



Cynulliad Cenedlaethol Cymru The National Assembly for Wales

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

**Dydd Llun, 11 Mehefin 2012
Monday, 11 June 2012**

Cynnwys Contents

Ethol Cadeirydd Dros Dro
Election of a Temporary Chair

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

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

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

Ymchwiliad i Sefydlu Awdurdodaeth ar Wahân i Gymru: Winston Roddick CB, QC
Inquiry into the Establishment of a Separate Welsh Jurisdiction: Winston Roddick, CB, QC

Dyddiad y Cyfarfod Nesaf
Date of the Next Meeting

Papurau i'w Nodi
Papers to Note

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

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal,
cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Jocelyn Davies	Plaid Cymru (yn dirprwyo ar ran Simon Thomas) The Party of Wales (substitute for Simon Thomas)
Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
Mark Drakeford	Llafur (yn dirprwyo ar ran Julie James) Labour (substitute for Julie James)
Eluned Parrott	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

Eraill yn bresennol
Others in attendance

Winston Roddick CB/QC

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

Stephen Davies	Cynghorydd Cyfreithiol Legal Adviser
Olga Lewis	Clerc Clerk
Alys Thomas	Ymchwilydd Researcher
Adam Vaughan	Dirprwy Glerc Deputy Clerk

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

Ethol Cadeirydd Dros Dro
Election of a Temporary Chair

[1] **Ms Lewis:** Good afternoon. I declare this meeting of the Constitutional and Legislative Affairs Committee open. The committee Chair, David Melding AM, has submitted his apologies for today's meeting. The first item of business is, therefore, the election of a temporary Chair. I invite nominations from committee members for a temporary Chair to be elected under Standing Order No. 17.22.

[2] **Mark Drakeford:** I nominate Eluned Parrott.

[3] **Jocelyn Davies:** I second that nomination.

*Penodwyd Eluned Parrott yn Gadeirydd dros dro.
Eluned Parrott was appointed temporary Chair.*

2.30 p.m.

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

[4] **Eluned Parrott:** Welcome to the Constitutional and Legislative Affairs Committee. We have received apologies from Julie James, for whom Mark Drakeford is kindly substituting, and Simon Thomas, for whom Jocelyn Davies is substituting today. There are a few housekeeping matters before we kick off with our business today. In case of an emergency, if you hear a fire alarm, the ushers will indicate the nearest safe exit. We are not expecting a drill, although the fire alarm has been heard today. Therefore, if an alarm is heard, please make your way to the exits as quickly and safely as possible. Headsets are available to provide translation and amplification. For translation, please use channel 1 and, for amplification, please use channel 0. I remind everyone to switch off any mobile phones completely as they interfere with the translation equipment in the room.

2.31 p.m.

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

[5] **Eluned Parrott:** On the negative resolution instruments, we have CLA152, which is the Town and Country Planning (General Permitted Development) (Amendment) (Wales) Order 2012. Are there any comments on this? I see that there are not. We also have CLA153, which is the Badger (Control Area) (Wales) (Revocation) Order 2012. Are there any issues or comments? I see that there are not.

[6] We have no affirmative resolution instruments to discuss. We do, however, have a superaffirmative resolution instrument, which is CLA155, the Natural Resources Body for Wales (Establishment) Order 2012. Are there any comments on this?

[7] **Mr Davies:** It is very rare to have a superaffirmative instrument. We have no reporting point, either technical or merits, on this Order. It is an Order that prepares the way for a body to be called the Natural Resources Body for Wales to be set up. There will be a second, more substantive, Order, which will transfer the functions of the Forestry Commission Wales, the Environment Agency Wales and the Countryside Council for Wales to this body. We are expecting that second, more substantive, Order in the autumn. It will also go to the Environment and Sustainability Committee, for it to have a look at it.

[8] **Eluned Parrott:** We will also be looking at this in more detail on 25 June. Would you like this committee to make any recommendations to the Environment and Sustainability Committee?

[9] **Jocelyn Davies:** I do not have an opinion on that.

[10] **Suzy Davies:** It is too early to say.

[11] **Ms Lewis:** The report on this statutory instrument, which follows the superaffirmative procedure, indicates that there might be issues that the Environment and Sustainability Committee might be interested in. We were asked to consider referring it to them for scrutiny.

[12] **Jocelyn Davies:** It is a brand new body and is a controversial idea. I think that we are having a statement on it this week. People will be interested in this, although I cannot think of a technical reason for referring it. However, Members would have an interest in this.

[13] **Eluned Parrott:** Suzy, do you have a point to make?

[14] **Suzy Davies:** No, not really, because the second substantive Order is where the main work will presumably be done. If it would be advantageous for the Environment and Sustainability Committee to start looking at it now, in terms of timetabling, then, why not? If it contains a matter of public interest, as Jocelyn said, then I would have thought that the normal position would be that it goes to committee anyway.

[15] **Eluned Parrott:** As I understand it, the superaffirmative procedure allows us more time for scrutiny, in which case, let us put that first report to the Environment and Sustainability Committee as soon as we are able. That will give it a longer period of time to look at it than it might otherwise have had. Are you happy with that? I see that you are.

2.35 p.m.

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

[16] **Eluned Parrott:** We have CLA151, which is the Education (Student Loans) (Repayment) (Amendment) (No. 2) Regulations 2012. Stephen, I think you have a couple of words to say on this.

