Introduction

Thank you for inviting me to speak today. I am, of course, here because I chair the Commission on Devolution in Wales. But I am also here because I am a Clerk whose whole career was spent in parliamentary institutions, for which I have enormous respect and affection.

I have enjoyed and profited from being a member of the UK Study of Parliament Group for almost 30 years. This is my first visit to the Scottish SPG, and, before I pass on to my allotted topic, let me take the opportunity to say how firmly I believe that the advent of the Scottish Parliament, and to a lesser extent, the Assemblies in Cardiff and Belfast, has re-invigorated the Westminster Parliament, and how much parliamentary keeping-up-with-the-Joneses has been good for British democracy.

I will be telling you something about the Commission's work to date and what it expects to do in the future. What I cannot tell you is what the Commission is going to say in its second report due early next year, not least because I do not yet know what my colleagues and I are likely to agree. But I will speculate on what we might say on parliamentary matters and interparliamentary relationships, principally to stimulate your ideas from a Scottish viewpoint.

I will also offer some thoughts on the differences between Wales and Scotland, and some personal thoughts on future constitutional developments.

History of the Welsh Constitution

I imagine that the constitutional history of Wales does not often figure in Scottish thought, so let me begin with some history. You will be relieved, though, that I don't plan to start with the tenth century laws of Hywel Dda or Owain Glyndwr's Parliament of Machynlleth of 1404.

To say that Wales's more recent constitutional relationship with the rest of the UK has fluctuated is something of an understatement. If one extreme was the Wales and Berwick Act 1746 with its provision that the word "England" in statute meant also Wales, we are coming

up to the centenary of one high point - the Welsh Church Act 1914 – an Act that dispensed with the established religions that you and England still have.

But after the First World War the campaign for Home Rule all-round of the early 20th century ran into the buffers with the failure of the 1919 Speaker's Conference to come up with agreed proposals. Plaid Cymru was formed in 1925, but did not win a seat at Westminster till 1966. The Home Secretary was given the added title of Minister of Welsh Affairs in 1951; but the then incumbent of the post (none other than David Lloyd George's son, Gwilym) was able to assert in 1955 in response to SO Davies's devolutionary Government of Wales Bill that "as political units, Wales and Great Britain are, in the world in which we live, essentially indivisible". That Bill, incidentally, received the support of only six Welsh MPs.

But if 1955 was almost a return to 1746, things have moved pretty steadily in a single direction, with a few stutters, since. A Minister of State for Wales was appointed in 1957, and the new Labour Government established the office of Secretary of State for Wales in 1964. The Kilbrandon Commission sat from 1968 to 1973, but was hopelessly divided on Wales. But partly because of the exigencies of the need to keep the "odds and sods" on board during the minority Labour Government of 1974 to 1979, first the Scotland and Wales Bill and then the separate Scotland Bill and Wales Bill were introduced and carried. Unlike the case here in Scotland, the rejection of devolution in Wales in 1979 was decisive, but the period of Conservative Government was probably equally decisive in stimulating demand for devolution, certainly here in Scotland, but also by a second wind, in Wales.

The Government of Wales Act 1998 was drafted in a hurry. The Welsh Office had given little thought to devolution before the 1997 election. Wales had had no Constitutional Convention. The 1978 Act was dusted down, but even as it made its progress through Parliament was radically re-written. Even so, the model chosen was ill-thought through and could not, and did not, survive long. It was based on a local government model and on an idea of consensual working. The legislative powers of the Assembly were no more than the former secondary legislative powers of the Secretary of State, and a curious hybrid creation of a legislature and an executive rolled into one came blinking into the sunshine.

The consensual model of politics soon disappeared. The amalgam of government and legislature was worn away from within, and became untenable. There was dissatisfaction with the limits on the Assembly's powers. Of all the constitutional reforms of the early Blair years, the model of the 1998 Government of Wales Act was the least long-lasting.

