government of Wales Act 2006, that is peculiarly Welsh. I believe that this is a substantial body of law. However, even as far back as 2004, of all the legislation then being passed by the National Assembly with regard to transport, planning and the environment, for example, 45% was to deal with Wales alone. With regard to education and lifelong learning, it was 50%, and with regard to local government, housing and economic and industrial development it was as high as 60%. With regard to the Welsh language and culture, it was obviously 100%. To that extent, it can be clearly argued that a jurisdiction in an ad hoc form has begun to encompass the various pieces of legislation that have been passed to serve the needs of the people of

Wales.

[34] **David Melding:** Suzy Davies will take us through the next set of questions. Elfyn has covered some of what we were going to start with, but there are lots of other things to follow up.

[35] **Suzy Davies:** You have already mentioned that we have a separate jurisdiction emerging in an ad hoc way. What is your definition of a separate jurisdiction? We have obviously dealt with several different definitions during the course of this inquiry.

[36] **Mr Llwyd:** A separate jurisdiction is a territorially recognisable area. It has laws to serve that distinct area and it has an administration within its boundaries to serve that area via the laws it enacts. That is probably the shorthand way I would describe it.

[37] **Suzy Davies:** That is absolutely fine. Thank you. You mentioned the emergence of a separate body of law, which is already substantial. Would you say that it is sufficient at the moment for us to have a separate jurisdiction. I am referring to evidence that John Williams gave us, with which you are probably familiar.

[38] **Mr Llwyd:** Yes; I read Professor Williams's evidence. I believe that there is a sufficient body of law. I referred earlier to those figures from 2004. Since then, a great deal of legislation has been passed in the National Assembly, including that from the Welsh Government, obviously. I am sure that you will be looking at the bulk involved, and I am sure that you will find that there is a substantial bulk of Welsh laws that have been created. However, more to the point, as you probably recognise better than I, given the new stronger powers you have under Part 4, there is no doubt that this will increase quite substantially in the years to come. It could perhaps be argued that we are not quite there but that we will certainly be there in a short time, and, therefore, you might just as well get ready for it. However, I believe that there is a sufficient body.

[39] Of course, there are peculiarly Welsh Acts that have been passed by Westminster to add to those we have created in this body. For example, looking back, I would refer to the Sunday Closing (Wales) Act 1881, the Welsh Intermediate Education Act 1889, the Welsh Church Act 1914, the National Insurance Act 1911, the National Health Service Act 1946, and the Welsh Language Acts of 1967 and 1993. I am sure that there are others as well. When you add those to the mix, you will find that it is quite a substantial corpus of law dealing with Wales. Of course, every piece of legislation passed by the National Assembly has substantial repercussions, and many of them now will have criminal sanctions attached to them. So, I think that we have reached a position where we can sensibly talk about the need for a jurisdiction based on the bulk of legislation already around, without looking to greater use of the stronger powers in the months and years to come.

2.45 p.m.

[40] **Suzy Davies:** I have two further questions arising from that answer, if that is okay. In your National Eisteddfod speech in 2010, I think, presumably on the basis of this idea that we have a substantial body of law developing, you said that we must have our own separate legal system in order to administer the laws made in Wales. What is the advantage of having a separate legal system rather than simply making sure that we get a better educated judiciary and legal profession?

[41] **Mr Llwyd:** The reason for that is that, if you are to deal adequately with the new laws—may I call them Welsh laws?

[42] **Suzy Davies:** Yes.

[43] **Mr Llwyd:** If you are to deal adequately with Welsh laws, you will need people to be trained sufficiently. As the body of law increases, there will be a need for lawyers practising in Wales to be properly trained in Welsh law. If I may further add that I have been a member of the Bar for 14 years and, before that, for some 22 years, I was a solicitor. I practise mostly in family and criminal law, and if I did not know how the Welsh family laws have gone, particularly children's law and so on, I could not practise now. What I am saying in a very ungainly way is that there is a need for lawyers to be trained in Welsh law. I believe that we need a Welsh legal system to administer that.

[44] The next question some would ask, although not necessarily the next question that you will put to me, is whether that lawyer would be able to practise elsewhere. The answer to that is quite simple. If I have a case in the North of Ireland as a barrister, I fill in a form and pay £600. On the other hand, if I wanted to practise in the Scottish jurisdiction, I would go through something called a qualified lawyers transfer test qualification, which is relatively straightforward. Overarching all that is the European cross-transfer professional qualification regulation. So, if it comes about that there is a special qualification for Welsh lawyers, which I think it inevitably will in due course, I do not think that it will be difficult for Welsh lawyers to practise elsewhere or deter them from doing so. In the same way, if our friends from England or Scotland wish to practise in Wales, they would have to be versed in Welsh laws. However, I guess that we would have a certain level of assistance in the matter in that, although we would be trained up in Welsh law, I do not think that it will ever come to the point where there will be walls between jurisdictions. Jurisdictions are there to serve their territories, but they are also there to serve beyond territories, and there are cross-territory understandings, as I have referred to, that will undoubtedly come into play in the event of this happening.

[45] **Suzy Davies:** Therefore, with regard to the alternative that I gave you to a separate administration, which was better education of the judiciary and professionals, are you suggesting that, in England, practitioners there would perhaps just not be as interested in developing their knowledge of Welsh law?

[46] **Mr Llwyd:** No, I am not saying that, and I know of many members of the family bar who practise out of Bristol Chambers and who practise in south Wales. They have stepped up to it and versed themselves in Welsh family law, and good luck to them. In the same way, a Welsh lawyer might wish to undertake cases over the border. I do not see any real difficulty with that. Although it is a very important matter, at the end of the day, in any European state, the boundaries of a legal jurisdiction are somewhat porous, given what I have just said.

[47] **Suzy Davies:** I am still struggling to understand why you would want a separate legal system, but I will move on—

[48] **Mr Llwyd:** No, I will enlarge on it, if you wish. A separate legal system will assist in the making of law for that defined area, and I would pray in aid what is happening in Northern Ireland for example. There are pieces of legislation in Northern Ireland which, it is said, have been formulated with ease because there is a separate jurisdiction in Northern Ireland. I think that the time has come for a separate jurisdiction in Wales for several reasons. I do not want to stray into other matters that might be raised later, but I could cite the various sittings of the higher courts in Wales, for example. Inevitably, they end up not being properly carried out because there is not a system to administer the courts in Wales. The administrative court first sat in Wales in 1998 and, sporadically for the first 10 years, there was the odd case in Wales, mostly dealt with in London. An office was opened in Cardiff in 2010, and since then the bulk of administrative law cases are fully heard, from beginning to end, within the boundaries of Wales, and I think that that is only right, particularly with regard to administrative law, which, at the end of the day, it is about challenges to authority, be it local



or central authority. So, I think it appropriate for that to be the case.

[49] I would also say that there is an economic spin-off for Wales from this. Currently, the economic input of the legal system in Wales amounts to about 50% of that of agriculture. That is quite high when you think about it, given the present state of things, which is that much of the work is transferred for the convenience of our learned friends down in London rather than staying in Cardiff, in Wales. Given that, if you were to have a Welsh jurisdiction, I have no doubt that there would be a huge economic spin-off in terms of cases beginning, being dealt with and ending in Wales. I would also say that, in Northern Ireland, which has a far lower population, the legal jurisdiction employs 16,000 people.

[50] **Suzy Davies:** This is my last question. Earlier, you mentioned criminal sanctions. Is it possible to have a separate legal jurisdiction here without devolving responsibility for criminal law—and, indeed, parts of civil law that go across the jurisdictions at the moment? I am thinking of private law and so on.

[51] **Mr Llwyd:** Yes, I understand. I know that the First Minister has been quoted as saying that he thinks it is possible to have a separate legal system without devolving criminal law. I am not sure whether that is absolutely correct, to be perfectly honest. From a political point of view, I would argue that the administration of justice should be devolved. However, my view is that, if we are to move towards a distinct Welsh jurisdiction, it would be highly desirable for there to be devolution of criminal law as well. There is a developing body of Welsh criminal law already, as you are well aware. I know that the corpus juris of Welsh law will undoubtedly entail some divergence on criminal matters. In my view, it can only be a matter of time before the build up of the number of Welsh criminal laws will make it inevitable that devolution of criminal law is necessary and vital.

[52] With regard to the actual mechanics of setting up a criminal law jurisdiction in Wales, again, this has already begun to a large degree. Consider the Crown Prosecution Service: there is a distinctly Welsh Crown Prosecution Service within the confines of Wales, albeit, of course, that the head office is in London. However, the main operational head office for Wales is in Wales. We have Welsh courts administration already. We would need a Welsh judicial appointments commission, although I pause there because I understand that the Judicial Appointments Commission in England is being done away with under the Public Bodies Act 2011. However, in essence, there would be an appointments commission. There is a Welsh Legal Services Commission. It is not quite there, but it can be easily achieved, in my view. The Law Society has an office in Cardiff to serve the various solicitors up and down Wales, and, as you know, since 1997, I think, there has been a distinct bar circuit for Wales, as opposed to the Wales and Chester circuit. I would add that the Wales Probation Trust is already in place, and we have four distinct Welsh police forces. Some of those points are double-edged, and can be used to support the First Minister's argument as well as mine, so you can pick and choose as you wish.

[53] I would also say this, if I may, in passing. In the few introductory remarks that I sent in, I speculated on the possible need for legislation to set up a jurisdiction. I am not utterly convinced that it would be necessary via Westminster. It could be done via the National Assembly for Wales and the Welsh Government. If I may put it on the record, the interaction of section 58, Schedule 3, section 109(1) and section 95(1) of the Government of Wales Act 2006 would, I think, mean that it is entirely possible for you in Cardiff to legislate for a Welsh jurisdiction. I would also say that my friend, Winston Roddick QC, has made a point of referring to this previously, and he is absolutely sure that that is the case.

[54] I would also say that, as for the need for it, in a speech to the Northern Ireland Assembly on 16 September 2008, the then Prime Minister Gordon Brown said

[55] ‘How can you, as an Assembly, address common criminality, low-level crime and youth disorder when you are responsible for only some of the levers for change, and when you have responsibility for education, health and social development but have to rely on Westminster for policing and justice?’

[56] He goes on.

[57] ‘The people of Northern Ireland look to you to deal with these matters because to them they are important. Full devolution is the way to deliver better services, tailored to the needs of all communities, regardless of the politics. It is the best way for you to serve them.’

[58] I say amen to that.

[59] **Eluned Parrott:** Mr Llwyd, could I follow up on one thing, for clarification purposes? Are you saying that you believe that it would not be practically possible to have a Welsh jurisdiction without the devolution of criminal law?

