

COMMISSION ON THE POWERS AND ELECTORAL ARRANGEMENTS OF THE NATIONAL ASSEMBLY FOR WALES

MINUTES OF PROCEEDINGS

of the

EVIDENCE OF:

Lord Carlile of Berriew

held at

The Boothroyd Room, Portcullis House, Westminster

on

THURSDAY 12 JUNE 2003

In Attendance

Lord Richard, Chair, Richard Commission

Ted Rowlands, Richard Commission

Tom Jones, Richard Commission

Peter Price, Richard Commission

Dr Laura McAllister, Richard Commission

Sir Michael Wheeler-Booth, Richard Commission

Paul Valerio, Richard Commission

Vivienne Sugar, Richard Commission

Eira Davies, Richard Commission

Huw Thomas, Richard Commission

Lord Carlile

Proceedings

Lord Richard

Thank you very much for coming. We are very grateful to you for giving up the time to come and see the Commission. I wonder if you would be kind enough to identify yourself for the sake of the transcript and then after you have done that if you would like to open up the subject from your point of view and then we can see where we should go.

Lord Carlile

Thank you very much, Lord Richard. I am Alex Carlile, Lord Carlile and I was a Liberal Democrat MP from 1983 to 1997 representing Montgomeryshire. I was much involved in the discussions with Ron Davies in his time as the Shadow Secretary of State for Wales. There led to the devolution settlement which was eventually enacted and I have long been a supporter of the principle of devolution and since it started broadly of its practice.

I know that you have received, although I do not expect you to have it in front of you, a copy of a printed

version of the Lloyd George lecture which I gave on the 19th June 2002 at the Criccieth Festival. I do not have a huge amount to add to what I said there and I would invite you in due course to take that into account.

If I can just headline a few points that might be useful as an introduction though. My main concern about devolution is that it does not yet have the clear support of the public in Wales as a reality, let alone as a concept. I live in mid-Wales. My two nearest towns are Newtown and Welshpool. My take on the public's view of the devolution process is that in so far as they are aware of it they are fairly cynical about it and in so far as they are cynical about it they think it is the political parties lining up a few nice jobs for some of their members. It may be that is unduly cynical and unfair, but I am sure it is a fair representation of the views which are felt by many people, and I base that in part on the limited campaigning I did as a member of my party, the Liberal Democrats, during the devolution election recently.

I think there has been some improvement in public perception, but I think it is very slow.

I believe that devolution has to be allowed to evolve. I believe it will evolve. My fear is that in general terms the evolution of the political process proceeds at the same pace as the evolution of the species and I do not myself believe that that is quite fast enough, I hope that this Commission will be able to give the devolution process, which is with us to stay, a bit of a kick along the route of further evolution..

The way I would describe our present devolution settlement in Wales is that it is eclectic. As a result, it is confusing. There are some parts of some statutes which are not devolved; there are other parts of statutes which are devolved, with ridiculous consequences. The example I always cite is that the Westminster Parliament is responsible for bugs on the Montgomery Canal whereas the Welsh Assembly is responsible for boats. Actually, I think I put it the wrong way round, which shows how confused people, can get. The true position is that the Westminster Parliament, because of British Waterways, is responsible for boats on the Montgomery Canal; the Welsh Assembly through its environmental responsibility is responsible for bugs on the Montgomery Canal and there is a conflict between bugs and boats on the Montgomery Canal. It makes it extremely difficult for that serious conflict, which actually has millions of pounds riding on it, because of possible tourist development -- Tom Jones will know all about this from his local knowledge -- millions of pounds riding on it, but it is very difficult to reach a solution and that is an example of where eclectic devolution is not working.

I believe that one of the things this Commission might do is to encourage Central Government to be a little bit less eclectic and to look at other countries where devolution is, to use a word I absolutely loathe but I cannot think of a better one, a little bit more holistic.

