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A Critique of Trading Standards in Wales – Post-devolution Developments and Prognosis

Huw David Evans

LLB, Solicitor (non-practising), PGCE (PCET)

This thesis is submitted in partial fulfillment of the requirements of Cardiff
Metropolitan University for the award of the Degree of PhD by Research

July 2020

Supervised by Dr Alan Sandry (Director of Studies), Dr Vitti Allender and Dr Ruth
Fairchild

Acknowledgements

Thank you to those who participated in the study. I am indebted to everyone for their contributions. It never failed to surprise me how willing people were to share their time and knowledge.

I am also indebted to my Director of Studies, Dr Alan Sandry, and to my other supervisors, Dr Vitti Allender and Dr Ruth Fairchild, for their enthusiasm, guidance and wise counsel throughout. They have been immensely supportive. I must also acknowledge Dr Sandry's excellent overall supervision of the project.

Thanks also to work colleagues who have been unfailingly supportive in helping me manage my PhD effort while balancing that with 'day job' commitments. I am particularly grateful to Dr Lalage Sanders who, as Graduate Studies Coordinator, was extremely helpful in getting things started.

Finally, and in no way least, I extend my gratitude to my wife, Christine, and children, Jonathan, Rebeca and Steffan, for their on-going support (and good-humoured tolerance) throughout my period of study. This has been greatly appreciated. Without it, I am not sure I would have completed this thesis.

Abstract

This thesis investigates and critically evaluates Trading Standards (TS) delivery in Wales. TS enforces law to promote fair trading. It is delivered through local government in Great Britain. Successful enforcement protects legitimate business and consumers from economic and other detriment. Although not taken forward, the catalyst for the thesis was a 2011 Welsh Labour Party National Assembly for Wales (NAW) general election pledge to 'seek to establish a national [TS] service' for Wales.

Chapter 1 explains the thesis' rationale. Chapter 2 considers the research strategy, design and implementation. Chapter 3 places TS in a critical theoretical framework, which includes reference to the rule of law, human rights and justice, and, in Wales, the promotion of well-being. Chapters 4 to 9 constitute the Literature Review.

Primary research involved semi-structured interviews, surveys of candidates standing at two sets of elections (to the NAW and the office of police and crime commissioner), and Freedom of Information Act requests to local authorities in Wales concerning a TS specific issue. Chapter 10 presents interview findings; six overarching themes emerged (including low TS profile and the damaging effects of reduced resourcing). Chapter 11 presents the surveys' findings; overall TS has low-profile and its recognition was confined to consumer protection. Chapter 12 findings concern the specific Wales TS issue and, again, suggest that TS has low profile.

In Chapter 13 it is argued that there are significant failings in TS delivery and that, although not devolved, TS can contribute to devolved government. As TS is not devolved, Welsh Government can only undertake a limited review of TS delivery; undertaking such a review is the first recommendation. The UK Government is not so restricted and there is a second recommendation that it undertakes a fundamental review of TS (including considering whether the TS classification should be retained and, if not, how the constituent parts should be divided), with a further recommendation for a consequential review dependant on the fundamental review outcome.

List of Contents

Declaration and Statements	i
Acknowledgements	ii
Abstract	iii
List of Contents	iv
List of Acronyms and Abbreviations	xi
List of Primary Legislation	xvi
List of Subordinate Legislation	xix
List of European Union Subordinate Legislation	xxi
List of Cases	xxiii
List of Treaties, Conventions etc.	xxiv
List of Figures	xxv
Chapter 1 – Introduction	1
Aim and Objectives	1
Thesis Structure.....	1
Rationale for Thesis.....	2
What is TS and Who Delivers It?	2
Why has TS Been Chosen?	5
Why is the Focus on TS in Wales?	5
Chapter 2 - Research Strategy, Design and Implementation	8
Category of Research.....	8
Legal Research.....	8
Social Research.....	10
Research Strategy	10
Research Validity.....	13
Research Design Category: Case Study	14
Aim and Objectives, and their Revision	15
Research Methods	15
Ethics	19
Edward Dienar and Rick Crandall principles.....	20
Economic and Social Research Council principles,.....	21
Legal Context.....	21
Ethics Approval.....	22
FOIA 2000.....	23
Secondary Data Gathering and Processing	23
Primary Data Gathering and Processing	24
Interviews	24

Interview Data Analysis.....	25
NAW and PCC Candidate Surveys: Data Gathering and Processing.....	27
NAW Candidate Survey	28
Party Manifestos	28
Follow-up.....	29
PCC Candidate Survey	29
Surveys' Data Analysis.....	29
FOIA 2000 Data Gathering and Analysis	30
Bringing It All Together	30
Research Design limitations	30
Summary	30
Chapter 3 - Critical Theoretical Framework	31
Economic Efficiency and TS.....	31
Overview	33
The Rule of Law and TS	33
Overview	37
Human Rights & Justice and TS	37
What are Human Rights?	38
ECHR.....	39
HRA 1998	40
ECHR, UDHR and TS: The Relationship.....	40
ECHR Application to TS.....	40
ECHR: Application to TS: Case Studies	42
Vulnerable Person Case Study: Relevant ECHR Rights, Application and Wider Consideration .	43
Whirlpool Case Study: Relevant ECHR Rights, Application and Wider Consideration	45
<i>Which?</i> Case Study: Relevant ECHR Rights, Application and Wider Consideration	46
Case Studies' Summary	47
Justice.....	47
Overview	49
Promotion of Well-being and TS	50
Overview	51
Summary	52
Chapter 4 – Development of TS	53
Local Government in Wales	53
The Market and Freedom of Contract	56
Laissez-faire.....	56
Free Trade Restrictions and the Bentham Test.....	58
Caveat Emptor.....	60