[17] **Mr Davies:** Yes, there is a reporting point on this. These are composite regulations and, as with composite regulations in the past, they have been made in English only; they have not been produced bilingually. The reporting point was made to the Government and the Government has responded by saying that it was not practicable in the circumstances to make them bilingual. These particular regulations were drafted by the Department for Environment, Food and Rural Affairs, but they had the assistance of lawyers in Cathays park. The same reason is given each time we report that a composite regulation has been made only in English. The same response always comes back that it was not practicable in the circumstances.

[18] **Jocelyn Davies:** Can we ask for some details on why it was not practicable?

[19] **Mr Davies:** Yes.

[20] **Eluned Parrott:** Are Members happy to take that forward? I see that you are. Thank you. There are no affirmative resolution instruments so, if there are no more comments on these regulations, we will move on.

2.36 p.m.

Ymchwiliad i Sefydlu Awdurdodaeth ar Wahân i Gymru: Winston Roddick CB, QC
Inquiry into the Establishment of a Separate Welsh Jurisdiction: Winston Roddick, CB, QC

[21] **Eluned Parrott:** We have been carrying out this inquiry for a number of weeks now. Today is our seventh oral evidence session. At the previous meeting, we heard from Elfyn Llwyd MP. Our witness today is Winston Roddick QC, whom Members will know is a former Counsel General for Wales. He is a very well regarded and well respected QC working in Wales and London. He has also spoken on a number of occasions about devolution and the devolution settlement, so we hope that this will be a very interesting evidence session.

[22] I welcome Winston Roddick QC to the Constitutional and Legislative Affairs Committee today. Thank you very much for your written evidence, which we have read with great interest. We have also been provided with a speech you gave in 2008. I think it was the Lloyd George memorial lecture—

[23] **Mr Roddick:** In Aberystwyth?

[24] **Eluned Parrott:** Yes.

[25] **Mr Roddick:** That speech was to the Centre for Welsh Legal Affairs. It was not the Lloyd George lecture.

[26] **Eluned Parrott:** Oh, my apologies. We have been provided with the text of that speech, which is obviously very pertinent to our inquiry, although things have progressed a little. We have quite a few questions that we would like to get through so, if I may, I would like to move straight to those. Going back to the 2008 Aberystwyth lecture, you spoke about there being an emerging jurisdiction in Wales already. To what extent do you think that jurisdiction has emerged and developed over the past four years since that lecture?

[27] **Mr Roddick:** The expression, ‘an emerging jurisdiction’ is not mine, of course. It originated in a paper published in 2004 by Professor Tim Jones and Jane Williams—who used to work in the Assembly, as you will remember—of Swansea University. The origin of the expression is with them. In 2004, they concluded that, based on statistics up to December 2002, Wales was an emerging jurisdiction. However, they defined ‘jurisdiction’ in a particular way. If I may, I will let you have this succinct definition: power or authority to interpret, apply and decide the law.

[28] They said that a jurisdiction has three commonly accepted characteristics, namely a defined territory, a distinct body of law and a structure of courts and legal institutions. So, territory, law and institutions are the characteristics. Although legislature is not an essential component of a jurisdiction, its existence is hardly irrelevant. So, they concluded, in 2004, on the basis of statistics up to December 2002, that Wales was then an emerging jurisdiction on the basis that it was a defined territory—and there is no doubt or problem about that—that, in 1988, it acquired a legislature that functioned like a parliament, and that, by December 2002—and this is the crucial point—the Assembly had created a very substantial amount of distinct law in the sense that it was either unique to Wales or, where it paralleled similar legislation in England, it involved significant differences in drafting, reflecting Welsh circumstances. They were able to draw that conclusion without taking into account the amount of Wales-only legislation passed at Westminster. So, that conclusion was based not on anything up until 2008 but only on the nascent years of the National Assembly for Wales.

[29] I hope that you will find it helpful if I give you this sheet of paper, which I am passing around the table. This document sets out statistically what the case was in December 2002. So, in answering your question—and I have not lost sight of it—I am going to say that, if this was the position in 2002, we are more than 10 years on from that; therefore, if there was a substantial body of Welsh law distinct from the laws of England in December 2002, the fact that there is such a body of law today is unchallengeable. It must follow, must it not? So, this document is a supplement to my evidence. There is a copy for everybody, I hope.

[30] **Eluned Parrott:** Thank you very much. That is very helpful.

[31] **Mr Roddick:** Not at all. You will see the basis of this very quickly in the document. The paragraph at the top of the page gives you a statistical analysis upon which that conclusion was based: how many instruments were passed by the Assembly and in what respect they were different. You will see that there was a 367% increase over what the Welsh Office had published the year before the Assembly came into effect. So, the Assembly has been a prolific manufacturer of legislation, if I may say so. Dividing it up, you can see how the instruments have been passed in the specific fields of responsibility. So, just to assist you, going across the top of the table, taking transport and planning as an example, you can see that the number of Orders with distinctly Welsh content was 10, then there is the column on the number of Orders mirroring those for England, another on the total of both those types of Orders, and the final column is the Orders with distinctly Welsh content as percentage of the total, which is 45%. You will see the total at the bottom of the table. What you then have at the bottom of the page—because they do their conclusion without reference to Wales-only legislation passed by Westminster—is the list of the Wales-only legislation passed by Westminster, just up until that period, and although you have a statute there from 2003, it was a statute, the existence of which was known about in December 2008.

[32] Where have we gone in the 11 years since then? In measuring the extent to which the process of emergence has continued since Jones and Williams concluded on the basis of their 2002 statistics that it was an emerging jurisdiction, that was four years before the second devolution settlement and 11 years before the Assembly acquired full legislative competence. So, if you could draw that conclusion in 2002, you can see the strength of the conclusion that one can draw now. I do not have the statistics of what legislation you have been passing in those years, but you will know that the Assembly has been as prolific as ever in bringing out legislation that is distinctly Welsh.

