



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

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

Dydd Llun, 2 Chwefror 2015
Monday, 2 February 2015

Cynnwys **Contents**

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introduction, Apologies, Substitutions and Declarations of Interest

Tystiolaeth mewn Perthynas â'r Bil Lefelau Diogel Staff Nyrsio (Cymru)
Evidence in Relation to the Safe Nurse Staffing Levels (Wales) Bill

Tystiolaeth mewn Perthynas â'r Ymchwiliad i Ddeddfu yn y Pedwerydd Cynulliad
Evidence in Relation to the Inquiry into Making Laws in the Fourth Assembly

Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order 17.42 to Resolve to Exclude the Public from the Meeting

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

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

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

Angela Burns

Alun Davies

Ceidwadwyr Cymreig (yn dirprwyo ar ran Suzy Davies)
Welsh Conservatives (substitute for Suzy Davies)

Llafur
Labour

David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
William Powell	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Simon Thomas	Plaid Cymru The Party of Wales

Eraill yn bresennol
Others in attendance

Fiona Davies	Cyfreithiwr, Llywodraeth Cymru Lawyer, Welsh Government
Mark Drakeford	Aelod Cynulliad, Llafur (y Gweinidog Iechyd a Gwasanaethau Cymdeithasol) Assembly Member, Labour (the Minister for Health and Social Services)
Dr Jean White	Prif Swyddog Nyrsio Cymru Chief Nursing Officer for Wales
Kirsty Williams	Aelod Cynulliad, Democratiaid Rhyddfrydol Cymru Assembly Member, Welsh Liberal Democrats

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

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

Dechreuodd y cyfarfod am 13:29.
The meeting began at 13:29.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introduction, Apologies, Substitutions and Declarations of Interest

[1] **David Melding:** Good afternoon, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I have received apologies from Suzy Davies, but I'm delighted to welcome Angela Burns as a substitute this afternoon. Welcome, Angela; we look forward to your contributions. I'll start with the usual housekeeping announcements. We do not expect a routine fire drill, so, if we hear the fire alarm, please follow the instructions of the ushers, who will help us leave the building safely. Switch all electronic devices to silent, please, or off. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there's a translation on channel 1. Should you need to amplify our proceedings, you can do that on channel 0.

13:30

Tystiolaeth mewn Perthynas â'r Bil Lefelau Diogel Staff Nyrsio (Cymru)
Evidence in Relation to the Safe Nurse Staffing Levels (Wales) Bill

[2] **David Melding:** Item 2, then, is evidence in relation to the Safe Nurse Staffing (Wales) Bill. I'm delighted to welcome the Minister, Mark Drakeford, who is the Minister with portfolio responsibility. Minister, do you want to introduce your team?

[3] **Y Gweinidog Iechyd a The Minister for Health and Social Gwasanaethau Cymdeithasol (Mark Drakeford):** Diolch yn fawr, Gadeirydd. Gyda mi y prynhawn yma mae Fiona Davies, ar yr ochr gyfreithiol, a Jean White, Prif Swyddog Nyrsio Cymru. **Services (Mark Drakeford):** Thank you very much, Chair. With me this afternoon is Fiona Davies, on the legal side, and Jean White, the Chief Nursing Officer for Wales.

[4] **David Melding:** Welcome to you all I think you are familiar with our proceedings, Minister, so I will start the questioning. We're not going to go into the policy here, but it would be useful if you could indicate whether the purpose of the Bill is something you support and, if so, whether you think this legislation is the best way of achieving that aim.

[5] **Mark Drakeford:** Thank you, Chair. Well, if the key purpose of the Bill is to ensure that we have the right number of nurses on our hospital wards, then that's clearly an ambition that we share as a Government. Do we need this legislation to achieve that ambition? I think it is arguable that a great deal of what the Bill seeks to achieve could be achieved through other tools and levers that the Government could deploy for this purpose. But, I'm open-minded about the possibility that the Bill could add to that repertoire and strengthen it, and will be hoping to engage constructively with the process as it develops to take a view on that.

[6] **David Melding:** Thank you; that's helpful. I'll now ask Alun Davies to take us through the next set of questions.

[7] **Alun Davies:** Yes, thank you for that. Following on from that initial question, reading through the legislation, there seems to be quite a lot in that Bill about duties to produce reports and the rest of it. Do you believe that it gives you a new power that you require in order to meet the ambitions, which you've said you share, within this Bill?

[8] **Mark Drakeford:** Well, Chair, as I said, I think there are already available to Welsh Government a series of actions that we have taken already and could potentially strengthen further in the future in order to achieve the ambition of the Bill. I think the Member in charge will have done something very useful in generating a debate around the topic and helping us in Government to look at the range of tools that we have already and whether we might be able to deploy them in any new way in support of the ambition. So, as I said, we could do a lot already and are doing a lot already. I'm genuinely open-minded as to how this Bill, suitably amended, and so on—I have to be clear that, as the Bill is currently drafted, the Government would not be able to support it, so there would have to be some changes introduced to be in that position—but, I'm open-minded about the possibility, if those things were achieved, that this wouldn't strengthen our ability to achieve our ambition in the way that Alun just suggested.

[9] **Alun Davies:** You've been extraordinarily diplomatic, Mark—Minister—I appreciate that. In terms of the structure of the Bill, and looking at the Executive function and Executive role in terms of delivering safe nursing on the wards across Wales, at the moment, the Bill—I think it's section 10A—limits any potential staffing ratio to adult acute wards. Are you comfortable with that approach, or would you like to see a different approach?

[10] **Mark Drakeford:** Well, the Bill begins, I believe, in those parts of the NHS where the evidence that can be drawn on in order to secure the right number of nurses on the ward is strongest. I think there are some definitional issues, even in the terms that were just used about adult in-patient wards and about the term 'acute hospital'. So, there are some definitional matters here that would need to be explored and strengthened. I take the purpose of the Bill to be to start in medical and surgical wards; that's where the evidence base is strongest and it's what the Royal College of Nursing who are, of course, strong supporters of the Bill, confirmed in front of the health committee last week. If I've understood that right—that the Bill would require us to begin in those contexts offers the possibility, through regulation, to add further settings beyond that—I think that's the right approach. It starts in the right place and it leaves other settings until the evidence base is stronger.

[11] **Alun Davies:** Well, I guess you'd have those powers without this legislation.

[12] **Mark Drakeford:** We already provide a great deal of advice to the NHS through the acuity tool, which was developed by the chief nursing officer here in Wales and heavily drawn on in the NICE guidance. There's a long way we can go with the powers we already have.

[13] **Alun Davies:** Could you make that guidance statutory without this legislation?

[14] **Mark Drakeford:** Well, Chair, when I said that one of the things that I think the Bill has already usefully done is to make us think about the way we deploy the existing powers we have, then one possibility would be to do as they have already done in Scotland and that is to make all guidance mandatory. We're not at the point to do that yet, because the acuity tool and all the guidance we've given in medical and surgical wards is still being tested, still being worked out, but we're very near the point now, I think, where we would have a widespread agreement in the NHS that the tool is fit for purpose and, at that point, making the guidance mandatory in the way that Mr Davies has suggested would be a course of action that the Government could take independently of this Bill.

[15] **Alun Davies:** Independently of the Bill. But, at the same time, potentially, this Bill could be used to give that tool the force of law.

[16] **Mark Drakeford:** Yes.

[17] **Alun Davies:** Okay. I'll leave it at that.

[18] **David Melding:** Simon.

[19] **Simon Thomas:** Diolch, Gadeirydd. I droi at rai o'r manylion yn awr, yn y Bil, Weinidog, mae'r Bil yn gosod allan y dyletswyddau'n helaeth iawn ar eich cyfer chi fel Gweinidog a'r Gweinidogion a ddaw, i roi canllawiau i gyrff y gwasanaeth iechyd. Rydym newydd glywed bod modd rhoi canllawiau eisoes. Beth, felly, mae'r ffordd y mae'r Bil yn ymwneud yn ei wneud i'ch helpu chi yn y meysydd yma? Mae'r Bil yn fanwl iawn yn gosod allan pa feysydd y dylech chi osod canllawiau yn eu cylch, ac mae hefyd yn gosod allan yn eithaf manwl yn is-adran (6) y dulliau rydych chi i fod i'w defnyddio i gyrraedd y nodau hynny. A yw

Simon Thomas: Thank you, Chair. Turning to some of the detail in the Bill, Minister, the Bill does set out the duties very extensively for you as Minister and forthcoming Ministers, to give guidance to health service bodies. We've heard that it is possible to issue guidance already. So, how would the way in which the Bill relates to this area help you in that regard? The Bill does set out in very detailed terms how you should issue guidance, and it also sets out in a great deal of detail in subsection (6) the methods that you should use to achieve those aims. Is that appropriate for what you're trying to do at present?

hynny'n gydnaws gyda beth sy'n digwydd ar hyn o bryd?

