



Ein cyf/Our ref: MB/FM/2449/13

Paul Silk
Chair of the Commission on Devolution in Wales
1 Caspian Point
Caspian Way
Cardiff
CF10 4DQ
commissiononwelshdevolution@walesoffice.gsi.gov.uk

6th June 2013

Dear Paul

I am writing in response to your letter of 24 April and further to my meeting with the Commission on 3 May.

You have asked for further information about how the devolution settlement is working in practice, with particular regard to the inter-governmental relations between the Welsh Government and UK Government departments.

The Commission will have seen the Permanent Secretary's evidence to the House of Commons Public Administration Select Committee, which I sent you on 1 May. This describes our working relationships with the UK Government as professional, business-like, constructive, numerous, complex and sometimes frustrating.

In this letter I set out a number of key issues in our relations with the UK Government. In the Annexes, I have included a selection of case studies, related to your questions, to illustrate in more detail the positive collaboration as well as some of the frustrations. The Commission will appreciate that I have not been able to share examples where negotiations are live and sensitive.

On your question about the extent of bilateral engagement between Welsh Government and UK Government Ministers, this is business-driven and very extensive on some issues. In other areas, where matters are largely devolved, the need to engage is considerably less. I have not provided a specific Annex on this, but Ministerial engagement is a feature of most of the case studies.

UK Government communications can be a major issue for Ministers here. There are occasions when the UK Government makes announcements relating primarily to England, but having significant implications for Wales, in respect of which there has been no prior consultation. Recent examples include the publication of the Government response to the

Francis Report and the remit for the School Teachers' Review Body. Our bilateral Concordats with UK Government departments commit both parties to good prior communication, but it is a constant challenge to make sure this is respected in practice.

As the case studies illustrate, there are many good examples of effective joint working with UK Government departments. Other recent examples include:

Negotiations on Enterprise Zones in Wales.

Legislation to prevent social housing fraud.

Negotiations around the Trans-European Transport Network covering roads, rail, ports and airports and access to relevant European funding for designated routes.

Legislation

Legislation is a key focus of inter-governmental communication. Many UK Bills in each Queen's Speech contain provisions that require the agreement of the Assembly through Legislative Consent Motions. Around 80-90% of Welsh Government Bills require some form of engagement with the UK Government. Around half require specific UK Government consents, some of which may require a large number of separate and substantive consents from different Secretaries of State. Accordingly, there has to be early and ongoing engagement between officials for this to run smoothly and Parliamentary and Assembly timetables to be met.

Although we start engaging early, e.g. around a year in advance in the case of the Social Services Bill, in many cases Whitehall has not engaged until we are getting close to the wire with our timetables. In some cases, we have had to make changes which undermine the effectiveness of our Bills, because of unresolved consent issues.

I have included the Social Services and Well-being (Wales) Bill case study (**Case Study 1(a)**) because it is a good illustration of the complexity of the devolution settlement, in this case the boundary with policing and justice issues in relation to vulnerable people. Long term, the need for consents here would be far less if policing and criminal justice were devolved, as we are proposing.

For now, I think the key issue is that Welsh Government legislation is being held up where the central issue is very clearly devolved. Sometimes the cause of delay is that there are challenges in resolving the UK Government's position across Whitehall Departments. With the current settlement, these issues will continue to arise, but I think the problems could be very much reduced with a strong policy steer within the UK Government that devolution boundary issues will not be used to delay the legitimate policy intentions of the Welsh Government.

The case studies focus on issues which relate directly to the devolution settlement and where inter-governmental relations work at the boundary of our respective powers. There are, however, many other areas where there is extensive engagement with the UK Government, but in the context of differing policies and priorities, as opposed to overlapping powers. Two examples follow:

For example, on the EU Budget for 2014-2020, the Welsh Government's priority was to maintain current spending on the Common Agricultural Policy and the Structural Funds whereas, in the negotiations, the UK Government sought and achieved a real-terms cut in the Budget. We were disappointed that, unlike other Member States, the UK Government

did not negotiate for special provisions to assist in the structural adjustment of regions such as Wales. Ultimately, the UK Government agreed to mitigate the reduction as it applied to Wales.

This is not an issue about the devolution settlement, but rather about the relative priority given by Whitehall to spreading economic growth across the UK regions. It illustrates the wider strategic and political context of our ongoing relations.

Strategic Infrastructure Planning raises similar issues of prioritisation, but these are compounded by the lack of a clear mechanism to manage strategic infrastructure issues that transcend national boundaries. At present, inter-governmental communication happens on an individual sectoral basis. There is no recognition of Welsh infrastructure needs and opportunities at a UK level. The UK National Infrastructure Plan in reality covers mostly English infrastructure, and there was very limited engagement with the Welsh Government. Welsh Government officials are working with HM Treasury to try to improve this situation – this is an area of crucial importance for Wales.

Turning to the devolution settlement itself, I offer the following observations arising from the case studies relating to Welfare Reforms. The speed and complexity of the UK Government's changes to the benefits system represent a significant challenge for inter-governmental relations. I have included a number of case studies on this issue because of its implications for people and communities in Wales, the direct practical implications for the Welsh Government and the substantial resources we are investing in dealing with them.

In particular, the way the abolition of Council Tax Benefit (**Case Study 2(f)**) was handled effectively side-stepped the devolution settlement. The UK Government abolished the benefit and cut the funding transferred to provide council tax support in the future by 10%, rather than transferring the appropriate powers and sufficient funding to operate council tax benefit in Wales. The reduction in funding, combined with the failure to share crucial information, and the challenging timescales in which we had to develop a new scheme, has made it very difficult to properly plan and implement the new arrangements. In short, setting aside our fundamental policy differences on welfare reforms, the way these changes were forced upon us militated against efficient and effective government.

On welfare reforms more generally, there is a myriad of issues falling into two broad categories:

- a. Real world impacts on individuals and communities. Although we very much regret these impacts, and they will undoubtedly create hardship, and increase pressure on devolved services, we accept that these are non-devolved matters on which our role is limited to making representations on behalf of Wales.
- b. Financial and administrative impacts on devolved services, including passported benefits. On these issues, the UK Government's Department for Work and Pensions (DWP) and Communities and Local Government (DCLG) generally recognise our direct practical interests and officials make a genuine effort to engage with us. But in practice the consultation machinery and timescales are simply inadequate for the scale of changes underway.

In relation to the devolution settlement, the conclusion I draw from these case studies is that the frustrations we experience are the inevitable fallout from the scale of the changes and the reform timetable. The implications for the Devolved Administrations have simply not been factored in to the planning at a sufficiently strategic level. In addition, the changes are imposing very significant unfunded costs on us, to the detriment of devolved services.

To conclude, I have tried to answer your questions with a balanced summary of both positive progress and genuine frustrations in our inter-governmental relations with the UK Government.

I am copying this letter and the Annexes to the Secretary of State for Wales.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

CARWYN JONES

Annex 1

“How the Welsh Government engages with UK Departments where it takes decisions on devolved policy areas that may have implications for UK Government responsibilities. Conversely, we would be interested in how each UK Government Department engages with the Welsh Government in devolved policy areas. In particular, we would be interested in whether the Welsh Government is consulted on draft legislation or policy initiatives to identify possible implications for devolved responsibilities and, if so, how and when this consultation occurs.”

Case Study 1(a)

Social Services and Well-being (Wales) Bill

Issue

A range of issues in the Social Services and Well-being (Wales) Bill that relate to the seeking of Secretary of State consents and the legislative competence of the Assembly.

Handling

A range of issues have been dealt with in the Bill where provisions affect the functions of Ministers of the Crown, so Secretary of State consents were sought as required by GOWA 2006.

The issues engaged the Secretaries of State in seven different departments of the UK Government. Despite early dialogue (commencing in February 2012), not all the consents required were received in time for introduction of the Bill in January 2013. This necessitated amendments being made to the draft Bill to ensure that it was within the legislative competence of the Assembly.

The area of the Bill principally affected was the provision for safeguarding adults and children. Modifications were made to sections of the Bill in respect of Safeguarding Boards – membership and supply of information; and co-operation duties to remove references to Secretary of State functions (probation and youth offending teams).

Discussions are ongoing between Welsh Government and Whitehall officials and we believe that we are close to securing outstanding consents, subject to Ministerial approval.

Key Points

One of the key issues was the sheer number of officials with whom discussions needed to take place, exacerbated by the lack of coherence between UK Government departments. The Wales Office was helpful in co-ordinating responses, but lacked the authority to achieve a broad degree of consensus across Whitehall until very late in the day.

