Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol

Adroddiad Atodol ar y Mesur arfaethedig ynghylch Llywodraeth Leol (Cymru)

Mawrth 2011

Cynulliad Cenedlaethol Cymru yw'r corff sy'n cael ei ethol yn ddemocrataidd i gynrychioli buddiannau Cymru a'i phobl, i ddeddfu ar gyfer Cymru ac i ddwyn Llywodraeth Cymru i gyfrif.

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Y Pwyllgor Materion Cyfansoddiadol

Rhaid i'r Pwyllgor Materion Cyfansoddiadol ystyried a chyflwyno adroddiad ar unrhyw faterion a nodir yn Rheol Sefydlog 15.2 a gall ystyried a chyflwyno adroddiad ar unrhyw faterion a nodir yn Rheolau Sefydlog 15.3, a 15.6.

Pwerau

Sefydlwyd y Pwyllgor Materion Cyfansoddiadol ym mis Mehefin 2007 (fel y Pwyllgor Is-ddeddfwriaeth). Nodir ei bwerau yn Rheolau Sefydlog Cynulliad Cenedlaethol Cymru, yn arbennig Rheol Sefydlog 15. Ceir y rhain yn www.cynulliadcymru.org

Aelodau'r Pwyllgor

Aelod Pwyllgor	*Plaid*	*Etholaeth neu Ranbarth*
Janet Ryder (Cadeirydd)	Plaid Cymru	Gogledd Cymru
Alun Davies	Llafur	Canolbarth a Gorllewin Cymru
William Graham	Ceidwadwyr Cymru	Dwyrain De Cymru
Rhodri Morgan	Llafur	Gorllewin Caerdydd
Kirsty Williams	Democratiaid Rhyddfrydol Cymru	Brycheiniog a Sir Faesyfed

Cynnwys

Argymhellion y Pwyllgor

Rhestrir argymhellion y Pwyllgor i Lywodraeth Cymru isod, yn y drefn y maent yn ymddangos yn yr Adroddiad hwn. Ewch i'r tudalennau perthnasol yn yr adroddiad i weld y dystiolaeth a'r casgliadau sy'n cyd-fynd â'r argymhellion:

Argymhelliad 1. Rydym yn argymell bod Llywodraeth Cymru yn ystyried canllawiau Swyddfa'r Cabinet "Guide to Making Legislation" ac yn llunio a chyhoeddi ei chanllawiau ei hun ar y materion hyn fel mater o frys, yn cynnwys cyngor i Adrannau ar y gweithdrefnau ar gyfer cyhoeddi gwelliannau ar ôl cyflwyno Mesur am y tro cyntaf. **tudalen 14**

Argymhelliad 2. Rydym yn argymell y dylai'r Pwyllgor Busnes ystyried p'un ai a oes angen canllawiau cliriach i Aelodau ynghylch a yw gwelliannau'n disgyn o fewn cwmpas Mesur ac o fewn yr egwyddorion cyffredinol a gytunwyd yng Nghyfnod 1. **tudalen 15**

Argymhelliad 3. Rydym yn argymell bod y Llywodraeth yn ystyried p'un ai a allai gyflawni ei nodau yn well o ran y gwelliannau dan sylw yn y Mesur hwn drwy eu disodli â'r geiriad a awgrymir yn y paragraffau canlynol a drwy ymgynghori'n briodol ar y gwelliannau ar eu newydd wedd. **tudalen 17**

Argymhelliad 4. Rydym yn argymell y dylai'r Llywodraeth ystyried p'un ai a fyddai disodli'r darpariaethau newydd â darpariaethau a fyddai'n rhoi'r pŵer iddynt orfodi cydweithio yn lle hynny, yn ffordd well o gyflawni'r amcan cyffredinol o wella gwasanaethau. **tudalen 20**

Os nad yw'r gwelliannau yn cael eu tynnu nôl neu gael eu newid rydym yn gwneud yr argymhellion atodol ychwanegol:

Argymhelliad 5. Rydym yn awgrymu gwelliant i'r Mesur arfaethedig drwy ychwanegu cymal tebyg i "in the area concerned" at welliant 91(1). **tudalen 21**

Argymhelliad 6. Rydym yn argymell gwelliant i'r Mesur arfaethedig fel bod union ystyr "effective local government" yng ngwelliant 91(2) yn cael ei ddiffinio'n glir yn y Mesur ac yn cael ei gyfyngu'n glir i gyd-destun y pŵer a nodwyd yn y gwelliant i uno cynghorau. **tudalen 22**

Argymhelliad 7. Rydym yn argymell gwelliant i'r Mesur arfaethedig fel bod yr hyn sy'n rhaid ei gyflawni yng ngwelliant 91(2) yn cael ei ddiffinio'n glir yn y Mesur ac hefyd wedi'i gyfyngu i gyd-destun y pŵer a nodwyd yn y gwelliant i uno cynghorau. **tudalen 22**

Argymhelliad 8. Rydym yn argymell gwelliant i'r Mesur arfaethedig i gynnwys gofyniad ar Weinidogion i ystyried effaith proses uno orfodol ar bob awdurdod lleol sy'n cael ei effeithio. **tudalen 23**

Argymhelliad 9. Rydym yn argymell gwelliant i'r Mesur i gynnwys gofyniad penodol i ymgynghori â'r awdurdodau lleol sy'n destun gorchymyn uno arfaethedig, yn ogystal ag unrhyw gynghorau cymuned o fewn eu ffiniau. **tudalen 24**

Argymhelliad 10. Rydym yn argymell gwelliant i'r Mesur i gynnwys gofyniad penodol i ymgynghori â chyrff cymunedol a mudiadau'r sector gwirfoddol sy'n gweithredu o fewn ffiniau'r awdurdodau lleol sy'n destun cynnig i'w huno. **tudalen 24**

Argymhelliad 11. Rydym yn argymell gwelliant i'r Mesur i gynnwys gofyniad penodol i ymgynghori â sefydliadau neu fuddiannau y tu allan i'r ardaloedd yr effeithir arnynt yn uniongyrchol gan y cynnig i uno. **tudalen 24**

Rôl y Pwyllgor

Rheolau Sefydlog

1. Gall y Pwyllgor Materion Cyfansoddiadol ystyried a chyflwyno adroddiad ar:

- '[b]a mor briodol yw darpariaethau mewn Mesurau Cynulliad arfaethedig ..... sy'n rhoi pwerau i wneud is-ddeddfwriaeth i Weinidogion Cymru, i Brif Weinidog Cymru neu i'r Cwnsler Cyffredinol'[1].
- 'unrhyw fater deddfwriaethol gyffredinol ei natur sy'n ymwneud â chymhwysedd y Cynulliad neu gymhwysedd Gweinidogion Cymru'[2].

2. Diben yr adroddiad hwn yw:

- cyflwyno gwybodaeth ar gyfer ystyriaeth Cyfnod 3 y Cynulliad o'r Mesur arfaethedig mewn cysylltiad â gwelliannau'r Llywodraeth a gytunwyd gan Bwyllgor Cyfnod 2, sy'n rhoi pwerau i Weinidogion Cymru uno awdurdodau lleol drwy orchymyn; ac
- ystyried p'un ai a yw'r gwelliannau dan sylw yn codi unrhyw faterion o natur gyffredinol y byddai Gweinidogion a'r Cynulliad yn dymuno eu hystyried wrth bwyso a mesur unrhyw Fesurau arfaethedig yn y dyfodol.

[1] Rheol sefydlog 15.6(ii)
[2] Rheol sefydlog 15.6(v)

Y Cefndir

Cyflwyno'r Mesur ac Ystyriaeth Cyfnod 1

3. Cyflwynwyd y Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru) ar 12 Gorffennaf 2010 gan Carl Sargeant AC, y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol, ac yn dilyn hynny cafwyd datganiad deddfwriaethol ar 13 Gorffennaf 2010.

4. Cyfeiriwyd y Mesur arfaethedig at Bwyllgor Deddfwriaeth Rhif 3 ar gyfer ystyriaeth cyfnod 1 (egwyddorion cyffredinol). Cyflwynodd y Pwyllgor adroddiad ar egwyddorion cyffredinol y Mesur arfaethedig ar 16 Rhagfyr 2010[3]. Roedd y Pwyllgor Cyllid[4] a'r Pwyllgor Materion Cyfansoddiadol[5] hefyd wedi ystyried y Mesur a chlywsant dystiolaeth lafar gan y Gweinidog. Gwnaethant gyflwyno adroddiad i'r Cynulliad ar 9 a 15 Rhagfyr yn eu tro.

5. Ni chafwyd unrhyw feirniadaeth sylfaenol yn unrhyw un o'r adroddiadau Pwyllgor ar y Mesur arfaethedig, yn wir, ar y cyfan roeddent yn ei gefnogi a'i groesawu.

6. Cafwyd trafodaeth yn y Cynulliad a chytunwyd ar egwyddorion cyffredinol y Mesur arfaethedig ar 11 Ionawr 2011[6].

Ystyriaeth Cyfnod 2

7. Ar ôl i'r Cynulliad gytuno ar egwyddorion cyffredinol y Mesur arfaethedig, dechreuwyd ystyried yn fanwl y Mesur arfaethedig ac unrhyw welliannau a gynigwyd iddo (Cyfnod 2) ar 12 Ionawr.

8. Cyflwynodd y Gweinidog, Carl Sargeant, 47 gwelliant i'r Mesur arfaethedig ar ran y Llywodraeth ar 25 Ionawr. Cyflwynwyd 43

[3] Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru) - Adroddiad Pwyllgor Cyfnod 1 - Pwyllgor Deddfwriaeth Rhif 3 - Rhagfyr 2010
[4] Adroddiad ar oblygiadau ariannol y Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru) - Y Pwyllgor Cyllid - Rhagfyr 2010
[5] Adroddiad ar Fesur Arfaethedig ynghylch Llywodraeth Leol (Cymru) - Y Pwyllgor Materion Cyfansoddiadol - Rhagfyr 2010
[6] Cofnod y Trafodion - Dydd Mawrth, 11 Ionawr 2011 - Egwyddorion Cyffredinol y Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru).

gwelliant pellach gan Aelodau Cynulliad eraill ar 26 Ionawr. Roedd y gwelliannau hyn yn ymwneud â rhannau o'r Mesur arfaethedig a oedd wedi bod yn destun ystyriaeth yn ystod Cyfnod 1. Nid yw'r adroddiad hwn yn rhoi sylw i'r gwelliannau hyn.

9. Ar 27 Ionawr, cyflwynodd y Gweinidog 13 gwelliant pellach. Roedd y gwelliannau hyn wedi arwain at ychwanegu rhan newydd at y Mesur arfaethedig a fyddai'n rhoi pŵer i Weinidogion Cymru sefydlu awdurdodau lleol newydd drwy uno dau neu dri awdurdod sy'n bodoli ar hyn o bryd. Mae'r gwelliannau'n nodi'r amgylchiadau lle gellid defnyddio'r pwerau i roi'r prosesau uno hyn ar waith, y gweithdrefnau ar gyfer gwneud hynny, a nifer o faterion ategol yn cynnwys unrhyw ddiwygiadau i drefniadau etholiadol a fyddai'n berthnasol. Ystyriwyd y gwelliannau hyn gan y Llywydd er mwyn pwyso a mesur pa mor dderbyniol oeddent. Dyfarnodd eu bod yn dderbyniol.

Y Gwelliannau a Gynigwyd

10. Mae **gwelliant 91** yn cyflwyno **pŵer i wneud gorchmynion uno** drwy uno dau neu dri phrif awdurdod lleol. Gellir gweithredu'r pŵer os yw Gweinidogion wedi'u bodloni nad yw'n debygol y gellir cyflawni llywodraeth leol effeithiol, mewn un o'r ardaloedd awdurdod lleol dan sylw, drwy ddefnyddio'r pwerau a roddwyd i awdurdodau lleol a Gweinidogion dan Fesur Llywodraeth Leol (Cymru) 2009 i sicrhau gwelliant parhaus, a lle bo angen i sicrhau cydweithio, rhwng awdurdodau lleol.

11. Mae'r gwelliant hefyd yn amlinellu cyfres o faterion y mae'n rhaid darparu ar eu cyfer yn achos unrhyw awdurdod newydd a gaiff ei greu gan orchymyn uno, yn cynnwys ei enw, p'un ai a fydd yn gyngor sir neu fwrdeistref sirol, y ffiniau, y drefn ar gyfer dirwyn i ben a diddymu.

12. Mae **gwelliant 92** yn galluogi'r gorchymyn uno i ddarparu ar gyfer amrediad o **faterion etholiadol** yn cynnwys cyfanswm nifer yr aelodau, ffiniau wardiau a nifer y cynghorwyr i bob ward, enwau'r wardiau, canslo etholiadau, ethol maer, a phroses benodi awdurdod cysgodol gan Weinidogion Cymru a swyddogaethau'r awdurdod hwnnw.

13. Os yw un o'r awdurdodau presennol yn gweithredu system cabinet gweithredol a maer, **mae gwelliant 93 yn mynnu bod awdurdod cysgodol yn cynnal refferendwm** i weld a ddylai'r awdurdod lleol newydd ddilyn yr un patrwm.

14. Mae **gwelliant 94** yn rhoi **pwerau i Weinidogion Cymru gyfarwyddo awdurdod cysgodol i gynnal refferendwm** dan amgylchiadau penodol a darpariaeth gysylltiedig.

15. Mae **gwelliant 95** yn rhoi **pwerau i Weinidogion wneud darpariaeth atodol** drwy reoliad at ddibenion gorchmynion uno, o ganlyniad i orchmynion uno, neu er mwyn rhoi gorchmynion uno ar waith yn llawn. Mae trosglwyddo eiddo a staff wedi'u cynnwys ymhlith yr amrediad o faterion sy'n cael sylw.

16. Dylid nodi ei bod yn bosibl bod rheoliadau dan yr adran hon yn gyffredinol berthnasol, hynny yw, gallent amlinellu'r trefniadau ar gyfer nifer o uniadau, yn cynnwys y rheini nad oeddent wedi cael eu cynnig eto.

17. Mae **gwelliant 96** yn galluogi Gweinidogion Cymru i gyfarwyddo'r Comisiwn Ffiniau Llywodraeth Leol i Gymru i **adolygu'r trefniadau etholiadol** ar gyfer ardal llywodraeth leol newydd.

18. Mae **gwelliant 97** yn gwneud gwelliannau canlyniadol i Ddeddf Llywodraeth Leol 1972.

19. Mae **gwelliant 98** yn amlinellu **gweithdrefn uwchgadarnhaol** i'w dilyn gan Weinidogion Cymru wrth wneud unrhyw orchymyn uno. Byddai'r weithdrefn hon yn cynnwys y camau canlynol:

- Gofyniad i ymgynghori ag unigolion sy'n ymddangos eu bod yn cynrychioli unigolion neu fuddiannau sy'n cael eu heffeithio gan y cynigion. Nid yw hyn yn cynnwys gofyniad penodol i ymgynghori â'r awdurdodau lleol dan sylw.
- Gofyniad, ar ôl ymgynghori, i gyflwyno dogfen gerbron y Cynulliad yn egluro'r cynigion, copi drafft o'r gorchymyn a manylion yr ymgynghoriad.
- Cyfnod o 60 diwrnod cyn y gellir cyflwyno gorchymyn drafft terfynol gerbron y Cynulliad.

- Gofyniad i Weinidogion Cymru ystyried unrhyw sylwadau pellach a wneir yn ystod y cyfnod 60 diwrnod. Gallai hyn gynnwys unrhyw argymhellion a wnaed gan Bwyllgorau'r Cynulliad neu Aelodau Cynulliad unigol.
- Gofyniad i Weinidogion Cymru nodi manylion y sylwadau a ddaeth i law ac unrhyw newidiadau a wnaed i'r gorchymyn drafft a gyflwynwyd yn wreiddiol.

20. Mae **gwelliannau 99-103** yn gwneud newidiadau canlyniadol a deongliadol eraill i'r Mesur.

21. Mae'r gwelliannau ynghlwm yn Atodiad A. Cawsant eu hystyried a'u cytuno gan Bwyllgor Deddfwriaeth 3 ar 9 Chwefror.

Penderfyniad i dderbyn Tystiolaeth Bellach

22. Nid yw'r Pwyllgor Materion Cyfansoddiadol erioed o'r blaen wedi derbyn tystiolaeth bellach am Fesur arfaethedig ar ôl adrodd arno yng Nghyfnod 1. Fodd bynnag, ym marn Aelodau Pwyllgor, roedd y gwelliannau'n cyflwyno gweithdrefn is-ddeddfwriaeth sylweddol newydd, nad oedd y Pwyllgor Materion Cyfansoddiadol, nac unrhyw Bwyllgor Cynulliad arall, wedi cael cyfle i graffu arni yng Nghyfnod 1.

23. Roedd yn ymddangos hefyd bod y gwelliannau wedi codi materion o natur ddeddfwriaethol fwy cyffredinol am y prosesau polisi y tu ôl i'r gwelliannau a'r trefniadau craffu ar gyfer eu hystyried.

24. Ac ystyried hyn, cytunodd y Pwyllgor i wahodd y Gweinidog dros Lywodraeth Leol a Chyfiawnder Cymdeithasol i ddarparu rhagor o dystiolaeth lafar ar y gwelliannau a'r datblygiad polisi y tu ôl iddynt.

25. Yn ddiweddar, cyhoeddodd y Pwyllgor adroddiad ar ei Ymchwiliad i'r gwersi a ddysgwyd wrth ddrafftio Mesurau Llywodraeth Cymru yn y trydydd Cynulliad[7]. Roedd yr adroddiad hwn yn cynnwys argymhellion ynghylch manylrwydd proses clirio polisi Llywodraeth Cymru yn ogystal ag egwyddorion ar gyfer ystyried pa mor briodol yw'r drefn ar gyfer craffu ar ddeddfwriaeth.

[7] "Ymchwiliad i Ddrafftio Mesurau Llywodraeth Cymru: gwersi a ddysgwyd o'r tair blynedd gyntaf" Y Pwyllgor Materion Cyfansoddiadol – Chwefror 2011

26. Roedd Canolfan Llywodraethiant Cymru wedi cyfrannu at yr Ymchwiliad hwnnw felly gofynnwyd iddynt ddarparu tystiolaeth ysgrifenedig a llafar am y gwelliannau, gan edrych yn benodol ar:

- y ffaith bod y pwerau i gael eu gweithredu drwy orchymyn;
- pa mor briodol yw'r weithdrefn a ddefnyddir ar gyfer gwneud gorchymyn o'r fath;
- p'un ai a oedd y gwelliannau'n darparu digon o fanylion am yr amgylchiadau lle gellid defnyddio'r pŵer i wneud gorchymyn o'r fath;
- p'un ai a oedd y gwelliannau'n darparu digon o eglurder am y trefniadau ymarferol y gallent fod yn berthnasol i unrhyw broses uno awdurdodau; a'r
- ffaith bod y Llywodraeth wedi cyflwyno'r hyn a ymddangosai'n welliannau sylweddol a phwysig yn gymharol hwyr yn y dydd;

27. Cyflwynodd Canolfan Llywodraethiant Cymru bapur i'r Pwyllgor yn ei gyfarfod ar 3 Chwefror. Hefyd, gwnaethant fynychu'r cyfarfod er mwyn rhoi cyfle i Aelodau ofyn cwestiynau am eu papur. Ar ôl y cyfarfod ar 3 Chwefror, gwnaethant hefyd ddarparu papur pellach. Mae eu tystiolaeth ysgrifenedig a llafar ynghlwm wrth yr adroddiad hwn yn Atodiadau B-D.

28. Mynychodd y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol gyfarfod y Pwyllgor ar 10 Chwefror i ateb cwestiynau gan Aelodau. Gan fod amser yn brin ar y diwrnod hwnnw, cytunodd hefyd i ddarparu atebion ysgrifenedig i gwestiynau nas gofynnwyd yn y cyfarfod. Mae Cofnod y Trafodion ar 10 Chwefror, cwestiynau ysgrifenedig y Pwyllgor i'r Gweinidog, a'i atebion i'r cwestiynau hynny ynghlwm yn Atodiadau E-G.

Ystyriaeth y Pwyllgor Materion Cyfansoddiadol

29. Rydym wedi ystyried y dystiolaeth ychwanegol a ddaeth i law ac wedi dod i gytundeb ar nifer o gasgliadau ac argymhellion. Rhestrir y rhain isod.

Y Cefndir Polisi, yr Amserlen a'r Weithdrefn

30. Yn ein hadroddiad ar y gwersi a ddysgwyd o dair blynedd gyntaf Drafftio Mesurau Llywodraeth Cymru, gwnaethom fynegi barn bod:

> "...angen i'r broses datblygu polisi fod yn fwy manwl, yn enwedig o ran cael mwy o bobl allan i herio'r polisïau cyn iddynt ddod yn gynigion deddfwriaethol."[8]

31. Aethom ymlaen i ddadlau bod angen cyhoeddi cynigion polisi manwl cyn cyflwyno deddfau newydd[9].

32. Yn ddiamau, cyn i'r Llywodraeth gyflwyno'n gwelliannau ar 27 Ionawr, nid oedd Pwyllgorau'r Cynulliad na'r Cynulliad wedi cael cyfle'n flaenorol i'w hystyried na'r hyn yr oeddent yn ceisio eu cyflawni. Ni ellir dadlau chwaith na fu unrhyw ymgynghoriad ag unrhyw sefydliad allanol cyn cyhoeddi'r gwelliannau. Er efallai bod Cymdeithas Llywodraeth Leol Cymru wedi cael rhywfaint o rybudd ymlaen llaw am y cynigion, mae'n amlwg o'u sylwadau a gyhoeddwyd[10] ac o atebion y Gweinidog i'n cwestiynau nad oedd hyn yn gyfystyr ag ymgynghori ystyrlon.

33. Nid oes dadl chwaith, ni waeth p'un ai a oes rheolaethau digonol ar sut y caiff y pwerau newydd eu defnyddio, fod y gwelliannau'n cyflwyno pwerau ychwanegol sylweddol i Weinidogion Cymru, sy'n ymwneud â meysydd newydd. Rydym yn derbyn sicrhad y Gweinidog presennol nad oes ganddo ddim bwriad eu defnyddio er mwyn ad-drefnu llywodraeth leol yn llwyr. Cytunwn hefyd nad ydynt fwy na thebyg yn ffordd effeithiol iawn o wneud hynny, ond pery'r

[8] Ibid, Paragraff 14
[9] Ibid, Paragraff 15
[10] Cymdeithas Llywodraeth Leol Cymru, *Rhybudd WLGA am beryglon ceisio newid deddfau ar y funud olaf*, Datganiad i'w Wasg, 27 Ionawr 2011.

ffaith y gellid defnyddio'r pwerau hyn i ail-lunio map llywodraeth leol Cymru, petai awydd i wneud hynny.

34. Ni chredwn ei fod yn arfer da nac yn bolisi da i geisio pwerau mor bwysig â hyn ar fyr rybudd, heb ymgynghori'n briodol, a heb esboniad digonol pam eu bod yn ceisio pwerau o'r fath, sut y byddant yn gweithio'n ymarferol, faint fyddant yn ei gostio, a pham na all dulliau eraill gyflawni'r un dibenion. Gall dull gweithredu o'r fath arwain at ddrwgdybiaeth am agendâu cudd a'i gwneud yn anos i sicrhau craffu priodol.

35. Er mwyn osgoi'r math hwn o feirniadaeth yn y dyfodol, credwn fod angen cryfhau canllawiau Llywodraeth Cymru i Weinidogion a'u Hadrannau yn y maes hwn. Tynnodd Canolfan Llywodraethiant Cymru ein sylw at Ganllawiau Swyddfa Cabinet y DU ar y gweithdrefnau a'r polisi ar gyfer cyflwyno newidiadau polisi i Fesur Llywodraeth y DU ar ôl ei gyflwyno[11]. Nid yw'n ymddangos bod canllawiau cyffelyb ar gael i Weinidogion Cymru.

36. Er na fyddem yn disgwyl i Lywodraeth Cymru ddilyn arferion Whitehall yn slafaidd, mae'r diffyg canllawiau'n creu gofod ac nid yw hynny'n beth da. Yn yr achos hwn, byddai canllawiau o'r fath o leiaf wedi hwyluso prawf gwrthrychol i benderfynu a oedd yn rhesymol bod y Llywodraeth yn cyflwyno'r gwelliannau hyn ar yr adeg y gwnaethant. Yn y dyfodol, byddai cyhoeddi canllawiau o'r fath yn helpu i ganolbwyntio meddyliau Gweinidogion a swyddogion ynghylch p'un ai a fyddai'r Cynulliad yn ystyried bod cyflwyno gwelliannau mor bwysig â hyn yn rhesymol ai peidio.

Argymhelliad 1 – Rydym yn argymell bod Llywodraeth Cymru yn ystyried canllawiau Swyddfa'r Cabinet "Guide to Making Legislation" ac yn llunio a chyhoeddi ei chanllawiau ei hun ar y materion hyn fel mater o frys, yn cynnwys cyngor i Adrannau ar y gweithdrefnau ar gyfer cyhoeddi gwelliannau ar ôl cyflwyno Mesur am y tro cyntaf.

37. Er bod y Gweinidog wedi gwneud pwynt dilys drwy ddweud ei fod wedi cydymffurfio â gofynion trefniadol y Cynulliad wrth gyflwyno'r gwelliannau hyn, nid yw hynny'n gyfystyr â dweud mai dyma'r camau doethaf i'w cymryd. Y cwestiwn sylfaenol yw

[11] http://umbr4.cabinetoffice.gov.uk/making-legislation-guide/drafting_the_bill.aspx,

p'un ai a yw cynnwys y gwelliannau newydd a gyflwynwyd, yn yr achos hwn neu yn y dyfodol, wir yn estyniad o'r hyn sydd eisoes yn y mesur drafft neu a oes materion newydd sbon yn cael eu hychwanegu ar y funud olaf nad ydynt wir yn estyniad naturiol o'r Mesur arfaethedig. O gofio'r enghraifft benodol hon, mae'n bosibl y byddai'r Cynulliad am ystyried diwygio ei weithdrefnau a'i reolau sefydlog er gwell er mwyn sicrhau mwy o eglurder ynghylch yr hyn y gellid ei ystyried yn ddilys fel rhan o gwmpas Mesur.

Argymhelliad 2 - Rydym yn argymell y dylai'r Pwyllgor Busnes ystyried p'un ai a oes angen canllawiau cliriach i Aelodau ynghylch a yw gwelliannau'n disgyn o fewn cwmpas Mesur ac o fewn yr egwyddorion cyffredinol a gytunwyd yng Nghyfnod 1.

