Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

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

Dydd Llun, 2 Gorffennaf 2012
Monday, 2 July 2012

Cynnwys
Contents

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

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

Offerynnau sy'n Cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reol Sefydlog Rhif 21.2 neu 21.3
Instruments that Raise Issues to be Reported to the Assembly under Standing Order No. 21.2 or 21.3

CLA 155—Gorchymyn Corff Adnoddau Naturiol Cymru (Sefydlu) 2012
CLA 155—The Natural Resources Body for Wales (Establishment) Order 2012

Ymchwiliadau'r Pwyllgor: Ymchwiliad i Sefydlu Awdurdodaeth ar Wahân i Gymru
Committee Inquiries: Inquiry into the Establishment of a Separate Welsh Jurisdiction

Bil Sgorio Hylendid Bwyd (Cymru)
Food Hygiene Rating (Wales) Bill

Papurau i'w Nodi a Dyddiad y Cyfarfod Nesaf
Papers to Note and Date of the Next Meeting

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

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

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

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

Eraill yn bresennol
Others in attendance

Christopher Brereton	Pennaeth Deddfwriaeth ynghylch Iechyd Amgylcheddol y Cyhoedd, Llywodraeth Cymru Head of Environmental Public Health Legislation, Welsh Government
Lesley Griffiths	Aelod Cynulliad, Llafur (y Gweinidog Iechyd a Gwasanaethau Cymdeithasol) Assembly Member, Labour (The Minister for Health and Social Services)
David Hughes	Bargyfreithiwr Barrister
Christopher Humphreys	Yr Adran Gwasanaethau Cyfreithiol, Llywodraeth Cymru Legal Services Department, Welsh Government

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

Steve George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Lisa Salkeld	Cynghorydd Cyfreithiol Legal Adviser
Alys Thomas	Y Gwasanaeth Ymchwil Research Service

Dechreuodd y cyfarfod am 2.28 p.m.
The meeting began at 2.28 p.m.

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

[1] **David Melding:** Good afternoon, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I will start with the usual housekeeping announcements. We do not expect a routine fire drill this afternoon, so if we hear the alarm, 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, the translation is available on channel 1, and you can amplify our proceedings on channel 0. Please switch off all electronic equipment completely, as it can interfere with the broadcasting equipment. I have received apologies from Julie James and I welcome Vaughan Gething as her substitute once again. I have also received apologies from Eluned Parrott, and I am pleased to welcome Peter Black, who has had some past association with this committee right at the beginning of the term of this Assembly. We welcome your presence this afternoon, as well, Peter.

2.29 p.m.

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:** These instruments are listed before you. Are there any issues? I see that there are none.

Offerynnau sy'n Cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reol Sefydlog Rhif 21.2 neu 21.3
Instruments that Raise Issues to be Reported to the Assembly under Standing Order No. 21.2 or 21.3

[3] **David Melding:** We do not have any instruments under item 3.

2.30 p.m.

CLA 155—Gorchymyn Corff Adnoddau Naturiol Cymru (Sefydlu) 2012
CLA 155—The Natural Resources Body for Wales (Establishment) Order 2012

[4] **David Melding:** I remind the committee that the committee has already discharged its usual responsibilities for reporting on this Order under Standing Order Nos. 21.2 and 21.3. However, the committee can also make a report after the Environment and Sustainability Committee has considered the Order, and this particularly relates to powers to extend the period for consultation. You will note that that has not actually been requested by the Environment and Sustainability Committee. However, I will take views.

[5] **Suzy Davies:** I refer to the letter that we have all received from the Chair of the Environment and Sustainability Committee, dated 27 June, which post-dates the replies given by the Minister for Environment and Sustainable Development to earlier questions. He says in paragraph 3 of that letter on 27 June, which is on page 9 our bundle of papers, that, in arriving at the decision—that is, not to request this committee to ask for the longer procedure—his own committee

[6] 'remained concerned about several issues that arose during its consideration of this draft Order.'

[7] I must say, Chair, that I find it quite strange that, having made that remark, he was still prepared to say that this committee needed to take no further steps. I do not know whether any other members of this committee have any mention to make on it. It strikes me that the position that we are in is quite contrary to that put forward by the Counsel General in Plenary only last week, which was followed by a debate in which all members of this committee spoke, about the need for correct and detailed scrutiny. It strikes me that this letter of 27 June from the Chair of the Environment and Sustainability Committee seems to curtail our need for further scrutiny. Do other Members have any comments?

[8] **David Melding:** Are there any other views?

[9] **Peter Black:** The letters in my bundle are dated 26 June and 29 June, but not 27.

[10] **David Melding:** It is the letter from Dafydd Elis-Thomas that you are referring to, Suzy, is it not?

[11] **Suzy Davies:** Yes, it is a letter that says that he does not require this committee to ask for the slightly extended scrutiny procedure, and yet he goes on to say that there are still things that need to be discussed.

[12] **Peter Black:** I do not think that I have that letter.

[13] **David Melding:** Just to clarify, the wishes of that committee have been forwarded to us in a letter from the Chair, Dafydd Elis-Thomas, and that is what Suzy Davies was quoting. It states that there were some outstanding issues of concern; however, they did not warrant, in the committee's view, an extension of the consultation period. That is the nub of it. Peter, you are reading the letter. Vaughan, do you have an immediate response to that matter or to what Suzy has raised, perhaps?

[14] **Vaughan Gething:** I sit on the Environment and Sustainability Committee, and I was there when the committee discussed this particular issue. The letter that we had from the Minister setting out a response to detailed questions that the committee had asked, and the written assurances that the Minister gave us about further scrutiny, were such that the environment committee felt satisfied that it could undertake its job properly. Also, there was an opportunity in particular to have a draft version of the second Order that the committee could then discuss and suggest amendments to before having the formal draft at which the formal 60-day scrutiny of that second Order would take place. The great majority of the functions will be contained in the second Order and the new body cannot actually come into being without that second Order. So, we took a pragmatic point of view, but we also took the opportunity, as the letter sets out, to mark out that we would still want further improvements to the process, which is entirely appropriate. So, it is not that the environment committee is avoiding scrutiny or saying that we are worried that we are not doing scrutiny properly; it is a pragmatic point, and we took seriously the written assurances that the Minister gave about further scrutiny of the process—and we will certainly hold the Minister to those assurances. That is the view that the committee took.

[15] **David Melding:** Thank you. That is very helpful, Vaughan. Peter, do you want to make any comments? I see that you do not. Suzy, do you want to respond to that?

[16] **Suzy Davies:** Just briefly. It strikes me from Vaughan's answer—and I am not on the environment committee, so I do not know what was said—that the word 'pragmatism' seems to be driving this decision rather than the need for particular scrutiny. Bearing in mind what all four members of this committee said in Plenary less than a week ago about the need for proper scrutiny, and also bearing in mind that John Griffiths's letter of 26 June actually throws up just as many issues as it answers, I am not satisfied that your committee is having a full opportunity to scrutinise this properly, but of course I appreciate that that is not my decision. However, I would like my unhappiness with that recorded, if it at all possible.

[17] **David Melding:** As far as we are concerned, we exercise this particular power in response to what a committee requests, and, as Vaughan indicated, the committee has discussed it and feels that it can do the necessary scrutiny via a second Order, which will be more substantive and will be issued in draft. I do not think that we can gainsay that. I think that we have to respect the committee's request, that it has looked at this issue and is content that it can exercise its scrutiny duties in that way. However, I note your comments, and these things are looked at in retrospect when all the Orders have been discussed. If people are unhappy with the process, they may reflect on what you said and adopt the sort of approach that you would adopt, which would be to extend the consultation on the initial Order and set a precedent at that stage, rather than hold fire until the second or subsequent Order.

[18] **Suzy Davies:** On a slightly more conciliatory note, the final paragraph of Dafydd Elis-Thomas's letter says

[19] 'I should be most happy to meet with you'—

[20] meaning you, I think, Chair—

[21] 'to discuss the draft Order, or how we might best approach subsequent orders of this type, should you consider that to be useful.'

[22] I think that such a meeting would be useful, as this is a situation that is likely to crop up time and again.

[23] **David Melding:** That is helpful. I think that I should meet him to discuss how this process, which we are exercising for the first time, has proceeded, and to see whether there are any improvements that we can make, that we all understand what has been achieved and what was intended, and that the safeguards that are intended to be in place by this procedure have been fulfilled. That said, to summarise, we have discharged our duties, we have reported on the technical matters that are our responsibility, and we have received correspondence from the committee that is doing the substantive scrutiny of the policy and it does not want for this Order to receive a 60-day consultation instead of the 40-day one that is provided for. I see that we are content with that—with your reservations, Suzy, which are on the record.

[24] **Simon Thomas:** Fel pwynt o drefn, mae Suzy wedi codi rhywbeth heddiw, sef llythyr nad wyf wedi'i weld, a dywedodd ei fod ar dudalen 9, ond nid yw'r llythyr ar dudalen 9 y pecyn Cymraeg yr wyf wedi'i argraffu, ac nid wyf wedi gweld y llythyr wrth argraffu'r papurau yn y fersiwn Gymraeg. Mae'r un peth gan Vaughan hefyd, felly nid wyf yn siŵr iawn beth sydd wedi digwydd, ond nid wyf wedi gweld y llythyr, dyna'i gyd.

Simon Thomas: As a point of order, Suzy has raised something today, namely a letter that I have not seen, and she said that it was on page 9, but the letter is not on page 9 of the Welsh bundle that I have printed out, and I did not see the letter as I was printing off the Welsh papers. I see that Vaughan has the same thing, so I am not quite sure what has happened, but I have not seen the letter, that is all.