Another key issue was the absence of basic understanding of the devolution settlement in Wales. Despite intensive dialogue since last autumn, in a meeting last month a senior official in one major UK Government department asked the Welsh Government team to explain how the legislative process worked in Wales. The lack of a clear understanding of the extent and nature of the Assembly’s law-making powers has undoubtedly added challenge and risk to the delivery of the Bill.

It has been difficult to get UK Government departments to articulate their concerns in sufficient detail to enable a distinction to be drawn between concerns about policy divergence between England and Wales (which we would consider ultimately is a matter for us) and legitimate concerns about the impact, or potential burdens, for non-devolved organisations including the police.

The safeguarding of vulnerable people requires multi-agency action, and is a prime example of the overlap between devolved and non-devolved areas. Legal advice had confirmed that we had the competence to require the police to be statutory members of adult and children safeguarding boards through new provisions set out in the Bill. However, despite the fact that the police are existing statutory members of local safeguarding children boards, this was something that was initially resisted by the Home Office on the grounds that it could impose new burdens for the police. It seemed to us that their position was not sustainable given that the Local Safeguarding Children Boards are reducing from 22 to a footprint of 6, which would reduce the burdens. It also exposed a lack of clarity on their part about the issue of competence and the extent of the Welsh Government's responsibilities in this field.

Another practical example relates to the (currently) unresolved issue of the proposed powers of entry to support the new legal framework for protecting adults at risk. The power was included in the Bill following extensive consultation with stakeholders in Wales. The purpose of the power is to facilitate a conversation in private between a practitioner and an individual suspected of being an adult at risk. The mechanism for achieving this would be an application to a justice of the peace for an order. The UK Government's Department of Health (DH), as adult safeguarding lead in the UK Government, indicated its support for the Welsh Government's proposal and intended to include similar provision in its forthcoming Care and Support Bill. However, we understand that DH's proposal was not supported across the UK Government.

The initial objection to our proposals stemmed not from a safeguarding perspective, but from the fact the Ministry of Justice (MoJ) has a policy objective to reduce the number of orders considered by courts. The MoJ's position has shifted significantly in recent weeks following exchanges of views with the Welsh Government team. We have faced similar issues with the Home Office, who remain concerned at the potential additional burden this could create for the police given that the provision includes the possibility that a practitioner "may be accompanied by a constable". We believe that there will be a positive resolution to the discussions. However, these are clear examples of the overlap between devolved and non-devolved responsibilities in this field and the potential barriers to our strengthening the safeguarding of people in Wales.

Case Study 1(b)

The Abolition of the Museums, Archives and Libraries Council

The Issue

The abolition of the Museums, Libraries and Archives Council (MLA) in England and the sublimation of its activity within Arts Council England (ACE) and The National Archives (TNA).

Handling

In July 2010, the Secretary of State for Culture, Media and Sport announced that the MLA would be abolished in 2012. Although the MLA was an English Non-Departmental Public

Body, it carried out a number of UK-wide roles, particularly in relation to museums. Wales would be unable to deliver on the current range of services provided through the MLA without a significant investment in terms of staff and funding. The position of a central body carrying out these roles leads to good economies of scale.

ACE took responsibility for:

- Renaissance in the Regions programme (including Accreditation)
- Museums and libraries development work
- Cultural property functions

TNA took over the sector leadership role for archives in England. CyMAL exercises this responsibility in Wales.

The Welsh Government's Minister for Heritage wrote to the Secretary of State for Culture, Media and Sport and the UK Government's Minister for Culture to express Welsh concerns at the possible loss of UK wide functions.

A total of four meetings between officials were held with DCMS during 2011/12, one of which included a senior representative from ACE.

Key Points

Many of the functions have been retained by ACE, although the level of funding for museums in particular has decreased. The functions of the cultural property unit, for example, were moved across to ACE in their entirety, as was the UK standard for museums, Accreditation.

The area where there was a specific issue was with the Portable Antiquities Scheme (PAS).

It was established in 1997 to encourage the voluntary recording of archaeological objects found by the public in England and Wales. At its heart are the Scheme's Finds Liaison Officers, who offer a comprehensive mechanism for systematically recording such finds for public benefit. The data recorded is published on the Scheme's website. The Scheme was managed by the British Museum on the MLA's behalf, working in partnership with some 63 national, local authority and university organisations.

As a result of the abolition of the MLA, responsibility for the governance and management of PAS transferred to the British Museum with effect from April 2012. DCMS provided ring-fenced funding, which is being cut by 15% in real terms, from £1.412m in 2010/11 to £1.323m in 2014/15.

In November 2010, the British Museum announced that it would be reducing its contribution to the costs of the Scheme in Wales from £59k to £6.5k from 2012 onwards. There was no consultation by the British Museum with the Welsh Government regarding this decision. It was announced by a press release as a fait accompli. While CyMAL had been warned by DCMS that this could be a possibility, no opportunity for further discussion was provided.

Current Status / Outcomes

Work with the Accreditation team at ACE and with the Cultural Property Unit has continued and is going well, mainly because the staff transferred across to ACE and therefore skills, experience and professional relationships were maintained.

In terms of the PAS, negotiations with the BM led to a position where there is now a tapered approach to the end of funding, rather than a complete cessation. The funding is gradually being taken up in Wales and is split three ways between CyMAL, Cadw and Amgueddfa Cymru – National Museum Wales. While this is a loss of funding to Wales, which happened without consultation, we are now in a position where we have time to adjust our budgets to cope with this new pressure.

Annex 2

“How each UK Government Department consults and engages with the Welsh Government in non-devolved areas where there is a Welsh interest.”

Case Study 2(a)

Consenting Energy Developments

Issue

The complex arrangements for consenting large energy generation developments and related infrastructure.

Handling

The publications of White Papers by the UK Government on Energy and Planning in 2007 superseded the previous discussions which had taken place about devolving energy consenting powers. The issue of devolving consents for major energy projects to the Welsh Government has been raised on numerous occasions by the Welsh Government’s Energy Ministers and First Ministers, all without success.

Key Points

Using powers contained in the Electricity Act 1989, Local Authorities in Wales are responsible for consenting energy generation developments with a capacity of under 50 MW, with Welsh Ministers having an appellate role. The consenting of energy generation developments with a capacity in excess of 50 MW is a matter for the UK Government, operating under a different regime (the Planning Act 2008). In contrast, the Scottish Government and the Northern Ireland Executive have the power to consent all energy generation developments and related infrastructure using unified consenting regimes.

The Welsh Government wants to maximise the economic and social benefits of energy developments and we believe that simplifying and streamlining consenting arrangements has an important role to play in achieving these objectives. Welsh Ministers already have significant powers relevant to delivering wider aspects of a low carbon economy such as responsibilities for environmental permitting, marine licensing, general planning (including marine planning), transport, economic development, skills and education, regeneration and local government. The Welsh Government believes that within the broad framework of UK energy policy, there is considerable scope for devolution and simplification, especially in relation to consenting individual developments.

In 2002, the UK Government agreed to assess the implications of any transfer of energy consenting powers to the Welsh Government and identify the benefits and disadvantages of such a proposal for the UK and Welsh Governments. A Tri-Partite Working Group was established with the joint agreement of the First Minister, the Secretary of State for Wales and the Secretary of State for Trade and Industry.

An informal survey of key energy stakeholders, carried out by the Secretariat of the Tripartite Working Group took place in November 2004 to gauge views on the proposed transfer of energy consenting powers. The survey reported that *“the general view is that the Welsh Assembly should have a greater role in energy consents powers – a move, according to some, which is long overdue.”* The examination of the issues by the Group did help to

eliminate any question that there was a technical obstacle to energy developments being consented by the Devolved Administration. However, despite the goodwill supporting a greater role for the Welsh Government in energy consents, the work of this Tri-Partite Working Group was not finalised.

Current Status

Some progress was achieved last year when the UK Government's Department of Energy and Climate Change (DECC) agreed to the Welsh Government having formal input into the forthcoming Ofgen Strategic Policy Statement as part of the Energy Bill. However, DECC has been resistant to the transfer of energy consenting powers or engaging the Welsh Government on the matter to build on the work of the Tri-partite group.

Case Study 2(b)

Anti-social Behaviour, Crime and Policing Bill

The Issue

Handling of issues arising from the Home Office's Anti-social Behaviour, Crime and Policing Bill.

Handling

In February 2011, the Home Office launched the consultation 'More effective responses to anti-social behaviour'. The consultation proposed a radical streamlining of the existing legislation, giving the police and their partners a handful of faster, more flexible powers to protect victims and tackle a range of problems. In May 2012, the Home Office published 'Putting victims first – more effective responses to anti-social behaviour'. This set out the UK Government's proposals, following both consultation exercises, and put them in the context of a wider need to focus the response to anti-social behaviour (ASB) on the needs of victims (particularly repeat and vulnerable victims).