[60] **Mr Llwyd:** No, I am not saying that. What I am saying, in effect, is that if, with respect, the National Assembly for Wales and the Welsh Government are to legislate in this regard, they might just as well do the whole lot at the same time. It seems to me to be an unfortunate way of dealing with matters to deal with them piecemeal. In theory, I suppose, the First Minister is correct, but I am not utterly persuaded of that. What I do believe is that you, as a committee, and the Welsh Government, would in short order have to revisit this situation and look again at the devolution of criminal law to Wales as a matter of common sense—and I do not mean to be pugnacious in saying that. What I mean to say is that, as the body of laws will be increasing, exponentially, I am sure, over the coming years, there will be many divergences in criminal law, and I believe that it is only appropriate that we look towards setting up a criminal jurisdiction now. I know, for example, that there is support for it among the higher echelons of the judiciary, and the police have recently been making their views clear as well—they now believe that it is time to look at a separate criminal law system for Wales. I believe that its time has come, and this committee and this Government have an opportunity to examine it and see that it is now time to put this in the frame. However, I am not utterly persuaded one way or another on the First Minister’s view. I will not say that he is wrong, but I will not say that he is right, either. Sorry, that sounds rather too political, does it not?

[61] **David Melding:** Some witnesses have said that it is a political decision in essence, namely whether you deliver a tidy system all at once before, functionally, you have to do it, or suffer real problems with the administration of justice by not moving ahead and reforming. Perhaps there are similarities in the evidence that we have just heard. Anyway, Julie will take us through the next set of questions.

3.00 p.m.

[62] **Julie James:** Thank you very much for your really good excursion through the various issues. I want to go back to a couple of the things that you mentioned. You mentioned critical mass, and particularly the administrative courts, and so on, but we have quite a lot of evidence in front of us that, despite the move of the administration to Wales in 2010—and I have to say that I was practising in this area myself before I became an Assembly Member—quite a large number of the administrative cases associated with Wales are still being dealt with in England. For example, I acted for three public bodies that had cases started in the Strand in the months before I became an Assembly Member, just a year ago, and that is still happening all the time, for various reasons. We also have some evidence—and I am yet to go through it all, so I am not sure whether it is contradictory—that we do not have a particular system at the moment for knowing how many Welsh cases are still being dealt with in

England, because they do not conveniently have a ‘W’ in their title or anything like that. We do not have a tracking system for that, so a lot of this is anecdotal.

[63] You said a little about what you thought about this, but I would like you to elaborate on the economic development possibilities for the legal profession in Wales. Do you think that if we forced cases to start in Wales when they are to do with Welsh law or Welsh public bodies—even if they were operating under UK law, because obviously that happens as well—that would drive the system forward faster?

[64] **Mr Llwyd:** It would, because actually they tend to disappear down the M4 simply at the convenience of senior counsel and leading counsel. Really and truly, there is no earthly reason why this should be. Normally, as you would know from your own experience, the witnesses would come from Wales anyway, and the solicitors would come from Wales, and maybe even the junior counsel, but then it will be the silk who might reside in the hallowed temples, and for his or her convenience everybody gets shipped down the M4. There is no real logic to that. There is no reason for it. I would argue, actually, in terms of administrative law, that it is desirable that a Welsh case should be heard in Wales. I would further say that every Welsh case should be heard in Wales, even personal injury or negligence cases, or whatever it might be. For many years, as you know, and as I know as a practitioner, these cases have tended to slip down towards London very easily. Somebody’s clerk will ring the chief clerk of the appropriate court and said, ‘We want this moved down because so-and-so will not be available to do it in Cardiff’, or Swansea, or wherever, so it has to be heard down in London. That practice has to stop, to be honest. It is appropriate, in my view, that it should be dealt with within Wales, especially when you are dealing with Welsh matters, but even if it were the application of England and Wales law within Wales, it is still appropriate that it should be heard in Wales, because the balance of convenience in terms of witnesses and lawyers will inevitably be on the Welsh side. Really, it has to stop. I would add one other point. You will know that, when they are shipped down the M4, to put it crudely, there is a considerable waiting list in the Royal Courts of Justice, and that slows things down. Justice delayed is justice denied.

[65] As to your point regarding the administrative court hearings, I think that you are absolutely right up to 2010. The evidence that I have had is that things have drastically improved since a specific court office was opened in Cardiff, and that it now insists that these cases stay in Cardiff. I discussed this with a High Court judge last week and he confirmed that that is the case. You are undoubtedly right about the situation prior to 2010, but more recently it is the other way, and I believe that that is to be welcomed.

[66] **Julie James:** Could I direct your attention to the development side of the question? The issue was the ability of the Welsh bar to go into service at senior QC level, or perhaps other levels, in those sorts of cases. In other words, is there a sufficient body of administrative challenge in Wales to allow a commercial expertise to grow up, or would you just be shipping people down the M4 in the opposite direction?

[67] **Mr Llwyd:** There is a certain commercial expertise in Chester. That is a complicating feature, because I am in chambers in Chester, of all places.

[68] **Julie James:** I was just going to come on to north Wales.

[69] **Mr Llwyd:** We will talk about that later; I will just be quiet for the time being. However, you know that there is a more developed commercial bar down in Cardiff and there are some very good firms of solicitors in Cardiff dealing with big commercial work. I believe that it is developing already and we are in a position where you can turn to some very good commercial law solicitors in Cardiff and some very good commercial law counsel, whether they be Queen’s counsel or junior counsel. I think that we are already there. I would also add

that the Counsel General does have a panel of counsel to deal with administrative law cases, and they come from north Wales and Chester as well as from the south Wales chambers. It is developing, it has been developing, and we are at a position now, I would argue—and I do not mean to be rude to our friends in London—where I do not see any point in having to go to a solicitor in the Temple if the expertise is available in Cardiff, both at a solicitor, junior counsel and Queen’s counsel level. I am sure that I am right in saying that.

[70] **Julie James:** That is very clear; thank you. Turning to the north Wales issue, again we have evidence in front of us that, despite the north Wales circuit being formed, a large amount of the work still slips across into Chester. I wondered if you wanted to comment on that.

[71] **Mr Llwyd:** I will. My chambers are in Chester and Cardiff, and you will know that, for many years, the Chester bar did serve the interests of north Wales. The curiosity is that, up until very recently, I was a member of chambers in Chester where we had 48 members; half of those were Welsh speakers who could do trials in Welsh, both civil and criminal, although we were actually over the border in England. So, it has served north Wales well. I welcome the fact that we now have the new, all-Wales circuit, but old habits die hard—that is the truth of it. The reason why quite a few of the cases have been crossing the border recently, if I can put it that way, is that, for a while, we did not have Caernarfon Crown Court because the new building was being commissioned and Mold Crown Court has gone through a huge refurbishment; during that six or eight-month refurbishment, judges were sitting in Chester, Knutsford, Warrington and occasionally Caernarfon. Those things have skewed matters, but at the end of the day you can also look at it as a sort of microcosm of the slide down the M4—a matter of convenience for counsel’s clerks possibly, and definitely court administrators. However, I think that we will see less and less of that over the years to come. We have finished the refurbishment work and we know where the courts are and, as I say, old habits die hard.

[72] Another complicating feature is that members of the bar in Chester are all members of the Wales circuit, but are also all members of the northern circuit. However, I do not think that it is above being sorted out. One of the things that you said earlier—and it is not revolutionary, but would be sensible—is that the letter ‘W’ could be attached to all cases that start in Wales. In my view, they should not be heard elsewhere unless there are extenuating circumstances of a peculiar nature that mean that they have to. Other than that, I would not wish to see them transferred. Not so much in crime, but certainly in the civil arena, it adds to the delay, as we recognise with the taking of matters down to London.

[73] **Julie James:** Indeed, and we have also heard evidence that there is insufficient work for the Cardiff court, so we have a ridiculous situation where it is taking English cases and Welsh cases are being heard elsewhere. That is very clear; thank you for that.

[74] On a slightly different topic, you also mentioned the whole issue about the establishment of a body of law and the need for a law commission to look at the need to develop particular laws or to codify, or whatever. Do you want to elaborate on that a little?

[75] **Mr Llwyd:** I have seen what Professors Gwynedd Parry and Williams have said about the law reform commission. The only misgiving that I have is that, normally, a law commission means kicking the ball into the long grass and this issue should not go in that direction; I do not think for one second that Professor Williams or Professor Gwynedd Parry is suggesting that.

[76] We have a sufficient body of practitioners and academics in Wales now to form a commission to look at this issue if necessary. I think that it is plain already, but I would think that. If we are to have a law commission, it can be dealt with in a relatively short time because

all the evidence is there to be looked at and I do not think that we need to stand by for a four or five-year process, which is very often the case with law commissions in England and Wales. I am not agin it because it may inform the debate even further. I am not sure whether it is entirely necessary, but if it were, it would not be the greatest disappointment on earth, but I would not like to see it taking a long time to report. I have read what Professors Parry and Williams have said, and I do not disagree with them as such. The only disagreement that I have is that I personally do not think that it necessary. The examination by this committee and the examination by the National Assembly and the Welsh Government in due course would be sufficient.

[77] **Simon Thomas:** Gan barhau â'r pwynt rydym newydd ei drafod, mae'r dystiolaeth yn dangos dau fath o gynnis sydd wedi cael eu gwneud. Un cynnis yw y gall comisiwn edrych ar y mater hwn yn ei gyfarwydd, a'r cynnis arall yw bod comisiwn diwygio'r gyfraith ei hun yn rhyw fath o hanfod o gael awdurdodaeth gyfreithiol ar wahân i Gymru. Nid yw'n glir eto i le rydym am fynd â hyn neu i le mae'r dystiolaeth hon yn mynd. Mae'n rhywbeth nid oeddwn wedi'i ystyried cyn dechrau'r ymchwiliad hwn. A oes gennych farn, nid ar gomisiwn i edrych ar hyn, ond ynghylch a yw comisiwn diwygio'r gyfraith, fel yr *England and Wales law review commission*, yn rhyw fath o hanfod i awdurdodaeth?

**Simon Thomas:** To continue with the point that we have just discussed, the evidence shows two sorts of proposals that have been made. One proposal is that a commission can look at this issue in its entirety, and the other is that a law reform commission in itself is a kind of pre-requisite of having a separate legal jurisdiction for Wales. It is not clear yet where we want to take this or to where this evidence is going. It was not something that I had considered before starting this inquiry. Do you have an opinion, not on a commission to look into this, but whether a law reform commission, such as the England and Wales law review commission, is a kind of pre-requisite for a jurisdiction?