We then had the 2006 Act. This was undoubtedly a step forward, but its Part 4 provisions for full primary legislative powers were principally for show and were expected to sit unused on the statute book for some time. But when the Welsh electorate delivered in 2007 an Assembly where Labour needed to share power with Plaid Cymru, there was new impetus for change. A referendum was proposed, held in 2010 and won, and the paraphernalia of Legislative Competence Orders – a sort of power to legislate, subject to big brother's approval - was replaced by primary legislative powers, albeit ones based on a conferred powers model rather than the reserved powers model found in Scotland.

I have run through this history which will be very familiar to many of you simply to illustrate how our constitutional path in Wales has lurched along, and has hardly followed a carefully planned piece of strategic thinking for what the relationship between Wales and the rest of the United Kingdom ought to be.

For all this, we have not been short of very high class analysis: Kilbrandon, of course, but more recently the Richard Commission of 2004, Emyr Jones Parry's All Wales Convention of 2009, and more specific pieces of analysis with an important bearing on Welsh constitutional matters like Roger Jones's report in 2009, the report of the Holtham Commission in 2010, and the McKay Commission report earlier this year. There have also been a series of extremely valuable reports from parliamentary committees, especially the Welsh Affairs Committee in the Commons and the Constitution Committee in the House of Lords.

Now there is our Commission on Devolution to Wales, and one is tempted to say with Macbeth "What, will this line stretch out until the crack of doom?"

Genesis of the Commission

So why was the Commission on Devolution to Wales established?

I think it is unlikely that there would have been a Commission, at least just yet, if the UK General Election of 2010 had not delivered a coalition.

The hurriedly agreed coalition agreement with its promises for a five year programme was, of course, a compromise. The Conservative election manifesto said little on constitutional matters in Wales (they would not stand in the way of the referendum on legislative powers, but their "priority remain[ed] getting people back into work and strengthening the Welsh economy") – though there was a reference to the UK's "unbalanced" constitutional settlement – a term, presumably of disapprobation. I am pretty sure therefore that it was the Liberal Democrats with their federalist history who secured a commitment to what the coalition agreement calls "a Calman-like process for Wales".

Having said that, collective responsibility has been a pretty hardy beast since 2010, and I have no cause to doubt the engagement of Ministers of both coalition parties with our work. Indeed, the Commission has enjoyed excellent support from both the present and the previous Secretary of State for Wales, for which we are very grateful.

Although the intention to set up a Commission was announced in June 2010, we were not actually established until October 2011. Initially there were seven Commissioners, one nominated by each of the political parties represented in the National Assembly, and three non-political nominees – there are now four non-political nominees. We have a range of experience – a banker, an industrialist, an entrepreneur, a former Vice-Chancellor; some are Welsh-speakers, some are not; we come from all over the nation, but we are predominantly male, I fear. How I came to be asked to chair the Commission, I have no idea. But I hope it says something about the appreciation there is for the neutrality and integrity of our profession.

Scotland

As I said, we were to be a Calman-like process for Wales. The mention of Calman allows me to side-step briefly to Scotland.

As you will know very well, Calman was a unionist Commission, eschewed by the SNP. Its principal recommendations were about fiscal powers and inter-institutional co-operation. It made few recommendations for changes in the balance of powers between Edinburgh and London.

Our Commission is not quite "ap Calman" as it was styled by some when it was first announced. First, and most importantly, its establishment was supported by all four political parties in the National Assembly, who all nominated members to it. That has been an enormous strength.

Secondly, if the non-fiscal powers of a Scottish Parliament that exists within the United Kingdom Union were at the time of Calman regarded as largely satisfactory by the unionist parties, there is pressure in Wales for a re-alignment of powers.

Thirdly, tax devolution was part of the referendum in Scotland in 1998, even if it was never implemented. Tax devolution would be new territory for Wales.