I also think that the eclecticism is at fault because it excludes some major functions. If I can give you two examples which I highlighted in my Lloyd George lecture, they are the police and the courts. At the moment we have four police forces in Wales, which are subject to the usual Home Office arrangements and accountable to the Home Office through the police authority, ACPO and all the other bodies. This is a personal view only, but my view is that the police force in Wales might benefit from some reform. It may be, for example, that four police forces are too many and that one might be quite enough, or two. I believe that that kind of important policy issue could be dealt with much more quickly and much more successfully in the devolved Assembly and I do not see that we in Wales are less capable of dealing with those issues than the devolved assemblies in Nevada, or New Mexico, or British Columbia or in the States of Australia.

Turning to the legal system, it is said by some that one of the reasons why we cannot have a fuller form of devolution, including some primary legislative powers is we do not have a separate legal system. That, in my view, is utter nonsense. If we look at the Commonwealth countries, Australia and Canada, where there is a significant measure of devolution, (and I have been to Canada recently), what they say to you there is something like this, "Oh, devolution works fine, having a Supreme Court in British Columbia is fine, it works very well. We have a little bit of trouble with Quebec, because they have a different legal system, but we manage". So, in other words, they turn the argument on its head and say that the disadvantage to devolution is having a separate legal system in Quebec and I guess they would say similar things with the somewhat different legal system in Louisiana in the United States.

So I would like to see devolution as a more holistic venture, and those are two examples of the kinds of policy areas that I would like to see included.

The final thing I wanted to say was -- well, two things really -- one is about primary legislative powers. It is a logical part of a devolutionary process that a devolved Parliament should have devolved primary legislative powers within constitutional limits and there are many other countries that do that.

The final thing I wanted to add is about membership of the Assembly. I know that there are a lot of representations about the size and the proportional election system. My view is that the Assembly will increase its size at its peril, because I do not believe that the people of Wales would regard increasing the size from 60 as remotely acceptable. They would regard it as the political parties once again feathering their own nests.

Lord Richard

Thank you very much indeed. Could I start off, perhaps, by pursuing with you really the holistic element that you think is lacking. You have given us two examples: one of the canal problem and the other the police problem. What do you think the Government should be doing that they are not doing?

Lord Carlile

I think that the Government in Westminster on the legislative side, as shown by the canal problem, should be taking a long hard look at all those aspects of legislation where the responsibilities are mixed between Westminster and the Assembly, and in every situation where it is possible to do so, without damaging the national interests, the powers should be devolved on a more holistic basis to Wales. I am not suggesting, obviously, that -- sorry, I will pause there, you were going to say something.

Lord Richard

I was just going to say, for example, is that what you think that devolution should in effect be sort of by subject rather than by power, in the sense that Wales has responsibility for its education, or the whole of health.

Lord Carlile

I do.

Lord Richard

The bitty things.

Lord Carlile

I do, and I think that was the intention originally. I do not quite know how it has happened, but somewhere along the line a large amount of legislation was looked at and a very difficult process, to be fair, had to be carried out at high speed and decisions were made that certain aspects should be retained in Whitehall, but we are now beginning to see the disadvantages of that, of which I have given you a slight caricature on the canal problem. In agriculture there are some responsibilities which are partly Westminster and partly Assembly. In education there are others. The historical evidence is that Wales has always run its own education system pretty well and it was left to get on with it without too much interference from others, and I do believe that the committee system of the Assembly works in the interests of the efficient deployment of resources and creation of everyday policy.

I chaired an enquiry for the Welsh Assembly on the safety of children in the National Health Service. I had a panel of 20 experts or so. It was rather like this commission in a sense. We produced a big-ish report with 150 recommendations and I was astonished by the rapidity of implementation of many of our recommendations. It happened in a way which would have been unimaginable under the old system with which you, Chairman, and I are very familiar: the old grand committee and Welsh Select Committee session, Welsh questions once a month and the whole nightmare of believing that whatever we did nothing much was going to happen for a very long time, but it is not so with the Assembly. Where something is urgent it happens.