[78] **Mr Llwyd:** Byddai'n bwysig gwneud hynny oherwydd mae'r corff o gyfreithiau yn tyfu—rydym yn gwybod hynny. Mae eisoes wedi cyrraedd lefel gymharol uchel, hyd yn oed o dan yr hen bwerau. Mae'n hawdd rhagweld y bydd yn tyfu yn sylweddol o dan y grymoedd newydd—mae hynny'n amlwg i bawb. Nid wyf yn erbyn cael comisiwn diwygio o'r fath; rwy'n credu byddai hynny'n beth da iawn ar gyfer y dyfodol.

**Mr Llwyd:** It would be important to do so because the body of law is growing—we know that. It has already reached a comparatively high level, even under the old powers. It is easy to anticipate that it will grow significantly under the new powers—that is clear to everyone. I am not against having a reform commission of that type; I believe that it would be a very good thing for the future.

[79] Rydym yn ffodus yng Nghymru; mae gennym bedair prifysgol bellach sydd ag adrannau cyfraith cryf. Mae hynny felly yn ein rhoi mewn sefyllfa gref. Byddai comisiwn diwygio yn bwysig o ran datblygu'r broses, y corff o gyfreithiau a'r hyn fyddwn eisiau edrych arno yn gyffredinol, a byddai'n cyfoethogi'r ddadl yn llwyr.

We are lucky in Wales; we now have four universities that have strong schools of law. That, therefore, puts us in a strong position. A reform commission would be important in terms of developing the process, the body of law and what we will want to look at more generally, and it would certainly enhance the debate.

[80] Rwyf hefyd yn teimlo y dylai rhyw adran brifysgol gael y swyddogaeth o ddilyn y cyfreithiau Cymreig hyn i gyd a pharatoi sylwebaeth ar y cyfreithiau hyn—nid wyf yn siŵr a wyf yn mynd i bwynt arall rŵan ond

I also feel that some university department should be given the function of following all these Welsh laws and preparing commentaries on them—I am not sure whether I have gone to another point now,

mae hynny'n eithriadol o bwysig. Mae gennym bobl mewn sawl prifysgol yng Nghymru—rwy'n falch o ddweud—sy'n gymwys ac yn awyddus i wneud hynny. Tybed a fyddai'n bosibl i'r pwllgor hwn gael hyd i ryw gymaint o arian i gychwyn y prosiect, boed hynny mewn un brifysgol neu ar y cyd gan fwy nag un adran. Byddai'n bwysig iawn i wneud hynny oherwydd, fel mae'r corff yn datblygu, mae pobl sy'n ymarfer y gyfraith yn edrych am eglurhad a sylwebaeth o ran yr awdurdodaeth a sut y gallant ddefnyddio hynny yn y ffordd orau bosibl. Nid dyna'r union gwestiwn a ofynnodd, Mr Thomas, ond mae'r ddau beth yn bwysig iawn yn fy marn i.

3.15 p.m.

[81] **Simon Thomas:** Rydych chi'n iawn; trafodwyd hynny yn y pwyllgor hwn. Rydym yn mynd i Ogledd Iwerddon ac rwy'n siŵr y byddwn yn edrych eto ar rai o'r pethau a wneir yno o ran sylwebaeth—neu o ran nesáu at sylwebaeth. Hoffwn fod yn glir ynghylch rhywbeth yn ymwneud â'r comisiwn cyn dechrau trafod unrhyw bwyntiau eraill. Rydych wedi amlinellu'r ffordd rydych yn gweld comisiwn diwygio'r gyfraith fel rhan o'r awdurdodaeth, ond roedd Gwynedd Parry yn dweud, fwy neu lai, yn ei dystiolaeth i ni, bod rhaid sefydlu comisiwn o'r fath cyn symud ymlaen i sefydlu awdurdodaeth ar wahân. Synhwyraf na chredwch chi fod rhaid gwneud hynny—gall y broses hon ddigwydd yn nes ymlaen ac mae'n dibynnu rywfaint ar y corff cyfreithiol sydd gennym.

[82] **Mr Llwyd:** Efallai fy mod wedi camddeall y sefyllfa. Roeddwn i'n meddwl fod yr Athro Gwynedd Parry, neu, hwyrach, yr Athro Williams, wedi sôn am gomisiwn—

[83] **Simon Thomas:** Credaf mai'r Athro Williams wnaeth sôn am hynny.

[84] **Mr Llwyd:** Soniodd ef am gomisiwn i edrych i mewn i'r holl fater o sefydlu'r system, a soniodd yr Athro Gwynedd Parry am gomisiwn diwygio.

[85] **Simon Thomas:** Yn union.

[86] **Mr Llwyd:** Credaf fod comisiwn diwygio, os rhywbeth, yn bwysicach na'r

but that is extremely important. We have people in a number of universities in Wales—I am pleased to say—who are qualified and eager to carry out that task. I wonder whether it would be possible for this committee to find some money to commence that project, whether it would be in one university or carried out jointly by more than one department. It would be very important to do that because, as the body of law develops, those practising the law are seeking clarity and commentary in terms of the jurisdiction and how they can make best use of the law. That is not quite the question you posed, Mr Thomas, but those two things are very important in my opinion.

**Simon Thomas:** You are right; that has been discussed in this committee. We are going to Northern Ireland and I am sure that we will be looking again at some of the things that are done there in terms of commentary—or in relation to getting closer to commentary. I want to be clear about something relating to the commission before we move on to any other points. You have outlined how you see a law reform commission as part of a jurisdiction, but Gwynedd Parry, in his evidence to us, more or less said that we have to establish a commission of that kind before we move forward to establish a separate jurisdiction. I sense that you feel that we do not have to do that—that process can happen later on and it depends somewhat on the body of law that we have.

**Mr Llwyd:** I may have misinterpreted the situation. I thought that Professor Gwynedd Parry, or Professor Williams, had spoken about a commission—

**Simon Thomas:** I think that it was Professor Williams who mentioned that.

**Mr Llwyd:** He mentioned a commission to look at the whole issue of establishing the system, and Professor Gwynedd Parry spoke about a reform commission.

**Simon Thomas:** Yes.

**Mr Llwyd:** I believe that a reform commission, if anything, is more important

comisiwn arall y cyfeiriodd yr Athro Williams ato. Mae'n hanfodol bod hynny'n digwydd oherwydd bydd yn cyfoethogi eich dadleuon chi a'r hyn sy'n dod allan o'r Cynulliad a Llywodraeth Cymru. Mae'n bwysig iawn—gyda'r grymoedd newydd—bod hynny'n digwydd. Rwy'n cytuno'n llwyr ag ef.

[87] **Simon Thomas:** Diolch. Mae hynny'n esbonio ac yn egluro'r pwynt hwnnw. Credaf eich bod wedi sôn am rôl prifysgolion o fewn y math hwnnw o gomisiwn. I symud gam ymlaen o hynny, mae gennym brifysgolion yng Nghymru sy'n gyfrifol am hyfforddi darpar gyfreithwyr a barnwyr yng Nghymru. Cyfeirioch yn gynharach at rai agweddau ar y cymwysterau angenrheidiol i ymarfer y gyfraith yng Nghymru ac ati. Rydym wedi derbyn rhywfaint o dystiolaeth ynghylch a ddylid cael prawf cymhwysedd i ymarfer y gyfraith yng Nghymru. Rydym wedi derbyn tystiolaeth gan rai pobl sy'n teimlo nad yw pawb yn llwyr ymwybodol o rychwant newydd y gyfraith sy'n digwydd ar hyn o bryd yng Nghymru. Cyn inni symud yn llwyr tuag at awdurdodaeth lwyr ar wahân, beth yw'ch barn chi ynghylch natur y wybodaeth sydd ei hangen er mwyn i bobl ymarfer y gyfraith yng Nghymru a Lloegr? Ym mha ffordd allwn ni sicrhau bod pobl yn gymwys i wneud hynny?

[88] **Mr Llwyd:** Mae hyn yn dod yn ôl yn rhannol at yr hyn a ddywedais yn gynharach ynghylch pwysigrwydd ein bod yn cael pobl sy'n edrych ar y cyfreithiau hyn ac yn paratoi sylwebaeth ddysgedig arno ac yn y blaen. Ni welaf fod problemau mawr o'n blaenau o ran y mater hwn. Mae'n gwbl bosibl i chi fynd i'r Alban a dysgu cyfraith yr Alban yn unig, ond mae'n bosibl hefyd i chi fynd yno a dysgu cyfraith yr Alban a chyfraith Lloegr mewn prifysgol yn yr Alban. Byddai'n beth bendithiol pe bai un brifysgol yng Nghymru i ddechrau yn bwrw iddi i gynnig cymhwyster ar gyfer ymarfer y gyfraith yng Nghymru. Yn y misoedd a'r blynyddoedd i ddod, byddai pobl yn dysgu cyfraith Cymru a hefyd yn dysgu cyfraith Lloegr—

[89] **Simon Thomas:** A chyfraith Ewrop mae'n siŵr.

than the other commission that Professor Williams referred to. It is crucial that that happens because it will enrich your arguments and what comes from the Assembly and the Welsh Government. It is very important—with the new powers—that that happens. I completely agree with him.

**Simon Thomas:** Thank you. That explains and clarifies that point. I believe that you have also mentioned the role of universities within that kind of commission. To move a step on from that, we have universities in Wales that are responsible for training prospective lawyers and judges in Wales. You referred earlier to some aspects of the qualifications needed to practise law in Wales and so on. We have received some evidence on whether a test of competence is needed to practise law in Wales. We have received evidence from some people who feel that not everyone is fully aware of the new range of law that is happening in Wales at present. Before we move fully towards a wholly separate jurisdiction, what is your opinion of the nature of information that is required for people to practise law in Wales and England? In what way can we be sure that people are qualified to do that?