[25] **David Melding:** Okay. Steve will explain the situation.

[26] **Mr George:** The letter arrived with us relatively late, and therefore it was added to both the Welsh and English packs relatively late. We have brought copies along today so that Members would have it, but it may be that the version of the papers that you have is an earlier version. I did not pick up on that, but I do not think that it is a feature of its being in one version of the pack and not in the other.

[27] **David Melding:** I will review the whole process, Simon. If you get a chance to read it, you will see that the letter was quite important and most of the discussion has sprung from that, on how to deal with the duties that we have under the Public Bodies Act 2011.

2.39 p.m.

Ymchwiliadau'r Pwyllgor: Ymchwiliad i Sefydlu Awdurdodaeth ar Wahân i Gymru
Committee Inquiries: Inquiry into the Establishment of a Separate Welsh Jurisdiction

[28] **David Melding:** David Hughes, barrister, will be joining us now to give oral evidence. Good afternoon, David. These proceedings will be conducted in Welsh and English. When Welsh is spoken, you can use channel 1 on the headset to hear the simultaneous translation. Channel 0 can be used to amplify proceedings. I am delighted to welcome David Hughes, who is a barrister practising out of 30 Park Place, Cardiff. He has extensive experience of the Gibraltar Bar and the operation of the Gibraltar jurisdiction.

[29] We are particularly pleased to welcome you this afternoon because of your experience with a small jurisdiction. We have a range of questions to put you. We have shared the questions between the Members, so we will move from Member to Member. They will ask several questions. There may be supplementary questions on the subject matter raised by a particular Member. If, right at the end, there is a particular issue that you feel is important to our inquiry that we have not addressed through our questioning, we will give you the opportunity to add to our evidence at that point.

[30] To start, it would be useful to have an initial view of how a very small jurisdiction operates and whether there are any broad lessons that we can learn before we go into detailed questions with regard to what, in the British context, is a small jurisdiction in Northern Ireland and what would be a small jurisdiction if one were established in Wales.

[31] **Mr Hughes:** Certainly. As you say, Gibraltar is an extremely small jurisdiction. Gibraltar has a population of just over 29,000. It has about 160 lawyers, but that includes people functioning as both non-contentious solicitors and contentious solicitors. It is a fused profession, so separate advocates, as we know barristers here, do not exist. It has a courts system that largely mirrors what we would expect to find here, although the terminology is different. The Supreme Court of Gibraltar is a trial court, essentially, combining the functions of the High Court here and the Crown Court. It has a written constitution, which changes the legal landscape quite significantly from what we are used to here, in that you can go to the basic competence of legislation and its compliance with the constitution in a way that we cannot do with primary legislation, or at least primary legislation in so far as it is passed by the United Kingdom Parliament.

[32] It has lessons for Wales. Although there are obvious differences between Wales and Gibraltar, the same can be said of any other small jurisdiction—whether it is a microjurisdiction such as Gibraltar or simply another relatively small jurisdiction, such as

Northern Ireland or Western Australia. You will always be able to find differences but that does not mean that the comparisons are not useful. Gibraltar is particularly useful in the sense that, if we have a fear that Wales would have a particular problem because of its size, looking to Gibraltar, if we do not see that problem there where the jurisdiction is so much smaller, the chances are that we would not see that problem in Wales. If we see a problem in Gibraltar, it does not necessarily mean that we will see it in Wales, because we are so much bigger. However, that is where it is a useful test for people's fears and concerns about the implications of separation.

[33] **David Melding:** Thank you. That is very useful for our analysis.

[34] **Peter Black:** In your evidence, you say that you have appeared in a number of cases regarding the interpretation of the Gibraltar constitution. What does that entail and how does it inform your evidence with regard to a Welsh jurisdiction?

2.45 p.m.

[35] **Mr Hughes:** First, with regard to what it entails, the Gibraltar constitution changed towards the end of my time there but both the 1969 and 2006 constitutions had specific provisions setting out fundamental rights, and they had a provision that gave the Supreme Court jurisdiction to hear an application by people who said that those rights had been, or would be, infringed. So, you had specific constitutional authority to bring cases to court. In terms of how the cases arose, it was simply a question of people coming into my office with a legal problem. They did not usually come in and say, 'We want to challenge the constitutionality of things'. It was a practical way of addressing people's problems.

[36] I am sorry; I have forgotten the question.

[37] **Peter Black:** How does that inform evidence for the work that we do here?

[38] **Mr Hughes:** The case of Rojas v. Berllaque illustrates the concern that I have. Rojas v. Berllaque was a case in which a woman was bringing civil proceedings in respect of a false imprisonment claim against a former boyfriend. She was entitled to a jury trial. Gibraltar's jury system, at the time, operated in such a way as to produce all-male juries. Section 19 (1) of the Supreme Court ordinance, as it was, stated that males who met certain criteria, subject to certain exemptions, were automatically on the list of potential jurors. Subsection (2) stated that females could apply to go on the list. Unsurprisingly, the women of Gibraltar each made individual decisions that they did not want to go on the list—although, if you asked them whether they thought that there should be all-male juries, the answer would probably have been 'no'.

[39] The section that I was talking about earlier provides for the Supreme Court to grant relief where people bring those claims. It has a specific power in relation to pre-constitutional legislation. I have noted it somewhere; I will see whether I can find the note. That legislation is to be construed with such modifications, adaptations, qualifications and exemptions as may appear necessary to bring it into conformity with the constitution. So, the court, in effect, had the power to amend legislation to bring it into conformity. At first instance, the chief justice exercised the power. He based it on the general power, rather than on that specific one, and simply read out the word 'male' from subsection (1) and read out subsection (2). So, it was just 'persons' rather than 'male persons'. The Gibraltar Court of Appeal is—at the time and now—comprised of people who, although they hold office as Gibraltar judges, are retired judges of the Court of Appeal in England and Wales. The majority of the Court of Appeal in that case took the approach that the remedy should simply have been a declaration that the statute, as drafted, was unconstitutional. They wanted to take an approach that we would recognise here if we were, for example, looking at a local bye-law, asking whether it could be

separated from that.

[40] My interpretation would be that that was paying insufficient regard to the court's expressed constitutional mandate. You ask how that transfers here, where we do not have a written constitution. We must bear in mind that these judges are able people going to a jurisdiction that they are not brought up thinking of as part of the jurisdiction of England and Wales. They have to get on an aeroplane to get there, there is a time difference, and they are sitting in physically different buildings. Despite all of those reminders of difference, I think that the majority still found it hard to make the jump to applying the law of Gibraltar, as opposed to being confined to the law of England and Wales. If that happens there, so much greater is the possibility, I think, of it happening here. We are talking about a country making laws that is a couple of hours' train ride from London, and where we have a legal tradition that presumes that the law in Wales is still the same as the law in England. If you go to England and speak to lawyers based there, you will find that that assumption is still widespread. It may not be an assumption shared by the higher judiciary, but whether we can be sufficiently sure that this risk will not be realised is something of which I am doubtful.

[41] **David Melding:** Before I bring in Simon Thomas, Vaughan, do you have a supplementary question?

[42] **Vaughan Gething:** Yes. I understand what you are saying, but it sounds as if your criticisms can be read as applying to the quality of the judges rather than to the system. You have just given your description of the difference in jurisdiction time—getting on a plane to go somewhere—but it is exactly the same for the Judicial Committee of the Privy Council, which still deals with appeals from a range of other jurisdictions across the globe. Also, is there not an argument that says that if you have judges who are schooled in the law of England and Wales hearing appeals on Wales-only laws, they will be more familiar with the range of concepts in place anyway? I am therefore not sure that I would read the very broad statements that you are making, in which you are very critical about lawyers in England in particular, as being necessarily decisive. They sound more like supposition, frankly, than hard evidence.

[43] **Mr Hughes:** They are not supposition. They are a judgment that I have reached based on experience rather than hard fact. Could you read the case and come to a different conclusion? Possibly. I sounded out some Gibraltar lawyers before coming here, to see whether their perceptions accorded with my own. The response was generally that they did. A book was recently written by a Gibraltarian lawyer about the development of the legal system in Gibraltar, and one of the things that he highlights in it is that there is some uncertainty about the extent to which a court will follow Anglo-Welsh case law.

[44] There is another case, in which I was not involved. It is the Almeda case, which is a Privy Council case, and that, again, could be subject to that sort of criticism. It concerned the immunity of highways authorities with regard to nonfeasance as opposed to misfeasance for highways defects; all right, you have the Highways Act 1980 in this jurisdiction, but this goes back to an earlier law. If you read the case, you can perhaps see a tendency to resort to Anglo-Welsh law instead of considering the proper application of that law to Gibraltar in Gibraltarian law. However, we are getting into complex issues of statutory interpretation there, because of the Gibraltar statute interpreting the law. It is not a critique of the quality of the judges.

[45] **Vaughan Gething:** Well, that is what it sounds like.

[46] **Mr Hughes:** I simply do not accept that. One of the—

[47] **Vaughan Gething:** Whether you accept it or not, that is what it sounds like.

[48] **David Melding:** Vaughan, let us hear from the witness. We are going to get drawn into a long discussion on Gibraltar law rather than a Welsh jurisdiction if we are not careful.

[49] **Vaughan Gething:** There are several broad-brush statements being made, Chair, about what would happen, and the witness is saying that they are not supposition. I am very uncomfortable with that.

[50] **David Melding:** All right; let us listen to the witness.

