

Independent Commission on the Constitutional Future of Wales: report of the transport sub-group

Summary

The evidence considered by the sub-group demonstrates that transport exemplifies the pressures on the devolution settlement identified in Chapter 7 of the Interim Report.

Most aspects are devolved, but rail infrastructure and the related rail services are largely reserved. Current arrangements cause major problems of governance, accountability and services delivery, including:

- a) a failure of UK Government agencies to respond to the needs of Wales, with sustained under-investment over a long period
- b) complex and opaque delivery arrangements which undermine accountability to Welsh and English citizens,
- c) weak and ad-hoc inter-governmental relations where the interests of Wales are not given sufficient weight when making investment decisions.

The solution requires either:

1. maintain the current distribution of responsibilities, with improved and robust shared governance arrangements, transparent mutual commitments, and a programme of UK Government investment to bring Welsh rail into line with standards elsewhere in the UK, or
2. devolve rail infrastructure with a baseline uplift to compensate for historic under-investment accompanied by a Barnett share of investment in England in the future.

Based on the current and historic government approaches to rail policy, we consider option 2 to be the most effective approach for remedying the challenges that the devolution boundaries are creating for rail infrastructure in Wales, with a greater use of shared governance in the management of cross-border services.

The reservation of Air Passenger Duty, when it is devolved to Scotland and Northern Ireland, is unfair to Wales. In considering this issue it is not clear whether the UK Government is acting to represent the whole of the UK or defending the interests of England.

We recognise that the Welsh Government does not have current concrete plans for adjustment of Air Passenger Duty, and so devolution of this topic is less pressing, but we have identified this as an unjustified anomaly in the devolution settlement.

Structure

This paper sets out the findings that the sub-group have reached on rail and aviation, where the evidence indicates that the devolution settlement is not working effectively. The table attached at Annex 1 sets out the current picture of devolution across all policy areas within transport, and a summary of the sub-group views on each topic. The members of the sub-group are:

Commissioners: Philip Rycroft (chair of sub-group), Laura McAllister, Lauren McEvatt, Albert Owen

Expert Panel: Gareth Williams

The sub-group's approach

The subgroup met four times:

- 22 February – initial meeting to establish scope and commission evidence
- 17 March – first evidence session with Prof. Mark Barry
- 17 April – second evidence session with the Deputy Minister for Climate Change and with representatives for Transport for Wales
- 24 April – final meeting to consider conclusions

The sub-group also considered written evidence submitted by:

- The Welsh Local Government Association
- Lord Peter Hendy, as chair of Network Rail and as author of the Hendy review on rail
- National Union of Rail, Maritime and Transport Workers
- Aslef (the train drivers union)
- Transport for Wales
- Parliamentary Under Secretary of State for Transport, UK Government
- Deputy Minister for Climate Change, Welsh Government

The sub-group also requested evidence from Unite, Lord Burns as author of the Burns Review of rail connectivity, Prof. Stuart Cole, Prof Sean Barrett, the North Wales Ambition Board, and the Welsh Affairs Committee but no response was submitted to the sub-group.

These papers are available on the Commission's website.

General points from the sub-group's findings

The transport devolution settlement has been subject to stresses and strains, due to the complexity of the devolution settlement and the inherently cross-border nature of transport services, with most aspects of rail reserved while much of transport policy more generally is devolved.

Transport has a significant impact on many devolved policy areas: economic development; access to education, employment, and services; climate change; environmental quality, particularly air pollution and noise; and tackling poverty. Policy

responsibility for transport is a significant lever for achieving these wider policy objectives.

Some aspects of the transport devolution settlement are working well. However, there are major issues in two domains, rail and aviation, which are explored in this report.

While Wales' transport infrastructure (particularly rail) is much more closely intertwined with that of England than is the case for either Scotland or Northern Ireland, transport in Wales is not uniquely complex. Wales faces the same issues as any country with a long coastline and a porous border, and there are many examples across the EU where similar or even more complex cross-border networks are managed effectively and efficiently (for example, in and around Aachen, a German city close to the borders with Belgium and the Netherlands).

Wherever powers lie, strategic transport infrastructure needs a robust framework of intergovernmental relations and shared decision making. What we have in Wales has not been working. There is a lack of trust between governments regarding their capacity and willingness to enact change. Different governments have different agendas, with the Welsh Government having a firm commitment to modal shift which is not shared by the UK Government.