**Mr Llwyd:** That partly returns to something that I said earlier regarding the importance of having people who look at these laws and make learned commentaries on them and so on. I do not see that there are huge problems facing us in terms of this issue. It is entirely possible for you to go to Scotland and learn Scottish law only, but it is also possible for you to go there to study Scottish law and English law in a university in Scotland. It would be beneficial if one university initially began the process of providing a qualification for practising law in Wales. In the ensuing months and years, people would learn the law of Wales and also that of England—

**Simon Thomas:** And the law of Europe, of course.

[90] **Mr Llwyd:** Wrth gwrs, yn enwedig o ran yr amgylchedd a sawl mater arall. Fodd bynnag, ewch ymlaen 10 neu 15 o flynyddoedd o sefydlu'r math hwnnw o gwrs a'r ffordd y bydd y Cynulliad a'r Llywodraeth yn datblygu yng Nghymru, byddwn yn mentro gweld yr elfen Gymreig yn mynd yn fwy a'r elfen arall yn mynd yn llai. Dyna sut rwy'n gweld hynny'n digwydd. Gofid rhai pobl wedyn, wrth gwrs, yw y byddai hynny'n eich rhwystro chi rhag ymarfer dros y ffin. Mae'r *qualified lawyers transfer test* o ran yr Alban, a soniais am Ogledd Iwerddon hefyd. Rwyf yn aelod anrhydeddus o far Wicklow yn Iwerddon—mae ganddynt hwy ddigon o broblemau yno heb i mi fynd yno i wneud pethau'n waeth, felly nid wyf i erioed wedi ymarfer y grefft yno. Fodd bynnag, rhaid cofio bod rheolau traws-Ewropeaidd hefyd yn dod i mewn i hyn. Mae'n bwysig ein bod yn cael cydnabod cymhwyster Cymreig a chymhwyster Seisnig, ond yr unig beth sydd yn hanfodol pan fod y personau hynny yn dod i ymarfer yng Nghymru neu fod Cymro neu Gymraes yn ymarfer dros y ffin, yw eu bod yn deall y gyfraith y maent yn delio â hi. Nid wyf yn ei weld yn broblem fawr.

[91] Mae'n rhaid cofio hefyd, er ei fod yn naturiol bod newidiadau a gwahaniaethau o fewn y corpws cyfreithiol Cymreig, na fydd pobl yn dweud bob amser bod yr hyn sydd yn digwydd dros y ffin yn anghywir. Maent yn mabwysiadu'r hyn y maent yn ei weld yn dda yn y fan honno ac mae pethau o Ewrop yn cael eu mabwysiadu hefyd. Mae rhai'n dadlau bod gormod o hynny. Nid wyf yn un ohonynt, ond nid awn i mewn i hynny yn awr. Fodd bynnag, dadleuir hynny. Nid wyf yn meddwl y bydd pobl yn creu gwahaniaeth er mwyn bod yn wahanol. Ni fuasai hynny'n gwneud synnwyr. Felly, i ateb eich cwestiwn, rwy'n gweld posibilrwydd buan o gael cyrsiau yng Nghymru yn delio â chyfraith Cymru'n gyfan gwbl ond hefyd gyda chyfraith Lloegr neu Loegr a Chymru ac, yn y pen draw, bydd un yn mynd yn fwy a'r llall yn mynd yn llai, ond wedyn bydd yn bosibl croesgymhwyso, ac mae hynny'n bwysig iawn.

[92] **Simon Thomas:** A gaf i ofyn, yn derfynol, am groesgymhwyso? Rydych wedi cyfeirio at Ogledd Iwerddon a'r system yn yr

**Mr Llwyd:** Yes, of course, particularly in terms of the environment and other issues. However, if you move on 10 or 15 years from the establishment of that sort of course and take into account the way that the Assembly and the Government will develop in Wales, I anticipate the Welsh element getting greater and the other element shrinking. That is how I see that happening. The concern of some people then, of course, would be that that would be a barrier to practising over the border. There is the qualified lawyers transfer test in relation to Scotland, and I mentioned Northern Ireland as well. I am an honorary member of the Wicklow bar in Ireland—they have enough problems there without me going over there to make things worse, so I have not practised the craft there. However, it must be remembered that trans-European rules are also relevant to this. It is important that we have a recognition of Welsh and English qualifications, but all that is essential is that when those individuals come to practice in Wales or a Welshman or Welshwoman practices over the border, they understand the law that they are dealing with. I do not see it as a major problem.

We must also bear in mind that, although naturally there are changes and differences within the Welsh legal corpus, people will not always say that what is happening over the border is wrong. They adopt what they consider to be good practice there and things from Europe are also adopted. Some argue that there is too much of that. I am not one of them, but we will not go into that now. However, that argument is made. I do not think that people will create difference just to be different. That would not make any sense. So, to answer your question, I see a possibility, at an early stage, of having courses in Wales that deal entirely with Welsh law but also with English or England-and-Wales law and, eventually, one will become greater while the other diminishes, but then it will be possible to have cross-qualification, and that is very important.

**Simon Thomas:** May I ask, finally, about cross-qualification? You have referred to Northern Ireland and the system in Scotland,



Alban, ac mae eich papur hefyd yn cyfeirio at y ddwy system honno. A oes rhinweddau i'r naill neu'r llall? A ydych yn ffafrio un ohonynt? Mae'r un yng Ngogledd Iwerddon, er enghraifft, yn fwy o *moveable feast*. Fel y gwnaethoch amlinellu, rydych yn gallu mwy neu lai dalu er mwyn bod yn rhan ohoni, tra bod cam yn un yr Alban lle mae'n rhaid i chi brofi eich bod yn gymwys. A ydych yn rhagweld y bydd y system Gymreig yn datblygu yn fwy fel un Gogledd Iwerddon neu'r Alban? A oes rhinweddau yn y naill neu'r llall y byddech yn eu hargymell?

and your paper also refers to those two systems. Does one have an edge over the other? Do you favour one over the other? The one in Northern Ireland, for example, is more of a moveable feast. As you outlined, you can more or less pay in order to be a part of it, while there is a step in the Scottish system whereby you have to prove that you are qualified. Do you foresee that the Welsh system will develop more like the one in Northern Ireland or in Scotland? Are there qualities to one or the other that you would recommend?

[93] **Mr Llwyd:** Rwy'n dyfalu yn awr, ond rwy'n ateb eich cwestiwn. Oherwydd hanes, datblygodd yr Alban yn wahanol oherwydd bod ganddi system gyfreithiol ers canrifoedd. Mae Gogledd Iwerddon, fel y gwyddoch, wedi bod yn rhan o Brydain ac yn y blaen, ond mae gwahaniaethau ers rhai blynyddoedd yn awr. Buaswn yn tybio mai ar hyd llinellau Gogledd Iwerddon y byddwn yn mynd oherwydd rhesymau hanesyddol yn fwy na dim. Mae'n hanes cyfreithiol ni, i raddau, yn gorffen gyda Hywel Dda ac yn ailgychwyn gyda'r Cynulliad Cenedlaethol a Llywodraeth Cymru. Oherwydd hynny, rwy'n meddwl mai ar hyd y llinellau hynny y byddwn yn mynd. Mae cymaint o wahaniaeth. Mae gwahaniaeth sylweddol iawn yn ymarfer yr Alban, ond nid yw mor bellgyrhaeddol yng Ngogledd Iwerddon.

**Mr Llwyd:** This is guesswork, but I am answering your question. Because of history, Scotland developed differently because it had its own legal system for centuries. Northern Ireland, as you know, has been a part of Britain and so on, but there have been differences for some years now. I would imagine that we would develop along the same lines as the Northern Ireland for historic reasons more than anything else. Our legal history, to an extent, finishes with Hywel Dda and restarts with the National Assembly and the Welsh Government. As a result, I think that we will develop along those lines. There is so much difference. The difference is very substantial in the practice in Scotland, but it is not as far-reaching in the Northern Ireland.

[94] **Eluned Parrott:** I am interested in the practical implications of creating a jurisdiction and making it work well. We have had some evidence from Wales's law schools. To return to the point that we were just discussing, if Wales's law schools placed a greater emphasis on Welsh law, would it be a barrier to their recruitment of international students and might that be a financial challenge, given that about 25% of Wales's law students are domiciled outside the EU?

[95] **Mr Llwyd:** No, I do not. When I was at Aberystwyth University, I did one of my theses in Welsh and I had lectures in jurisprudence, the history of law and the laws of Hywel Dda through the medium of Welsh, and it was well known in those days that Aberystwyth was a bit of a trailblazer. When I looked around the room in a tort or criminal law lecture, I would see that about 50% of the students were from various countries abroad. So, it did not deter them then and I cannot see it deterring them now, because Aberystwyth has a very good name for teaching, for example, international law and international environmental law. It would not simply be one area of law. It would teach Welsh law, but every other kind of law as well, and I am sure that the same is true of Cardiff, which has a very good department, and of Swansea and Bangor, which are already teaching through the medium of Welsh and teaching Welsh law as it is coming through. So, I do not think that it will deter foreign students—quite the reverse. A university that respects its own country's laws and also teaches international law and practice well is a university that is well worth looking at.

[96] **Eluned Parrott:** Thank you very much. To return to another point that we have already discussed, I was very interested to hear you describe the impact of setting up a dedicated office for the administrative court in Wales. You said that you had received evidence that there has been a significant change in behaviour since that office was established. To a certain extent, that cuts across some of the other evidence we have received from people who have done some research in this area. Do you have statistical evidence on the impact of the establishment of that office that you could share with the committee?

[97] **Mr Llwyd:** I must confess that I do not have statistical evidence. However, in advance of this meeting I spoke to a High Court judge from Wales who told me that the situation had vastly improved since the dedicated court office was opened in 2010. I put that to you sincerely. Perhaps we could pursue the statistical side of it. Perhaps I should have come with some statistics, but I do not have them, I will be honest.

[98] **David Melding:** It is something we can work on as a committee, I think.

[99] **Eluned Parrott:** That is great. I was not meaning to imply—

[100] **Mr Llwyd:** No, I know you were not, and neither was I meaning to mislead anyone.

[101] **Eluned Parrott:** Of course. Turning to another practical issue, we have heard some evidence that the issue of a separate jurisdiction is significant enough to require approval of the people of Wales by means of a referendum. Would you agree with that?

[102] **Mr Llwyd:** No, I would not agree with that. Put it this way: it is already well on its journey. To put it simply, my belief, sincerely held, is that it is not a question of whether there will be a Welsh jurisdiction but when there will be one. That is all there is to it. The Welsh people would not necessarily find there to be a great deal of change immediately, but, if there were a Welsh jurisdiction, I believe that, as is the case in Northern Ireland, they would find it easier to access the laws and to engage with the law makers, practitioners and so on. That, apparently, is the evidence that comes from Northern Ireland. I understand that you may well be going there, so I will leave you to find out. However, I do not think that a referendum would be required. Put it this way, it is not that it is a blue area today and will be a red area tomorrow. It is grey in the middle and the grey is becoming darker as more and more of it develops anyway. My belief is that it will come and that it is just a question of when. In my humble opinion, to aid the development of the National Assembly and the progress of Welsh Governments, it is highly necessary to have that.

[103] **Eluned Parrott:** You talk about the organic nature of this process, and, clearly, devolution has evolved in a very similar way. Although this is unscientific, I do not get the sense that there is a huge amount of dissent within the National Assembly on the need to discuss this issue. Do you think that there is a consensus among the parties in Westminster?