[20] **Mark Drakeford:** Diolch, Simon, **Mark Drakeford:** Thank you, Simon, for the am y cwestiwn. question.

[21] Chair, I think the Bill gets the basic approach right here in leaving to guidance a range of important factors that would need to be taken into account in achieving its objectives. My own view at the moment is that some of the way in which the Bill sets out its approach to guidance is over-prescriptive. So, you will know that in the amendment that it seeks to make to section 10 of the 2006 Act, in the fifth part of that, it says 'guidance', and then it has a long list of things that the guidance must cover. Now, I believe that that approach is over-prescriptive. I think you could argue that what the Bill should do is to set out the requirement for guidance and then leave it to the process of consultation and the actions that would flow from that to decide what it contains. Even if an argument could be mounted for going further than that, then I think that the long list of things under part—I always get my 'parts' and 'clauses' and things mixed up, Chair, so I apologise for that, now; is this clause 5?

[22] **Ms Davies:** It's subsection 5.

[23] **Mark Drakeford:** Subsection 5. The long list of things in subsection (5) is over-prescriptive as it stands and should be illustrative of the things that guidance could cover, rather than insisting that it must. To give you just one example of where I think that will lead us into quite a lot of difficulties: at the moment it says that the guidance

[24] 'must be designed to ensure that the requirements of the duty are met on a shift-by-shift basis'.

[25] That's (f) there. Chair, I invite you to imagine a position where six nurses come on duty at 7 o'clock in the morning. Two of them are working until 1 o'clock. Two of them are working until 4 o'clock. Two of them are doing a 12-hour shift that day and are there until 7 o'clock in the evening. Where does the shift-by-shift cut-off point come in that sort of way? The chief nursing officer would explain to you that it's a great deal more complex than that as well. So, I understand the spirit behind that clause, but, as currently framed, as an absolute must, I think it would end up making difficulties rather than solving them in the way that I'm sure the guidance would be designed to do.

[26] **Simon Thomas:** Mae'n amlwg, o'r hyn roeddech yn ei ddweud gynnu fach, y byddai rhai o'r gwelliannau y bydddech chi eisiau eu hystyried cyn edrych ar y Bil yn ei gyfanrwydd, felly, yn troi o gwmpas rhai o'r manylion hyn. Mae'r rhain wedi'u hysgrifennu ar wyneb y Bil, wrth gwrs—y pethau sydd i fod mewn canllawiau yn benodol. Mae yna ddull arall yr ydych chi newydd ei awgrymu, wrth gwrs, sef eich bod yn rhoi dyletswydd ar Weinidogion, ac wedyn bod yna broses gan Weinidogion i lunio canllawiau, yn unol â beth yw'r sefyllfa ar lawr gwlad, fel petai. Ond, wrth gwrs, nid yw'r Cynulliad yn cael gweld hynny wedyn o reidrwydd. Felly, beth fyddai eich teimladau chi ynglŷn â mynd ag egwyddor y Bil ymlaen—ai mewn canllawiau neu mewn **Simon Thomas:** It's clear, from what you said earlier, that some of the amendments that you'd like to consider before looking at the Bill as a whole, therefore, are based on some of these details. These have been set out on the face of the Bill, of course—the things that are meant to be in guidance specifically. There is another method that you've just suggested, of course, which is that you place duties on Ministers, and then that there's a process for Ministers to put together guidance, in accordance with what the situation is at the grass-roots level. But, of course, the Assembly can't see that necessarily, then. So, what would your feelings be about taking this principle of the Bill forward—should that be done in guidance or in regulations? Of course,

rheoliadau? Wrth gwrs, mae rheoliadau yn dod gerbron y Cynulliad mewn rhyw ffordd neu'i gilydd.

[27] **Mark Drakeford:** Wel, i ddweud y gwir, Gadeirydd, yn fy marn i, rwy'n meddwl y byddai rhai pethau y mae'r Bil yn eu rhoi i ganllawiau yn well i'w gweld ar wyneb y Bil. Mae rhai termau sylfaenol—. Fel arfer, fel rwyf wedi clywed—a gall Fiona esbonio lot yn fwy na fi—mae'r termau sylfaenol, fel arfer, yn cael eu diffinio ar wyneb y Bil, ac mae lot o bethau yn y Bil yma y mae'r Bil yn dweud y bydd hi lan i'r canllawiau i'w diffinio o ran beth yn union rŷm ni'n mynd i'w wybod mas o'r termau. Felly, mae rhai pethau, rwy'n meddwl, y mae'n well i'w diffinio ar wyneb y Mesur, ac mae pethau eraill, rwy'n meddwl, y byddai'n well inni eu gwneud trwy'r canllawiau, achos rŷm ni yn siarad am faes hyblyg dros ben, lle mae pethau yn newid. Mae gwasanaethau yn newid, mae'r cyd-destun yn newid, mae triniaethau yn newid. So, i fynd yn ôl bob tro i *regulations* i'w hail-wneud nhw, bob tro mae rhywbeth yn newid—. Nid wy'n meddwl mai hynny yw'r ffordd orau i'w wneud e. So, gellir cryfhau rhai pethau ar wyneb y Bil—y termau sylfaenol—ond, o ran y pethau eraill, y canllawiau yw'r ffordd orau i'w wneud e.

[28] **Simon Thomas:** Rydych chi newydd roi eich bys ar rywbeth roeddwn yn mynd i'w ofyn i chi yn benodol, sef mai peth rhyfedd yw cael Bil sy'n dwyn y teitl 'lefel staffio diogel' ond lle nad oes unrhyw ddiffiniad ar wyneb y Bil o beth yw lefel staffio diogel, na chwaith ddiffiniad o nyrsio. Felly, mae'r Bil yn diffinio yn fanwl iawn rai o'r pethau y mae'n rhaid i chi eu gwneud i gyrraedd y sefyllfa yma, ond nid yw'n diffinio beth yw'r sefyllfa yr ŷch chi i fod i'w chyrraedd.

[29] **Mark Drakeford:** Ac, wrth gwrs, mae'n anodd dros ben i ddyfeisio canllawiau heb wybod yn union beth rŷm ni'n trial ei greu yma.

[30] Chair, I could ask Fiona Davies, if you are willing, just to say a few words on some of the terms that we think might be better defined on the face of the Bill itself, rather than through guidance, as currently envisaged.

[31] **David Melding:** We'll take it now. It does cut a bit across another question, but that's not a problem. I think it's better now in the flow of evidence.

regulations do come before the Assembly in some way or another.

Mark Drakeford: Well, to be honest, Chair, in my view, there are certain things that the Bill provides for in guidance that would be better to be included on the face of the Bill. There are some basic terms—. Usually, as I've heard—and Fiona can explain this far better than I can—the basic terms are, usually, defined on the face of the Bill, and there are a number of things in this Bill that the Bill states will be down to the guidance to actually define in terms of exactly what we're going to understand by the terms. So, there are certain things that are more effectively defined on the face of the Bill, and there are others that I think should be achieved through guidance, because we are talking about an extremely flexible area, where things do change. Services change, the context changes, treatments change. So, to return on all occasions to regulations and to remake them, every time there is a change, is not, I think, the best way forward. So, certain aspects can be strengthened on the face of the Bill—the basic terms—but, in terms of other aspects, I think that guidance is the best way forward.

Simon Thomas: You've just put your finger on something that I was going to ask you specifically, which is that it's a strange thing to have a Bill that has the title of 'safe staffing levels' but has no definition on the face of the Bill of what a safe level of staffing is, or a definition of nursing either. So, the Bill defines in great detail what you have to do to reach this situation, but it doesn't define what the situation that you wish to reach is.

Mark Drakeford: And, of course, it is very difficult to draw up guidance without knowing exactly what we're trying to achieve here.

[32] **Mark Drakeford:** Thank you very much.

13:45

[33] **Ms Davies:** We'd want the definitions on the face of the Bill to be completely clear so that everyone's certain what the guidance is intended to capture. So, what we'd be looking for clear definitions on are 'adult in-patient wards' and 'acute hospitals'—what type of wards exactly are they going to capture there? The term 'health service body' at the moment includes Welsh Ministers, which means the Welsh Ministers issuing guidance to themselves, which is an unusual situation—

[34] **Simon Thomas:** It could be necessary. [*Laughter.*]

[35] **Ms Davies:** So, they're the type of terms we want clarity on. Also, on sections 10A(1)(a) and 10A(1)(b), we just want to confirm completely what these duties are meant to capture, how they'd be measured and how we can tell whether they've been delivered or not.