There is an imbalance in the power relationships between the two governments, where the Welsh Government is unable to sufficiently influence the outcomes in a system that is managed on an East-West basis. Despite the devolution of some rail powers, the Welsh rail infrastructure continues to be managed by Network Rail as part of the western region, which stretches from west Wales to Paddington.

These factors make partnership difficult, but the system must be made to work. The recent reform of inter-governmental machinery which creates an Inter-Ministerial Council on Transport (as for other UK government departments) might provide the basis on which to build a more formal and structured discussion of transport policy and priorities, but much will depend on the state of inter-governmental relations across the UK, which largely depends on the leadership and commitment of UK the Government, in this case, the Secretary of State for Transport and his or her officials.

Rail services and Air Passenger Duty (APD) have been devolved to Scotland and to Northern Ireland. This shows that there is no rationale against devolution in principle; in Scotland's case the rail system is still part of the wider GB network. Logically, arguments against devolution of rail and APD to Wales must be made on their practical implications, rather than on a point of principle.

Our work suggests that the current system, especially for rail, brings significant disadvantage to Wales and to Great Britain more widely.

Infrastructure with UK wide significance

Some transport assets in Wales, such as major roads, railways, ports and airports are of UK wide significance, not least given the major transport routes to Ireland via Wales. However, after the UK's withdrawal from the EU and its Trans-European Transport Networks there is no agreed definition of what constitutes strategically

significant transport infrastructure. The arrangements on formal consultation between administrations on significant infrastructure, let alone decision making on investment decisions, are ad hoc.

It is also not clear what obligations are created for governments, both devolved and non-devolved, for standards and maintenance of networks or infrastructure when they are deemed to be 'significant'. This absence of clear and mutually accepted obligations leads to sub-optimal outcomes for infrastructure in Wales. The impact of this is particularly acute for areas that are partially devolved, such as rail, where greater clarity on government obligations and standards of significant networks and infrastructure could lead to better outcomes from investment decisions.

Rail

Context

Rail is partially devolved to Wales. Railway services and the channel tunnel are reserved in terms of legislative competence. Railway services has a broad meaning, including both the passenger rail services and the infrastructure works. The Senedd can legislate for financial assistance for rail services, with some specific exceptions.

Executive responsibility for setting the terms and conditions of rail passenger services that operate wholly or mainly in Wales and procuring an operator. Transport for Wales (TfW) for the Welsh rail franchise is devolved to the Welsh Government. In addition, responsibility for the Core Valley Lines infrastructure was transferred to the Welsh Government and TfW in 2020.

The UK Government, however, remains responsible for infrastructure planning and funding of Network Rail which has responsibility for managing the remainder of the public rail network in Wales. The UK Government and Parliament also sets the legislative framework for franchise arrangements (including for the Wales and the Borders franchise) and manages the franchising arrangements in respect of other services into Wales from London and the English regions.

The Welsh Government has long sought greater responsibility for rail services in Wales. The Silk commission recommended the devolution of control over Network Rail and that the Welsh Government should have powers over the Wales and Borders franchise.

The most contentious area is rail infrastructure, which is devolved in Scotland and Northern Ireland. In Wales, TfW owns and operates the valleys lines and the Wales and Borders Franchise on behalf of the Welsh Ministers, who are exercising certain functions of the Secretary of State under agency agreement to deliver rail services. However, the governance structure for rail in Great Britain has not been amended to reflect this reality. While there was a transfer of resources as part of this agreement, much of the Welsh Government's spend on rail comes from its own budget, which does not benefit from Barnett consequential for investment in rail services in England.

This approach has been dubbed 'devolution by stealth' by some who gave evidence to the Commission, where aspects of rail management have been given to Welsh

Government to manage through agency agreements and transfer of functions orders while the Government of Wales Acts, and the role of the Senedd, remain largely unaltered. This approach creates problems of accountability, as we discuss below under *governance*. However, it is in the area of practical delivery where ‘devolution by stealth’ is most clearly felt; the Welsh Government is taking on and funding responsibilities which they are legally permitted to take on but are not funded to deliver.

In practice, it seems that TfW do have the ability to deliver their rail strategies, but the approach required by the current settlement means that is achieved at a higher cost and greater risk to public service delivery than is necessary. The structures interfere with delivering services efficiently and wider public service delivery is being affected by funding being directed away from current budgets towards rail, to compensate for the lack of a Barnett consequential.