Overview	61
Development of the TS Portfolio.....	61
Legal Metrology	62
Traditional functional areas other than weights and measures	64
The Molony Committee and Consumer Protection	66
The Crowther Committee and Consumer Protection	68
Product Safety and Consumer Protection.....	71
Intellectual Property Enforcement.....	75
Age Restricted Product Supply	75
EU Law and TS	76
The EU and the Emergence of Consumer Protection	77
EU Law and TS in Wales	79
Miscellaneous.....	80
TS Funding	80
TS Legal Resourcing.....	81
CPUTRs 2008 and the Fraud Act 2006.....	82
LWMA Enforcement Powers	83
Means of Enforcement.....	84
Summary	86
Chapter 5 - TS and Devolution in Wales	87
History of Devolution in Wales	87
Absence of a Separate Legal Jurisdiction in Wales.	89
TS and Devolution in Wales	90
Legal Competence and TS	90
Reserved Matters having TS Impact.....	92
TS and Devolved Matters	94
Summary	94
Chapter 6 - TS and comparative contexts	96
TS and Northern Ireland.....	96
Devolved Functions.....	97
TSSNI Portfolio	97
Prosecution Arrangements	98
TS and EH.....	98
TSOs as Civil Servants	98
Other Matters	99
Overview	99
Local Government Enforcement: Comparative Regimes	100
Food Enforcement and the Food Safety Act 1990	100

Workplace HS Enforcement	101
Overview	102
TS and Prosecutions	102
Case Studies	104
Overview	107
Legal Metrology and Consumer Protection Separation.....	108
Overview	108
Summary	108
Chapter 7 - Regulation and TS	109
Regulation	109
TS as a Regulator	110
Regulation and Regulator: Implications for TS.....	110
Regulatory Services	112
Summary	112
Chapter 8 - New Labour and TS: 1997-2010.....	114
Devolution.....	114
Human Rights Act 1998.....	114
Better Regulation and Best Value	114
The Hampton Report.....	116
Accountability	117
Sanctions	117
The BRTF Report.....	118
Legislative and Regulatory Reform Act 2006	119
The Rogers Report.....	119
The Macrory Report	120
Regulatory Enforcement and Sanctions Act 2008.....	121
Drawing on Chapter 7	124
New TS Initiatives.....	124
Summary	125
Chapter 9 - Consumer Landscape Changes and Reduced Resourcing	126
Consumer Landscape Reform	126
Comptroller and Auditor General and Public Accounts Committee Reports	127
Consumer Landscape Reform Changes.....	129
The Effects of Reform and Reduced Resourcing.....	132
Legal Metrology Capacity.....	136
TS Workforce Survey	139
HealthWatch Study	140
Wales since 2010.....	142

Review of TS	143
Office for Product Safety and Standards (OPSS) etc	146
Summary	147
Chapter 10 – Findings from Interviews.....	148
Wales Labour Party Manifesto Commitment	149
Low TS Profile.....	150
TS and Reduced Resourcing	155
TS and Change.....	159
Consumer Landscape Reform	159
Consumer Advice	165
Intelligence-led Working	168
Increased Criminality and the TS/Police Interface	172
PA Model.....	175
TS Delivery Outsourcing	176
Legal Resourcing.....	179
Helping Oneself	181
Trader Regulation.....	181
Trader Self-regulation	183
Self-help	184
Other Ways of Doing Things.....	186
Legal Metrology and Consumer Protection separation	186
FSA and HSE.....	187
Barbados, Northern Ireland and Jersey	189
Investigation and Prosecution Separation	191
Challenges to TS	196
Regulatory Services Brigading	196
TS Portfolio Uncertainty	198
TS Professional Identity Fissures	202
Overview	207
Chapter 11- NAW & PCC Candidate Surveys	208
TS and Devolution	208
Main Political Party Manifestos	208
TS Related Focus	209
Policing Related Focus	209
Welsh Labour Party's 2011 NAW election manifesto	210
Summary of Findings.....	211
NAW Candidate Survey	211
Summary of Findings.....	223

PCC Candidate Survey	223
Summary of Findings.....	235
NAW and PCC Candidate Surveys' findings - Points Arising.....	236
Chapter 12 - A Wales TS Case Study: Publication of Letting Agents' fees	238
Background	238
Policy context.....	239
Overview	240
London and LAF publication.....	241
LAF publication function and Wales: Freedom of Information Act 2000 requests.....	242
Analysis and findings.....	244
Chapter 13 – Discussion, Conclusion and Recommendations	246
Introduction	246
Current Context.....	246
Effectiveness of TS delivery and the LWMA model	249
Failings in LWMA TS Delivery: Implications of the Assessment	254
Response to challenges TS faces	271
Fundamental review	272
Consequential review.....	274
TS classification aside - better ways of doing things	279
TS in Wales	286
Conclusion	296
Recommendations	298
List of References	300
Appendices.....	315
Appendix 1: Ethics Approval 24 October 2011	315
Appendix 2: Ethics Approval 2 February 2015	316
Appendix 3: Ethics Approval 17 March 2016	318
Appendix 4: Ethics Approval 15 March 2017	320
Appendix 5: Ethics Approval 16 February 2018	322
Appendix 6: Interview Participant Information Sheet	323
Appendix 7: Interview Participant Consent Form	325
Appendix 8: NAW Candidate 2016 Election Survey - Questions.....	326
Appendix 9: NAW Candidate 2016 Election Survey - Candidate Email.....	327
Appendix 10: NAW Candidate 2016 Election Survey - Participant Information Sheet	328
Appendix 11: NAW Candidate 2016 Election Survey - 2 nd Candidate Email	329
Appendix 12: PCC Candidate 2016 Election Survey - Questions	330
Appendix 13: PCC Candidate 2016 Election Survey - Candidate Email.....	331
Appendix 14: PCC Candidate 2016 Election Survey - Participant Information Sheet	332

Appendix 15: PCC Candidate 2016 Election Survey - 2 nd Candidate Email	333
Appendix 16: Rule of Law - Tom Bingham’s Eight Sub-principles and TS Application	334
Appendix 17: UDHR, ECHR and TS.....	336
Appendix 18: ECHR and Corporations.....	338
Appendix 19: Examples of EU Law Conferring Functions on LWMA’s	339
Appendix 20: Three TS Case Studies	342

