



DG Undeb Sy'n Newid
UK's Changing Union

Constitutional change and the capacity of the civil service and public services in Wales

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Introduction

Developing appropriate capacity and capabilities is fundamental if government and public services are to deliver desired outcomes for the people of Wales. Concerns about the future capacity and capability of the Welsh civil service and public services are regularly raised as issues of concern in debates on future devolution. Further devolution, it is argued, would result in such high costs and demands on capacity that however desirable it may be in principle, in practice it is simply too great a risk to take. These statements are often made with little evidence to support them.

This paper aims to explore the capacity and capability issues may be were the settlement to remain as it is or were different aspects of constitutional change to take place. This includes moving to a reserved powers model, devolving further responsibilities and creating a separate legal jurisdiction.

Methodology

The report is based largely on desk-top research. It has also benefited from a round table discussion which was held with a small number of senior civil servants, practitioners and thinkers in June 2013 and a number of one-to-one discussions. I am very grateful to all those who have contributed their time and ideas and they are listed in annex 1. All errors are my own.

Definitions

Capacity and capability are nebulous terms that mean different things in different contexts. Even when used in the context of government and public services, meanings vary.

Capacity is used here to describe the resource available to a government but also its ability to use these effectively in order to achieve a set of desired outcomes. It relates to actual and potential performance.

Capability refers to people's skills and abilities, but also how these are combined with structures and processes to deliver outcomes. It includes leadership and management and the ability to respond to new challenges creatively.

The ingredients for maximising capacity and capability will be contested, including the financial and human resources and the processes and structures needed to deliver most effectively.

Key findings

The constitutional model can be enabling or disabling for developing capacity and capability. A stable and coherent settlement which provides for clear accountability would provide a stronger foundation for developing capacity and capability.

Two aspects of the current settlement act to weaken capacity and capability – the conferred powers model and the piecemeal division of powers within devolved areas.

There is no reason why capacity and capabilities could not be put in place to support the delivery of new responsibilities.

A fair transfer of resources should accompany responsibilities. This would be supported by transparency and an independent body determining the level of resource transfer.

Skills, knowledge and expertise would need to be built in newly devolved areas. There are a number of options available to the Welsh Government to achieve this, including the transfer of expertise within the Home civil service, permanent recruitment of staff, secondments, consultancy and building the capabilities of existing staff.

Sufficient scope for planning and developing capabilities would need to be built into any transfers.

The development of a Welsh legal jurisdiction of some form or another is inevitable. Capacity and capabilities should be developed within this context whether or not a separate jurisdiction is created in the short term.

The core capacity and capabilities of the devolved civil service and public services need to be strengthened, whether or not there is further constitutional change. Achieving this would enhance performance within any further areas of responsibility.

Constitutional change will be based on political decisions. Capacity and capability will ultimately be built around whatever constitutional settlement is in place.

Current capacity and capability: overview

Core capacity and capabilities

Some have cautioned against additional powers being devolved to the National Assembly on the basis that the Welsh Government has failed to develop sufficient capacity and capabilities to deliver against current responsibilities. This lack of confidence in the Welsh civil service was reflected in the research undertaken by the UK Changing Union (UKCU) in gathering evidence for Silk Part 2 (Osmond and Upton ed, 2013).

This is notably different from Scotland, where confidence in the Scottish Government civil service appears much higher and does not appear to be a substantive issue in the independence debates.

It can be argued that the Welsh civil service has been incredibly resilient given a period of considerable change over the past 15 years, not least in the constitutional settlement. This includes redefining the executive and therefore civil service responsibilities in the Government of Wales Act 2006, changing the process for developing primary legislation with the introduction of Part IV of the

Act in 2011 and absorbing additional responsibilities from Animal Health to the Social Fund through a process of ad hoc devolution.

Each change to the constitutional settlement has necessitated refocusing capacity and capabilities. This in itself can be a drain on capacity. For example, the Scottish Assembly has had primary legislative powers since 1999. The Scottish Government (and Parliament) has well established processes for progressing its legislative programme. In Wales, the National Assembly was given powers to pass primary legislation in 2007 in the form of Assembly Measures. The process was complex and resource intensive. It was not until 2011 that the Assembly received powers to pass Acts of the Assembly. This means that the efforts to develop capacity around earlier systems are to a large extent wasted and processes to support an effective Welsh Government legislative programme are still bedding down.