Governance

The current arrangements for rail management create gaps in accountability for service delivery on both sides of the border. The accountability gap in agency agreements is that the Secretary of State remains accountable to the UK Parliament for delivery, even though the Welsh Government is the delivery agent and not answerable to Parliament in the same way. The Welsh Government is accountable to the citizens of Wales via the Senedd; a body which can scrutinise and challenge the decisions of Welsh Ministers but does not have powers to legislate for change in rail management if they disagree with the approach taken by ministers. While the agency agreements currently used to manage rail services are practical, they separate the responsibility for delivery from the accountability to citizens.

This is not a good long-term solution. In Wales, the Welsh Government (via Transport for Wales) runs much of the network but does not have the full range of powers and control over resources which would make it more clearly accountable to the Welsh electorate, acting as it does as an agent of the Department for Transport. In those parts of England where services are operated exclusively by Transport for Wales (e.g. Hereford to Manchester) operating only through an agency agreement does not provide a channel for elected politicians to represent their constituents’ interests. Additionally, DfT franchised services run into Wales without a sufficiently formal role for the Welsh Government and Senedd to raise implications on TfW services and other aspects of devolved transport policies.

These opaque arrangements make it challenging for elected representatives to hold the executive to account, as well as rendering it unclear to citizens to whom they should raise concerns about rail services in Wales.

Better intergovernmental relations could solve many of the current problems of management of cross-border rail. This would require a step change in the relationship between the Department of Transport and its agencies and the Welsh

Government and TfW. The establishment of Great British Rail¹ (GBR) could an opportunity to achieve this and create shared governance structures for rail in Great Britain, with parity of treatment for each government, but this opportunity has so far not been taken up. This would require a shift in mindset by UK Ministers and officials, and potentially some further devolution.

In the short to medium term, more structured and rigorous intergovernmental arrangements might help improve the situation. However, it is questionable whether this would be a long-term solution to the fundamental governance problems set out here, which are based in imbalances of authority over rail. The evidence we received from the Parliamentary Under Secretary of State for Transport did not reflect any concerns with the efficacy of the current inter-governmental awareness nor any suggestion that significant changes would be needed to address the concerns presented in evidence from within Wales. The lack of recognition of the shortcomings of the current situation does not give us confidence that improved inter-governmental relations would be a sufficient remedy to the problems we set out in this report.

Further rail devolution within England might have a positive impact on this imbalance; it is possible that there could be more sensitivity to local and regional needs in cross border areas if the Welsh Government was dealing with an empowered regional government in England rather than always going to go through a Whitehall based decision process for local investments.

Effective intergovernmental relations would need to recognise the respective mandates and priorities of each government. This has not been the experience of the past 20 years. Additionally, the funding settlement has been inadequate to manage the level of investment that has been required for rail services in Wales. The evidence therefore indicates that the only way to ensure proper consideration of the needs of Wales for rail might be by enhancing the powers of the Welsh Government through further devolution to ensure that the UK Government must take their priorities into account.

Finance

Investment in Wales' rail infrastructure has been low relative to the rest of the UK over a sustained period. The work of the Burns Commission published in December 2020 underlined the inadequacy of the public transport network in Southeast Wales compared with similar urban areas in England.

This under-investment is largely due to:

- DfT/ HMT funding models that prioritise population size and density over other factors such as geographical size, track length, and maintenance needs.
- Lack of Barnett consequential for rail infrastructure schemes which are determined (unilaterally by UK Treasury) to be England and Wales schemes

¹ Great British Railways (GBR) is a planned state-owned public body that will oversee rail transport in Great Britain, with the exception of Transport for London services, Merseytravel services, and light rail and trams elsewhere in England.

(including HS2 and Northern Powerhouse, where no infrastructure is being built in Wales).

- The scale of the lack of a consequential for HS2, which as well as amounting around £5bn, also has the affect of squeezing the Barnett consequential for devolved transport schemes as HS2 funding takes up an ever-greater proportion of Department for Transport funding².

Some rail funding has come to Wales via the Levelling Up Fund; the UK Government's Levelling Up Fund will support projects up to £20m, with the potential to rise to £50m for transport projects. In the first round Wales received £121m out of £1.7bn that was awarded. In the second round Wales received £208m out of £2.1bn awarded. This amounts to £329m out of the £3.8bn allocated under the Levelling Up Fund to date, or 8.65%. As only some of the awards are for transport related projects, and not all of these for rail, the amount available for rail projects is clearly much lower than it would have been had a £5bn Barnett consequential been made available.