Yr Egwyddor o Ddiddymu Cyrff Statudol drwy Orchymyn

39. Roedd tystiolaeth Canolfan Llywodraethiant Cymru yn dadlau, er mwyn cyd-fynd â Chanllawiau Swyddfa Cabinet y DU, mai'r lle gorau i ddelio â materion dadleuol yw mewn deddfwriaeth. Drwy hyn, byddai'r Cynulliad yn gallu eu hystyried unwaith fel mater o egwyddor yn hytrach na gorfod dod yn ôl atynt bob tro y mae darnau unigol o ddeddfwriaeth ddirprwyedig yn dod gerbron. Byddai hyn hefyd yn rhoi cyfle i ystyried y gwelliannau yn hytrach na gorfod dilyn dull gweithredu is-ddeddfwriaeth sydd, i bob pwrpas, yn golygu derbyn y cwbl neu ddim byd. Awgrymant hefyd y dylai cyrff sydd wedi cael eu creu gan statud bob amser gael eu diddymu gan statud.

40. Cytunwn fod y ddau gynnig hyn yn werth eu hystyried fel egwyddorion arweiniol wrth lunio deddfwriaeth. Mae Awdurdodau Lleol eu hunain wedi cael eu hethol yn ddemocrataidd ac er nad oes swyddogaethau'n cael eu dwyn oddi ar awdurdodau lleol, bydd bob amser rhywfaint o sensitifrwydd ynghlwm wrth uno un corff a etholwyd yn ddemocrataidd ag un arall, sensitifrwydd sy'n fwy amlwg nag yn achos cyrff eraill y goron, megis 'cwangos'. Mae hyn yn arbennig o wir pan nad yw'r cynnig deddfwriaethol sy'n cael ei ystyried wedi ffurfio rhan o faniffesto etholiadol neu raglen a gytunwyd ar gyfer Llywodraeth, y pleidleisiwyd arno yn y Cynulliad.

41. Nid ydym yn argyhoeddedig y dylai'r egwyddorion hyn fod yn rheolau caeth. Er enghraifft, mae'n bosibl y bydd adegau pan fydd dull cam wrth gam gyda rhaglen o ddiwygio yn fwy addas wrth ddefnyddio is-ddeddfwriaeth yn hytrach na deddfwriaeth sylfaenol. Yn yr un modd, pan fydd gan Lywodraethau fandad clir ar gyfer newid, mae'n bosibl mai pwerau is-ddeddfwriaeth sy'n cynnig y ffordd fwyaf ymarferol ymlaen.

42. Cynigodd y Gweinidog ei hun rai enghreifftiau lle mae cyrff statudol wedi cael ei diddymu gan orchymyn neu lle y gallent gael eu diddymu gan orchymyn. Cyfeiriwyd at y Mesur Cyrff Cyhoeddus[12] sydd gerbron Senedd y DU ar hyn o bryd, Deddf Llywodraeth Leol a Chynnwys y Cyhoedd mewn Iechyd 2007[13] a Deddf Llywodraeth Cymru 1998[14] fel enghreifftiau penodol. Fodd bynnag, nid ydym yn argyhoeddedig bod unrhyw un o'r enghreifftiau a nodwyd yn cydweddu'n llwyr â'r cynigion hyn.

43. Nid yw'r Mesur Cyrff Cyhoeddus yn ddeddf ac yn wir, mae wedi cael ei feirniadu gan Bwyllgor Cyfansoddiad Tŷ'r Arglwyddi. Dywedodd y Pwyllgor:

> "When assessing a proposal in a Bill that fresh Henry VIII powers be conferred, we have argued that the issues are 'whether Ministers should have the power to change the statute book for the specific purposes provided for in the Bill and, if so, whether there are adequate procedural safeguards'.[**5**] In our view, the Public Bodies Bill [HL] fails both tests."[15]

44. Rydym yn deall nawr bod Llywodraeth y DU wedi ymateb i adroddiad y Pwyllgor ac wedi penderfynu dileu cynigion sy'n galluogi Gweinidogion i chwalu cyrff a swyddfeydd drwy ddefnyddio deddfwriaeth eilaidd[16].

45. Mae'n wir bod Deddf Llywodraeth Leol a Chynnwys y Cyhoedd mewn Iechyd 2007 yn galluogi'r Ysgrifennydd Gwladol cyfrifol i weithredu cynigion ar gyfer gwneud newidiadau i strwythur neu i ffiniau awdurdodau lleol drwy orchymyn. Fodd bynnag, mae'r pwerau hyn yn amodol ar y cyfyngiad bod rhaid i'r

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[12] Mesur Cyrff Cyhoeddus [Tŷ'r Arglwyddi] 2010-11
[13] Deddf Llywodraeth Leol a Chynnwys y Cyhoedd mewn Iechyd 2007 c. 28
[14] Deddf Llywodraeth Cymru 1998 c. 38
[15] HL Constitution Select Committee, *Public Bodies Bill* [HL], Sixth Report 2010-2011, November 2010
[16] Hansard Tŷ'r Arglwyddi – Pwyllgor Mesur Cyrff Cyhoeddus[HL] 7fed Diwrnod 28 Chwefror 2011 – Colofn 798-800

awdurdodau lleol eu hunain ysgogi unrhyw gynigion[17]. Mae hyn yn wahanol iawn i'r pwerau sy'n cael eu ceisio yn y Mesur presennol lle gallai Gweinidogion Cymru weithredu o'u pen a'u pastwn ei hunain.

46. O ran Deddf Llywodraeth Cymru 1998, daeth i fodolaeth yn sgil refferendwm, a greodd gorff democrataidd gan ddisodli swydd yr Ysgrifennydd Gwladol. Unwaith eto, mae hwn yn gynsail gweddol denau ar gyfer yr hyn a gynigir nawr.

47. Er nad ydym mewn egwyddor yn gwrthwynebu pob achos o ddefnyddio gorchymyn i ddiddymu cyrff a grëwyd yn statudol, credwn fod angen mwy o ymgynghori ac ystyriaeth er mwyn dod i farn gytbwys am ba mor addas ydynt. Rydym hefyd yn poeni nad ydynt, fel y'u drafftiwyd, yn rhoi digon o fanylion am y cyfyngiadau ar y math o amgylchiadau lle gallent gael eu defnyddio.

48. Felly, nid ydym yn teimlo ein bod yn gallu dod i farn ar hyn o bryd p'un ai a yw'n rhesymol i arfer y pwerau hyn drwy orchymyn. O gofio'r prinder amser ar gyfer ystyried ac ymgynghori ar y cynigion hyn, a'r ffaith eu bod yn ymwneud â chyrff a etholwyd yn ddemocrataidd ac a sefydlwyd gan statud, ac er nad ydynt yn dwyn unrhyw swyddogaethau oddi ar lywodraeth leol, credwn y byddai'n syniad gwell i ddisodli'r cynigion hyn gyda fersiynau diwygiedig a fyddai'n cyflawni nodau'r Llywodraeth mewn ffordd fwy cymedrol ac ystyriol.

Argymhelliad 3 – Rydym yn argymell bod y Llywodraeth yn ystyried p'un ai a allai gyflawni ei nodau yn well o ran y gwelliannau dan sylw yn y Mesur hwn drwy eu disodli â'r geiriad a awgrymir yn y paragraffau canlynol a drwy ymgynghori'n briodol ar y gwelliannau ar eu newydd wedd.

Y Datblygiad Polisi sydd wrth gefn y Pŵer i Uno

49. Yn eu hadroddiad Cyfnod 1 ar y Mesur, dyma ddywed Pwyllgor Deddfwriaeth 3[18]:

[17] Deddf Llywodraeth Leol a Chynnwys y Cyhoedd mewn Iechyd 2007 c. 28
[18] "Adroddiad Pwyllgor Cyfnod 1 ar y Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru)" Pwyllgor Deddfwriaeth Rhif 3 - Rhagfyr 2010

"413. Mae Mesur Llywodraeth Leol (Cymru) 2009 yn rhoi'r pŵer i Weinidogion Cymru i roi cyfarwyddyd i gydlafurio ac i orfodi awdurdodau lleol i weithio gyda'i gilydd lle maent yn methu yn eu dyletswydd i sicrhau gwelliant parhaus yn y ffordd y maent yn arfer eu swyddogaethau. **O ystyried yr ymgyrch tuag at gydlafurio ar draws y gwasanaethau cyhoeddus yn gyffredinol, credwn fod angen atgyfnerthu'r Mesur arfaethedig er mwyn darparu arf mwy effeithiol i orfodi cydlafurio mewn amgylchiadau y tu hwnt i'r pwerau cyfyngedig sydd ym Mesur 2009 ar hyn o bryd. Rydym yn argymell bod y Gweinidog yn ceisio ffyrdd o ymdrin â'r mater hwn ac atgyfnerthu'r Mesur arfaethedig, gan edrych ar amgylchiadau eraill lle byddai'r Gweinidog am orfodi awdurdodau lleol i gydlafurio efallai.**"

50. Eglurodd y Gweinidog mor glir ag y gallai nad oes bwriad ganddo i ddefnyddio'r pwerau i gyflwyno proses o ad-drefnu llywodraeth leol yng Nghymru yn llwyr neu ar raddfa eang. Rydym yn derbyn ei air ar y pwynt hwnnw.

51. Mae'n ymddangos taw safbwynt y Gweinidog yw bod y cynigion yng ngwelliannau'r Llywodraeth yn arf ychwanegol a fyddai'n ei alluogi ef neu Weinidogion y dyfodol i uno Cynghorau os oedd un ohonynt yn afresymol wrth fethu â chydweithio â Chyngor arall neu os oedd Cyngor yn methu â gwella. Byddai'r pwerau'n cael eu rhoi ar waith ddim ond pan nad oedd y pwerau a ddarparwyd gan Fesur 2009 wedi gweithio neu os oedd Gweinidogion o'r farn na fyddent yn debygol o weithio. O'r herwydd, lluniwyd y gwelliannau er mwyn ymateb i argymhelliad y Pwyllgor Deddfau a nodir uchod yn ogystal ag ymateb i drafodaeth ym Mhwyllgor Iechyd, Lles a Llywodraeth Leol y Cynulliad ym mis Mehefin 2009 pan ofynnwyd i'r Gweinidog edrych ar fodel i sicrhau mwy o gydweithio.

52. Er bod y Gweinidog wedi siarad am gynghorau sy'n methu a'r angen i symud yn gyflym i fynd i'r afael â sefyllfaoedd o'r fath, daeth yn amlwg wrth iddo ateb ein cwestiynau nad dyma oedd y prif fwriad wrth gefn ei gynigion. Mae paragraffau 71 i 80 ei ddystiolaeth lafar yn esbonio taw ei brif fwriad yw gorfodi mwy o gydweithio neu orfodi cynghorau i wneud gwelliannau lle nad ydynt yn llwyddo i wneud gwelliannau ar y pryd, yn hytrach na mynd i'r afael â methiant llwyr neu drychinebus.

Wrth ateb cwestiynau yn ddiweddarach (gweler paragraffau 112 i 124), amcangyfrifodd y Gweinidog y byddai angen o bosibl rhwng chwech a saith mis er mwyn cymeradwyo gorchymyn uno, sydd unwaith eto'n awgrymu na luniwyd y pwerau hyn gydag argyfwng gwirioneddol mewn golwg.

53. Nid ydym wedi ein hargyhoeddi chwaith mai creu pŵer i uno cynghorau oedd ym meddwl Pwyllgor Deddfwriaeth 3 wrth argymell cryfhau'r pŵer i gydweithio. Fodd bynnag, rydym yn derbyn gair y Gweinidog mai dyma oedd ei ddealltwriaeth o'u hargymhelliad a bod y gwelliannau hyn, yn rhannol o leiaf, yn ymateb i hynny.

54. Felly, mae'n ymddangos i ni fod y gwelliannau hyn yn darparu, yn eu hanfod, chwip fawr i fygwth y Cynghorau os ydynt yn methu â chydweithio neu wella. Mae'n ymddangos y byddai'r pwerau hyn yn cynnig ateb llawer rhy feichus mewn argyfwng gwirioneddol, er enghraifft petai gwasanaethau plant yn methu'n llwyr gan roi bywydau yn y fantol. Fodd bynnag, yn eu ffurf bresennol, gallent fod yn ddull o ad-drefnu llywodraeth leol yn sylweddol drwy'r drws cefn. Er ein bod yn derbyn nad dyma sydd wrth wraidd y gwelliannau, y mater dan sylw yw p'un ai a yw'r camau diogelu'n ddigon cryf i atal hyn rhag digwydd yn y dyfodol, a chofio na fyddai Gweinidogion na Llywodraethau'r dyfodol yn rhwym wrth addewidion y Gweinidog presennol.

55. Mater i'r broses wleidyddol yn hytrach nag i ni yw penderfynu ai bygwth uno cynghorau yw'r ffordd fwyaf priodol o sicrhau cydweithio a gyrru gwelliannau. Rydym yn bryderus oherwydd nad oedd sôn am uno, na'r bygythiad o uno, yn yr amrediad o ddewisiadau polisi posibl a gafodd eu hystyried yn y Mesur hwn i wella a chydweithio o'r cychwyn cyntaf. Nid oedd neb a roddodd dystiolaeth yng Nghyfnod 1 wedi cynnig yr ateb hwn ychwaith.

56. Rydym eisoes wedi amlinellu ein pryderon bod y gwelliannau hyn wedi'u cyflwyno'n hwyr yn y broses ddeddfu heb fawr o ymgynghori nac esboniad. Rydym wedi datgan yn glir nad ydym yn credu bod hyn yn arfer da a bod angen tynhau'r gweithdrefnau hyn yn y dyfodol.

57. Er ein bod yn mynegi pryderon am y ffordd y mae'r gwelliannau wedi cael eu cyflwyno y tro hwn, credwn y byddai wedi bod yn rhesymol i sicrhau pwerau wrth gefn cryfach i Weinidogion er mwyn gorfodi awdurdodau lleol i gydweithio dan amgylchiadau penodedig, mewn cysylltiad â'r agenda gwella gwasanaethau. Credwn y byddai hyn wedi bod yn fwy cydnaws â bwriad cyffredinol y Mesur ac roedd yn bwynt a gafodd ei ystyried a'i argymell yn benodol gan y Pwyllgor Deddfau a'r Cynulliad yng Nghyfnod 1.

Argymhelliad 4 - Rydym yn argymell y dylai'r Llywodraeth ystyried p'un ai a fyddai disodli'r darpariaethau newydd â darpariaethau a fyddai'n rhoi'r pŵer iddynt orfodi cydweithio yn lle hynny, yn ffordd well o gyflawni'r amcan cyffredinol o wella gwasanaethau.

Y Cynsail a Sefydlwyd gan y Gwelliannau hyn

58. Fel yr eglurwn mewn man arall, derbyniwn air y Gweinidog na fydd ef yn defnyddio'r gwelliannau hyn i roi proses ad-drefnu llywodraeth leol ar waith yng Nghymru ar raddfa eang drwy'r drws cefn (ond nodwn hefyd nad yw Gweinidogion y dyfodol yn rhwym wrth yr addewid hwn). Derbyniwn hefyd fod y gwelliannau wedi cael eu cyflwyno i ategu prif fyrdwn y Mesur yn unol â gweithdrefnau'r Cynulliad ei hun. Mae'r Gweinidog hefyd wedi dadlau mai arf arall yn unig yw'r gwelliannau hyn a fydd yn ei helpu i wthio awdurdodau lleol i gydweithio at ddibenion gwella gwasanaethau.

59. Fodd bynnag, credwn fod angen tynnu sylw'r Llywodraeth at y ffaith bod llawer ym maes llywodraeth leol yng Nghymru o'r farn bod y cynigion hyn, yn ôl pob golwg, yn cyflwyno materion newydd sbon nad ydynt yn gysylltiedig o gwbl â byrdwn gwreiddiol y Mesur.

60. Mae'r ffaith bod gwelliannau wedi'u cyflwyno i'r Mesur yn gymharol hwyr yn y broses, heb ymgynghori arnynt a heb esboniad priodol, yn golygu y gallai hyn osod cynsail a gaiff ei ddefnyddio gan Weinidogion eraill mewn gweinyddiaethau yn y dyfodol i gyfiawnhau gweithredoedd tebyg, gan gyfeirio at y gyfres bresennol o welliannau fel awdurdod i wneud hynny.

61. Rydym ni am ei gwneud yn gwbl glir y dylid gwrthwynebu'n gadarn unrhyw lywodraeth yn y dyfodol sy'n ceisio defnyddio hyn fel cynsail, ac eithrio dan amgylchiadau eithriadol.

Gwelliannau a Gyflwynwyd

62. Beth bynnag yw ein barn, y ffaith sydd ohoni yw bod y gwelliannau wedi'u cytuno gan Bwyllgor Cyfnod 2 ac felly mae'n debyg iawn y byddant, naill ai yn eu ffurf bresennol neu'n dilyn gwelliannau pellach yng Nghyfnod 3, yn ffurfio rhan o'r Mesur os caiff ei gymeradwyo.

63. Felly os bydd hyn yn digwydd, rydym wedi ystyried sut y gellid gwella'r pwerau a gytunwyd gan Bwyllgor Cyfnod 2 i dawelu rhai o'r pryderon am y gwelliannau.

Pŵer i wneud Gorchmynion Uno

Cyfyngiad Daearyddol

64. Un o'r materion sy'n peri drwgdybiaeth y gallai'r pŵer i uno gael ei ddefnyddio i ad-drefnu llywodraeth leol drwy'r drws cefn yn fwy eang na bwriad y Gweinidog presennol yw nad oes sôn am gyfyngiad daearyddol mewn cysylltiad â "effective local government". Byddai ychwanegu cymal megis "in the area concerned" neu debyg yn helpu i dawelu'r pryderon taw'r hyn a olygir yw llywodraeth leol effeithiol (yng Nghymru).

Argymhelliad 5 - Rydym yn awgrymu gwelliant i'r Mesur arfaethedig drwy ychwanegu cymal tebyg i "in the area concerned" at welliant 91(1).

Ystyr "effective local government"

65. Yn ein barn ni, rhan allweddol o welliant 91 yw is-adran (2), sy'n dynodi bod rhaid i Weinidogion, cyn gwneud gorchymyn uno, gael eu bodloni bod "…effective local government is not likely to be achieved in a local government area…" drwy ddefnyddio pwerau'r Gweinidog dan adrannau 28, 29, 30 neu 31 Mesur Llywodraeth Leol (Cymru) 2009 (neu wrth i awdurdodau lleol ddefnyddio'u pwerau dan adran 9 y Mesur hwnnw).

66. Dywedodd y Gweinidog wrthym fod y term llywodraeth leol effeithiol yn un safonol a ddefnyddir mewn deddfwriaeth llywodraeth leol sy'n dyddio'n ôl i Ddeddf Llywodraeth Leol 1972. Serch hynny, nid oedd yn gallu dweud wrthym beth yn union a olygir wrth y term hwn nac ychwaith beth fyddai'r meini prawf a ddefnyddir i benderfynu p'un ai a yw awdurdod yn darparu llywodraeth leol effeithiol ai peidio. Fodd bynnag, roeddem yn falch o nodi bod y Gweinidog yn ymddangos ei fod yn barod i ystyried newidiadau yn y maes hwn er mwyn egluro'r ystyr.

67. A chofio natur ddidrugaredd y pwerau a gaiff eu rhoi ar waith pe bernir bod cyngor yn aneffeithiol, mae hefyd yn hanfodol, yn ein barn ni, bod datganiad o egwyddorion neu feini prawf clir yn y Mesur yn amlinellu sut yn union y caiff "effeithiolrwydd" ei fesur.

Argymhelliad 6 - Rydym yn argymell gwelliant i'r Mesur arfaethedig fel bod union ystyr "effective local government" yng ngwelliant 91(2) yn cael ei ddiffinio'n glir yn y Mesur ac yn cael ei gyfyngu'n glir i gyd-destun y pŵer a nodwyd yn y gwelliant i uno cynghorau.

Ystyr "not likely to be achieved"

68. Mae gennym bryderon tebyg am ddefnydd y term "not likely to be achieved", yn enwedig pan gaiff ei ddefnyddio law yn llaw â "effective local government". Unwaith eto, roeddem yn falch o nodi bod y Gweinidog yn barod i ystyried cyflwyno gwelliannau yng nghyfnod 3 i egluro ystyr "not likely" yn y cyd-destun hwn.

69. Byddai'n well gennym petai'r Mesur yn cael ei ddiwygio fel bod yn rhaid i Weinidogion gael eu bodloni bod "effective local government [sut bynnag y caiff hyn ei ddiffinio] <u>has not been</u> achieved" cyn gwneud gorchymyn uno. Fodd bynnag, y pwynt allweddol i ni yw bod o leiaf angen egluro'r term hynod annelwig "likely" yn fanylach yn y Mesur.

Argymhelliad 7 - Rydym yn argymell gwelliant i'r Mesur arfaethedig fel bod yr hyn sy'n rhaid ei gyflawni yng ngwelliant 91(2) yn cael ei ddiffinio'n glir yn y Mesur ac hefyd wedi'i gyfyngu i gyd-destun y pŵer a nodwyd yn y gwelliant i uno cynghorau.

70. Yn ein barn ni, byddai pryderon y rheini sydd o bosibl yn gweld y pwerau hyn fel mecanwaith ar gyfer ad-drefnu llywodraeth leol yn sylweddol yn cael eu tawelu'n ddirfawr petai mwy o eglurder ynghylch y ddau derm hyn.

Effaith ar awdurdodau lleol eraill

71. Yn y drafft presennol, nid oes gofyniad ar Weinidogion i ystyried pa effaith fyddai gwneud gorchymyn uno yn ei chael ar y cynghorau eraill sy'n rhan o'r broses uno, hynny yw'r rheini nad ydynt yn cael eu hystyried yn aneffeithiol.

72. Mae'n siŵr taw'r syniad sydd wrth wraidd y gwelliannau hyn yw y gallai uno wella safonau neu berfformiad yn yr ardal sydd dan ofal yr hen awdurdod anhydrin, ond mae'n rhaid felly bod yr un perygl, o leiaf, y gallai perfformiad ddirywio yn yr awdurdodau eraill, a oedd yn effeithiol. Ond mae'n fwy dyrys na hynny oherwydd mae'n debyg y byddai'n cael effaith ar berfformiad ym mhob un o ardaloedd yr hen awdurdod, o bosibl mewn ffyrdd cymhleth sy'n anodd eu rhagweld. Fan lleiaf, gallai olygu dargyfeirio adnoddau gwerthfawr i'r broses uno.

73. Rydym o'r farn felly y dylid cydbwyso'r gofyniad ar Weinidogion i fodloni eu hunain am "a local government area" gyda gofyniad i ystyried effaith uno ar yr awdurdodau lleol nad ydynt yn cael eu hystyried yn aneffeithiol.

Argymhelliad 8 - Rydym yn argymell gwelliant i'r Mesur arfaethedig i gynnwys gofyniad ar Weinidogion i ystyried effaith proses uno orfodol ar bob awdurdod lleol sy'n cael ei effeithio.

Gofynion Ymgynghori

Yr Awdurdodau Lleol Dan Sylw

74. Mae gwelliant 98(2) yn nodi'r weithdrefn sy'n rhaid glynu wrthi er mwyn gwneud gorchymyn uno, yn cynnwys y trefniadau ymgynghori. Mae'r gwelliant yn dweud bod rhaid i Weinidogion ymgynghori ag unigolion sy'n ymddangos eu bod yn cynrychioli unigolion neu fuddiannau sy'n cael eu heffeithio gan y cynigion. Mae'n debyg bod hyn yn rhoi disgresiwn sylweddol i Weinidogion o ran â phwy y dylent ymgynghori.

75. Yn ein barn ni, mae'n anorfod y byddai'r Llywodraeth yn ymgynghori â'r awdurdodau lleol sy'n cael eu heffeithio gan gynnig i uno, neu gyda'r cynghorau cymuned yn yr ardaloedd hynny. Fodd bynnag, credwn y byddai'r darpariaethau o ran ymgynghori'n cael eu cryfhau'n sylweddol gan ofyniad penodol yn y Mesur i ymgynghori â'r cyrff hyn.

Argymhelliad 9 - Rydym yn argymell gwelliant i'r Mesur i gynnwys gofyniad penodol i ymgynghori â'r awdurdodau lleol sy'n destun gorchymyn uno arfaethedig, yn ogystal ag unrhyw gynghorau cymuned o fewn eu ffiniau.

Cyrff Cymunedol a Gwirfoddol

76. Credwn hefyd y dylid ymgynghori â chyrff cymunedol eraill, yn enwedig yn y sector gwirfoddol, ac y dylid cyfeirio'n benodol at hyn yn y Mesur.

Argymhelliad 10 - Rydym yn argymell gwelliant i'r Mesur i gynnwys gofyniad penodol i ymgynghori â chyrff cymunedol a mudiadau'r sector gwirfoddol sy'n gweithredu o fewn ffiniau'r awdurdodau lleol sy'n destun cynnig i'w huno.

Ymgynghori â buddiannau ehangach

77. Yn ogystal â'r effaith ar yr ardaloedd lleol dan sylw, mae'n debygol y byddai'n effeithio ar ardal ehangach hefyd. Er enghraifft, o ran gwasanaethau tân neu heddlu, darparwyr trafnidiaeth neu lle mae awdurdod lleol yn rhannu gwasanaethau neu drefniadau darparu gwasanaeth gyda chyrff nad ydynt yn rhan o'r cynnig i uno. Er mwyn sicrhau bod yr ymgynghoriad yn rhoi sylw i'r ystyriaethau ehangach hyn, credwn y dylid diwygio'r Mesur i sicrhau bod gofyniad penodol i ymgynghori â'r buddiannau hyn.

Argymhelliad 11 - Rydym yn argymell gwelliant i'r Mesur i gynnwys gofyniad penodol i ymgynghori â sefydliadau neu fuddiannau y tu allan i'r ardaloedd yr effeithir arnynt yn uniongyrchol gan y cynnig i uno.

Defnyddio'r Weithdrefn Uwchgadarnhau

78. Mae gwelliant 98 yn nodi'r weithdrefn sy'n rhaid glynu wrthi yn achos cynnig i wneud gorchymyn uno. Mae'n weithdrefn uwchgadarnhau. Golyga hyn, ar ôl yr ymgynghoriadau

cychwynnol, rhaid i'r llywodraeth, os yw'n dymuno bwrw ymlaen, gyflwyno gorchymyn drafft a chaniatáu cyfnod o 60 diwrnod (pan fydd y Cynulliad yn eistedd) ar gyfer ymgynghori pellach. Byddai hyn hefyd yn rhoi amser i Bwyllgorau'r Cynulliad ystyried y gorchymyn drafft.