2.45 p.m.

[33] Lord Chief Justice May, who had a working party, said that, since 2002,

[34] ‘The divergence has probably increased...as the Assembly has grown in confidence and has gathered more powers and powers in more fields. The divergence will certainly increase after May 2007, when the Assembly makes “Assembly measures” and it would, of course, increase still further if the Assembly acquires...legislative powers’.

[35] That is, under Part 4. In 2011, the First Minister talked about a legislative programme of 20 Bills. Put all that together and I think that it answers your question.

[36] **Eluned Parrott:** Jocelyn, did you want come in on this point?

[37] **Jocelyn Davies:** On the list that has been compiled—

[38] **Mr Roddick:** My list?

[39] **Jocelyn Davies:** Yes, your list. Back in those days, of course, the Assembly itself passed statutory instruments on something different or something the same as was being done in England. Add to that the legislation in relation to England passed by Westminster that does not apply in Wales, and perhaps we have done nothing, that is still a divergence in law. So, even if this particular Government has not brought loads of legislation in, if England has been legislating and those laws do not apply in Wales, that is still a difference. Has there been a difference in the basic principles or the rules of law?

[40] **Mr Roddick:** No, none whatsoever, and I practise on both sides of the border and sit judicially on both sides of the border. So, I can say emphatically 'no' to that.

[41] The rules of construing our statutes are very different, which is a big point, because as you know, we draft bilingually, and therefore the rules—

[42] **Jocelyn Davies:** And gender neutral.

[43] **Mr Roddick:** And gender neutral. If somebody has to construe a bilingual statute, there is a particular knack to it. There is a particular art to it, which only we have. However, thank you for that point. I agree entirely.

[44] **Jocelyn Davies:** You can add that to your list. [*Laughter.*]

[45] **Mr Roddick:** Thank you very much.

[46] **Eluned Parrott:** Obviously, we have a lot of evidence from you now about this divergence in the legal structures of England and Wales, but have you experienced any problems as a barrister practising in both Wales and England? You have a huge amount of experience in this area, but have you experienced any practical problems with the system as it is at the moment?

[47] **Mr Roddick:** No, none whatsoever.

[48] **Eluned Parrott:** We will now move on to questions from Suzy Davies, who will take the next section forward.

[49] **Suzy Davies:** Can I just develop that last question for a second? From what you are saying, the current administration of justice system causes you no problems. Do you foresee that it will in the future?

[50] **Mr Roddick:** No, but I am bilingual. [*Laughter.*]

[51] **Suzy Davies:** Yes, some of us are.

[52] To move to the specific disciplines of law, you will know that the First Minister has suggested that it is possible for a Welsh jurisdiction to develop further without developing the full range of criminal law. Do you think that that is a valid position to hold?

[53] **Mr Roddick:** No, and I am not sure that the First Minister said it. I know that Mr Melding has said it, as he said it in the *Western Mail*. The First Minister said quite the contrary, and I was interviewed by the BBC about that. Now, what the First Minister said was that he would like the National Assembly for Wales to assume responsibility for the criminal justice system. So, he was not excluding it, but making it the responsibility of the National Assembly for Wales. Mr Melding said that you can have devolution of justice to Wales excluding the responsibility for the criminal justice system. In fact, he said it in the *Western Mail* on the—

[54] **Suzy Davies:** Do you mind my asking what your view is? Is it all or nothing, really?

[55] **Mr Roddick:** Absolutely. It would make for an impossible situation and would be wholly impracticable. If you had the devolution of responsibility for some aspects of the justice system—for example, if you were responsible for the law of contract, for the administration of justice in areas involving contract, and you had administration of justice in areas involving injuries and accidents—you would have to have judges who were part of the Welsh jurisdiction dealing with the Welsh devolved matters and other judges dealing with the subjects that were not part of the Welsh jurisdiction. Sometimes, you can have cases that involve the devolved and the non-devolved and it would become simply impossible. You cannot separate the one part of the justice system from the other, because our courts and our judges have competence right across the board.

[56] **Suzy Davies:** Sorry, but could you just clarify this for me? Are you arguing that, for example, probate law, which seems to have no specific Welsh dimension to it, should remain non-devolved, or are you saying that it should be devolved, and only probate cases arising in Wales should be dealt with in Wales?

[57] **Mr Roddick:** It is very important, if I may say so, not to confuse the administration of justice with the substance of the law. They are two distinct matters.

[58] **Suzy Davies:** I agree.

[59] **Mr Roddick:** We are talking about devolving responsibility for administering justice across the board, not a jurisdiction to change the law, for example to change the criminal law, the law of probate, the law of marriage, family law or anything like that. In some of the things that I have read recently, I have noticed confusion between responsibility for the administration of justice and the substance of the law. As I understand it, the exercise in which the Assembly, this committee and the consultation conducted by the Welsh Government is involved is concerned only with the administration of justice and not with the substance of the law.

[60] **Suzy Davies:** I do not know whether I completely agree with you on that, because we are discussing the nature of jurisdiction and its different meanings. However, I wish to take you back to what you said earlier that, actually, there is nothing wrong with how the current system works. I am still not quite sure which way you are arguing, and which way you are taking us on this.

[61] **Mr Roddick:** I think that the present system works all right, but the case for devolving justice to the National Assembly for Wales does not depend on whether it works all right or not. It is constitutionally logical to give control over the administration of justice to an Assembly that has full legislative competence. As I have said on other occasions, and in the paper before you, there is no other legislature that I know of anywhere in the world that has full legislative competence but does not also have responsibility for the administration of justice.