Any transfer of responsibility and infrastructure needs to be properly funded, which must also include funding to address the consequences of past low levels of investment. All the evidence points to the conclusion that rail investment in Wales, (and the funding transferred to the Welsh Government) is inadequate and should be addressed regardless of whether there are further changes to the devolution settlement. At present Wales has 12% of the length of the UK's rail network but attracts 2% of the rail investment.

The legacy of historic under-investment leads to sub-standard facilities and service availability and reliability. This increases the demands on the Welsh budget which does not benefit from its fair consequential of rail spending in England.

This is not just a historic problem. There remains a disconnect between the priorities of the Welsh Government/ TfW and Network Rail. Under the current settlement, the Welsh Government has limited scope to influence Network Rail's plans for the forthcoming phase of infrastructure investment, which have continued low levels of investment in Wales both in improvements and maintenance that will increase the cost of delivering rail services in Wales while reducing the availability and reliability of services.

Additionally, the Welsh Government's fiscal framework, characterised by tightly limited borrowing powers and limited year-end flexibility, was not designed with managing rail assets in mind. The outcome is that as well as not receiving sufficient funding through a lack of Barnett consequential for rail investment and legacy of low

² After the cancellation of HS2, the UK Government has committed that an equivalent sum will be spent on transport schemes across the UK. An illustrative list of schemes was published at the time of the announcement, but it shortly became clear that this list was subject to change. In advance of confirmation of the schemes to be delivered we have not been able to assess the level of funding that would come to Wales through the Barnett formula when funding is directed to transport schemes in England within devolved competence, such as roads and public transport, nor the level of additional funding that would be spent on rail transport in Wales.

investment, the Welsh Government does not have the fiscal tools to properly manage the financial risks of such an asset. As a result of this, wider public services in Wales are at risk of harm as funding must be diverted away from other programmes to manage cost pressures on the rail network, as has been the case post-covid. The Welsh Government of course does not have to fund railways. However, the risk is choosing not to do so is that the rail infrastructure degrades over time, making it difficult to meet the Welsh Government's other objectives, such as mobility for those without cars, improvements to environmental quality, economic development and on tackling climate change³.

We are mindful of the challenging circumstances facing public budgets, and that there cannot be a blank cheque for rail services. However, full devolution of rail services, if it was fairly funded (not based on historic spend) and accompanied by greater fiscal flexibility, could make it possible for the Welsh Government to take responsibility for difficult decisions in the pursuit of a coherent, efficient and socially just transport network, and achieve better value for money for public investment. At present, the current settlement drives up the cost and complexity of delivery while underfunding services in Wales. Neither of these aspects benefit transport users or taxpayers.

Implications of remaining as present

If the current devolution settlement continues without adjustment, then there would be the following consequences:

- Welsh rail would most likely continue to be underfunded in the context of the current poor state of the rail infrastructure, particularly in the context of the Welsh Government's ambition to achieve modal shift away from private cars; boost Wales' economy post-covid, and respond to climate change
- The Welsh Government will continue to be faced with a choice to divert funding away from other devolved areas to meet unfunded rail costs, without receiving an adequate Barnett consequential and sufficient funding to meet its responsibilities.
- There would continue to be devolution by stealth, where the Welsh Government is delivering services on behalf of the Secretary of State through an agency agreement, and exercising executive functions in areas where the Senedd has limited powers to act. The result is an accountability gap caused by agency agreements and Transfer of Functions Orders placing delivery in the hands of a government where the legislature does not have an adequate remit to hold that government to account.
- The Welsh Government remains without sufficient authority to influence the decisions taken over investment in the network.
- The UK Government would remain responsible for directing rail investment decisions for Wales, without any guarantee these decisions would take into full account the wider transport network, plans of TfW and regional economic

³ Significant stretches of Wales' rail network are coastal and therefore vulnerable to the impact of climate change – mitigating the impact of climate change on the network will require forward planning and additional funding.

development plans, while at the same time having incentives to prioritise investments elsewhere. This would make it less likely that investment decisions deliver real value for public money, avoid duplication and waste, and deliver economic growth.

