

Ministerial Advice**To:** First Minister**From:** Wyn Price**Date:** 23 June 2017**Subject:** Transfer of Functions – Part 1 of the Civil Contingencies Act 2004**MATS Reference number MA-L/FM/0242/17**

When is a decision required from the Minister? A decision is required by 27 June for the TFO to be included in the general Transfer of Functions Order which will accompany the Wales Act and which will come into force in April 2018. If the decision is not to accept the transfer without a commensurate transfer of funding then the UK Government maintains that a separate TFO would not be possible for another two to three years.

1. What is the issue you are asking the Minister to consider?

The First Minister asked officials to make a full assessment of the costs of exercising the executive functions under Part 1 Civil Contingencies Act 2004 before deciding whether to accept the formal transfer.

2. What action(s) are you recommending to the Minister?

You are asked to agree that:

- the transfer is accepted and included in the general Wales Act Transfer of Functions Order;
- you write to the First Secretary of State and Minister for the Cabinet Office to continue to pursue the transfer of funding (Annex 1); and
- Should the transfer of funding from the UK Government not be forthcoming, funding will have to be taken forward on risk and considered as part of the ongoing budget preparations for 2018/19.

You are also asked to note:

- the full assessment made of the costs to deliver these functions appropriately in Wales; and
- the proposals for delivering these functions and the wider role in co-ordinating work on counter-terrorism and cyber security.

3. Deputy Director, Statement of Assurance

☒ I, *Martin Swain*, confirm that I have quality assured this advice.

I am satisfied that the recommended decision or action, if agreed, would be lawful and affordable. Welsh Government policy priorities and cross portfolio implications have been fully considered.

Advice**4. Context - What is the situation that has led to this advice?**

You wrote to the Rt Hon Ben Gummer MP, Minister for the Cabinet Office and Paymaster General, on 10 April to express your disappointment that no transfer of funding will be considered to accompany the transfer of executive functions under Part 1 of the Civil Contingencies Act 2004 (the 'Act'). You agreed that before any consideration is given to accepting the proposed transfer, a full assessment of the costs required to exercise these functions appropriately needs to be conducted (MA-L/FM0030/17).

Whilst Cabinet Office has agreed to transfer these functions and include the TFO in the general Wales Act TFO there is still no commensurate transfer of funding being offered. Officials advise you to write again to the new Cabinet Office Minister to make the point that the cost of £360,000 per annum to support the delivery of reserved responsibilities for the UK Government in Wales, not only for civil contingencies but also counter-terrorism and cyber resilience, is not an unreasonable request; particularly in the context of the UK Government committing £1.9 billion towards the threat of cyber alone.

5. What is your advice to the Minister?

There are compelling arguments at this time for Welsh Government to accept the proposals and exercise greater devolved responsibility over civil contingencies in Wales. At a time where the threat of terrorism remains high, cyber attacks are becoming more frequent and the impact of climate change is expected to increase the risk of flooding and other hazards, it is more important than ever that Welsh Ministers have appropriate powers to shape how Wales prepares itself for these risks.

In accepting the transfer of functions, Welsh Ministers will be able to play a more influential role in setting the direction and delivery of civil contingencies. This not only includes developing policy which is more appropriate to Wales but also being able to provide support to the devolved agencies delivering those services.

Welsh Ministers would no longer need to rely upon a Minister of the Crown to monitor compliance or take action against a devolved service. The proposed model sees Welsh Government actively monitoring compliance by devolved services

instead of relying upon self-assessment or the outcome of Resilience Capability Surveys. It goes further by allowing Welsh Government to provide more direct leadership at a Wales level on certain aspects of capability building such as critical national infrastructure, training and exercising and community resilience and by supporting local delivery through embedding staff within Local Resilience Forums to help progress and expand their work. The proposals go further by recommending that the additional resources also discharge a wider remit on counter-terrorism and cyber resilience.

The transfer creates an opportunity to provide a less ambiguous constitutional platform from which to develop preparedness across all agencies and so strengthen resilience against the growing risks.

The compelling argument for accepting the transfer can be viewed as outweighing the cost implications. However, the UK Government should still be pressed to meet these costs on the grounds that the request is not unrealistic given the commitment to support the delivery of reserved responsibilities in Wales, not only for civil contingencies but also counter-terrorism and cyber resilience.

Assessment of Models in the other UK Nations

To formulate an appropriate model for Wales, officials have conducted an assessment of how the functions are exercised, and how resilience in general is delivered, in England, Scotland and Northern Ireland. The assessment also takes account of the current position in Wales at the local level and how the duties under the Act have been discharged since its implementation in November 2005.