[62] **Suzy Davies:** So, you are arguing for constitutional consistency, shall we say, rather than trying to solve a practical problem?

[63] **Mr Roddick:** Absolutely. I think that there is no symmetry between the three devolution settlements at present. Scotland is one model and Northern Ireland is another and although there are similarities on this, we are the odd one out. It seems constitutionally illogical to me.

[64] **Mark Drakeford:** Is it your argument that the administration of justice has to come to Wales comprehensively?

[65] **Mr Roddick:** Yes.

[66] **Mark Drakeford:** Does it have to come all in one go, or can it be built up over time?

[67] **Mr Roddick:** I have thought about this very carefully, over a long time, about whether you can have the devolution of the justice system by evolution, and by just seeing what happens and letting it evolve. I do not think that you can do that. The Richard commission said that that kind of development does not follow any comprehensible constitutional principle. The authorities, which are cited in the 'Legal Wales' paper, state that the devolution by evolution argument is constitutionally illogical and leads to considerable inconsistencies. In order to have a logical and workable system, you have to devolve them all at the same time, because you have the magistrates' court, the Crown Court, the High Court and the Court of Appeal. They function as a body of courts. In my view, you have to devolve them all at the same time. It is relatively simple to do it by an Order in Council, giving to Welsh Ministers the responsibility for the function known as the administration of justice. It would pass comprehensively if you were to do that.

[68] **Jocelyn Davies:** I do not know whether you have seen the Magistrates' Association's submission, but it does not agree with you, I think that it would be fair to say. In fact, it does not agree that we should be having this inquiry, but there you are—it says that there is not even a strong enough case to be having this inquiry. However, the point that it makes is that we do not have a sufficiently well-developed infrastructure to support devolving jurisdiction. For example, there is no prison in north Wales. It also says that there is no problem, and you mentioned this earlier, with having different legal texts on either side of the border and that it is possible to administer justice without having a separate jurisdiction. However, it says that public confidence in the administration and delivery of justice is low. What are your views on that?

[69] **Mr Roddick:** It makes a hatful of points. I am not sure which one to take first. So far as the esteem of the administration of justice is concerned in magistrates' courts and broadly, the reputation and standing of the administration of justice in the United Kingdom is the best in the world. It cannot be bettered; it is outstanding. Of course, it has blemishes and blots and has been bruised from time to time, but it is of considerable quality. Judges are independent and they are among the finest judges in the world. There is great respect for the quality of justice in this country, and I am surprised to hear the Magistrates' Association saying otherwise.

[70] **Jocelyn Davies:** I got this off the internet; you may have my copy of the evidence if you like.

[71] **Mr Roddick:** No, I accept it.

[72] **Jocelyn Davies:** What about the insufficiently developed infrastructure to support devolution, including the fact that there is no prison facility in north Wales?

[73] **Mr Roddick:** If we attach too much weight to that, Wales simply will not progress, will it? If the absence of a prison in north Wales is the basis of that argument, the answer is to get a prison in north Wales. We are more likely to have one after we have devolved justice than if we wait based on the magistrates' argument. We certainly have the infrastructure—we have all the courts. We do not have a prison in north Wales, but we nearly did, so, in principle, the argument that we ought to have one there is well recognised. That we do not is not a reason for not moving along. We are more likely to have one if we move along. The

effect of moving along this line on the economy of Wales will be absolutely enormous.

[74] **Eluned Parrott:** We will return to Suzy Davies to continue her line of questioning.

[75] **Suzy Davies:** I am picking up from what you are saying that if the administration of the courts systems, inter alia, was brought into Wales, we would have more professional members of the bar and solicitors and even a judiciary prepared to work solely here. Do you think that that would be the case, or are you still arguing that the legal profession would be able to work across the border and that its legal training would not be affected specifically?

[76] **Mr Roddick:** The question of whether its legal training would be affected is not a matter for the Assembly, but for the statutory regulators. They would have a look to see whether or not the laws of Wales are so different as to require proof of competence by those who practice here. That is not the present position. However, it is a matter for the statutory regulators and there is no proposal on the table to devolve the responsibility of the statutory regulators and, therefore, the professions can come and go as they do now. I respectfully suggest that the Assembly should be saying that loud and clear, in that the purpose of this is not to erect barriers, and nor will its effect be to erect barriers. If we are clear about that, the professions will embrace it rather than find objection to it.

3.00 p.m.

[77] **Suzy Davies:** You mentioned a few moments ago that you could see great economic benefits; that presumably means bringing more cases here, and starting more cases here.

[78] **Mr Roddick:** Starting cases here is a very big point.

[79] **Suzy Davies:** Could you tell us more about that? I appreciate that you have a public administration background. Are you able to tell us a bit about your experience with the administration court?

[80] **Mr Roddick:** If you mean cases not being started in Wales even though the case involves matters arising in Wales, I am afraid that that happens all too often, and it can be remedied by a very simple rule change requiring that all cases involving matters in Wales should be started in Wales. The parties can then show cause if they want them heard elsewhere. There is nothing wrong with that, it is no restriction on liberty and it makes good sense. However, although that rule change is quite simple, and the judiciary thinks it is quite simple, we have not got it.

[81] **Suzy Davies:** It is simpler than devolving the whole administration of justice, is it not?

[82] **Mr Roddick:** No, it is all part and parcel. If you were to devolve justice, you would have the authority to introduce the rule change.