Sir Michael Wheeler-Booth

Lord Carlile, drawing on your experience as a Member of Parliament here, we have been told that there is supposed to be a so to speak co-legislative process between the Assembly and Westminster Parliament on primary legislation. Some witnesses have suggested this does not work too badly but others have suggested it does, it works badly. What is your view?

Lord Carlile

First of all, the arrangement is informal, so it depends on the goodwill of the people who are involved. From my viewpoint as a member of the Lords, I think it has worked reasonably well. That is because ministers in the Assembly have been keen to come here and explain what they want, to discuss the effect on Wales of different items of legislation and to do so frankly and freely in a non-partisan atmosphere. Most of the meetings at which these matters are discussed are completely non-partisan, so I think it has worked quite well, but it is informal. I think some might take the view that a more institutionalised arrangement would be a better guarantee of these co-operative systems working well. I have my doubts about that, but it does depend on the attitude of the Government in Wales at any given time. There has been a change, from a coalition to a Labour Government in Wales and we will have to see how that works in the next few months, but I would expect them to be entirely co-operative.

Ted Rowlands

With so many ministers of justice, as you suggest, can we define, would it be a lock, stock and barrel of

transfer from the Lord Chancellor's responsibilities, plus some Home Office, or between the two, or are there certain aspects of the Lord Chancellor and the Home Office which would be still preferably done on a UK basis?

Lord Carlile

If we can take them separately. So far as the Lord Chancellor's Department judicially are concerned, I would view perhaps British Columbia as my template. British Columbia has its own High Court structure, it has its own Supreme Court, which is pretty supreme. I have cited British Columbia Supreme Court cases in courts in England and Wales and they are of some authority. There are some very good judges and the system is well developed, but it is subject to the federal structure of Canada and the Canadian Supreme Court, which is extremely supreme, and deals with all constitutional issues.

In reality we have already a lot of devolution of the justice system in Wales. We have Welsh Magistrates' Courts which effectively are controlled in Wales. Crown Courts are controlled within Wales under the Wales and Chester circuit. The county courts are controlled by the Lord Chancellor's Department within Wales. The Technology and Construction Court, which deals with building disputes, sits in North and South Wales. The Commercial Court, there is now a Commercial Court judge based in Cardiff permanently, who will sit in North or Mid Wales. The Divisional Court, which is extremely important, dealing with judicial review has made it its practice to sit in Wales whenever possible to deal with devolution issues, and we have three extremely expert Welsh judicial review judges in John Thomas, Stephen Richards and, Maurice Kay.

The Court of Appeal Criminal Division tries to sit in Wales from time to time to hear Welsh appeals, so we are already three-quarters of the way there. My view is that we should have a Welsh division of the High Court which would sit up to Court of Appeal level in Wales, but would be subject to the normal final appellate jurisdiction of the House of Lords and would be part of the ordinary law of precedent that applies in all our courts. So a Court of Appeal Wales decision would be of the same authority as any other Court of Appeal decision, and I am not suggesting that there should only be Welsh judges. I think there is an advantage to have judges who have sat in England as well in it and, indeed, one could cite the Hong Kong Final Court of Appeals as an example of one which has benefited from judges of more than just its own domestic jurisdiction.

Ted Rowlands

Would the logic of that also be Welsh criminal justice bills as opposed to an England and Wales criminal justice bill? We have a succession of them. Does that mean in fact you would not have the same policy, and the same concern, or any of these other issues that at the moment are the substance of the criminal justice bills?

Lord Carlile

I would not myself find any difficulty in looking at -- let us call it state legislation on criminal justice issues. It happens all over the world in federal jurisdictions to a limited extent. Broadly I think that we would have to ensure that the foundations -- for example, of sentencing policy -- would be the same throughout England Wales. As to prisons, there is the practical problem that there are not enough local prisons in Wales to send all the Welsh criminals to, and Welsh prisons also have a lot of English criminals.