List of Acronyms and Abbreviations

ABI	Association of British Investigators
BCU	Basic Command Unit
BEIS	Department for Business, Energy and Industrial Strategy
BERR	Department for Business, Enterprise and Regulatory Reform
BIS	Department for Business, Innovation and Skills
BRTF	Better Regulation Task Force
BTS	Barbados TS
C&AG	Comptroller and Auditor General
C&AG Report	Comptroller and Auditor General, <i>Protecting Consumers - the System Enforcing Consumer Law</i> (National Audit Office 2011).
C&AG no. 2 Report	Comptroller and Auditor General, <i>Protecting Consumers from Scams, Unfair Trading and Unsafe Goods</i> (National Audit Office 2016)
CA	Citizens Advice
CCA 1974	Consumer Credit Act 1974
CCICACRs 2013	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)
CD	Consumer Direct
CIWM	Chief Inspector of Weights and Measures
CLR	Consumer Landscape Reform
CMA	Competition and Markets Authority
CMU	Cardiff Metropolitan University
COPFS	Crown Office and Procurator Fiscal Service
CPA 1961	Consumer Protection Act 1961
CPA 1987	Consumer Protection Act 1987
CPCF	CTSI Professional Competency Framework
CPP	Consumer Protection Partnership
CPPD	Continuous Personal and Professional Development
CPS	Crown Prosecution Service
CPUTRs 2008	Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)
CRA 2015	Consumer Rights Act 2015
Crowther Committee Report	Department of Trade and Industry, <i>Consumer Credit: Report of the Committee</i> (Cmnd 4596, 1971).
CSHS	Cardiff School of Health Sciences.

CTSA	Consumer and Trading Standards Agency
CTSI	Chartered Trading Standards Institute
DFENI	Department for the Economy, Northern Ireland
DTI	Department of Trade and Industry
DTS	Diploma in Trading Standards
EC	European Community
ECA 1972	European Communities Act 1972
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950), otherwise known as the European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EH	Environmental Health
ESRC	Economic and Social Research Council
EU	European Union
FA	Food Authority
FA 2006	Fraud Act 2006
FCA	Financial Conduct Authority
FOIA 2000	Freedom of Information Act 2000
FSA	Food Standards Agency
FSA 1990	Food Safety Act 1990
GAIN	Government Agency Intelligence Network
GB	Great Britain
GPSRs 2005	General Product Safety Regulations 2005 (SI 2005/1803)
GWA 1998	Government of Wales Act 1998
GWA 2006	Government of Wales Act 2006
Hampton Report	Philip Hampton, <i>Reducing Administrative Burdens: Effective Inspection and Enforcement</i> . (HM Treasury 2005)
Hodgson Committee Report	Board of Trade, <i>Report of the Committee on Weights and Measures Legislation</i> (Cmd 8219, 1951)
HRA 1998	Human Rights Act 1998
HS	Health and Safety
HSE	Health and Safety Executive
IMLU	Illegal Money Lending Unit
IP	Intellectual property
IWM	Inspectors of Weights and Measures

JTS	Jersey TS
LA	Local authority
LBRO	Local Better Regulation Office
LG	Local government
LGA	Local Government Association
LGA 1888	Local Government Act 1888
LGA 1972	Local Government Act 1972
LGWA 1994	Local Government (Wales) Act 1994
LILO	Local intelligence liaison officer
LRRA 2006	Legislative and Regulatory Reform Act 2006
LWMA	Local Weights and Measures Authority
Macrory Report	Richard Macrory, <i>Regulatory Justice: Making Sanctions Effective: Final Report</i> (Cabinet Office 2006)
MEA	Ministry of Economic Affairs, Netherlands
MOJ	Ministry of Justice
Molony Committee Report	Board of Trade, <i>Final Report of the Committee on Consumer Protection</i> (Cmd 1781, 1962).
NAO	National Audit Office
NAW	National Assembly for Wales
NCCZ	No Cold Calling Zone
NICS	Northern Ireland Civil Service
NTS	National Trading Standards
NTSST	NTS Scams Team
OFT	Office of Fair Trading
Ofwat	Water Service Regulation Authority
OMBC	Oldham Metropolitan Borough Council
OPSS	Office for Product Safety and Standards
OSCOLA	Oxford Standard for the Citation of Legal Authorities
PA	Primary Authority
PAC Report	Committee of Public Accounts, <i>Protecting Consumers – the System for Enforcing Consumer Law</i> (2011).
PACE 1984	Police and Criminal Evidence Act 1984
PC	Plaid Cymru
PCC	Police and Crime Commissioner
PCN	Penalty charge notice

PPSNI	Public Prosecution Service for Northern Ireland
RESA 2008	Regulatory Enforcement and Sanctions Act 2008
RIA	Regional intelligence analyst
RIPA 2000	Regulation of Investigatory Powers Act 2000
RIT	Regional Investigation Team
Rogers Report	Peter Rogers, <i>National Enforcement Priorities for Local Authority Regulatory Services</i> (Cabinet Office 2007)
RSPCA	Royal Society for the Protection of Cruelty to Animals
Simpson Report	Joe Simpson and others, 'Local, Regional, National: What Services Are Best Delivered Where? A Report to Carl Sargeant, AM, Minister for Social Justice and Local Government.' (2011)
SSA	Standard Spending Assessment
SSW	Secretary of State for Wales
SSWWA 2014	Social Services and Well-being (Wales) Act 2014
TDA 1968	Trade Descriptions Act 1968
TEC	Treaty establishing the European Community (March 25, 1957)
TEU	Treaty on European Union (February 7, 1992)
TFEU	Treaty on the Functioning of the European Union (May 9, 2008)
TS	Trading Standards
TS manifesto commitment	The 2011 NAW general election manifesto commitment from the Welsh Labour Party (WLP) to 'seek to establish a national [TS] service' for Wales in Welsh Labour Party, <i>Welsh Labour Manifesto 2011: Standing up for Wales</i> (2011) 22.
TS Scotland	Trading Standards Scotland
TSD	Trading Standards department
TSI	Trading Standards Institute
TSO	Trading Standards Officer
TSQF	Trading Standards Qualifications Framework
TSSNI	Trading Standards Service for Northern Island
UCP	Unfair commercial practice
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKIP	UK Independence Party
WAG	Welsh Assembly Government
WCP	Welsh Conservative Party