[83] **Jocelyn Davies:** May I ask a question about the need for more lawyers and so on? I am sure that you saw the comments by our Minister for Education and Skills that anyone who wants to create a Welsh legal jurisdiction will just be lining the pockets of lawyers. More lawyers, and richer lawyers, is not all that popular an idea, is it?

[84] **Mr Roddick:** I quite agree, but it is not just for lawyers; it is for Wales. The administration of justice in Wales is a constitutional necessity, almost. To treat Wales differently from the other two nations on these grounds is demeaning, is it not?

[85] **Jocelyn Davies:** I agree with you, but I am supposed to be asking you the questions.

[*Laughter.*] I think that we have it a bit mixed up. What are the consequences of not devolving it?

[86] **Mr Roddick:** We would just carry on as we are.

[87] **Jocelyn Davies:** It is working.

[88] **Mr Roddick:** It does work, but it is a matter of the logic of devolving justice. It is acceptable to Westminster as a matter of principle. It has demonstrated that by what it did with Scotland and Northern Ireland. What I think is that it may be good now, but it would be infinitely better if you devolved it, because you would be bringing the justice system closer to the people. In my paper, I have listed all the positive consequences that would arise, so it would be an improvement, and you are deprived of that improvement if you do not take the step.

[89] **Jocelyn Davies:** Lawyers are often seen as a very exclusive club. This is a small country. Could we have a healthy system of administering the law in such a small country with such an exclusive club?

[90] **Mr Roddick:** The administration of justice is not in the hands of lawyers; it is in the hands of civil servants.

[91] **Jocelyn Davies:** The same applies here, then.

[92] **Mr Roddick:** I do not think that it does. You are very familiar with the quality of the civil service that you have in Wales and with the Welsh Government. Her Majesty's Courts and Tribunals Service Wales has quality people, and if you adopt the formula that I have spelled out in the paper by a transfer of the assets and the functions, that civil service would transfer to Wales. You do not have a clique among civil servants, if I may say so. I take your point about lawyers, but the civil servants are an entirely different kettle of fish. They are responsible for the administration—along with the politicians. I will not say that politicians are a clique.

[93] **Jocelyn Davies:** At least we have to be voted in, so there is a slight difference. In terms of the tribunals, which you mentioned earlier, my question is the same: we are a small country, so could we have a healthy system of independent, specialist tribunals?

[94] **Mr Roddick:** Yes, undoubtedly.

[95] **Jocelyn Davies:** Do you not have any reservations about that at all?

[96] **Mr Roddick:** No. You have to look at these matters empirically. Northern Ireland has a smaller population and a smaller jurisdiction than Wales, but tribunals in Northern Ireland work perfectly well. I do not think that smallness is a problem; largeness is a problem, not smallness.

[97] **Eluned Parrott:** I will now move back to Suzy Davies.

[98] **Suzy Davies:** I think that I have had all the answers to the questions that I needed to ask. The answers that I was looking for have been brought out in different ways.

[99] **Eluned Parrott:** We will move back to Jocelyn Davies then.

[100] **Jocelyn Davies:** Do you have a view on whether or not we need a law reform commission?

[101] **Mr Roddick:** I have always been of that view. Once Wales started making its own law in 1998—and most certainly today, because it is making primary legislation—it needed to be advised by a body such as a law commission about what its laws should contain. Policy, of course, is a matter for Ministers and the Assembly more generally, but the law reform commission can assist on what mischief needs to be addressed and what laws need to be amended, improved or repealed. That is the function of the law reform commission—to look independently at the contents of our law and to say ‘This law is creating this problem; rewrite it’, or whatever. It might give you advice before a Bill becomes an Act.

[102] I do not think that it necessarily ought to emulate the model of the Law Commission in England and Wales, and it certainly does not require any elaborate machinery to set it up in the Assembly. The best example that I can think of is the first Welsh Language Board, which was a non-statutory board that was set up without formality by the Secretary of State for Wales ringing six people up and saying, ‘Look, I want to set up a non-statutory Welsh Language Board to give advice, inter alia, on whether we should have a statutory one’ and so on. If it is open to the Assembly to set up a non-statutory body of that kind, it could be called a law reform commission, or something similar, and be made up of some academics, some eminent practitioners and maybe a retired judge. You could do that at very little expense.

[103] **Jocelyn Davies:** So, you are talking about ministerial discretion to ring up half a dozen people. You have already said that we will not need an Act in Westminster to devolve it, and that it could simply be done by statutory instrument. All this seems a bit cosy. We are back to the cliquiness of a few people deciding to make this fundamental change to the administration of justice in Wales. The previous Home Secretary, Jack Straw, said that we would need a referendum to devolve jurisdiction, but you seem to think that a few of us could get together and organise it without even a vote in Parliament.

[104] **Mr Roddick:** No, I am not saying that. To take that out of what I am saying is a serious misunderstanding on your part, if I might say. I do not say that. First of all, if you want to administer justice, you have to do it by taking the statutory path that I have indicated here, and it can only be done in that way. To say what you have said is to confuse what I said about how, informally, you can set up a law reform commission when I was responding to your question about that. You can informally set up a body to function like a law reform commission.

[105] As far as Jack Straw’s point about needing a referendum is concerned, we have nothing to fear from referenda.

[106] **Jocelyn Davies:** A referendum may not be needed. They are sometimes held for political purposes, but you do not think that we would need a referendum for constitutional purposes; it would not be required for this particular devolution.

[107] **Mr Roddick:** I do not think so, but if there was to be a referendum, I do not see that Wales has anything to fear from a referendum on further devolution of powers.

[108] **Eluned Parrott:** Are your questions complete, Jocelyn?