79. Yna, byddai rheidrwydd ar y Llywodraeth i ystyried y sylwadau a dderbynnir cyn cyflwyno'r cynigion terfynol. Gall y cynigion terfynol gynnwys unrhyw sylwadau a dderbyniwyd a rhaid atodi manylion y sylwadau hyn.

80. Ar ôl cyfnod pellach o 20 diwrnod, ac ar ôl i'r Pwyllgor Materion Cyfansoddiadol gael cyfle i graffu ar y gorchymyn drafft terfynol, rhaid i gyfarfod llawn y Cynulliad gytuno ar y gorchymyn drwy bleidlais, a hynny fel arfer yn dilyn dadl yn y Cynulliad ar y gorchymyn.

81. Rydym yn derbyn bod y weithdrefn uwchgadarnhau'n drefn drwyadl a hirfaith. Er bod pawb, yn ôl pob golwg, yn cytuno nad hwn fyddai'r llwybr priodol i'w ddilyn wrth ddelio ag achos brys o chwalfa gwasanaeth neu fethiant trychinebus, dyma'r weithdrefn craffu gwarchodol briodol i'r Llywodraeth ei dilyn yng nghyd-destun pwerau uno o'r fath y mae'r Llywodraeth yn eu cynnig.

82. Fodd bynnag, ni ddylid ystyried y weithdrefn uwchgadarnhau fel yr ateb i bob problem. Yn y pen draw, y Llywodraeth sydd â'r pŵer i gynnig gorchymyn, i fframio'r ymgynghoriad, i ddadansoddi'r ymatebion ac i ddiwygio'r gorchymyn os ydynt yn dymuno. Ar ôl i'r Llywodraeth gyflwyno drafft terfynol y gorchymyn, nid oes cyfle pellach i wneud gwelliannau ac mae'r amser a ganiateir ar gyfer trafodaethau hefyd yn nwylo'r Llywodraeth yn llwyr. Erbyn y cam hwn, rhaid i'r Cynulliad gymeradwyo'r gorchymyn heb ddiwygiadau pellach ar sail derbyn y cwbl neu ddim byd.

Materion eraill

83. Yn ogystal â'r materion yr ydym wedi rhoi sylw penodol iddynt uchod, mae'r gwelliannau a gynigwyd gan y Llywodraeth yn cynnwys darpariaethau yn ymwneud ag ystod o faterion eraill. Nid mân faterion yw'r rhain chwaith, maent yn cynnwys materion megis ffiniau etholiadol, nifer y cynghorwyr, canslo etholiadau, trosglwyddo staff ac eiddo, creu awdurdodau

cysgodol, a phosibilrwydd o gynnal refferenda ynghylch sefydlu meiri etholedig. Ceir hefyd welliannau canlyniadol i Ddeddfau Seneddol ac rydym yn ymwybodol na ddarparwyd dim gwybodaeth ac ni roddwyd dim ystyriaeth i agweddau ariannol y gwelliannau hyn.

84. Yn yr amser a oedd ar gael i ni, nid ydym wedi gallu craffu ar unrhyw rai o'r materion hyn yn fanwl. Er bod y Pwyllgor Deddfau wedi ystyried pob un o'r gwelliannau yng Nghyfnod 2, mae diffyg unrhyw ddogfennau esboniadol gan y Llywodraeth, ac anallu'r Pwyllgor Cyfnod 2 i ymgynghori â chyrff allanol neu glywed tystiolaeth ganddynt, yn debygol o olygu nad oedd yr ystyriaeth yng Nghyfnod 2 wedi'i seilio ar gymaint o heriau allanol ac nac oedd lefel y craffu mor fanwl â Chyfnod 1. Credwn fod y rhain yn rhesymau pellach pam y byddai'n syniad gwell i graffu ar y gwelliannau hyn yn fwy ystyriol nag sydd wedi bod yn bosibl yn yr achos hwn.

Deddfu ar gyfer Llywodraethau'r dyfodol

85. Yn ystod y sesiwn casglu tystiolaeth gyda'r Gweinidog, dywedwyd wrthym mai rhan o'r rheswm dros gyflwyno'r gwelliannau hyn oedd:

> "…so that the next Assembly Government could use those powers if it wished rather than our creating a process that meant that no such amalgamation or mergers could take place until, probably, well into the next Assembly…"[19]

86. Tynnwyd ein sylw hefyd at lythyr gan y Gweinidog at Gadeirydd y Pwyllgor Cyllid am y gwelliannau. Ceir copi o'r llythyr hwn yn Atodiad H. Mae'n ymddangos bod y Gweinidog yn gwneud yr un dybiaeth sylfaenol wrth ddweud:

> To save money and protect frontline services, we need the tools to make this happen.
>
> The Local Government Measure provides us with a timely opportunity to secure powers which, it has become obvious, are necessary. If we did not take the opportunity to introduce the amendments at this stage, we would need to start the whole process of timetabling and introducing a new Measure

[19] See Annex E Para 22

following the elections in May. This is likely to take another 12 months– it is conceivable these powers may need to be used before then.

87. Ni ddylai Gweision Sifil na Gweinidogion ragdybio, ychydig cyn etholiad, y byddai Llywodraeth olynol sydd newydd ei hethol o anghenraid yn dymuno mabwysiadu polisïau ei rhagflaenwyr. Mae'n ddigon posibl bod materion yn trosglwyddo o un weinyddiaeth i'r llall, naill ai oherwydd bod yr un blaid neu'r un pleidiau'n cael mwyafrif neu oherwydd bod cryn gefnogaeth i'r mater oherwydd nad yw'n fater pleidiol neu nid yw'n fater dadleuol, ond ni ellir cymryd hyn yn ganiataol.

88. Hoffem ddatgan ar goedd ein diolch i Ganolfan Llywodraethiant Cymru am baratoi papur i'r Pwyllgor ar fyr rybudd ac am fynychu ein cyfarfod ar 3 Chwefror i ateb ein cwestiynau. Hoffem hefyd ddiolch i'r Gweinidog, Carl Sargeant, a'i swyddogion am fynychu ein cyfarfod ar 10 Chwefror i ateb cwestiynau ac am ei atebion cynhwysfawr i'n cwestiynau ysgrifenedig.

HYSBYSIAD YNGHYLCH GWELLIANNAU

Cyflwynwyd ar 27 Ionawr 2011

Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru)

Carl Sargeant **91**

I ychwanegu Adran newydd—

'( ) Pŵer i wneud gorchymyn cyfuno

(1) Caiff Gweinidogion Cymru, os ydynt wedi eu bodloni ei bod yn angenrheidiol er mwyn sicrhau llywodraeth leol effeithol, wneud gorchymyn ("gorchymyn cyfuno") i gyfansoddi ardal llywodraeth leol newydd drwy gyfuno dwy neu dair ardal llywodraeth leol.

(2) Cyn gwneud gorchymyn cyfuno, rhaid i Weinidogion Cymru gael eu bodloni na fyddai'n debyg y câi llywodraeth leol effeithiol ei sicrhau mewn ardal llywodraeth leol sydd i'w chyfuno gan y gorchymyn—

(a) drwy i unrhyw un neu rai o'r awdurdodau lleol o dan sylw arfer ei bwerau o dan adran 9 (Pwerau cydlafurio etc) o Fesur Llywodraeth Leol (Cymru) 2009, neu

(b) drwy i Weinidogion Cymru arfer eu pwerau o dan—

adran 28 (Gweinidogion Cymru: cymorth i awdurdodau gwella Cymreig),

adran 29 (Gweinidogion Cymru: pwerau cyfarwyddo etc),

adran 30 (Pwerau cyfarwyddo: trefniadau cydlafurio), neu

adran 31 (Pŵer Gweinidogion Cymru i addasu deddfiadau a rhoi pwerau newydd)

o'r Mesur hwnnw."

(3) Rhaid i orchymyn cyfuno ddarparu ar gyfer y canlynol—

(a) a fydd yr ardal llywodraeth leol newydd yn sir ynteu'n fwrdeistref sirol,

(b) enw Cymraeg ac enw Saesneg yr ardal llywodraeth leol newydd,

(c) sefydlu awdurdod lleol ar gyfer yr ardal llywodraeth leol newydd,

(d) a fydd yr awdurdod lleol newydd yn gyngor sir ynteu'n gyngor bwrdeistref sirol,

(e) enw Cymraeg ac enw Saesneg yr awdurdod lleol newydd,

(f) diddymu'r ardaloedd llywodraeth leol presennol,

(g) ffin yr ardal llywodraeth leol newydd, ac

(h) dirwyn i ben a diddymu'r awdurdodau lleol ar gyfer yr ardaloedd llywodraeth leol presennol.

(4) Os sir fydd yr ardal llywodraeth leol newydd, rhaid i'r gorchymyn cyfuno ddarparu i'r awdurdod lleol newydd gael enw'r sir gan ychwanegu—

(a) yn achos ei enw Saesneg, y geiriau "County Council" neu'r gair "Council" (megis yn "Pembrokeshire County Council" neu "Pembrokeshire Council"); a

(b) yn achos ei enw Cymraeg, y gair "Cyngor" (megis yn "Cyngor Sir Penfro").

(5) Os bwrdeistref sirol fydd yr ardal llywodraeth leol newydd, rhaid i'r gorchymyn cyfuno ddarparu i'r awdurdod lleol newydd gael enw'r fwrdeistref sirol gan ychwanegu—

(a) yn achos ei enw Saesneg, y geiriau "County Borough Council" neu'r gair "Council" (megis yn "Caerphilly County Borough Council" neu "Caerphilly Council"); a

(b) yn achos ei enw Cymraeg, y geiriau "Cyngor Bwrdeistref Sirol" neu'r gair "Cyngor" (megis yn "Cyngor Bwrdeistref Sirol Caerffili" neu "Cyngor Caerffili").'.

Carl Sargeant **92**

I ychwanegu Adran newydd –

'( ) Materion etholiadol

Mae'r ddarpariaeth y caniateir ei gwneud mewn gorchymyn cyfuno yn cynnwys darpariaeth ar gyfer neu mewn cysylltiad ag unrhyw un o'r materion canlynol (ond nid yw wedi ei chyfyngu i'r cyfryw ddarpariaeth)—

(a) cyfanswm yr aelodau o unrhyw awdurdod lleol ("cynghorwyr");

(b) nifer yr ardaloedd etholiadol a'u ffiniau at ddibenion ethol cynghorwyr;

(c) nifer y cynghorwyr sydd i'w hethol yn ffurfiol gan unrhyw ardal etholiadol;

(d) enw unrhyw ardal etholiadol;

(e) ethol cynghorwyr ar gyfer unrhyw ardaloedd etholiadol;

(f) diddymu etholiadau cynghorwyr ar gyfer unrhyw ardal etholiadol;

(g) ethol cynghorwyr cymunedol ar gyfer unrhyw gymuned;

(h) diddymu etholiadau cynghorau cymuned;

(i) ethol maer awdurdod lleol;

(j) penodi aelodau o awdurdod lleol presennol gan Weinidogion Cymru i fod yn aelodau o awdurdod cysgodol am gyfnod cysgodol;

(k) penodi am gyfnod cysgodol weithrediaeth i'r awdurdod cysgodol;

(l) swyddogaethau awdurdod cysgodol, a chyflawni'r swyddogaethau hynny, yn ystod cyfnod cysgodol.'.

Carl Sargeant **93**

I ychwanegu Adran newydd –

'( ) Gofyniad i gynnal refferendwm sy'n cynnwys maer etholedig

(1) Pan fo un neu ragor o'r awdurdodau lleol presennol yn gweithredu gweithrediaeth maer a chabinet, rhaid i'r gorchymyn cyfuno ei gwneud yn ofynnol i'r awdurdod cysgodol gynnal refferendwm ynghylch a ddylai'r awdurdod lleol newydd weithredu gweithrediaeth maer a chabinet.

(2) Pan fo is-adran (1) yn gymwys, mae'r ddarpariaeth y caniateir ei gwneud mewn gorchymyn cyfuno'n cynnwys darpariaeth (ond nid yw wedi ei chyfyngu i ddarpariaeth)—

(a) o ran y dyddiad, neu'r amser erbyn pryd, y mae'n rhaid cynnal refferendwm,

(b) o ran y camau gweithredu y caniateir eu cymryd, neu na chaniateir eu cymryd, neu y mae'n rhaid eu cymryd gan awdurdod cysgodol o flaen refferendwm neu mewn cysylltiad ag ef,

(c) o ran y camau gweithredu y caniateir eu cymryd, neu na chaniateir eu cymryd, neu y mae'n rhaid eu cymryd gan awdurdod cysgodol ar ôl refferendwm,

(d) i alluogi Gweinidogion Cymru neu mewn cysylltiad â'u galluogi, os bydd unrhyw fethiant gan yr awdurdod cysgodol i gymryd unrhyw gamau gweithredu a ganiateir neu sy'n ofynnol yn rhinwedd y gorchymyn, i gymryd y camau gweithredu hynny.

(3) Mae'r ddarpariaeth y caniateir ei gwneud yn rhinwedd is-adran (2) yn cynnwys darpariaeth sy'n cymhwyso neu'n atgynhyrchu (gydag addasiadau neu hebddynt) unrhyw ddarpariaethau yn adran 25, 27, 28, 29 neu 33 o Ddeddf Llywodraeth Leol 2000 neu Ran 4 o'r Mesur hwn.'.

Carl Sargeant **94**

I ychwanegu Adran newydd –

'( ) Pŵer i gyfarwyddo refferendwm sy'n cynnwys maer etholedig

(1) Caiff Gweinidogion Cymru drwy reoliadau wneud darpariaeth i'w galluogi neu mewn cysylltiad â'u galluogi, o dan unrhyw amgylchiadau a ragnodir yn y rheoliadau, i gyfarwyddo awdurdod cysgodol i gynnal refferendwm ynghylch a ddylai'r awdurdod lleol newydd weithredu gweithrediaeth maer a chabinet.

(2) Mae'r ddarpariaeth y caniateir ei gwneud drwy reoliadau o dan yr adran hon yn cynnwys darpariaeth (ond nid yw wedi ei chyfyngu i ddarpariaeth)—

(a) ynghylch y dyddiad, neu'r amser erbyn pryd, y mae'n rhaid cynnal refferendwm,

(b) o ran y camau gweithredu y caniateir eu cymryd, neu na chaniateir eu cymryd, neu y mae'n rhaid eu cymryd gan awdurdod cysgodol o flaen refferendwm neu mewn cysylltiad ag ef,

(c) o ran y camau gweithredu y caniateir eu cymryd, neu na chaniateir eu cymryd, neu y mae'n rhaid eu cymryd gan awdurdod cysgodol ar ôl refferendwm,

(d) i alluogi Gweinidogion Cymru neu mewn cysylltiad â'u galluogi, os bydd unrhyw fethiant gan yr awdurdod cysgodol i gymryd unrhyw gamau gweithredu a ganiateir neu sy'n ofynnol yn rhinwedd y rheoliadau, i gymryd y camau gweithredu hynny.

(3) Mae'r ddarpariaeth y caniateir ei gwneud yn rhinwedd is-adran (2) yn cynnwys darpariaeth sy'n cymhwyso neu'n atgynhyrchu (gydag addasiadau neu hebddynt) unrhyw ddarpariaethau yn adran 25, 27, 28, 29 neu 33 o Ddeddf Llywodraeth Leol 2000 neu Ran 4 o'r Mesur hwn.'.

Carl Sargeant **95**

I ychwanegu Adran newydd –

'( ) Darpariaeth atodol, gysylltiedig, ganlyniadol, drosiannol a darpariaeth arbed

(1) Mae'r ddarpariaeth y caniateir ei gwneud mewn gorchymyn cyfuno yn cynnwys darpariaeth atodol, cysylltiedig, trosiannol a darpariaeth arbed (ond nid yw wedi ei chyfyngu i'r cyfryw ddarpariaeth).

(2) Caiff Gweinidogion Cymru drwy reoliadau sy'n gymwys yn gyffredinol wneud darpariaeth atodol, gysylltiedig, ganlyniadol, drosiannol a darpariaeth arbed—

(a) at ddibenion gorchmynion cyfuno neu o ganlyniad iddynt; neu

(b) i roi effaith lawn i orchmynion cyfuno.

(3) Mae rheoliadau o dan is-adran (2) yn cael effaith yn ddarostyngedig i unrhyw ddarpariaeth a gynhwysir mewn gorchymyn cyfuno.

(4) Yn yr adran hon, mae cyfeiriadau at ddarpariaeth atodol, gysylltiedig, ganlyniadol, drosiannol neu ddarpariaeth arbed yn cynnwys darpariaeth (ond nid ydynt wedi eu cyfyngu i ddarpariaeth)—

(a) ar gyfer trosglwyddo eiddo, hawliau neu rwymedigaethau o awdurdod lleol presennol i awdurdod lleol newydd;

(b) i achos cyfreithiol a gychwynnir gan neu yn erbyn awdurdod lleol presennol gael ei barhau gan neu yn erbyn awdurdod lleol newydd;

(c) ar gyfer trosglwyddo staff, iawndal am golli swydd, neu mewn perthynas â phensiynau a materion staffio eraill;

(d) ar gyfer trin awdurdod lleol newydd at rai dibenion neu at bob diben fel yr un person mewn cyfraith ag awdurdod lleol presennol;

(e) mewn perthynas â rheolaeth neu gadwraeth ar eiddo (tirol neu bersonol) a drosglwyddir;

(f) sy'n cyfateb i unrhyw ddarpariaeth y gellid ei chynnwys mewn cytundeb o dan adran 68 o Ddeddf Llywodraeth Leol 1972 (cytundebau trosiannol o ran eiddo a chyllid).

(5) Mae'r hawliau a'r rhwymedigaethau y caniateir eu trosglwyddo'n unol â gorchymyn o dan yr adran hon yn cynnwys hawliau a rhwymedigaethau mewn perthynas â chontract cyflogi.

(6) Mae Rheoliadau Trosglwyddo Ymgymeriadau (Diogelu Cyflogaeth) 2006 (OS 2006/246) yn gymwys i drosglwyddiad a wneir yn unol â gorchymyn o dan yr adran hon (p'un a yw'r trosglwyddiad yn drosglwyddiad perthnasol at ddibenion y rheoliadau hynny ai peidio).

(7) Yn is-adran (1), mae'r cyfeiriad at ddarpariaeth atodol, gysylltiedig, ganlyniadol, drosiannol neu ddarpariaeth arbed hefyd yn cynnwys darpariaeth (ond nid yw wedi ei chyfyngu i ddarpariaeth) mewn cysylltiad â'r canlynol—

(a) sefydlu cyrff cyhoeddus neu aelodaeth o'r cyfryw gyrff mewn unrhyw ardal yr effeithir arni gan y gorchymyn cyfuno ac ethol neu benodi aelodau'r cyfryw gyrff;

(b) diddymu neu sefydlu, neu gyfyngu neu estyn, awdurdodaeth unrhyw gorff cyhoeddus mewn neu dros unrhyw ran o unrhyw ardal yr effeithir arni gan y gorchymyn cyfuno.

(8) Caiff darpariaeth atodol, gysylltiedig, ganlyniadol, drosiannol neu ddarpariaeth arbed mewn gorchymyn cyfuno neu mewn rheoliadau o dan yr adran hon fod ar ffurf darpariaeth—

(a) sy'n addasu, sy'n eithrio neu sy'n cymhwyso (gydag addasiadau neu hebddynt) unrhyw ddeddfiad; neu

(b) sy'n diddymu neu'n dirymu unrhyw ddeddfiad (gydag arbedion neu hebddynt).'.

Carl Sargeant **96**

I ychwanegu Adran newydd –

'( ) Adolygu trefniadau etholiadol

(1) Caiff Gweinidogion Cymru gyfarwyddo Comisiwn Cymru i ymgymryd ag adolygiad o'r trefniadau etholiadol ar gyfer ardal llywodraeth leol newydd.

(2) Caiff Comisiwn Cymru o ganlyniad i'r cyfryw adolygiad gyflwyno argymhellion i Weinidogion Cymru ar gyfer gwneud newidiadau i'r trefniadau etholiadol sy'n ymddangos i Gomisiwn Cymru yn ddymunol er mwyn cael llywodraeth leol effeithiol a chyfleus.

(3) Wrth bwyso a mesur y trefniadau etholiadol ar gyfer ardal llywodraeth leol newydd at ddibenion yr adran hon, rhaid i Gomisiwn Cymru i'r graddau y mae'n rhesymol ymarferol gydymffurfio â'r rheolau a nodir yn Atodlen 11 i Ddeddf Llywodraeth Leol 1972.

(4) At ddibenion yr adran hon mae i "trefniadau etholiadol" yr un ystyr ag "electoral arrangements" yn adran 78 o Ddeddf Llywodraeth Leol 1972.'.

Carl Sargeant **97**

I ychwanegu Adran newydd –

'( ) Diwygiadau i Ddeddf Llywodraeth Leol 1972

(1) Diwygir Deddf Llywodraeth Leol 1972 fel a ganlyn.

(2) Yn adran 58 (adroddiadau'r Comisiwn a'u gweithredu), yn is-adran (1)(b) ar ôl "section 57 above" mewnosoder "or in accordance with a direction under section [ ] of the Local Government (Wales) Measure 2011".

(3) Yn adran 59 (cyfarwyddiadau ynghylch adolygiadau), yn is-adran (1) ar ôl "57 above" mewnosoder "or in accordance with a direction under section [ ] of the Local Government (Wales) Measure 2011".

(4) Yn adran 60 (y weithdrefn ar gyfer adolygiadau), yn is-adran (1) ar ôl "this Act" mewnosoder "or in accordance with a direction under section [ ] of the Local Government (Wales) Measure 2011".

(5) Yn adran 68 (cytundebau trosiannol o ran eiddo a chyllid), yn is-adran (1) ar ôl "this Act" mewnosoder "or by an order under section [ ] of the Local Government (Wales) Measure 2011".'.

Carl Sargeant **98**

I ychwanegu Adran newydd –

'( ) Y weithdrefn sy'n gymwys i orchymyn cyfuno

(1) Rhaid i Weinidogion Cymru gydymffurfio â'r adran hon cyn gwneud gorchymyn cyfuno i roi effaith i gynigion i gyfansoddi ardal llywodraeth leol newydd drwy gyfuno dwy neu dair o ardaloedd llywodraeth leol presennol ("y cynigion").

(2) Rhaid i Weinidogion Cymru ymgynghori ag unrhyw bersonau y mae'n ymddangos i'r Gweinidogion eu bod yn cynrychioli personau neu fuddiannau yr effeithir arnynt gan y cynigion.

(3) Os bydd Gweinidogion Cymru, yn dilyn yr ymgynghori hwnnw, yn dymuno bwrw ymlaen â'r cynigion, rhaid iddynt osod gerbron Cynulliad Cenedlaethol Cymru ddogfen sydd—

(a) yn esbonio'r cynigion,

i. yn eu nodi ar ffurf gorchymyn drafft, ac

ii. yn rhoi manylion yr ymgynghori o dan is-adran (2).

(4) Ni chaniateir i unrhyw ddrafft o orchymyn cyfuno i roi effaith i'r cynigion ("y gorchymyn drafft terfynol") gael ei osod gerbron y Cynulliad yn unol ag adran 165(2)(b) tan ar ôl i'r cyfnod o 60 niwrnod, sy'n dechrau ar y diwrnod y cafodd y ddogfen ynglŷn â'r cynigion ei gosod gerbron Cynulliad Cenedlaethol Cymru o dan is-adran (3), ddirwyn i ben.

(5) Wrth gyfrifo'r cyfnod a grybwyllwyd yn is-adran (4) rhaid peidio ag ystyried unrhyw amser pryd y bydd Cynulliad Cenedlaethol Cymru wedi'i ddiddymu neu wedi cymryd saib am fwy na phedwar diwrnod.

(6) Wrth baratoi'r gorchymyn drafft terfynol, rhaid i Weinidogion Cymru ystyried unrhyw sylwadau a gyflwynwyd yn ystod y cyfnod a grybwyllwyd yn is-adran (4).

(7) Os caiff y gorchymyn drafft terfynol ei osod gerbron Cynulliad Cenedlaethol Cymru yn unol ag adran 165(2)(b), rhaid bod gyda'r gorchymyn ddatganiad gan Weinidogion Cymru sy'n rhoi manylion—

(b) unrhyw sylwadau a ystyriwyd yn unol ag is-adran (6), a

iii. unrhyw newidiadau a wnaed i'r cynigion a oedd wedi eu cynnwys yn y ddogfen a osodwyd gerbron Cynulliad Cenedlaethol Cymru o dan is-adran (3) ac y mae effaith wedi ei rhoi iddynt yn y gorchymyn drafft terfynol.

(8) Nid oes dim yn yr adran hon sy'n gymwys i orchymyn o dan adran ( ) sydd wedi ei wneud yn unswydd at y diben o ddiwygio gorchymyn cynharach o dan yr adran honno.'.

Carl Sargeant **99**

I ychwanegu Adran newydd –

'( ) Cywiro gorchmynion

(1) Pan fo—

(a) gwall mewn gorchymyn cyfuno, a

(b) ni ellir ei gywiro drwy orchymyn dilynol a wneir o dan adran ( ), caiff Gweinidogion Cymru, drwy orchymyn, gywiro'r gwall.

(2) At ddibenion yr adran hon, mae "gwall" mewn gorchymyn yn cynnwys darpariaeth sydd wedi ei chynnwys yn y gorchymyn neu wedi ei hepgor ohono drwy ddibynnu ar wybodaeth anghywir neu anghyflawn a ddarparwyd gan gyngor cymuned neu unrhyw gorff cyhoeddus arall.'.