Strong arguments have been made for further reform of the Welsh civil service. This includes steps to address specific weaknesses by, for example, introducing a Treasury function and a strong strategic function within the Cabinet Office (Chapter 3, Osmond and Upton ed, 2013). Not only is a comprehensive review needed in order to design reforms, but it is crucial that this is open and transparent so that the process builds public confidence in the civil service.

These reforms are needed whether or not there are changes to the constitutional settlement. The UK Government is also undertaking a Civil Service Reform programme. We do not yet know what success either government will have and the constitutional settlement cannot be based on judgements as to the potential performances of future Welsh and UK governments.

Shrinking public finances

The Silk Commission is undertaking its deliberations in the midst of a UK government 7 year fiscal consolidation programme which will see significant public spending cuts until at least 2021. This affects the whole of UK public expenditure, including Welsh Government expenditure. According to the Institute of Fiscal Studies (IFS):

“The Welsh Government is set to see a real-terms reduction in current spending of 8.4% between 2010-11 and 2014-15, with the capital budget falling by 42.8%”.

Whilst we have already seen reductions in public spending, the extent of the spending cuts is set to be much greater in future years. The IFS predicts that Unitary Authorities in Wales could see an 18% reduction in spending on services and that some service areas could see spending cuts of 52%.

The civil service and public services in Wales will need to develop different approaches to deliver in this context, whether responsibilities lie in Whitehall or Cardiff.

Demand for new models of governance and public services

Even before the economic crisis and associated public spending cuts, longer-term trends such as an aging population, rising inequality and exceeding environmental limits have made existing models for delivering public services, and indeed overall governance, increasingly unsustainable. Other developments, particularly new technologies, have opened up new possibilities.

Rethinking how we build the capacity and capabilities of our civil service and public services in these new contexts is needed whether or not there is a change to the constitutional settlement. A Commission on Public Service Governance and Delivery has recently been established by the Welsh Government.

Developing capacity to deliver new responsibilities: overview

Some have cautioned against transferring additional powers because the Welsh Government does not currently have the capacity to deliver within these areas.

This is not a reasonable argument. Capacity to deliver within new responsibilities will only be developed properly when it is clear that a political decision has been taken to transfer the relevant powers.

It is important to consider, however, how existing capacity can be used and new capacity can be developed to meet any new responsibilities. Fundamental to any transfer of responsibility is that the associated resources are also transferred. The Welsh Government could then decide how to best use those resources to develop capacity and capability.

Transferring resources to match responsibilities

A fair level of resource must be transferred alongside any responsibility. However, how much would be 'fair' and how could we be assured that it would be transferred?

Once resources to deliver against a new responsibility have been transferred to the National Assembly's budget, any future variations are generally determined by the Barnett formula. However, the Barnett formula does not apply in determining the sum initially transferred. The process for agreeing the transfer of resources for new responsibilities is much more opaque. Some attempts have been made to describe the process:

"The amount of the transfer is determined on an ad hoc basis."

(Independent Commission on Funding and Finance, 2009)

"... where a Bill transfers responsibility for existing functions from the UK Government to the Welsh Assembly Government... then the budget transfer for those functions is a matter for a negotiation between the Assembly Government and the UK Government. There is not a Barnett consequential as a result. So, there would be negotiation as to what sum should be transferred"

(Carwyn Jones quoted in the Constitutional and Legislative Affairs Committee report, 2012)

The lack of transparency in the process makes it very difficult to know what resources have been transferred or to what extent they are fair.

Ultimately it is the UK Treasury which holds the purse strings and it is the UK Departments which have access to whatever detail there is on how current budgets are structured. When responsibilities for delivering Council Tax Benefit and the Social Fund were recently devolved at the request of the UK Government the Welsh Government complained that they came with significantly reduced programme budgets and insufficient consideration of administrative costs. In an ever tighter financial environment, these negotiations will be more difficult.

Having a fair baseline level of resources is central to enable the Welsh civil service and public services to deliver effectively. Fair and transparent processes for transferring resources with responsibilities should be put in place, whether we continue with ad hoc devolution or have a more comprehensive transfer.

The characteristics of a fair process would include:

A breakdown of resource transfer to be published alongside the transfer of responsibility.

Broad criteria defining what constitutes a fair transfer which are published.

An independent body to determine the final transfer of resources, or at the very least to consider any appeals.