Finally, Wales is not Scotland. Our GVA per head is 75% of the UK average compared to 99% in the case of Scotland. Scotland has been well served by the Barnett formula, or at least, very much better served than Wales has been. Our border is much more porous than Scotland's is. Scotland has retained civic institutions since 1707 and had, of course, emerged as a state in a way Wales never did in the early modern era. And support for independence in Scotland is far ahead of the 9 per cent figure that our polling evidence suggests to be the level of support in Wales – though the same poll did show that two-thirds of the Welsh population favour greater powers for the Assembly.

Here I want to throw out a small pebble. There is no axiomatic solidarity in the relationship between Wales and the two other small home nations. Of course there is an emotional Celtic link, and a common sense of being the smaller partners in the Union, with the

concomitant recognition that what suits the English majority, and what therefore has an appeal for a Westminster Government, might not work equally well in Edinburgh, Belfast and Cardiff.

However, if you talk to officials and politicians in Cardiff, Belfast and Edinburgh, you soon become aware that they will only act in concert when they regard their own particular interests as making that desirable.

Although therefore there is always an advantage in having a Scottish precedent for change in Wales, Wales does not serve its best interests if it merely tries to swim in Scotland's slipstream.

Consequently I believe that our Commission has been right always to ask what is best for Wales from first principles, rather than to look at what is happening in Scotland and to ask what could be carried over to Wales.

But Scotland's future will profoundly affect Wales, whatever the result of your referendum: either Wales will be one of only two devolved nations and England will predominate even more, or there is likely to be a further push for fuller self-government within the Union by Scotland, with areas like social security benefits being considered for devolution. That push will also have implications for us.

Part 1 recommendations

Let me return to the Commission on Devolution to Wales. Our work was divided into two Parts. The first part was financial. Our terms of reference here were:

> *To review the case for the devolution of fiscal powers to the National Assembly for Wales and to recommend a package of powers that would improve the financial accountability of the Assembly, which are consistent with the United Kingdom's fiscal objectives and are likely to have a wide degree of support*

We had the immense good fortune to follow in the wake of the Commission appointed by the Welsh Government that Gerry Holtham chaired. That was a Commission of just three most distinguished

economists, and it would have been perverse of us entirely to plough on regardless of their work. But I do believe that there was value in exposing their views to a more public and more political scrutiny – to which they stood up very well. We did depart from Holtham in some important respects, but it would frankly have been surprising if we had not said many of the same things.

We published our report on Part I in November last year. I am not going to explain today our views on airport passenger duty or landfill tax, you may be pleased to hear. But I think it is worth mentioning a couple of general principles and conclusions that we drew.

The main thing that struck us in Part I was that Wales appears to be unique in the world in having legislative and spending powers but no tax and borrowing powers. We felt that this was anomalous and that Wales should have some tax and borrowing powers.

While we believed that a suite of smaller taxes should properly be within the Assembly's control, we also believed that it was important that a significant tax should also be within that control. For various reasons, we ruled out corporation tax, value added tax, fuel duties and national insurance, but we concluded that the income tax base should be shared between the governments in Cardiff and London, with the Welsh Government free to alter each rate of tax independently, enjoying – or suffering – the consequences of any variation they made.

We called our Report "Empowerment and Responsibility: Financial Powers to strengthen Wales". While we entirely accepted that the Assembly is at present accountable to the people of Wales, we felt that having to make fiscal choices would bring a deeper accountability to Welsh political life and would enrich the political process. It would also empower a Welsh Government to use its financial powers to strengthen Wales, as Welsh Governments have used their other powers in ways that they believe serve the interests of the people of Wales.

But we were also clear that this should be subject to not undermining either the UK Government's macro-economic responsibilities, or the fiscal transfers that underpin the successful UK fiscal and monetary union. And we set two conditions for the transfer of income tax powers: a mutually satisfactory resolution of funding issues between

the two governments, and the endorsement by the people of Wales in a referendum.

The UK Government's response to our Part 1 recommendations is imminent. It was important to us and significant politically that all four parties in the Assembly endorsed our recommendations. I am optimistic!