[51] **Mr Hughes:** It is not a critique of the quality of the judges. One of the judges who took the approach to remedy what I was talking about is Sir Ian Glidewell, who agreed with the submissions that I was making on the substantive question here. The judges in question are appellate judges in a jurisdiction the judiciary of which enjoys a very high international regard—England and Wales. Sir Ian Glidewell, in particular, I felt, adapted extremely well to Gibraltar generally. Most of the time, he appeared to have grasped that he was not applying the law of England and Wales—I did disagree on an approach taken on this case.

[52] If you want to take the view that I am criticising the judges or trying to explain away shortcomings in an argument that I presented without success, then that is fine. However, if that is the approach that you take, I refer you to the Almeda case with regard to highways immunity. There, again, I felt that the same problem had arisen.

[53] There is another case, which I argued shortly before coming back to Wales, involving Abecasis and the Attorney General. I reviewed that case before coming here. The available report of it is not easy to read, because of problems in the way that it comes up on the relevant website, but in that case, which concerned whether the eviction of squatters in certain circumstances was a violation of a constitutional right, again there was very much a reference to an Anglo-Welsh authority rather than an approach to the Gibraltar constitution. In each of these instances you can say, 'It was appropriate in the circumstances', or 'It was your own shortcomings in argument', and that might be right, but the fact that I can refer to those three instances and have that impression is not supposition; it is a judgment that I am basing on my own experience. You can share that judgment or not, but it is not supposition.

[54] **David Melding:** We will move on, otherwise we will get bogged down on this issue. We will give weight to the evidence later, Vaughan, and you will be able to express any scepticism that you have at that stage.

[55] **Simon Thomas:** Hoffwn ofyn cwestiynau yn Gymraeg. Yn gyntaf, hoffwn ofyn am eich barn am y mater hwn—

Simon Thomas: I would like to ask my questions in Welsh. First, I would like to ask your opinion on this issue—

[56] **David Melding:** Have you got the translation?

[57] **Mr Hughes:** Yes, I have it now.

[58] **Simon Thomas:** A ddylid creu awdurdodaeth gyfreithiol ar wahân i Gymru fel mater o egwyddor gyfansoddiadol, neu a ydych chi'n credu mai mater ymarferol yw hwnnw, ar gyfer adeg pan mae corff digonol o gyfraith Gymreig? P'un sydd bwysicach i chi, neu a yw'r ddau yn berthnasol yma?

Simon Thomas: Should a separate legal jurisdiction be created for Wales as a matter of constitutional principle, or do you believe that that is a practical matter for a time when there is a sufficient body of Welsh law? Which is more important to you, or are both relevant here?

[59] **Mr Hughes:** I think that both are relevant. I am uneasy with the approach that says

that we have to wait for a sufficiently distinct body of law. That is partly because of the question of what a distinct body of law is and how we would make that; partly because, by definition, when you reach that point, you would not have the jurisdiction that you would need; and partly because it is a recipe for a mess. The practical arguments in favour of a separate jurisdiction, to my mind, include the one that I just mentioned—the fear of what may happen otherwise. It does not matter whether you think it is particularly likely, highly probable or fairly improbable. What matters is that you think that it is a real possibility, because unless you can dismiss it as a real possibility, you are acknowledging the risk that one day a court will make a determination that would have the effect of undermining all your work. As a matter of principle—and I recognise that the British tradition is not particularly keen on constitutional principle as opposed to practicality—it seems to me that, if a territory has sufficient recognition that it has its own primary legislative body, even if that does not have plenary competence, that jurisdiction should have a court system to adjudicate that. The facile answer to that would be to say, 'We do—we have the courts of England and Wales', but that is a court system of England and Wales, not a Welsh system. Other practical arguments in favour of a proper Welsh jurisdiction would be that you in the Assembly will be making policy choices and they will be reflected in legislation, and they may well differ from the choices being made in respect of England. In doing that, you will be reflecting a degree of difference from England.

[60] **Simon Thomas:** And England will do vice versa.

[61] **Mr Hughes:** Absolutely. One of the things that we have to recognise is that it is not just activity here that will lead to differences becoming bigger; it could also happen where you decide, as a collective, that you are happy with the legislative status quo, but the Westminster Parliament decides that it is not, in the English context. It would therefore move on and we would remain with the status with which we are happy.

3.00 p.m.

[62] It seems to me that it is right that those cultural differences should be reflected in a separate court system. That does not mean that the courts of England are not good courts; it is the same as a New York lawyer saying, 'The courts of Massachusetts are fine, but they are not the courts of my state or the courts of my polity'. That is the principled argument. The practical argument, as I have just said, is that I am uncomfortable with saying, 'Let's wait for the moment and then do it', because when the moment comes and you have not done it, you are not ready for that moment.

[63] **Simon Thomas:** I do not want to reopen the discussion that you were having with Mr Gething—

[64] **David Melding:** Nor do I. [*Laughter.*]

[65] **Simon Thomas:** In the cases that you were talking about in that regard, the principle had been established that there was a separate jurisdiction. Did the difficulty—if I can put it that way—arise from the fact that it was a small jurisdiction that people had not perhaps taken fully into account, or from a lack of divergence from another jurisdiction; in other words, the body of law-type of argument? Did the fact that it was a separate jurisdiction mean that it did not quite come across and make that work properly, because you seemed to be suggesting that it was an imperfect working of the system?

[66] **Mr Hughes:** I do not know if I would say that it was either of those; I think that it was more cultural. There is sufficient divergence between the law of Gibraltar and the law of England and Wales—

[67] **Simon Thomas:** With a written constitution, I would imagine that there would be.

[68] **Mr Hughes:** Yes. The divergence is of the sort that if you go there and you know that it is divergent and you check things, you will probably be all right. We all start in legal practice there without training in the local law. I think that it was probably a combination of cultural difference and the experience that one gets of the day-to-day application of that law. It is probably to do with its itinerant nature or the fact that it is not there all the time. One can contrast that with the example given of the Judicial Committee of the Privy Council, because these are the same judges who spend the bulk of their time doing United Kingdom cases, whether it is England, Wales or Northern Ireland. However, they have a significant caseload of Commonwealth cases through which they are getting greater experience of the day-to-day application of written constitutions.

[69] **Simon Thomas:** If we take the example of there not being a huge body of Welsh law yet, but an increasing body of Welsh law, and your judgment regarding a cultural difference and the importance of that in a jurisdiction, how practical and feasible would it be to have the devolution of the civil side but not the criminal justice side in the Welsh context?

[70] **Mr Hughes:** I think that that would be tricky because neat divisions of the sort that you just mentioned are apt to create argument about where those divisions lie, and on which side of the division a particular case happens to be. For example, one would probably say that the bulk of the administrative court's work is civil, but when the administrative court hears an appeal by way of case stated from a magistrates' court, it is probably exercising a criminal jurisdiction, even though we would ordinarily think of it as being a civil court. If you say, 'That case is easy—it is crime', what about when the administrative court hears a judicial review of a criminal court's decision? Is it then exercising a criminal jurisdiction or a civil jurisdiction?

[71] One of the criticisms made of this process in the past is that it is just a way for lawyers to make money. The solution that I proposed in my memorandum of written evidence is a way to avoid lawyers making money by having a nice, clean solution that avoids the scope for argument.

[72] **Simon Thomas:** Your evidence also mentions the 'funding of access to justice'. This is an issue where the committee saw something different happening in Northern Ireland to what is being proposed at the moment in England and Wales, for example. Could you elaborate a little more on that point and on the importance that you would place on that within the establishment of a legal jurisdiction in Wales?

[73] **Mr Hughes:** Obviously, it is absolutely vital, if we are to have the rule of law and to maintain it, that people are able to go to court. We all hope that they will not need to, but they need to have that option. If we are going to have a court system, it seems to me to be inevitable that we in Wales—you—should have control of the framework that allows people to access that court system. I do not see that one can operate without the other. Choices made in respect of England may not reflect the priorities that you judge to be appropriate for Wales. The option that I canvassed in my written memorandum is a conditional legal aid fund. We know that that works in jurisdictions of comparable populations, broadly speaking, to Wales; it works in Hong Kong and some of the Australian states. I can explain it briefly if you are not familiar with how that would work. It is something that would reduce the amount of money that the community as a whole, whether it is as taxpayers or payers of insurance premiums or however, pays to lawyers. It would return some of the money that passes through the legal system back to fund other people's access to justice. I do not say that this is something that would be compelled by a separate jurisdiction—plainly, it will not—but increasing access to justice and at the same time spending less money on lawyers is an example of the sort of options that would be open for you to take.

[74] **Simon Thomas:** That is a kind of policy decision that could result from a separate jurisdiction.

[75] **Mr Hughes:** It is. Absolutely.

[76] **Simon Thomas:** I am just interested at the moment to see how that might affect the workings of that jurisdiction. Whatever the policy decision taken, a separate legal aid-type system in Wales would in itself mean that any cases up to the Supreme Court level originating in Wales would have to be heard in Wales. That would be the effect of it, would it not?

[77] **Mr Hughes:** Yes.

[78] **Simon Thomas:** It could not then send cases to be listed in London because it would not only be a different jurisdiction—they could be the same judges—but a different funding system and a different way of approaching the barristers or the solicitors or whoever. What you propose would mean a very contained jurisdiction.

[79] **Mr Hughes:** You are absolutely right. Sorry, I had slightly misunderstood the question as it was first framed. It would be mean that the access to justice would be much closer to people in Wales. In Cardiff at least, and in heavily populated south-east Wales, people may not be too far from a court, but when they need to start getting to the Court of Appeal, even though we have visits by the Court of Appeal, if they want appellate justice, they would generally have to go to London. The Supreme Court, I understand, never sits outside London, and we can lament that but we can probably not change that. So, that would be much closer to people in Wales. There are other issues about closeness to access to justice that already exist. I am not a criminal practitioner but, for example, the provision of a women's prison in Wales or a prison in north Wales are real problems. The creation of a jurisdiction would not solve them, but the absence of a separate jurisdiction does not mean that they do not exist.