Carl Sargeant **100**

I ychwanegu Adran newydd –

'( ) Dehongli

Yn y Rhan hon—

mae "aelod o awdurdod lleol" ("member of a local authority") yn cynnwys maer etholedig o fewn ystyr adran 39(1) o Ddeddf Llywodraeth Leol 2000) neu aelod gweithredol etholedig (o fewn ystyr adran 39(4) o'r Ddeddf honno) o'r awdurdod;

ystyr "ardal etholiadol" ("electoral area") yw unrhyw ardal yr etholir cynghorwyr drosti i awdurdod lleol;

ystyr "ardal llywodraeth leol" ("local government area") yw ardal y mae awdurdod lleol wedi ei sefydlu ar ei chyfer;

ystyr "ardal llywodraeth leol bresennol" ("existing local government area") yw ardal llywodraeth leol a ddiddymir gan orchymyn cyfuno;

ystyr "ardal llywodraeth leol newydd" ("new local government area") yw ardal llywodraeth leol a gyfansoddwyd drwy orchymyn cyfuno;

ystyr "awdurdod cysgodol" ("shadow authority") yw awdurdod sydd wedi ei benodi neu wedi ei ethol i gyflawni swyddogaethau a ragnodwyd drwy orchymyn cyfuno ac a ddaw'n awdurdod lleol newydd ar ddiwedd y cyfnod cysgodol;

ystyr "awdurdod lleol" ("local authority") yw cyngor sir neu gyngor bwrdeistref sirol yng Nghymru;

ystyr "awdurdod lleol newydd" ("new local authority") yw awdurdod lleol a sefydlwyd drwy orchymyn cyfuno;

ystyr "awdurdod lleol presennol" ("existing local authority") yw'r awdurdod lleol ar gyfer ardal llywodraeth leol bresennol;

ystyr "Comisiwn Cymru" ("Welsh Commission") yw Comisiwn Ffiniau Llywodraeth Leol i Gymru a sefydlwyd gan adran 53 o Ddeddf Llywodraeth Leol 1972;

mae "corff cyhoeddus" ("public body") yn cynnwys—

(a) awdurdod lleol;

(b) cyd-fwrdd, neu gyd-bwyllgor, y mae awdurdod lleol wedi ei gynrychioli arno;

ystyr "cyfnod cysgodol" ("shadow period") yw cyfnod cyn y bydd aelodau o'r awdurdod lleol newydd yn cychwyn ar eu swydd;

ystyr "gorchymyn cyfuno" ("amalgamation order") yw gorchymyn o dan adran ( );

mae "staff" ("staff") yn cynnwys swyddogion a chyflogeion.'.

Carl Sargeant **101**

Adran 165, tudalen 93, llinell 10, gadewch allan 'neu Rhan 2' a rhowch yn ei le ', Rhan 2, Adran 143, ( ) [*Adran newydd i'w hychwanegu gan welliant 91*]neu ( ) [*Adran newydd i'w hychwanegu gan welliant 94*]'.

Carl Sargeant **102**

Adran 165, tudalen 93, llinell 11, gadewch allan 'neu 161' a rhowch yn ei le '161 neu ( ) [*Adran newydd i'w hychwanegu gan welliant 99*]'

Carl Sargeant **103**

Adran 165, tudalen 93, ar ôl llinell 11, ychwanegwch—

‘( ) gorchymyn yn diwygio gorchymyn o dan Adran ( ) [*Adran newydd i'w hychwanegu gan welliant 91*];’.

Atodiad B – Papur gan Ganolfan Llywodraethiant Cymru

Y Mesur Arfaethedig ynghylch Llywodraeth Leol, Gwelliannau a gyflwynwyd gan Lywodraeth y Cynulliad ar 27ain Ionawr

Marie Navarro, Manon George, David Lambert, Legal Members of the Wales Governance Centre, Cardiff University.

Introduction.

The Assembly's Constitutional Affairs Committee has requested our comments on the amendments tabled by the Assembly Government on 27th January to the draft Local Government Measure which is currently being considered by an Assembly Legislation Committee.

The Committee is particularly interested in the following:

1. The proposal to exercise these powers by Order.

The Cabinet Office has published advice on the drafting of Government Bills[1] which we referred to in our supplementary evidence on the Drafting of Assembly Measures requested by the Assembly's Constitutional Affairs Committee in December 2010.

It suggests that some of the factors to consider in deciding whether powers are to be included in delegated legislation include:

- matters may need to be adjusted more often than it would be sensible for Parliament to legislate for by primary legislation,
- there may be some rules which are better legislated for after there has been experience of administering the new Act,
- there may be an uncontroversial precedent for having delegated legislation in the particular area,
- there may be transitional matters which are appropriate to be dealt with by delegated legislation and
- there may be technical matters which are appropriate to be dealt with by such legislation.

[1] http://umbr4.cabinetoffice.gov.uk/making-legislation-guide/drafting_the_bill.aspx, paragraph 9

They also suggest that matters which are controversial should best be set out on the face of the legislation so that Parliament can consider them once as a matter of principle rather than having to return to them each time when individual delegated legislation has to be considered.

We consider that the order making powers contained in the amendments tabled to the Proposed Local Government Measure should therefore be included on the face of the Measure for the reasons given by the Cabinet Office.

Furthermore the wide ranging order making powers given to Welsh Ministers in the proposed amendments are similar in their extent to the order making powers which Central Government Ministers are seeking with regard to the future of some 150 Quangos in the Public Bodies Bill currently before Parliament (though in the case of the Bill the powers were on the face of the Bill when introduced into Parliament). There has been considerable criticism of the fact that the powers sought in the Bill would be exercised by Order. In terms which we consider apply to the order making powers in the draft Measure, the House of Lords Committee on the Constitution (report published November 2010) considered that:

> (a) many of the public bodies in the Bill were created by statute. The Bill vastly extends Ministers' powers to amend primary legislation by Order. The Select Committee considers that such "Henry VIII powers" are pushing at the boundaries of the constitutional principle that only Parliament may amend or repeal primary legislation,
>
> (b) departures from this constitutional principle should be contemplated only where a full and clear explanation and justification is provided. Ministers have not made out a convincing case as to why statutory bodies affected by the Bill should be abolished or merged only by Ministerial Order, rather than by ordinary legislative amendment and debate in Parliament, and
>
> (c) the order making powers in the Bill are not required to be exercised, unlike the safeguards contained, for example, in section 3(2) of the Legislative and the Regulatory Reform Act 2006, by reference to:
>
> i. ensuring that the effect of the order is proportionate to any clearly stated policy objective,
>
> ii. the prevention against removing any necessary statutory protection, and
>
> iii. the striking of a fair balance between the public interest and the interests of any person or body adversely affected by it.

Like many of the 150 bodies in the Public Bodies Bill, the current Welsh local authorities were also created by statute, the Local Government (Wales) Act 1994. Like the Bill the amendments to the draft Measure considerably extend Ministers

powers to amend primary legislation by order - subsection (8) of the clause entitled "Supplementary, incidental, consequential […] provisions", reference 95, p.8 of the Notice of Amendments.

To our knowledge a full and clear explanation and justification has not been given as to why the abolition or merging of local authorities should be by Ministerial Order.

The order making powers contained in the amendments to the Proposed Measure appear to contain none of the above safeguards. The "effective local government" requirement in the draft Measure amendments is not considered to be a clearly stated policy objective for such purposes.

2. The Appropriateness of the Procedure to be used for making the Order

The order making powers reflect the super affirmative procedure for making subordinate legislation set out in the Assembly's Standing Order 25 as an Order Subject to Special Assembly Procedure. The House of Lords Committee on the Constitution in its report on the Public Services Bill considered that, if the Bill's order making procedure were made subject to Parliament's equivalent of the super affirmative procedure, this would reinforce the "fundamental constitutional requirement of detailed legislative scrutiny." However in our supplementary representations made last month to the Assembly's Constitutional Committee as part of its enquiry into the making of Measures, we referred to the comments of the House of Lords Committee on the Constitution. The Committee stated, in reference to the Digital Economy Bill, that no explanation had been given by the Government as to why primary legislation, if necessary fast track primary legislation, could not be used instead of relying on Ministerial powers to alter the statute book. The Assembly's Standing Orders provide a fast track legislation procedure should the need arise: Government Proposed Emergency Measures Standing Order 23.107.

With such comments in mind, we do not consider that the super affirmative procedure gives as much opportunity to the Assembly and its Committees to fully assess the implications of Ministers' proposals as do the extensive scrutiny procedures applied by GOWA 2006 and the Assembly's Standing Orders to the consideration of draft Measures.

3. Whether the Amendments provide enough detail about the circumstances in which an Order might be made.

The order making powers proposed to be introduced by these new amendments depend on the Welsh Ministers being satisfied that "it is necessary to achieve effective local government". This phrase is not defined in the tabled amendments. Does it mean effective by reference to the cost of running the local authorities, the quality of services produced, the standards of education of children or the number of staff involved, for example? The only matter to which the Ministers must first be satisfied before proposing an order that the powers listed in subsection (2) (Amendment 91 p.2, Clause "Power to make an amalgamation order") is that such powers are not *likely* to be effective. The matters in subsection (2) are defined by

reference to the provisions of sections 9 and 28-31 of the Local Government Measure 2010 which only make one reference to "effectiveness". This is in the context of a local authority improving strategic effectiveness through the strategic objectives set out in its current community strategy for the local authority's area.

The provisions therefore appear to seek Ministerial order making powers which are very wide and do no depend on any clearly defined criteria in that they refer to matters which could all be fulfilled but which would not stop the Ministers from concluding that they are not LIKELY to achieve effective government. The lack of clarity arises from the use of the words 'likely' and 'effective local government'.

4. Whether the Amendments provide Sufficient Clarity about Practical Arrangements that might apply to any Amalgamation.

In the absence of detailed provisions as to the actual operation of the legislation on the face of the Public Bodies Bill, the House of Commons Public Administration Select Committee noted the equal absence of the publication by the Government of clear administrative guidance as to how the transition would be achieved between abolishing public bodies and merging them with other bodies.

While there are consultation procedures and the laying of the draft Order before the Assembly provided in the draft amendments, there are no detailed provisions as to the matters which the Assembly Government would take into account when exercising the wide enabling powers. Again the only criteria is that of 'effective local government' which is not defined or explained anywhere on the face of the Proposed Measure. As far as is known, there is no guidance which has been published in association with the tabling of the amendments to the current Measure. How can the Assembly's Legislation Committee and the Plenary Assembly properly consider the proposals in the context of how they would operate without such detailed explanations either in the amendments or in parallel published administrative guidance?

In our supplementary representations to the Assembly's Constitutional Committee we endorsed the emphasis of Mr. Daniel Greenberg in his evidence to the Committee on the need for the Government to always give an explanation of the occasions when it might be necessary to use delegated legislative powers granted by primary legislation. However first of all Mr Greenberg emphasised the need for new primary legislation to be justified. If there were administrative arrangements in existence which could achieve the policy objectives then new powers should not be sought. So far the Assembly Government appears to have failed to explain *why* the provisions in sections 9 and 28-31 of the Local Government (Wales) Measure 2010 could not achieve the same objectives as the proposed amendments.

An explanation of the occasions when delegated legislative powers might be used should always be given. Where there is a need for primary legislation even though at the time of the draft primary legislation being considered by the legislature, it was not possible to foresee whether or in what circumstances the power might be used.

We noted that the Cabinet Office recommends the giving of such information and in our supplementary memorandum we illustrated this by setting out examples from the Explanatory memorandum accompanying the Welfare Reform Bill of 2008. We also

noted the comments of the House of Lords Committee on the Constitution which was strongly of the view that it is not acceptable for the legislature to be told that as the Government has no current plans to use the delegated legislative powers it was seeking, that it was unable or unwilling, as the legislation was proceeding through Parliament to assess the extent of such powers.

We are not aware of any such explanation having been issued by the Assembly Government in the case of the current amendments.

5. <u>The relatively late Stage at which the Government is introducing, what appear to be, quite substantial and substantive amendments.</u>

In this respect the current advice issued by the Cabinet Office on the presentation of Government Bills to Parliament is helpful. It is entitled "Handling of Amendments in the Commons and the Lords"[2].

It makes the following points:

(1) The Government's Future Legislation Committee which clears Bills for presentation to Parliament has to be satisfied that the Bill is fully ready to be introduced. If the Committee is not so satisfied and considers that "there is still policy development which may result in Government amendments after the Bill's introduction, the Committee can and does refuse clearance". This raises the question as to whether there is a similar system operating in the Assembly Government and, if so what happened in this case?

(2) Once a Bill has been introduced to Parliament, proposed amendments to the Bill must be classified by the Government Department concerned into one of 4 types:

(a) Minor and Technical- those which do not impact on the substance of the Bill and will therefore not take up time in debate.

(b) Concessionary- those which ease the handling of the Bill because they have been suggested by Select Committees or by Members .

(c) Essential- to correct unforeseen circumstances that have arisen since the introduction of the Bill which have lead to the pressing need for the amendment, e.g. correcting a major error in the Bill which would cause major problems in the operation of the legislation if the Bill went through unamended.

(d) Desirable- any new area of policy, even where the scope of the Bill's scope is not widened.

The Cabinet Office states that (a)-(c) amendments would usually be permitted to be tabled. Amendments within (d) would not unless it can be clearly shown that there are

[2] see footnote 1

exceptional circumstances. Otherwise " no purely desirable amendments will be cleared by the Cabinet Office at any stage of the Bill's passage through parliament. Desirable amendments must wait for a separate legislative opportunity".

In commenting on amendments which apparently came within the "essential" (c) category in the current Bill before the House to amend the Parliamentary voting system, the House of Lords Committee on the Constitution adversely commented that the effect of such amendments is that because they raised a number of constitutional concerns, it had been impossible to adequately explore the reasons and effect of the amendments "due to lack of time made available for the scrutiny of this Bill."

In relation to the amendments proposed to the current Local Government Measure, questions arise as to:

(1) Does the Assembly Government operate a classification system similar to the convention operated by the Cabinet Office? If not, why? If so under what classification were the amendments placed? Were they considered to be urgent and, if so, what are the reasons for this?

(2) How does the Government propose with these amendments to overcome the criticism made by the Lords' Constitution Committee that major amendments to legislation cannot be properly scrutinised? Will the Government subject the amendments to the same consultation procedures to which a draft Measure is subject before it is introduced to the Assembly - for example consultation and debate in a pre-legislative committee? If not, and in the absence of any apparent pressing need for the amendments, will the Government follow the conventions of the Cabinet Office and withdraw them and place them in a later Measure?

Marie Navarro, Manon George, David Lambert.

Atodiad C – Dyfyniad o Gofnod y Trafodion: Y Pwyllgor Materion Cyfansoddiadol - 3 Chwefror 2011

9.43 a.m.

Ystyried y Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru)— Canolfan Llywodraethiant Cymru, Ysgol y Gyfraith, Caerdydd
Consideration of the Proposed Local Government (Wales) Measure— Wales Governance Centre, Cardiff Law School

[52] **Janet Ryder:** Steve has alluded already to the fact that our agenda and the timings of this morning's meeting have changed considerably this week. I want to thank the members of the committee for their help in arriving at this stage. We will now deal with the issue of the amendments that have been laid to the Proposed Local Government (Wales) Measure by the Government. This is a long scenario. I will read through the chronology that I have in front of me. On 6 July 2010, the proposed Measure was referred to Legislation Committee No. 3 by the Business Committee. On 12 July 2010, the Minister for Social Justice and Local Government introduced the proposed Measure and explanatory memorandum, which states:

[53] 'The proposed Local Government Measure will make changes intended to strengthen the structures and working of local government in Wales at all levels and to ensure that local councils reach out to and engage with all sectors of the communities they serve.'

[54] On 13 July, the Minister made a legislative statement in Plenary and, between July and October, Legislation Committee No. 3's consultation period on the proposed Measure was held. On 23 September, the Minister gave oral evidence to Legislation Committee No. 3. On 13 October, this committee took evidence from the Minister. On 15 December, our committee laid its report before the Assembly. On 27 January, last week, we discussed in private the amendments proposed by the Welsh Government, which would allow the Government to amalgamate local authorities. It was at that point that we raised concerns about the extent of those amendments, given that we had had no notice or consultation. We felt that they were introducing major policy changes that had not been subject to any previous consideration in the Assembly or by Assembly committees.

[55] In light of that discussion last week, I wrote to the Minister inviting him to attend today's meeting. I am sure that committee members will appreciate that this is on a very tight timescale now. Legislation Committee No. 3 is now looking at this proposed Measure at stage 2 and is dealing with these amendments. We invited the Minister in today to give evidence, but, unfortunately, he has not been able to attend. You will have received, I hope, the Minister's response. It is a very short letter, explaining that he has previous commitments, and cannot attend today. However, he says

[56] 'I would however be able to attend the Constitutional Affairs Committee to discuss these matters on 10 February'.

[57] That is next Thursday, and he suggests a time slot between 9 a.m. and 9.45 a.m., so that is 45 minutes for the consideration of what could be some fundamental changes to this proposed Measure. My initial feeling is that, perhaps, after today's session, we may wish to extend that time slightly. As we cannot, it seems, extend it beyond 9.45 a.m., we may have the option of extending it before 9 a.m., but I would suggest to committee that we take

today's evidence and then return to this matter afterwards.

[58] I am thankful to the witnesses for coming in at short notice. I requested that the Wales Governance Centre look at the amendments and prepare a paper for us. It is unusual for us to go back and look at these amendments, but they are a significant move away from the original intent of the proposed Measure. The Wales Governance Centre has prepared a paper for us and it has been circulated to members of the committee, who have been able to look at it. We asked David Lambert and Marie Navarro to come in at very short notice, and they have agreed. If Members are content, I will now invite them in, and we can take evidence on their paper.

[59] I will give our witnesses some time to settle in, but while they are doing so, I thank them very much indeed for submitting a paper at short notice, and for making themselves available to come in this morning. I am, as Chair of this committee, very grateful for that. These amendments have raised a number of points of discussion. It is not usual practice for this committee to return to a piece of legislation once we have signed it off, but we felt, after last week's discussion, that this may prove a significant development, and there is no other opportunity to take evidence on these amendments. I am grateful to you both for coming in—you have been to committee on a number of occasions now. Please introduce yourselves for the record, and if you have any introductory remarks, feel free to make them at this point.

9.50 a.m.

[60] **Ms Navarro:** Bore da. My name is Marie Navarro and I have been working with David Lambert on Wales Legislation Online in Cardiff Law School for the past 12 years.

[61] **Mr Lambert:** I am David Lambert, and I have been working with Marie for the past 12 years on Wales Legislation Online. We are both members of the Wales Governance Centre, and I am also a lecturer and tutor in public law at Cardiff Law School.

[62] **Janet Ryder:** Thank you for that. One of the reasons why we came to you is because you have, for many years now, observed how legislation has been developed in the Assembly. We are looking forward to the evidence that you are going to give us today. The paper has certainly raised a considerable number of questions, so if it is okay with you, we will go straight into those questions.

[63] I will start on the exercise of powers that the amendments refer to. Your paper refers to the Cabinet's Office guidance that states that

[64] 'matters which are controversial should best be set out on the face of the legislation so that Parliament can consider them once as a matter of principle rather than having to return to them each time when individual delegated legislation has to be considered'.

[65] You further state in your paper that you consider that

[66] 'the order making powers contained in the amendments tabled to the Proposed Local Government Measure should therefore be included on the face of the Measure for the reasons given by the Cabinet Office'.

[67] You also outline the reasons why the Cabinet Office at Westminster would put issues on the face of a Bill. Can you explain why these amendments should be placed on the face of the proposed Measure, on the basis of that Cabinet Office guidance?

[68] **Mr Lambert.** We see a parallel between these amendments and the provisions of the Public Bodies Bill, which is going through Parliament and which will abolish something like

160 bodies. Most of these bodies are established by Acts of Parliament, and they will be abolished by Order. The House of Lords Constitution Committee's criticism is that if bodies are created by statute, they should be abolished by statute. In other words, you should take each individual body on its own, and decide whether, as a matter of a new Act of Parliament, that body is to be abolished or not, based on the facts relating to that body.

[69] It seems to us that it is the same situation with local authorities in Wales, which were established by an Act of Parliament, namely the Local Government (Wales) Act 1994. If there is to be any merging or abolition of any of those local authorities, then they, too, should be the subject of separate Measures, because they were established by an Act of Parliament. You should not therefore have an Order that can merge or abolish 22 authorities and end up with seven. In other words, if something is established by statute, you should abolish or merge by statute; you should not do it by Order. That is the criticism of the House of Lords Constitution Committee.

[70] **Janet Ryder:** We are a different body to Westminster. The Assembly has always set out to work in a way that is right for Wales. However, would you expect a Government to be operating along similar guidance lines as those issued by the Cabinet Office when considering what amendments to bring forward?

[71] **Mr Lambert:** We would, because these comments do not come from the Cabinet Office but from the Constitution Committee of the House of Lords, which has a tremendous standing. To us, it is looking at it from a fundamental constitutional point of view, in that, if something is established by primary legislation, then it should be merged or abolished by primary legislation, not by Order, so that your Parliament—the Assembly—just like the UK Parliament, has the opportunity of carefully considering the proposals in relation to a particular body on the facts of that particular body at the time. For us, you can only consider that by the usual process of looking at a Measure or, in Parliament, an Act, not by Order.

[72] **Janet Ryder:** One defence that the Government seems to be giving for tabling the amendments is that it is not its intention to reshape the whole of local government, as the power would be used on an individual basis in which up to three councils could be merged at one time. You said that that could give it the ability to reduce the number of local authorities to seven. Technically, it would, but the defence that we may hear from the Government is that it would be used on a case-by-case basis. In that case, would the arguments that you have put forward still stand?

[73] **Mr Lambert:** Yes, I think that they would, because that is the argument in relation to the Public Bodies Bill. The Government says, 'We don't intend to abolish all these bodies; we'll pick and choose'. The Constitution Committee's response is still, 'All right, you pick and choose and make your proposals individually by means of primary legislation'. If you have no particular plans, you will do it bit by bit, and you will have the opportunity to do it in that way by primary legislation. You do not need an Order in any case, because there is no emergency.

[74] **Alun Davies:** You seem to be saying that your objections to the amendments are on a point of principle in relation to where the executive powers of a Minister and where the powers of the legislature should rest. So, you would object to the powers being used by a Minister, whichever way they were introduced.

[75] **Mr Lambert:** By Order.

[76] **Alun Davies:** So, for you, the amendments are an issue, but not the defining one.

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

[78] **Alun Davies:** On the range of powers that are available to a Minister, the Minister made it clear that the power would be used only in extreme circumstances, and that it is a power that he seeks to hold as a backstop power in order to encourage local authorities to collaborate and improve. Where a local authority has not improved, the backstop power is there to force improvement. I understand that a similar power exists in England, in that the relevant UK Minister can make amalgamation Orders. Would you object to the use of that in England as well?

[79] **Mr Lambert:** Yes, I would, on the basis of the criticism by the House of Lords Constitution Committee. It said that, if there is an emergency, we have a fast-track system of looking at new primary legislation. The Assembly also has a fast-track system.

[80] **Alun Davies:** Therefore, you simply do not think that the power should exist at ministerial level.

[81] **Mr Lambert:** Indeed, because of the advice of the Constitution Committee.

[82] **Alun Davies:** Even if it is a backstop power that would be used once in a lifetime.

[83] **Mr Lambert:** Yes.

[84] **Rhodri Morgan:** If I were the Minister, I think that I would be saying to you, 'Look, the Public Bodies Bill has a clear stated intent: it is the bonfire of the quangos Bill in posh legal language'. The Minister would say that the proposed Measure, however, is not a bonfire of local government Measure at all. As Alun put it, it is a wish to have an adjunct power to abolish a group of local authorities by merger. However, that is not the intent of the proposed Measure; the power is an adjunct to the other powers in it to compel or oblige local authorities to improve or to seek continuous improvement in their performance. It will be adjoined to those powers, because, if that is the only way in which you can secure continuous improvement, you need it there as a backstop. That is quite different from the intent of the bonfire of the quangos Bill. How would you respond to that criticism? The whole basis of your argument is that they are not chalk and cheese, but the same circumstances as those addressed in the Bill in the other place.

[85] **Mr Lambert:** I would say that the Government has not made out a case for seeking this Order-making power, because it has no proposals in mind at the moment. It has not laid down any criteria, and we do not know the extent of the powers. Why, therefore, if there is no emergency or rush, does it not come to the Assembly with a proposal each time?

10.00 a.m.

[86] **Rhodri Morgan:** If I may just interrupt, you are now changing your ground, are you not? Your previous grounds were that this is pretty well identical to the public reform, bonfire of the quangos Bill. Therefore, the criticism to which that has been subjected by the House of Lords Constitution Committee also applies to this one. I put it to you that they are not, or the Minister would claim that the circumstances are entirely different, because the intent of the Bill is to abolish quangos, and the intent of this proposed Measure is not to abolish local government but to have a backstop power if nothing else can be done to achieve another purpose, which is not abolition but continuous improvement. You are changing your ground from the fact of the similarity between the two sets of circumstances before Westminster and us to something completely different now, are you not?

[87] **Mr Lambert:** No, it is still this problem that if a body has been created by an Act of Parliament, you have to show, to me, extreme reasons for taking a power by Order to abolish

that body. That is the problem with the Public Bodies Bill. It seems to me that it is the same problem with local authorities, which were established by an Act of Parliament. Why, suddenly, are you not following the constitutional principle of amending that Act of Parliament individually at the time that you want to merge that particular body? That also seems to be the criticism of the Public Bodies Bill. Why, suddenly, are you saying that it is not for the Assembly to decide how the Local Government Act 1994 will be changed, but for Ministers, who will just put an Order before the Assembly? You will be cutting out the normal procedures that you would have if this was a formal proposal by a new Measure to amend the 1994 Act. This also tends to happen in central Government. It is this whole principle of asking, if something is set up by an Act, why Ministers want to change it by Order. Why can you not change the Act bit by bit, when the need arises?

[88] **Rhodri Morgan:** By an amendable motion?

[89] **Mr Lambert:** Yes, by an amending this with a new Measure.

[90] **Rhodri Morgan:** By a motion that is, in itself, amendable by a vote in the Assembly?

[91] **Mr Lambert:** No, by a new Measure amending the Local Government Act 1994.

[92] **Rhodri Morgan:** Yes, but the difference between an Order and a Measure is that a Measure is amendable by debate, whereas an Order is not.

[93] **Mr Lambert:** Indeed. You have a whole different procedure for Measures. It is subject to greater consideration.

[94] **Janet Ryder:** I now call on Alun to speak very quickly, because Kirsty then wants to speak.

[95] **Alun Davies:** The key reason why we have these objections is to enable debate and proper scrutiny to take place, so that a Government cannot simply act without any heed to people's fears and concerns. If this is a particular power—a narrow power, if you like; although I accept that the legislation is written more widely than I feel comfortable about—to be used in extremis on a single, case-by-case basis, one would assume that because it is an extreme power to abolish a local authority, a process will have been followed before that power is invoked. The amendment does contain the circumstances in which a power can be used. The burden of my question is that this is not a power that will be used in isolation; it would be the culmination of a process that could take a year, 18 months, or a considerable period of time. It is not so much an Order that would be rushed through this place in an afternoon, but a consequence of a failure of process. Therefore, throughout that process, people would have the opportunity to scrutinise and to discuss, with the Government, the way forward. This is a power that will be used as consequence of a failure of process. Therefore, there would be an opportunity, because there would be quite a long process involved.

[96] **Mr Lambert:** Before Marie replies, how do you know that? There is nothing very much on the face of the legislation. That is what worries us. There is a vague thing about consultation, but how do you know whether it will be used in extremis; and how do you know that there will be tremendous consultation taking place for two years?