Part 2 work

We approached Part I by a desire to be consensual; to be evidence based and listen to views across all of Wales and beyond; to base our recommendations on principles, and to take full account of the international evidence. That approach served us well in Part 1, and we will be continuing it in Part 2, where we have three new Commissioners, having lost two who served on Part 1.

The remit for Part 2 of our work is

> *To review the powers of the National Assembly for Wales in the light of experience and to recommend modifications to the present constitutional arrangements that would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales.*

We have expressed our vision for Part 2 in the following terms:

> *We believe that the people of Wales will be best served by:*
> - *a clear, well-founded devolution settlement that allows coherent political decisions to be made in a democratic and accountable manner, and*
> - *political institutions that operate effectively and work together in the interests of the people they serve.*
>
> *Devolution of power to Wales should benefit the whole of Wales and the whole of the United Kingdom*

That vision is provisional (if such a thing is possible) in the sense that we are prepared to refine it in the light of what we learn in evidence.

I emphasised earlier what an advantage it has been to our Commission, as opposed to our Scottish predecessor, that all four

parties represented in the National Assembly have nominated members. That does, of course, mean that, unlike Calman, we are not all avowedly unionist. So we would not expect our Plaid Cymru-nominated member to sign up to anything that suggested that the union will last for ever.

Nevertheless, I think we are all interested in our Part 2 work in trying to establish an intellectually coherent rationale for what our terms of reference call the "constitutional arrangements" of Wales.

Let me give some examples. Why are powers reserved in Scotland, reserved and excepted in Northern Ireland and conferred in Wales? Is there a principle behind this, or is it an accident? If there is a principle, does it withstand scrutiny? If it is an accident, is it a happy accident? Is it defended because of constitutional inertia? Is it attacked in Wales because of a perception that we are treated as second-class members of the union? How would any change be effected? Would it be worth the candle?

Another example. Uniquely in Wales, the Secretary of State must come before the National Assembly to explain the Queen's Speech. No doubt this was originally designed for an Assembly with no primary legislative powers. But should it be removed now that the Assembly does have these powers, or is it an interesting example of accountability of the government of the United Kingdom to a devolved legislature that Scotland and Northern Ireland ought to consider emulating?

Should we have a Welsh jurisdiction, to match those in Scotland and Northern Ireland? If so, what are the costs and the practical consequences for things like court structures and rights of audience? Can a jurisdiction grow organically – in other words, can we just wait and see it develop, or does it need to be designed and planned?

Why is policing not devolved in Wales when it is in Scotland and Northern Ireland? Why on the other hand is health almost entirely devolved? Why is Wales restricted to on-shore generation of 50MW capacity onshore and 1MW offshore? Can our railways be devolved when they snake in and out of England? Can water be devolved or do we need to recognise where the water actually flows?

Again, is all this pragmatism or principle? Historical accident or strategic design? And any of you who reads the evidence we have received from both Governments and many other witnesses will realise that the issue of where that devolution line is drawn is contested all across the frontier.

I hope that our Part 2 report will address at least some of the questions of principle, and that it will not shy away from recommending both where the dividing line between Cardiff's powers and those of London should be, and why we believe that it should be placed where we recommend.

Parliamentary matters

Our terms of reference refer to the National Assembly and the UK Parliament, rather than to the Welsh and UK Governments. For the most part, we are looking at what the two Governments' responsibilities ought to be because we read the references to the legislatures as encompassing the governments that are responsible to them. But we are also going to look at mechanisms inside the UK Parliament for dealing with Welsh matters, and at interparliamentary relations.

The Presiding Officer of the National Assembly has given evidence to us, as have the SPG and the Speaker and the Clerk of the House of Commons. You can read that evidence on the Commission's website – and, if the SSPG were minded to submit its own evidence, based on the Scottish experience, we should very much welcome that.

What are the principal issues?