[36] **Simon Thomas:** That's fine. Over to the other questions, I think.

[37] **David Melding:** I don't know whether there's anything you want to add, Angela. We've covered the points that—

[38] **Angela Burns:** Yes. I think, actually, my only question, which may be slightly cheeky, is actually to ask you why you think this Bill has come in this format, because, as we all know from legislation that's come before the Assembly in the past, we always have a very clear list of definitions on, I think, almost 99% of the Bills. So, it's very unusual for a lawyer working with a Member to have drafted a Bill in this format, and I'm just curious to try to understand—and I will be asking the Member this question in a moment—from your point of view: do you have a view as to why it might have come like this, because this is a real departure from our normal legislative procedure?

[39] **Ms Davies:** Yes. What I would say is that the office of the legislative counsel in the Welsh Government has developed a house style and best practice on how to make the legislation as user-friendly and clear and certain as possible. So, because it hasn't been drafted by them, it doesn't follow that house style. It's been drafted externally, and so a different approach has been taken that the Government may not necessarily have followed itself.

[40] **Angela Burns:** No, I do take that point, it's just that, even in other private Members' Bills that have come before us, we've always had a very clear list of definitions, and so it is quite marked by its absence. But, otherwise, Chair, I think, to be honest with you, all the questions that I wanted to ask have already been fleshed out, and I think you've made clear your uneasiness over some of the differentiation between guidance and what's on the face of the Bill.

[41] **David Melding:** Thank you. William.

[42] **William Powell:** Diolch, Gadeirydd. Minister, earlier, you referred to the level of prescription within this Bill, some of which you find useful, others which you maybe think excessive. In that context, would you comment further on the inclusion in section 3 of the duty placed upon Welsh Ministers with respect to reviewing the operation and effectiveness of the legislation, and, in particular, the frequency of reviews, which, as I understand it, initially, is one year and then in a two-year cycle?

[43] **Mark Drakeford:** Thank you. Chair, can I preface what I am going to say by making it clear that, if a Bill of this sort were to get the support of the National Assembly, then I completely agree that a review mechanism would be necessary? So, I'm agreeing with the purpose of section 3. I think I have three current questions in my mind about it, as currently drafted. One is the timing issue, to which Bill Powell has referred. It's barely a year since this National Assembly agreed to a three-year reporting cycle for the NHS in Wales, and here we are introducing a reporting cycle on a different basis and cutting across that basis. I think it would be important to have the cycles consistent with one another and, given that everything else is now operating on that three-year cycle, I think it would be sensible for this review arrangement to operate on the same basis. Shall I mention my other two issues at this point, Chair?

[44] **William Powell:** Please.

[45] **Mark Drakeford:** Now, we head into another discussion about the prescriptive nature of the Bill as currently drafted, because here we have a long list of matters that are said to

[46] 'constitute indicators of safe nursing including, but not limited to—'.

[47] Well, for me, we would have to be confident that the items listed in it tell us something genuine about the number of nurses on a ward in a hospital at any one time, and I don't think that every item on this list would stand up to that test. If I could just take (b), for example: 'readmission rates'. I'm admitted to the hospital in Cardiff; I get treated for whatever condition took me there and I'm discharged. I go on holiday to Colwyn Bay, I fall over and break my leg and I'm admitted to Ysbyty Gwynedd. I've been readmitted. What possible connection is there between my readmission to Ysbyty Gwynedd and the number of nurses that were on the ward during the time that I was in Cardiff for a completely different condition? I really don't see that readmission rates are a sensible measure of whether you have the right number of nurses on the ward at any one time. The chief nursing officer, I'm sure, can go through the list more extensively with you. So, at the moment, not all the measures on this list are sensible ones.

[48] And then my third issue is this: that I think to get support from the Government, the review mechanism would have to be proportionate. The NHS generates an enormous amount of data all the time. A review mechanism that captures data that are already in the system to test the effectiveness of the Act would be one thing. An approach to review that generated a huge new industry of data collection, taking nurses away from providing safe care in order to fill in forms for the purpose of this Bill, would be something different. So, they would have to be indicators that tell you something genuine and the ability to report on them would have to be proportionate, and the time frame over which those reports were made would need to be consistent with the other time frames we use in the NHS.

[49] **William Powell:** Thank you, Minister, for that. Earlier, one of your team mentioned section 10A(1)(b)—the second core duty—namely maintenance of staffing ratios referred to in that section being dependent on the issuing of guidance. Minister, will you comment on whether, in your view, specific guidance does, in fact, need to be made for that section to be commenced, and, I emphasise, only after that guidance has been issued? And, if so, what, in your view, would the impact be of the introduction of such minimum ratios?

[50] **Mark Drakeford:** Well, in answer to the first question, Chair, I cannot imagine how that duty could be made to operate in advance of guidance as to how it should operate. So, I think the Member's absolutely right—the guidance would have to be there first in order for that duty to be effectively discharged.

[51] The second question takes me to a different sort of answer, because, from my point of view, there is a problem with 10A(1)(b), and it's in the word 'minimum'. It's not an approach that the National Institute for Health and Clinical Excellence, for example, has recommended in the guidance that they have provided. I think the word 'minimum' takes us into all sorts of difficulties. I can think of other words—'safe', for example, to take the title of the Bill—and 'necessary for patient care'; I can imagine that. But the word 'minimum' takes you into a world of rigid numerical formulas that I think would make the Bill very difficult to operate. It would be very difficult to reflect the changing circumstances on wards at any one time. It could lead you into all sorts of unintended and perverse outcomes; we've seen this in other parts of the world where you have a numerical minimum. Organisations that have fixed budgets do things like this—they get rid of expensive advanced practitioner nurses and employ more nurses who don't have the skills that are necessary to meet the needs of people on that ward. They sack cleaners, who you need in order to make sure that healthcare-acquired infections are driven down, because there's no minimum number of cleaners required in the law, and you employ nurses in their place.

[52] So, there's all sorts of unintended and possibly perverse outcomes from the word 'minimum' that we would need to see addressed, and I think it would be better addressed within the spirit of the Bill if that word could be reconsidered.

[53] **William Powell:** Chair, finally from me, if I may: Minister, could you please explore with us the implications for the Welsh Government of implementing the Bill, if it were successful, particularly in terms of developing secondary legislation and, then, wider guidance?

[54] **Mark Drakeford:** Well, there would be implications for the Welsh Government, but they're not, as it seems to me, disproportionate to the intention of the Bill. If the Bill were to gain the support of the National Assembly, there would be the need to consult on guidance and there would be the need to develop guidance. The only regulation-making power in the Bill is one for Government to exercise in the future, should any Government wish to add to the settings where safe nursing ratios would be applied through the Bill. I don't see that happening in the short run. It requires the affirmative procedure, which I think is right. So, there are implications for Government, but I don't think they're disproportionate to the purpose.

[55] **William Powell:** I'm grateful, thank you.

[56] **David Melding:** To clarify that latter point, then, to extend the provision of the Bill beyond adult in-patient wards, you think it is appropriate to do that by regulations, should you or a future Minister, at that stage, feel it appropriate.

[57] **Mark Drakeford:** Chair, I think it is a sensible approach. I think the affirmative procedure is right as well. As I say, the evidence for doing so in other settings is embryonic, at best. We'd certainly want to see how the Act worked out in acute medical and surgical settings first, but it does allow Governments the flexibility to bring forward other settings in the future, should the evidence be there to support that.

[58] **David Melding:** I think—oh, Simon.

[59] **Simon Thomas:** Mae gennyf jest un cwestiwn olaf. Pe bai'r Bil, fel ag y mae, yn mynd drwyddo, nid wyf yn gweld yn y Bil unrhyw ddiffiniad sydd yn rhoi syniad imi o beth yw gofal nyrsio a beth yw ystyr hwnnw, a beth, yn wir, yw ystyr 'nyrs' bellach yn y **Simon Thomas:** I just have one final question. If the Bill, as it stands, were to be passed, I don't see in the Bill any definition that gives me an idea of what nursing care is and what that means, and what, indeed, 'nurse' means now as the profession

ffordd mae'r proffesiwn yn datblygu. A oes yna ddiffiniad mewn Deddfau eraill, felly, mae Llywodraeth Cymru yn dibynnu arnynt er mwyn gweithredu'r Bil yma, ynteu a fydd angen ychwanegu at yr hyn rydych chi eisoes wedi ei drafod o ran diffiniadau i fod yn glir beth mae'r Bil yn anelu ato?

develops. Is there a definition in other legislation, perhaps, that the Welsh Government depends on to implement this Bill, or will there be a need to add to what you have just discussed in terms of definitions to be clear about what the Bill is aiming towards?