[80] **David Melding:** Suzy Davies will take some questions. I think that we have probably done the issue of access as much as we need to, so Suzy will take us to the other questions.

[81] **Suzy Davies:** I want to develop this theme of access to justice but looking at it through a different part of the telescope, if you like. It is a matter of location, location, location. You deal with it in Gibraltar, as you said, by having multidisciplinary lawyers, while, in Northern Ireland, they seem to deal with it by having multidisciplinary law buildings. If you are positing a position, which you are, that one way of bringing justice nearer to us in Wales is to have a separately administered jurisdiction, could that be done by civil procedure rules and practice direction, or do you think that this needs to be dealt with by statute regarding where cases should be commenced?

[82] **Mr Hughes:** You could do something by way of rules; however, I do not think that you could do enough. You could beef up the rules to have a direction that a certain number of cases must be heard in Wales. You could even have that at Court of Appeal level. We would still, however, be competing against the call on resources that exists elsewhere in the joint Anglo-Welsh jurisdiction.

[83] **Suzy Davies:** Are you saying that you would not have set down in the practice directions the sort of rules that we are talking about, simply on practical grounds?

[84] **Mr Hughes:** I think that there would be practical concerns about them. If one looks at the Administrative Court practice direction, for example, the rules go quite some way to creating a presumption that cases will be heard in Wales. One obvious example of an

exemption from that is our extradition cases—appeals against extraditions. All the extradition cases are dealt with in the City of Westminster Magistrates' Court and, on appeal, they are heard at the Royal Courts of Justice; that is not local justice for Welsh people. One can argue about the merits of the practicalities that have led to that conclusion, but that is purely a reflection of practicality rather than anything else. It is an example of practical concerns trumping any desire that people who are being extradited from Wales should have their justice done locally.

[85] **Suzy Davies:** So, you would be arguing for a statutory requirement for certain types of cases to be started in Wales; is that so?

[86] **Mr Hughes:** I would, but I would be arguing for more than that. As long as you have a combined jurisdiction with combined courts, the practical call on resources from different parts of that jurisdiction is an inevitable part of the administration of that justice. If you have an express direction in statute that a particular case must be heard in Wales, you need the judicial resources to hear that case, and you need those judicial resources not to be called on by other parts of the jurisdiction. If they are, someone is going to face an unsatisfactory wait for their justice, whether it is the statutory requirement to hear the case in Wales trumping the need for that judge to do work elsewhere in our joint jurisdiction, or whether it is the Welsh person who waits too long for their justice.

[87] **Suzy Davies:** Therefore, having it as a statutory direction rather than a judges' direction could increase the delays in the judicial system in Wales. May I suggest something else that may be an alternative to this? This building makes its laws bilingually, and for each law one has to look at both the English and Welsh texts to establish its meaning. That almost necessarily means that you need judges at a high level with either an incredibly good knowledge of legal law or for them to be fully Welsh speaking. Would you accept that it is more likely for cases at that level to start being heard in Wales just from practical necessity, rather than everything coalescing down in London, or do you think again that a specific change needs to be made to ensure that that happens?

[88] **Mr Hughes:** I do not know whether it is more likely that those cases would be heard down here, simply because the Welsh-speaking judges whom one would want to see in the courts interpreting that legislation are judges of a joint jurisdiction and have other calls on their duty. They are not there purely as Welsh-speaking judges to consider arguments about bilingual legislation; they are being called on to do their other judicial duties as well. I do not see how you can get around that while we retain a joint judiciary with England.

3.15 p.m.

[89] **Suzy Davies:** Keeping it as it is, with a Welsh-speaking judiciary based down in London, presumably overcomes the kind of concerns that you were talking about when you gave evidence earlier about the cultural hat, if you like. Certainly, the judges that we are talking about will be completely alive to the fact that there are different laws affecting Wales, even if they are not clear on the specifics regarding which particular law is different.

[90] **Mr Hughes:** There are two different aspects to that. First, there is the fact that those Welsh-speaking judges will have other calls on their time. They are judges—whether at the High Court or the Court of Appeal—who have a range of cases that need to be heard.

[91] **Suzy Davies:** Should they be prioritised for cases based on Welsh legislation coming from here?

[92] **Mr Hughes:** Well, that depends against what they are prioritised. A High Court judge may well be prioritised to hear Welsh legislation, but if that High Court judge is faced with an

English-language habeas corpus application in the morning, that is the one that they will have to give priority to.

[93] The second point that I would make in answer to that is that I think that it is wrong to presume that speaking the Welsh language equals familiarity with Welsh culture, or at least to read too much into that. It is one of the points that I have touched on in the memorandum of written evidence that I submitted to you. Part of the benefit to be gained from moving to a separate jurisdiction is an enhancement of Welsh civic culture. At the moment, able lawyers in Wales are faced with a choice between practising in Wales, basing themselves in Wales and living in Wales, or moving to London, which, whether we like it or not, is the centre of the jurisdiction of which we are part at the moment.

[94] A Welsh speaker who moves to London in their early 20s to pursue a legal career, who comes back to visit friends and family, but bases themselves in London, has no greater claim to be a Welsh lawyer than someone from Newcastle, Birmingham or wherever, who comes to make their legal career in Wales. The ability to speak the Welsh language is an important ability—we need Welsh-speaking judges and that need is already recognised—but most of the population of Wales do not speak Welsh. If I may say so, the Assembly has made a pretty good job—and, in Wales generally, we make a pretty good job—of balancing the rights and the responsibilities of the linguistic communities in Wales. What you are suggesting is a recipe for appointing Welsh speakers who have gone to London. That is what will happen. It will be a way for Welsh speakers to advance their careers by moving to London, hoping to be appointed judges merely by virtue of the fact that they speak Welsh.

[95] **Suzy Davies:** So, if there is—

[96] **David Melding:** Are you moving on, Suzy, because we are way over time?

[97] **Suzy Davies:** Yes, I am moving on to my last question.

[98] **David Melding:** It is not your fault, but the intricate nature of this evidence—[*Inaudible*.]

[99] **Suzy Davies:** That is fine. I will move on to my last question.

[100] On the basis of what you have said, what we need in Wales is an extended legal profession, a more multidisciplinary legal profession, and certainly a profession that is prepared to stay only on this side of the Severn bridge. Is that what you are arguing for?

[101] **Mr Hughes:** No, not quite. I think that I am arguing for a distinct Welsh court system that serves the people of Wales and is assisted in performing its work by distinct Welsh legal professions. In other words, Welsh solicitors and Welsh barristers, under the authority of Welsh regulators. That is not an argument for artificial separation. Scotland is not a good comparison; Northern Ireland is a better comparison. It is relatively simple for lawyers to go to practise in Northern Ireland. I would anticipate it to be at least as easy for lawyers to move between England and Wales. I undertake cases in Wales myself.

[102] **Suzy Davies:** May I just mention that, as a rule, lawyers practising in Northern Ireland do not tend to come over here? Will the same happen under the system that you are proposing?

[103] **Mr Hughes:** I think that it might.

[104] **Suzy Davies:** Will Welsh lawyers go over the Severn bridge?

[105] **Mr Hughes:** I think that that will change in time. Lawyers who already have significant cross-border practices will retain those. What we will see is a tendency for people not to leave this jurisdiction. People will still be faced with the choice 'Do I practise in Wales or do I practise elsewhere?' However, instead of the choice being between practising in the centre of a large jurisdiction and what some would describe as an obscure backwater of that large jurisdiction, it will be 'Do I practise in a small jurisdiction or a larger one?' Some of the written evidence that was submitted to you dealt with the development of the legal community in Belfast and how that developed quite quickly in response to the creation of Northern Ireland. What we would see would be a slightly different career path for lawyers who chose to be based here. I speak primarily from a barrister's point of view here. Barristers who took silk in Wales would probably have quite a broad practice, but if we were looking at those people as future judges in Wales, I do not necessarily think that that would be a bad thing. Specialism is fine, but too narrow a specialism leads to a point where, eventually, one knows everything about nothing, and it does not equip those people to go on and become judges with a broad experience of practice before they go on the bench.

[106] **David Melding:** That takes us neatly on to Vaughan's first question.

[107] **Vaughan Gething:** It is a question about how having, potentially, a narrower pool of lawyers for the appointment to judicial positions in a separate jurisdiction could work here, bearing in mind that there is a similar position with a much smaller population base in Gibraltar.

[108] **Mr Hughes:** It is, undoubtedly, an issue in Gibraltar. The current judiciary resident in Gibraltar is four strong. There is a stipendiary magistrate and three supreme court judges, three of whom are products of the Gibraltar legal system, but the tendency there has been for people to go on the bench relatively early in their careers. You do not tend to get the stars of the local legal scene going onto the bench. That is a problem that is caused as much, I suspect, by the fact that it is a fused profession, which means that people can be conflicted out of cases much more easily than they can at the bar.

[109] It is interesting to compare the size of jurisdiction that Wales would be with other common law jurisdictions. Looking beyond United Kingdom—we obviously have a larger population than Northern Ireland—we have a larger population than Western Australia, the Northern Territory, Tasmania or South Australia. New South Wales is about double our size population-wise, but Queensland is only 1 million bigger. These are jurisdictions that are calling on their populations to find their judges. They are doing so with some success. The current chief justice of Australia, if I recall correctly, is from Western Australia and was appointed from the courts of Western Australia. Several European Union member states have smaller populations than us, and I am not just talking about the very small ones like Malta; I am talking about places like Estonia and, I think, Latvia. So, we would be a relatively small jurisdiction, but not an unusually small jurisdiction. I think that 20-odd of the United States have smaller populations.