Skills, knowledge and expertise

Where new responsibilities are transferred which demand increasing civil service capacity to deliver, the administrative budget should be transferred in tandem.

The Welsh Government would have a number of options as to how it then developed capacity and capabilities in new areas of responsibility. The UK Government sets out three ways in which it will develop new skills and capabilities where needed: build, borrow and buy (UK Government, 2013). These options are also available to the Welsh Government.

The civil service can build on the capabilities of current staff. It has core competencies which should span the organisation and which are focused on setting direction, engaging people, delivering results and working to core civil service values (Civil Service Competency Framework). These skills are transferrable to new areas of responsibility.

If significant areas of responsibility were transferred, additional staff would need to be recruited. In practice, this might mean fewer redundancies.

Specialist knowledge and expertise will be needed. This could be secured through recruitment or by transferring expertise from Whitehall or the Scottish Government to the Welsh Government. This potential is one of the benefits of operating within the Home Civil Service. It would also be possible to bring in external expertise on a temporary basis, including through secondments. Another option would be to buy in necessary expertise on a temporary and fixed term basis, for example to guide the initial development of projects.

The actual delivery of services is primarily undertaken by external public bodies or delivery agents. Were new responsibilities to be transferred, the people who currently deliver services should not change. For example, were criminal justice to be transferred, the skills and expertise within the Police Authorities would also transfer.

The wider policy community would also need to be developed in new areas in order to input ideas and challenge government – in taxation and prison services, for example. This would also need to be a priority for external funders and universities to support robust Wales-specific policy initiatives.

Initial set up costs

There will be initial set up costs which would need to be assessed in each area. Some of the responsibilities being discussed would have very limited, if any, set up costs whilst others would be significant. Some of these costs would need to be negotiated with the UK Government.

Moving to a reserved powers model

The 'conferred' model

The current 'conferred model' has been widely criticized for creating uncertainty as to exactly what areas are the responsibility of the National Assembly and what are the responsibility of Parliament (UKCU, 2013; Welsh Government, 2013; Navarro & Lambert, 2013). This is exasperated by the blanket restriction on modifying the powers of UK Ministers. This lack of clarity:

- obscures accountability
- increases the potential for conflict between the two tiers of government
- creates additional complexity policy development and particularly in legislation

The referral of the Local Government and Byelaws (Wales) Bill, a relatively uncontroversial Bill, to the Supreme Court perfectly illustrates the problem.

The drain on capacity is clear. There are immediate costs in taking a case to the Supreme Court and ongoing costs in policy and legislative teams in the Welsh Government, as well as Whitehall officials, being absorbed in identifying where powers might lie. There is also the diversion of political effort and energy to battling these conflicts. Perhaps most significant is the cautious approach to policy and legislation that this necessitates and the fact that legislation is then not as coherent as it should be.

Potential implications of moving to a reserved powers model

Introducing a reserved powers model would release the currently unproductive capacity absorbed by working within the conferred model.

There would be no additional demands on capacity from operating within a reserved powers model. This is supported by the experience of Scotland and Northern Ireland. Wales is unique in the UK in having a conferred model of devolution. It is also unique in having to allocate such significant resources negotiating the devolution settlement. Whilst there will always be areas of dispute on the boundaries of devolved powers, they do not permeate the policy and legislative processes or consume the time and effort of politicians, lawyers, civil servants or the wider policy community in Scotland or Northern Ireland to the same extent.

Identifying where power lies would be much clearer under a reserved powers model, which would therefore increase accountability. Clearer accountability should in itself drive capacity and capability to be better focused on improving performance.

Additional powers within devolved subjects

Current settlement

Within the 20 subject areas in which the National Assembly has powers to legislate, there is a long list of exceptions as well as areas where responsibility is unclear.

When the Government of Wales Act 1998 was drafted, decisions as to which powers should reside in the Assembly and which remain at Westminster were based on the historic responsibilities of the Wales Office prior to devolution. There was no attempt to create a coherent package of powers. Whilst there have been some tweaks, this is still reflected in the 2007 Act. The result is a piecemeal and often arbitrary division of powers within subject areas. These have been referred to as 'jagged edges'.