For context, Annexes 2, 3 and 4 details the current structures operated within the:

- Scottish Government (Annex 2);
- Cabinet Office (Annex 3); and
- Department for Communities and Local Government (Annex 4)

Current Welsh Government structures are shown at Annex 5 with the proposal for additional resources and functions at Annex 6.

Scotland

Part 1 of the Act applies to Scotland, with the powers it sets out residing with Scottish Ministers if they relate to devolved matters. While civil protection in Scotland is largely a devolved matter and therefore the responsibility of the Scottish Government, certain responders in Scotland operate in reserved areas, with regulations and guidance issued by UK Ministers.

Regulations and guidance made by the Scottish Ministers detail how Scottish Category 1 and 2 responders, exercising functions within the devolved competence in Scotland, should perform their duties under the Act.

The Scottish Government has published *Preparing Scotland* which brings together, in one place, statutory guidance on the implementation of the regulations, non-statutory guidance on good practice, and the integration of national and local planning for emergencies in respect of devolved functions. This is supported by a range of guidance for Scotland contained in a 'Hub' which sets out the philosophy,

principles and good practice, and 'Spokes' that provide detailed guidance on specific matters.

The Scottish Government has established a Division comprising 54 people to exercise its functions under the Act and to develop resilience in general. They also have a separate unit of 5 people dealing specifically with counter-terrorism and a further separate Division dealing with cyber resilience. The Resilience Division covers response and policy engagement, risk and improvement, essential services and communities and projects. The Division has teams responsible for each Regional Resilience Partnerships (equivalent to Local Resilience Forums) and operates a Scottish Resilience Development Service (ScoRDS) which provides training, exercising and other knowledge development opportunities to the emergency services and other responder agencies, to ensure that Scotland is prepared to respond to any major emergency.

One of the main deliverables of the Resilience Division is to provide assurances to Ministers that an overarching system is in place to deliver strategic direction, build capability and improve preparedness.

England

The Cabinet Office Civil Contingencies Secretariat (CCS) leads on civil contingencies and co-ordinates the work on resilience across Whitehall Departments. CCS has a workforce of 30 executive bands and above plus supporting staff which leads on work on the Act, national risk and capabilities. CCS is responsible for the statutory and non-statutory guidance supporting and facilitates the central UK response arrangements under COBR. See Annex 3.

CCS also works particularly closely with the Resilience and Emergencies Division in the Department for Communities and Local Government (DCLG RED), which is able to feed in information about how the local level is building capability and how well the local and national levels are working together. DCLG has 34 members of staff located at London, Bristol, Birmingham and Leeds acting as advisers to the Local Resilience Forums across England. See Annex 4.

Northern Ireland

Civil contingencies is a devolved matter in Northern Ireland although national security is reserved. Part 1 of the Act applies only in a very limited way. The Civil Contingencies Policy Branch (CCPB) of the Executive Office works across the public sector to promote and encourage the development of effective emergency preparedness to mitigate the effects of a civil emergency on the public and the environment. In addition to its preparedness agenda CCPB facilitates the effective delivery of the central strategic crisis management arrangements within government to deal with the most serious types of emergencies.

CCPB supports the effective functioning of the Civil Contingencies Group (Northern Ireland) (CCG(NI)), the principal strategic civil contingencies preparedness body for the public sector chaired by the Head of the NI Civil Service and comprising senior level membership from key civil contingencies stakeholders. CCPB also delivers this role when CCG(NI) is in emergency response mode. As part of its role to promote and encourage good civil contingencies practice, CCPB has produced an overarching framework of civil contingencies policy, guidance and advice.

Exercising the Functions

Monitoring Compliance of Duties in Wales

There is no individual inspectorate responsible for monitoring delivery of the duties under the Act. This is done through Category One and Two responders performance monitoring or regulatory regimes. However, Part 3 of the Auditor General's report on civil contingencies (December 2012) concluded that the approaches taken by Category One responders to implement the Act are inconsistent and that responders are not effectively monitoring their activities. Indeed, the report stated that the scrutiny and performance management of resilience activity is generally ineffective. It found that many responders do not recognise their duty to undertake self-assessment, although the Civil Contingencies Act 2004 relies upon this in maintaining acceptable performance standards. On the back of this, the Public Accounts Committee (PAC) report recommended (July 2013) that Welsh Ministers should have a statutory duty to monitor the performance of Category One and Category Two responders. Only the UK Government currently has powers under the Act to do this in Wales and clearly, according to the findings, these powers appear not to have been exercised effectively.