[110] If we needed to call on people from outside our population to appoint judges, one way of doing that would be—I will explain first how it is done in Gibraltar. The constitution has a provision for the appointment of acting judges. That is not a particularly satisfactory one, because the way that the provision is worded means that they do not have adequate security of tenure. However, you could do it by empowering the lord chief justice of Wales, say, to invite judges, the lord chief justices of England or Northern Ireland, to nominate people from their courts to come and sit if we needed someone. We have recorders; we have deputy High Court judges. I do not think that would be a problem; if it were a problem, a lot of other common law jurisdictions would not have functioning judiciaries.

[111] **Vaughan Gething:** I will just move on quickly; I know that we are very much up

against time. In your paper, you state that a separate Welsh jurisdiction might well see the cost of regulating the legal profession reduced. Is there any evidence to support that?

[112] **Mr Hughes:** If, by 'evidence', you mean, 'Can I point to existing structures that regulate at lower cost that we do?', no, I cannot, because those structures are precisely what we do not have in Wales. What I would invite you to do is to consider the way the legal profession is regulated at the moment. We have the Bar Standards Board and the Solicitors Regulation Authority. Over them, we have—I have the name noted down somewhere in my papers—the office of legal regulation, I think, which regulates those regulators, and then we have the legal ombudsman, who considers complaints about them. That seems to me to have some duplicity of function and that becomes all the more apparent when you think that the Bar Standards Board, instead of merely regulating independent referral lawyers in self-employed practice, is proposing to regulate or actually does regulate—it is difficult to keep up with these things because they change so often—entities, in other words, barristers who join together and, in effect, form something that it is not a solicitors' firm but closely resembles a solicitors' firm and may or may not have non-lawyer ownership. I question whether the duplicity of function is necessary, and, if it is necessary in the current Anglo-Welsh jurisdiction, I question whether it would be necessary in a separate Welsh jurisdiction. My understanding is that in Northern Ireland, the Bar Council and the Law Society continue to hold the regulatory function. I wonder whether that has been shown to be inadequate. The duplicity of regulation necessarily involves increased cost, and that cost is passed on to the consumer, and it need not be.

[113] **Vaughan Gething:** That appears to be a policy choice, rather than a choice about jurisdiction. I will move on, because we do not have an awful lot of time. Your paper talks about legal education and how people gain their expertise, both in legal education—I understand, having read your paper, that Gibraltarian lawyers come over here in the main to gain their first qualification, and then they have to go back and have a period in practice in Gibraltar before gaining a BIPC to courts in Gibraltar. That is not hugely dissimilar to a training period in this jurisdiction. I am interested in how you would see that working in a separate jurisdiction here, and also how you would see that impacting upon law schools in Wales, which train many more graduates for the legal practice course than we ever need solicitors, and the same with Bar schools from universities in Wales, which train many more barristers than they would ever need in a separate jurisdiction here in Wales.

[114] **Mr Hughes:** That is right; they do. Those are the policy choices that would be open to you as an Assembly if we had a separate jurisdiction. No change to current legal training or legal education would be compelled by the move to a single jurisdiction. There are arguments both ways as to where the change should be made. The point that I was seeking to make in the written memo of evidence is that there is a problem with legal education in the amount of people who are paying significant amounts of money for training that they will never get the opportunity to put into practice. It is a problem that you may decide is an acceptable price to pay for a satisfactory system. If you do not take that view, the move to a separate jurisdiction would allow you to change it. If you do take that view, nothing in the move to a separate jurisdiction would compel you to change it.

[115] **Vaughan Gething:** Okay. The final point is about a law reform commission. We have heard evidence that this would be desirable. I am interested in your view as to whether you think that would be desirable here and whether there is any similar institution in Gibraltar.

[116] **Mr Hughes:** There is no similar institution in Gibraltar. I think it would be desirable.

3.30 p.m.

[117] **David Melding:** That was an excellent answer. [*Laughter*.] In terms of its succinctness, that is.

[118] **Peter Black:** Emyr Lewis and Professor Wincott suggested that a test of competence to practise as a lawyer in Wales might become necessary. What is your view on that?

[119] **Mr Hughes:** It is hard to separate consideration of that from consideration of reform of legal education as a whole. I would be reluctant to express a firm view on it because, although I have clear in my own mind the fact that the current legal education system is not working appropriately, because it produces all these poor people with very large debt and little chance of getting into practice, I do not have a firm view on what should replace it, and I do not think that I can answer that question without having that firm view.

[120] **Peter Black:** We talked earlier about when a body of law becomes sufficient to justify a separate jurisdiction—you quite properly expressed, in my view, that we should not need to wait for that. At that point where that body of law exists, is it not then necessary for those lawyers who come to practise in Wales to prove that they understand the impact of that body of law in terms of their practise in Wales?

[121] **Mr Hughes:** I do not know that it is, for this reason: the practical experience in Gibraltar, where you are faced with that problem, is that, if you are sensible, and you realise and check things, you will be all right. There is no period of pupillage or training contract in Gibraltar, but, by virtue of solicitors' rules, you are required to practise with other people for a few years before you can set up your own practice. So, people are compelled to be under supervision even though they have right of audience from day one. It is hard to see that, in Wales, even if we did away with training contracts, we would allow people to set up their own practices from day one. People will probably still be required to practise with other practitioners for a while. That will reduce significantly the degree of risk of people making mistakes, but people make these mistakes already. I have been involved in cases in which England-based lawyers have used English forms to serve people when they needed to use Welsh forms. I suspect that happens, because people are not aware. If we were a separate jurisdiction, people would realise that they were somewhere else and that it would be better to check.

[122] **Peter Black:** The need to practise in Wales with another law firm, for example, could be seen as a test of competence in a way, or at least a route to competence.

[123] **Mr Hughes:** Yes.

[124] **Peter Black:** The committee has received evidence, including from the Law Society, that remarked on the lack of commentary on Welsh law and cases. I wonder whether you have any observations on that issue.

[125] **Mr Hughes:** It is a problem. Part of it is a problem because of the legal culture. People are busy earning their own livings, and I think that the fact that people see themselves as being in, to use that horrible phrase, 'an obscure backwater', rather than the centre, means that they are not putting themselves out there, writing the articles. For example, if we become a separate jurisdiction, *The Commonwealth Lawyer*, the journal of the Commonwealth Lawyers Association, would become an obvious forum for people to air views, write articles, publish things and make known Welsh lawyers as being distinct from English lawyers.

[126] **Peter Black:** The Counsel General made a statement last week in which he talked about setting up a website specifically to attract that sort of commentary. I think that he is looking for people to offer their services free and for gratis, so I am not sure how successful that will be. However, do you think that that is one way forward?

[127] **David Melding:** He said that the honour would be its own reward. [*Laughter*.]

[128] **Mr Hughes:** That is one way of doing it. People do spend their time doing things for free. I have spent my time drafting a memorandum of evidence for you and the Government's consultation.

[129] **David Melding:** We are very grateful that you have spared this time to be with us.

[130] **Mr Hughes:** My preference would be for Welsh lawyers to make their commentary in a broader Commonwealth context, because the interchange of ideas between jurisdictions is a very healthy thing. However, I do not see that as inconsistent with the Counsel General's proposal.

[131] **David Melding:** Simon, did you want to come in?

[132] **Simon Thomas:** No, I do not need to pursue it.

[133] **David Melding:** The point was covered by Peter. I think that covers the questions we wanted to put to you. Is there anything in particular you would like to raise that we have not covered?

[134] **Mr Hughes:** There is just one thing, really. The spectre of cost—whether a separate jurisdiction would be a terribly costly thing—has been raised. I have seen the evidence of Lord Morris of Aberavon supposing that the cost would be considerable. I am sorry to disagree with him, but I cannot see how the cost would be particularly significant. We already have courts in Wales and judges sitting in Wales. We already have staff administering those people. There would be a need to create an appellate court in Wales, but, presumably, there would be a corresponding loss of appellate judiciary in England. Therefore, the total cost to the people should not increase anything more than minimally. That is the only other observation I wanted to make.

[135] **David Melding:** We are going to try to gain some empirical evidence on this. I am not quite sure how we are going to do it, but it is, quite reasonably, an issue that has been raised and that needs careful thought. However, as you say, there is a structure of courts on an England-and-Wales basis at the moment.

[136] **Peter Black:** You are arguing that the cost of a separate jurisdiction here would be offset by savings in England. Do you think that England would give us the money? [*Laughter*.]

[137] **David Melding:** I think the witness said that the costs would be minimal. I do not think you were saying that you believe there would be no cost.

[138] **Mr Hughes:** I have not said that I believe that there would be no cost. I do not believe that there would be significant costs and my understanding is that, on the application of the Barnett formula, funding of legal services is actually one area in which Wales would do better from transferred competence.

[139] **Peter Black:** Excellent.

[140] **David Melding:** As I think you probably guessed, we had a few more questions and we could have gone on, but, unfortunately, the clock is a tyrant on Monday afternoons and we have to take evidence from a Minister on the Food Hygiene Rating (Wales) Bill. Therefore, we are constrained this afternoon. Otherwise, I would have been delighted to have extended

this session somewhat, because you have brought some very interesting evidence on how a micro-jurisdiction operates. I would put you down as someone who has great optimism about how a Welsh jurisdiction would operate. It is important that we hear from people who feel that some of the barriers often conceived of are not necessarily so daunting. Other people have a very different view, and we have heard that view. That evidence has been very valuable as well and we need to have both opinions well expressed and weigh them in the balance, and you have enabled us to do that this afternoon. I am very grateful to you. I can confirm to everyone that this was pro bono and that we are not receiving a bill for the time and expertise we have had, for which we are very grateful. [*Laughter*.] Thank you.