WFGWA 2015	Well-being of Future Generations (Wales) Act 2015
WG	Welsh Government
WGP	Wales Green Party
WIMLU	Wales Illegal Money Lending Unit
WIT	Wales Investigation Team
WLDP	Welsh Liberal Democrat Party
WLGA	Welsh Local Government Association
WLP	Welsh Labour Party
WMA 1985	Weights and Measures Act 1985

List of Primary Legislation

Act of Union (Ireland) 1800	89
Adulteration of Food and Drinks Act 1860	58, 277
Animal Health Act 1981	4, 62
Animal Welfare Act 2006	4, 106
Anti-Social Behaviour Act 2003	76
Bribery Act 2010	284
Care Act 2014	51
Children Act 1989	41
Children and Families Act 2014	76
Company Directors Disqualification Act 1986	86
Competition and Consumer Protection Commission Act 2014 [Ireland]	108, 277
Constitutional Reform Act 2005	24, 33, 36, 258
Consumer Credit Act 1974	passim
Consumer Protection Act 1961	xi, 71, 72
Consumer Protection Act 1987	xi, 72
Consumer Rights Act 2015	passim
Consumer Safety (Amendment) Act 1986	72
Consumer Safety Act 1978	72
Consumers, Estate Agents and Redress Act 2007	85, 182
Contempt of Court Act 1981	101
Contracts (Rights of Third Parties) Act 1999	60
Copyright, Designs and Patents Act 1988	75, 83
Crime and Courts Act 2013	171
Criminal Attempts Act 1981	164
Criminal Justice and Public Order Act 1994	75
Crossbows Act 1987	76
Data Protection Act 1998	22
Data Protection Act 2018	22
Departments (Northern Ireland) Act 2016	96
Enterprise Act 2002	passim
Enterprise and Regulatory Reform Act 2013	129
Estate Agents Act 1979	passim
European Communities Act 1972	xii, 76, 77
European Union (Withdrawal) Act 2018	76, 77
Explosives Act 1875	65
Factory Act 1878	58
Financial Services and Markets Act 2000	130, 291
Food Safety Act 1990	passim
Food Standards Act 1999	4, 100
Fraud Act 2006	passim
Freedom of Information Act 2000	passim
Gambling Act 2005	62, 198
Government of Ireland Act 1920	97
Government of Wales Act 1998	6, 87, 88, 97
Government of Wales Act 2006	passim
Hallmarking Act 1973	80
Health and Safety at Work etc. Act 1974	101
Housing (Wales) Act 2014	passim
Human Rights Act 1998	passim

Intellectual Property Act 2014	75
Interpretation Act 1978	55
Knives Act 1997	76
Laws in Wales Act 1535	54, 90
Laws in Wales Act 1542	54, 90
Legal Aid, Sentencing and Punishment of Offenders Act 2015	82, 267
Legal Services Act 2007	80
Legislative and Regulatory Reform Act 2006	passim
Licensing Act 2003	5, 58, 76, 198
Local Government (Miscellaneous Provisions) Act 1976	198
Local Government (Miscellaneous Provisions) Act 1982	198
Local Government (Wales) Act 1994	55, 64, 253
Local Government Act 1888	xiii, 54, 63, 65
Local Government Act 1894	54
Local Government Act 1972	xiii, 3, 55
Local Government Act 1999	115
Local Government and Housing Act 1989	98
Local Government Finance Act 1988	80
London Government Act 1899	55
Medicines Act 1968	181, 203
Merchandise Marks (Prosecutions) Act 1894	67
Merchandise Marks Act 1887	67
Merchandise Marks Act 1891	67
Merchandise Marks Act 1911	67
Merchandise Marks Act 1926	67
Merchandise Marks Act 1953	67
Merchandise Marks Acts 1887 to 1953	67, 68
Modern Slavery Act 2015	41
National Audit Act 1983	127
National Standards Authority of Ireland Act 1996 [Ireland]	108, 277
Northern Ireland Act 1998	87, 96, 97
Northern Ireland Constitution Act 1973	97
Offensive Weapons Act 2019	76, 250
Petroleum Act 1871	65
Police and Criminal Evidence Act 1984	passim
Police Reform and Social Responsibility Act 2011	99
Proceeds of Crime Act 2002	180, 266
Prosecution of Offences Act 1985	103, 281
Protection from Harassment Act 1997	82
Public Health (Wales) Act 2017	249
Referendums (Scotland and Wales) Act 1997	88
Registered Designs Act 1949	75
Regulation of Investigatory Powers Act 2000	xiv, 40, 42, 268
Regulatory Enforcement and Sanctions Act 2008	passim
Rights of Children and Young Persons (Wales) Measure 2011	87
Sale of Food and Drugs Act 1875	65
Scotland Act 1998	87, 97
Scrap Metal Dealers Act 2013	198
Social Services and Well-being (Wales) Act 2014	passim
Solicitors Act 1974	85
Sunday Trading Act 1994	198

Tenant Fees Act 2019	131, 251
Theft Act 1968	82, 83, 164, 174
Theft Act 1978	83
Trade Descriptions Act 1968	passim
Trade Marks Act 1994	75, 83
Union with England Act 1707	89
Union with Ireland Act 1800	89
Union with Scotland Act 1706	89
Video Recordings Act 1984	75
Wales Act 1978	88
Wales Act 2014	88
Wales Act 2017	88
Water Industry Act 1991	110
Weights and Measures Act 1824	62, 63
Weights and Measures Act 1834	63
Weights and Measures Act 1878	63
Weights and Measures Act 1889	63
Weights and Measures Act 1963	23, 63, 64
Weights and Measures Act 1985	passim
Well-being of Future Generations (Wales) Act 2015	passim