[104] **Mr Llwyd:** I spoke in the House of Lords last Wednesday evening, and there was a member of the Liberal Democrat party taking part and Lord John Morris was there, who I understand is giving evidence to you. Lord Morris differs in his opinion from many of the Labour politicians I have spoken with. It is very difficult to say, to be honest. I guess that there would be a consensus within the Liberal Democrat party—and, shock, horror, within our party. I know of certain Conservatives in Westminster who also feel that this is a positive step and that it is necessary. However, I cannot answer your question. I know that there is a great deal of talk about it. Lord Morris feels that the time is not right and he does not think it is necessary. However, he differs from quite a few within his own party and, I believe, from the vast majority of lawyer politicians—the ones that I know, anyway.

[105] **Eluned Parrott:** Finally, to what extent are the opinions you have expressed today

orthodox Plaid Cymru policy and to what extent are they the result of your own thoughts and experiences?

[106] **David Melding:** That is not to deprecate orthodox Plaid Cymru policy. [*Laughter.*]

[107] **Eluned Parrott:** No, no.

[108] **David Melding:** It is interesting.

[109] **Simon Thomas:** No comment. [*Laughter.*]

3.30 p.m.

[110] **Mr Llwyd:** Mr Thomas can vouch for one thing, which is that I have never been orthodox. Perhaps that is why I have never got on in the world. However, those are my sincerely held opinions. I honestly have not canvassed them with anybody. I have been thinking about this for some time now. The people I have discussed it with are Members of the House of Lords, members of the judiciary, members of the police service, justices of the peace and generally people who are interested. That is how I have come around to the opinion that I have now held for some time. I know that, 15 to 20 years ago, what I am discussing today would very much have been a minority sport. Today, it is not just important, but vital given where we are with the constitutional settlement. As politicians in Wales, you need the tools for the job, and I believe that the tools for the job will be provided for you by a separate Welsh jurisdiction. This is not simply a political theorist or a political anorak speaking; I have some 35 years' experience of the law, and I believe that the time is now right for us to move forward with this.

[111] **David Melding:** That finishes the questions that we want to put to you, Elfyn. However, as I said, if you feel that there is anything important that has not been captured, you now have an opportunity to put it on the record.

[112] **Mr Llwyd:** Thank you very much, Chairman. The only thing I would say is to reiterate that the system in Northern Ireland, which you will be seeing, is worthy of particular attention. However, I think that you will find that the judiciary in Northern Ireland is almost a cast of thousands. The number of judges in Northern Ireland is beyond my comprehension, especially at the higher level. What I would say is that we do not need that many in Wales, even with our larger population, and I do not think that we would have any difficulty whatsoever in providing a first-class cadre of excellent judges who will serve the needs of Wales very well. As I said just now, the debate now is an important one, and I appreciate the fact that you are taking evidence on it. If I may presume upon the committee, I would say that, if you conclude that the time is not right, I think that you will have to come back in short order to look at it again. As Welsh democracy matures, it is becoming increasingly inevitable that there be a system to serve it. With those few words, I thank you for inviting me here and for giving me such a generous hearing. Diolch yn fawr iawn i chi i gyd.

[113] **David Melding:** We intend to gather evidence in Northern Ireland, and you are not the first witness to say how important that jurisdiction is. I conclude by giving you the committee's thanks for giving up an afternoon to help so lucidly with the evidence that we are seeking to gather from a wide range of sources. We really appreciate the perspective that you have brought this afternoon. Thank you very much.

3.33 p.m.

**Bil Safonau a Threfniadaeth Ysgolion (Cymru)  
School Standards and Organisation (Wales) Bill**

[114] **David Melding:** We now have an evidence session with the Minister for Education and Skills, Leighton Andrews, who will join us in a moment. In the meantime, I will just remind everyone that we are not looking at the policy of the proposed Bill but at how the subordinate legislation would operate. I know that it is not always easy to disentangle the two, but try to be as disciplined as possible.

[115] Good afternoon. I am delighted to welcome the Minister for Education and Skills, Leighton Andrews, to give evidence to our committee this afternoon as we look at the proposed operation of subordinate legislation. Leighton, would you like to introduce your colleagues?

[116] **The Minister for Education and Skills (Leighton Andrews):** I have a number of colleagues with me: Anthony Jordan, Amina Rix, Simon Morea and Ceri Planchant.

[117] **David Melding:** I will put the first question to you, Minister. It is an important question that we put to all Ministers who come here. How have you sought to strike the balance between what is on the face of the Bill and what you intend to leave to subordinate legislation?

[118] **Leighton Andrews:** I think that we give fairly careful consideration to what the right balance is in that regard. The Bill contains the main provisions that establish key principles, the intentions behind policy, and the enabling powers that derive from those policy intentions. There is a need to avoid unnecessary detail in the Bill itself. The subsequent enabling powers are really for subordinate legislation because they are principally administrative and technical and because, from time to time, they may be subject to change. The subordinate legislation principle allows that flexibility. There are obviously some places in this Bill where powers have simply been moved across from existing legislation and I suppose that, in a sense, we have tried to keep to the overall approach that has been adopted in previous pieces of legislation.

[119] **David Melding:** That brings me nicely to my second question. What sort of approach will be taken to recasting and consolidating existing education provision? Have you tried to capture as much existing legislation as possible, or have you been more limited in your approach?

[120] **Leighton Andrews:** Broadly, I suppose that we have been looking at areas where we had a prior commitment to legislate. That might be from previous statements made in the Assembly. In respect of school organisation, for example, I outlined in 2010, I think, a series of steps that we needed to take, some of which we were able to achieve by regulation, but others that, as you know from this Bill, we have to achieve through primary legislation. Other commitments may be manifesto commitments, for example. We have looked within these particular policy areas at the current situation and tried to draw together and consolidate what is meaningful. We have not done a general trawl across the whole of education policy.

[121] **David Melding:** That is very helpful, thank you. Suzy will take us forward with the next set of questions.

[122] **Suzy Davies:** Minister, if I may, I would like to take you back to section 98(2), as I did in the Children and Young People Committee, and draw your attention to the three exceptions to Order-making powers being exercised by a statutory instrument, which would mean that such Orders would not be subject to the procedural control of the Assembly. Those exceptions are Orders made under section 58(2), section 67 and paragraph 34(1)(b) of

Schedule 5. For convenience, those are listed in section 98(2) of the Bill. Are you able to explain why those three are the exception to the usual rule? Before you answer, perhaps I should say that, in your previous reply to me, you said that this Bill is mainly about consolidation and ‘recasting’, I think was the word used. However, I wonder how that applies to section 58(2) in particular, although you may answer about all three?

[123] **Leighton Andrews:** Sections 58(2) and 67 largely restate existing provisions set out under Schedule 7 to the School Standards and Framework Act 1998 and sections 191 and 192 of the Education Act 2002. No Assembly procedure is currently required for these powers to be exercised, and I do not think there is any obvious reason why there should be. The powers essentially relate to the direction to individual local authorities or governing bodies to take action, and they specify a time by which the action should be taken. So, they are very specific, not general powers. Clearly, the imposition of an Assembly procedure would extend the time taken and make it harder to achieve timely intervention should that be required. The effect of the Order would be to direct local authorities or governing bodies to exercise their own powers to bring forward proposals and those proposals would then be subject to consultation in accordance with the code and would, depending on the level of objection, be determined by the local authority, the local determination panel or the Welsh Ministers.

[124] **Suzy Davies:** The two sections that you mentioned specifically are likely to be slightly controversial. In your answer, you just referred to the code, which is obviously dealt with in this legislation as well. However, what we do not have on the face of the Bill is the contents of the code, so the Assembly has nothing by which to measure whether the Welsh Government is exercising its powers satisfactorily. If this is a recasting and a consolidation Bill in part, it is also an opportunity to reform. I presume that you are satisfied that the current position does not need changing with regard to those three sections.

[125] **Leighton Andrews:** As I said, in a sense, we are transposing the powers from previous legislation. I am perfectly happy to share the school organisation code with this and any other committee as the legislation progresses, because officials have been working on that. We would be happy to share that with you, perhaps during Stage 2.

[126] **Suzy Davies:** That would be helpful. Thank you, Minister. I will now ask you specifically about paragraph 34 relating to the transfer of land. Are these powers likely to encompass compulsory purchase orders or the purchase of private property or land?

[127] **Leighton Andrews:** Are you talking about section 34?

[128] **Suzy Davies:** Paragraph 34 of Schedule 5. Essentially, I want to know whether you envisage these powers being used.

[129] **Leighton Andrews:** Again, this largely restates the power that is already set out in the Change of Category of Maintained Schools (Wales) Regulations 2001. There are very limited circumstances in which this power could be used, and, in fact, the existing power has never been used. It allows us to exclude the transfer of land between parties when they have failed to reach agreement on what land should be excluded when a school changes category and land ownership may have to be transferred. They are very specific and precise powers.

[130] **Suzy Davies:** They could in theory include compulsory purchase if the local authorities were not playing ball—or a school authority.

[131] **Leighton Andrews:** The powers are to exclude the transfer of land. I need to get advice on that, I think, and come back to you.

[132] **Suzy Davies:** That is fine, thank you. I appreciate that it is quite a precise question.

[133] **Leighton Andrews:** It is not about a power that would allow the purchase or otherwise; it is to exclude the transfer. I will get firm advice to you.

[134] **Suzy Davies:** Regarding section 58, which is perhaps a bit more controversial, it enables the Welsh Ministers to direct a local authority to establish or discontinue a school. We are talking about directing them, after all. Could you explain the implications of an Order to discontinue? Is that ultimately just a shortcut to the Welsh Ministers having a power to close schools themselves?

[135] **Leighton Andrews:** No, it is not. The reality is that we can do this under existing legislation if a local authority is not taking sufficient action to address the issue of surplus places. We could follow through a process now to direct them to do so. I have made it clear to the new local authority leaders in just the last few days that I expect them to address the issue of surplus places, and I have made them aware of the approach that we think they should be taking. Is this controversial? Well, it is a power that exists currently but it has not, so far, been used, as I understand it. However, it is a power that might be used.

[136] **Suzy Davies:** The reason I say that it is controversial is because, even though it may be an existing power, it is one that the Welsh Ministers can exercise without the Assembly's having any form of scrutiny over it. I am sure that that could cause problems, particularly if you intend to use the power.

3.45 p.m.

[137] **Leighton Andrews:** It seems to me that this goes to the heart of the nature of the difference between the Assembly and the Government. The Assembly is no longer a corporate body. It seems to me that there is a role and a process for Government and its Ministers to take action having had the legislative framework agreed previously by the legislative body. It seems to me entirely appropriate that we have that separation and that Ministers are able to act within the parameters of law that have been laid down by the Assembly.