3.39 p.m.

Bil Sgorio Hylendid Bwyd (Cymru)
Food Hygiene Rating (Wales) Bill

[141] **David Melding:** I am delighted to welcome the Minister for Health and Social Services, Lesley Griffiths. Minister, do you want to introduce your officials at this point?

[142] **Lesley Griffiths:** Yes. On my left is Chris Humphreys, and on my right is Christopher Brereton.

[143] **David Melding:** You may refer to them with regard to the evidence that we are going to take from you this afternoon. We welcome you all here today. I remind the committee that this Bill has been referred to the Health and Social Care Committee for consideration. We will now look at its provisions in relation to subordinate legislation. I will ask the Minister the first question. What is the approach that you have taken regarding what you wanted to put on the face of the Bill and what you wanted to do via subordinate legislation?

[144] **Lesley Griffiths:** We have given careful consideration to the balance of powers that appear on the face of the Bill and those that would be the subject of subordinate legislation. In drafting the Bill—and Chris will bear me out here—we were very mindful of the committee's report on your inquiry into the drafting of Welsh Government Measures and, in particular, the principles that were set out in paragraph 34 of your report from February of last year. Our aim has been to put as much detail as possible on the face of the Bill and use regulation-making powers mainly to prescribe technical matters, such as the form of the sticker, and the forms that will be used by food businesses when they want to make an appeal or if they want to request a re-rating. In the few cases where there is power to use regulations to make provisions of a more fundamental nature, the Bill provides for the power to be the subject of affirmative procedures. This applies to several regulations, which you will have seen in my policy intentions, which I hope you found helpful.

[145] **David Melding:** They may be subject to the questions.

[146] **Lesley Griffiths:** I think that we have struck an appropriate balance between the level of detail on the face of the Bill and the correct and appropriate level of detail in the subordinate legislation.

[147] **David Melding:** That sets out your procedure very clearly, thank you, Minister. You certainly get a gold star for mentioning a committee report, and it is one of our earlier reports. [*Laughter*.]

[148] **Lesley Griffiths:** I will remember that.

[149] **David Melding:** Simon Thomas will ask the next question. I should say that the

translation is on channel 1. Apologies to Simon.

[150] **Simon Thomas:** Rydych newydd amlinellu'r hyn sydd ar wyneb y Bil a'r hyn yr ymdrinnir ag ef mewn is-ddeddfwriaeth, ac un o'r pethau yr ydych wedi dewis ei roi yn yr is-ddeddfwriaeth ddilynol yw diffiniad o sefydliad bwyd. A allwch esbonio pam yr ydych yn credu ei bod yn well delio â hynny yn yr is-ddeddfwriaeth yn hytrach na rhoi diffiniad clir ar wyneb y Bil?

Simon Thomas: You have just outlined what is on the face of the Bill and what will be dealt with in subordinate legislation, and one thing that you have chosen to place in subsequent subordinate legislation is the definition of a food business establishment. Can you explain why you think that that would be better dealt with in subordinate legislation rather than placing a clear definition on the face of the Bill?

[151] **Lesley Griffiths:** Some of them are defined on the face of the Bill, and they include—

[152] **Simon Thomas:** Yes, you have further powers.

[153] **Lesley Griffiths:** Yes. They include food businesses registered or approved by the food authority. The definition of 'food business establishments' was limited in the consultation draft of the Bill to food business establishments that supplied food direct to the consumer. That is mainly because that was consistent with the Food Standards Agency's voluntary scheme, currently in operation. The consultation then sought views from stakeholders as to whether these businesses should then include business-to-business trade. When we went through the consultation, including business-to-business trade was generally supported, and, given that they supply our schools and hospitals, I very much agreed with that. If you think back to the E. coli outbreak that we had in 2005, you see that it is very much needed. The FSA is very supportive of that. I want to ensure that we get the Bill right, and I want to ensure that it covers as many food establishments as possible.

[154] **Simon Thomas:** Rwyf am barhau yn Gymraeg. Mae'n well cadw at un iaith. Yr hyn sydd gennych yma yw hawl i newid y diffiniad yn nes ymlaen. Fodd bynnag, yn y ddogfen yr ydych wedi'i chyflwyno inni am eich bwriadau polisi, rydych yn dweud nad oes gennych fwriad ar hyn o bryd i ddefnyddio adran 2(6)(a) i newid y diffiniad. Gan eich bod yn dweud yn y ddogfen nad yw'n fwriad gennych ar hyn o bryd i'w ddefnyddio, pam ydych chi mor glir ynghylch yr angen am y pwerau, ac, er mwyn eglurder, pam ydych chi'n teimlo bod angen i'r pwerau hyn fynd drwy'r broses gadarnhaol pe baech am eu defnyddio? Beth yw'r meddylfryd am ddewis y ffordd hon?

Simon Thomas: I will carry on in Welsh. It is better to keep to one language. What you have here is the right to change the definition at a later date. However, in the policy intentions document that you have provided to us, you state that you have no intention at this time of using section 2(6)(a) to amend the definition. Given that you say in that document that you have no intention at the moment of using it, why are you so set on the need for the powers, and, for the sake of clarity, why do you feel the need for these powers to go through the affirmative procedure should you want to use them? What is the thinking behind taking that approach?

3.45 p.m.

[155] **Lesley Griffiths:** I suppose that it is all about futureproofing. While the definition of a food business establishment at the present time is comprehensive, there may be others that we would like to see included in the scheme in future. We could also extend the definition of a food authority in the future. That might then include other regulatory bodies, so we need to futureproof that aspect as well. I think that that should be done by the affirmative procedure, because, to me, that would be a fundamental change.

[156] **Simon Thomas:** I suppose that a question might then be asked from a scrutiny point of view. You have said about the consultation and the powers resulting from the consultation. What safeguards are there to ensure that you do not in future seek to extend these definitions of a food establishment and the authority that you have just mentioned beyond the remit of your initial consultation?

[157] **Mr Humphreys:** On safeguards, it is subject to the affirmative procedure, which we feel would give a more appropriate level of scrutiny, because it would be changing one of the fundamental elements of the scheme.

[158] **Simon Thomas:** Do you have anything particular in mind at the moment?

[159] **Lesley Griffiths:** No. I suppose that it would impose new obligations on food establishments, as well.

[160] **Simon Thomas:** On a specific point, do we have a port health authority in Wales?

[161] **Mr Brereton:** Yes, we have. We have a number of port health authorities, the majority of which are constituted by their local authority. For example, Cardiff is a port health authority, and it is also a food authority and a local authority. The only separate port health authority in Wales, away from a local authority setting, would be Swansea bay port health authority. It is really the twenty-third local authority, in a sense, in that it has a number of powers given to it by the constituting bodies, namely the local authorities around it, to enable it to undertake port health work in Swansea bay. So, that would be covered as well by the legislation.

[162] **Simon Thomas:** So, the powers that are proposed in the Bill to change the definition of a food authority would also affect any further changes that might happen to this port health authority as well.

[163] **Mr Brereton:** It is certainly captured currently.

[164] **Lesley Griffiths:** Port health authorities are included in the present draft. It is just if we were to extend it beyond local authorities and port health authorities.

[165] **Suzy Davies:** Before we move on from that particular section, if I understand correctly the answers that you have given regarding the description of a food authority, why you have used the affirmative procedure and why you have kept it as it is, it is pretty much the same reason as you gave for the definition of the food business establishments, namely to give a bit of scope and to be as clear as possible.

[166] What consideration did you give to authorities that have perhaps been left out of this? I am thinking of national parks. They have a planning role, which means that they can give planning permission for food establishments, so have they been included in this at all? Is that the sort of area that you think this might extend to? I know that it is very difficult to predict the future, but is that it?

[167] **Mr Brereton:** Currently, they would not be considered as food authorities, because the food hygiene rating sits on the back of routine food hygiene work. So, it has to sit on the back of work undertaken by local authorities and food authorities, but national parks do not do that. However, on futureproofing, as you say, at the moment, it is based on the current regulatory delivery framework, but if that were to change, as a result of the review currently ongoing by the Food Standards Agency, for example, other regulatory bodies could be captured, or the delivery structure might change. So, we have to retain the flexibility created

by the regulations to reflect the changing regulatory framework. At the moment, however, national parks would not be included.

[168] **Suzy Davies:** I know that they would not, but I was just wondering whether that was the sort of area that you could potentially go into, if their obligations change. 'Yes' is your answer, I think.

[169] Moving on to section 3, on the power to make regulations regarding food ratings that were awarded prior to the Bill being established—and it would probably be best if I actually quoted the regulation—this is a new compulsory scheme, but you will be using old information, effectively. Why have you chosen to include that at all, rather than relying on new, fresh information?

[170] **Lesley Griffiths:** I suppose that the short answer is that it will allow faster migration to the new scheme. The whole intention of this Bill is to put the food hygiene rating scheme on a mandatory footing. However, the Bill cannot require food businesses to have on display the voluntary scheme sticker, so this will allow the findings of a previous inspection to be relied upon, for speed. It would take too long to do the whole lot all over again. Basically, that is the short answer.

[171] **Suzy Davies:** Bearing in mind that some establishments might be, not 'caught out' exactly, but they might have slightly 'elderly' ratings, if you like, would it not have given them a bit more comfort to have this on the face of the Bill? I appreciate that any subsequent regulation could be brought in by the affirmative resolution, but do you not think that it was important enough to go on the face of the Bill?