[97] **Ms Navarro:** There are so many different issues around the amendment that we have many different grounds on which we think that there could be discussion. First, we could not see any justification from the Government as to why the amendment was necessary in the first place. There is reference to several sections of the proposed Measure and an Act of Parliament, which would have been used beforehand, so we do not know why these powers are not good enough. Why do you have an extra weapon on an extra two lines of Government

spend? So, we do not have a justification for why you need the amendment or the legislation in the first place, or for why that need was only perceived as necessary after the proposed Measure was drafted. David and I believe that there should be some conventions with regard to the work of the Assembly and Assembly Government. We think that if there were documents equivalent to these Cabinet Office papers, which we refer to all the time, it would help the smooth running of everything, including the amendments and the contents of legislation in the first place.

[98] I know that the Assembly is different from Westminster and that you will come up with your own criteria and conventions, but Westminster's guidance on drafting amendments is such that such an amendment would never have been accepted, because it would be seen as something more than minor and technical, concessionary or desirable amendments, so it would not have been accepted. I know that it is for the Presiding Officer here to decide.

[99] So, one ground is that we do not know exactly why the powers are sought or when they would be used. That is where I come back to these criteria that we have found. David has read the text of the amendments, as we have not seen any explanatory memorandum, and you could not introduce an amendment in Westminster that contains a delegated power without a supplemental explanatory memorandum.

[100] **Janet Ryder:** I will bring in Kirsty in a moment, but I have a couple of quick follow-up questions. If this power had been sought in the original proposed Measure, the scrutiny of that proposed Measure would have allowed those arguments to have been satisfied—all of that would have come through. As it is coming through at this stage, are you saying that none of these stages have been satisfied and that this is a major diversion in the intent of the proposed Measure, in your opinion?

[101] **Mr Lambert:** Yes.

[102] **Kirsty Williams:** Thank you for your comments and for your paper. As we have heard, it seems that the Government is saying—as articulated by Rhodri Morgan and Alun—that this is a fall-back position and would be used only in absolutely terrible circumstances when everything else failed, and therefore would be an emergency power—I believe that Alun referred to it as a backstop power. I can understand why a Minister would want to have an ultimate sanction and to be able to act in an emergency. Could you explain how a Minister could act in an emergency to dissolve or amalgamate councils without having to resort to the amendments that have been brought forward? Is there another way that a Minister could act in such an emergency?

[103] **Ms Navarro:** We do not know exactly all the contents of the legislation, which is—

[104] **Kirsty Williams:** Forget this legislation. Are there mechanisms already available for a Minister to have a fast-track process to achieve this? Is there something already in existence within the Assembly's procedures that would allow the Minister to do this?

[105] **Mr Lambert:** There is an emergency Measure procedure, under Standing Order No. 23.107.

[106] **Kirsty Williams:** So, if a Minister felt that there was an extreme situation that needed to be dealt with, there are existing processes available to a Minister to do that, are there?

[107] **Mr Lambert:** There are indeed, yes.

[108] **Kirsty Williams:** What is your opinion, Mr Lambert, as to what extent the amendments tabled by the Minister to the proposed Measure could create a constitutional

precedent in Wales, so that other Ministers or other Governments could use this example in months and years to come to justify similar actions?

10.10 a.m.

[109] **Mr Lambert:** In the absence of any established principles—I am sorry to mention the UK Parliament again, but it has those principles, many of which are laid down by the Cabinet Office and the House of Lords Constitution Committee—it would set a precedent, and it would be difficult to argue against it, because there are no other existing principles. This is a new principle and the beginning of a new convention; you can change conventions afterwards, but it is always difficult to do so once something like this has been established.

[110] **Kirsty Williams:** So, in your view, there are issues beyond what is before us at the moment; if it was to go forward in this way, it would establish a principle that could be followed in other cases.

[111] **Mr Lambert:** Yes, I think so, in the absence of any other established principles.

[112] **Kirsty Williams:** As you said in your paper, and as you have reiterated this morning, to your knowledge a full and clear explanation and justification has not been given as to why abolishing or merging local authorities should be done by ministerial Order. Can you think of any reason why it would be justifiable to use a ministerial Order to abolish or merge local authorities?

[113] **Mr Lambert:** In the absence of any explanatory note, we cannot; we have not seen such a note. There may be very good reasons, such as the need for emergency provisions, but we have not seen them. Again, that goes against the established convention of the UK Parliament; at least the UK Parliament provides an explanatory note with the legislation.

[114] **Kirsty Williams:** Forgive me for not knowing the procedures in Westminster as well as I should, but if such amendments had been tabled there, would it have been a requirement that a further explanatory note should accompany them to give the back story?

[115] **Mr Lambert:** Yes. That is the advice of the Cabinet Office.

[116] **Ms Navarro:** It would go even go further than that; such amendments would not have been accepted. According to the Cabinet Office's documents, they are 'desirable amendments'—we have included the reference in the footnotes of our paper—and are defined as

[117] 'all new areas of policy, even if they do not widen the Bill's scope. Also any issues which are proposed to be added to a Bill which are not essential but merely a new policy idea where the Bill is being used as a vehicle'.

[118] **Mr Lambert:** Interestingly, the amendments would not have been accepted by the Government, as what Marie is reading is the Cabinet Office's advice.

[119] **Kirsty Williams:** As you will be aware, Mr Lambert, over the last 11 years, this institution has sometimes become a bit jumpy if told that it has to follow Westminster practice; in some ways, we have battled against that. Is there any reason why the practice in Westminster that you have described would not be considered best practice? I am trying to understand whether there is a good reason for doing it differently.

[120] **Mr Lambert:** We think that the best practice is not so much established by the Cabinet Office—the Government—but by a body such as the House of Lords Constitution

Committee; the latter represents Parliament, and is highly respected. It is interesting that the Cabinet Office seeks to reflect the advice of the House of Lords Constitution Committee. There is an equivalent Select Committee in the House of Commons, but it is the House of Lords Constitution Committee that is referenced; the Cabinet Office paper that we found refers constantly to the principles set out by the House of Lords Constitution Committee. The attitude of the Cabinet Office is, 'Why should we fight against those principles? They are very good principles.' They are coming from the Parliament, not the Executive.

[121] **Janet Ryder:** Given the nature of the questions that we have been asking, I am going to bring in William, because his questions are also on the process.

[122] **William Graham:** You do not consider that the superaffirmative procedure gives as much opportunity for the Assembly and its committees to assess fully the implications of the Minister's proposals as the extensive scrutiny procedures outlined in the Government of Wales Act 2006 and the Assembly's Standing Orders for the consideration of proposed Measures. Why does the superaffirmative procedure not offer much of an opportunity to assess the implications of the Minister's proposals in this instance?

[123] **Mr Lambert:** It seems to us that the superaffirmative procedure is under the control of the Government, whereas proposed Measures and their consideration are under the control of the Parliament. So here is a procedure that states that something happens within 60 days, the Government consults and so on. To us, that seems very different from following the Standing Orders and the principles that have already been established by the Assembly in relation to looking at proposed Measures. So, because this is subordinate legislation, we feel that it is a bit out of your control. The Government is in the driving seat.

[124] **Ms Navarro:** There are extra stages in dealing with a proposed Measure; Plenary is given much more weight than would be the case with the affirmative resolution procedure. So, that is another argument. It always comes back to the point of why should that power be exercised by Order and not by Measure. So, we are circling around the same idea all the time. If you take it from different angles, you always reach the same conclusion. However, we appreciate that the Government gave the Order-making powers the highest type of control in the superaffirmative procedure.

[125] **Mr Lambert:** It is only the second time that it has been used. I think the Local Government (Wales) Measure 2009 has it, does it not?

[126] **Ms Navarro:** Yes, it is the second time since the Assembly started under Part 3.

[127] **William Graham:** You have touched on my next question, which is about fast-track legislation. You have probably answered why you think the Minister's proposals are better addressed through an emergency Measure. You have clarified that.

[128] **Janet Ryder:** Are you going to ask that question? I had a supplementary question.

[129] **William Graham:** Well, the question has been posed already and the answer has been given.

[130] **Janet Ryder:** I will ask a supplementary question, then. We have talked about the fast-track Measure and the emergency procedure. In his question to you earlier, Alun Davies put forward the idea that perhaps the Minister would require this amendment to go through as part of this proposed Measure as a backstop. Can you explain to me whether there is any difference between having it as a backstop in this proposed Measure or having and using the emergency powers? Would the ability to use those powers to bring forward an emergency Measure to merge two or three local government areas not act in a similar way as a threat,

which is what Alun was alluding to? The Government might need this threat to make local government authorities merge. What is the difference between the two, if there is any?

[131] **Mr Lambert:** The difference is that you are in control of emergency Measures, it seems to us. You can decide whether it is an emergency and presumably the Government has to give reasons why it considers an emergency Measure to be required. You can say 'yes' or 'no'. You are not so much in control of the superaffirmative procedure. Once it is there, then the Government says, 'Great, we are going to do this'. Then it follows the procedures and there you are thinking, 'Gosh, we only have 60 days'. Some of those days might be holidays or something such as that, and it is not in your control. It is the Executive doing it and not the Parliament.

[132] **Ms Navarro:** You would not be able to vote on the general principles, as you would for a proposed Measure, either.

[133] **Janet Ryder:** So over and above whatever argument the Government has for bringing forward these amendments within this proposed Measure to make local government work, there is a much deeper argument emerging as to where power should rest: with the Executive or with the legislative body.

[134] **Mr Lambert:** Absolutely. That is what comes out in all of these comments by the House of Lords Constitution Committee.

[135] **Ms Navarro:** We heard that this would only be used in an absolute emergency and so on. In the amendment, we read that this is necessary for effective local government. We have no idea what 'effective' means, and to me, the worst bit is the word 'likely' that is used. It says that it would be used when all of the provisions that already exist on the statute books are 'likely' to fail. So, not only is there a problem of who should have the power, but of when should it be used. If it were in a separate proposed Measure, then you would have a full debate on the general principles of the proposed Measure, the circumstances, and so on, which you might not have with subordinate legislation.

[136] **William Graham:** So what you are saying, to paraphrase again, is that there is another procedure, and the emergency procedure would be quite effective and would probably be able to, on the face of that particular piece of legislation, spell out exactly what has gone wrong and why a remedy is required.

[137] **Mr Lambert:** If the Government convinces you, yes.

[138] **William Graham:** It would be for the Government to satisfy Plenary or this committee that its emergency Measure was necessary and immediate, and to specify the reasons that the failure had occurred.

10.20 a.m.

[139] **Ms Navarro:** You also fulfil the constitutional principle that only a legislature can change something that has been created by statute; it helps to fulfil all the requirements. Only a Parliament can undo what a Parliament has done; a Minister cannot do that.

[140] **Alun Davies:** To what extent are we dancing on the head of a pin here? You are right, and I have got no disagreement in principle with what you are saying about the need for primary legislation, but in terms of the process of scrutiny and involvement, to what extent, in real terms, do you believe that there is a significant difference between a superaffirmative procedure and an emergency Measure, which, given the circumstances, would be pushed through reasonably quickly? A superaffirmative process provides for a great deal of

consultation and discussion on different aspects of any proposed Order—that is why we call for it. It might well be that that process could allow a greater range of people to participate in consultation than simply a rushed parliamentary process that we might seek in order to provide for that legislative parliamentary scrutiny. That could have the impact of tightening or reducing the amount of space and time for real debate about what the Government seeks to do.

[141] **Ms Navarro:** You could have a normal Measure procedure. If there really was an emergency and a rush, you would go to the extreme, and use the emergency procedure, but if there was not such an emergency, you would just use a normal Measure procedure, with all the normal stages. So, you can go back to that. If you wanted to involve even more people, you could have it published in draft and invite a consultation on the draft Measure before it was introduced here.

[142] **Mr Lambert:** This is a classic requirement that we discuss with our public law undergraduates in year one at the university. The Minister is very much in the driving seat. Under this superaffirmative procedure, it is the Minister who decides who is consulted. There is no mention of the Assembly. That worries me. There are many considerations about whether it would be reasonable or unreasonable to consult. It is a classic problem question for undergraduates.

[143] **Alun Davies:** In real terms, when that genie gets out of the bottle, there is no question that there are enough people, even around this table, who would make sure that it was raised in the Assembly. While I recognise and share your concern about consultation issues, in real terms it would be done here. This amendment lists the circumstances in which the power can be exercised. Without seeking to read out all the different processes that would need to be followed by Ministers before making this Order, it lists a number of processes that must be followed beforehand. So, in terms of what Marie was saying about going through a traditional Measure-making process, that would already have happened. You would not seek to go down that route anyway. In fact, you would be seeking a fast termination of this process, because it would have already failed, given the safeguards that have been put in to the amendment by the Government.

[144] **Mr Lambert:** Again, constitutionally, should it not be you, rather than the Government, in charge of the process? You are not in the driving seat under the superaffirmative procedure.

[145] **Janet Ryder:** Surely, that begs a further question: if it was the Government's intention, when it drafted its proposed Measure, to have the power, as a last stop, to merge councils, should that not have been written in at that time?

[146] **Rhodri Morgan:** Can we try to work out the nature of your objections, and how easily they might be corrected by changing the wording and tightening up slightly subjective expressions? You mentioned that you do not like the word 'likely', and that it is not suitable for use in legislation, and that 'effective local government' is not defined. We all share your unease about this late addition—which is always going to create suspicion about what is going on and whether this is subsidiary to the overall purpose of the proposed Local Government (Wales) Measure, as we have previously understood it. Do you think that other words could be used to tighten up expressions such as 'likely' and 'effective local government' that would dampen your fears that this could be used to achieve purposes that do not fall under the umbrella of the proposed Measure?

[147] **Mr Lambert:** We accept the procedure, but there are no criteria at all. I do not know what 'effective local government' is. We have proposed a number of things. I am not in any way a politician, but does 'effective' mean that the local authority is not bankrupt, or that it

produces good social services?

[148] **Rhodri Morgan:** We have all read the paper, but if you were writing this legislation, and the Minister had said that what he needed was a backstop power within the overall umbrella of the proposed Measure so that it is the least subjective and the most objective that it can be, are there words that you could find to satisfy everybody that this was a subsidiary backstop power, to show local government that the Minister was serious about continuous improvement, which is the overall purpose of the proposed Measure? Could you put this in the legislation or amend the legislation and explanatory memorandum so that that is clear? Are you saying that that is impossible, or are you saying that, had it been done with a bit more attention to detail in amending the explanatory memorandum, it could have achieved the purpose of having a backstop power without creating the possibility of the reorganisation of local government by the back door?

[149] **Mr Lambert:** Purely as a lawyer—I have never taken part in the drafting of Bills—I would say that it is very difficult to define the word 'effective'. You can have criteria—

[150] **Rhodri Morgan:** Are you saying that this is impossible or is it just poor, inappropriate choice of language to use 'likely' or 'effective', because they are too open to subjective interpretation, not by this Minister, but by a successor Minister? If so, can you replace them with different words, or are you saying that it is a fundamental flaw, and that this is such a constitutional abortion that you will have to recommend to the committee that we recommend that the Minister withdraw it?

[151] **Mr Lambert:** It is not for us to draft—

[152] **Rhodri Morgan:** No, but are you saying that it is a fundamental flaw?

[153] **Mr Lambert:** I think that it is. I think that you have to set out the criteria individually.

[154] **Rhodri Morgan:** Where would you do that? Would that be in a resubmitted, amended explanatory memorandum? Are you saying that it could be done if you had an amended explanatory memorandum that set out the criteria?

[155] **Mr Lambert:** I think that it would have to go in the amendment itself.

[156] **Rhodri Morgan:** It would have to go in both. So, you do not think that it is impossible.

[157] **Mr Lambert:** It is not impossible.

[158] **Rhodri Morgan:** It is not a fundamental flaw; it is poor drafting.

[159] **Mr Lambert:** It is always possible, I think, to set out criteria.

[160] **Rhodri Morgan:** I have one last point to make. I am not an expert on procedure, but I have observed Henry VIII powers in use—not the original Henry VIII, but the Neil Hamilton Henry VIII power in the Deregulation and Contracting Out Bill of 1994—and they are interesting. However, the key point is that an Order is not amendable, but a Measure or a piece of law is amendable. Picture a backstop power being used to merge Rhondda Cynon Taf and Merthyr Tydfil, Torfaen, Caerphilly and Blaenau Gwent, Conwy and Denbighshire, or Anglesey and Gwynedd. Are you suggesting that that should be amendable?

10.30 a.m.

[161] In other words, if a piece of legislation is brought to the Assembly with the aim of merging two or three local authorities in the Valleys or north Wales, are you saying that that itself is amendable? You could put your hand up to seek to have a vote on creating a situation where, instead of having Torfaen, Blaenau Gwent and Caerphilly, you would delete Torfaen and put in Newport instead, or you could take Torfaen out so that you would have only two local authorities instead of three. That means that you would have an amendable motion to merge. Are you saying that that is the case, or do you accept that, once you reach that stage, it has to be an unamendable motion—in other words, an Order—that is either rejected or accepted? The Order-making procedure is normally unamendable. Are you saying that this has a primary legislative character, whereby the Assembly itself can amend it?

[162] **Mr Lambert:** Yes, indeed. A Measure can make exactly the same provisions as an Act of Parliament. Therefore, your proposed Measure can amend the Local Government Act—

[163] **Rhodri Morgan:** Is that appropriate for consideration of a motion to merge local authorities? If we get to that stage, do you think that the Assembly should consider amendments to add or delete the number of local authorities being merged?

[164] **Mr Lambert:** Yes, I think so. You cannot possibly say that the 1994 Act is in concrete. The Assembly must be able to amend Acts, as it is doing now as part of its Measures. In our view, due to the individual circumstances of particular proposals to merge, they should come to the Assembly individually by means of a Measure.

[165] **Rhodri Morgan:** You are referring to a Measure that would itself be amendable, are you not?

[166] **Mr Lambert:** Yes, indeed.

[167] **Rhodri Morgan:** Therefore, it would be possible to add a local authority or take one out, as well as to vote the Measure down altogether.

[168] **Mr Lambert:** Certainly.

[169] **Janet Ryder:** I have a question on the back of that. In your reading of the original piece of legislation, did you see any intent to merge local government areas? Alternatively, in your interpretation of the proposed Measure, was the intention to improve the performance of local government areas? Is there a connection between the two?

[170] **Mr Lambert:** We thought the latter, which is why we thought that this amendment fell within the final category relating to the Cabinet office: it was desirable, and it suddenly appeared to the Government to be so. According to the Cabinet office, unless there are emergency reasons for moving an amendment, on the basis that it is desirable and urgent, the Government does not accept it. It does not put the amendment forward; it leaves it for further legislation.

[171] **Janet Ryder:** In your interpretation, therefore, is this a step too far, and something that should come as separate legislation?

[172] **Mr Lambert:** It seems to be a desirable amendment, but there is no reason why it has been brought forward at this stage on the basis of urgency.

[173] **Ms Navarro:** Again, the problem is that we do not have the normal documentation that goes with such an amendment so that we can understand why it was brought up in the

first place, and why now. We can try to guess and assume, but if we had the necessary documentation, it would make things much easier, and we could have a better debate on this.

[174] **Janet Ryder:** We cannot gainsay what the Minister will say next week, and the reasons that he will give us for this, but, in looking at the evidence that has been brought forward, the only reason that I have been able to find so far comes from a report by Legislation Committee No. 3. The report says:

[175] 'Given the drive towards collaboration across public services generally, we believe that the proposed Measure needs to be strengthened to provide a more effective tool to compel collaboration in circumstances beyond the current limited powers in the 2009 Measure. We recommend that the Minister seeks ways of addressing this issue and strengthening the proposed Measure to look at other circumstances where the Minister may want to compel local authorities to collaborate.'

[176] I appreciate that you may not have seen the report, but it uses the word 'collaborate'. For my benefit, could you draw on your legal background to give me a definition of what you would term as 'collaborate', what you would term as 'merge' and what the difference between them might be?

[177] **Mr Lambert:** Off the top of my head, I would say that 'collaborate' is a kind of administrative statement, whereas 'merge' is very much a legal provision. The two seem to be very different. It is like having a gun in a bag—if you do not collaborate administratively, we will merge you.

[178] **Rhodri Morgan:** That is exactly the Minister's intention.

[179] **Mr Lambert:** However, there are no criteria. The only thing that you have is these provisions that they will look at four sections of last year's local government Measure, and if they do not think that they are sensible or something similar, in this particular case, they will order them to merge. However, what will they take into account in deciding that those sections are not working?

[180] **Ms Navarro:** That local government is not efficient.

[181] **Janet Ryder:** We will return to this in a minute.

[182] **William Graham:** As a member of that legislation committee, it is worth commenting that what was in my mind and in the mind of others was the collaboration part of it. I am thinking of twenty-first century schools, of which collaboration is a vital part, the Beecham recommendations for collaboration and, to go back to 1994, when it was suggested that there would not be, for the sake of argument, 22 directors of education authorities, but that they would be merged into representative bodies from those area councils. That never came about. We were concerned that the Ministers should have the power to compel, which is the word that was used, collaboration. It was not my intention that that should be used for amalgamation.

[183] **Rhodri Morgan:** This is the critical thing. We have explored the question of what happens if recalcitrant local authorities show no interest in collaboration. The Minister thinks that he is then like a one-legged man in an arse-kicking contest, because he cannot compel the local authorities to do what he wants them to do, but he might be able to do so had he this power in reserve. That is the issue. It is not about an emergency procedure to be used when a local authority is at the point of collapse. It is a backstop power. Can you see the difference between the need for an emergency power, when you would have to rush legislation through because a local authority was on the point of collapse, and the need for something different

due to a resolute refusal to collaborate in an exercise of continuous improvement, when it would be inappropriate to use an emergency Measure if what you want is a backstop Measure to oblige collaboration due to recalcitrance?

[184] **Janet Ryder:** Before you answer that, would you have expected the Minister and his officials, in drawing up the original proposed Measure, to have thought it right the way through, with all the subsequent eventualities and, therefore—it does not matter how desirable this may be to some Ministers—to have included it at that stage?

[185] **Mr Lambert:** I hesitate to offer the Cabinet Office advice again, but that is what the Cabinet Office advice is saying. You should first of all sit down, focus and work out the whole extent of a Bill and then present the Bill to Parliament. You do not put in desirable amendments halfway through the Bill process. You are under a duty to think it out at the beginning. That is why we and the Cabinet Office would not agree to desirable amendments going through afterwards.

[186] **Janet Ryder:** I know that Kirsty wants to come in, but I will bring William in because he sat on the committee.

[187] **William Graham:** Bearing in mind what you have said in evidence, why do you think that the subsequent amendments are so detailed? They give the power to the Ministers to give support for amalgamation in terms of community councils, the boundaries of authorities and the numbers of councillors and so on, which does not suggest that it is simply a collaborative agenda.

[188] **Mr Lambert:** It looks as if they were preparing this amendment at the same time as they were putting the proposed Measure forward. What seems to happen in Parliament, and this is against the advice of the Cabinet Office, is that Bills are put into Parliament as quickly as possible, particularly if you have a new Government with new thoughts and then, suddenly, as the Bill proceeds, they afterwards think, 'Ah, let's put an extra little bit in', or a large bit. They had not thought of it at the beginning, but as the Bill is going through, they are preparing the amendment and developing it. In central Government terms, I suppose you would have two Bill teams: one would be the original Bill team, steering through the original Bill, and the other would be a separate, supplementary Bill team filling in all the details of the supplementary part. Again, the Cabinet Office would say, 'That is really not on. By all means, the supplementary Bill team may prepare their proposals, but for another Bill, not for an amendment to this one'.

10.40 a.m.

[189] **Janet Ryder:** William, do I take it from the question that you just asked that it is your assumption that, because of the detailed nature of these amendments, they may have been thought through beforehand?

[190] **William Graham:** I am not convinced that it is about 'collaboration'. In my view, the amendments suggest amalgamation. If that is not the intention, why is there so much detail in the amendments? That is my view.

[191] **Janet Ryder:** Not that the amendments could have been drawn up beforehand.

[192] **William Graham:** Quite.

[193] **Rhodri Morgan:** I have one last question.

[194] **Janet Ryder:** Kirsty has been waiting some time to come in.

[195] **Kirsty Williams:** I guess that there has been a lot of speculation as to why the Minister has brought forward these amendments at this stage and, to be fair to the Government, I do not think that it is in the business of wholesale reform and the redrawing of local government boundaries—I do not think that that is what is in the Minister's mind, if I am being fair to him. There has been a lot of speculation that there is an individual issue that the Minister is seeking to address, and there is probably a legitimate debate to be had about that. However, is there another, more appropriate way, even at this late stage in this Assembly term—and we are approaching the end very quickly—for this Minister to deal with that issue, rather than asking the National Assembly via these procedures to hand over an ill-defined but significant amount of power? Is there another way that the Government or the Minister could achieve those goals rather than asking us for a wholesale handing over of power?

[196] **Mr Lambert:** Yes there is: a proposed Measure, setting out exactly how you would amalgamate two local authorities. You could set out on the face of the proposed Measure the number of councillors in the amalgamated authority, and the number of staff who might have to go, and the whole thing would be a composite document just for those two authorities.

[197] **Ms Navarro:** As a one-off.

[198] **Mr Lambert:** You would see it all on the face of the proposed Measure as it goes through. You see, there is nothing currently on the face of this proposed Measure as regards Orders; all it says is that you can decide the number of councillors, and the number of staff that will go. I think that you could have a self-contained proposed Measure to spell that out.

[199] **Kirsty Williams:** So, there is another way.

[200] **Mr Lambert:** Yes, there is another way.

[201] **Rhodri Morgan:** If you were working within this proposed Measure—despite the unease that we all share in relation to the late addition of these two amendments, and their possible use by a successor Minister to achieve local government reorganisation by the back door, without having to go through the usual White Paper and Measure-making procedure—how would you seek to reinforce the protection or improve the amendments, so that it would be far more difficult, if not impossible, for a successor Minister to abuse them to achieve local government reorganisation by the back door? Are there reinforced wordings or changes to the explanatory memorandum, or ministerial undertakings that could be given, which would throw a block against any future Minister seeking to abuse the power and to go from 22 local authorities to seven or eight without the need for primary legislation?

[202] **Mr Lambert:** What I would say to that—and I do not know if Marie has anything to add—is that you should set out the criteria. On page 2 of our paper, we quote the House of Lords Constitution Committee praising the criteria in section 3(2) of the Legislative and Regulatory Reform Act 2006 for ensuring that the effect of an Order is proportionate and that there is a method of preventing the removal of any necessary statutory protections. It strikes a fair balance between the public interest and the interests of all those who would be adversely affected by the decision. That is at least the beginning of the criteria. There is not any of that in the amendments.

[203] **Kirsty Williams:** Could you please repeat the page number?

[204] **Ms Navarro:** It is on page 2 of our evidence.