[109] **Jocelyn Davies:** Yes.

[110] **Eluned Parrott:** Thank you. I would like to move on at this point and bring in Mark Drakeford.

[111] **Mark Drakeford:** Mr Roddick, I wonder if I can go back to some of the things you said earlier in terms of the scope of what is meant by administration of justice. In your 2008

lecture, you said:

[112] 'I also include in the expression "administration of justice" an all-Wales police service responsible to the Assembly.'

[113] **Mr Roddick:** Not an all-Wales police service—a devolved police service, which may be more than one police force.

[114] **Mark Drakeford:** Yes. I am simply quoting the text. At the time, there was a debate about whether there should be a single police force. So, avoiding the 'all-Wales', you would include a devolved responsibility for the police under the umbrella of 'administration of justice'.

[115] **Mr Roddick:** Yes, I would.

[116] **Mark Drakeford:** Does it stop there? Are there other elements that you would add, such as the probation service?

[117] **Mr Roddick:** Absolutely. It was a silly mistake to have left that out because it is an obvious one to include, as it is a limb of the justice system.

[118] **Mark Drakeford:** What about youth justice services?

[119] **Mr Roddick:** Yes, all of that.

[120] **Mark Drakeford:** The prison service?

[121] **Mr Roddick:** I think I put the prison service down.

[122] **Mark Drakeford:** I go back then to your contention that administration of justice has to be done all in one go—either you have it or you do not have it. Given the comprehensive set of responsibilities that you outline, is that still your view, that they would all have to come on the one day?

[123] **Mr Roddick:** I cannot say that they would all have to come on one day, but it would make sense if they were all to come at the same time, because you would then have the whole. The problem with separating them is that one part would start to become dysfunctional. Your example of the probation service and the youth service are inextricably attached to something else, are they not? For example, when I sit in the Crown Court and I am sentencing somebody, I have to have a report from a member of the probation service. So, that limb of the justice system would need to be subject to the same control as the other limbs of the justice system.

[124] **Mark Drakeford:** Do you think there is any merit in the argument that there is some ground in the middle between the two positions you outlined earlier, which is the evolution of devolution, which you described as a happenstance model—it might happen or it might not, and you would have no control over the process—and the one you have outlined, which is the big bang approach to it? Is there somewhere in the middle, which is a planned journey from the position we are in to the one you want to go to? Behind that is my fear that the position you outlined would mean, in the fallen world that politics operates within, that the search for the perfect would drive out the possible.

[125] **Mr Roddick:** I am sensitive to those considerations and I have given them careful thought. You will see among the arguments advanced by the Legal Wales Standing Committee, which is comprised of judiciary as well as other members of the profession, that

that argument is described as ‘not today, but tomorrow’ and they say that there is a constitutional case for it here and now, which justifies the responsibility being devolved at one and the same time, based upon today’s circumstances. I cannot say—and I do not argue—that a gradual process is not possible. Of course it is, because what we have had since 1998 has been a gradual process. Bit by bit, we have become distinct.

3.15 p.m.

[126] Looking at it and the analysis of this, which is a 2002 case, we are 10 years down the road, and the other nations of the UK had it all at one and the same time, and we have matured sufficiently to have it. There is almost an inference in this that maybe Wales has not quite matured sufficiently to assume the responsibility. My own view, for what it is worth, is that it has demonstrated that it is sufficiently responsible and experienced now to be given the same responsibilities as the other two nations: Scotland and Northern Ireland.

[127] **Mark Drakeford:** I will now turn to a separate issue, which has already been raised by Suzy Davies. This committee has received evidence from eminent academics, lawyers and senior legal practitioners, arguing that, given the divergence of the law on both sides of the border, your table and the things that have happened in the decade since, a test of competence to practise as a lawyer in Wales might have become a necessity. I understand your earlier point that that is not a matter for the Welsh Government to decide. I am not interested at the moment in who would make the decision, but their evidence was that we have already reached the point where law in Wales has diverged to an extent that someone who wishes to practise law in Wales should have to pass a test of competence to do so. Do you agree with that? Have we reached that point?

[128] **Mr Roddick:** I do not think that we have. I have addressed that specifically in my paper. Judges and advocates are quite used to dealing with discrete areas of law. They develop a specialisation that enables them to understand different statutes to do with different things, and if someone were to say to me, ‘We have reached the stage whereby you must qualify if you are to practise in Wales’, I would simply ask them to show me any piece of legislation that they think is beyond the competence of a reasonably competent advocate or judge who practises in our courts at the present time and I am sure—I would put my shirt on it—that they could not find one, other than one expressed in the Welsh language, because that is a different competence.

[129] **Mark Drakeford:** How would you answer someone who, having heard your evidence today, said that they were left slightly puzzled by the fact that your evidence appears to head in two different directions? On the issue of the administration of justice, you are fully convinced that we have already reached the stage where this should be done here in Wales and you are well convinced of that—things are so different already that, constitutionally, the responsibility ought to be here in Wales. However, on the other hand, things are not different at all, because a lawyer who has never set foot in Wales, who has practised somewhere else across the border for their entire professional life, could turn up here tomorrow and apparently be competent in this very different jurisdiction, without even having to pass a test of competence to be able to do so. If someone were puzzled by that, how would you help them to understand the two apparently different positions that you are taking?

[130] **Mr Roddick:** I would go back to where I started from in this discourse, and it was with a definition of jurisdiction to define precisely what I mean. I have not lost sight of that. As I said, a jurisdiction is the authority to interpret, apply and decide the law. It has three commonly accepted characteristics, namely a defined territory, a distinct body of law and a structure of courts and legal institutions. Those are all boxes that can be ticked. It is not an element of that that the law must be so distinct that you feel that you could not understand it or follow it. That is what I go back to: the simple definition of territory, law and institutions.