[172] **Lesley Griffiths:** No, I think that they are more appropriate for regulations, because they will need to make detailed provision for the phased migration of food businesses into the new scheme. However, I think that there is also a transitional nature here because they relate to the initial implementation of the Act. So, in future, and in the longer term, they will cease to be relevant. It is more appropriate.

[173] **Suzy Davies:** So, it is a rolling programme sort of thing.

[174] **Lesley Griffiths:** Yes, and given that it is such a fundamental change, I think that it is more appropriate to have it in the regulations, under the affirmative procedure.

[175] **Suzy Davies:** Do you have any specific instances in mind of where you might use this procedure? Is it just a case of speed as much as anything else?

[176] **Mr Brereton:** On the FSA website, there are currently something like 20,000 plus businesses rated in Wales, and we do not want to lose all that work. The oldest one of those would be from October 2010, when the rating scheme first came about. A business goes through a cycle of inspections every six, 12, 18 months or perhaps every three years, and its rating gets renewed. We do not want to lose that body of already-rated premises. As I think we have indicated in the regulations, we are looking for a 12-month transition during which time local authorities will be able to transfer those ratings to the new scheme and display them. So, we can keep all those 20,000 businesses, migrate them over a period of 12 months into the new scheme, and we will not have lost any ground.

[177] **Suzy Davies:** So, it is essentially a power that will be used only the once.

[178] **Mr Brereton:** That is right, and that is why I think that it is in the regulations rather than on the face of the draft Bill. After 12 months, you will no longer be looking at that.

[179] **Suzy Davies:** I understand. That is great, thank you.

[180] **Vaughan Gething:** Good afternoon, Minister. I will just deal with a few a couple of fairly brief points, one of which is in relation to the regulations about the sticker. We know that it is the negative procedure that is proposed for those regulations. Can you indicate what sort of considerations you are taking into account in prescribing the form and detail of the sticker that must be displayed?

[181] **Lesley Griffiths:** Yes. The intention is that the regulations will prescribe the format of the food hygiene rating sticker. The Bill requires the FSA to provide the sticker to a food business without charge. However, we need to consider whether we issue just one sticker to premises that may have multiple entrances, for instance. A hospital springs to mind, as it might have several cafes, and one sticker would be needed in each cafe. The most important thing for me is that the consumer recognises the sticker and what it means. I think that the voluntary scheme has helped hugely. We are all now used to seeing fives and fours. Personally, I have not seen anything below a rating of 4 on display. It will be interesting to see—

[182] **David Melding:** They do not take you anywhere that might have a lower rating. [*Laughter.*]

[183] **Lesley Griffiths:** Clearly, we do not have any in Wrexham. [*Laughter.*] One reason for bringing forward the mandatory scheme is that businesses with a lower rating than four perhaps do not display the sticker, so that has to be a primary consideration. However, I also want to maintain the consistency that we have seen with the voluntary scheme.

[184] There will be very specific design criteria, as there are at present. There is consistency. There will be a Welsh Government logo on the mandatory scheme sticker.

[185] **Vaughan Gething:** That is helpful. Moving on to the information that a food authority has to send to a food operator—and again I note that these regulations will be subject to the negative procedure—could you indicate what sort of things you are looking to prescribe? How are you currently thinking about the balance of information that you want food authorities to be sending on to food businesses?

[186] **Lesley Griffiths:** The Bill requires the food authority to send to the operator a written notification of its rating, the reasons why it received that rating, and the food sticker. Food authorities will also be required to send additional information. I sent you the policy intentions, and you will hopefully have picked up on page 5 the requirement for the food authorities to set out the actions that are needed to improve under each of the rating criteria provisions that are used for the food hygiene rating. This is essential, as it informs the food business operator of what they need to do to improve their level of compliance, and thereby their food hygiene rating. Other information, such as when and where the food hygiene rating will be published, how it will be displayed, the appeals process, the right to reply, and how to request a rebate are also covered.

[187] **Vaughan Gething:** Just to follow up on that, you say that you will be sending out details of the areas where they need to improve. We have all seen 4 and 5 ratings displayed voluntarily, but we have not seen 3s, and we certainly have not seen 2s, 1s or 0s. When the scheme comes in, and food businesses are required to display those ratings, and you get the food business asking, ‘What are we required to do?’, I am interested in the interplay with the enforcement element of dealing with food hygiene issues. If someone gets a 0 or a 1, consumers would ask why the business is able to continue trading. I would be interested to know what information on those very low-end ratings will be sent out, and whether there will be timescales within which they have to improve, or a wholly separate machinery showing

what they have to do to improve their rating, and a separate notice coming from a different part of the food authority saying, 'If you do not improve within a certain period of time, then your business will close'. I think that they are different points.

[188] **Lesley Griffiths:** Yes.

[189] **Mr Brereton:** May I comment on this? You are right; there are two parallel processes here. There are the routine inspections that local food authorities undertake to ensure food safety. They will be going in to inspect them every six, 12, 18 or 24 months, depending on their risk rating for food hygiene purposes. Those that are rated 0, 1 or 2, which are not broadly compliant in terms of legislative compliance, will be revisited by those local authorities. They will not be left alone. There will be separate enforcement procedures, and if they are an imminent danger to health, they will be closed. That is completely separate from the rating. The rating is really a by-product of the food hygiene inspection, giving it a public face and providing consumers with information so that they can make an informed choice about where they shop or where they eat. Up to now, if you have gone into a restaurant and the kitchen door has been closed, you have not been able to see anything, but now that door will be open as the rating will be on the front door. However, not for one minute will they be left alone if they are failing in terms of regulatory compliance. The local authority will be going in and taking enforcement action, and if they need to do so, they will close it, and if they need to take them to court, they will do so. At one end, there will be a letter of guidance to them and, at the other end, there could be court action to ensure compliance. However, they will not be left alone. It is a parallel process, but it is going on at the same time.

[190] **Vaughan Gething:** Briefly again on this point, let us say for the sake of argument that improvement action is required because someone has had a 1 rating. The local authority sends its food safety team in and, if they then say, 'We recognise that you have improved', does that business still have to pay for a new rating itself, rather than the local authority having to provide an additional service to a business that is not adhering to the standards that we would want it to? How do they get to have a new rating, and who is responsible for the cost of that new rating? I want to be assured that the public purse will not have to pay for revisits to premises that are not meeting standards.

[191] **Lesley Griffiths:** It is a very important point. If a food business establishment requests a re-rating, it would then have to pay for that, rather than the public purse, if it was doing it to up its rating, if you like. Is that what you are asking?

[192] **Vaughan Gething:** Yes. Finally, you have exempted a number of establishments from rating; they are not listed on the face of the Bill. How did you reach that judgment about the establishments that should be exempted, why they are not on the face of the Bill and why you propose to put them into the affirmative procedure and regulations?

4.00 p.m.

[193] **Lesley Griffiths:** The Bill will cover all registered or approved food businesses in Wales, but some food businesses will be exempt, in a similar way to how they are exempt now under the FSA voluntary scheme. We will have the powers to prescribe that certain categories of establishment may be exempt, but it is my intention that as many businesses as possible will be covered, so the exemptions will be limited.

[194] Some low-risk food establishments will be exempt, such as a leisure centre that only sells food in a vending machine or a newsagent that sells packets of confectionery. They would be exempt. Certain businesses that operate from private addresses, such as child minders, would be exempt from having to display a rating, as would some sensitive establishments such as the armed forces.

[195] **Simon Thomas:** Rydym wedi gofyn am sticeri, ond o edrych ar adran 6 y Bil, mae gwefan yr FSA yn hynod o bwysig yn hyn o beth hefyd. Hynny yw, mae'r sticeri yn rhan o roi'r wybodaeth, ac mae'r wefan yn rhan arall. Beth yw'r seiliau cyfreithiol i'r wefan? A oes gennych gytundeb gyda'r Asiantaeth Safonau Bwyd y bydd gwefan ac arni'r holl wybodaeth hon, neu a oes seiliau cyfreithiol i'r wefan? Mae'n ymddangos i mi nad yw'r broses sticeri yn gallu gweithio'n llwyr heb y wefan. Ers i'r Bil hwn ddod gerbron, rwyf wedi treulio sawl awr yn chwilio am y lleoedd rwyf yn bwyta ynddynt i weld beth yw eu sgôr, ac mae'n siŵr bod pobl eraill yn gwneud yr un peth. Mae'r ddau yn mynd gyda'i gilydd. Beth yw'r ochr gyfreithiol o ran gwneud yn siŵr bod gwefan i'w chael, neu cytundeb yn unig ydyw gyda'r asiantaeth?

Simon Thomas: We have asked about stickers, but in looking at section 6 of the Bill, the FSA's website is very important in this regard. That is, the stickers are part of the provision of information, and the website is another. What is the legal basis for the website? Do you have an agreement with the Food Standards Agency that there will be a website containing all this information, or is there a legal basis for the website? It seems to me that the sticker process cannot work entirely without the website. Since this Bill has come before us, I have spent several hours searching for the places where I eat to see what their scores are, and I am sure that many others will have done the same. The two go together. What is the legal side of this in terms of ensuring that a website is available, or is it only an agreement with the agency?

[196] **Mr Humphreys:** That is an interesting point. There are specific obligations under the Bill on the Food Standards Agency to publish the information. Current practice under the scheme as it operates across the whole country is for it to appear on the website, so there is an underlying expectation that that is how things will go on in the future. It is an interesting point. As far as I recall, there is nothing specific in here; it is about the means by which this information will be published.