As part of the assessment process, information was requested from local authorities on the level of staffing resources dedicated to civil contingencies and how this had changed since the implementation of the Act in 2005. From the 14 local authorities which responded, there has been a reduction in staffing numbers from 43.5 to 27. In a number of instances, emergency planning officers have additional duties such as elections and occupational health. In one example, the staffing levels have been reduced from 3 to one person working two days a week on civil contingencies. Duties for the Fire Service under the Act have not been fully audited.

Policy Development

The Welsh Government would need to develop its own policy in relation to the various civil contingencies functions that it is proposed to transfer under the Act. These include powers to issue guidance to Category One responders in relation to the civil contingency duties and the manner in which such duties are to be performed. Many of the functions confer regulation making powers upon the Welsh Ministers which would also need to be resourced in the event that they were exercised. For example, making regulations in relation to category 1 responders about the extent of the assessments and planning duties imposed on them under the Act (section 2). Other examples include making regulations which require or permit disclosure of information between responders (section 6) and amending the list of responder organisations (section 13).

Other Commitments

Outside of the specific responsibilities under the Act and the wider civil contingencies agenda, Community Safety Division is also responsible for leading on two other continually evolving areas of risk:

Cyber Resilience

The recent ransomware attack which caused widespread disruption to the NHS in

both England and Scotland and affected thousands of organisations and individuals demonstrates the risk which currently exists from cyber attacks and the need to develop more robust cyber security arrangements. The UK Government has recognised this risk and has invested £1.9 billion to further bolster cyber security and has established a National Cyber Security Centre (NCSC) to lead on this work. In its first three months, the NCSC dealt with 188 high-level cyber attacks against the UK. Furthermore, it was reported in the Cyber Security Breaches Survey 2016 that 65% of large UK firms detected a cyber security breach or attack in the past year.

This is clearly an evolving risk which needs to be combatted and the Welsh Government needs to be resourced appropriately to co-ordinate this work.

Counter-Terrorism

The threat of international terrorism remains high. There have been 4 terrorist attacks in the UK in recent months and Wales is not immune to the threat it poses.

Irrelevant & Sensitive There is a significant amount of work being taken forward by the Resilience Team on the UK CONTEST Strategy in Wales; particularly in respect of maintaining the CONTEST governance structure and specific work being taken forward on extremism and the threat of marauding terrorist firearm attacks. Following Exercise Red Kite last summer there is greater momentum than ever before across all services to strengthen their capability against the threat through increased planning, training and exercising. Unlike in the UK Government, where civil contingencies and counter-terrorism are led by two separate Whitehall Departments, the Welsh Government has one small team delivering both areas.

All of this takes resource and it is a resource we would like to see the UK Government committing under the Act and for which there should be an appropriate transfer of funding.

The way in which the Welsh Government provides leadership and support in civil contingencies is a corporate function which spans all Departments, not just Education and Public Services, with key areas such as health emergency planning, flooding, radioactivity and pollution, transport, water and animal health all having responsibilities in civil contingencies.

Proposals and Costs

Whilst it would be unrealistic to replicate the resources dedicated by Scottish and UK Governments to resilience, our proposals are to ensure that we have sufficient resources to monitor compliance against the duties of the Act by devolved services, develop and maintain policies and guidance relevant to Wales, assist local delivery through more direct engagement with LRFs and co-ordinate training and exercising at a national level in Wales. To do this we are proposing, in addition to the current team of 7 (Annex 6) to:

Auditing Team

3 x SEOs to monitor the compliance of Welsh Category 1 responders in discharging their duties under the Act and to peer review the performances of the Local Resilience Forums. They would provide an annual monitoring report for Welsh Ministers. One SEO would be based in North Wales and the other two would cover

the 3 LRF areas in the South. Between them they would audit the 3 FRS (working closely with the Chief Fire and Rescue Adviser who would manage their work on FRS), 22 local authorities, Natural Resources Wales (Working with Head of Sponsorship in the Environment and Sustainability Department) and the 6 LA Port Health Authorities/1 Port Health Authority (working with the Chief Environmental Health Officer). They would also monitor compliance of Welsh Category 2 responders (Water companies, Arriva Trains Operating Companies) working with Water Branch and Transport Department respectively. The SEOs will also have responsibilities for counter-terrorism and will help develop and deliver the CONTEST strategy in Wales. They will also lead on specific aspects of civil contingencies capability building on an all-Wales basis.