List of Subordinate Legislation

Bunk Beds (Entrapment Hazards) (Safety) Regulations 1987 (SI 1987/1337).....	74
Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276) .	83, 267, 339
Cigarette Lighter Refill (Safety) Regulations 1999 (SI 1999/1844).....	75
Client Money Protection Schemes for Property Agents (Approval and Designation of Schemes) Regulations 2018 (SI 2018/751)	182
Code of Conduct (Qualifying Local Government Employees) (Wales) Order 2001 (SI 2001/2280 (W 170))	98
Construction Products Regulations 2013 (SI 2013/1387)	79, 273, 340
Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)	passim
Consumer Credit (EU Directive) Regulations 2010 (SI 2010/1010)	339
Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334)	6, 253
Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)	passim
Consumer Rights Act 2015 (Commencement No. 3) (Wales) Order 2015 (SI 2015/1904 (W 276)	238, 240
Consumer Rights Act 2015 (Commencement) (England) Order 2015 (SI 2015/965)	238
Cosmetic Products Enforcement Regulations 2013 (SI 2013/1478).....	73, 340
Criminal Justice and Public Order Act 1994 (Commencement No. 14) Order 2007 (SI 2007/621).....	75
Electrical Equipment (Safety) Regulations 2016 (SI 2016/1101)	4, 73, 341
Electromagnetic Compatibility Regulations 2016 (SI 2016/1091).....	340
Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013)	253
Electronic Commerce Directive (Financial Services and Markets) Regulations 2002 (SI 2002/1775)	253
Energy Information Regulations 2011 (SI 2011/1524).....	340
Energy Performance of Buildings (England and Wales) Regulations 2012 (SI 2012/3118)	78, 340
Environmental Civil Sanctions (England) Order 2010 (SI 2010/1157)	123
Environmental Civil Sanctions (Wales) Order 2010 (SI 2010/1821)	123
Explosives Regulations 2014 (SI 2014/1638)	65
Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095)	339
Financial Services Act 2012 (Consumer Credit) Order 2013 (SI 2013/1882)	131
Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (SI 2013/1881)	131
Fireworks (Safety) Regulations 1997 (SI 1997/2294).....	75
Furniture and Furnishings (Fire) (Safety) Regulations 1988 (SI 1988/1324)	73
Gas Appliances (Enforcement) and Miscellaneous Amendments Regulations 2018 (SI 2018/389).....	73, 341
General Product Safety Regulations 2005 (SI 2005/1803)	xii, 73, 339
Health and Safety (Enforcing Authority) Regulations 1998 (SI 1998/494)	101, 189
Legislative and Regulatory Reform (Regulatory Functions) Order 2007 (SI 2007/3544)	119
Measuring Instruments Regulations 2016 (SI 2016/1153).....	78, 341
Medical Devices Regulations 2002 (SI 2002/618)	339
National Assembly for Wales (Transfer of Functions Order) 1999 (SI 1999/672).....	88
Nightwear (Safety) Regulations 1985 (SI 1985/2043)	73
Non-automatic Weighing Instruments Regulations 2016 (SI 2016/1152)	341
Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634)	341
Packaging (Essential Requirements) Regulations 2015 (SI 2015/1640)	340
Pedal Bicycles (Safety) Regulations 2010 (SI 2010/198)	73

Personal Protective Equipment (Enforcement) Regulations 2018 (2018/390)	74
Petroleum (Consolidation) Regulations 2014 (SI 2014/1637)	65
Plugs and Sockets etc. (Safety) Regulations 1994 (SI 1994/1768)	41, 74
Pressure Equipment (Safety) Regulations 2016 (SI 2016/1105)	341
Price Marking Order 2004 (SI 2004/102)	339
Product Safety (Revocation) Regulations 2012 (SI 2012/1805)	74
Protective Equipment (Enforcement) Regulations 2018 (2018/390)	341
Public Bodies (Abolition of the National Consumer Council and Transfer of the Office of Fair Trading's Functions in relation to Estate Agents etc) Order 2014 (SI 2014/631)	130, 131
Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013 (SI 2013/783)	130
Pyrotechnic Articles (Safety) Regulations 2015 (SI 2015/1553)	65, 340
Radio Equipment Regulations 2017 (SI 2017/1206)	341
Recreational Craft Regulations 2017 (SI 2017/737)	79, 273, 341
Stop Now (EC Directive) Regulations 2001 (SI 2001/1422)	84
Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/ 2960)	339
Tobacco for Oral Use (Safety) Regulations 1992 (SI 1992/3134)	74
Toys (Safety) Regulations 2011 (SI 2011/1881)	74, 340
Upholstered Furniture (Safety) Regulations 1980 (SI 1980/725)	74

List of European Union Subordinate Legislation

Directive 1990/385/EEC on the approximation of the laws of the Member States relating to active implantable medical devices ([1990] OJ L189/17)	339
Directive 1993/13/EEC of the Council on unfair terms in consumer contracts ([1993] OJ L 95/29)	340
Directive 1993/42/EEC concerning medical devices ([1993] OJ L169/1)	339
Directive 1994/62/EC of the European Parliament and the Council on packaging and packaging waste ([1994] OJ L365/10)	340
Directive 1998/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests ([1998] OJ L166/51)	339
Directive 1998/6/EC of the European Parliament and of the Council on consumer protection in the indication of prices of products offered to consumers ([1998] OJ L 80/27)	339
Directive 1998/79/EC of the European Parliament and of the Council on in vitro diagnostic medical devices ([1998] OJ L331/1)	339
Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees ([1999] OJ L171/12)	340
Directive 2001/95/EC of the European Parliament and of the Council on general product safety ([2002] OJ L11/4)	339
Directive 2002/65/EEC of the European Parliament and of the Council concerning the distance marketing of consumer financial services ([2002] OJ L271/16)	339
Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices ([2005] OJ L149/22)	339
Directive 2006/114/EC of the European Parliament and of the Council concerning misleading and comparative advertising ([2006] OJ L376/ 21)	339
Directive 2008/122/EC of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts ([2009] OJ L33/10)	339
Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers ((2008) OJ L133/66)	339
Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys ([2009] OJ L170/1)	340
Directive 2010/30/EU of the European Parliament and of the Council on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products ([2010] OJ L153/1)	340
Directive 2010/31/EU of the European Parliament and of the Council on the energy performance of buildings ([2010] OJ L153/13)	340
Directive 2011/83/EU of the of the European Parliament and of the Council on consumer rights ([2011] OJ L304/64)	340
Directive 2013/29/EU of the European Parliament and of the Council on the harmonisation of the laws of member States relating to the making available on the market of pyrotechnic articles ([2013] OJ L178/27)	340
Directive 2013/53/EU of the European Parliament and of the Council on recreational watercraft and personal watercraft ([2013] OJ L354/90)	341
Directive 2014/30/EU of the European Parliament and of the Council on the harmonisation of the laws of the Member States relating to electromagnetic compatibility ([2014] OJ L96/79)	340
Directive 2014/31/EU of the European Parliament and of the Council on the harmonisation of the laws of Member States relating to the making available on the market of non-automatic weighing instruments ([2014] OJ L96/107)	341