First, there are issues that are peculiar to our settlement – I have already referred to the Secretary of State's obligation to attend the Assembly to explain the Queen's Speech. But he also has the statutory right to participate in proceedings (whatever precisely that means) and also a power in certain circumstances, primarily if the interests of the United Kingdom or of England are adversely affected, to make an Order prohibiting the Clerk of the Assembly from submitting a Bill for Royal Assent. There are other statutory constraints, such as the obligation for Standing Orders to distinguish between the roles and responsibilities of constituency and regional

members, and for committee composition to be determined by d'Hondt. Are these appropriate obligations, powers and rights?

Then there is the issue of capacity – something that we hear often in evidence in relation to the Welsh Government and Civil Service, as well as the Assembly. Baldly, the question is whether 60 AMs are enough to do the job, especially when only 16 or so members of the government party are available to fill all the posts on scrutiny committees – a fact that means that six AMs sit on three committees.

Next there is the issue of the lack of clarity in the settlement – something that the Presiding Officer regards as making her position particularly difficult in deciding whether a proposed piece of legislation is within or outwith the Assembly's legislative competence. She cites, as have many others, the fact that the very first Act of the Assembly – the rather footling Local Government By-laws (Wales) Act 2012 - was referred to the Supreme Court by the Attorney General, albeit that the Court found it to be within the Assembly's competence. One of our guiding principles is clarity, and we will undoubtedly be asking whether the reserved powers model would enhance clarity – or, indeed, if there are other mechanisms that would achieve this.

The Presiding Officer also cites difficulties in determining whether a matter is within competence as being an important factor in the debates between the administrations in London and Cardiff about whether Legislative Consent Motions are necessary in particular cases. For example, in the case of the abolition of the Agricultural Wages Board by the UK Government, a policy opposed by the Welsh Government, the argument from London was that this was a matter of employment law and therefore not devolved, while the argument from Cardiff was that it was a matter of agricultural law, which is devolved. I think we are likely to ask ourselves how the legislative consent mechanisms can be strengthened – and here, of course, the Mackay Commission recommendations, if adopted, would do much to heighten the profile of the idea of legislative consent.

Finally, there are other issues connected with interparliamentary relations. Here the Commission took up with the Speaker of the House of Commons and the Lord Speaker a number of the recommendations of Calman on these matters - recommendations which seem to have made little progress at Westminster. While the

Lord Speaker's response was disappointing, the Commons Speaker's evidence showed perhaps a more enlightened approach than his predecessor.

Speaker Bercow said that he would be happy for legislative competence matters to evolve into a legislature to legislature, rather than executive to executive, dialogue; for standing orders to be amended to increase opportunities for joint committee working between the Assembly and the Commons; for Assembly Ministers and Members to have a voice at Westminster when there were proposals to alter devolved competence; for Assembly Members to have better access to the Palace of Westminster, and for there to be a forum for the exchange of ideas between parliamentarians throughout the United Kingdom. He also identified the need for there to be a part of the Commons secretariat with specific responsibilities for inter-institutional relationships within the United Kingdom.

Overall, I regard this as a very welcome recognition that the Commons needs to re-assess its relationships with the devolved legislatures. I would certainly welcome your views on whether there are any other issues on which we ought to move forward in the interests of the devolved legislatures.

Constitutional change

Let me turn finally to some larger questions.

I am rather an inadequate Welsh learner, but one Welsh proverb has always much appealed to me: Dyfal donc a dyr y garreg – persistent tapping breaks the stone. Perhaps the drip, drip theory of constitutional development is the right one.

Earlier, I used the rather loaded word "lurched", but one could ask what is wrong with a gradual process of change where each new step is thoroughly tested and, if necessary, modified. You only need to look at the modern consequences of the Second Amendment to the US Constitution to recognize the problem of sanctifying constitutions in a way that means that it is next to impossible to trim the hooves of a constitutional cow.

The almost imperceptible shifts in constitutional practice in the UK allow us a flexibility and adaptability that we perhaps ought to value. Constitutional change perhaps ought to be a process rather than an event, as the American Marxists Huberman and Sweezy wrote in 1960 of the Cuban revolution, so pre-dating by 37 years Ron Davies's often-quoted dictum.