[205] **Rhodri Morgan:** Do you think that that is not of itself sufficient, but it is a good start as a reinforcement against any suspicion that a successor Minister could misuse the power in

order to achieve wholesale local government reorganisation, shall we say, as opposed to retail local government reorganisation, by the back door, and without it being a backstop power in relation to a refusal to collaborate on continuous improvement, but something that the Minister could just damn well do?

[206] **Mr Lambert:** Yes, we do.

[207] **Ms Navarro:** I would definitely provide for a definition on the face of the proposed Measure, so an amendment to your amendment, to define what is meant by 'efficient local government'. I would get rid of 'likely', because it is a totally subjective word, and provide robust guidance to the Assembly at the same time, in the form of an explanatory memorandum or administrative guidance, as to when and how the powers would be exercised. You should also, and I refer again to the Cabinet Office's document, give examples as to the precise times when the powers would be exercised or give examples of precedence in order to give a clear idea as to when it would be acceptable to use the power, so that the Minister has a clear understanding of the intention behind the legislation.

[208] **Rhodri Morgan:** To what extent is it useful for the Minister to give spoken undertakings that can be linked to definitions in a proposed Measure, where it is very difficult to find the right words? It is usually regarded as helpful these days that a Minister, speaking on his or her feet in the Assembly, actually names the circumstances in which the power could and could not be used. Is that not normally regarded as helpful reinforcement? It did not used to be, but I think that it is now.

[209] **Mr Lambert:** I would emphasise what you have said by saying that I would link any explanatory note to statutory criteria. I would not keep it all in explanatory notes. I would have statutory criteria and then expand it by a reference to the explanatory notes. Local authorities, the Assembly and anyone else would then be able to point to the statutory criteria and to the explanatory notes and say, 'Minister, what on earth are you doing? You are not following the statutory criteria and you are not following the explanations given by your predecessor.'

[210] **Rhodri Morgan:** The Minister would then be exposing him or herself to a judicial review threat, with a much higher likelihood of successful challenge because they have broken the guidance.

[211] **Mr Lambert:** Yes, absolutely. The guidance would be before the court.

[212] **Rhodri Morgan:** So, in that sense, you are saying that it is doable, with a lot of additional work, to reinforce the explanatory memorandum, to give guidance, to change some of these subjective words like 'likely' and 'effective local government' and to reinforce by ministerial undertaking the circumstances in which it would and would not be right to us the power and so on. So, it is doable to make it clear that this is subsidiary to the requirement to collaborate, it is a backstop power and cannot be used as a backdoor for local government reorganisation.

[213] **Mr Lambert:** We would prefer an amended proposed Measure.

[214] **Rhodri Morgan:** Yes, but you are saying that it is doable, if all of those things were done.

[215] **Mr Lambert:** Yes.

[216] **Ms Navarro:** We would also want a statement stating that this is not a precedent, so that it should not be treated as a precedent.

[217] **Rhodri Morgan:** So, you would want a ministerial statement to that effect.

[218] **Ms Navarro:** Yes.

[219] **Janet Ryder:** We have covered an awful lot of points there. I know that we have asked a lot of you already, but would it be possible for you to provide us with a note on these further things? If we could have something in writing before we have the Minister in, that would be exceptionally helpful.

[220] Kirsty, do you still want to come back on that?

[221] **Kirsty Williams:** I think the point has been made. It is clear that there are things that the Government could do to improve the procedure that it has used. Do you agree that the principle that a Parliament alone can undo something that a Parliament has done is ultimately the principle by which we should be governed? Although there is an opportunity here to address some people's concerns, what you have outlined is no substitute for that basic principle that it is the right of a Parliament to undo what a Parliament has done.

10.50 a.m.

[222] **Mr Lambert:** Yes.

[223] **Alun Davies:** Do you believe that the amendment as written gives the Government the legal powers for wholesale local government reorganisation in Wales?

[224] **Mr Lambert:** Yes.

[225] **Alun Davies:** You believe that the safeguards that have been built into it in sections 2(a) and 2(b) are irrelevant, essentially, and that the Government, by using these powers, could amalgamate all local authorities in Wales with others.

[226] **Mr Lambert:** We would say that they are procedural, and, fair enough, there are many procedures for consultation, but they are not substantive—there are no substantive criteria.

[227] **Rhodri Morgan:** They are open to abuse, is that what you are saying?

[228] **Mr Lambert:** They are open to a lot of interpretation. I am sure that Ministers will not want to abuse. When I was studying equity in Aberystwyth, we had a phrase that said that equity depended on the length of the Lord Chancellor's foot. So, the approach to equity depended on the shoe size of whoever was the Lord Chancellor at the time. In this case, it depends on whatever the Minister wants to do.

[229] **Alun Davies:** As Kirsty has pointed out, we are coming to the end of this Assembly, and, when a new Government is formed later in the year, a new Minister could take an entirely different view of the power and use it in a way that the current Minister would regard as unexpected, shall we say?

[230] **Mr Lambert:** Indeed. The new Minister could depart from any statements that his predecessor has given as part of the explanatory note. The Minister could say, 'I have looked at this matter again, and I am changing it.' That is how conventions change in Parliament; ministerial accountability changed almost overnight.

[231] **Ms Navarro:** That is why you need the criteria on the face of the proposed Measure.

[232] **Alun Davies:** Therefore, the only way to give us the safeguards that we want to see—and I think that there is wide agreement on that—is by further amendment to the proposed Measure.

[233] **Mr Lambert:** Yes.

[234] **Janet Ryder:** Fundamentally, this goes back to the point that Kirsty raised, which is that it is about whether we allow any future Minister to have the power, or whether we retain it in the hands of the Assembly and a Minister has to come and ask for that power as and when it is needed.

[235] **Mr Lambert:** Yes.

[236] **Janet Ryder:** Does anyone have any further questions? There are a number of questions that arise. For me, this issue has raised some fundamental points that go way beyond the proposed Measure. This raises fundamental constitutional questions, and it is a shame that we have reached it in the last few months of this Assembly. There are fundamental questions here about where power is held in Wales in the future, and whether it is handed over to a Government or whether it is held by the Assembly. I may well have overstepped the mark by saying that, but I cannot get away from a deep, deep feeling.

[237] **Alun Davies:** To be fair, Janet, I do not think that those remarks are representative of the committee as a whole. I would not want the record to show that I endorse that, because I do not. I wish that the Government had acted differently. I do not think that this is the best way in which to go about legislating, and it is not the best way of creating a new statutory framework for local government. However, I do not think that it is an abuse, and I do not believe that the Government is acting in blind faith. We need to differentiate between our own personal and political views about what the Government is seeking to do and what we are dealing with here, which is a particular point of principle with regard to legislation. I do not necessarily disagree with other things that have been said here, but we need to guard against over-interpretation.

[238] **Janet Ryder:** This is the Constitutional Affairs Committee. Politics has nothing to do with the committee; it looks at the constitutional handling of this matter. In your evidence, Mr Lambert, you referred to the evidence that was given by Daniel Greenberg. He said clearly—and you agreed with his statement—that a Government must make its intentions clear at the outset, and show clearly that its policy is thought through and that the aim of the proposed Measure could not be achieved in any other way.

[239] **Ms Navarro:** Any new idea should not be contained in the same piece of legislation. Any new idea arising after a Bill is introduced should go in another Bill.

[240] **Rhodri Morgan:** However, a new idea may be subsidiary to the overall purpose. I find myself acting as devil's advocate or Minister's advocate in a way here, but it seems to me that the Minister's case is that this is a late addition, and he apologises that it is a late addition, but that it is subsidiary to the need for a comprehensive ability to compel collaboration, and that it is not a separate or new idea—it is a subsidiary one. The issue is whether or not that objective to compel or oblige authorities to collaborate is subsidiary, and to be achieved through the amendment, or whether it is a new power, as you say, and a completely different animal. That is the issue.

[241] **Ms Navarro:** That is why we wish that there were established conventions—again, I come back to that point—so that Government, the Assembly and us outside would be clear about what is acceptable for the Assembly. Again, I appreciate that it can be different from

Westminster, and, in a way, I hope that it is, but very good practices have been established in Westminster over the centuries, so there are good ones to be kept, and new ones which you can come up with and some that can be changed. However, it would be useful for everyone if, in the new Assembly—with, hopefully, more powers—we would establish conventions and principles. A review of Standing Orders going on, and that may be an opportunity to include some of that there, or it could be kept for conventions, which are more flexible for the future.

[242] **Janet Ryder:** Thank you very much. If you could provide what you were saying about criteria and any further evidence in writing, that would be most welcome. Thank you very much for coming in this morning.

10.57 a.m.

Atodiad D – Papur Ychwanegol gan Ganolfan Llywodraethiant Cymru

Gwybodaeth Ategol am y Mesur Arfaethedig ynghylch Llywodraeth Leol, Gwelliannau a gyflwynwyd gan Lywodraeth y Cynulliad ar 27ain Ionawr

Marie Navarro, David Lambert, Legal Members of the Wales Governance Centre, Cardiff University.

Introduction.

The Assembly's Constitutional Affairs Committee has requested our comments on the apparent lack of criteria and guidance that would assist in determining the circumstance when the Assembly Government might make an amalgamation order under the proposed amendments tabled by the Assembly Government on 27th January to the draft Local Government Measure.

In seeking to answer the Committee's request we would still draw attention to the evidence which we submitted to the Committee last Thursday. It is considered that provision would best be made by making specific provision for individual amalgamations in primary legislation in a draft Measure if and when the need arises in a particular case. In so doing we again wish to reflect the comments of the House of Lords Select Committee on the Constitution, a committee of a Parliament whose remit is similar to aspects of the remit of the Assembly's Constitutional Affairs Committee, both in respect of the Public Bodies Bill (to which we have previously referred) and also to the conclusions of the Committee on the Legislative and Regulatory Reform Bill (2005-6).
Paragraph 44 of the report states: '**We are unconvinced that delegating order-making powers to Ministers to change the statute book and the common law is the most constitutionally appropriate way forward'.**[1]

Criteria

As a result of the work of Select Committees in the House of Commons and in the House of Lords, provisions were added to the Legislative and Regulatory Reform Bill 2005 so that the powers contained in the Bill set out safeguards to which the House of

[1]HOUSE OF LORDS, Select Committee on the Constitution, 11th Report of Session 2005–06, **Legislative and Regulatory Reform Bill**
http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/194/194.pdf

Lords' Committee on the Constitution commented that there was now a better balance in the Bill even though the powers 'remain over-broad and vaguely drawn'[2].

In our report to the Assembly's Constitutional Affairs Committee we explained why we consider the amendments of the 27th January presented to the Assembly are over-broad and vaguely drawn. There is an apparent lack of safeguards other than the indistinct provisions of subsection (2) of the amendment 91 on page 2 of the Notice of Amendments together with procedural safeguards in amendment 98.

The Legislative and Regulatory Reform Act 2006 has three types of substantive safeguards as well as procedural safeguards:

1) The order making power in the Act relates to the 'removing or reducing any burden' s.1(2). S.1(3) defines what is meant by 'burden'. There is no definition in the amendments to the proposed Measure of what is 'effective local government'.

2) S.3(2) of the 2006 Act contains pre-conditions to the making of an order. A number of those conditions could usefully be considered for inclusion in the proposed Measure amendments. In particular we would draw the Committee's attention to the following section 3(2) of the 2006 Act.

> 3 Preconditions
>
> 1. (1)A Minister may not make provision under section 1(1) or 2(1), other than provision which merely restates an enactment, unless he considers that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.
>
> 2. (2)Those conditions are that—
>
> **3. (a)the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;**
>
> **4. (b)the effect of the provision is proportionate to the policy objective;**
>
> **5. (c)the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;**
>
> 6. (d)the provision does not remove any necessary protection;
>
> 7. (e)the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
>
> 8. (f)the provision is not of constitutional significance.

Associated with these pre-conditions is the requirement in section 14(2)(c) that in laying any draft order before Parliament the Minister must explain why it is considered that the relevant section 3(2) conditions are satisfied in the particular case. The proposed requirement in amendment 98(3)(a) to the proposed Measure

[2] Ibid, Paragraph 5

is only a requirement that the proposals are explained not that any additional pre-conditions have been fulfilled.

3) Finally section 21 of the 2006 Act provides that if it is considered that relevant section 3(2) pre-conditions are fulfilled, any order made under the Act must have regard to the 5 principles set in section 21 before an order can be made.

> 21Principles
>
> (1)Any person exercising a regulatory function to which this section applies must have regard to the principles in subsection (2) in the exercise of the function.
>
> (2)Those principles are that—
>
> (a)regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent;
>
> (b)regulatory activities should be targeted only at cases in which action is needed.
>
> (3)The duty in subsection (1) is subject to any other requirement affecting the exercise of the regulatory function.

There are no such principles in the amendments to the proposed Measure.

The necessary new principles and pre-conditions which might apply to the amendments to this proposed Measure are a matter for the Assembly Government to decide upon and to draft before presenting them to the Assembly for its consideration. We only wish to draw the Committee's attention to examples of what such pre-conditions, principles and definitions might look like.

Explanatory Documents:

1) Accompanying the 2006 Act as it proceeded through Parliament was a detailed explanatory note setting out not only a summary of the proposed legislative provisions but also in what circumstances the powers might be used (this is a matter referred to in the Annex to the Constitutional Affairs recently published **Drafting Welsh Government Measures: Lessons from the first three years**[3]**).**

In addition the Explanatory Notes to the 2006 Bill/Act reflect statements explaining how the legislation would be used made by Ministers as the Bill went through Parliament. Thus paragraph 6 of the Explanatory Notes refers that a Minister gave "a clear undertaking (…) that orders will not be used to implement highly controversial reforms" (Hansard, 9 Feb 2006: Column 1058-1059)."[4]

To our knowledge there is no Explanatory Notes accompanying the amendments to the Proposed Measure which set out the considerable information contained in the Notes accompanying the 2006 Bill/Act.

[3] http://www.assemblywales.org/cr-ld8393-e.pdf
[4] http://www.legislation.gov.uk/ukpga/2006/51/notes/division/2

2) A further document was issued by the Department responsible for the Bill, entitled 'Guidance for Officials'. This was issued either as the Bill was going through Parliament or soon afterwards and was certainly being prepared as the Bill proceeded. It is a very detailed and extremely useful document covering every aspect of the matters to be considered before an order under the 2006 Act could be presented to Parliament. It is on the relevant Department's website and was therefore publicly available. At the time it was the Department for Business, Enterprise and Regulatory Reform[5]. The document gives details as to when a Legislative Regulatory Order cannot be used as well as when it can be used. It also details the pre-conditions and principles applying to an order. It seems to us that a document like this is a necessity for Assembly Members local authorities, and the public in general to be fully informed as to how the proposed amendments would operate.

3) In addition Ministerial statements made during the passage of the legislation stating how the legislation would operate are very important and are often incorporated in the formal Explanatory Notes accompanying the draft and enacted legislation.

Conclusion:

The Assembly Constitutional Affairs Committee might wish to consider the nature of the provisions which were eventually included in the Legislative and Regulatory Reform Act 2006.

The definitions together with the accompanying explanatory notes reflect the principles laid down by Parliamentary Committees and in particular the House of Lords Constitution Committee. The Committee was adamant that without such Bill provisions and accompanying documents they would report against the Bill to Parliament. The Government accordingly adopted their recommendations which are fully reflected in the Guidance Note to Officials on the Act.

Marie Navarro and David Lambert.

[5] http://www.bis.gov.uk/assets/biscore/better-regulation/docs/10-774-legislative-reform-order-making-powers-guidance.pdf

Atodiad E – Dyfyniad o Gofnod y Trafodion: Y Pwyllgor Materion Cyfansoddiadol - 10 Chwefror 2011

Ystyried y Mesur Arfaethedig ynghylch Llywodraeth Leol (Cymru): Sesiwn Dystiolaeth gyda Carl Sargeant AC, y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol
Consideration of the Proposed Local Government (Wales) Measure: Evidence Session with the Minister for Social Justice and Local Government, Carl Sargeant AM

[2] **Janet Ryder:** With Members' approval, I will move straight into our evidence session this morning. This is an important issue and I appreciate the Minister making time to come in to this early session. I welcome Carl Sargeant, the Minister for Social Justice and Local Government, who will give evidence today in relation to the Proposed Local Government (Wales) Measure, and specifically in relation to the amendments that have been tabled at this stage of the proceedings. Minister, would you introduce yourself and your officials for the record? You may then make any comments that you would like to make before we move on to questions.

[3] **The Minister for Social Justice and Local Government (Carl Sargeant):** Good morning. I am Carl Sargeant, the Minister for Social Justice and Local Government. With me is Frank Cuthbert—what is your proper title, Frank? I get it wrong all the time and Kirsty says things when I get it wrong.

[4] **Mr Cuthbert:** I am head of the local government democracy team.

[5] **Carl Sargeant:** Deborah is—

[6] **Ms Richards:** I am a member of the legal services team.

[7] **Carl Sargeant:** Would it be useful to frame where we are with the proposed Measure? Thank you for the invitation to come along this morning to answer your questions on the Proposed Local Government (Wales) Measure, particularly on the amendments. I have followed with interest the discussions that you have had in this committee and others, particularly those on the paper from the Wales Governance Centre, which was presented to you last week. I have no doubt that you will have drawn on that for questions to ask me this morning.

[8] Before we start the questions, I would like to make three quick, general points. The amalgamation power is important, but has not been brought forward without consideration of the implications. It would certainly be a big step to bring forward a proposal to amalgamate two or three authorities. However, this is a power that Welsh Ministers would not be able to use at random or on a whim. I am sure that your questions will touch on the procedures that will be put in place. The Government's amendments were accepted yesterday at Stage 2, and include a range of significant, built-in checks and balances around the proposed Measure. That is important for me and for other Ministers in future. That is where we are with that.

[9] My last point, and the main point, is that I have heard it said publicly and in the media and other circles that this is a precursor to reorganisation. I want to say categorically

that it is not. That is not my intention, and it would not be the intention of another Minister. I believe that procedures are built into the proposed Measure that would prevent a Minister from doing that in the future. I am happy to discuss that further. These are powers that are specific to an area of two or three councils and, quite frankly, if a Minister tried to use these powers as a tool for reorganisation, it would be extremely difficult because that Minister would have to take through eight or nine proposed Measures at once. Thank you, Chair; I am happy to take your questions.

[10] **Janet Ryder:** You have just outlined that this is quite a large step forward from the general thrust of the proposed Measure as it was introduced. The power to amalgamate is a much bigger step than a power to force collaboration. Why was this power not included in the original proposed Measure?

[11] **Carl Sargeant:** It is fair to say that the proposed Measure should be taken as a whole. We have had discussions in the past about where we are with the proposed Measure as a package, and the progress from the 2009 Measure, where we were seeking collaboration, recovery and so on. This is the tool for the end point in the process of managing local councils. Since the introduction of the proposed Measure, there have been a lot of live issues out there, and I would like to mention some of them, and explain why we have taken our view on this. An independent evidence session has shown that a merger of children's services at two authorities would provide significant cost savings, but the councils in question refused to act on that. I thought that was, at best, unreasonable, although we are still working on that. Another authority has been in special measures, which is no surprise to Members—everyone knows what I am talking about. Services were put at risk for the public, and the prospect of improving corporate capacity is still weak. That is another live issue. So, it is a question of the tools that we have in the box. This part of the box was empty; we did not have this tool for delivering the merger of authorities that fail to improve.

[12] **Janet Ryder:** If this part of the tool box was empty, why did your officers not spot that when you were drawing up the proposed Measure?

[13] **Carl Sargeant:** This has come from evidence given to several committees. The agenda was around collaboration. It was always possible to bring in a proposed Measure if there was a failing authority. That would be a process that we could consider. Committees have made recommendations on collaboration, which is great; trying to encourage councils to do things, to work differently and take that agenda forward. However, when they fail to do so, and fail to improve, what do you do then? We looked at that, and we did not have a tool unless there was complete failure.

[14] **Janet Ryder:** When did that become obvious to you, Minister?

[15] **Carl Sargeant:** During the process of questioning. We have some quotations. At the Health, Wellbeing and Local Government Committee meeting that I attended in June last year, I was asked if I would

[16] 'consider coming up with a model that might not be around full-scale reorganisation, but looking at some neighbouring councils that could share a big element of their education service, share senior directors and chief executives, and pool their resources'.

[17] I said that we would do some work around that. The recommendation from Legislation Committee No. 3 was that we needed more effective tools to compel collaboration. My interpretation of that was that we should look at the package we have, and see what is missing from the box of tools. We have the 2009 Measure, which is about the structure of driving through collaboration and recovery for an authority, but as for the endgame, when you have a failed council, or one that is failing to improve—what is the next

step? The next step is merger.

[18] **Janet Ryder:** I will allow myself one more question, and then I will bring in Alun and Kirsty. You are telling us that, as your officials were drawing up this proposed Measure, they had not foreseen a need for these amendments. It was not part of the original policy.

[19] **Carl Sargeant:** The issue for me was presenting the proposed Measure as it was introduced. We then had some questioning around, 'What next, if you cannot achieve collaboration or work effectively with councils?' When we looked at that, we did not have the necessary powers in the proposed Measure, other than through the introduction of an emergency Measure for a specific council. If we were to do that, there would be legislative process, time and cost implications for the Assembly. This proposed Measure lends itself to that process, which is why we have inserted it there. The evidence presented to us by the committee was that we should be able to do something. We are doing something through this proposed local government Measure.

8.40 a.m.

[20] **Alun Davies:** It is very curious, Minister, that this process of policy development seems to be going on at the same time as the Government seeking legislation. One would have anticipated that the process of policy development would have been completed by Government before it sought the legislative authority to put that policy into action. The points that we made in our earlier report on the process have been well made. It is curious, again, Minister, that this process is going on and that this amendment appears. I know that it is technically in time and so on, but it is certainly very late in the day in terms of enabling this place as a legislature to ensure effective scrutiny of the additional power that you are seeking.

[21] **Carl Sargeant:** Can Frank just come in on this point? Then I will be very happy to answer Alun's question.

[22] **Mr Cuthbert:** Perhaps I can comment—as the question has been raised—on why it was not included in the first draft of the proposed Measure. It is true that the proposed Measure grew out of two pieces of legislative competence, in the main: the Local Democracy, Economic Development and Construction Act 2009, which transferred competence for scrutiny and governance to the Assembly, and the legislative competence Order that transferred powers on widening participation on community councils and remuneration of councillors. However, even then, when we were making the initial draft, we saw the need to strengthen the provisions of the 2009 Measure by introducing a provision for the production of guidance on collaboration. We have been faced with a moveable feast. During the course of the past two years, we have seen increasing situations in which efficiencies and greater collaboration were required in local government. Certain weaknesses and failures along that road have led to the situation where it seemed timely to introduce the legislative competence that we have had since 2007 on the abolition and creation of local authorities so that the next Assembly Government could use those powers if it wished rather than our creating a process that meant that no such amalgamation or mergers could take place until, probably, well into the next Assembly, which might be very late given the situation that we face.

[23] **Alun Davies:** I am not entirely sure that I accept that, Mr Cuthbert. It has not been a moveable feast. As I understood it, the policy of the Government has been in place since the Beecham process, and the process of collaboration has been well known and well accepted. So, if policy development was taking place in Government in any coherent fashion, Government would understand that, if it was putting in place processes, there must be an end to those processes. It does not seem to be rocket science to be able to put that in place before seeking legislation. I understand the issue with competence and LCOs and so on. That is one work stream, but surely the policy development and establishing where the Government seeks

to be at the end of the legislative process should have happened some time ago.

[24] **Carl Sargeant:** I wish to respond with regard to process, in support of what Frank was saying. The collaboration element of this is built into the 2009 Measure, and we follow on. What has been identified through evidence sessions and understanding what is happening—and I think that Frank was suggesting that the process has been a moveable feast with regard to what is happening in local government, which has significantly changed the way that it operates over the past 12 months—is that, financially, there is a need to operate very differently. With respect, there are authorities that still have a silo mentality. I have been driving the collaboration agenda; Government has been driving the collaboration agenda. In some areas, we are seeing service failure and collaboration is not working. We must have the tools to ensure that, where we put in place recovery, support and so on under the 2009 Measure, we can address the problems if we still do not see improvement. It would be irresponsible of a Minister, whoever that might be, to let any authority continue. That is why we have put in place in this part of the proposed Measure a power to amalgamate, because that completes the toolkit. This is no more than the final tool for the process around the 2009 Measure.

[25] **Kirsty Williams:** Minister, I think that it is a bit of a leap to go from Legislation Committee No. 3's concerns about compelling collaboration to the position of being able to dissolve local authorities. There is a difference, is there not, between compelling a local authority to do one thing and simply getting rid of the local authority? Do you not already have the power to direct local authorities to collaborate under the 2009 Measure? If you can already direct local authorities, why are you taking this measure? Mr Cuthbert, I am very curious: is it now the Government's policy to legislate on behalf of future Assembly Governments? You just said that it was felt necessary to have this power in place for a future Assembly Government. That is very curious thing to do. Surely, it is the business of future Assembly Governments to decide what legislative powers they want and do not want. Frankly, I am amazed that it is now the policy to legislate on behalf of future Governments.

[26] **Janet Ryder:** In fairness, it should be the Minister who responds to this.

[27] **Carl Sargeant:** Absolutely. If Frank also wishes to comment, I would be happy for him to do so. First, Kirsty, you are absolutely right that we have the powers to compel authorities to collaborate under the 2009 Measure. Be under no illusions: the committee that was questioning me also understood that. Its concern was what you do if you have the powers to compel authorities to collaborate and it still does not work. I understood that line of questioning to lead to asking 'What is next?' I have come back with a process to allow the amalgamation of authorities. That was my interpretation of where the questioning led. It is not that the committee or I failed to understand that the 2009 Measure already included the power to compel collaboration. It knew that, I knew that, and it was asking me, 'What do we do next?' I have come back with the tool to do that job.

[28] To pick up on the point about legislating for future Governments, Frank will be able to clarify his comments, but what I believe Frank meant was that we are at the end of a term and legislation is a process at whatever point you are at in the term. Clearly, if this is passed, it will be legislation for the next Government. I do not think that that is any different to any other legislation. A new Government will use the legislation that has been created by the previous Government.

[29] **Janet Ryder:** However, Minister, other legislation that has been passed has gone through the full consultation and Measure process, unlike these amendments—

[30] **Carl Sargeant:** Chair—

[31] **Janet Ryder:** William wants to come in on this point.