There was further consultation on one aspect of the reforms – the Community Remedy – which was consulted on in December 2012. This consultation sought views on proposals to introduce legislation to allow Police and Crime Commissioners to give victims of low-level crime (such as low-level criminal damage and low-value thefts) and anti-social behaviour a say in the punishment of the offender.

In December 2012, the Home Office published these proposals in the form of a draft ASB Bill, for pre-legislative scrutiny by the Home Affairs Select Committee (HASC). The draft legislation also included provision to introduce the Community Remedy. The Community Remedy will be a menu of sanctions for low-level crime and ASB, drawn up by the Police and Crime Commissioner in consultation with the local community. The menu would be used by police officers when dealing with such matters out of court, with victims given the option to choose an appropriate sanction for the offender.

Home Office officials have engaged with Welsh Government officials from the beginning of the process. In addition, Ministerial letters have been exchanged on the consultations and the detail of the draft Bill.

Key Points

Certain provisions in the Bill do not relate to matters within the legislative competence of the Assembly, e.g. forced marriage and firearms, and Welsh Government and Home Office officials are in agreement regarding this. There are some areas which do relate to matters within the legislative competence of the Assembly, such as the Community Protection Notice and Public Spaces Protection Order under Part 4 of the Bill, where the Home Office agrees with Welsh Government officials that LCMs will be required. There are also certain elements of the Bill where the opinions of Welsh Government officials and Home Office officials differ with regard to competence.

One area where opinions differ relates to paragraph 12 of Part 1 of Schedule 7 to the Government of Wales Act 2006 ("GOWA 2006"). The UK Government are of the opinion that provisions in Parts 1 and 2 and elements of Chapter 3 of Part 4 (Closure Orders) of the Bill relate to anti-social behaviour and are therefore outside the Assembly's competence as the provisions fall within the exception of "anti-social behaviour orders" contained to the subject of local government in paragraph 12 of Part 1 of Schedule 7 to GOWA 2006. That said, the UK Government's evidence to the Silk Commission notes that the exception is unclear and that "*The Commission may wish to consider whether this exception should be redrafted, or an additional exception inserted into the Schedule, to put beyond doubt that the exception covers ASB.*"

The Welsh Government take the view that this exception is restricted to anti-social behaviour orders (ASBOs) created and defined by section 1 of the Crime and Disorder Act 1998, rather than anti-social behaviour generally as argued by the UK Government. In consequence the new provisions in Parts 1, 2 and elements of Chapter 3 of Part 4 of the Bill could not fall within this exception as they do not relate to ASBOs created under that Act.

The Bill repeals section 1 of the Crime and Disorder Act 1998 and therefore the ASBO. In the Welsh Government's view, the exception becomes redundant on the repeal of the relevant provisions in the Crime and Disorder Act 1998.

Current Status / Outcomes

Officials are currently drawing together the LCMs required under this Bill.

Case Study 2(c)

Secure Accommodation for Young People

The Issue

The MoJ's 'Transforming Youth Custody: Putting Education at the Heart of Detention' consultation, which ran from February to April 2013.

Handling

MoJ officials advised and discussed the consultation over the phone on two occasions as it was being developed. Welsh Government officials were advised it was a very high level consultation that was seeking views on how custody for young people could be improved with a specific focus on education. Welsh Government officials advised that education in Wales is devolved and any references to the education situation in England also need to include the situation in Wales. The document was not seen by Welsh Government in

advance. The Secretary of State for Justice phoned the then Minister for Local Government and Communities on the morning the consultation was published.

Key Points

The consultation was far more detailed about education provision than we had been led to believe, with references to academies, Ofsted and other England only education arrangements. The document did not describe education in Wales and the only references were around the fact that secure accommodation provision would need to cover England and Wales and one paragraph that specifically mentioned Wales below.

“In responding to this challenge, we will need to take account of the different position in Wales where education provision and most of the children services that resettle young people and provide ongoing support are devolved”.

The consultation made it difficult for Wales to respond as many of the questions were very focused on the England education system and therefore the potential for any changes may not reflect the situation in Wales and make the system more fragmented for young people from Wales.

Current Status / Outcomes

The Welsh Government’s Minister for Local Government and Government Business and Deputy Minister for Skills and Technology submitted a joint response to the consultation in April 2013. It responded to the consultation questions, but also identified the Welsh Government’s disappointment and concern that a consultation which has the potential to fundamentally change the way in which youth custody is provided in the future did not reference how education is delivered in Wales.

A formal response was received from the Secretary of State for Justice in April. It provided assurance that as the responses to the consultation are considered and the MoJ moves quickly towards developing proposals, the MoJ will continue to consider the position of Welsh children and young people and his officials will work with Welsh Government officials to achieve this.

Case Study 2(d)

The Funding of S4C

The Issue

The UK Government’s Comprehensive Spending Review announcement on 20 October 2010 that S4C will predominantly be funded through the licence fee and a significant reduction in S4C’s budget – 36% between 2010 and 2014.

Handling

Despite the importance of S4C to the Welsh economy and to safeguarding the Welsh language, the Welsh Government was not consulted in any way before the UK Government’s announcement in relation to the wide ranging changes to the future funding and governance of S4C.

Key Points

The Operating Agreement between the S4C Authority and the BBC Trust was published in January 2013 and refers to the joint objective of the S4C Authority and the BBC Trust to ensure that the largest possible proportion of the licence fee contribution to the S4C Services is spent on providing programmes and services in the Welsh language primarily for audiences in Wales.

As well as governing the funding and accountability arrangements between the BBC Trust and the S4C Authority, the Agreement will ensure the editorial and managerial independence of the S4C service.

Current Status / Outcomes

Since October 2010 we have consistently expressed our concerns to the UK Government and the BBC Trust about the impact any major funding cuts will have on S4C, and its ability to serve the Welsh audience.

The Welsh Government welcomed the announcement that an agreement had been reached between the BBC Trust and the S4C Authority on the future funding, governance and accountability of S4C for the next six years. The agreement also importantly protects the editorial and managerial independence of S4C.

We hope that this will enable both broadcasters to build on this agreement in order to develop a sustainable future for Welsh language broadcasting.

The first priority, of course, should be for S4C and the BBC to begin to deliver on the back of the partnership. But because of the crucial importance of S4C's role we also believe that the outcome of this partnership should at some point be subject to an independent review, a position which has been agreed by all parties in the Assembly. Our position is clear – there should be a wide ranging review of S4C commissioned jointly by the UK and Welsh Government. This commitment to press for an undertaking for a review is outlined in our Programme for Government.

There has been greater collaboration recently between S4C and the Welsh Government and this is welcome. However, it is very rarely that officials from the UK Government's Department for Culture, Media and Sport (DCMS) contact the Welsh Government in relation to S4C policies. The only worthwhile engagement is during recruitment exercises to appoint Members to the S4C Authority. During 2012, an official from the Welsh Government was represented on the selection panel to appoint three new Members to the S4C Authority. Although DCMS led on this appointment it was definitely beneficial that the Welsh Government was involved in order to provide expertise especially to reflect the needs of viewers in Wales.

Case Study 2(e)

Civil Contingencies

The Issue

Engagement between the Welsh Government and UK Government on civil contingencies.

Handling

Although civil contingencies, as a discrete function, is not devolved in Wales there was close co-operation between Cabinet Office and Welsh Government on the development of the Civil Contingencies Act 2004 and this has continued into the enhancement programme for the legislation and regulations which has taken place in recent years. Cabinet Office ensures that Welsh Government is fully consulted and engaged on policy developments relating to civil contingencies and recognises that the consent of the Welsh Government is required formally to all changes to the legislation in respect of devolved areas. Welsh Government officials are permanent members of the UK Capabilities Programme Board and National Security Council to ensure that there is direct engagement and input from the Welsh Government on the development of civil contingencies at the UK level.

Key Points

The recent Wales Audit Office report on civil emergencies in Wales concluded that the Welsh Government's role is complex and there is lack of clarity of this role with responders. Whilst engagement and consultation between the Welsh Government and the UK Government works well on a day-to-day basis, the confusion over where responsibility lies has led to what the Wales Audit Office described as a gap in the oversight of civil contingency activity in Wales. Although the evidence provided by the UK Government to the Silk Commission states that existing arrangements work well and there is no need for significant change, this does not take into consideration the gap in oversight which this has created and that the best way of providing such oversight is to devolve responsibility to the Welsh Government.

Current Status / Outcomes

The Welsh Government and Cabinet Office have agreed to work together to strengthen strategic oversight of the delivery of civil contingencies in Wales in the light of the Wales Audit Office recommendation but the position of the Welsh Government remains that the best way to achieve this is through the devolution of responsibility.