I think that there is room for some quite separate arrangements, and Scotland is a good example of this, for example in dealing with youth crime. It may be that we can deal with youth crime far more effectively in Wales using a Welsh solution than necessarily following a solution which is prescribed for Reading, or Brixton, or other very heavily populated areas of England.

Ted Rowlands

You would think of perhaps a devolution of the youth justice side but not necessarily of the justice system as a whole. Is that right?

Lord Carlile

I would think of a devolution of the justice system that would build into it the requirement that some legislation would have to be on a UK wide basis. It is just what they do in the United States. It is just what they do in Canada. I do not think there is any particular difficulty about achieving that.

Ted Rowlands

Devolution is not federalism. You are actually a federalist.

Lord Carlile

I would not actually use the F word to describe myself. I have tried to avoid it. I think I am a devolutionist rather than a federalist, but I think if you want to call the sort of solution that I am offering federalist then I will not be unduly offended. The state has to be responsible for what is in the interests of the state, but you

devolve what you can devolve if you are going to have better Government through the devolution process. Using the youth courts as an example I think we would have a better process through devolution than we get through the London Parliament.

Dr Laura McAllister

Can I ask you about the Sewell Convention; how it has been used in Scotland. From your own experience and your knowledge outside the Parliamentary side, can you present first some of the arguments for and against that being a widely used concept in an Assembly which has primary legislative powers.

Lord Carlile

You will have to explain to me how it has been used in Scotland because I have not made a particular study of how it has been used in Scotland.

Dr Laura McAllister

It has been used in many more cases, much more frequently, and there has been submissions raised about problems with scrutiny on the part of the Parliament when there is a change in a piece of legislation.

Lord Carlile

I have experience professionally of one case in which the Sewell Convention was used in a very broadly interpreted way, and from what I remember of giving advice in that case, I was surprised that it had been applied so broadly. The definition of devolution issues in Wales though is different for legislative reasons from the definition of devolution issues in Scotland and I would not pretend to be an expert in this; this is only through the one case in which I advised a few months ago, but my perception was that the way in which devolution issues are adjudged in Scotland has actually worked quite well. It has kept in the Scottish courts the full integrity of the Scottish legal system and has given them an interesting constitutional role that has not caused any noticeable clashes with Westminster as yet, but I do think that the way in which devolution issues are defined is a very complex question and is closely allied to issues like the reform of the House of Lords, the reform of the judicial committee of the House of Lords in which we know there are strains between some of the Law Lords at the present time. Does that answer your question?

Dr Laura McAllister

I think it does. I just wonder, we may be going beyond your expertise in this particular area, but in Scotland as well, for the capacity for a scrutiny reserve to ensure that things were not being ended dramatically and not being debated or scrutinised by the Scottish Parliament. I just wonder if that is something that we need to look at, because the Sewell or the equivalent would inevitably be used in the case of Wales.

Lord Carlile

I do not pretend to any expertise in this area. I think what I would say is I do not know of any credible evidence to suggest that the Welsh are any worse at dealing with issues of that kind than the Scots. The notion that the Scots have more experience I think is on the whole fairly risible as between the creation of the Scottish Parliament, and the last time they passed any legislation in the Scottish Parliament I think everyone who had been involved in the previous Scottish Parliament, their children, their grandchildren and several generations thereafter met their maker long ago. I do think we actually started from much the same point as Scotland and it is ever so slightly offensive to the Welsh that they were thought to be less capable of accepting a significant measure of devolution as compared with our friends in Scotland.

Huw Thomas

You have made the argument for more powers in terms of legislation to pass to Wales, and yet you have held very strongly the argument that there should not be an increase in the numbers of AMs. I just wondered whether you considered that therefore the Assembly in terms of its size, the number of backbenchers after all is fairly constrained, can actually handle the kind of legislative programme that would then take place?