[32] **Carl Sargeant:** Chair, may I respond to that point? That is an interesting point. That is an accusation that we have done something out of the ordinary here. Let me refer back to some amendments that were tabled in the past. Amendments to the Welsh Language (Wales) Measure 2011 were tabled by Alun Ffred Jones at Stage 3; amendments to the Social Care Charges (Wales) Measure 2010 were tabled by Gwenda Thomas at Stage 2; amendments to the Learner Travel (Wales) Measure 2008 were tabled by Ieuan Wyn Jones at Stage 3 on the back of Kirsty Williams asking for an amendment to be tabled. I have not done anything outside the Government of Wales Act 2006 or the Standing Orders of the Assembly—unless you are suggesting that I have.

[33] **Janet Ryder:** No one is suggesting that, Minister. What we would like to see, and what we are looking to hear from you today, is that the policy was thought through from the beginning. A number of the things that you have said today leave a number of questions to be asked. I believe that William has a question to ask on this point.

[34] **William Graham:** Minister, I am surprised at your contention arising from Legislation Committee No. 3's deliberations. As a member of that committee I can say that we never discussed amalgamation—nothing was further from our thoughts, in fact. What we were talking about, which is exactly what is in the minutes, was collaboration. We were thinking of twenty-first century schools and a whole lot of other things that are entirely dependent on collaboration. We were encouraging you to strengthen your toolbox in terms of collaboration, but we were certainly not talking about amalgamation. I am surprised that you came away with that view. Why was that?

8.50 a.m.

[35] **Carl Sargeant:** That was certainly the view that I felt the committee presented to me. With regard to the detail of the report from Legislation Committee No. 3, it referred to the need for the proposed Measure to be

[36] 'strengthened to provide a more effective tool to compel collaboration in circumstances beyond the current limited powers in the 2009 Measure'.

[37] My interpretation of that and the discussions that took place in committee—and I assume that you were signed up to that process—

[38] **William Graham:** We never mentioned amalgamation. We felt very strongly that there was a need for collaboration and the ability to compel authorities to collaborate, but amalgamation was never discussed.

[39] **Carl Sargeant:** I do not recognise that point, Chair.

[40] **Janet Ryder:** When were the drafters first given instructions to start working on these amendments?

[41] **Carl Sargeant:** With regard to the evidence that we were taking from the Health, Wellbeing and Local Government Committee, I said then that we should start work on understanding what powers we had and therefore work on the potential to—

[42] **Janet Ryder:** The Health, Wellbeing and Local Government Committee of when?

[43] **Carl Sargeant:** June 2010.

[44] **Janet Ryder:** Was anything made public at that point? Before the amendments were tabled, was anything ever made public to show that you were thinking that this would be part of your policy?

[45] **Carl Sargeant:** In terms of drafting, Chair, no, that would not be made public. Nor would the paperwork be for the public. That is something that would be looked at internally. I do not think that any suggestion has been made to me by local government that my message has not been clear. I have regular contact with John Davies, the leader of the Welsh Local Government Association, about proposals for collaboration and the steps for driving improvement in local authorities. That is the intention of this proposed Measure, Chair.

[46] **Janet Ryder:** Collaboration? Are you still talking about collaboration?

[47] **Carl Sargeant:** The improvement of local authorities. That is the whole package. The toolbox is about the improvement of local authorities.

[48] **Janet Ryder:** Through collaboration?

[49] **Carl Sargeant:** Through collaboration.

[50] **Rhodri Morgan:** That is the ideal point for me to come in. Is your case essentially that this is another arrow in the quiver of the collaboration agenda?

[51] **Carl Sargeant:** Yes.

[52] **Rhodri Morgan:** In other words, your contention is that this is not a separate policy that could be described as local government reorganisation by the back door.

[53] **Carl Sargeant:** That is what I was trying to suggest at the very beginning of the meeting. This is a package of measures. It is in the amendments, and, if it helps, we can issue guidance to tighten what it says there so that people understand that this is part of a process, from the Local Government (Wales) Measure 2009 right the way through to the power to amalgamate authorities. You have got to consider and go through a whole raft of proposals and evidence before you get to this. This cannot be taken in isolation; this is a package.

[54] **Rhodri Morgan:** This is the absolute crux of the Constitutional Affairs Committee. We do not consider the merits of the proposed Measure. What we are looking at is the degree of close association between the Government's amendments and the overall intent of the proposed Measure, which is to enable collaboration for the purpose of service delivery improvement—that is a Government agenda—and the extent to which this power is subsidiary to the purpose of the proposed Measure. All we are considering is whether this can appropriately be fitted under that umbrella. Essentially, we are trying to establish whether that is the case or whether it is a separate thing that you have thought up rather late and which should really have been the subject of a completely different proposed Measure because, essentially, it is a different agenda. However, your contention is that this is subsidiary to and fits in with the agenda to have collaboration for the purpose of local government service delivery improvement and the Proposed Local Government (Wales) Measure.

[55] **Carl Sargeant:** Absolutely. That is why the Order refers to the exercise by any of the local authorities concerned of the powers under section 9 of the Local Government (Wales) Measure 2009. That is why we have made it very clear. I hope that you appreciate, Chair, that I am trying to be helpful with regard to how this is framed so that the public and future Ministers clearly understand that this tool is not about reorganisation. This tool for amalgamation completes the package of tools from the 2009 Measure for effective local government.

[56] **Rhodri Morgan:** If you could do anything to bind your hands for the remaining months that you are the Minister for local government and, subject to your reappointment, the hands of your successors in future, until there is another local government Measure some 10 years down the line, so that this power could not be used to achieve local government reorganisation by the back door, that would be highly appropriate and helpful to this committee, and to the wider public's understanding. Anything that you can do to stop it from being used by one of your successor Ministers to achieve local government reorganisation by the back door without going through the conventional White Paper and separate Measure route would be enormously helpful in order to clarify the purpose. I do not know whether you, your legal colleague, and Frank as your policy colleague can offer advice on the degree to which you can fit yourself into the corset that would mean that, not only could it not be used for local government reorganisation, it would be enormously difficult to try, because it would be subject to judicial review and legal challenges that are likely to be successful, because it would be clearly contrary to the intent of this Government and you as the current Minister.

[57] **Carl Sargeant:** That was our intention and that is what we believe we have framed here. However, if there are elements that need to be strengthened, then I am happy to listen and to make any necessary amendments as appropriate.

[58] **Rhodri Morgan:** That would apply to the wording. You will have seen the criticism of the use of subjective terms that cannot be put to any objective tests through the courts in judicial review challenges that might be held in the great blue yonder were this to go through—words such as 'likely' and 'effective'. The explanatory memorandum needs to be tightened, and any undertaking that you could give today, and when it returns to be debated by the Assembly as a whole, would be enormously useful, because that will affect whether any future Minister might think that it could be used for a completely different purpose from your intent.

[59] **Carl Sargeant:** I believe that I have tried to test that. If I woke up one morning feeling not too good and thinking, 'I'm not too fond of those two or three local authorities; they've got to go', what would be the test procedure for me or for any future Minister to go through? What are the hoops that you have to go through before you could do that? You might have a bad morning and think that you could implement such a reorganisation, but you cannot, because there are a number of hoops that you have to jump through in order to be able to do that.

[60] The tests set out in section 2 relate directly to the 2009 Measure and these would have to be fulfilled prior to any reorganisation. It is necessary to demonstrate that amalgamation is needed to achieve effective local government. Evidence would be needed for all of this and an Order would have to be drawn up and would have to proceed through the necessary stages in the Assembly according to the superaffirmative procedure. These powers are different to the powers possessed by English Ministers.

[61] **Rhodri Morgan:** I have two further questions. Frank Cuthbert referred to the cut-off point for when the Government could add particular points—even points that might prove to be slightly controversial in your relationship with this committee or, more importantly, the Welsh Local Government Association as the main stakeholders. Although, perhaps I should not have used the words 'more importantly'. You probably knew that, if you added an amendment of this nature, the WLGA would be up in arms about it, as might the Wales Governance Centre and this committee. Frank used the phrase 'moveable feast', but I think that you need to unpack that slightly.

9.00 a.m.

[62] We have heard Ron Davies's famous dictum about devolution being a process rather than an event, but you cannot say that legislation is a process and not an event. There is a cut-off point at which you say, 'Okay; that is the legislation', and you cannot change it subsequently every year to move the agenda on a bit because circumstances have changed. There has to be a cut-off point. You have mentioned that other Ministers have brought forward late amendments. We say 'late', but they are not out of order; they are within the cut-off point. However, we need to test the 'moveable feast' phrase. What I am trying to get into my mind is that, once you reach the cut-off point, whatever the appropriate cut-off point is, even though it will upset this committee, the Welsh Local Government Association and the other stakeholders, you then say, 'Okay, if we can get this legislation through, we probably will not have any more legislation on this front for a decade or more'; therefore, you have to make all of your changes up to the cut-off point, whatever that sensible cut-off point is, and that is it. You will not change it again. Then, for 10 years, local government knows where it is. Can we put the 'moveable feast' phrase that Frank Cuthbert used into that sort of idea, in that, once you reach the cut-off point, you have to finish and then produce no more legislation for 10 or 20 years?

[63] **Carl Sargeant:** From the introduction of the proposed Measure and through the committees, I have received scrutiny and evidence. I know that William and I perhaps disagree on our interpretation of that, but my interpretation of what was asked of me by committee was to bring forward additional tools to compel collaboration and beyond. My assessment of the tools that we have is that the 2009 Measure is limited in driving that collaboration. There is no next step. You can drive collaboration and you can remove functions, but you could still have a failing council at the end. There is nothing that you can do about that. Over the past 12 months, while this proposed Measure has been going through and while we have been taking evidence, I have seen local government in some areas responding really well to change. In some areas, authorities have not been responding as well, and, in other areas, the response has been appalling.

[64] **Rhodri Morgan:** Wriggling out of their obligations, would you say?

[65] **Carl Sargeant:** Yes; absolutely. I have made that very clear to them. I am not prepared to accept that as the Minister currently responsible. As we have seen in children's services and social services, we have seen poor service. Helen Mary made exactly this point yesterday: if we do not step in where authorities are failing, it would be irresponsible of us and, in certain areas, it could be fatal. I am not prepared to do that as the Minister for local government.

[66] **Janet Ryder:** I will just bring in Alun at this point, because I know that the time is pressing.

[67] **Alun Davies:** We have had half an hour of this now, and we have been discussing the policy development process in Government. I think that we are all familiar with the points that you want to make, Minister—we accept that. However, we are looking at a particular amendment to much wider legislation. Some concerns came out of our evidence last week. Perhaps, if we put those directly to the Minister, we could see how we will respond to those.

[68] **Janet Ryder:** I thought that your question was going to add on to Rhodri's point. It is not a supplementary question to the point that Rhodri was making. I am therefore going to allow Rhodri to finish his question.

[69] **Alun Davies:** I felt that it did follow on from Rhodri's question.

[70] **Janet Ryder:** We will come on to those issues.

[71] **Rhodri Morgan:** I have one last question in this particular group of questions—I am sorry, but I have been given an awful lot of questions this morning. Let us be clear about the word 'failure'. My understanding—possibly wrong—is that you already have the power to deal with a failed council, in that you can wind it up and, presumably, use emergency procedures to terminate its existence. To use Dalek language, you could collaborate, amalgamate, exterminate or whatever. Therefore, you are already able to exterminate a council when it becomes a failed council. Is that the case? I do not know. It may not be the case.

[72] **Carl Sargeant:** Subject to a Measure being introduced, and going through the same procedures—

[73] **Rhodri Morgan:** An emergency procedure, therefore.

[74] **Carl Sargeant:** Yes. We have live examples of that. We have been in Anglesey for 18 months going through a process of stabilising and rebuilding the council. This is not a precursor to what I could or will do, but if I were to say, 'Look, no more', then what would the procedure be? I would have to introduce an emergency Measure.

[75] **Rhodri Morgan:** So, what you are saying is, short of the use of emergency procedures to deal with a completely failed council, you want something else to deal with a council that is wriggling out of engagement with the service delivery improvement agenda. It is recalcitrance rather than failure. Is that the case?

[76] **Carl Sargeant:** No, we have to base it on failure to improve.

[77] **Rhodri Morgan:** 'Failure to improve' is different to 'failure', which would be across-the-board failure, where the council has to be wound up under emergency procedures.

[78] **Carl Sargeant:** If we have council collapse and are unable to recover the situation using the 2009 Measure, without these powers, we would need an emergency Measure to deal with that. What we are doing with this package of measures is looking at areas where the collaboration agenda is not being adhered to. I referred earlier to cost savings of £500,000 that were available to two local authorities, which they dismissed. Where do we go from there?

[79] **Rhodri Morgan:** So, that is a refusal to engage, and a wriggling out of obligations, but something short of the outright failure that would result in the justified use of an emergency procedure. Is that a fair description of the circumstances that you intend this amendment to cover?

[80] **Carl Sargeant:** Yes.

[81] **Mr Cuthbert:** The existing legislative powers of the Assembly Government could enable the transfer of some or all of the functions of a local authority to someone else—to another local authority, or to another body of people—if that were felt to be the only reasonable solution. However, that has a temporary nature to it: you would not have a local authority existing for any length of time without any functions.

[82] **Rhodri Morgan:** Can we deal with the point about the Henry VIII power? This is a bit like that Australian television personality who used to take food out of alligators' mouths while holding them open with a stick, saying, 'He's getting very angry now'; the Wales Governance Centre is getting very angry now, it has to be said, about this proposed Measure. It says that you cannot wind up a body that has been formed by statute, other than by a separate statute; you should not be allowed to do it by Order. Could you or your legal adviser

give us a view about the use of the Henry VIII power to wind up a body created by statute—in this case, by the Local Government (Wales) Act 1994?

[83] **Carl Sargeant:** I will ask Deborah to deal with the detail and the legal-speak of that, if I may. However, Order-making powers to amalgamate councils were conferred on the Secretary of State in 2007 and they have been used to amalgamate several councils already, under the affirmative resolution of the Minister. I am not proposing that; I am proposing powers subject to the superaffirmative procedure. On the legal element of this, Deborah might be able to answer on that part of the Order, if that would be helpful, Chair.

[84] **Janet Ryder:** Thank you, but I think that we will return to that later. Do you want to come in now, Kirsty?

[85] **Kirsty Williams:** I would like to hear from Deborah first.

[86] **Ms Richards:** The thrust of the paper seems to suggest that guidance from Parliament states that it is not advisable to give Henry VIII powers to abolish bodies set up by statute. The conclusion drawn in David Lambert's paper is that somehow that is unconstitutional or a novel thing to do. We disagree. There is precedent for it. Not only have powers been conferred on the Secretary of State to amalgamate local government in England to create unitary authorities, but those powers were given to the Secretary of State by an Act of Parliament, without criteria, and the Order-making process was subject to the affirmative procedure.

9.10 a.m.

[87] The House of Lords Constitution Committee exists to scrutinise Bills to see whether there are any issues of constitutional concern. You have heard from David Lambert that the committee was concerned about the Public Bodies (Reform) Bill and that the committee reported on that Bill; however, it did not scrutinise the Local Government and Public Involvement in Health Act 2007 that conferred those powers on the Secretary of State.

[88] **Kirsty Williams:** Do you not agree that the 2007 Act and the powers conferred by that Act allow the Secretary of State to act on the basis of proposals put forward by a local authority? That is where the power lies. The Secretary of State can act to create a new body on the basis of proposals put forward by local authorities. I would argue that that is fundamentally different to the situation that we are in here, where the Minister will be able to act of his own volition, rather than in response to proposals put forward by local authorities, which is the fundamental essence of the power under the 2007 Act.

[89] **Ms Richards:** That is correct, but there is an additional element because, when proposals are put forward, the Secretary of State can direct the merger of local authorities under the 2007 Act.

[90] **Kirsty Williams:** However, it is done on the basis of proposals brought forward by local authorities. The fundamental difficulty that people have with this is that this power, which is conferred on the Minister with these amendments, allows the Minister to act of his own volition, not on the basis of recommendations that he may have received from local authorities, asking him to make an Order to amalgamate them. That is the fundamental difference.

[91] **Carl Sargeant:** Before Deborah responds to your points, I would just like to say that the powers are not identical: we will be using the superaffirmative procedure. Although it will be brought forward by the Minister, it will be ratified by the Assembly, not the Minister. This decision will ultimately be taken by the Assembly.

[92] **Kirsty Williams:** I am not claiming that they are identical. You seem to be using the existence of the 2007 Act—and I am in no doubt that you will also mention the 1992 Act—as a reason why you should have these powers. I am not claiming that they are the same, but you are using them as a precedent in asking for these powers. I did not say that they are the same.

[93] **Ms Richards:** To clarify, under the 2007 Act, if a local authority does not put forward proposals, the Secretary of State can require them to do so.

[94] **Carl Sargeant:** They can be required to do so without making a request for it.

[95] **Kirsty Williams:** However, proposals have to come forward—

[96] **Ms Richards:** That is subject to the affirmative procedure, whereas ours is subject to the superaffirmative procedure, for which there is more consultation.

[97] The other precedent that you should be aware of is that the National Assembly for Wales had powers conferred upon it under section 28 of the Government of Wales Act 1998 to be able to abolish statutory bodies that were set up by statute. Some of you may recall the Orders in relation to the Wales Tourist Board, the Welsh Development Agency and Education and Learning Wales. Those bodies were all abolished by Order and the powers to do so were conferred by an Act of Parliament. Those Orders have taken effect.

[98] **Alun Davies:** Would this process not be far less painful if the Government were to bring forward amendments that would clearly delineate the powers available under this legislation in the way that Rhodri suggested earlier? The suggestions were to include a better definition of the word ‘effective’ in the first part of amendment 91, a better qualification of the term ‘not likely to be achieved’ in the second part of the amendment and to provide a supplementary explanatory memorandum to define how those powers should be used in the future. I would suggest that that would mean that those powers would not be available to future Governments to use in the way that has been suggested.

[99] My view of the Government of Wales Act 1998 is that it was creating a democratic body and abolishing the post of Secretary of State, so it needed to include those powers to achieve that objective. I do not think that that is a fair precedent to use. It is clear that we need greater definition and delineation of these powers, and a clear statement from the Government about the process and to clarify that this is a power in extremis, and not a power that should be used in general.

[100] **Carl Sargeant:** As I said earlier, I would be happy to make amendments in order to strengthen the detail so that future Ministers fully understand the detail as to what these powers should be used for. On the terms ‘effective’ and ‘likely to’, ‘effective’ is a term that has been used in local government for many years, in many other Acts, such as the Local Government Act 1972; it is all there and laid out. If you are saying that our drafting needs to be tightened up—we believe that we are already there, but there seems to be a view that that is not the case—and if there is a way in which we can tighten that up so that it is clear to people that these procedures represent a package of tools from the Local Government (Wales) Measure 2009 through to the process of amalgamation, I am happy to look at that. As I said in Legislation Committee No. 3 yesterday—

[101] **Alun Davies:** I am sorry, but may I stop you there? Being happy to look at something and being happy to do something are two different things. I would prefer you to do the latter as well as the former. Will you give us that commitment?

[102] **Carl Sargeant:** Of course.

[103] **Alun Davies:** ‘Of course’ is a commitment—

[104] **Carl Sargeant:** As I said in committee yesterday, and I am more than happy to repeat it today, I would be happy to provide an explanatory memorandum to accompany this process. I would be happy to look at the wording in terms of ‘effective’ and ‘likely to’, and, if need be, I will bring amendments forward at Stage 3. I am not being obstructive in this process—I am trying to be constructive. I have been honest and open with you. My intention is to prevent future Ministers from instigating wholesale reorganisation. This is a process or tool around collaboration and effective governance and that is what I want to create legislation to do. If we need to tighten that up, I would be happy to do so.

[105] **William Graham:** On that point, Minister, you told Legislation Committee No. 3 that you would publish guidance on what collaboration would look like. Can you do that at Stage 3?

[106] **Carl Sargeant:** Guidance on what collaboration would look like—

[107] **William Graham:** That is what you said.

[108] **Carl Sargeant:** I need to look at in what context I said that.

[109] **William Graham:** You said to the committee that you would publish guidance. You said, first, that it would be published later in the year, and then you said that you would publish guidance on what collaboration would look like. In my view, that will provide great reassurance. When are you going to do it?

[110] **Mr Cuthbert:** I think that this is a reference to the section of the proposed Measure that provides for guidance on collaboration to be produced. Normally, that would not be produced until after the proposed Measure was made.

[111] **William Graham:** In terms of giving reassurance and in view of the questions at committee today and yesterday, do you not think that it would be appropriate to do it at Stage 3?

[112] **Carl Sargeant:** I will consider that.

[113] **Kirsty Williams:** How long do you anticipate that it would take you to get an Order through under these powers? You say that you need to have these tools if there were exceptional circumstances in which you had to act. How long would an Order take to go through the superaffirmative process?

[114] **Carl Sargeant:** If we were to enact—

[115] **Kirsty Williams:** If you enacted this, how long would it take to get an Order through the superaffirmative process?

[116] **Carl Sargeant:** There are several stages—

[117] **Kirsty Williams:** I know that there are several stages. How long would it take?

[118] **Carl Sargeant:** We will map it out. There is a 60-day consultation period for the superaffirmative procedure. I know that you laid amendments for discussion at yesterday’s legislation committee meeting to extend the period from 60 days to 365 days. We believe that 60 days is an appropriate consultation period to take evidence from interested parties on the

superaffirmative procedure. With regard to the whole timeline, there will be a full consultation over three months—Frank has the specific details on that—it will be laid before the Assembly for a two-month period, and there will be a minimum of six or seven months between the beginning and the end of the process.

9.20 a.m.

[119] **Kirsty Williams:** You say that the process would take six or seven months; Gwyn, how long would an emergency Measure take to get through?

[120] **Mr Griffiths:** Standing Orders provide for all of the stages to be taken in one day, if that is the wish of the Assembly.

[121] **Kirsty Williams:** So, what the Minister is proposing is a process that will take six or seven months, and you are saying that Standing Orders allow for an emergency Measure to be taken through in one day, if necessary. So, any Measure could certainly be taken through in six or seven months.

[122] **Carl Sargeant:** I must respond to that point. You are talking about consultation with people. I can take a Measure through in a day. That is quite right. That was a loaded question to Gwyn. The issue for me is whether we want to consult people and whether we want to take through a process of the 2009 Measure. This is a package, Chair. This is about trying to support councils that are failing to deliver good public services. That is not a bad position to be in. We are trying to help them to do that. When they fail, we go through a consultation period with the interested parties in terms of the Order process and making a Measure for the amalgamation of services. Is it not better that that is based on consultation? Is that not your argument—that we need to consult people?

[123] **Kirsty Williams:** I am just responding to your earlier argument. You used the issue of children's services and said that time would be of the essence and that, as Minister for local government, you were not willing to sit back and allow a local authority to fail children and that you would act. I am just establishing the fact that, should you need to do that, there are existing provisions under Standing Orders to allow you to act in a single day, rather than following the process that you are outlining today, which takes six to seven months. That is my point. I am just trying to test your evidence. You said that you need these powers to protect children in failing authorities and that you were not prepared to sit back and let that happen. I am just trying to establish what powers and timescales are already in place.

[124] **Carl Sargeant:** It is an interesting point, and you are absolutely right that the powers allow us to do that should that be needed. However, I would be horrified if we had a council in Wales where we did not see early signs of failure. That is why, under the 2009 Measure, where we see signs of failure, we can start to intervene, whether by offering support through the WLGA, recovery boards or beyond that. If, out of the blue, a Minister came to us and said, 'Crikey, nobody has caught this—not the auditor general, Estyn or anyone—and there are fundamental issues here' and the only option was to remove the council, you would have to introduce a Measure. You could not do that through this process. That is what I am saying. The checks and balances built into this proposed Measure are a whole process of taking a council from a failing position. I do not want to remove or amalgamate councils. I want them to function well. That is not a bad thing. The support mechanism in the 2009 Measure is to support them, but, if that does not work, what do we do next? If we cannot recover, where do we go? That is the process of consultation, through the Assembly, which is not my decision. The immediate decision is mine, but, ultimately, it would be a decision of the Assembly. Again, to go back to the issue of the Secretary of State for Wales, that is a very different power and a very different position to be in. This happens on the say-so of the Assembly, not on my say-so.

[125] **Janet Ryder:** Minister, I wish to take you back to something you said earlier. You said that you have regular meetings with the WLGA and that you have discussed this. You seemed to intimate that you have already discussed this issue with the WLGA and that it would be aware that this was coming forward. So, can you explain why the WLGA is now asking why this did not form part of the extensive 18-month policy debate and evidence-gathering sessions on the proposed Measure that have been undertaken within the Assembly and in which the WLGA was asked to give evidence? You have given us very clear evidence today that you have been thinking and considering this and drawing it up since June 2010. I am asking you to guess why the WLGA has said this. Is it wrong in saying this or has it misunderstood what you have said?

[126] **Carl Sargeant:** I think so. It is a turkeys-and-Christmas scenario. The media and, unfortunately, individual Members have said things that are perhaps not as accurate as they could be about what this actually is. People have been saying that the proposed Measure is one of reorganisation; it is not. It is a raft of measures with a tool at the end—namely, amalgamation—for improving local government services. I have given you examples today—and Rhodri alluded to them earlier—of authorities that are responding well to the message of collaboration, and some others that are not. With respect, the WLGA is the umbrella body for all of the organisations, and is very protective of its institutions, as it should be. However, I have had many conversations with the WLGA about how we deal with the improvement of authorities.

[127] **Janet Ryder:** So, to be absolutely certain about this, according to the timescale that you have given us, halfway through the consultation process on this proposed Measure, the WLGA, as the chief body concerned in this, was aware that this was your intention—to move from collaboration to amalgamation.

[128] **Carl Sargeant:** No, I have not said to the WLGA, 'I intend to introduce an Order to amalgamate councils'.

[129] **Janet Ryder:** You will be aware that this committee has always said that we expect a Minister, when he or she brings forward a piece of legislation, to have completely thought through the policy behind it. That is why this would seem to be a deviation from that process. You have already said that, at the beginning, you were not thinking about these amendments. At what point in the consultation period were you certain that you would change the process? You have told us that the drafters started at least in June last year, which seems to be halfway through that consultation phase. At what point was this made public, or were your partners in local government made aware of this?

[130] **Carl Sargeant:** Local government was made aware the same week as we laid the amendments.

[131] **Janet Ryder:** Within a month of this date.

[132] **Carl Sargeant:** Chair, I do not want to be rude, but I am very conscious of the time. I have another meeting to go to.

[133] **Janet Ryder:** There are a number of other issues arising from this that we would like to question you on, regarding how, if you were to use these powers, you would deal with the number of councillors, the council ward boundaries, subsidiary bodies, ownership of property, handing over of affairs, and so on. You say that this is not a reorganisation, but we are all aware of what has happened when we have had to go through a process of creating one council out of a number of others, and there is a raft of practical issues that we would like to question you on. Unfortunately, there does not seem to be an opportunity for that, as these

amendments have come forward so late in this process. How should we deal with that?