Case Study 2(f)

The Abolition of Council Tax Benefit

The Issue

A lack of engagement and understanding of devolution by the UK Government throughout the process to abolish council tax benefit.

Handling

The Welsh Government has attempted to consult and engage with the UK Government on this issue since 2010. However efforts to develop new arrangements have been hindered by delays in engagement and requests for information and meetings being left unanswered.

Key Points

In the Comprehensive Spending Review 2010, the UK Government announced its intention to abolish council tax benefit and to pass responsibility for providing assistance with council

tax bills to local authorities in England and to the Devolved Administrations, accompanied by a 10% cut in funding. This was done without any prior warning or engagement with the Welsh Government.

Following this announcement, an urgent meeting was requested with the Secretary of State for Work and Pensions to discuss this proposed change in policy, to raise issues around competence and to seek further details on its implications for Wales. No response was received to this letter and it was not until the introduction of the Welfare Reform Bill into Parliament in February 2011 that it became apparent that the UK Government was pressing ahead with its plans.

Despite repeated requests at both a Ministerial and official level, the Welsh Government did not receive any information to allow consideration of the impact in Wales or to inform the practical actions that had to be taken to continue to provide council tax support. In fact, it was not until the publication by DCLG of its consultation on its plans to localise council tax support in England in August 2011 that the full extent of this reform started to become clear.

Council tax benefit has not been devolved, the benefit has been abolished and the Welsh Government has taken up the responsibility of putting a new scheme in its place. However, the relevant powers were not transferred to the Welsh Government so it has been necessary to establish what could be achieved within the existing council tax system and within the Assembly's legislative competence – which explicitly excludes social security benefits.

In examining the legislative options a further constraint regarding competence was identified that could have resulted in the Welsh Government being subject to legal challenge. As a result, the Secretary of State for Wales was asked to take forward an Order in Council to make amendments to GOWA 2006 to clarify the competence of the Assembly, in order to remove the risk of legal challenge. This request was refused.

In December 2011, the Local Government Finance Bill was introduced into Parliament as the legislative vehicle for DCLG to introduce council tax reduction schemes in England as a replacement for council tax benefit. The Bill was introduced without prior discussion with, or notification to, the Welsh Government. However, following urgent discussions, DCLG agreed to allow provisions for Wales to be included within their bill, to ensure that replacement schemes could be delivered in time and within competence, provided that the provisions for Wales were not broader than those sought for England.

While officials in DCLG were supportive throughout the development of extensive provisions for Wales, due to the lack of earlier engagement these had to be developed within very constrained timescales and we were often in the position of having to react and develop a policy approach in response to a decision taken by DCLG.

Following the passage of the Bill, DCLG has, in a number of cases, shown a lack of awareness of devolution and has caused difficulties and unnecessary work. For example:

- DCLG, without prior notice, made legislation relating to England only (The Local Authorities (Contracting Out of Tax Billing, Collection and Enforcement Functions) (Amendment) (England) Order 2013) to amend an Order that related to England and Wales. As these amendments were required due to the introduction of council tax reduction schemes, similar amendments were necessary for Wales, however on investigation it transpired the Order concerned functions that have not been transferred to Welsh Ministers. As a result it was necessary to seek agreement from the Secretary of State for Wales and the Secretary of State for Communities and Local

Government to make an Order on behalf of Welsh Ministers. This resulted in significant extra work for officials in the Welsh Government.

- Recent proposals in relation to administrative funding for council tax reduction schemes made by DCLG to Her Majesty's Treasury as part of Spending Review discussions. Despite this now being a devolved issue and the administrative funding being transferred to the Welsh Government we had no involvement in the development of these proposals. In fact it was only after HMT informed DCLG they would need the consent of Devolved Administrations before the proposal would be considered that we were involved.

In the main, working with DCLG has been positive and constructive, yet it is felt this has been down to the development of relationships with a number of key individuals rather than a conscious awareness / approach of the Department.

Throughout the work to develop a replacement scheme, DWP's policy stance has been that council tax benefit is being abolished and that future arrangements are not their responsibility. This approach has been frustrating and has hindered the sharing of expert advice and knowledge in relation to a benefit scheme which has been developed by the Department over a period of 20 years.

A particular sticking point has been funding discussions. Since the announcement that funding for future council tax support arrangements would be cut by 10%, protracted discussions have been ongoing with DWP to determine how the funding transfer would be calculated. Despite numerous pieces of Ministerial correspondence and meetings, information in relation to the transfer has been very scarce and on a number of occasions provisional figures were provided without any supporting information.

The objective for the Welsh Government has always been to ensure that Wales receives a fair funding transfer that represents no more than a 10% reduction in expected 2013/14 expenditure, and that adequate funding is provided for transition costs and administrative funding. Serious concerns were raised in relation to the provisional funding figures provided in May 2012 which indicated a far greater cut than expected and which was based on forecasts that did not seem reflective of the situation in Wales. While the actual funding transfer set out in the Autumn Statement (£222m in 2013/14 and 2014/15 respectively) was higher than the provisional forecasts provided there is still concern that the cut in funding is greater than 10% - this will not be known until the end of 2013/14.

The timing of the Autumn Statement, and the reluctance of DWP to provide any information on the final funding transfer prior to this date, created considerable operational issues, as the council tax reduction scheme regulations could not be laid without calculating the percentage reduction in funding. This eventually resulted in the Assembly having to be recalled during Recess to vote on the regulations to ensure that local authorities could adopt them prior to 31 January 2013.

No additional funding has been provided for the transitional costs of establishing new schemes to replace council tax, which is considered to be counter to the statement of funding policy given that these costs arise directly as a result of a UK Government policy decision. DCLG provided transitional costs to local authorities in England in year, as this was considered not to be new funding no consequentials were provided for Wales.

DWP has also provided no information on the central administrative costs of monitoring and maintaining the council tax benefit (which are understood to be considerable) and no

funding for this purpose has been transferred to the Welsh Government despite expectations that we will undertake a similar central administrative role.

In relation to the transfer of funding for administrative costs for local authorities running the new schemes, these discussions have been complicated by the need to split the administrative funding for council tax benefit from that of housing benefit which is not being devolved, but is being incorporated within Universal Credit. There has been considerable concern around the level of funding that would be allocated to council tax support and whether this would be adequate to maintain a complex means testing system – something that needed to be set out in regulations prior to the funding being confirmed.

In 2013/14, DWP decided not to split the council tax benefit and housing benefit administrative costs and to continue with previous arrangements – i.e. paying an administrative subsidy direct to local authorities to cover the costs of administering both systems (approximately £24m). This was notified directly to local authorities in Wales with no prior notification to the Welsh Government despite part of the funding being provided for an issue that was now the direct responsibility of the Welsh Government. The funding arrangements for 2014/15 are still under discussion.

The final area where we have experienced difficulty in working with DWP has been in relation to obtaining information about other welfare reforms such as Universal Credit or Personal Independence Payments that was required to inform the operation of council tax reduction schemes and the resulting regulations. In fact the scheme has had to be designed and regulations made without information from DWP on the level of information that will be provided to local authorities from Universal Credit, a significant issue given that almost 70% of claimants in Wales are currently passported straight on to the council tax benefit as they are in receipt of a qualifying benefit.

On some occasions we have been notified of urgent amendments required for welfare reforms at a very late stage and on other occasions it has been left to DCLG to notify the Welsh Government of changes required as a result of DWP's policy decisions. DWP has also not been prepared to make consequential amendments for Wales in respect of welfare reforms, where legislative competence would allow, despite making the same changes for DCLG.

While individual policy officials in DWP have tried to be helpful throughout this work, the sheer number of officials working on different aspects and the overall approach taken by the Department has considerably complicated and at times hindered our work to develop a replacement scheme.

Case Study 2(g)

The Abolition of the Discretionary Social Fund

The Issue

The Welfare Reform Act abolished the discretionary elements of the Social Fund (Crisis Loans and Community Care Grants) in March 2013. Responsibility to provide support in these areas has been transferred to the Welsh Government and our replacement scheme.

Handling

The Welsh Government Discretionary Assistance Fund has been operational since April 2013. The development of our new fund has required Welsh Government officials to work closely with DWP.

Key Points

Funding Settlement

Despite the Welsh Government raising numerous concerns with DWP over the twelve months prior to our new scheme going live, DWP did not confirm the funding for the scheme until December 2012 – only four months before any replacement scheme was to go live.

This uncertainty over the quantum of funding, coupled with the fixed tight timescale, meant that the Welsh Government had to proceed with designing a replacement scheme, and the procurement of a third party to administer it, without the assurance that the funding to be provided from DWP would be sufficient.