[60] **Mark Drakeford:** Well, this is one of the questions that we've been exploring, as to whether there are definitions in other parts of the statute book that we could rely on. As far as I am aware—but others will know better than me—there is, for example, no definition in statute of what an acute hospital is, so we couldn't just pick the term up here and define it elsewhere. There is no definition of an adult in-patient ward that is simply translatable—

[61] **Professor White:** But there is a definition of 'registered nurse', as that's a protected title. That's probably the only piece of legislation that is very clear about what it is—

[62] **Simon Thomas:** Is it clear that this refers to registered nurses?

[63] **Professor White:** It says 'registered nurses' in 10A(1)(a)—

[64] **Simon Thomas:** Oh, so in 10A—in the insertion.

[65] **Professor White:** Yes.

[66] **Simon Thomas:** Okay.

[67] **David Melding:** I think that covers the questions we wish to put to you, Minister. Is there any other material you want to bring to our attention or a view you have, at the moment, on the drafting of the Bill?

[68] **Mark Drakeford:** No, thank you. Everything, I thought, was covered in the questions.

[69] **David Melding:** Thank you very much. We're grateful for your time this afternoon.

[70] We'll continue our evidence session, then, on the Safe Nurse Staffing Levels (Wales) Bill. I'm delighted to welcome the Member in charge, Kirsty Williams.

[71] **Kirsty Williams:** Thank you.

[72] **David Melding:** Welcome this afternoon—and the legal adviser on this to the Member in charge, Joane Jackson. If I can ask you, then, Kirsty, what the purpose of this Bill is, and why you believe it requires this legislative vehicle.

14:00

[73] **Kirsty Williams:** Thank you very much. Good afternoon to all Members. The purpose of the Bill is to provide an overarching duty on health boards to ensure a safe, appropriate level of nurse staffing in all settings, and a statutory basis for the delivery of minimum ratios and accompanying guidance that would affect adult acute in-patient settings. Ultimately, it's to improve patient care for those living in Wales, and improve working conditions for nursing staff, ensuring that they are working with the appropriate number of colleagues on a ward.

[74] Why is legislation necessary? First of all, there is strong academic evidence that supports the principle of improved patient outcomes and avoidance of harm, with a direct relationship between the number of staff on a ward and the number of patients they are required to look after. We know, looking at some of the experiences across the border in England, such as the number of reviews that have happened following Mid Staffs, for instance, what can happen to patient care if there is a lack of qualified nurses on wards. So, we know that, potentially, there can be a huge amount of harm created if staffing levels are not correct, and we do know that, despite progress that has been made here in Wales, local health boards do not comply with guidance that is already issued by the Chief Nursing Officer for Wales. So, the chief nursing officer already issues guidance to local health boards about ratios for nurse to patient during the daytime, and during the night-time, and although we have seen moves to compliance against those ratios, health boards do not meet them on a consistent basis. Therefore we think—‘I think’; not the royal ‘we’—I think that the only way of achieving that is actually creating a statutory basis on which health boards have to implement guidance issued by Welsh Government.

[75] **David Melding:** Thank you for that answer. Just to put on record, are there any competence issues that you’re aware of? Have you had any discussions with the Welsh or UK Governments regarding the competence of this Bill?

[76] **Kirsty Williams:** The explanatory memorandum, Chair, makes clear my view that the Bill is within the legislative competence, specifically paragraph 9 of Part 1 of Schedule 7 to the Government of Wales Act 2006, which covers ‘Health and health services’. So, I believe it is within competence. I’ve had no discussions with UK Government. That’s part of the process that I know this committee has been interested in—how you can facilitate conversations with backbenchers, whether it be—

[77] **David Melding:** It’s easier Government to Government, though.

[78] **Kirsty Williams:** Yes, Government to Government is easier. There’s no real mechanism to allow backbenchers, either in Westminster or here, to have those discussions. I’ve had a number of meetings with the Minister for Health and Social Services here in Wales.

[79] **David Melding:** Thank you. Alun.

[80] **Alun Davies:** Thank you very much. I’m interested in the basis of this Bill. In answer to the Chair’s opening questions, you said that this was creating a statutory basis for delivering safe staffing, and then you went on, in answer to the second question, to talk about the Mid Staff’s experience and the academic evidence that you’ve received that a safe staffing is required. I don’t think people necessarily disagree with that analysis. However, this Bill doesn’t create that, does it? What this Bill does is to create a new power for a Minister to issue guidance. The Bill doesn’t, unless I’ve misread it, define what that safe staffing is, and neither does it compel that to actually happen.

[81] **Kirsty Williams:** What the Bill seeks to achieve in the first instance is an overarching requirement on health bodies to ensure that nurses are deployed in sufficient numbers to provide—to ‘enable’, as the Bill states,

[82] ‘the provision of safe nursing care to patients at all times’.

[83] Safe nursing in an overarching way will look different depending on the nature of the nursing involved. So, it’s very difficult to define exactly what safe nursing looks like. So, that would look very different in a tertiary centre, looking after acutely unwell people, as to even a district general hospital ward that is looking after surgical patients. So, what we’re trying to

do is enshrine the principle of safe staffing across the board, but it's difficult to define 'safe' in the context of health services because that will vary from setting to setting.

[84] What the Bill then seeks to do is to build upon that overarching method by creating a triangulated approach to what safe staffing looks like in acute wards. So, it seeks to achieve the Welsh Ministers issuing guidance with regard to ratios, but it goes beyond that because what we know is that numbers alone—numbers alone—can't define what safe staffing is. So, it creates a minimum ratio because strong academic evidence demonstrates that if you drop below a certain number, things can become unsafe, but safe staffing also means the use of acuity tools. So, safe staffing has to reflect the nature of the patients that are on the ward on any one day. What might be a safe staffing ratio one week may not be the same the next week because we could be dealing with sicker patients. And it also has to take into consideration the professional judgment of the nurse in charge of a ward as well. So, what we're trying to create here is a triangulated approach to what safe staffing looks like because numbers alone can't make it happen necessarily.

[85] **Alun Davies:** I think that answers the issue about complexity that the Minister's actually made himself. That does suggest that primary legislation probably isn't the place to deal with these matters. If a Bill creates a single duty for a Minister to issue guidance—. You said in answer to the first question that guidance hadn't been sufficient to actually deliver on the safe staffing that you've outlined. I don't think anybody actually disagrees with the principle; whether this Bill actually delivers that is the question we're trying to answer, which is a different question. So, if existing guidance isn't delivering it, why should future guidance, which this Bill creates, answer that question as well?

[86] **Kirsty Williams:** I think you're right. You're perfectly correct: there is no debate about whether there is a direct correlation between safe staffing and patient outcomes. I think that's taken as a given. The issue is then how best to achieve that. We know that the advice that is currently being given isn't necessarily followed by the local health boards. So, that's why I think we have to have a statutory underpinning of that advice and that guidance, because that guidance has existed for a number of years now and still the LHBs do not comply with it. It seems to me that only by making it statutory and having this legal underpinning will LHBs prioritise this piece of work. You and I, Alun, have sat on health committees of this Assembly and previous Assemblies long enough; we know that what health managers prioritise are the statutory requirements. They prioritise their spending first on what they are required to do by law, and everything flows from that, so I think that's why the principle of having statutory guidance is absolutely key in making it happen, and it also empowers patients and staff to take a challenge. What we know from evidence that's been collected recently into the review of the complaints procedure in NHS Wales is that both staff and patients often feel massively reluctant in coming forward to make a challenge when they regard staffing as being unsafe. This gives them a legal basis, potentially, to create case law to go to law to challenge these principles and to hold to account—.

[87] **Alun Davies:** I'm afraid I disagree with you completely there, Kirsty. What it does is provide a duty on the Minister to issue guidance. That's what it provides—

[88] **Kirsty Williams:** Yes, and then the—

[89] **Alun Davies:** Sorry, if I can just finish—.

[90] **Kirsty Williams:** Yes, of course.

[91] **Alun Davies:** You're supposed to answer questions; you've got to let us ask them occasionally. What this Bill does—. Nobody disagrees with the outcome, okay? It's the process by which we get to that outcome that we're debating and discussing today. Now, this

Bill doesn't provide for what you've just described. What it does is mandate or compel the Minister to issue guidance and then it compels health boards to report. That is what it actually does. And, in answer to an earlier question, you explained the complexities of different nursing scenarios and different care settings, and everybody agrees with and recognises that. The point I would put you is that surely a better approach would be a Minister issuing guidance to health boards, which could be more detailed, and then giving those areas of guidance statutory authority. Wouldn't that be a more powerful tool than a Bill that simply compels the Minister to issue guidance?