[134] **Carl Sargeant:** If you have a raft of questions, you could write to me and I would be more than happy to respond. If my answers raise any questions, then of course I would be happy to have that discussion with you on the way that we handle that. If there are questions around specifics details, I can certainly write back with a detailed response.

[135] **Janet Ryder:** We would be very grateful for that, but just as you are working to a timescale, so are we: we have to lay this committee report so that it can be considered at Stage 3. We would need to do so by 1 March at the latest. Given the intervening half-term recess, that would mean that, if we write to you today on this issue, we would need a very swift response.

[136] **Carl Sargeant:** You have my word that I will do my best to ensure that you have a response in time for Stage 3.

[137] **Janet Ryder:** There are a number of other issues, but does anyone have anything specific that they want to raise? We will certainly write to you today, Minister, following this meeting. Thank you for your time today, and for answering the questions. I hope that you will appreciate that it is, as you just said in answer to my last question, less than a month since this issue arose, and therefore there are a number of questions on which we have not had the opportunity to scrutinise you in public. We appreciate your time in coming in, and we will write to you today on this matter. We would be grateful for a quick response to that. As always, a transcript of the meeting will be sent to you so that you can check it for accuracy.

[138] **Carl Sargeant:** I would like to finish by thanking you for the opportunity to be here this morning. As I have explained, it is my intention that this part of the proposed Measure is part of a package of tools, and they are not to be seen in isolation. I would be happy to respond accordingly by letter to the questions that you raise with me.

9.30 a.m.

Atodiad F – Cwestiynau ysgrifenedig y Pwyllgor i'r Gweinidog

Y Pwyllgor Materion Cyfansoddiadol
Constitutional Affairs Committee

Cynulliad Cenedlaethol Cymru
National Assembly for Wales
Bae Caerdydd / Cardiff Bay
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Carl Sargeant AM
Minister for Social Justice and Local Government
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10 February 2011

Dear Carl

Proposed Local Government (Wales) Measure – Further Questions

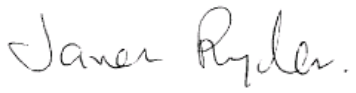
Thank you for attending the Committee's meeting this morning to answer questions on the Government amendments to the proposed Local Government (Wales) Measure that will give Ministers the power to amalgamate local authorities in certain circumstances.

In the limited time available this morning, Committee Members were unable to ask questions in many of the areas that we hoped to cover. However, I was grateful for your agreement to provide written answers to these questions. I was also grateful to you for agreeing to reply quickly. The Committee will be considering a draft report on this issue at its meeting on 17 February and, as the following week is a non-sitting week, I am sure the Committee would appreciate a response by close on 15 February at the latest.

I attach as an appendix to this letter a list of the questions that we would like you to address.

If your officials would like any further clarification, I would be grateful if they could speak to the Clerk to the Committee, Steve George, who can be contacted by telephone on 02920 898242 or by e-mail at stephen.george@wales.gov.uk.

Yours sincerely,



Janet Ryder AM
Chair, Constitutional Affairs Committee

Timing of the amendments

1. Why were the proposals for amalgamation of local authorities not included in the original Measure as introduced?

Have any specific issues arisen since the Stage 1 debate that has led to these proposals being brought forward.

2. No written justification or any supporting information has been published for introducing such significant amendments at this stage. Why was it not considered necessary to produce any written justification, or any explanatory document, to accompany the amendments?

3. Legislation Committee 3 recommended that the proposed Measure be "strengthened" in order to "look at other circumstances where the Minister may want to compel local authorities to collaborate." What consideration did the Minister give to strengthening his powers to compel collaboration short of amalgamation?

For example, the Minister already has powers to direct in respect of collaboration under section 29 of the Local Government (Wales) Measure 2009. Did the Minister consider strengthening these powers?

4. The Explanatory Memorandum provided art introduction states the Welsh Government has "already consulted on non-statutory guidance on collaboration" and the responses from local authorities and national partners were "overwhelmingly positive."

What discussions has the Minister had with local government about the new amendments? What was their response?

5. The WLGA said in relation to these proposals "…it does bring into question why this did not form part of the extensive eighteen month policy debate and evidence gathering sessions on the Measure that

have been undertaken within the Assembly on which the WLGA were asked to give evidence"

What explanation can the Minister offer to the WLGA on this point? Why did he not inform them of the amendments until the week they were published?

Principle of abolishing bodies by Order

6. The Wales Governance Centre expressed concerns that merging local authorities – which are created by statute – by Order contravened the principle that bodies created by statute should be abolished by statute. What is the Minister's response to this?

7. Can the Minister explain why he did not consider bringing forward these proposals in a separate Measure?

If the need is so that he can respond speedily, why has the Minister chosen to pursue a process that would take longer than the option already open to him of an emergency Measure?

8. Why does the Minister consider it appropriate that new local authorities can be created by subordinate legislation when previously the creation of new local authorities during local government reorganisation has been a matter for primary legislation?

9. The House of Lords Constitution Committee thinks that "where the further use of such powers[Henry VIII powers] is proposed in a Bill, we have argued that the powers must be clearly limited, exercisable only for specific purposes, and subject to adequate parliamentary oversight." Does the Minister consider that the amendments as drafted:

a) Clearly limit the powers of the Minister;

b) Make it clear that they can only be used for specific purposes;

c) Are subject to adequate oversight by the Assembly?

Power to make amalgamation orders

10. In amendment 91 (2), why do Welsh Ministers only have to be satisfied that "effective local government is not likely to be achieved…". Would the Minister consider amending this to "effective local government has not been achieved"?

11. Again under amendment 91(2), before they can use the power to amalgamate, Ministers must satisfy themselves that a number of other

powers, that already exist, are not likely to achieve effective local government in an area. Does this mean that Ministers could make an amalgamation order without having relied on these powers if they think such reliance would be unsuccessful? Why is that?

12. The requirement in amendment 91 (2) is solely in relation to the use of powers. Why is there no requirement to be satisfied in relation to specific performance criteria? Why is there no definition of what constitutes "effective local government"?

What do you mean by "effective local government"?

Will you consider amendments to clarify the meaning of "effective"

Will you consider amendments to specify performance criteria that must be met?

13. The requirement in amendment 91 (2) also requires a Minister to be satisfied in relation to "a local government area". Why is there no requirement to have regard to the impact of a forced amalgamation on the local authorities that are not ineffective?

14. Why should one or two effective local authorities be "punished" for the failures of another local authority?

What consideration has the Minister given to the possibility that the "ineffective" authority will drag down the effectiveness of the other authorities and how does he propose to address this?

15. Why does the amendment specify that "two or three" local government areas may be amalgamated? What were the criteria for deciding that no more than three local government areas could be amalgamated?

16. The WLGA claims that progress is being made in integrating functions in big service areas and that "constant emphasis on local government boundaries in this context is meaningless". What is the Minister's response to this viewpoint?

If the Minister disagrees with the WLGA, and believes instead that local government boundaries are meaningful, why is has the Government left it until this stage to address the issue?

17. Is it the intention of the Minister to make use of these powers if and when they are secured? What is the earliest time they might be needed?

18. Given that the Minister has stated that his intention is not to conduct a "wholesale review" how does he propose spelling out his objective rationale and criteria for amalgamation so that individual proposals are not perceived as arbitrary?

Should these criteria be set out on the face of the Measure?

Procedures applicable to an amalgamation order

19. Why did the Minister feel that a super affirmative procedure was appropriate in this case? Is it a recognition that the power is a very considerable one to be exercised by Order?

20. Amendment 98(2) states that "Welsh Ministers must consult such persons as appear to them to be representative of persons or interests affected by the proposals. Would this include the population of the local authority areas in question?

21. In amendment 98(2), why is there no specific requirement to consult the local authorities that would be affected, and community councils within them?

Who else would be consulted and will the Minister consider setting out those to be consulted on the face of the Measure, particularly the local authorities concerned?

Electoral Matters

22. Would the Minister still proceed if there was strong opposition to a proposed amalgamation from the population of the local authority areas in question?

23. Can the Minister explain what powers he currently has in respect of electoral arrangements and the Local Government Boundary Commission for Wales ("the Commission")?

24. How do the amendments to the Local Government Act 1972, in amendment 97, affect the relationship between Ministers and the Commission?

Has the Commission been consulted on these proposals? What was its reaction?

25. Directions issued by Ministers in 2009 indicated that 30 councillors was the minimum appropriate size for a local authority and 75 the maximum. What is the basis for these figures and do the amendments enable Ministers to alter them?

How would the number of Members and ward boundaries of any new local authority, created by an amalgamation, be decided?

Transitional and Financial Issues

26. When local government was reorganised in the 1990s, the Local Government (Wales) Act 1994 contained statutory provisions for transition, including a residuary body.

Why do you think this is not needed under your proposals? Why is it appropriate for transitional issues to be dealt with by Regulations rather than on the face of the Measure?

27. What assessment has the Minister made of the costs of any amalgamations?

28. Would the Minister expect that any proposals for amalgamation placed before the Assembly should include an assessment of the costs arising from transition?

Would he consider bringing forward amendments to make this requirement more specific?

Atodiad G – Ymateb y Gweinidog ar 16 Chwefror

Carl Sargeant AC/AM
Y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol
Minister for Social Justice and Local Government

Llywodraeth Cynulliad Cymru
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Eich cyf/Your ref
Ein cyf/Our ref: LF/CS/026/11

Janet Ryder AM
Chair
Constitutional Affairs Committee
National Assembly for Wales
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15 February 2011

Dear Janet

Proposed Local Government (Wales) Measure

Thank you for your letter dated 10 February following my appearance before your Committee to discuss the Government amendments to the proposed Local Government (Wales) Measure that will give Ministers the power to amalgamate local authorities. You attached a list of questions which you asked me to address.

I and my officials answered several of the questions during the meeting on 10 February. I shall not repeat myself, but refer you and your staff to the official transcripts. The attached paper presents my comments on the questions we did not reach or cover sufficiently in the meeting.

Yours sincerely

Carl Sargeant

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Proposed Local Government (Wales) Measure

Constitutional Affairs Committee – follow-up questions

Addressed in the meeting on 10 February

Can the Minister explain why he did not consider bringing forward these proposals in a separate Measure? If the need is so that he can respond speedily, why has the Minister chosen to pursue a process that would take longer than the option already open to him of an emergency Measure?

Since introduction of the proposed Measure a number of issues have emerged which have demonstrated that local authorities are unwilling or failing to collaborate. We need to use the opportunity of this measure as it is conceivable, given the developments which I mentioned in the meeting, that the powers may need to be used before the new Assembly would be able to consider a new Measure.

Using a new measure to achieve what can be achieved through the current measure and has been ruled as in order would be costly and time consuming.

I chose this option over the emergency Measure procedure precisely because I wanted to give Assembly Members the opportunity and the time to consider and debate the proposals in some detail. The emergency measure process condenses all the stages into one day and so curtails the time for consideration and debate by Assembly Members. That may be appropriate in circumstances of great urgency – but that is not the case with these matters.

Why does the Minister consider it appropriate that new local authorities can be created by subordinate legislation when previously the creation of new local authorities during local government reorganisation has been a matter for primary legislation?

The precedents referred to involving primary legislation concerned the wholesale re-organisation of local government across the whole of Wales, namely the Local Government Act 1972 and the Local Government (Wales) Act 1994.

Wales has not had to contemplate more localised re-organisation of local government covering only a part of the country, so we have neither precedent nor mechanism. I consider that a measure would be appropriate for wholesale re-organisation, but would be a heavy-handed mechanism for a more localised re-organisation involving only two or three authorities.

I believe that an order, subject to super affirmative procedure is a more appropriate mechanism, offering high levels of consultation and Assembly scrutiny without pre-occupying the whole Assembly with an issue which is primarily of interest to one part of Wales.

The House of Lords Constitution Committee thinks that “where the further use
of such powers[Henry VIII powers] is proposed in a Bill, we have argued that the powers must be clearly limited, exercisable only for specific purposes, and subject to adequate parliamentary oversight.” Does the Minister consider that
the amendments as drafted:
a) Clearly limit the powers of the Minister;
b) Make it clear that they can only be used for specific purposes;
c) Are subject to adequate oversight by the Assembly?

I believe that the provisions fulfil these criteria. The circumstances in which the power may be used are set out clearly in subsection (2) of what was amendment 91; the Minister must demonstrate that he or she is satisfied that the tests introduced by that provision have been met. The power of the Minister is further limited by the power to amalgamate being limited to two or three local authorities per order. I believe that the super affirmative resolution procedure as set out in what was amendment 98 will give Assembly Members more than adequate oversight.

In amendment 91 (2), why do Welsh Ministers only have to be satisfied that “effective local government is not likely to be achieved…”. Would the Minister consider amending this to “effective local government has not been achieved”?

Again under amendment 91(2), before they can use the power to amalgamate, Ministers must satisfy themselves that a number of other powers, that already exist, are not likely to achieve effective local government in an area. Does this mean that Ministers could make an amalgamation order without having relied on these powers if they think such reliance would be unsuccessful? Why is that?

The requirement in amendment 91 (2) is solely in relation to the use of powers. Why is there no requirement to be satisfied in relation to specific performance criteria? Why is there no definition of what constitutes “effective local government”? What do you mean by “effective local government”? Will you consider amendments to clarify the meaning of “effective”. Will you consider amendments to specify performance criteria that must be met?

The Welsh Ministers will not be able to make an order for amalgamation at random or at whim. The Welsh Ministers must demonstrate that amalgamation is needed to achieve effective local government – and that this could not be achieved by exercising specified powers already available to them in the 2009 Local Government Measure.

The Welsh Ministers would have to show that they had applied the tests introduced by subsection (2) – in the document to be laid before the Assembly explaining the proposals which is required under the super affirmative resolution procedure.

The term “effective” has long been used in legislation relating to local government. The Local Government Act of 1972 enables the Welsh Commission (i.e. the Local Government Boundary Commission for Wales) to make recommendations in the “interests of *effective* and convenient local government”. Notwithstanding these criteria, in the 1972 Act there is no express definition of the term within the legislation. The Local Government Wales Measure 2009 provides that local authorities must secure continuous improvement in the exercise of its functions and this includes its “strategic effectiveness”.

The phrase “not likely to achieve” indicates that Welsh Ministers must make a judgement as to whether, on the means available to them, effective local government is not likely to be achieved. The Welsh Ministers will have to use their judgement; there is a test to be applied; this is a standard format in legislation when powers are given to Ministers and the terminology used is appropriate to the situation. The expression “likely to be achieved” which necessarily entails an element of judgement, is used in a number of contexts in legislation eg, section 99 of the Local Transport Act 2008.

The test for Welsh Ministers in deciding that it is necessary to make an amalgamation order in order to achieve effective local government is laid down in subsection (2) – the test is that Ministers must be satisfied that the other methods open to them laid out in that section are not likely to achieve effective local government.

The Welsh Ministers will have to spell out the rationale and how the test was met in the explanatory document accompanying a proposal to amalgamate which must be laid before the Assembly under the procedure set down in amendment 98

I am satisfied that the wording of what was amendment 91 is appropriate, but will consider whether any changes would clarify matters.

The requirement in amendment 91 (2) also requires a Minister to be satisfied in relation to “a local government area”. Why is there no requirement to have regard to the impact of a forced amalgamation on the local authorities that are not ineffective? Why should one or two effective local authorities be “punished” for the failures of another local authority? What consideration has the Minister given to the possibility that the “ineffective” authority will drag down the effectiveness of the other authorities and how does he propose to address this?

The questions seem to imply that amalgamation will be a knee-jerk reaction to circumstances where an authority had failed completely and that greater collaboration between authorities does not bring benefits and opportunities to all concerned. This is unrealistic – not least because it would be irresponsible

of the Welsh Ministers to knowingly wait until an authority had failed before proposing amalgamation.

I would expect that a proposal for amalgamation would follow a period of increasing collaboration between the authorities concerned. Application of the tests set out in subsection (2) require there to have been exploration of greater collaboration before amalgamation can be considered. It would not be a bolt from the blue – so the process of integration across many areas, to the advantage of both local authorities, would be already quite advanced.

The amalgamation provisions also allow for a process of transition from the old authorities to the new. The arrangements are based very much on those applied for the re-organisation which followed the 1994 Act, which worked very well and smoothly.

Why does the amendment specify that "two or three" local government areas may be amalgamated? What were the criteria for deciding that no more than three local government areas could be amalgamated?

That was my judgement as to what was appropriate in the context of a proposal for *localised* re-organisation of local government. I find it difficult to perceive of a circumstance where it would be effective to amalgamate four or more local authorities.

The WLGA claims that progress is being made in integrating functions in big service areas and that "constant emphasis on local government boundaries in this context is meaningless". What is the Minister's response to this viewpoint?
If the Minister disagrees with the WLGA, and believes instead that local government boundaries are meaningful, why is has the Government left it until this stage to address the issue?

I would agree that some progress is being made, but it is not enough. There have been several disappointments in recent months – which I mentioned in the meeting and already referred to in this note. If local authorities are reluctant to take action themselves, then I must do so.

Is it the intention of the Minister to make use of these powers if and when they are secured? What is the earliest time they might be needed?

These powers may be commenced by order no sooner than two months after the approval of the measure by Her Majesty. They would be available for use once commenced. I am not able to speculate as to when the Welsh Ministers might need to use them.

Given that the Minister has stated that his intention is not to conduct a "wholesale review" how does he propose spelling out his objective rationale and criteria for amalgamation so that individual proposals are not perceived as arbitrary?

Should these criteria be set out on the face of the Measure?

Each proposed amalgamation will be different as it will depend on the authorities concerned and will be conditioned by the circumstances in those authorities. The tests set out in subsection (2) to amendment 91 will provide the rationale and the criteria for each proposal – and these will have to be set out in the explanatory documents required of Ministers under the super affirmative procedure.

Why did the Minister feel that a super affirmative procedure was appropriate in this case? Is it a recognition that the power is a very considerable one to be exercised by Order?

Yes. The super affirmative procedure will provide for a high level of public consultation, allow the opportunity for Assembly scrutiny in plenary and committee and require approval of the final order by the Assembly itself.

Amendment 98(2) states that "Welsh Ministers must consult such persons as appear to them to be representative of persons or interests affected by the proposals. Would this include the population of the local authority areas in question?
In amendment 98(2), why is there no specific requirement to consult the local authorities that would be affected, and community councils within them?
Who else would be consulted and will the Minister consider setting out those to be consulted on the face of the Measure, particularly the local authorities concerned?

The wording imposes requirements which are phrased in broad terms, on the basis of which Ministers would have to consult the local authorities affected (including community councils), WLGA, local representative bodies and local people. Making the wording more specific could mean important interests were left out.

The super affirmative procedure will require Welsh Ministers to set out in the explanatory document the details of the required consultation. If the consultation was wanting in any way, it would be exposed at that point.

Would the Minister still proceed if there was strong opposition to a proposed amalgamation from the population of the local authority areas in question?

I am not prepared to speculate on how I or a future Minister might respond to the different reactions to any potential future proposal as each decision would have to be assessed in light of all the relevant circumstances of a particular case.

Can the Minister explain what powers he currently has in respect of electoral arrangements and the Local Government Boundary Commission for Wales ("the Commission")?

Section 59 of the Local Government Act 1972 enables Welsh Ministers to issue directions for the guidance of the Commission in conducting reviews, including reviews of electoral arrangements. These directions can include guidance in relation to the allocation of single or multi-member divisions, a target councillor to elector ratio and a timetable for completion of the review.

How do the amendments to the Local Government Act 1972, in amendment 97, affect the relationship between Ministers and the Commission?

They should not change them at all. Welsh Ministers already have powers to direct the Commission to review local government areas, including a review of electoral arrangements in consequence of proposals for changes in local government areas, under section 54 of the 1972 Act.

Has the Commission been consulted on these proposals? What was its reaction?

The Commission has not been consulted.

Directions issued by Ministers in 2009 indicated that 30 councillors was the minimum appropriate size for a local authority and 75 the maximum. What is the basis for these figures and do the amendments enable Ministers to alter them?

The minimum and maximum numbers of councillors were in the Directions issued by the then Secretary of State for Wales for the previous electoral reviews conducted by the Commission which began in 1996 and ended in 2001. There was no compelling policy or other reasons to alter them for this set of electoral reviews. Fresh directions could be issued to the Commission which need not replicate the figures in the 2009 directions.

How would the number of Members and ward boundaries of any new local authority, created by an amalgamation, be decided?

If there was not time for a review by the Commission before the first election to the new/shadow authority, Assembly Government officials would need to propose electoral divisions to Welsh Ministers. This was what happened in the 1994/96 reorganisation – but by Welsh Office officials – because the first elections were too soon for the Commission to conduct a review. They proceeded then to carry out a review following the elections. If there were time for a review before the first elections, the Commission would make proposals to Welsh Ministers on councillor numbers and their distribution.

When local government was reorganised in the 1990s, the Local Government (Wales) Act 1994 contained statutory provisions for transition, including a residuary body.
Why do you think this is not needed under your proposals? Why is it appropriate for transitional issues to be dealt with by Regulations rather than on the face of the Measure?

There is a proposed new section which provides for transitional provision – together with supplementary, incidental, consequential and saving provision. This provides a power to cover transitional issues, some of which are listed in the section. It might well be possible for transitional issues to be included in the amalgamation order and the proposed section provides for that, but the regulation-making power is considered prudent in case it is not possible to include everything in the order.

We do not believe a residuary body will be needed. An amalgamation between two or three unitary authorities is much more straightforward than what happened because of the 1994 Act. There will be only one "successor authority" covering the whole area of the abolished authorities whereas in 1994 each of the abolished counties might have three or more successors.

What assessment has the Minister made of the costs of any amalgamations?

Would the Minister expect that any proposals for amalgamation placed before the Assembly should include an assessment of the costs arising from transition?
Would he consider bringing forward amendments to make this requirement more specific?

This is an enabling power. It is not possible at this stage to make an assessment of the cost implications of using the power. These would depend on so many different factors depending on the authorities concerned.

I would expect each amalgamation to produce large-scale savings – arising from reductions in the number of councillors, staff of corporate services, procurement, economies of scale.

Estimates of costs, including transition costs, would be included in the proposals for amalgamation and would be included in the explanatory document which must be produced under the super affirmative procedure.

Atodiad H – Llythyr y Gweinidog ar 11 Chwefror at Gadeirydd y Pwyllgor Cyllid

Carl Sargeant AC/AM
Y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol
Minister for Social Justice and Local Government

Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref: LF/CS/024/11

Angela Burns AM
Chair
Finance Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

11 February 2011

Dear Angela

Proposed Local Government (Wales) Measure

Thank you for your letter dated 2 February about the Assembly Government's amendments tabled to the proposed Local Government (Wales) measure which would enable the Welsh Ministers to amalgamate local authorities in Wales.

You expressed your members' concern about such wide ranging amendments being introduced after Stage 1 scrutiny. The amendments are a response to increasing urgency of the need to provide effective tools to drive forward collaboration between local authorities. This was recognised by Legislation Committee 3 in their Stage 1 report which stated that:

"*given the drive towards collaboration across public services generally, we believe that the proposed Measure needs to be strengthened to provide a more effective tool to compel collaboration in circumstances beyond the current limited powers in the 2009 Measure."*

The proposed amendments would give the Welsh Ministers a power to amalgamate two or three local authorities (and no more). In the current financial climate, local authorities need to work together and collaborate much more closely with their neighbours. In the last year it has become clear that some local authorities are more willing to do this than others. To save money and protect frontline services, we need the tools to make this happen.

The Local Government Measure provides us with a timely opportunity to secure powers which, it has become obvious, are necessary. If we did not take the opportunity to introduce the amendments at this stage, we would need to start the whole process of timetabling and

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introducing a new Measure following the elections in May. This is likely to take another 12 months– it is conceivable these powers may need to be used before then.

This is an enabling power – it would enable Welsh Ministers to bring forward a proposal for amalgamation at some point in the future. It is not possible at this stage to make an assessment of the cost implications; these would depend entirely upon the circumstances of each proposed amalgamation. We would certainly anticipate each amalgamation producing large-scale savings arising from changes in corporate services, procurement savings and the economies of scale which would flow from the amalgamation of two or three authorities into one. The savings would depend on many different factors depending on the authorities concerned.

Looking to the future, the use of this power will be governed by the Assembly's super affirmative resolution procedure. This means that when proposing to use the power, Welsh Ministers must consult with the representatives of those affected before laying before the Assembly a document explaining the proposals, the results of the consultation and an initial draft order. Details of all the costings and projected savings would be included in the consultation proposals and in the explanatory document to be placed before the Assembly when the initial draft order is laid. It would be an opportunity for Assembly committees to "call in" the proposal during the 60 day period for detailed scrutiny.

I hope my explanation of the procedures has provided re-assurance about how we would use the power and the information we would examine and publicise.

Yours sincerely

Carl Sargeant AM/AC

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Tystion

Rhoddodd y tystion a ganlyn dystiolaeth lafar i'r Pwyllgor ar y dyddiadau a nodir isod. Gellir gweld trawsgrifiadau llawn o'r sesiynau tystiolaeth lafar yn www.cynulliadcymru.org

3 Chwefror 2010

David Lambert	Cymrawd Ymchwil, Canolfan Llywodraethiant Cymru
Marie Navarro	Cydymaith Ymchwil, Canolfan Llywodraethiant Cymru

10 Chwefror 2010

Carl Sargeant AC	Y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol
Frank Cuthbert	Pennaeth Tîm Democratiaeth Llywodraeth Leol, Llywodraeth Cymru
Deborah Richards	Cynghorydd Cyfreithiol, Llywodraeth Cymru

Rhestr o'r dystiolaeth ysgrifenedig

Ystyriodd y Pwyllgor y dystiolaeth ysgrifenedig a ganlyn. Gellir gweld yr holl dystiolaeth ysgrifenedig yn llawn yn www.cynulliadcymru.org

Dogfen	*Cyfeirnod*
Llythyr gan Gadeirydd y Pwyllgor at Carl Sargeant AC, y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol	CA(3)-03-11(p1)
Ymateb y Gweinidog	CA(3)-03-11(p2)
Y Mesur Arfaethedig ynghylch Llywodraeth Leol. Papur a baratowyd gan Ganolfan Llywodraethiant Cymru, Ysgol y Gyfraith Caerdydd	CA(3)-03-11(p3)
Gwybodaeth ychwanegol gan Ganolfan Llywodraethiant Cymru, Prifysgol Caerdydd	CA(3)-04-11(p1)
Gwybodaeth ychwanegol gan Carl Sargeant AC, y Gweinidog dros Gyfiawnder Cymdeithasol a Llywodraeth Leol	CA(3)-05-11(p2)