Final confirmed funding for the Welsh Government scheme was set by DWP at 2012/13 levels and is frozen for the two years of the fund. The amount allocated in 2013/14 for Programme funding is £10,206,521, with an additional £2,156,714 for Administrative funding. For 2014/15, Programme funding remains the same and Administrative funding will be £1,976,862.

This funding settlement from DWP did not take into account a likely increase in applications due to anticipated reductions in household incomes and/or potential budgeting problems associated with monthly benefit payments.

In addition, whilst the settlement gives indicative allocations for financial years 2013/14 and 2014/15, there remains uncertainty about whether the consequential funding for the new welfare provision will end, or be reduced after the 2 year commitment given. Clearly there are implications for the Welsh Government in putting in place new welfare provision if no further settlement is provided for 2015/16 onwards.

The Welsh Government has sought further clarification on continued resourcing and how this will be calculated, however we are still awaiting a response from DWP on the issue. Clearly this restricts our ability to establish any long terms goals for the fund.

Data Sharing

During the development of the Discretionary Assistance Fund, Welsh Government officials worked closely with DWP in order to ensure access to client benefit details would be accessible by our third party contractor.

This was an effective working partnership that eventually saw the Data Sharing Regulations of the Welfare Reform Act amended to allow the sharing of data directly with both Welsh Ministers and third party organisations nominated by Welsh Ministers. This was vital to the operation of the new fund and we are grateful for the support, guidance and flexibility shown by DWP colleagues in this matter.

In later discussion with DWP it became apparent that, despite the amendments to the regulations, DWP were insisting on the Welsh Government signing up to a Memorandum of

Understanding in order to permit the ongoing sharing of data with Northgate for the purposes of operating the fund in Wales.

In requiring this, DWP will effectively be transferring the role of data controller to the Welsh Government. By doing so the Welsh Government will be potentially taking on responsibility for a matter over which it does not have ultimate control, particularly in terms of the actions of Northgate's employees.

Whilst the Welsh Government maintained the position with DWP that legally it is possible for them to make arrangements directly with Northgate (the Welsh Government contracted provider) as to data sharing, should they be prepared to do so and that this should be the case, it became clear that DWP were not prepared to do so. As such the Welsh Government had no option but to sign the Memorandum of Understanding and take on the additional risks and burdens.

Local DWP Links

During the formation of the Discretionary Assistance Fund, officials established strong links and good relationships with DWP Wales, and the Devolution Partnership Managers. These relationships are built on mutual trust and open discussion and through this DWP have provided some vital support.

There is now an ongoing two-way dialogue between officials in the Welsh Government and DWP Wales, which will continue as the new fund is established against the background of the welfare reforms. It is important that, as new policies are introduced by DWP and whilst the Discretionary Assistance Fund develops, we continue to work closely together. It should be emphasised, and is continually emphasised to DWP Wales, that our new fund is not a continuation of its old discretionary Social Fund and we need to ensure that this message is reinforced with DWP's frontline staff.

Case Study 2(h)

Housing Benefit Welfare Reforms

The Issue / Handling

A variety of engagement activities have taken place between Welsh Government Housing officials and DWP officials in the roll out of changes to Housing Benefit as part of the welfare reforms.

Key Points

The Welsh Government are invited to sit on DWP Advisory Groups that interact with the research organisations following a financial contribution to two research projects (Direct Payments in the Social Sector and The Effects of Local Housing Allowance Reforms) looking at welfare reform issues. These groups have prompted good consultation and ideas from the groups have been responded to and acted upon. However, information from these research projects has been slow to be distributed.

Welsh Government officials are members of the DWP Support Exempt Accommodation working group which demonstrated early engagement when issues were identified.

The Welsh Government are members of the DWP Practitioners Operations Group and regular meetings are held at the DWP HQ in London. DWP-led UK wide Support and Exceptions Working Group initially had too many members resulting in the meetings being chaotic. As a result, DWP agreed to a Wales working group which is working extremely well.

Welsh Government officials are members of the DWP Benefit Cap Working Group and regular meetings are held.

The Single Fraud Investigation Service is in the early stages of development and regular telephone updates have been received from DWP to keep the Welsh Government informed at all stages.

Rent Officers Wales meet with DWP on a regular basis to prepare for reform changes. However, DWP appear to consult at a late stage in the process and seem to be unaware of the detail required to deliver Universal Credit arrangements in regard to rental markets.

In general, Welsh Government and DWP officials have good working relationships and DWP officials respond quickly to emails but it is clear that there is a great deal more work to be done in development of policy.

Case Study 2(i)

Passported Benefits

The Issue

The introduction of Universal Credit and Personal Independent Payment as part of the UK Government's welfare reforms has significant implications for Welsh Government passported benefits and services. This requires changes to eligibility criteria and potential consequential amendments to Welsh Government legislation to enable Universal Credit and Personal Independent Payment claimants to access Passported Benefits in Wales if otherwise eligible.

Despite DWP's implementation of Universal Credit having direct financial costs for administering passported benefits in Wales, DWP has made its position clear, i.e. that any changes should be introduced on a cost neutral basis (unless the Devolved Administrations or relevant Whitehall departments are prepared to meet any shortfall).

In addition, there is still a lack of definitive information from DWP on the Universal Credit that is critical to the development of sustainable arrangements for some of the passported benefits in Wales.

Handling

Passported Benefits cover a wide range of policy areas across the Welsh Government, e.g. education (free school meals), health and housing. Engagement with DWP regarding the impact of the introduction of Universal Credit and Personal Independent Payment has been both at an individual policy level with DWP, and with corresponding departments within the UK Government to identify necessary changes for the Universal Credit Pathfinder phase and in preparation for the further roll out of Universal Credit and Personal Independent Payment, and also at a Senior level in a Passported Benefits cross-nation group.

There has been extensive engagement with DWP (and other four nation officials), but the scale, scope and nature of the Universal Credit project has made it extremely difficult for DWP officials to provide detailed, definitive information to assist planning for passported benefits.

Key Points

Universal Credit Initial Roll Out

The general preference for the Universal Credit Pathfinder phase (April 2013-October 2013) is that all Universal Credit claimants may be eligible to apply for passported benefits, subject to meeting other qualifying criteria. The option remains to extend this approach to April 2014. However, given the uncertainty over DWP roll-out plans for Universal Credit, this carries a risk to the Welsh Government. Therefore even as a preferred option, this will need to remain subject to review.

Alternatively, DWP has suggested the use of the DWP earnings thresholds to establish eligibility for passporting. Officials have considered this option however, DWP will be unable to provide automated information from October 2013 until April 2014 therefore, and any passported benefit adopting this approach will need to introduce clerical processes to support the eligibility checks.

To allow maximum flexibility and to take account of emerging detail, individual Welsh Government departments are continuing to keep arrangements under review and as appropriate, develop alternative solutions. Welsh Ministers have confirmed this position with UK Government Ministers and also confirmed that the Welsh Government reserves the right to review its options in light of any changes or emerging information.

Universal Credit Roll Out from April 2014

Source data have been difficult to obtain. Officials have attempted to model potential impacts based on Universal Credit earnings thresholds. This led to concerns that three thresholds were insufficient to take into account the complexity of people's circumstances, and would lead to vulnerable people – including children – losing out. Additional thresholds and markers for disability and children were suggested by the UK Government's Welfare Reform Minister in response to concerns raised by my Minister for Education and Skills but remain unconfirmed. We understand that the earnings thresholds will be applied automatically, through Universal Credit IT systems, from April 2014. However, in recent exchanges, DWP has confirmed that whilst information provided for modelling purposes was based on data for gross earnings thresholds, the DWP data exchange is likely to be based on net earnings thresholds. Further work will now be required for Welsh Government analysts to understand if there are any implications for the modelling that has already been undertaken.

The issues on passporting are not restricted to Wales and Scotland but also have potential implications for other Whitehall departments.

Universal Credit Roll Out and Delivery from April 2015

DWP confirmed in April 2013 that as they are considering a longer term strategy on passported benefits, they are unable to give absolute assurances at this stage that they will continue to support data exchange on earnings thresholds beyond April 2015. Any passported benefits basing their eligibility on Universal Credit earning thresholds may need

to be reconsidered and the arrangements changed again for delivery beyond this point. This has implications for devolved resources. DWP has committed to detailed discussions with us in the course of the coming weeks.

Current Status / Outcomes

For the majority of passported benefits, where appropriate, legislative changes have been made or guidance amended for the Universal Credit Pathfinder – which went live in one Jobcentre in the North East of England in April 2013. This means that in general, anyone who is receiving Universal Credit may be entitled to receive a passported benefit if they migrate to Wales and fulfil the eligibility criteria set for each respective passported benefit.