Implications of enhanced and secured devolution

If rail services were devolved to Wales on the same basis as they are currently devolved in Scotland, then the following consequences would be anticipated:

- The Welsh Government/ TFW would have a formal role in future train franchising and infrastructure maintenance/ upgrade decisions, meaning that these decisions could be better integrated with transport planning in Wales, leading to better use of resources.
- There would be clearer democratic accountability within Wales, with the Senedd having more locus for scrutiny as well as more direct connection between delivery and accountability.
- It could improve intergovernmental relations in rail, by delineating roles between Department for Transport and Welsh Government and placing them on a more equal footing.
- The democratic deficit in border areas, where elected representatives may struggle to raise constituents concerns with other governments, would continue and arguably become more problematic.
- The assumption is that an adequate baseline uplift and Barnett consequential would come to Wales, but this would not be sufficient to address the historic underinvestment, nor would it reflect that Wales' share of the UK's rail track length is roughly double its population share.
- Welsh citizens most likely would continue to be disadvantaged as other service budgets are diverted towards rail, unless there were appropriate reform of fiscal powers.

The most serious drawbacks of this option could be remedied by accompanying devolution of rail services with the following financial measures:

- amendments to the fiscal framework necessary for managing a capital asset of the scale of the rail infrastructure;
- an amendment to the funding formulas for rail that recognise the scale of the existing rail infrastructure in Wales rather than the population share; and
- top-up funding to address the historic maintenance needs.
- Greater use of shared governance mechanisms for cross-border rail passenger services and infrastructure.

Implications under a federal system

In a federal system, much would depend on whether it was decided that the rail network should be managed by the UK federal government or by the sub-state governments.

If rail was the responsibility of sub-state governments, the implications would be similar to the option above. Since rail investment in the English regions would

become a responsibility of either the English Government or of regional governments, the relationship across the border would be more one between equals, with formal inter-governmental machinery and dispute resolution mechanisms put in place as part of a new UK-wide constitution.

Should rail infrastructure be retained as a federal matter, then there is a risk that the problems of the current system could continue, given the disproportionate influence England would likely exercise in the UK Government. There would, however, no longer be the confusion of UK Ministers both representing the wider UK interest and being directly responsible for rail delivery in England, so it is also possible that such a system would deliver a more equitable approach.

Any new funding arrangements set up under a federal system would need to reflect both the fiscal flexibility needed to manage a large capital asset like the railway, and funding formulas would need to reflect the scale of the rail infrastructure in Wales (rather than use measures such as population share).

Implications if Wales were an independent country

In an independent Wales, all rail travel would be the responsibility of the Welsh Government. There would need to be strong, formalised working relations with the rest of the UK/ England for cross-border services. While this would be complex, given the nature of the Welsh railway, this is the situation that is currently experienced by governments across the EU without noticeable detriment to rail services. Failure to agree robust cross border arrangements could mean a severe reduction in rail travel in Wales. At an extreme case, it would not be possible to travel north-south by train.

All costs of delivering a rail network would be borne within Wales, and the Welsh Government and Senedd would need to determine how best to divide costs between taxpayers, passengers and other network users (such as freight). Few, if any railways in the world operate without subsidy and loading costs more heavily onto passengers would likely lead to a vicious circle of decline in usage leading to cuts in services. However, competition for public spending in a newly independent Wales would be extremely fierce. The problem of financing a viable railway network would be exacerbated by the fact that an independent Wales would inherit a large aging rail network with high maintenance needs, with no or little electrified track and thus higher baseline costs for operating a railway than many small countries in Europe.

Aviation

Many aspects of aviation are governed by international treaties and conventions, meaning that there is limited flexibility for countries to diverge in terms of aviation policy. The assumption is that Wales will continue to participate in these conventions regardless of future governance arrangements.

Air Passenger Duty (APD)

There has been extended debate about the merits of devolving APD to Wales, largely centred on how the Welsh Government might use that power. A distinction

needs to be drawn between whether a power should be devolved in principle, and how a government may choose to exercise that power. The UK government has devolved APD to Scotland and Northern Ireland (for long haul), despite a potential impact on English airports, and has not presented a convincing argument why this should not be so for Wales.

We recognise that the Welsh Government does not seem to have immediate plans to amend APD rates for Welsh airports, and so this issue does not have the same ongoing impact that the devolution boundaries for rail are creating. However, the coherence of the devolution settlement points to this power being considered for further devolution.