Those are all boxes that can be ticked.

[131] **Jocelyn Davies:** How many cases do you suppose come before the courts that revolve around the meaning of words?

[132] **Mr Roddick:** Many.

[133] **Jocelyn Davies:** Of course, we are producing bilingual legislation and the meaning of the legislation is not to be found within the English or the Welsh text, but in the reading of the two together.

[134] **Mr Roddick:** Absolutely.

[135] **Jocelyn Davies:** If that is the case, then there must be a requirement of a competence to interpret the meaning of that legislation with the reading of both together.

[136] **Mr Roddick:** I agree.

[137] **Jocelyn Davies:** It seems to me that we could be coming to a situation where you would need a test of competence that you could read the two texts. That is one of the reasons—I know that you remember this—why the texts are side by side and not back to front.

[138] **Mr Roddick:** I introduced it.

[139] **Jocelyn Davies:** I remember the debates at the time, probably just as well as you do. We will argue over that at a different point. However, should there not be a test of competence that you can interpret the law by reading Welsh and English and interpret them together to find the real meaning of the words?

[140] **Mr Roddick:** That is the specific exception that I mentioned a moment ago. Subject to competence in Welsh, I do not think that the differences between the laws are such that you need to demonstrate competence, but there, in the interpretation of our bilingual legislation, you have to. In Canada—this underlines your point—at one time, they thought, ‘Maybe we can get by with interpreters in court’. They said, ‘No, the judges who do not speak French must acquire a competence in it’ and that is what happened. Judges had to acquire a competence in French in order to construe legislation drafted side by side. As you will know, it was the Canadian model that I adopted into the Office of the Counsel General when drafting legislation. So, I agree with you 100% that, in that regard, you must demonstrate a competence in Welsh.

[141] **Mark Drakeford:** Just for the sake of clarity, the argument, in your mind, would apply equally in the opposite direction, so that a lawyer who has been trained in Wales, who has qualified by studying the distinct body of law that is now Welsh law, who has practiced that law in front of exclusively Welsh tribunals, could turn up in Ashby-de-la-Zouch tomorrow and practice without any further test of their competence.

[142] **Mr Roddick:** If they are already members of the Bar of England and Wales, they would have demonstrated their competence in the laws of England and Wales. What we are talking about is whether there is an additional requirement, something else you have to demonstrate with regard to Wales, not what Welsh lawyers and solicitors that are qualified on the England and Wales basis, as I am, have to do. Does that answer your question?

[143] **Jocelyn Davies:** Some will be better than others.

[144] **Mark Drakeford:** Very slightly. I remember being involved a long time ago—Mr Roddick, you may well have advised the Welsh Government at the time—in a proposal that emanated from the Department for Transport in England. It did not go very far. It would have required anybody who had passed a driving test in Wales to pass a separate driving test in order to drive on the roads in England. In some ways, that is taking it to an absurd length, but there is still a question there. I do not think that you did deal with one aspect completely, which is this additional test of competence. If Welsh law is evolving and emerging in a distinctive way—so distinct that it, in your mind, completely justifies the devolution of the administration of justice—it is still no barrier to a lawyer's ability to practise. All I am asking is whether the user of a Welsh lawyer's services in England deserves any further test of that person's ability to do the job, given the diverging patterns, or whether it is not a problem that needs solving.

[145] **Mr Roddick:** I would very much like to state that additional qualifications and tests of competence should be a necessity. I am sure that, were I able to say that, the case for devolving justice would be that much stronger. However, I will resist that, because, at the moment, I cannot say that it is a necessity. It might become a necessity, but, at the moment, I do not think so.

[146] **Suzy Davies:** I think you may have answered this next question as well; you are doing very well in jumping ahead of me today. However, I want to confirm that it is not the present position with the divergence of laws that is driving your argument, but constitutional consistency.

[147] **Mr Roddick:** It is both. I have tried to lay out—

[148] **Suzy Davies:** I only ask because, with regard to the devolution of the administration of the administration of justice—the civil service aspect of it—surely whether there is divergence or not is not hugely relevant, is it not?

[149] **Mr Roddick:** The divergence is as to the substance of the law.

[150] **Suzy Davies:** Exactly. Would you say that it is different from the administration of the administration of justice?

[151] **Mr Roddick:** Yes, it is. If I follow your point, the civil service in Wales, in administering justice, knows the system as it is, and it would present it with no difficulty whatsoever in the new regime. Not at all.

[152] **Suzy Davies:** I take that point. Thank you.

[153] **Mark Drakeford:** I have one last question on a slightly different topic. The committee has received evidence, including evidence from the Law Society, pointing to a lack of commentary on Welsh laws and cases. It suggests that that is a deficit in the current system. Would you agree with that point? If it is a genuine difficulty, where does the remedying of that difficulty best lie?

[154] **Mr Roddick:** I have been concerned with this since 1998, when the law began to change. It is very important that the law is accessible and is known, because, with secondary legislation, if it is not reasonably accessible, is actually invalid according to the rule of law. Therefore, it is very important that there should be comments on the substance of our laws. I know that there are two limbs to your question: one is about the laws and the other is about the cases. I will come to the cases in a moment. It is imperative that the laws of Wales should become known. We have been saying that to the publishers. I think that some publishers do now show the Welsh variation. I do a broad spread of work, and the books pick up on whether

the law is different as a matter of principle in Wales from what it is in England, and they will point that out. However, there is not sufficient clarity, in my view, and it ought to be done.