However, the final design and the precise roll out schedule for Universal Credit from October 2013 is still unknown. Open design questions include whether welfare customers will be able to print or request a hardcopy of their current entitlement, and if this will be shown broken down into its components. This is important as it would help in eligibility assessments for passported benefits where required, and enable advisory services to provide more targeted advice and support. In addition, the migration plan from existing benefits to the new benefits is under DWP review. Preparation for substantial changes to legislation, eligibility criteria or guidance for post October 2013 is being severely hampered by the lack of detailed information and data for modelling purposes, lack of details on volumes for the remainder of this financial year and next financial year. The Welsh Government's Minister for Communities and Tackling Poverty has a meeting scheduled with the UK Government's Minister for Welfare Reform in June to discuss concerns relating to welfare reform.

Case Study 2(j)

Armed Forces Covenant and Strategic Defence Review

The Issue

Implications of the Armed Forces Covenant, and wider decisions regarding the Strategic Defence Review and its impact on Welsh Citizens.

Handling

There is a strong working relationship between the Ministry of Defence (MoD) and Welsh Government regarding the Armed Forces Covenant. The Welsh Government is represented on the MoD's Covenant Reference Group and, similarly, MoD officials attend the Minister for Local Government and Government Business Expert Group on the needs of the Armed Forces Community in Wales. On health issues Welsh Government is represented, at official level, on the UK/MoD Partnership Board.

Key Points

Welsh Government has its own Package of Support for the Armed Forces Community in Wales which complements the Covenant. This document gives us the opportunity to set out policies that are specific to Wales, as well as those that are consistent across the UK.

Welsh Government has established a Concordat with the MoD that sets out arrangements for consultation between the Welsh Government and the MoD, including exchange of

information, confidentiality and security, access to services, resolution of disputes, and review of relations. A separate Concordat is in place to cover health issues.

The Welsh Government has been fully engaged in the development of the MoD Armed Forces Covenant guidance, and each year contributes to the production of the Armed Forces Covenant annual report setting out how the Government and Devolved Governments are supporting the Armed Forces, their families and veterans in key areas.

There are instances where information on UK Defence reorganisation is not shared with Welsh Government in advance of announcements. Welsh Government was not consulted on proposals for Army Restructure, and was not made aware of the implications for Welsh regiments (or those based in Wales) before the announcement was made. In some instances the Welsh Government has been unable to establish the date on which announcements are going to be made. The Welsh Government's Minister for Local Government and Communities raised this as a matter of concern in evidence to the Welsh Affairs Committee in October 2012.

Whilst the Welsh Government is represented at official level on the MoD's Covenant Reference Group, Welsh Government Ministers have not been offered a place on the Prime Minister's overarching Ministerial Committee on the Armed Forces Covenant.

Current Status / Outcomes

Welsh Government is working closely with 160th Brigade to ensure that we are able to take account of these changes in our future plans and proposals.

A Wales-specific care pathway for injured/ill service personnel discharged into Wales is being developed by the Welsh Government and the MoD for severely injured personnel. The scheme also includes the transfer of medical records from the MoD to GPs. This work is part of the Concordat between the MoD and the Welsh Government.

Annex 3

“How the two governments work together in areas where a policy area includes both devolved and non-devolved policies (that is, when the UK Government has a mixture of England-only responsibilities and responsibilities for England and Wales, Great Britain or the United Kingdom).”

Case Study 3(a)

Water

Water is a policy area that includes both devolved and non-devolved functions and responsibilities. This is further complicated by the legislative framework for the water industry, which is structured around water company boundaries (wholly or mainly in Wales or England) rather than along political boundaries.

The Issue

The introduction of UK Government market reform proposals within the water industry in England as part of the draft Water Bill.

Handling

Neither the Welsh Government nor affected parties were consulted on the UK Government's proposal to introduce market reform proposals into the English areas served by water companies operating wholly or mainly in Wales, as well as the Welsh areas served by companies wholly or mainly in England.

The UK Government's market reform proposals have been subject to an impact assessment. The impact assessment did not assess the implications of the market reform policy being introduced into the English areas served by Water companies operating wholly or mainly in Wales, as is now being proposed by the UK Government.

Key Points

The Water Industry Act 1991 established a regulatory regime based around water company boundaries. Since 1999, when Parliament devolved executive functions to the Assembly in relation to policy for the water industry for areas wholly or mainly in Wales (Dwr Cymru Welsh Water and Dee Valley Water). The UK Government has set policy for the water industry wholly or mainly in England (Severn Trent Water). To date neither Government has deviated from this arrangement.

The approach being taken forward by the UK Government in relation to the market reform proposals in the draft Water Bill moves towards a geographical split of functions, whilst retaining powers for the area served by Severn Trent Water in Wales. The Welsh Government does not believe the case has been made to introduce these powers for Wales at this time. The draft Water Bill currently allows the Secretary of State to exercise powers for the English parts of undertakers who are wholly or mainly in Wales (Dwr Cymru Welsh Water and Dee Valley Water). In addition to this it allows the Secretary of State to continue to exercise powers in relation to the Welsh part of Severn Trent Water which operates wholly or mainly in England.

This fundamentally changes the devolution settlement in relation to water and we do not agree with the unilateral approach taken by the UK Government. Nevertheless, we believe that this example highlights a major weakness of the current regulatory regime for the water industry, structured as it is along water company boundaries. As we have noted in our evidence to the Silk Commission, we believe it is now appropriate to ensure that policy and regulation of the water industry is set along the geographical boundary with England, rather than along water company boundaries. This case study highlights the practical problems of setting policy for the water industry when there is policy divergence between both governments and regulatory responsibilities do not align with political boundaries.

Current Status / Outcomes

We continue to be in discussion with the UK Government on this matter.

Case Study 3(b)

Renewables Obligation

Issue

Financial support for different renewable technologies in Wales cannot be tailored to particular Welsh conditions or priorities as is the case in other Devolved Administrations.

Handling

Ministers have corresponded with their UK counterparts on numerous occasions to point out that we are being disadvantaged by the RO regime compared to the other Devolved Administrations. This is as a result of not having the levers to tailor financial support for renewables to Welsh circumstances and by subsidising the development of renewables in other Devolved Administrations. The UK Government has noted its intention to move to a unified ROC regime but differences remain despite the recent review of RO banding in Scotland, Northern Ireland and England and Wales.

Key Points

In April 2009, the Renewables Obligation (RO) was reformed with the introduction of banding, with different renewable energy generation technologies receiving different levels of support. Up until that point, 1 Renewables Obligation Certificate (ROC) was issued for each megawatt hour (MWh) of eligible generation, regardless of technology. The aim of the reform in 2009 was to provide a greater incentive to those technologies furthest from the market with potential to deploy on a large scale. The RO banding levels for England and Wales is set by the UK Government but is devolved in Scotland and Northern Ireland.

This reform enabled the Scottish and Northern Irish Devolved Administrations to vary bandings for particular technologies (for instance, small scale wind in NI was 4 compared to 1 in England and Wales; and wave in Scotland was 5 compared to 2 in England and Wales). This not only enabled the other DAs to position their countries as attractive places to invest and develop these technologies, to the wider benefit of their economies - the additional subsidy cost was borne across the UK, including Welsh taxpayers. Ministers have raised this injustice with the UK Government on a number of occasions. Because ROs are devolved to Scotland and Northern Ireland, the UK Government can only reform the system through primary legislation - until such point, DECC cannot force a single subsidy regime for the UK.

Uncertainties over the development of the UK Energy Bill mean that it is not definite that the levelling of the RO will take place, at least to the envisaged timescale. It is also possible that Scotland will choose to continue its own RO, albeit at its own expense, thus skewing renewables support for an indefinite period. If the UK Government cannot deliver a single subsidy regime, Wales should be given RO powers to enable us to vary the RO in line with our priorities.

Current Status

Despite the Welsh Government noting on a number of occasions the ongoing inequity of the RO position and its role in inhibiting the deployment of appropriate renewable technologies in Wales, the UK Government maintains that current arrangements will lead to a competitive market across the UK, particularly in light of the changes in RO subsidy levels announced last year following the comprehensive RO Banding Review. However, it may be that we are a long way from achieving a consistent level of support for renewable technologies across the UK as a whole following the closure of the RO to new generation in 2017. If problems with the Energy Bill delay the 2017 end date for new RO contracts, or if Scotland develops an RO of its own, the Welsh Government will push ever more forcefully for RO powers.

Case Study 3(c)

Death Certification

The Issue

Death certification (a non-devolved function) and the Coroners and Justice Act 2009 (the 2009 Act) introduced new arrangements that apply to England and Wales.

Although death certification is a non-devolved function, the 2009 Act gives the Welsh Government a limited power to make regulations and has financial implications for the Welsh Government arising from the costs of implementing the new arrangements and the additional knock on costs for Coroners and local authorities which may arise from them.