Two different governments, working to two different legislatures, with responsibility for aspects of direction and delivery within the same area drains capacity through:

- unnecessary duplication of effort across administrations
- overall delivery being impeded because of differing priorities meaning efforts are not co-ordinated or even counteract each other
- public service providers working to different strategic directions
- external agencies duplicating effort in liaising with two governments
- effort wasted on a 'blame game' across institutions rather than achieving the desired outcome.

There will always be a need for boundaries of responsibilities between different governments within a devolved context. However, minimising these and maximising coherency within the devolved powers would create better foundations for strengthening capacity and capabilities.

The current difficulties are illustrated in the two examples below.

Transport

There is a complex patchwork of devolved and non-devolved powers within transport. Professor Cole has set out the difficulties of achieving an integrated transport system for Wales given the incoherent split of responsibilities and delivery mechanisms (Chapter 5, Osmond and Upton ed, 2013).

Sustrans Cymru and the Bevan Foundation set out the difficulties this causes in relation to buses. The Welsh Government has responsibility for bus subsidies but responsibility for bus regulation in Wales is retained by the UK Government and it in turn has conferred some of these responsibilities to local authorities in Wales.

Welsh Government policy is to focus on benefit to passengers by encouraging bus operators to run services on less commercial routes within its overall grant. It has used its powers in relation to bus subsidies to reform the Bus Service Operating Grant. However, the bus regulatory framework, set by the UK government to achieve different aims, acts to minimise the impact of the subsidy policy. Until this can be resolved, as Sustrans and Bevan Foundation state:

"the Welsh Government, Regional Transport Consortia in Wales and Local Authorities in Wales will continue to use public money to provide ineffective subsidy."

Planning for energy infrastructure

Under the current settlement, the Welsh Government has responsibility for setting the planning framework for some infrastructure for renewable and low carbon energy. The UK also retains some responsibility for setting the planning framework for infrastructure for renewable and low carbon energy in Wales.

The Welsh Government has set out its policy for this in its Energy policy statement, *Energy Wales, A Low Carbon Transition*, and detailed guidance on planning for renewable energy is set out in Technical Advice Note 8. The UK government has set out its policy in the National Policy Statement for Renewable Energy Infrastructure. Whilst the Welsh Government policy takes a spatial approach, the UK Government policy does not.

The division of responsibilities is complex, based on a seemingly arbitrary size of development which varies according to onshore and offshore developments.

Energy companies need to work with a number of bodies to obtain the full range of necessary consents and licenses. This would be the case if the responsibility for planning and consenting renewable energy developments were wholly devolved. However, the system in Wales is particularly complex. This level of complexity does not exist in Northern Ireland or Scotland where planning and consenting powers for renewable energy is wholly devolved.

Stevie Upton describes the impact this has on achieving energy outcomes in Wales:

“This introduces uncertainty over policy direction and inconsistency of process for developers. It also enables politicians of all colours to engage in a cross-border blame game over planning decisions, delays and policy failings. As a result, clarity over which body should be held accountable to the electorate is lacking. A further complication is that, with responsibility so comprehensively split between the UK and Welsh Governments, there is every chance that action by the former will cut across the latter’s policy aspiration.”

(Chapter 4, Osmond and Upton ed, 2013)

Delivering within a new settlement

Devolving further powers to provide coherent divisions of responsibility should provide a much stronger platform for building capacity and would eliminate the sort of drains on capacity discussed above. This would be easier to achieve if the reserved powers model was introduced.

If additional responsibilities were devolved, capacity and capabilities to deliver against these would need to be developed as set out above. As these are areas where there is already devolved responsibility, this should not be too difficult to achieve. It would mean building capacity within existing departments, or even simply within existing teams. Some capability already exists in this areas with some existing knowledge and expertise as well as relationships with key bodies. However, each area will differ. Examples are given below using the areas already discussed.

Consent to renewable energy developments

This is not a delivery function so there would be no programme budget to transfer or create. The Welsh Government would need to allocate some administrative resources to support the decision making process in new areas of responsibility. This would not be a significant cost and could be managed within existing budgets. It may benefit from the transfer of these costs from the UK Government.

The Welsh Government would need to develop skills, knowledge and expertise as described previously. Some have suggested the Welsh Government could delegate advice on decision-making to the existing Planning Inspectorate. It could also recruit staff with the required expertise, including via secondment. Civil servants with generalist skills could also develop knowledge and expertise given time.