Lord Carlile

You are talking to someone who thinks that the House of Commons could work perfectly well if it only had 300 members, so the answer logically has to be yes. Incidentally, the House of Lords could manage perfectly well with 100 members. So, again, the answer has to be logically yes. I think that we are given to very large legislatures in this country; not as large as in some countries, but having recently visited some offices on Capitol Hill, I noted that one Republican congressman I visited had I think he told me he had 350,000 constituents, and he seemed to be managing quite well, albeit with staff that those of us who have been Members of Parliament would have envied, or perhaps not!

Lord Richard

You cannot say that 60 is a huge number.

Lord Carlile

I do not think 60 is a huge number.

Lord Richard

I do not think 80 would be either.

Lord Carlile

I do not think 60 is necessarily the right number. I think the point I was trying to make was that as it happens there are 60. There have been two devolution elections for an Assembly of 60 members and I think the public are not going to be terribly impressed if suddenly the numbers go up to 80 or 90.

Paul Valerio

Perhaps you are right, but some evidence we have suggests that there was not sufficient time given by AMs to scrutiny. If we were to accept that there is an argument for more powers to be evolved is not the existing system more intolerable if you have the small number of AMs not giving the full work adequately, and the basic reason you might come to that conclusion is the public perception that they will not wear more than 60, so it is a bit of a dilemma which way I can treat it.

Lord Carlile

I have been impressed so far from what I have seen about the way they have organised themselves. I do not yet believe that they are so overworked and overstretched that they could not deal with the critical mass of work which would be involved in an evolutionary increase in their activity.

I am also concerned about the credibility of political organisations. If the Assembly had been able to do more, and I do not blame them for this but it is a fact, in saying what the Assembly is, what it does then I might take a different view. I frequently say to people, "You may be cynical about the Assembly but let me just remind you that the Assembly governs Wales in almost all aspects" which I believe to be true, but the public need a lot of convincing over that. In the chattering classes even, out of Cardiff at any rate, and out of the very strongly Welsh speaking areas of the west, the Assembly has a long way to go to reach a level of credibility, even in its contact with the local County Council. It certainly has not happened in Powys yet.

Vivienne Sugar

Whatever the Commission recommends later this year, the current settlement is still going to be with us for another few years. I would like to have your observations on the effectiveness of scrutiny of primary legislation as it affects Wales under the current system.

Lord Carlile

I can only speak of the documents that I have received from the Assembly --

Vivienne Sugar

No, I mean scrutiny by the House of Commons.

Lord Carlile

Scrutiny here of Welsh secondly legislation.

Vivienne Sugar

No, of things which affect Wales but are going through as primary legislation.

Lord Carlile

In terms of primary legislation, each political party has a front bench which deals with Welsh affairs, and I think under that practical arrangement there is a decent level of scrutiny of legislation affecting Wales, the primary legislation affecting Wales. In this place, in both houses I think there is precious little scrutiny of secondary legislation and of the deliberations of the Assembly. Ministers are extremely reluctant to trespass into the

Assembly's area of work, partly because it is often right that they should not and partly because it is a good excuse for not answering questions. So I think that the scrutiny here of what the Assembly does is thin. Indeed, the materials from the Assembly that are readily available in the libraries of this place are not all one would wish them to be, but that may have been because of the earlier days at least of the Assembly's Website, which has improved a lot, but was not terribly good.

In terms of the Assembly scrutiny of what is happening here, my impression from the material I receive from the Assembly is that it is strong, that they pay close attention to what happens here and if the volume of material that I receive through my own party is anything to go by then there is an effective level of scrutiny.

Lord Richard

Can I thank you very much indeed.

Lord Carlile

Thank you very much indeed.

Lord Richard

Thank you very much indeed. It was very useful and very helpful.