The 2009 Act requires that in Wales the new Medical Examiners would be appointed by Local Health Boards (LHBs). In England the responsibility was given to local authorities. The recommendations of the recently published Final Report of the Mid Staffordshire Inquiry (The Francis Report) emphasised the importance that the Medical Examiners were independent of the organisations where the patients' deaths are being scrutinised. As the majority of deaths occur in Welsh hospitals which are administered by the Local Health Boards (LHBs), this would imply that Medical Examiners appointed, employed by LHBs and located there would not be regarded as independent.

Handling

In order to ensure that the new death certification processes are compliant with the Francis Report's recommendations, Welsh Government officials have asked DH to amend the 2009 Act to remove the requirement that LHBs in Wales should appoint Medical Examiners.

DH officials have been reluctant to sponsor an amendment to the 2009 Act to remove this requirement as this could delay the implementation process.

Welsh Government officials have also suggested that the implementation of the death certification reforms in Wales and England should be decoupled, but DH have again been reluctant to do this as they wish the new arrangements to be introduced in tandem in England and Wales, although temporary decoupling would be legally possible.

Key Points

Officials also have concerns about whether the Welsh Government would receive funding for the new arrangements, such as access to the £16 million start up funding which DH intend to make available to local authorities in England and the additional costs for Coroners services likely to arise from the introduction of the new arrangements.

Current Status / Outcomes

Welsh Government officials have written to DH to clarify the likely costs involved in introducing the new arrangements in Wales and what provision they have made to fund them.

Annex 4

“Whether there are areas where there is joint policy development and implementation. This might particularly include planning for cross-border provision of public services or working collaboratively to deliver more efficient outcomes, for example capitalising on economies of scale.”

Case Study 4(a)

Cross-border Health Issues

The Issue

The protocols that apply when Welsh patients need treatment in England, how the money flows work and how well the arrangements work in practice.

Key Points

Since devolution in 1999, Wales has developed its own health policies to suit Welsh needs and circumstances. Most of the healthcare needs of the people of Wales can be provided in Wales, but some people will have to travel out of Wales for some specialised services which require a large catchment population. In addition, some patients make use of services in England because of their close proximity to services, and the reverse is also true. It is likely that the precise balance between services provided within and outside Wales' boundaries will change over time.

It is the responsibility of Local Health Boards (LHBs) in Wales acting alone or, in the case of highly specialised services working together through the Welsh Health Specialised Services Committee, to decide whether to enter into agreements with providers in England. The policy has not changed, nor does it impact on very large numbers of patients.

The Protocols – the Policy and Procedural Frameworks for Managing Cross-border Health Matters

The overall relationship between the Welsh Government and DH is governed by a Concordat, which was originally agreed following the initial devolution settlement and updated in 2011. The Concordat is to be reviewed again following changes in the role of DH and the establishment of NHS England.

The Health and Social Care Act 2012, which reformed the English NHS, includes a clause that places a duty on NHS England to pay heed to border issues in undertaking its work. Wales has indicated that it will reciprocate in legislation and in the interim Wales is operating as if that was already the case.

To manage relationships between the two NHS systems on the border, in 2005 a joint cross-border protocol (the Protocol) was developed between the Welsh Government and DH. The initial aim was to enable residents in England and Wales living near the border to have a GP beyond the border and access to other services, taking account of the different statutory requirements on either side of the border. The Protocol has been agreed on an annual or biannual basis since then.

In light of the changes in the English NHS that came into operation in April 2013, UK Government Ministers and Welsh Ministers agreed that the Protocol would be broadened from April 2013 to take account of the increasing differences between the English and Welsh health systems. Following discussions between officials, the two Health Ministers signed a set of agreed principles which set the framework for how the two systems should interact and a new extended Protocol was signed by the NHS Chief Executive for Wales and the Chief Executive of NHS England.

The Protocol deals with the practical issue of allowing people living near the border to have a GP over the border. It provides that the legal responsibility for providing services to a patient resident in Wales, but registered with a GP in England, remains with the LHB, but the operational responsibility (the commissioning of health services) falls to the Clinical Commissioning Group (CCG). The reverse applies in the case of a patient resident in England but registered with a Welsh GP. LHBs are expected to meet Welsh targets, and CCGs English targets. This element of the Protocol applies only to those patients resident along the England and Wales border, and who live within the following LHB and CCG areas:

In Wales - Flintshire, Wrexham, Powys, Monmouthshire, and Denbighshire.

In England - NHS South Cheshire, NHS West Cheshire, NHS Wirral, NHS Herefordshire, NHS Shropshire, NHS Telford and Wrekin, NHS Gloucestershire and NHS South Gloucestershire.

In addition, the Protocol refers to a number of other practical points which both sides need to address to ensure smooth running of services on the border.

Cross-border Public Services Currently Provided for and Accessed by the Welsh Population

Approximately 6.5% of all elective/emergency admissions of Welsh residents take place across the border in England.

Welsh residents can be registered with a GP in England; equally English residents can be registered with a GP in Wales. There are currently 15,011 Welsh residents registered with an English GP.

Use by Welsh residents of hospital services in England varies, depending on population distribution, hospital location, ease of access and distribution of services. Admissions rose from 39,000 in 1999/00 to 54,000 in 2008/09, although they have levelled off since then with 52,000 admissions in 2011/12, including both emergency and elective patients.

Emergency admissions generally are unforeseen. In these cases, speed of access, and therefore geography, are crucial, and the decision as to which hospital to access is made purely on grounds of accessibility, though patients are generally taken to the nearest hospital. In 2011/12 there were 19,000 emergency (including maternity) admissions of Welsh residents to English Trusts included in a total of around 52,000 admissions.

Elective admissions are planned and scheduled. In 2011/12 there were 33,000 non-emergency admissions of Welsh residents at English Trusts.

Funding

There are three main types of funding flow:

In the case of GP services provided across the border, there is no funding flow between England and Wales. Broadly there is a “knock-for-knock” arrangement based on historic funding flows.

In the case of secondary care services provided to patients with a GP across the border, a net funding transfer is agreed annually between DH and the Welsh Government. The funding transfer is based on per capita spend on secondary care services, and the funding transfer is based on the net number of patients resident on one side of the border but registered with a GP on the other side. In practice, as approximately 5,000 more English residents are registered with a Welsh GP than vice versa, there has been a transfer of approximately £5.8 million to Wales annually to meet these costs.

In the case of services commissioned for patients resident in Wales with a GP in Wales, Welsh LHBs and WHSSC make payments for activity undertaken by English NHS providers, either under contractual or non-contractual arrangements. In most cases, this activity is now charged by English providers at English tariff (Payment by Results) rates. When the English tariff was introduced, the cost to Welsh commissioners increased for the same level of activity. Until 2011/12 DH paid an annual compensation payment to the Welsh Government of approximately £12 million to recognise this increased cost. However, in 2012/13 DH Ministers appeared to have decided to end the compensation payment without prior consultation with the Welsh Ministers. This issue is being investigated with DH.

It is less common for English residents registered with GPs in England to seek treatment in Wales, but where this does occur, Welsh LHB and NHS Trust providers charge English CCGs for the activity based on their local calculated cost. There are a limited number of services (including GUM and A&E), where no cross-border charge is made, and activity is covered on a “knock-for-knock” basis. In other words, English CCGs will meet the cost of Welsh residents seeking treatment in English A&E Departments, and vice versa.

Current Status / Outcomes

In general, the arrangements work well in practice, subject to the points regarding changes to compensation payment arrangements. When the Welsh Affairs Committee undertook an enquiry into cross-border healthcare in 2006/07 it suggested only minor changes. An England-Wales cross-border NHS and government group has been meeting regularly since 2005 and within Wales there is an NHS-government group that includes all the LHBs and representatives of GPs.

It was agreed to extend the cross-border Protocol when it was renewed in 2013. Officials from the Welsh Government, DH, NHS England, LHBs and CCGs all worked together to create a fuller document, with two seminars bringing all the parties together. These helped successfully redraw the protocol, encourage collaborate working among new and existing institutions on either side of the border and allow the existing cross-border groups to be refreshed to reflect the new arrangements in England.

There remain therefore formal structural arrangements and good working relationships on border matters in place between:

DH, NHS England and the Welsh Government,
the Welsh Government and the Welsh NHS and
the Welsh and English NHS bodies along the border.

Although there are differences in some areas of policy and practice between England and Wales - such as structures, the role of markets, targets - the basic position on both sides is that patients should not suffer detriment as a result of these. Any issues should be resolved in ways invisible to the public.