[138] **Suzy Davies:** Would your answer be pretty much the same in relation to section 82? Have you had a chance to look at that? This is the direction requiring the discontinuance of community or foundation special schools. It is related to section 67.

[139] **Leighton Andrews:** It is the same principle in the sense that, again, there will always be procedures here, and we will always have a duty to act reasonably, and there will always be courses of action open to people through the courts or whatever if they think that we have gone too far, shall I say. There have been cases, for example, that have been brought against Welsh Ministers under the process of judicial review in the education field in the last couple of years, some of which have failed and one of which—well, lawyers will take a view on whether it was successful or not. It would be wrong for me to comment.

[140] **Simon Thomas:** Mae un cwestiwn penodol gennyf. Mae Suzy Davies wedi amlinellu nifer o bethau, a dywedasoeh o leiaf unwaith nad ydych erioed wedi defnyddio'r pŵer; rydych wedi ei drosglwyddo, ond nid yw wedi cael ei ddefnyddio yn y gorffennol. Rwy'n meddwl mai pedwar maes a amlinellwyd gan Suzy Davies. A fyddai'n bosibl inni gael enghreifftiau o le rydych wedi defnyddio'r **Simon Thomas:** I have one supplementary question. Suzy Davies highlighted a number of issues there, and you said on at least one occasion that, to be honest, you had never made use of the power; you had transferred it, but it had never been used. I think that Suzy Davies referred to four areas there. Would it be possible for us to have examples of where you have used the powers in the past and, obviously, where you have not, so

pwerau yn y gorffennol ac, yn amlwg, lle nad ydych wedi ei ddefnyddio, er mwyn gweld sut mae hynny wedi digwydd yn y gorffennol? Hynny yw, sut ydych chi wedi arfer y pwerau hynny yn y gorffennol, er mwyn inni weld sut y gallent gael eu harfer yn y dyfodol?

that we can see how that has happened in the past? That is, how have you exercised these powers in the past, so that we can see how they could be exercised in the future?

[141] **Leighton Andrews:** If you are prepared to be specific about the sections to which you are referring, I am happy for us to look at previous uses of any of those powers.

[142] **Simon Thomas:** I was thinking of those four specific things that Suzy Davies outlined.

[143] **David Melding:** This could be done via correspondence.

[144] **Leighton Andrews:** Perhaps the clerk would send us a specific question on this.

[145] **David Melding:** Yes. Eluned will now take us through the next set of questions.

[146] **Eluned Parrott:** Minister, I notice that your explanatory memorandum states in one of the opening paragraphs that school standards across Wales are too low. Could you clarify whether the Order-making powers and powers of direction in the Bill are intended to be local in character or whether they could, in theory, be applied on an all-Wales basis?

[147] **Leighton Andrews:** They would be specific to a local situation.

[148] **Eluned Parrott:** Do you see any situation where you might wish to apply them on a broader basis?

[149] **Leighton Andrews:** No. We would want to focus very naturally on the performance of particular local authorities. I suppose there could be examples where we might want to look at the position of particular schools, but it is more likely to be local authorities.

[150] **Eluned Parrott:** In section 5 of the explanatory memorandum you explore in detail the implications of the powers to make subordinate legislation, which is very helpful, but you do not explore in the same way powers that are not subject to procedural control in the Assembly. I wonder if you can state why you did not feel that that was necessary in the memorandum.

[151] **Leighton Andrews:** There are established processes by which Ministers will undertake certain kinds of decisions. It did not seem to me necessary to restate those in the explanatory memorandum.

[152] **Eluned Parrott:** Have you undertaken a cost-benefit analysis of these particular powers as well?

[153] **Leighton Andrews:** All the cost-benefit analysis that we have undertaken is set out in the regulatory impact assessment.

[154] **Eluned Parrott:** I am wondering if you can give us an outline of how you would intend to keep the Assembly informed of any future Orders, directions or statutory guidance issued by Welsh Ministers under the Bill that are not subject to that procedural control.

[155] **Leighton Andrews:** I would imagine that, on the whole, it would be through a

written statement or, potentially, an oral statement. If you think of the most drastic interventions that we have undertaken on local authorities, in Blaenau Gwent, for example, you will recall that I made an oral statement to the Assembly, and I think that I am right in saying that, in respect of Pembrokeshire, the Deputy Minister made an oral statement. It seems to me that that is the appropriate process. It would depend on the nature of the intervention, but certainly something as serious as moving commissioners in to take over the execution of the authority's education function, as happened in Blaenau Gwent, is serious enough to require an oral statement. Sometimes a written statement might be more appropriate if it was a different kind of action.

[156] **Eluned Parrott:** If it were a less major intervention—for example, if it were asking for governors to be appointed, or something that was less controversial in that sense—would you think a written statement would be appropriate in those circumstances?

[157] **Leighton Andrews:** Probably. You are asking me to speculate on a hypothesis here, and I do not like to do that, but, in general terms, I would think that would be appropriate. From time to time it might be more appropriate to write to Assembly Members, but an approach like that—

[158] **David Melding:** It would not be appropriate to use any of these powers, even over very local and less serious matters, perhaps, or matters that do not carry the full weight of sending in commissioners, without some trace being issued so that the Assembly realises that powers have been exercised.

[159] **Leighton Andrews:** Wales is a very small place and it is very hard to exercise powers without their being noticed, on the whole, but if you are taking powers, and you are going to be using powers that have not previously been used, then it would be wise to make a statement to the Assembly.

[160] **Eluned Parrott:** Moving on to something slightly different, I note that the explanatory memorandum states that local education authorities fear using the powers that they already have because they feel that the current legislation is unclear and ambiguous—I think that is the phrase that is used. I imagine that it is your intention that the legislation that you are putting in front of us will encourage local education authorities to use their powers more often. Are the revised criteria for intervention objective enough to effect that encouragement and that change, or are some of them still subjective, and might be tested in the courts?

[161] **Leighton Andrews:** Our underlying purpose here is to bring clarity to a number of areas of legislation, which ought to make it easier for local authorities to understand when they can use their powers and indeed when they should use their powers. My view is that we are not necessarily seeking for local authorities to use these powers more frequently; what we are seeking is for them to understand when they should. I suspect that clarity over when they should use these powers and the occasional use of them, or possibly the threat of their use, might be a way in which certain actions could be encouraged within the school system. As I said when I made the oral statement on the Bill, earlier intervention can mean less drastic intervention. In terms of being challenged, obviously if a local authority behaves unreasonably it can be challenged, and no doubt will be.

[162] **Eluned Parrott:** I turn to section 34, where you look at the scrutiny procedures for issuing guidance. Essentially, you set out the requirement to consult and the way in which the guidance will be set out for the Assembly. Why did you follow this particular procedure? Why did you feel it was the most appropriate procedure in this instance?

[163] **Leighton Andrews:** The section 34 power is about issuing guidance to, potentially,



all school authorities to support improvement. Therefore, there is the opportunity for scrutiny in the way described. However, the powers of direction are about timely intervention to correct identified gaps or failings. To require an Assembly procedure in relation to these would, as I said in answer to an earlier question, extend the time taken and make it harder to achieve timely and effective intervention. Therefore, we must be clear about where we want these procedures. Essentially, it is an issue of the difference between the issuing of guidance, such as school improvement guidance, and the need to give very clear direction in certain areas.

[164] **Eluned Parrott:** I notice that consultation is mentioned throughout the Bill with regard to the exercising of many of the powers you have set out. Are you working to a particular definition of consultation? For example, I note that, in some instances, if you are proposing to place additional people on a school's governing body, one of the required consultees is the governing body. It seems a little strange to me that you would consult people with whom you are potentially not happy. There may be a conflict of interest inherent in that. Do you have a particular idea of what that consultation will look like?

[165] **Leighton Andrews:** There could be circumstances where a governing body was seeking assistance from the local authority or others, and it would be appropriate for us to consult the governing body in that case. It may have identified gaps in the level of expertise it requires. Therefore, I would not want to exclude governing bodies from having an input to appointments to their own governing body, even where that was driven by the need to improve performance. Usually, we consult fairly broadly and we have well established systems in the department to consult different organisations and interests. Separately within this Bill, we have set down a less specific approach in relation to the whole issue of school organisation. However, really, what is being set out here is that there is an existing procedure under current legislation and a need to comply with that. Consultation is defined in law, as I understand it, as a degree of contact and a requirement over a period to respond. So, those issues are already covered.

[166] **Eluned Parrott:** Thank you. I would like to look at the issue of a code on school organisation. Can you give us some examples of the types of requirements and guidelines a statutory code on school organisation might contain?

[167] **Leighton Andrews:** We are not coming at this as though it were year 0, of course. School organisation guidance has been in existence for decades, so, in a sense, we are building on what already exists. Therefore, the code will set out the requirements in relation to the way in which consultation on school organisation proposals must be conducted and on the operation of the local determination panels. Putting those in the code enables the requirements to be framed in a way that makes them accessible and understandable by all those to whom they will apply. In other words, they must be written in plain English rather than legalese. I also hope that we can update the code with reference to best practice as people go through the process.

[168] **Eluned Parrott:** Thank you. Your reference to plain English may answer my next point, but I am just wondering why the requirements and guidelines were not included on the face of the Bill.

[169] **Leighton Andrews:** There are some things that should be in Bills and some things that should be contained in codes or guidance, and I think that we are clear that the code, which will be a legislative code, of course, is the appropriate place for this. As I said earlier, I am very happy to share the code in draft with the committee.

4.00 p.m.

[170] **Eluned Parrott:** Okay. Just to clarify, it is legislative in character rather than explanatory.

[171] **Leighton Andrews:** Yes, indeed. However, it will largely mirror the current guidance on school organisation set out in the relevant circular.

[172] **Eluned Parrott:** Thank you, Minister.

[173] **David Melding:** Simon, will you take us through the next set of questions?

[174] **Simon Thomas:** Rydym newydd drafod y cod statudol, ac rydych newydd gadarnhau y bydd yn ddeddfwriaethol ei natur. Cyn hynny, roeddem yn trafod canllawiau statudol. A fedrwch chi esbonio wrthym y gwahaniaeth rhwng canllawiau a chod? Pam rydych wedi dewis defnyddio'r un weithdrefn yn y Cynulliad ar gyfer cymeradwyo'r ddau beth hyn? Yr un weithdrefn sydd ar gyfer y canllawiau statudol i wella ysgolion ag sydd i'r cod statudol ar gyfer aildrefnu neu drefniant ysgolion. Beth yw eich meddwl o ran y ffordd yr ydych yn mynd i ddefnyddio'r Cynulliad i gymeradwyo'r ddau gam hyn?