[197] **Simon Thomas:** So, you place a duty for the information to be published on the FSA's website, but there is no legal underpinning in the Bill for there to be a website?

[198] **Lesley Griffiths:** No.

[199] **Simon Thomas:** I just wanted to know how those two would go together; I will leave that with you.

[200] **Lesley Griffiths:** The other thing in the Bill is that a food business operator would have to give a verbal undertaking as well.

[201] **Mr Brereton:** We have other powers where we can issue instruction to the FSA anyway, and there is the ability to issue guidance of a statutory nature. So, I am quite sure that we can close—

[202] **Simon Thomas:** Would it be possible to have a note to see how these interact, Chair?

[203] **David Melding:** Yes. We are drifting into policy, but we sometimes cannot help it. They are important issues, so I am sure that the Minister will be happy to help us.

[204] **Lesley Griffiths:** We will send a note. It is also important to say that I am not being overly prescriptive on exemptions; we have not consulted on the regulations yet, and it will be interesting to see what stakeholders come forth with on exemptions as well.

[205] **Vaughan Gething:** On the point that I raised about the payment for re-ratings, will that be covered in regulations anywhere, in terms of responsibility for payment for a re-rating

and also the level of payment that a food authority could charge?

[206] **Mr Brereton:** It is on the face of the Bill. It says that a local authority can recover its reasonable costs, but it must publish those costs in advance and notify the person who has requested re-rating. So, there is a test of reasonableness and a test of publication, so that they know the costs up front when they are making that request. The idea, as you say, is not to divert local authority resources away from essential food hygiene work because the business is playing catch-up. They would have to pay for that request and pay the reasonable cost.

[207] **Vaughan Gething:** Would you expect the local authority to publish its scheme for the cost in advance?

[208] **Mr Brereton:** I would expect the local authority to notify the individual premises when they request a re-rating, and I anticipate that it will publish the costs in advance and work together as local authorities to organise the way in which they charge so that it is consistent across Wales.

[209] **Vaughan Gething:** It would appear to be an important point to raise in advance that the duty falls on food authorities.

[210] **Lesley Griffiths:** It is important that it is on the face of the Bill so that businesses know what the offences are, if you like, right at the beginning.

[211] **Peter Black:** Sticking with the categories that are exempt from rating, what factors did you take into account when deciding whether this procedure should be affirmative or negative in terms of the regulations?

[212] **Lesley Griffiths:** Sorry, could you say that again?

[213] **Peter Black:** For those establishments that are exempt from rating, when you determined whether the regulations should be affirmative or negative, what factors did you take into account when making that decision?

[214] **Lesley Griffiths:** I think that it should be the affirmative procedure, as it removes from those businesses the obligation to comply with the Bill's requirements. It will have a fundamental effect, and I suppose that means that it should go through the affirmative procedure.

[215] **Peter Black**: You have a power under section 6(2) to prescribe in regulations what further information the food authority must provide to the Food Standards Agency, but that is to be subject to negative resolution. Why did you make that choice in contrast to that?

[216] **Mr Brereton:** We can require the local authorities to provide the Food Standards Agency with information for publication. What we are trying to do is to seek an administrative provision in which we can require local authorities to provide further information to the Food Standards Agency. The substantive requirement for food authorities to provide information is in relation to the notification and publication of the rating. The provision to prescribe further information is about leaving it open for the future. We are aware that the Food Standards Agency is undertaking consumer research on whether consumers desire further information and the form that such information should take. Others have called for the publication of inspection reports, for example. We might, in the future, want to seek the publication of those—it is something, I know, that the Minister has said that we have an open mind on. This would allow us to require food authorities to provide that further information to the Food Standards Agency, possibly for publication.

[217] At the moment, however, we are awaiting the Food Standards Agency's further consumer research to find out just what information the public really wants and how they want it provided, rather than jumping the gun in terms of its provision. So, the regulatory powers are held in reserve, should further food information be required to be submitted by the food authorities to the FSA.

[218] **Peter Black:** But you accept that taking that route could, at some stage, lead to a substantive additional requirement for information, which might lead to some discussion about whether you were being proportional. I think that it would therefore be more appropriate to have a debate in the Assembly through the affirmative procedure, rather than leave it to the Minister to make that decision.

[219] **Lesley Griffiths:** It is certainly something that we could look at, if that is the committee's view.

[220] **Peter Black:** Okay; thank you. My last question is on the sticker. You have indicated that the negative procedure is appropriate for prescribing the location and the manner in which the food hygiene rating sticker must be displayed. What considerations will be involved in prescribing the location? I think that you referred earlier to hospitals and other locations.

[221] **Lesley Griffiths:** The primary consideration is to ensure that the sticker is in a very prominent position. That is, in the case of a restaurant, whether it should be in the window or the door. I do not want it to be inside so that people have to go into the premises to see it, because it is sometimes very difficult for someone to walk in and then walk out.

[222] I mentioned premises with multiple entrances, and we need to look at that issue with regard to supermarkets, for instance. I mentioned that, where there are several cafes in a hospital, you would have to look at that issue. It is near impossible to prescribe the location by regulations, and there will be some food establishments for which it will be difficult to work out where their stickers should be displayed.

[223] **Peter Black:** How do you approach the regulations when you have so many different possible variations in terms of where that sticker should be? Should it be on the menu?

[224] **Lesley Griffiths:** I think that there needs to be flexibility—you are right.

[225] **Mr Brereton:** At the moment, with the stickers being displayed under the voluntary scheme, the Food Standards Agency has undertaken research that shows that 77% of the mystery shoppers who went to look for them found them relatively easily. So, we have some information on which to base the regulations in terms of where they should be displayed. I think that we have some confidence in the description in regulations, but we do need flexibility, which is why the regulations will allow the food authority to work with the business to agree a location where display can be difficult. We cannot prescribe everything, so we are going to give the freedom to the food authority and the business operator to agree a location.

[226] **Simon Thomas:** It is possible to conceive of an example where, for example, supermarkets and hospitals will have different ratings for different parts of the establishment. How would you ensure that that was dealt with within these regulations?

[227] **Mr Brereton:** That is a bit of a technical question. At the moment, if you go to a supermarket that is operating a butcher's shop, a bakery and everything else, if it was all part of that supermarket body, they would be rated as a whole.

[228] **Simon Thomas:** What about a cafe within a supermarket?

[229] **Mr Brereton:** Yes, the cafe as well. However, if it is a separately franchised business operating within it—a coffee provider, for example, within the shop—that would be a separately registered food business that would have its own rating and it would display that rating as you enter that location within the wider supermarket.

[230] **Simon Thomas:** However, these regulations, which are, as has been pointed out, subject to the negative procedure, would have to deal with some aspects of that. Am I right? These are the regulations that would set that out, are they?

[231] **Mr Brereton:** Yes, in terms of the display. The food authorities have done that successfully in 20,000 premises, and we are going to try to mirror that successful practice in regulations.

[232] **Peter Black:** How would you decide on the rating for the whole establishment if, for example, the meat counter in a supermarket has a rating of one, but the cafe has a rating of five?

[233] **Lesley Griffiths:** It is all the same, because it is on the same premises.

[234] **Peter Black:** The premises are the same, but people might say that it is safe to eat in the cafe but it may not be safe to buy the meat.

[235] **Mr Brereton:** Normally, a supermarket of that kind would have controls that cover all of its operations and functions. So, you would look at it as a whole and rate it as a whole. If there were separate issues where enforcement was needed, then I am quite sure that, because it might drag the rating down for the whole of the premises, they would quickly get that done.

[236] **Suzy Davies:** I have a similar question. I was thinking about events, such as the Royal Welsh Show or the Eisteddfod, where you have smaller operators on site.

[237] **Lesley Griffiths:** They would be mobile traders.

[238] **Suzy Davies:** As they are all functioning in the same place, you would not have just one score on the door as you come in to the Eisteddfod, for example.

[239] **Lesley Griffiths:** No, because each mobile trader, if registered in Wales, would have their own specific hygiene rating.

[240] **Suzy Davies:** That is okay; thanks.

[241] **David Melding:** It is difficult to get the weight and the importance of the regulations without slipping in to some policy considerations, but we appreciate that you are answering the questions robustly. However, we realise that the central purpose of what we have to do is to form a judgment on your use of regulations, and that is certainly what will drive the report, although these issues are illuminated by the practical examples that drag us into policy issues.

[242] Finally, I would like to ask about Schedule 1, Part 1, paragraph 3, which sets fixed penalties and discounted penalties, or the power to vary those. That would be subject to the negative procedure. We generally take a rather dim view of possible penalties on a citizen or on a business—well, not a dim view on that being done, but to changes to such a scheme being done by the negative procedure rather than the affirmative, because if you quadrupled the penalty, it seems reasonable to have a debate about that in the Assembly. So, why do you

think that you can do this by the negative procedure without causing too much hullabaloo?

[243] **Lesley Griffiths:** We certainly need to revisit that point, and I am very happy to consider changing that to the affirmative procedure.

[244] **David Melding:** We are very happy when you make such a candid response. Do we have any other questions to put to the Minister? I see not. Therefore, thank you, Minister.

4.14 p.m.

Papurau i'w Nodi a Dyddiad y Cyfarfod Nesaf
Papers to Note and Date of the Next Meeting

[245] **David Melding:** The next meeting will be held a week today on 9 July. We have a paper to note in relation to the meeting on 25 June.

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

[246] **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) and (ix).

[247] I do not see any Member objecting, so we will now go into private session.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 4.14 p.m.
The public part of the meeting ended at 4.14 p.m.