Vernon Bogdanor, in the peroration of the History of the British Constitution in the Twentieth Century produced by the British Academy in 2003, argued that the historic British constitution based on tacit understandings more than codified rules might be, at the time he wrote ten years ago, in the process of transformation to a quasi-federal codified constitution, but that it also risked remaining in no-man's land because there was "little political will to complete the process, and little consensus on what the final goal should be".

Since I am not a politician, I shall not comment on the political will to complete the process of constitutional reform, though I am conscious from my work with the Commission that many citizens find the discussion of constitutional issues an annoying habit of the chattering classes.

But how would one begin to build consensus on the final goal? Here I think that the Commission on Devolution offers a few modest lessons: get all-party buy in, and involve civil society and citizens in what they call in New Zealand "the constitutional conversation". If pre-legislative scrutiny is a good idea in the case of ordinary day-to-day legislation, then thorough testing is even more desirable in the case of proposals for constitutional change. We hope that we as a Commission are doing that in the areas within our remit, and we expect any proposals we make also in due course properly to be tested in Parliament.

When First Minister Carwyn Jones recently came to see the Commission, he was asked about his proposal for a Constitutional Convention. He had originally advocated a Convention to be held before the Scottish referendum. Since this is not going to happen, he now believes a Convention should follow the referendum, whatever the result. He may have support more widely for that view.

On the basis of what I have learned from my work with the Commission, let me suggest a few topics that are beyond the remit of

our Commission, but relevant to Wales and which might perhaps form part (but only part) of any wider constitutional reappraisal:

First, there is the fair funding issue. What ought to be the basis of fiscal transfers inside a union? What ought to replace the unsustainable Barnett formula? How does any formula cope with divergent policies within the Union? And what is different as between fiscal transfers to, say, the North East of England and to Northern Ireland?

What is the rationale for asymmetric devolution? Is it justifiable in principle, or is a justified only on the basis of historical accident? Can we expect more of it if London receives greater powers, as Tony Travers's report has recently suggested, and if other city regions in England want to follow?

And do we need more clarity by what we mean by subsidiarity and localism? How many levels of government do we need - from community council to European Union, and do we want to settle their relative powers and interrelationships?

What ought to be the implications of devolved government for the make-up of both Houses of Parliament, and how can Lords reform be considered without this territorial element?

Is a quasi-federation a "proper" constitutional outcome? Do we instead need something where the rights of the federal government (if I can call Whitehall and Westminster that for the moment) are as subject to the rule of constitutional law as the rights of the "states" that make up the federation?

And if that is a step too far, we certainly could look at better mechanisms for the resolution of disputes between the governments within the UK, or, on the positive side, for enhancing their co-operation. As one official said rather strikingly to us here in Scotland, there may be a hierarchy of Parliaments in the UK, but there is no hierarchy of governments (though he had perhaps not taken full account of section 114 of the Government of Wales Act 2006).

Then there is what one of our Commissioners dubbed "the problem of England".

With the exceptions of Tanzania and Trinidad and Tobago, I am not aware of any federation where 85% of the population is in one unit. If Scotland leaves the Union, the problem becomes even more acute – but I am not going to venture into the interesting constitutional chasm that opens if you vote “yes” next year.

English regional government, as proposed by Gladstone in the Midlothian campaign, by Churchill in 1911 and, of course, by Tony Blair, might have been one solution, but there seems no appetite to revive it.

The McKay Commission has produced an elegant solution to the parliamentary aspect of the English question, but I doubt that it will have satisfied those who want a stronger voice for England on laws that affect England alone. Nor does it solve the problems inherent in having the government of England and the government of the United Kingdom institutionally intertwined.

According to Vernon Bogdanor, the establishment of the devolved administrations raised “fundamental questions concerning parliamentary sovereignty and federalism, questions that successive governments sought to avoid answering”. Those fundamental questions still need answers, and that is beyond the unpaid pay grade of the Commission on Devolution in Wales.

Thank you for listening so patiently.