[155] Who should do it? Websites are of great assistance in this context, in my view. If you go on any legal website and type in ‘health’ ‘Wales’ and a certain question, it will take you to the relevant statutory instrument. Everybody can move with ease and facility today through computers and websites, especially the younger lawyers. So, I think that it is becoming easier. The books do not contain it, but we do not use books; we use websites. The websites are very good. If you ask the right question, you can get the right answer from a website. All laws, and by that I mean legislation, primary and secondary instruments, are available on some website or another. The National Assembly for Wales’s website contains all its instruments, and that is available to you wherever you are in the world. Therefore, no-one has an excuse of not knowing or not being able to ascertain what the law is in Wales.

[156] It would be useful if you had a commentary on it—you used the word ‘comment’. To have the text of the law is one thing, but you would like to read a commentary, a professorial analysis of what it means and so on. That is important and I think that we are slightly bereft on that front. However, these things evolve, given time.

3.30 p.m.

[157] **Jocelyn Davies:** Have you ever looked on the website to find a statutory instrument?

[158] **Mr Roddick:** I have and—

[159] **Jocelyn Davies:** They are not easy to find, but that is a practical issue, is it not?

[160] **Mr Roddick:** Yes, it is.

[161] **Jocelyn Davies:** They could be easy to find. The name of a statutory instrument never really gives you a clue as to what it is about, either. Well, sometimes it does. We had a case quite recently where the Electoral Commission did not know that we had changed the law on elections.

[162] **Mr Roddick:** I saw that, and I expressed opinions about the validity of that legislation. The validity of that legislation was in question because of its inaccessibility. Anyway, that is—

[163] **Jocelyn Davies:** Anyway, it is an example.

[164] **Mr Roddick:** With regard to commentary on cases decided in Wales, that is not my experience. I do not know who told you that or what they said and whether they have been in front-line cases. I have been in a number of front-line cases in the past 18 months and each one has received detailed comments in journals and on websites. I need not tell you what the cases were about, but I have found them because the point is interesting. It does not matter where the case is decided; if it gives rise to an interesting point of law, it will be picked up by the law reporters.

[165] **Mark Drakeford:** Does Legal Wales have any additional responsibilities here to make this material more readily accessible to professional practitioners?

[166] **Mr Roddick:** No. Legal Wales, as you know, is something I set up after the first devolution settlement in order to bring all the lawyers together. It is an informal gathering. It has no power. It does not even have a budget. It has only recently acquired an account. However, it has been very successful as a gathering of professional people. It became a civic

society. That is what it is—a new civic society that came into being following devolution. However, it does not have the resources to do that. It does not even have a secretariat.

[167] **Eluned Parrott:** I would like to turn to a couple of practical issues relating to your experience. Do you practice in the England-and-Wales jurisdiction only or have you practised in other UK jurisdictions?

[168] **Mr Roddick:** I have not practised other than in England and Wales.

[169] **Eluned Parrott:** Is there a significant amount of transfer between the jurisdictions in the UK?

[170] **Mr Roddick:** Not so much with Scotland, but certainly with Northern Ireland. It is quite easy.

[171] **Eluned Parrott:** Returning to this idea of the qualified lawyers transfer scheme or the idea of some sort of pre-qualification, one of the practical issues I am a little concerned about is whether there might be any problems for Scottish or Irish counsel wishing to practice in Wales if there was a preponderance of the English jurisdiction law in any qualifications set. Do you foresee such problems?

[172] **Mr Roddick:** I do not foresee those difficulties. I answered your question wrongly a moment ago when you asked whether I had experience of other jurisdictions. I do. I was supposed to appear in a pollution case in Trinidad. I was called to the Bar there in absentia simply by showing my practising certificate. That demonstrates the ease and facility with which you may go into another court and practice.

[173] This is not for professionals; this is for a nation. That is what this discussion is about. It is about devolution of the administration of justice so that we may obtain symmetry with the way in which the other two nations have been dealt with, and there is no constitutional obstacle to that—there is no constitutional obstacle to that. This is not politics; it is a constitutional lawyer's analysis.

[174] **Eluned Parrott:** Thank you very much. I believe that that concludes our questions, unless anyone else wishes to follow anything up. It just remains for me to ask whether you have any concluding remarks you would like to share with us.

[175] **Mr Roddick:** No, I just wish to thank you very much for inviting me.

[176] **Eluned Parrott:** Thank you very much for your evidence today and, of course, for your written evidence, which is really interesting. Thank you for engaging so actively with our questions today.

[177] **Mr Roddick:** It was a pleasure to see some familiar faces.

[178] **Eluned Parrott:** I also want to thank you for the written information you provided today. It may be necessary for the clerk to get in touch to discuss the sources with you, so that it can be properly referenced. I hope that that is okay with you.

[179] **Mr Roddick:** Yes.

[180] **Eluned Parrott:** Thank you very much. In which case, we will move on to the next item.

3.36 p.m.

Dyddiad y Cyfarfod Nesaf
Date of the Next Meeting

[181] **Eluned Parrott:** The date of the next meeting, at which Professor Thomas Watkin will be giving evidence in this inquiry, has been provisionally set for 18 June. That should also be an extremely interesting evidence session.

Papurau i'w Nodi
Papers to Note

[182] **Eluned Parrott:** We have one paper to note, which is the report of the meeting on 28 May.

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

[183] **Eluned Parrott:** I move that

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

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

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 3.36 p.m.
The public part of the meeting ended at 3.36 p.m.