Directive 2014/32/EU of the European Parliament and of the Council on the harmonisation of the laws of the Member States relating to the making available on the market of measuring instruments ([2014] OJ L96/149)	341
Directive 2014/35/EU of the European Parliament and of the Council on the harmonisation of the laws of Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits ([2014] OJ L96/357)	341
Directive 2014/53/EU of the European Parliament and of the Council on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment ([2014] OJ L153/62)	341
Directive 2014/58/EU of the European Commission setting up a system for the traceability of pyrotechnic articles ([2014] OJ L155/28)	340
Directive 2014/68/EU of the European Parliament and of the Council on the harmonisation of the laws of Member States relating to the making available on the market of pressure equipment ([2014] OJ L189/64)	341
Directive 2015/2302/EU of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements ([2015] OJ L326/1)	341
Regulation 2006/2004/EC of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ([2006] OJ L364/1)	79
Regulation 2009/1223/EU of the European Parliament of the Council on cosmetic products ([2009] OJ L342/59)	340
Regulation 2011/305 EU of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products ([2011] OJ L88/5)	340
Regulation 2016/425/EU of the European Parliament and of the Council on personal protective equipment ([2016] OJ L81/51)	341
Regulation 2016/426/EU of the European Parliament and of the Council on appliances burning gaseous fuels ([2016] OJ L81/99)	341
Regulation 2016/679/EU of the European Parliament and the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ([2016] OJ L119/1)	22

List of Cases

<i>Agricultural Sector (Wales) Bill, Reference by the Attorney General for England and Wales</i> [2014] UKSC 4	89
<i>Blakemore v Bellamy</i> (1983) 147 JP 89	9
<i>Chanter v Hopkins</i> (1838) 4 M&W 399	59
<i>Commissioner of Police of the Metropolis v DSD and another</i> [2018] UKSC 11	37
<i>Costa v ENEL</i> (6/64) [1964] ECR 585	77
<i>Donoghue v Stevenson</i> [1932] AC 562	61
<i>Engel v The Netherlands</i> (no 1) (1976) 1 EHRR 647	35
<i>Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong</i> [1985] AC 1	111
<i>Jones v Bright</i> (1829) 5 Bing 533	59
<i>NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration</i>	77
<i>R (Virgin Media Ltd) v Zinga</i> [2014] EWCA Crim 52	265
<i>Scherras v De Rutzen</i> [1895] 1QB 918	111
<i>Sunday Times v United Kingdom</i> (1979-80) 2 EHRR 245	338
<i>Sweet v Parsley</i> [1970] AC 132	111
<i>Yeoman Credit Limited v Apps</i> [1962] 2 QB 508	59

List of Treaties, Conventions etc.

Charter of Fundamental Rights of the European Union (December 7, 2000)	78
European Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950)	passim
Treaty establishing the European Community (March 25, 1957)	xiv, 78
Treaty of Lisbon (December 13, 2007)	77
Treaty of Union (July 22, 1706)	89
Treaty on European Union (February 7, 1992)	xiv, 76, 77
Treaty on the Functioning of the European Union (May 9, 2008)	xiv, 77, 78
United Nations Convention on the Rights of the Child (November 20, 1989)	87

List of Figures

Figure 1: <i>Blakemore v Bellamy</i> - TS Case Study re Application of Legal Research Methods	9
Figure 2: Case Study - A Vulnerable Person	43
Figure 3: Case Study - Whirlpool.....	45
Figure 4: Case Study - <i>Which?</i>	46
Figure 5: Case study - Courts in Wales.....	93
Figure 6: Case Study - Vance Miller and Others	105
Figure 7: Case Study - RSPCA.....	106
Figure 8: Grant Spend by NTS 2018/2019	132
Figure 9: Case Study - Consumer Landscape Reform 'Pros' and 'Cons'.....	133
Figure 10: Case Study - Legal Metrology	138
Figure 11: Case Study - HealthWatch.....	141
Figure 12: Interviewee Characteristics.....	149
Figure 13: Case Study - Outsourcing of the Netherlands Legal Metrology System	179
Figure 14: Comment on Themes	207
Figure 15: NAW Candidate Survey Q1- Role of TS.....	212
Figure 16: NAW Candidate Survey Qs2 & 3 - Does TS fulfil its Role etc	213
Figure 17: NAW Candidate Survey Q4 - Positive Aspects of TS Service Delivery.....	214
Figure 18: NAW Candidate Survey Q5 - Factors Contributing to Positive Aspects of TS Service Delivery	216
Figure 19: NAW Candidate Survey Q6 -Aspects of TS Service Delivery that could be Improved	218
Figure 20: NAW Candidate Survey Q7 - Ways for Improvement of TS Service Delivery	220
Figure 21: NAW Candidate Survey Q8 - Ways that TS can contribute to WG Delivery.....	221
Figure 22: NAW Candidate Survey Q9 - Additional Comment.....	222
Figure 23: PCC Candidate Survey Q1 - Role of TS	225
Figure 24: PCC Candidate Survey Q2 - Relevance of TS Enforcement to Police Enforcement .	226
Figure 25: PCC Candidate Survey Q3 - Reasons for Q2 Response	227
Figure 26: PCC Candidate Survey Q4 - Areas of Enforcement Where TS and Police Relationship	229
Figure 27: PCC Candidate Survey Q5 - Areas of Enforcement where TS and Police Relationship: Why and How Important	231
Figure 28: PCC Candidate Survey Q6 - Whether TS/Police Relationship in Working Arrangements and Operational Practice	234
Figure 29: PCC Candidate Survey Q7 - Additional Comment	235
Figure 30: FOIA 2000 Questions to LAs.....	242
Figure 31: LA Responses to FOIA 2000 Questions.....	243