**Simon Thomas:** We have just discussed the statutory code, and you have just confirmed that it will be legislative in nature. Before that, we discussed statutory guidance. Can you explain to us the difference between guidance and a code? Why have you chosen to use the same Assembly procedure to approve both of these things? The procedure for statutory guidance to improve schools is the same as that for the statutory code for school organisation or reorganisation. What are your thoughts on how you are going to use the Assembly to approve both of these actions?

[175] **Leighton Andrews:** Given that these are general principles that will affect all parts of Wales, it is important to have a proper process in both of these areas whereby they are approved by the Assembly. The procedure that we are suggesting for the school organisation code is the same as has been followed in the past for the school admissions and the school admissions appeals codes. Like the school organisation code, they impose mandatory requirements and provide general guidance.

[176] I think that this is the appropriate process. There is a requirement on the face of the Bill to lay a draft of the code before the Assembly, and then Assembly Members will be in a position to decide whether there should be a debate about its contents.

[177] **Simon Thomas:** A oeddech wedi ystyried y weithdrefn gadarnhaol, y byddai rhai'n dadlau ei bod yn cryfhau rôl y Cynulliad yn y broses arbennig hon? A oeddech wedi ystyried honno, neu a ydych yn cario ymlaen oherwydd mai dyma'r hyn a wnaed gyda chodau tebyg yn y gorffennol?

**Simon Thomas:** Did you consider the affirmative procedure, which some would argue would strengthen the role of the Assembly in this particular process? Did you consider that, or are you pressing ahead because that is what was done in relation to similar codes in the past?

[178] **Leighton Andrews:** As I have said, it is the same procedure as for the school admissions code. It seemed to us the appropriate procedure to follow.

[179] **David Melding:** It is an odd tweaking of the negative procedure, is it not? It is almost as if you feel that you should do a bit more, but that you do not quite want to commit to the affirmative procedure.

[180] **Leighton Andrews:** Is it, though? There will be consultation on the code, and that will be quite widespread, so that there will be an opportunity for public debate. The opportunity is there for Assembly Members essentially to intervene in the process and to

decide to have a debate on the code. I do not see that as an odd tweaking at all; I think that it is a sensible procedure.

[181] **Simon Thomas:** Weinidog, rydych wedi esbonio mai'r rheswm dros gael cod yn hytrach na rhoi manylion ar wyneb y Bil yw eich bod yn teimlo bod hwn yn rhywbeth a all newid dros gyfnod a'i bod yn haws felly cael modd newid y cod a dod yn ôl drwy'r broses rydym newydd ei hamlinellu yn hytrach na newid y ddeddfwriaeth sylfaenol. Serch hynny, mae'r gosodiad ar wyneb y Bil ynglŷn ag ymgynghoriad braidd yn foel. Mae'n datgan yn syml bod yn rhaid i Weinidogion Cymru ymgynghori â'r personau y gwêlant yn dda. Oni ddylech chi fod ychydig yn fwy penodol ar wyneb y Bil ynglŷn â'r ffaith na ddylid ymgynghori â pawb, ond efallai enwi rhai o'r bobl y mae'n rhaid ymgynghori â hwy yng nghyd-destun y cod trefniant ysgolion hwn?

**Simon Thomas:** Minister, you have explained that the reason for having a code rather than putting the detail on the face of the Bill is that you feel that this is something that could change over time and that it is therefore easier to have a means of changing the code and returning through the process that we have just outlined rather than amending primary legislation. However, the statement on the face of the Bill with regard to a consultation is rather bare. It simply states that Welsh Ministers must consult such persons as they think fit. Should you not be a little more specific on the face of the Bill with regard to the fact that not everybody should be consulted, and perhaps name the people who must be consulted in the context of this school organisation code?

[182] **Leighton Andrews:** If we are going to consult on the code, then we will do it quite widely. We would anticipate there being a number of interests that would want to give their views, and that would include, obviously, local authorities, and I would imagine that it would include the teaching unions and other bodies, such as Estyn and so on, and the schools themselves may have views. We would publish it widely: it would be published on our website and I am sure that it would get a lot of attention when we published it. I imagine that we would publish it with a written statement. All schools receive news on written statements that are made by the Minister through our newsletters. So, in a sense, I do not feel the need to specify each and every consultee on the face of the Bill.

[183] **Simon Thomas:** No, that is not the case. However, it is not unusual for primary legislation to state, 'You must consult with these persons and other persons as you see fit'. That is not an unusual case. You do not have to specify everyone. You have just mentioned the people whom you would expect to consult, so why not name them on the face of the Bill?

[184] **Leighton Andrews:** It varies, does it not? I do not think that there is a consistent approach, necessarily, to that in legislation.

[185] **Simon Thomas:** I agree that there is not a consistent approach; I just wanted to know why you chose to use this approach on this particular occasion.

[186] **Leighton Andrews:** There is certainly no intention here not to consult widely on this. It is fair to say that there will be every desire to get input from people on the code when we publish it.

[187] **David Melding:** We do not expect you to wander down to the Rhondda Conservative club and consult a few people—

[188] **Leighton Andrews:** I am not sure that there is a Rhondda Conservative club, Chair. *[Laughter.]* There are some Conservative clubs in the Rhondda.

[189] **David Melding:** That was probably a poor example. However, obviously, we cannot have an arbitrary process. So, is it just the general defence of reasonableness that you make in

terms of the range of people you will consult?

[190] **Leighton Andrews:** The difficulty is who you do and do not list. Do you list the special educational needs tribunal and some of the organisations acting on a voluntary basis that may have some interaction with schools? You could end up with a very extensive list and I would rather not exclude people at that stage by suggesting that they are less worthy of consultation.

[191] **Simon Thomas:** Y cwestiwn yw: a ydych wedi mynd yn rhy bell y ffordd arall drwy roi'r grym yn gyfan gwbl yn nwylo'r Gweinidog ynglŷn â phwy y dylid ymgynghori â hwy? Fodd bynnag, hoffwn symud ymlaen oherwydd mae gennyf gwestiwn arall ynglŷn â phryd y byddai'r fath god ar drefniant ysgolion yn dod i rym. Rydych yn dweud yn glir iawn yn y memorandwm esboniadol eich bod yn bwriadu dod â chod drafft gerbron y Cynulliad Cenedlaethol yn fuan ar ôl derbyn Cydsyniad Brenhinol. Os ydych yn bwriadu gwneud hynny mor fuan, pam nad ydych wedi nodi ar wyneb y Bil y dyddiad rydych yn bwriadu gwneud hynny? Hynny yw, pam nad ydych yn dweud y bydd yn cael ei wneud o fewn chwe mis neu bedwar mis, neu bryd bynnag? A oes rheswm pam nad ydych wedi nodi yn y Bil y dyddiad y bydd y cod yn cael ei gyflwyno?

**Simon Thomas:** The question is: have you gone too far the other way by putting the power entirely in the hands of the Minister regarding who should be consulted? However, I would like to move on because I have another question regarding when such a code on school organisation would come into force. You state very clearly in the explanatory memorandum that you intend to bring a draft code before the National Assembly shortly after receiving Royal Assent. If you intend to do that so quickly, why have you not noted on the face of the Bill the date on which you intend to do that? That is, why do you not say that it will be done within six months or four months, or whenever? Is there any reason why you have not noted in the Bill the date on which the code will be introduced?

[192] **Leighton Andrews:** As I said earlier, the preparation of the draft code is very well advanced and we are happy to share it with the committee. In fact, I see no reason why we could not consult on it during Stage 2 of the passage of the Bill. We would then be able to lay an appropriately amended draft code before the Assembly following the commencement of the provisions of Part 3 after the Bill receives Royal Assent. However, it is certainly our intention that the new regime for school organisation will apply from September 2013. So, let me say that absolutely transparently today.

[193] **Simon Thomas:** You have said that previously, Minister, and I have no doubt that you will keep on saying it. The question is: would it not confirm your intention in legislation were you to put this on the face of the Bill? I am asking whether you have a particular reason not to do so.

[194] **Leighton Andrews:** I do not think that there is a particular reason not to put it in the Bill, but we have been very clear about what we are doing.

[195] **Simon Thomas:** Iawn. Symudaf ymlaen at ran arall o'r Bil, er bod y cwestiwn am yr un maes. Yn adran 40 ac Atodlen 2, mae gennyf bwerau eang iawn ynglŷn â diwygio'r Bil drwy gyflwyno newidiadau rheoleiddiedig. A fedrwech chi esbonio pam rydych yn dymuno cael pwerau mor eang yn y maes hwn?

**Simon Thomas:** Okay. I will move on to another part of the Bill, although the question relates to the same field. In section 40 and Schedule 2, you have very wide powers relating to reforming the Bill by introducing regulated alterations. Can you explain why you wish to have such wide-ranging powers in this area?

[196] **Leighton Andrews:** Schedule 2 sets out the alterations to a school that require the publication of statutory proposals, and similar prescribed alterations are currently set out in regulations. Any change to those regulations would be subject to the negative resolution procedure. In order to be as transparent as we can, we have set out the regulated alterations on the face of the Bill. However, policy may develop over time, and it is possible that we might need to add or take away from the current list of alterations. So, the principle enshrined in primary legislation that significant alterations to schools should be made through statutory procedures would be unaffected. In recognition of the fact that these are powers to alter primary legislation, I think that it is appropriate that they are subject to affirmative procedures.

[197] It is important that the committee bears in mind that it is only alterations to schools that can be changed by an Order, and not whether a school can be opened or closed. So, we are talking very specifically about that form of change.

[198] **Simon Thomas:** A ydych wedi ystyried rhoi mwy o rôl i'r Cynulliad? Rydych newydd amlinellu pam rydych yn teimlo ei bod yn bwysig bod rôl i'r Cynulliad yn y maes hwn, ond mae modd cryfhau rôl y Cynulliad fel y corff deddfu drwy'r *superaffirmative procedure* gan baratoi drafft ac ymgynghori arno, ac wedyn symud at y weithdrefn gadarnhaol. A ydych wedi ystyried hynny o gwbl? Rwyf yn deall mai trosgwlyddo grymoedd sydd yn digwydd yn y fan hon, ond mae cyfle i wella'r drefn weithiau, onid oes?

**Simon Thomas:** Have you considered giving the Assembly a greater role? You have just outlined why you feel that it is important for there to be a role for the Assembly in this area, but there is a way of strengthening the Assembly's role as the legislative body through preparing, under the superaffirmative procedure, a draft for consultation, and then moving towards the affirmative procedure. Have you considered that at all? I understand that you are transferring powers here, but there is sometimes an opportunity to improve procedures, is there not?