[92] **Kirsty Williams:** But, with all due respect, that's not what the Bill does. If I refer you to proposed new section 10A(1), it says:

[93] 'Each health service body in Wales must in exercising its functions—

(a) have regard to the importance of ensuring that registered nurses are deployed in sufficient numbers'

[94] There is an overarching duty placed upon the health boards to be able to demonstrate to patients and to staff that they have complied with this duty. So, there is an overarching—

[95] **Alun Davies:** No. They've had regard to it, not complied with it. Have regard—

[96] **Kirsty Williams:** Well, have to regard to it. They would have to account for themselves, in any case that was brought against them, how they had set about to have regard to it, and they would be challenged on that, in a way, at the moment, people can't challenge them. It then goes on to create the circumstances by which Welsh Ministers can issue or will issue guidance to those bodies, then, to demonstrate how they should comply with that overarching duty, and that's the difference. There's the overarching principle and then the requirement on Ministers to publish guidance to demonstrate, so that health boards will have to demonstrate that they have gone through these measures to arrive at the nurse staffing levels that they had on a ward at any one time to have due regard to section 10A(1).

[97] **David Melding:** Okay. I think we've established the evidence there. Your interpretation may be slightly different, but I think we have given that a full test. Do you want to take us on to any of the other questions?

[98] **Alun Davies:** No, I'm okay.

[99] **David Melding:** Well, I will then, in terms of limiting the application to adult in-patient wards and acute hospitals. Why isn't it more expansive? Why isn't it all NHS settings where patients are receiving nursing care?

[100] **Kirsty Williams:** The first thing to remember, of course, is the overarching duty for safe staffing in all settings, but you're right that the issue around Ministers issuing statutory guidance does fall to those wards. It does so because, at present, that's where the evidence is strongest. That's where we can clearly demonstrate the linkages between nurse-to-patient ratios and safe staffing. We also know from the work of Francis and Keogh, and the 'Trusted to Care' report in Abertawe Bro Morgannwg area, that those wards were the wards where, potentially, we had a problem, Chair. What we do allow for in the Bill is for Welsh Ministers, at a later date, to bring in guidance of a similar nature to other settings. We know that the Chief Nursing Officer for Wales and the National Institute for Health and Care Excellence are looking currently at issues of staffing in the community, so district nurses—. So, that evidence base for other settings is currently being worked on at the moment and it would be my hope and expectation, when we have a clear evidence base for safe staffing ratios in those fields, that the Government could utilise the provisions within this Bill to issue guidance in

those areas. We are starting where we know the problem is potentially the greatest now and where we have the evidence, and I hope that I've futureproofed the legislation by allowing Welsh Ministers the ability to introduce guidance in other settings, as and when the evidence becomes available to them.

[101] **David Melding:** And that might be five years, 10 years hence or more immediate than that.

[102] **Kirsty Williams:** No. My understanding is that it's this year, later on this year, in 2015, that NICE intend to publish guidance, for instance, on maternity settings. We've already had some guidance from NICE on accident and emergency staffing levels, just last month, in January. So, this work is ongoing and is imminent—

[103] **David Melding:** I sense from the—. Oh, I beg your pardon, if you weren't finished.

[104] **Kirsty Williams:** I'm not clear on when the CNO Wales's work on community nursing is due to report, but it's ongoing work now.

[105] **David Melding:** We were just looking at the architecture of all this—you know, the policy implications are for others. But, I sensed from the Minister that he thought it was quite a distance away before other health settings would be captured.

[106] **Kirsty Williams:** Well, I know NICE is working on publishing, as I said, on maternity later on this year. A&E has already been published and the CNO is working on community nursing ratios and evidence on that basis at the moment, as are individual health boards, for instance, such as Powys local health board.

[107] **David Melding:** I'll just ask this final one. The use of the affirmative procedure marks that this is still quite an important part of the process, and you've thought accordingly that the affirmative would be, you know, the right level.

[108] **Kirsty Williams:** I think it's important for the Assembly as a whole to have a say on that guidance, yes.

[109] **David Melding:** Alun, I saw Angela first, and then I'll come to you.

[110] **Angela Burns:** Thank you for this, but can I just ask you, given your very clear explanation of why you felt it would be difficult to put the ratios of nurses on the face of the Bill, because they would change according to how sick the people were et cetera, and therefore you need a reasonable duty placed on the health boards, and given the complexity of that triangle, as you described it, did you consider—and, if so, on what grounds would you dismiss—instead of making this a Bill that's about the levels of nurses, making it a Bill that's about the outcome that you would expect the correct level of nurses to have achieved? Would that be easier to encapsulate in a Bill and get statutory powers for, making it more outcomes based, rather than—

14:15

[111] **Kirsty Williams:** Oh, gosh.

[112] **Angela Burns:** Sorry, does that make sense? I'll take my earpiece out; I can't hear myself properly.

[113] **Kirsty Williams:** Well, I'm not sure if it does. You're right; there is always a danger. I think we become obsessed with inputs and sometimes we should be more worried about

what comes out—

[114] **Angela Burns:** Sorry, I'm trying really hard not to stray into policy, because my question is asking, really, why you took this direction with this Bill rather than trying to achieve the same methods—. Rather than trying to go through every hospital, every acute ward, every different change in patient health at any given time during a week or a month or a year, and asking hospitals to flex that, would there have been an easier way of looking at the outcome that you would have expected for treatment on an acute ward?

[115] **Kirsty Williams:** We've tried to look at outcomes in the last section of the Bill, which looks at a way of trying to monitor the effectiveness of it. So, I have spent a great deal of time looking at what I would hope the outcomes to be, how you could measure the effectiveness of it by the list, and in fact the Minister, I know, is questioning, actually, whether such a long list is appropriate and is actually proportional. So, we have spent a great deal of time focusing on looking at outcomes for patients, but I don't know whether we could have legislated for it the other way round.

[116] **Angela Burns:** I think that what this question is trying to drive at is: if you are looking at making sure this can be an effective Bill that has the appropriate teeth, it's still—. Even though you may have issued statutory guidance, I just wonder whether, unless there's that complete tie-in, will health boards not say, 'Ah, yes, but, actually, in week 52 of this year, no-one was really that sick on that ward, so we didn't need that level of nursing', and therefore you're having to suck in lots of people to make clinical judgments. Or have I missed that little bit?

[117] **Kirsty Williams:** First of all, we know that there is a minimum below which care potentially can be compromised. That is why the CNO already issues those numbers, and issues those guidelines. We know already there's a level below which—. What I was concerned about is not actually the minimum, but actually being able to flex up when the demands are placed upon the service, hence the triangulated approach. When I initially started, the Bill was called the 'Minimum Nurse Staffing Levels (Wales) Bill', and it was as a result of consultation exercises, talking to the professionals, that actually we developed the triangulated approach, because it became clear that safe staffing is more than just about numbers. That's why we included the acuity tool, which the Welsh Government has introduced, as well as the professional judgment of the nurse in charge, so that it actually didn't become a minimum numbers game, because that alone will not ensure safe staffing. Outcomes are very much at the forefront of our mind, hence I think it's important to try and evaluate the effectiveness of legislation, how you test yourself, and that's why we've got the reporting mechanisms, and what I regard as a comprehensive list of outcomes in the last section of the Bill.

[118] **Angela Burns:** Okay.

[119] **David Melding:** Alun, did you want to follow up on a matter?

[120] **Alun Davies:** It was just a point of clarification. In answer to your questions, Kirsty outlined the NICE timetable for issuing guidance. I interpreted that, Kirsty, as you indicating that you would expect to see this legislation commenced in those settings at a time that follows the issuing of the NICE guidelines.

[121] **Kirsty Williams:** That would not be for me; the Bill is written in such a way as to allow the Welsh Government, as it saw fit—. My understanding, from what the Minister has said in the Chamber, and, I believe, from what he said to you earlier, is that, as and when the evidence is accumulated for other settings, this Bill gives them the opportunity to introduce ratios and guidance in those areas. That would be a matter for Ministers to explain to the

Chamber and the people of Wales as to why, or why not, they didn't feel it appropriate to bring forward guidance at the time. I've tried to futureproof the Bill because we know that evidence is being gathered, and we know that health services in Wales are changing. The direction of travel—the Minister's clear intention—is that more services are delivered in community, out of district general hospitals, so we've tried to take account of that in drafting the ability of Welsh Ministers to bring forward legislation at a later date.