Chapter 1 – Introduction

This thesis is a critique of Trading Standards (TS) in Wales. TS is more fully explained below but refers to a United Kingdom (UK) legal framework designed to secure and maintain a fair and safe trading environment. Chapter 1 explains the rationale for the thesis, sets out its aim and objectives, and explains the thesis structure.

Aim and Objectives

The aim of the thesis is:

To investigate and critically evaluate TS delivery in Wales. Included in that evaluation is an assessment of the effectiveness of current arrangements and options for effective future delivery.

The objectives of the thesis are:

1. To critically investigate the origin and development of TS in the UK and, in particular, in Wales.
2. To investigate and critically evaluate how TS is delivered in Wales.
3. With reference to examples, to investigate and critically evaluate how TS (or its component parts) are delivered outside Wales.
4. To identify and critically evaluate options for the effective future delivery in Wales of TS. In assessing future delivery, consideration is to include potential separate arrangements for delivery of TS component parts.

The aim and objectives were revised at the data analysis stage as the original aim proved too limiting. It implicitly presupposed that TS should continue as a discrete area. However, data gathered suggested potential alternative structural arrangements.

Thesis Structure

Chapter 2 explains the research strategy, design and implementation for the thesis. Chapter 3 places the thesis in a critical theoretical framework. Chapters 4 to 9 constitute the thesis' Literature Review. Findings from primary research are set out in Chapters 10 to 12 with discussion arising, conclusions and recommendations considered in Chapter 13.

Rationale for Thesis

Interest in the thesis subject is rooted in two places: experience as a government lawyer working in the Welsh Office and the National Assembly for Wales (NAW); and as a lecturer in TS, and seeing effective TS delivery as an important public good. There was also a parallel stimulus: the 2011 NAW general election manifesto commitment from the Welsh Labour Party (WLP) to 'seek to establish a national [TS] service' for Wales¹ (the TS manifesto commitment).

Some questions arise in order to explain the nature of the thesis and its choice. These are:

1. What is TS and who delivers it?
2. Why has TS been chosen?
3. Why is the focus on TS in Wales?

What is TS and Who Delivers It?

In Great Britain (GB), local government (LG) delivers TS. There are different arrangements in Northern Ireland. TS comprises diverse subject matter such as consumer credit, hallmarking, intellectual property (IP), product safety, food labelling, unfair commercial practices (UCPs) and legal metrology. A definition of TS is given after some preliminary considerations.

Legal metrology is 'the application of legal requirements to measurements and measuring instruments'.² It is otherwise known as 'weights and measures'. This alternative terminology is significant as UK legislation refers to weights and measures: eg, the Weights and Measures Act 1985 (WMA 1985). Two main strands to TS can be identified: legal metrology and consumer protection. The WMA 1985 and the Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs 2008)³ are obvious representatives of each strand.

The CPUTRs 2008 define a consumer as:

any individual who in relation to a commercial practice is acting for purposes which are outside [her or] his business.⁴

¹ WLP, *Welsh Labour Manifesto 2011: Standing up for Wales* (2011) 22.

² International Organisation of Legal Metrology, 'What Is Legal Metrology?' (nd). <<http://www.oiml.org/en/about/legal-metrology>> accessed 22 April 2019.

³ SI 2008/1277.

⁴ Reg 2(1).

This definition is standard and excludes individuals acting in a business capacity. Consumers may have legal protection in situations where a trader does not: eg, this could arise where a trader has breached the CPUTRs 2008 and engaged in UCPs affecting consumers and other traders. Consumer protection law aims to protect consumers generally from unsafe or unfair practice: eg, product safety law from physical harm, and UCP law from economic harm.

Consumer protection can also apply to legal metrology as accurate measurement and its effective enforcement can protect consumers from economic detriment. But while there is overlap, each has a different focus. Originally the content of TS was, effectively, exclusively legal metrology but since the Trade Descriptions Act 1968 (TDA 1968) consumer protection has increased significantly.

Business protection is a less prominent third strand: ie, protection of legitimate traders from illegitimate traders. Consumer protection has developed as a social policy area and in consequence consumer protection law has been materially strengthened. Business protection has not seen something similar.

LG delivers TS in GB. The legal foundation is the local weights and measures authority (LWMA). Local authorities (LAs) in GB are designated as LWMAs under the WMA 1985⁵ and an LWMA must enforce legislation in its area. An LWMA must also appoint a chief inspector of weights and measures (CIWM).⁶ The LWMAs in Wales are the 22 county and county borough councils that, under the Local Government Act 1972 (LGA 1972), are principal councils.

Over time, LWMAs have been required to enforce additional legislation, especially for consumer protection. In practice, the administrative part of the LWMA that delivers TS is referred to as the TS department (TSD). The legal position is different in Northern Ireland, where it is the duty of the Department for the Economy (DFENI) to deliver TS.⁷

⁵ S 69.

⁶ S 72.

⁷ Northern Ireland Trading Standards Service, 'Trading Standards Service' (nd). <<https://www.economy-ni.gov.uk/topics/consumer-affairs/trading-standards-service>> accessed 22 April 2019.