Skills and expertise in this area would include leadership and strategic vision. Improving capabilities more generally around leadership and strategic vision within Welsh Government should be happening anyway.

Transport

The additional capacity required to deliver bus regulation would be minimal. There would be no programme budget and in this case it is unlikely that there would be any administrative resource transfer. Policy expertise would need to be developed within the Welsh Government, but this is a generalist skill and would not have any significant capacity implications. Drafting any changes to regulations is already a core activity of the Welsh Government.

This is just one example of many 'jagged edges' within transport. In other cases, for example, were responsibility for rail investment transferred (as proposed by UKCU), there would need to be a transfer of capital budgets which would involve much more complex negotiations. Were responsibility transferred, lessons could be learnt from Scotland, where this is already devolved.

Devolution of additional fields of responsibility

Decisions to devolve responsibilities in new areas - such as taxation, policing and criminal justice - would be political. Capacity and capability would then need to be built within the civil service in areas where it currently has little, if any, responsibility. How complex or straightforward this would be would vary depending on the specific powers being devolved. Three examples are given below.

Taxation

The Silk Commission's first report recommends part of the budget for the Welsh Government being funded by devolved taxation, including business rates, stamp duty land tax, landfill tax, air passenger duty and some level of income tax.

In putting in place arrangements to deliver these functions, it would be possible to draw on the experience of Scotland as well as other countries with devolved fiscal arrangements such as Canada (Trench, 2013) and indeed arrangements in small countries.

In order to deliver these functions, the Welsh civil service would need a new tax policy unit. This could be a small team within the current Finance Department (or a new Welsh Treasury). New personnel with the required skills would need to be recruited - these could potentially be transferred from the Treasury.

Policies would initially be inherited but the wider policy community would also need to build capacity on tax policy for Wales. Alan Trench has commented:

"Adapting to running a fiscally decentralised UK would, among other things, require a huge shift in outlook from tax specialists within government and outside it."

It would be most efficient for HMRC to implement and maintain the Welsh rate of income tax for which the Welsh Government would need to compensate them. The Welsh Government would need to fund the administration of any taxes which are wholly devolved (such as Stamp Duty) whether through a new or existing body and to invest in compliance.

The Silk Report Part 1 notes that a Welsh Treasury would need to be put in place were taxation powers to be devolved. However, the need for a Welsh Treasury function is well established and is not dependent on the transfer of taxation powers.

Whilst perfectly feasible, some of the process of devolving taxes will be complex and time would be needed for planning. It would trigger the development of capacity in this area within and outside government as well as the development of knowledge and expertise that could be beneficial to wider policy.

Police

The necessary capacity and capability could be developed swiftly were policing to be devolved. This was the case when Fire and Rescue Services were devolved in 2007 and there would be many similarities.

A new team would need to be established within the Welsh Government and it would be reasonable to expect some transfer of administrative budgets to support this.

The Welsh Government's current responsibilities already demand that it works with the four Police Authorities in Wales, supported by a Police Liaison Team. Additional staff resources and specialist

expertise would need to be developed and might be transferred from the Home Office or brought in through secondments with external partners or permanent recruitment.

Police funding is currently split between the UK Government (Home Office), Welsh Government and council taxes. The Welsh Government has assessed the resource transfer implications of devolving policing to be £300 million (Welsh Government, 2013). This relates to the Home Office police grants (capital and revenue) paid to the Welsh Police and Crime Commissioners. Identifying and transferring these programme budgets should be relatively straightforward.

An assessment would need to be made of the budget transfers in relation to activities currently carried out on an England and Wales basis. In practice, it is likely that most of these activities would continue to take place on an England and Wales (or UK) basis with Welsh Government contributing its share of resources. It is unlikely that any additional expertise would need to be developed in areas such as specialist support services or professional training.

In terms of policy development and direction, the four Police and Crime Commissioners already work together and with the Welsh Government. It has been argued that the creation of the Police and Crime Commissioners means that policing is already largely devolved (Michael, 2013).

Criminal Justice

The additional capacity and capabilities needed to deliver a devolved criminal justice system is of a different order from the areas discussed so far. It would represent the devolution of a major area of government responsibility which would include:

- Police (unless dealt with discretely)
- Criminal courts
- Prison service
- Probation service
- Crown Prosecution Service
- This would encompass youth justice.