[122] **David Melding:** We can reflect on this in our report, because, you know, if the Minister never brings forward regulations, then the Bill would get stuck where it is at the moment in terms of adult in-patient wards. We can indicate that that's something perhaps other committees that are looking at the policy might want to follow up.

[123] **Kirsty Williams:** I appreciate that care is delivered in lots of areas; it's about creating a system where we don't let perfection become the enemy of the good, you know. We've got to start somewhere. We know that there is a potential problem here, and, if we start here, we've futureproofed it as well for the Minister to do the right thing in other areas.

[124] **David Melding:** Simon.

[125] **Simon Thomas:** Diolch, Gadeirydd. Yn gyntaf oll, hoffwn ofyn i chi pam rydych chi wedi dewis y derminoleg sydd gennych yn y Bil. Yn fy marn i, yr unig ffordd o greu cyfraith sy'n rhoi hawliau fyddai rhoi'r cymarebau ar wyneb y Bil. Rwyf wedi clywed y dystiolaeth pam nad yw hynny'n digwydd. Felly, mae'r Bil yn rhoi hawl i Weinidogion i gyhoeddi canllawiau statudol. Nawr, mae'r Bil yn dweud, bob tro, rwy'n meddwl, fod yn rhaid i'r cyrff priodol dalu sylw i'r canllawiau statudol hynny, ond, wrth roi tystiolaeth i'r pwyllgor gynau bach, fe wnaethoch chi ddefnyddio'r term 'sylw dyledus', *due regard*, ond, a dweud y gwir, 'sylw' yn unig sydd ar wyneb y Bil. A oes gwahaniaeth yn eich barn chi rhwng 'sylw' a 'sylw dyledus', a pham rydych chi wedi dewis un yn hytrach na'r llall?

Simon Thomas: Thank you, Chair. First of all, I would like to ask you why you have chosen the terminology you have within the Bill. In my opinion, the only way of creating law that gives rights would be to put the ratios on the face of the Bill. I have heard the evidence why that isn't happening. Therefore, the Bill gives Ministers the right to publish statutory guidance. Now, the Bill says, every time, I believe, that the appropriate bodies have to give regard to that statutory guidance, but, in giving evidence to the committee earlier, you used the term 'due regard', but, to tell the truth, 'regard' is the only thing written on the face of the Bill. Is there a difference, in your opinion, between 'regard' and 'due regard', and why have you chosen one rather than the other?

[126] **Kirsty Williams:** Sorry, I misspoke; the Bill is 'regard'. It's a turn of phrase. I would expect health bodies to 'have regard to'.

[127] **Simon Thomas:** Is 'due regard' a stronger term? Did you consider it?

[128] **Kirsty Williams:** Joanest.

[129] **Ms Varney-Jackson:** Without being flippant, they mean the same thing, i.e., 'pay attention to'.

[130] **Simon Thomas:** Diolch. Mae hynny'n ein gadael ni, felly, gyda sefyllfa—. Nid wyf eisiau mynd dros yr hen dir y mae Alun eisoes wedi mynd drosto, ond rydym mewn sefyllfa lle nad yw hynny, a dweud y gwir, yn trosglwyddo o'r newydd, ond mae'n

Simon Thomas: Thank you. That leaves us, therefore, with a situation—. I don't want to rehearse old ground that we have just gone over with Alun, but we are in a situation where that does not, to be honest, transfer new provisions, but it publishes guidance.

cyhoeddi canllawiau. A gaf jest droi at y canllawiau am eiliad, felly? Achos, yn isadran (5), rydych yn gosod allan fanna yn y Saesneg (a) i (h) sawl peth sydd yn orfodol i'r Gweinidog eu cynnwys yn y canllawiau. Ond, yn wahanol i rywle arall yn y Bil, nid oes sôn fanna am unrhyw beth arall mae'r Gweinidog yn teimlo sy'n briodol i'w roi yn y canllawiau. A ydych yn meddwl, felly, bod hynny'n rhy haearnaidd o safbwynt rhoi canllawiau statudol ar waith? Mae'n diffinio'n agos iawn beth mae'r Gweinidog i fod i'w gwneud, ond nid yw, yn eich geiriau chi, yn *futureproofing*. Nid yw yno.

May I turn to the guidance for a moment? In subsection (5), you set out in English (a) to (h) several things that the Minister must include in the guidance. But, in contrast to elsewhere in the Bill, there is no mention made there of anything else that the Minister feels is appropriate to include in the guidance. Do you think, therefore, that that is too restrictive in terms of implementing statutory guidance? It defines very closely what the Minister is supposed to do, but it does not, in your words, futureproof. That is not there.

[131] **Kirsty Williams:** I think what we have tried to do is create a scenario that allows for flexibility. If the ratios were on the face of the Bill, any changes to medical technology, how we do our care, how we do our nursing, would require a whole new legislative process. But, at the same time, what I've tried to do in subsection (5) is to try and define very closely my expectations of the Minister. I've sat looking at legislation previously brought forward by Government that doesn't clearly define the expectations of the Minister, and I've been uncomfortable with that. It's been completely left to the Minister's discretion. What I've tried to do here is describe in subsection (5) what I regard as the basic elements that would make that guidance worthwhile. So, I have tried to get this balance between the need for flexibility and also the need to be clear for Members voting what they are voting for. So, rather than just some nebulous phrase of guidance, Members have a very clear expectation of what that guidance is, and I've tried to get that balance. That's what the approach has been—flexibility, but also, to be honest, Simon, holding the Minister's feet to the fire and satisfying myself that the guidance will do the job.

[132] **Simon Thomas:** So, 5(a) to 5(h) is not an exhaustive list, in your opinion. It is what the Minister must do, but he or she could be issuing the statutory guidance in other areas as well.

[133] **Kirsty Williams:** Yes. I mean, my understanding is there's nothing in the legislation that would preclude the guidance covering other areas, but, for me, the listing of 'must' gave me some confidence that the guidance would be fit for purpose, would include the right elements, and would give to Assembly Members whom I was asking to support this Bill a greater idea of what that guidance would contain, when sometimes we have no idea what guidance will look like and we're asked to vote on it. So, it's about trying to get that balance, that balance of flexibility but also clarity for Members, when I'm asking them to vote.

[134] **Simon Thomas:** Yn y cyd-destun hwnnw, wrth gwrs, rydych yn sôn am roi rwy o syniad i Aelodau Cynulliad beth sydd ynghlwm wrth y gwaith yma, ond, yn y pen draw, na fydd Aelodau Cynulliad yn gweld canllawiau statudol—yn ffurfiol, beth bynnag; mae modd holi mewn pwyllgor, ac ati, wrth gwrs, ond ni fyddwn yn eu gweld nhw yn statudol. Rydych wedi cyffwrdd ar hyn gynau fach, rwy'n meddwl, ond hoffwn i jest ei gael ar gofnod. Gan nad oes modd rhoi'r cymarebau creiddiol yma ar wyneb y Bil, pam nad ydych chi wedi dewis

Simon Thomas: In that context, of course, you talk about giving Assembly Members a better idea about what is involved in this work, but, ultimately, Assembly Members will not see statutory guidance—formally at least; they can ask in committee, of course, but we won't be seeing them on a statutory basis. You've touched on this earlier, I think, but I'd like to have it on record. As there is no way of putting these core ratios on the face of the Bill, why haven't you chosen regulations through the affirmative procedure, for example, in order to

rheoliadau drwy ddull cadarnhaol, dywedwch, ar gyfer delifro'r canllawiau—rwy'n defnyddio'r gair heb ei ddefnyddio yn yr ystyr gyfreithiol fanna—yn hytrach na chanllawiau statudol? Achos mae'n ymddangos i mi, o edrych ar gyfraith yn gyffredinol, mai canllawiau statudol yw'r arf gwannaf oll sydd gyda ni tu fewn i gyfraith y Cynulliad.

implement the guidance—I'm using the word without using it in the proper legal sense there—instead of statutory guidance? Because it seems to me, from looking at law in general, that statutory guidance is the weakest tool that we have within Assembly law.

[135] **Kirsty Williams:** Again, it's a question of balance. I did consider the issue of regulation versus guidance for those very reasons, but, in the end, given the need for flexibility in a field of practice that is changing constantly—. You know, how we do our nursing today is very different from how we did our nursing five years ago; the nature of the patients that nurses are looking after now, as we know, is very different from what we were looking after even five years ago. So, again, it's this constant battle to achieve flexibility, which allows the law to respond to situations in hospitals, in the profession, versus a statutory procedure that would be required to come back and back and back, which, potentially, could leave us in a situation where you had unsafe practices potentially going on in hospitals by virtue of needing a legislative process to come back. The regulations that allow Government to flex and to change their guidance in respect to current best practice and the way that the regulations, I think, potentially, would be unhelpful—. It's a constant battle, but, on balance, I think safety is best delivered by the flexibility of the guidance, rather than regulation.