1 X SEO for NHS Monitoring working closely with or embedded within the Health Resilience Team. They would cover Public Health Wales, Welsh Ambulance Service and the 7 Health Boards

Policy Team

2 x SEOs responsible for issues relating to the exercise of the functions, making regulations (Welsh version of *Emergency Preparedness*), producing guidance (Welsh version of *Emergency Response and Recovery* as well as other guidance such as Scientific and Technical Advice Cell Arrangements etc), issue directives (where required), requesting information, bring enforcement proceedings (where required), risk assessments, liaison with UK Government and general policy issues.

We have included a provision to add cyber security responsibilities to two of these SEO posts. They will report jointly to the Head of Resilience and Head of Cyber Resilience and help co-ordinate the use of the cyber funding being made available by the UK Government. The two posts will add greater resilience to the Welsh Government's response arrangements to cyber incidents and can co-ordinate the planning for cyber across the public sector in Wales.

Administration

We would need an additional Team Support to support the work of the two teams.

Costs

This would mean an additional 6 SEOs and 1 Team Support for the Team – (6 x £55,248 plus 1 x £27,648 - £359,136 per annum) as shown in Annex 5.

6. What legal or policy obligations are relevant to this advice?

The power to respond to the UK Government on the proposals is provided for in section 62 of the Government of Wales Act 2006 which allows the Welsh Ministers, the First Minister and the Counsel General to make appropriate representations about any matter affecting Wales.

These are executive functions under Part 1 of the Act. They relate to duties in respect of planning not response. The risks are more about how prepared and capable devolved services are in their planning rather than giving Welsh Ministers more responsibility in leading the response to an incident. Welsh Government will have no powers under the Act in relation to Police and MCA, a caveat in the proposed transfer from Cabinet Office.

Under the Well-being of Future Generations (Wales) Act this paper aims to support a Wales of cohesive communities.

There are no effects or impacts on The United Nations Convention on the Rights of the Child.

The following Legal and Policy obligations have been considered:

Welsh Language Standards – there are no effects or impacts on the Welsh language arising from this advice.

Equality and Human Rights – this submission is not considered to raise any issues with regard to equality and human rights

Promoting Economic Opportunity for All (Tackling Poverty) – this submission is not considered to have any direct implications relating to the Promoting Economic Opportunity for All (Tackling Poverty) Agenda.

Legal advice has been provided and included within the advice.

7. What are the financial implications of Ministers agreeing to this advice and which budget will this be paid through?

Officials estimate that the cost of exercising the functions appropriately will require an additional 6 SEO's and 1 Team Support for the team (6 x £55,248 plus 1 x £27,648 = £359,136 per annum). Currently, there is no budget provision within the current DRC allocation.

Given the Welsh Government DRC budget is expected to decline from 2017-18, we will continue to pursue funding for the transfer of functions from the UK Government.

Resilience is a corporate responsibility, currently the resilience team of 7 are funded through EPS DRC budget. EPS has no further funding capacity to support additional resources without significantly affecting departmental delivery priorities going forward. As resilience remains a corporate responsibility, should the transfer of funding from the UK Government not be forthcoming, funding will have to be taken forward on risk and will have to be considered as part of the ongoing budget preparations for 2018/19.

The EPS Operations Team and the Central Services Operations Team (clearance number EPS/FM/0011/17)CSOT(17/18)-MA054)) are content this MA complies with Interim Finance Notice 01/2015.Strategic Budgeting is content with this advice.

8. What communication, engagement or media activity is planned following this decision?

Local Resilience Forums and key agencies are aware of discussions with Cabinet Office on the possible transfer of functions.

No communication activity is planned though there may be media interest if and when the transfer these functions is agreed. Officials will liaise with communication colleagues to agree suggested lines to take in the event of media interest.

Annex A: Copy Recipients

All mandatory copy recipients (as indicated in the guidance).

- 1) Head of Division
- 2) Cabinet Secretary for Communities and Children

EPS Mandatory CCs:

NR
Carys Evans
NR
Jo-Anne Daniels
John Howells
NR
Helen Lentle
NR
Carla Lyne
NR
EPS Submissions Mailbox
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Additional copy recipients specifically interested in this advice:

Madeleine Brindley Special Adviser
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Finance Department
Freedom of Information Officer
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Dylan Hughes
Legislative Programme and Governance
NR
Policy Integration Team
PS Counsel General
PS Cabinet Secretary for Economy and Infrastructure
PS Cabinet Secretary for Education
PS Cabinet Secretary for Environment and Rural Affairs
PS Cabinet Secretary for Finance and Local Government
PS Cabinet Secretary for Health, Well-being and Sport
PS Chief Medical Officer
PS Minister of Lifelong Learning and Welsh Language

PS Minister for Skills and Science
PS Minister for Social Services and Public Health
PS Permanent Secretary
PS Leader of the House and Chief Whip
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