The Welsh Government has argued that policing and criminal justice are the only mainstream public services which are not devolved in Wales (Welsh Government, 2013). Criminal justice (and in fact 'justice') is devolved in both Scotland and Northern Ireland.

The Welsh Government has estimated that were criminal justice to be devolved, the budget needed would be approximately £1.2 billion, of which £900 million would be new funding responsibilities. The total budget allocated to Welsh Government departments for 2013-14 was just under £14.9 billion. A new Welsh Government (criminal) justice department would form one of the bigger departments within the government.

Whilst careful planning would be needed, there is no reason why the capacity and capabilities to deliver within this new area could not be developed within the Welsh Government. These functions are delivered effectively by the Scottish and Northern Ireland Governments, albeit within a very different context given the long history of devolved responsibility.

So what might this involve in practice for Wales? A Cabinet Minister would need to lead a new Justice department. The much smaller size of the National Assembly when compared to Scotland and Northern Ireland would, however, limit the scope for bringing more political leaders into government, including as Deputy Ministers.

A new department would need to be established to support the Minister to deliver her or his functions. Negotiating adequate budget transfers would again be crucial but, in principle, achievable.

Specialist skills and expertise would need to be transferred and overall capacity put in place given this is a new area. It would be essential to bring people into the civil service who have expertise in different aspects of the criminal justice system. Ideas and understanding of how the criminal justice system might be adapted to work most effectively within a devolved setting would continue to grow over time.

Programme budgets, including revenue and capital budgets, for delivering the criminal justice system would also need to be devolved. There is a criminal justice system in operation in Wales, albeit not devolved, and resources for delivering current services would be transferred.

Where services are already organised on a territorial basis, such as the police, this would be relatively straightforward. Other services would need to be remodelled on a territorial basis. This would be complex and demand careful planning. For example, how might a devolved prison system work in practice? Would Welsh Government be responsible for funding Welsh prisoners, wherever they are based? How would a capital budget transfer be calculated to allow potential not only to maintain prisons but to build new facilities, for example for female prisoners? These issues are not impossible to resolve, but neither are they straightforward. It underlines the importance of a fair and transparent process to agree budget transfers.

Looking to external capacity, there is little in the way of a Wales-focussed criminal justice policy community. Much more thinking around potential policy would need to be done in the lead up to any transfer of the criminal justice system. The Welsh Government should now lead on this given that it has already stated it as an aspiration (Welsh Government, 2013). It would also demand external funders and universities to channel resources into developing ideas in this area.

Developing this capacity to deliver a devolved criminal justice system is perfectly feasible. It will not happen unless a political decision is taken to devolve the criminal justice system. It would demand careful negotiations on budget transfers and time to put structures in place and to develop capabilities. If this were done, it would mark a step change in the capacity and capabilities of the Welsh Government civil service.

A Welsh legal jurisdiction

Current situation

England and Wales is currently a single legal jurisdiction. Courts in England and Wales apply the laws of both the National Assembly for Wales and the UK Parliament. There is a common judiciary and legal profession.

This model is not currently under particular strain. Unlike debates around moving to a reserved powers model or eliminating the 'jagged edges', which are seen as important for good government, there is no great concern that the England and Wales jurisdiction currently prevents effective delivery of justice.

Following devolution, Wales has developed a stronger legal identity. Legal institutions and the system of courts increasingly recognise Wales as a 'distinct domain of judicial activity' (UKCU, 2013). For example, Wales is now a distinct administrative area within Her Majesty's Court and Tribunal Service. Distinctively Welsh judicial institutions have developed and the Law Society has an office in Wales. Cases involving Welsh law can be heard in Wales and can also be heard in the medium of Welsh.

The key consideration here is that whilst the system currently works relatively effectively, it will come under increasing strain over time as devolution beds in. The body of distinct Welsh law is currently relatively small but it is growing all the time and if criminal justice were devolved this would increase significantly. It is inevitable that a separate jurisdiction in some form another will emerge over time.

Given the inevitability of change, it would be more efficient to put in place plans for building capacity and capabilities to ensure justice is administered effectively in this emerging context. The alternative is waiting until the system becomes increasingly ineffective, introducing ad hoc changes when parts reach breaking point.