[136] **Simon Thomas:** And in that regard then, and the Chair will stop me if I'm straying too far into policy here, but looking at 5(h) again and also subsection (6), which are the methods that the Minister must use in this guidance, is there anything there—. I know this will be statutory guidance, which is different, but is there anything there that the chief nursing officer is not issuing at the moment to health boards?

[137] **Kirsty Williams:** No. The difference is very much in having a statutory underpinning. So, the CNO does already give guidance on nurse ratios.

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

[139] **Kirsty Williams:** The Welsh Government has included the acuity tool, but there's no statutory basis for use of that acuity tool either. So—

[140] **Simon Thomas:** So, very roughly speaking, you would expect the guidance to be similar to the guidance that's issued now, but it would be on a statutory footing if the Bill were to be passed?

[141] **Kirsty Williams:** Yes, because, for instance, another thing we haven't talked about today is protected time for nurses to undergo training and for the nurse in charge of the ward to be supernumerary, so not included in the ratio. Again, this is all good practice that is issued by the CNO but isn't routinely delivered by local health boards. Again, it's that important principle of making it statutory that is the big difference.

[142] **Simon Thomas:** Ocê. Diolch.

Simon Thomas: Okay. Thank you.

[143] **David Melding:** Angela?

[144] **Angela Burns:** Thank you, Chair. I appreciate that you may feel that you're repeating yourself again, because it is unusual to see a Bill come forward without definitions.

[145] **Kirsty Williams:** Okay.

[146] **Angela Burns:** And so, just picking up on Simon's point again, you've left a lot of this to the guidance element. Why didn't you put some of the key ratios or why didn't you put some of the key definitions like 'an acute hospital'—or terms—actually as a definition on the face of the Bill, so that it is something that Assembly Members can scrutinise now rather than leaving to regulations at a later date, which we will be unable to?

14:30

[147] **Kirsty Williams:** I know that this has been an issue. What's important to remember is this Bill actually fits into the basis of the National Health Service (Wales) Act 2006. So, actually, this fits into that existing legislation. With many of the definitions that I think the committee might have concerns about not being on the face of this legislation, those terms are defined in that piece of legislation, which this Bill fits into. Joaneast can probably give a better legal definition of that, but for instance, 'nurse' is not defined here because, actually, it's defined in the National Health Service (Wales) Act 2006, which this legislation slots into. Therefore, those definitions are already within that existing legislation, but Joaneast will probably explain it better than me.

[148] **Ms Jackson:** New section 10A(5)(d) provides Welsh Ministers with the power to define the terms that would apply to the duty in 10A(1)(b). Now, some of the terms that are used in 10A(1)(b) already have a definition. For example, as a result of the consultation on the original draft, we changed the definition of 'nurse' to 'registered nurse' because, in the context of 'nurse', 'registered' has a definition in the Interpretation Act 1978. As Kirsty said, because the Bill also inserts provisions in to the National Health Service (Wales) Act 2006, where appropriate, it picks up the definitions already set out in the Act, such as the definition of 'patient', which is already defined in the 2006 Act in section 206. Where there are phrases such as 'healthcare support worker', 'acute' et cetera, which will require definition, it is not appropriate, we feel, to include these on the face of the Bill, because they are sector specific and have room for nuance and adjustment in the relation of the experience of that sector. Nursing levels will need to respond extremely quickly to changes and the best means of achieving that, we feel, is to leave the definitions to be decided by Welsh Ministers on the basis of any expert evidence they receive.

[149] **Angela Burns:** Okay. I'm going to have to push you a little bit on this, because I do see one or two references to the read-across to the 2006 Act. So, are you saying then, for the record, for those of us who aren't experts in this field, that the 2006 Act very clearly defines what an acute hospital is, for example?

[150] **Ms Jackson:** I don't think it defines the term 'acute hospital', and that's the sort of term I refer to that is suitable, being a sector-specific term, for definitions included in guidance. I understand that the guidance already issued by the chief nursing officer and NICE actually covers matters such as that.

[151] **Kirsty Williams:** So, for clarity, 'acute' is not defined in the 2006 Act. The CNO and NICE do have a definition of 'acute hospitals': adult acute settings in acute hospitals, as defined by the CNO and NICE, are medical and surgical wards that provide overnight care for adult patients in acute hospitals.

[152] So, there are definitions that already exist, and I am open to the suggestion, if Members felt that the legislation would be more complete if some of those definitions were included on the face of the Bill. That's part of this process for me to reflect on.

[153] **Angela Burns:** I think that, for me, in terms of just a piece of legislation, whilst

everyone can admire and support the policy, the intent of the Bill, it just seems to me to be a little bit random, if you like, to leave so much of it to regulations being made by Welsh Ministers. Part of the hypothesis for having this Bill is that there are regulations already out there and in place that the Welsh Ministers are not either enacting toughly enough or able to persuade health boards to adhere to, in order to achieve the aims that you're trying to, if you like, strengthen, by making them more statutory, with this Bill. Therefore, to have a set of regulations that we as a National Assembly won't then be able to view is leaving, if you like, the poacher back in charge of the chicken coop. That's a real mixed series of metaphors there, but I hope I've made my point. [*Laughter.*]

[154] **David Melding:** [*Inaudible.*]—it's interesting that both the Member in charge and the Minister, in fact, have used exactly the same definition of 'acute setting', so, you know, there is some definition there.

[155] **Kirsty Williams:** Yes. 'Acute setting' does exist. As I said, it's designed by the CNO and NICE. You know, I'm open to suggestions, if a definition of 'acute setting' would enhance the Bill. I would definitely reflect on that. I just want to be clear that there is nothing in the 2006 Act that would allow the Minister to do this. This is new; this would be new provision—or the read-across from the 2006 Act is the definition. So, there's nothing in 2006 that would allow the Ministers to do this that they're not already doing. This is new. The only read-across would be that the definitions, which some Members have been concerned about, are included in the 2006 Act. Therefore, it's not necessary for them to be reiterated in this piece of legislation.

[156] **Angela Burns:** Okay. One final question. Again, it's just a very technical legal issue. You talk about a health service body meaning the Welsh Ministers, the local health board, and an NHS trust established by virtue of section 18, and you're talking then about the Welsh Ministers issuing guidance upon themselves. Does that give you any cause for concern, or is that legally acceptable?

[157] **Kirsty Williams:** The reason that is there is that, under section 3 of the National Health Service (Wales) Act 2006, the duty to provide nursing services actually does lie with Welsh Ministers. So, the Welsh Ministers, under the terms of that legislation, have that duty. LHBs and NHS trusts are directed to exercise those functions on behalf of the Minister. So, you could actually end up in a situation, if those health bodies didn't exist, under current legislation, with the health Minister being legally required to provide nursing services. That's why it's included in that way, because you could end up in the situation, if, for whatever reason, there were no LHBs or NHS trusts, where the duty would lie with the Minister then. That's why it's written that way.

[158] **Angela Burns:** Thank you.

[159] **David Melding:** Back with you, Simon, for a specific—

[160] **Simon Thomas:** Jyst un peth penodol, ac mae'n dilyn yr hyn rydym ni wedi bod yn ei drafod, a dweud y gwir. Un o'r rhesymau dros gyflwyno'r Bil yma, yn eich tyb chi, oedd y ffaith bod y canllawiau presennol ddim yn cael eu dilyn yn briodol bob tro gan y byrddau iechyd, ac felly roedd eisiau, os leiciwch chi, roi'r canllawiau ar lefel statudol.

Simon Thomas: Just one specific issue, and it follows on from what we've been discussing, if truth be told. One of the reasons for putting this Bill forward, in your opinion, was the fact that the current guidance isn't being followed appropriately every time by the health boards, and therefore it was necessary, if you like, to put these guidelines on a statutory footing.