Under the Protocol, the Welsh Government and NHS England agree to put in place arrangements on each side of the border to ensure that local NHS bodies work together to deal with a number of specified practical issues. Those are to:

ensure no treatment is refused or delayed due to uncertainty or ambiguity as to which body is responsible for funding an individual's healthcare provision;

ensure that the different financial regimes that operate either side of the border do not create inappropriate barriers to patient care;

ensure that the border is no block to accident and emergency services or to emergency treatment when required;

allow NHS and other staff safely to cross the border where needed with full indemnity cover;

facilitate access to redress from patients coming for treatment from across the border;

create and manage mechanisms for identifying and managing cross-border issues;

ensure arrangements are in place so that bodies engage populations across the border in discussions on quality and changes to services provided;

ensure that safe, reliable and integrated arrangements, including protocols for communications and dealing with problems, are in place regarding out-of-hours services, night-time hospital discharge, transport, social services and community services for residents dealt with by providers across the border;

publicise information on the web so that people can easily access what they need to know;

ensure entitlements and ways of accessing services e.g. screening are clear to patients, their own LHB/CCG, GPs and other clinicians;

ensure commissioning for mental health care reflects the needs of the patient and their legal rights in their home country;

NHS bodies maintain good open communications with neighbouring bodies across the border within a locally agreed framework;

ensure there are well-defined and clear protocols for managing changes in where a patient is treated; and

ensure people along the border – GPs, patients, advocate organisations, etc have easy access to information.

The Welsh Government and NHS England are working together to create a reference point on both websites, directing members of the public to guidance relating to treatment when crossing internal and international borders. These web sites will include a comprehensive Frequently Asked Questions section relating to the England/Wales border.

Case Study 4(b)

The National Commissioning Board

The Issue

New arrangements with the DH and MoJ handover remit to the NHS England National Commissioning Board (NCB). This relates to areas as diverse as armed forces health, offender health and high security hospital (e.g. Broadmoor) provision for Welsh patients.

There are potential similar issues with the Home Office and police custody when the transfer of forensic medical services to the NHS is viewed by the Home Office as desirable, but the devolution settlement means that the Welsh Government could only commission the health component of these services, whereas forensic evidence gathering would be unlawful. The Home Office has been informed of this constraint several times.

Handling

Meetings were held and Welsh Government officials repeatedly suggested that there would be issues for the NCB to commission in Wales because of devolution.

Key Points

The NCB took on England and Wales responsibilities from April 2013, but is not able to commission for Wales. This has highlighted issues about arrangements for very specialist second medical opinions for serving members of the armed forces. The issue needs to be resolved as agreements in England do not cover Wales and we cannot disadvantage serving forces in Wales.

Previously all non-conflict related specialist military health activity was covered under a national contract between University Hospital Birmingham and Joint Medical Command, MoD, regardless of the location of the patient. With effect from April 2013, (in England) the MoD no longer commissions accelerated services via MoD Hospital Units. All referrals from Defence Medical Services medical centres become the commissioning responsibility of the NCB.

As the NCB does not commission for Wales, there are currently no commissioning arrangements for activity associated with MoD personnel stationed within units in Wales (funding, access times, standards, designated centres, application of local initiatives, etc).

Current Status / Outcomes

The Welsh Government continues to work with officials in DH, the MoJ, the Home Office, the MoD and NHS England to resolve some of the issues. Other issues will require legislative changes for England and Wales to resolve.

Case Study 4(c)

Special Educational Needs

The Issue

Part 3 of the UK Government's Children and Families Bill – Children and young people in England with special educational needs (SEN).

Handling

Information is shared on a reciprocal basis, for instance the development of the proposals in the UK Government's Children and Families Bill that impact on SEN policy in Wales. There was early engagement as the provisions were being developed and Welsh Government officials have been able to feed into the Bill clauses. Differences of opinion have also been resolved by policy officials and lawyers without necessitating Ministerial exchanges.

Key Points

Although the provisions on SEN within the Bill relate to England only, there have been detailed discussions to ensure that all cross-border issues are covered and both governments are content with the arrangements.

Current Status / Outcomes

There will need to be ongoing dialogue with the UK Government's Department for Education (DfE) to ensure effective joint consideration of any non devolved matters and proposed changes to UK legislation.

The development of an Additional Learning Needs (Wales) Bill in the near future will require equivalent early engagement and consideration to ensure the provisions for cross-border issues are dealt with at an early stage, in particular to cater for the differences in each country's system.

The Welsh Government's Department for Education and Skills (DfES) has a dedicated Legislation Team that is able to establish contacts within Whitehall and policy officials liaise with their opposite numbers and have built up good networks which they nurture. However, the engagement relies on existing good relations and better co-ordination between Whitehall and the Welsh Government is required to ensure that all provisions are covered.

Case Study 4(d)

Firefighter Pension Schemes

The Issue

Firefighter pensions are devolved to Welsh Ministers under the Fire and Rescue Services Act 2004.

Handling

Nationally we are represented at discussions through membership of the Firefighters Pension Committee (FPC) chaired by DCLG. This includes employer and employee representatives. In reality, although devolved, there is little leeway to diverge from national policy as this may impact on HM Treasury funding for the pensions schemes.

The Public Service Pensions Act 2013, which came into force in April, will lead to the reform of public service pension schemes based on the recommendations outlined by the Independent Public Service Committee led by Lord Hutton.

A working Group has been set up by DCLG to consider the implications and Governance of the new firefighter pension scheme 2015 and Devolved Administrations have been invited to attend on observer status.

Key Points

There are two pensions schemes for firefighters in Wales, the Firefighters Pension Scheme 1992 (FPS) and the New Firefighters Pension Scheme 2007 (FPS 2007). The FPS is currently the most expensive public sector pension scheme and also the only pension scheme devolved to Welsh Government.

Welsh Government considers it essential that Welsh firefighters' pensions maintain collective parity with firefighters' pension schemes across the UK. There are instances however where information on changes to the legislation on pension schemes are not shared with Welsh Government in advance of decisions being made which does have an impact on when changes to schemes are implemented in Wales due to a knock on effect to legislative timetabling and consultation. This in turn leads to timing differences when changes are introduced which impacts on the Fire and Rescue Authorities who administer the schemes and scheme members themselves.

The Public Service Pensions Bill, published in September 2012, contained provisions for schemes to carry out valuations and set an employer contribution cap in line with Treasury directions. This will impact on the Firefighters' Pension Schemes for Wales. The Government Actuary Department (GAD) was commissioned to undertake the 2012 valuation process of collecting data for Wales. GAD undertook the same exercise for UK Government and the Scottish Government. Due to the Ministerial commitment to maintain parity it made sense and good value for money to engage GAD because the model they devised for England was utilised for Wales Scotland and Northern Ireland. This affords economies of scale.

Current Status / Outcomes

A new Firefighter pensions Adviser has recently been appointed for the Welsh Government, who previously undertook a similar policy role in DCLG. The role is to increase engagement

with relevant stakeholders, provide high quality and reliable policy advice to Welsh Government officials and participate in the creation of a Wales Fire Pensions Committee.

Case Study 4(e)

Safe and Confident Neighbourhoods

The Issue

A Home Office led, cross-Government strategy for safe and confident neighbourhoods, which the Welsh Government endorsed and which included a foreword from the Welsh Government's Minister for Social Justice and Local Government.

Handling

In March 2010, the Home Office published a Safe and Confident Neighbourhoods Strategy: Next Steps in Neighbourhood Policing. This was a cross-Agency and cross-Government strategy, endorsed by a number of Whitehall departments, the Association of Chief Police Officers, the Association of Police Authorities and the Welsh Government. The aim was to build on neighbourhood policing by developing stronger partnerships at the neighbourhood level, both to tackle crime and anti-social behaviour and increase public confidence that the police and local councils were dealing with the crime and anti-social behaviour issues that really matter.

Recognising that levels of crime and anti-social behaviour are influenced by a range of factors both devolved and non-devolved, and that delivering safer communities required partnership between devolved and non devolved agencies, Home Office Ministers were very keen that Welsh Government should endorse the strategy if possible.

There was close consultation and engagement at official level throughout the development of the strategy, and conversations between the Welsh Government's Minister for Social Justice and Local Government and the UK Government's Minister of State for Policing. Following negotiation, officials were able to recommend that Welsh Government Ministers endorsed a strategy which set out areas for joint working and joint action, whilst respecting matters where a distinctive approach was being taken in Wales.

Key Points

As above, there was close consultation and engagement throughout the process. The key issue was to ensure that the strategy respected the interface between devolved and non-devolved matters, and recognised that the relationship between Home Office and Welsh Government was distinctive from that between Home Office and other Whitehall departments.

Current Status / Outcomes

The strategy was published only a couple of months before the UK General Election in May 2010, following which the new Coalition Government took power and decided not to implement the strategy.