Capacity and capabilities for a Welsh jurisdiction

Exactly what a separate Welsh legal jurisdiction would mean in practice is currently ambiguous (NAfW, 2012). This makes it impossible to assess exactly what is needed to deliver most effectively. The Constitutional and Legislative Affairs Committee's Inquiry attempted to establish the potential cost but found it impossible to do so given the variety of definitions being used and the different interpretations of what functions might need to be transferred for its establishment. Making comparisons with other administrations is also impossible because functions are split differently.

However, the issues for consideration are broadly similar to other areas of responsibility being transferred. Firstly, Scotland and Northern Ireland already have separate legal jurisdictions. Scotland has always maintained a separate legal system and a legal jurisdiction for Northern Ireland was established when Northern Ireland itself came into existence in 1921. This suggests that the capacities and capabilities involved in operating a separate jurisdiction could equally be developed in Wales, albeit that the historical contexts are very different.

As with other areas, administrative budgets would need to be transferred, in this case from the Ministry for Justice. Skills and expertise would need to be recruited in order to support a Minister to deliver her or his functions, including policy expertise. This would ideally sit within a new Department for Justice with related teams such as those delivering justice functions as well as

constitutional affairs and any newly devolved justice functions.

Existing programme budgets – revenue and capital budgets – would also need to be transferred and core aspects of some services would need to be redesigned on a territorial basis. Some service areas already have a territorial basis which would make transfer simpler, for example the Crown Court, County Court and Magistrates’ Court and Tribunals. The development of effective and efficient High Court and Court of Appeal systems for Wales would be more complex.

A Welsh judiciary would need to be established as a fully independent part of the Welsh Government. Careful thought would be needed as to how a Welsh judiciary and legal profession would operate and what their relationship would be with colleagues in England, other parts of the UK and the Republic of Ireland. Each of these jurisdictions contains different models which will be more or less suitable for Wales to draw on, and thus can be viewed as a long-term aspiration that might have to wait until widespread acceptance of urgent capacity problems and or more prosperous economic circumstances.

Conclusions

It is clear that the capacity and capability of the civil service and public services are essential to the delivery of outcomes for citizens in Wales. The constitutional model can be enabling or disabling for developing capacity and capability. Some changes to the current settlement - moving to a reserved powers model and resolving 'jagged edges' - would release capacity. Creating a more stable constitutional settlement should also enable more sustainable development of capacity and capabilities.

There is no reason why capacity and capabilities could not be put in place to support the delivery of any new responsibilities. Vital to this will be the fair transfer of budgets along with responsibilities. In order to ensure this happens, the process must be transparent and an independent body should be responsible for determining a fair level of transfer.

In some areas, putting in place new models of delivery will be complex and demand time and careful planning. Similarly, in some areas developing the capabilities to deliver will also demand time and planning. There is no reason why time cannot be given to ensure this is done effectively.

The development of a Welsh legal jurisdiction of some form or another is inevitable. Capacity and capabilities should be developed within this context whether or not a separate jurisdiction is created in the short term.

The core capacity and capabilities of the devolved civil service and public services need to be strengthened, whether or not there is further constitutional change. Achieving this would enhance performance within any further areas of responsibility.

Whether or not the constitutional settlement should change is a political decision. Capacity and capability will ultimately be built around whatever constitutional settlement is in place. However, a more stable and coherent settlement which provides for clear accountability would provide a stronger foundation for developing capacity and capability.

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Annex

Roundtable

A round table discussion was held on 27 June, 2013 under the Chatham House rule to inform the research.

Anna Nicholl and Roshi Naidoo from Egino facilitated the session and participants were:

- Jeff Andrews, Welsh Government
- Nick Bourne, Commission on Welsh Devolution and Commission on Public Service Governance and Delivery
- Carys Evans, Welsh Government
- Gerry Holtham, Adviser to Welsh Government
- Marie Navarro, Your Legal Eyes
- Hugh Rawlings, Welsh Government
- Steve Thomas, Welsh Local Government Association
- Michael Trickey, Public Services 2025

One to one discussions

The research also benefitted from a number of one to one conversations held with:

- Professor Derek Birrell, University of Ulster
- Robert Jones, University of Cardiff (PhD student)
- Gerry Holtham, Adviser to Welsh Government
- Emyr Lewis, Wales Governance Centre
- Marie Navarro, Your Legal Eyes
- Richard Parry, University of Edinburgh
- Ed Poole, London School of Economics (PhD student)
- Hugh Rawlings, Welsh Government

Constitutional change and the capacity of the civil service and public services in Wales