[161] Ond, os ydym ni'n troi at y ffordd y However, if we turn to the way that the health

mae'r byrddau iechyd, i bob pwrpas, i fod i adrodd ar eu cyflawniad o dan y Bil, sef adran 10A(10), lle mae'n rhaid iddynt gyhoeddi, dywedwch, adroddiad blynyddol, ac ati, bob tro yn yr is-adrannau o dan hynny—10A(10)(a) a 10A(10)(b), er enghraifft—mae sôn am anelu at gydymffurfio, yn hytrach na dangos sut maen nhw wedi cydymffurfio. Byddech chi wedi disgwyl gweld mewn Bil o'r fath eiriau tebyg i hynna. Gan bod yn rhaid iddyn nhw dalu sylw priodol, pan fo'n rhaid iddynt gymryd pob cam rhesymol, pam felly mae ond raid iddynt adrodd sut maent wedi anelu, yn hytrach nag adrodd yn benodol ar sut maen nhw wedi cyflawni?

boards, to all intents and purposes, are meant to report on their achievements under the Bill, which is section 10A(10), where they have to publish an annual report, and so on, in the sub-sections under that—10A(10)(a) and 10A(10)(b), for example—mention is made of them aiming to comply, rather than showing how they have actually complied. You would've expected to see in a Bill of this kind wording similar to that. Given that they have to consider appropriately, when they're having to take all reasonable steps, why do they only have to report how they've aimed to comply, rather than reporting specifically how they have complied?

[162] **Kirsty Williams:** Okay. The reason it is drafted like that is because there may well be circumstances that mean that perhaps the LHB has been unable to comply. This is the famous example during the debate of the nurse who gets stuck on the Briton Ferry bridge on her way to her shift, which was a cause of great concern to some Members. Would that mean that the hospital ward would have to close as a result of the nurse being broken down on the bridge? There may be circumstances where an LHB is unable to comply at every shift. This is not about shutting wards down in circumstances like that, or, indeed, criminalising people, or making nurses feel, 'If I don't go in today', and they're down on the ward, 'I'm going to be personally responsible'. The aim of this legislation then, and what we're requiring them to do is demonstrate how they went about that. It may be that there were very understandable reasons why perhaps they were unable to comply, and the legislation also talks about how you would be expected to report on a negative incident. Of course, what we're looking for, really, is patterns, Simon. You know, maybe one shift, because the nurse is stuck on the Briton Ferry bridge, is not going to be compromising care, but if that ward is constantly reporting events where they are understaffed, that sends you a signal, doesn't it, that something about the establishment is wrong? So, this is about aiming to comply, so that health boards can say, 'You know, these are the steps that we took that we thought were reasonable to comply with this legislation', because I do understand there may be circumstances beyond a local health board's control where perhaps they're not able to comply exactly with the legislation. So, again, it's about trying to create a regime that is proportionate.

[163] **Simon Thomas:** I think the proportionality, to my mind, is covered by the fact that this is statutory guidance rather than regulation or primary legislation, to be honest. It strikes me that there's a slight mismatch that the Bill is worded along the lines of 'having regard' and 'reasonable steps', but then ends up with an annual report that is about 'aiming' to comply. I would be more familiar, even with this kind of Bill, with something that said, 'You must have due regard to this guidance, and then demonstrate in your annual report how you complied'. The wording 'how you comply' doesn't mean that you have to comply 100%; it means you demonstrate how you've set about it—essentially what you said: how you set about complying. The compliance may not be 100%, and then there are other interventions to, you know, find the reason for that and to deal with that. So, I do find it a little strange, but, you know, we only look at wording here, not the policy. I find it strange that we have this aim to comply. It's not something that strikes me as being very familiar within this setting, of legislation.

[164] **Kirsty Williams:** All I can say is that the legislation has been drafted, both with the in-house team and external expertise, with the aim of creating that flexibility, and this was the suggested wording.

[165] **David Melding:** William.

[166] **William Powell:** Diolch, Gadeirydd. When the Minister was answering questions earlier on, on section 3 of the Bill, he identified a potential tension between the three-year review cycle within the Welsh NHS that's recently come into force, I understand, and the proposals within this piece of legislation. Could you, as Member in charge, explain, please, the rationale for the inclusion of section 3 as drafted, requiring the Welsh Government to review the operation and effectiveness of the Bill, and also speak to the frequency that you're proposing?

[167] **Kirsty Williams:** Okay, first of all, I thought it was a really important principle that there was a mechanism set out in legislation for how to review the effectiveness of it. Again, we spend a lot of time passing legislation, I think without an effective mechanism to review the effectiveness of it. So, it was an important principle for me to have this section on the Bill. I think it's a part of good law that we reflect to see whether the law has achieved its stated goals and its outcomes.

[168] Again, you try to find a system that is onerous, but not too onerous. Therefore, the two-year figure went out to consultation as a way of trying to create a balance—not to make it, you know, overly prescriptive and an onerous task, but at the same time not leaving it so long as to diminish the effectiveness of the review mechanism at all. We had no strong feelings or representations during the consultation. It's been out to consultation twice: the broad principles, and, secondly, the more detailed consultation. That seemed to have gained a general acceptance as being the right balance.

[169] **William Powell:** Okay. That's useful for a better understanding of how we've come to that definition.

[170] If we could look at section 4, around commencement, some scrutineers have suggested the wording of the commencement provision at section 4 of the Bill could be open to misinterpretation. Section 4 could be read as referring to, and I quote,

[171] 'a health service body beginning on or after Royal Assent', rather than the financial year beginning on or after Royal Assent. I wonder if you could clarify your intention with respect to that detail.

14:45

[172] **Kirsty Williams:** Okay. My intention is that the provisions are intended to apply to all health service bodies in Wales, including the existing ones. Health service bodies are established by virtue of section 11 of the 2006 Act that we have been talking about. They cannot simply begin. In the event that the Bill was to be limited to health service bodies established after Royal Assent, the commencement provisions would refer to a health service body established on or after Royal Assent. But, Joaneest, perhaps you could explain better than me.

[173] **Ms Jackson:** I think you've started to explain it very well. Yes, health service bodies are created by virtue of statutory instrument. I'm sure you'll all be familiar with the SIs that you've scrutinised in Plenary, which set up the local health boards. Likewise, NHS trusts, which are also included in the definition of NHS bodies, are established by way of an establishment Order. As Kirsty said, they do not just begin. Consequently, we do not think there's any confusion in the terminology used in this section. It can only apply to existing health bodies, otherwise it would have explicitly stated that it was to apply to health service bodies established on or after Royal Assent. On that basis, I submit to you, it's quite clear in

this context that the word ‘beginning’ applies to the financial year and not to the health service body.

[174] **William Powell:** I’m grateful to you both for that clarification. It has been suggested that it might be positively unhelpful to refer specifically to financial years within the legislation. Would it potentially have been more helpful to include the reasoning for that decision in the explanatory notes of the EM, of the explanatory memorandum, on the Bill?

[175] **Kirsty Williams:** Well, given that it’s been a cause for concern, yes, probably. If people have misread that, then obviously it’s a failure on our behalf to have it clearly explained in the explanatory memorandum. I want the law to be as accessible and as understandable as it possibly can be. If that situation has arisen, from people who are well-versed in reading such legislation, then obviously it is a failure on my behalf on writing the explanatory memorandum and I will take that into consideration.

[176] **William Powell:** Grateful for that. Finally, Chair, if I may, the second core duty, namely the maintenance of staffing ratios in section 10A(1)(b), depends on the issuing of guidance, as we have discussed extensively in earlier questions. Could you help us to better understand whether specific provision needs to be made for that sub-section to be commenced—and here is my emphasis—only after that guidance has, in fact, been issued?

[177] **Kirsty Williams:** I can’t envisage that you could commence without the guidance being in place.

[178] **William Powell:** No, that is consistent with the Minister’s view earlier.

[179] **Kirsty Williams:** I can’t see how it would be workable.

[180] **David Melding:** That concludes the questions we want to put to you. If there’s anything we’ve not captured in our evidence that you want to bring to our attention, now’s the time. If not—

[181] **Kirsty Williams:** No, thank you.

[182] **David Melding:** We’ll say thank you very much for your evidence this afternoon.

14:48

**Tystiolaeth mewn Perthynas â’r Ymchwiliad i Ddeddfu yn y Pedwerydd
Cynulliad**

Evidence in Relation to the Inquiry into Making Laws in the Fourth Assembly

[183] **David Melding:** Item 3 is postponed, due to matters beyond our control and the control of the witness. You will be advised as to any rescheduling in due course.

14:49

**Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o’r
Cyfarfod**

**Motion under Standing Order 17.42 to Resolve to Exclude the Public from the
Meeting**

[184] **David Melding:** I now move the relevant Standing Order that we conduct the rest of our proceedings in private, unless any Member objects. I don’t see any Member objecting.

Cynnig:

bod y pwyllgor yn penderfynu gwahardd y cyhoedd o weddill y cyfarfod yn unol â Rheol Sefydlog 17.42(vi).

Motion:

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

*Cynigiwyd y cynnig.
Motion moved.*

[185] Please clear the public gallery and switch off the broadcasting equipment.

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 14:49.
The public part of the meeting ended at 14:49.*