[199] **Leighton Andrews:** What we are setting out here is quite limited in practice. The superaffirmative procedure might be appropriate in situations where, for example, individuals might be affected as individuals. For example, there is legislation governing a special educational needs tribunal so that children's right of appeal is dealt with through the superaffirmative procedure. I think that that is a good example. I think that the NHS Redress (Wales) Measure 2008 may have a similar procedure. You are talking there about things that are potentially very specific to particular individuals, so, in a sense, that principle is a fair one. We are talking here about alterations to schools; we are not talking about closures of schools or opening of schools. That is a different scale of things.

[200] **Simon Thomas:** Gan symud yn ôl at rywbeth rwyf am gael eglurhad arno, mae adran 57 yn delio â diffiniad o ysgol fach, sef ysgol â llai na 10 o ddisgyblion ar ddiwrnod penodol ym mis Ionawr. Rydych wedyn yn rhoi hawl i'r Gweinidogion newid y dyddiad hwn. A allech chi esbonio pam yr ydych am gael yr hawl i newid y dyddiad ar gyfer pennu a yw ysgol yn ysgol fach? Oni fyddai'n haws pennu'r dyddiad yn y Bil fel bod pawb yn gwybod beth yw'r diffiniad o ysgol fach ac ar ba ddyddiad y pennir hynny, fel y gallwn wybod a yw ysgol yn ysgol fach ai peidio? A oes rheswm penodol dros chwilio am system newydd?

**Simon Thomas:** To return to something that I want some clarity on, section 57 deals with the definition of a small school, namely a school with fewer than 10 pupils on a specific day in January. You then give Ministers the right to change this date. Can you explain why you want to have the right to change the date on which a school is categorised as a small school? Would it not be easier to specify that date on the face of the Bill so that everyone knows what the definition of a small school is and on what date that categorisation will occur, so that we know whether or not a school is a small school? Is there a specific reason for trying to find a new system?

[201] **Leighton Andrews:** We have chosen the date on which the annual school census takes place, which is ordinarily the third Tuesday in January. We have set that down here. However, the school census date might change, and, if it did, we would need to alter the date set out in the primary legislation. That is a very technical issue, and it would have a pretty minimal impact, I think. So, in this one instance, I think that we considered that affirmative procedures would be an inappropriate use of Assembly time.

[202] **Simon Thomas:** I would tend to agree with you on that. I assume that the school census is also covered by regulation, or at least by some kind of code or guidance, so why is there not a direct link to the census rather than to a date that is then changed by regulation?

[203] **Leighton Andrews:** That is a very good question. I will come back to you on it.

[204] **David Melding:** You have a right to reply in writing, Minister.

[205] **Simon Thomas:** We might have an answer already, but there we are.

[206] **Leighton Andrews:** I am told that the school census date is not set out in regulations.

4.15 p.m.

[207] **Simon Thomas:** That is what I was trying to get to. Perhaps we will come back to this, but that explains it anyway.

[208] **Julie James:** I am tail-end Charlie on this long afternoon, but not tail-end Charlie in terms of the topic because we are turning to the issue of Welsh and the Welsh in education strategic plans. Section 87 gives the Welsh Ministers regulation-making powers to require local authorities to make an assessment of whether there is demand for Welsh-medium education in an area. If you make them, those regulations will be subject to the negative procedure. They seem rather more significant than that to me, so I am wondering why you have chosen that particular procedure for that power.

[209] **Leighton Andrews:** There is a general principle that we are setting down in relation to the Welsh in education strategic plans in the Bill. Our view is that local authorities should be obliged to carry out an assessment of demand in a particular area if either of the following applies: where more than 50% of pupils in maintained schools are assessed in the language, literacy and communication skills of learning through the medium of English and the local authority has not carried out an assessment of the demand among parents in its area for Welsh-medium education in the three years immediately preceding the academic year for which we want those data; or, if Ministers have rejected the local authority's plan under section 86 and informed it that we require it to carry out an assessment. There will be a consultation on the regulations and guidance before we bring in the commencement Order in September 2013. The main duties are set out on the face of the Bill. What we are really talking about subsequently is the details.

[210] **Julie James:** Okay, thank you, Minister. That is very helpful. There is a whole series of regulations set out in section 88 relating to the Welsh in education strategic plans, which have the unfortunate acronym of 'WESPs', which I cannot get my head around at all. There is a whole series of regulations and they seem to be quite different: some are about the form and content of the strategic plans, others are about the timing and duration, while others are about whether they should be under review. It is quite a wide-ranging set of regulations, and they are all subject to the negative procedure. On the face of it at least they appear to have different weightings.

[211] **Leighton Andrews:** I suppose that what we are seeking to do is to take local authorities through a process where we feel further action is needed in future. It is inevitable that we need to give guidance on this area. The fact that we are setting the WESPs on a statutory basis is evidence of our belief that we need to go further in this area if we are to see effective implementation. However, having said that, once we have debated the general principle, which we are doing here, I am not sure that we necessarily need to go through a procedure other than the negative procedure when we bring forward the regulations. It is possible, I suppose, that, over a period of time, we might gather further evidence about best practice and approaches that need to be incorporated, and we may wish to amend those. However, this is part of a continuing debate. The key thing is that we are getting the principle on the face of the Bill.

[212] **Julie James:** So, you are seeing the regulations as a series of guidance regulations.

[213] **Leighton Andrews:** Well, they are things that will have to be implemented, but, in a sense, the key principle is set out in the Bill. Compliance with that will then be set out in the regulations.

[214] **Julie James:** Fine. That is great. In some ways, Minister, I wondered whether you were going to be able to give us examples of why you might want to make regulations on the form and content of a WESP or on their timing and duration. Are you talking about individual education strategic plans for individual LEAs or are you talking about regulations across the whole of Wales?

[215] **Leighton Andrews:** We are expecting local authorities to prepare Welsh in education strategic plans. They will need to do that in compliance with the regulations that we have drawn up. On the basis of those plans, they may subsequently be challenged by us with regard to whether the plans are adequate. It is even possible that we might reject them. The regulations here are potentially very important for local authorities, and, therefore, there is no room for doubt as to what is expected of them.

[216] **Julie James:** To labour the point, as I am not quite getting my head around it, are you talking about allowing local authorities to draw up Welsh in education strategic plans, checking whether they are okay and then looking at whether you might need to make regulations, or are you talking about making regulations that set out what those plans might have in them in the first place?

[217] **Leighton Andrews:** We would want them to have a good understanding of what is expected of them, so, yes, we would expect them to comply with the regulations we are making.

[218] **Julie James:** Okay, so the regulations come first and then the plans.

[219] **Leighton Andrews:** Yes.

[220] **Julie James:** Okay. Thank you very much for that. Turning to a different issue, section 93 deals with school-based counselling. I understand that there is a current pilot scheme on extending counselling services to year 5 and below, but you have gone ahead and published the Bill prior to knowing what the outcome of the pilot scheme might be. Can you explain your thinking on the timing of this?

[221] **Leighton Andrews:** What we have been doing over a period of years is building up independent counselling support for young people. This goes back to the work of the children's commissioner following the Clywch inquiry back in 2004. We commissioned research on best practice in the UK with regard to school-based counselling and we published

a strategy for school-based counselling in 2008. We have taken a number of steps to look at how we might extend that to the primary sector. Those pilot schemes have now ended. Clearly, we are now considering how we can support local authorities to extend counselling services in future. That is going to take some time to achieve, but we wanted to get the general principles in the Bill because we thought that this was a timely opportunity to legislate. This will enable us to ensure that we are taking this forward with local authorities in the appropriate way.

[222] **Julie James:** So, you see yourselves as fleshing that out as you get more information.

[223] **Leighton Andrews:** The primary pilot schemes concluded in March 2012. We want to understand the conclusions of those, but we wanted to use this legislative opportunity to get the principles established and to make the necessary arrangements.

[224] **Julie James:** I understand that there are also going to be powers to make regulations requiring the provision of independent counselling services at locations other than schools. Again, these are to be subject to the negative procedure. In what circumstances would that arise? Is the negative procedure appropriate? It seems quite a big move to take this out of schools.

[225] **Leighton Andrews:** An example might be extending school-based counselling to primary pupils in year 4 or below and we wanted to propose that the local authority could provide counselling on the site of a primary school as opposed to a secondary school, which is what there is express provision for in the Bill. We might want to propose it to be made available in any other more suitable location that the local authority identified. If we do not have a regulation-making power, it would mean that young children would have to access counselling on the site of a maintained secondary school or at any other location identified by the local authority, which may be inappropriate. What we are trying to do here is ensure that there is flexibility with regard to the settings in which this counselling can take place.

[226] **Julie James:** Thank you very much, Minister. I have one last very technical question to do with the commencement provisions for parents' meetings. I am told that you have confirmed in a letter that the provisions are contained on the face of the Bill and will commence two months after the Bill receives Royal Assent. However, I am also briefed that the Bill's commencement provisions state only that Chapter 3 of Part 2 and section 92 will come into force two months after Royal Assent and that the rest of the Bill is subject to commencement provisions. As your last act in front of the committee, could you explain that?

[227] **Leighton Andrews:** Yes, we are very grateful to the committee for its help in identifying this issue and we will be bringing forward a Government amendment at a later stage. [*Laughter.*]

[228] **Julie James:** Marvellous, thank you, Minister.

[229] **David Melding:** We have influence. [*Laughter.*]

[230] **Simon Thomas:** This will be the first of many.

[231] **David Melding:** On an issue relating to how we tidy things up, you have consolidated a certain amount of legislation, as you indicated in the Bill. Why does the explanatory memorandum not have a table of derivations? It is a very standard procedure.

[232] **Leighton Andrews:** That is a perfectly reasonable question. I am happy to come back on that and see whether we can look at that for future stages.



[233] **David Melding:** Unless you have anything to add, Minister, that concludes the session, which was very useful. We covered a lot of ground. We appreciate your succinct and direct answers. Thank you very much.

4.26 p.m.

**Papur i'w Nodi**  
**Paper to Note**

[234] **David Melding:** The next meeting is on 11 June. May I notify you that I will be conducting public duties in the Falkland islands on that date, so I will not be here?

[235] **Simon Thomas:** I am also not here on 11 June.

[236] **David Melding:** Right, we therefore have work to do to ensure that the committee will be able to meet effectively on that day. There is a paper to note from the meeting held on 21 May.

4.27 p.m.

**Cynnig o dan Reol Sefydlog Rhif 17.42 i Benderfynu Gwahardd y Cyhoedd o'r  
Cyfarfod**  
**Motion under Standing Order No. 17.42 to Resolve to Exclude the Public from  
the Meeting**

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

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

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

*Derbyniwyd y cynnig.*  
*Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 4.27 p.m.*  
*The public part of the meeting ended at 4.27 p.m.*