The lead UK Government departments with policy responsibility for TS is the Department for Business, Energy and Industrial Strategy (BEIS). BEIS was previously known as the Department for Business, Innovation and Skills (BIS) from 2009 to 2016, the Department for Business, Enterprise and Regulatory Reform (BERR) from 2007 to 2009, the Department of Trade and Industry (DTI) from 1970 and to 2007 and the Board of Trade before that.

A distinction must be drawn between work carried out by TS officers (TSOs) for an LA but where this is not done on behalf of the LWMA. Two examples are for animal health and welfare,⁸ and food standards.⁹ For each, there is a separate statutory regime that supports enforcement, distinct from the LWMA regime. The focus in this thesis is LWMA work and, unless otherwise stated, TS is defined as the sum of activity carried out by an LA as an LWMA. That definition is technical and hides the nature and quality of activity encompassing TS.

Legal metrology, consumer protection and business protection sit within TS but there is a need to give overall coherence. The overarching theme is securing a fair and safe trading environment. And typically, 'promoting a fair and safe trading environment' (or something similar), is how TS explains its purpose.¹⁰ This might be pursued in variety of contexts:

- Achieving a functional and efficient trading environment through accurate and verifiable measurement: eg, legal metrology facilitates this.
- Promoting safety in trading, through standards to remove or reduce risk of harm: eg, enforcing the Electrical Equipment (Safety) Regulations 2016.¹¹
- Achieving a more equitable trading environment by securing greater equality of bargaining power to avoid unfair exploitation of a position of power or influence that one potential party to a contract has over another: eg, making certain contract terms void and unenforceable.¹²

⁸ Legislation includes the Animal Health Act 1981 and the Animal Welfare Act 2006.

⁹ Legislation includes the Food Safety Act 1990 and the Food Standards Act 1999.

¹⁰ See: eg, Conwy County Borough Council, 'Trading Standards' (nd).

<<http://www.conwy.gov.uk/en/Resident/Trading-Standards.aspx>> accessed 22 April 2019.

¹¹ SI 2016/1101.

¹² See: Consumer Rights Act 2015, pt 2.

- Achieving a more equitable trading environment through enforcement mechanisms and associated sanctions. Therefore, legislation is enforced through traditional application of the criminal law but also through civil means (eg, obtaining an enforcement order under the Enterprise Act 2002, Part 8, to stop a trader engaging in unlawful activity) and administrative means (eg, under the Estate Agents Act 1979 a person can be stopped from carrying out estate agency work).¹³
- Protecting more vulnerable people by denying them a right to trade: eg, not permitting the sale of alcohol to persons under the age of 18.¹⁴

TS is a UK phenomenon. It has emerged in a piecemeal way and has been identified with the fusion of legal metrology and consumer protection enforcement. In other countries, such as the Republic of Ireland, they have remained separate.

Why has TS Been Chosen?

TS can be linked to various desired outcome: eg,

- A functional and efficient market because there is confidence in 'weights and measures',
- A safe market wherein electrical appliances do not electrocute people or cause fires,
- An equitable market because UCPs are eliminated,
- A market where the more vulnerable, such as the young, are prevented from trading to protect their own welfare.

Therefore, a trader may legitimately prosper, a consumer does not suffer physical or financial harm, and those under the age of 18 remain protected. These desired outcomes are socially significant and can contribute to the general good and individual well-being. TS can contribute to their delivery.

Why is the Focus on TS in Wales?

In focusing on Wales, there are six prominent considerations. The TS manifesto commitment was an obvious stimulus.

¹³ S 3.

¹⁴ See: Licensing Act 2003, pt 7.

The broader imperative was devolution. The Government of Wales Act 1998 (GWA 1998) established the NAW and provided for devolved government in Wales. Wales has developed politically with its own corpus of law and policies. TS is not devolved but LG is devolved. As TS is delivered through LG, legal competence exists to make changes for TS delivery. Thus, a national TS service could be established through a joint body comprising each LWMA in Wales.

Although not devolved, TS can contribute to the effective delivery of devolved government: eg, health and social welfare is devolved and, within that, promotion of well-being is a key policy objective. There is related devolved legislation such as the Social Services and Well-being (Wales) Act 2014 (SSWWA 2014) and the Well-being of Future Generations (Wales) Act 2015 (WFGWA 2015). 'Well-being' is widely defined and includes physical, mental health, emotional, social and economic well-being.¹⁵ Effective TS delivery can enhance well-being.

Technological change has revolutionised trading activity, especially for cross-boundary trading. On-line trading is increasingly the commercial norm: eg, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013¹⁶ (CCICACRs 2013) reflect this. The existing model of TS delivery is for each LWMA to act for its area. That model can be questioned due to cross-boundary trading and a need for increased LWMA collaboration. As a possible signpost about inadequacy with the current model there are cross-boundary initiatives such as Regional Investigation Teams (RITs).¹⁷ This is a BEIS funded project targeting dishonest and other 'rogue' trading. Another initiative is Illegal Money Lending Units (IMLUs) (HM Treasury funded). Each involves LWMA joint-working and each in Wales was established on an all-Wales basis. Considering such examples raised the question about possible other all-Wales TS initiatives.

Following establishment of the UK Conservative/Liberal Democrat coalition government in 2010, it embarked on a reform process to the 'consumer landscape': ie, the mechanisms in place for securing consumer protection. Its intention was to:

¹⁵ SSWWA 2014, s 2.

¹⁶ SI 2013/3134, replacing SI 2000/2334.

¹⁷ Formerly known as Scambusters.

rationalise [consumer protection bodies'] functions and eliminate confusion and duplication, strengthen local delivery, and produce a more effective service for consumers at a lower cost to the taxpayer...¹⁸

Although TS is wider than consumer protection enforcement, consumer protection is a core element of TS. The change has had direct impact on TS delivery in Wales.

The final reason concerned the implications of UK European Union (EU) membership and the decision to leave the EU. The EU seeks to achieve a common landscape in areas of EU competence. This arises with consumer protection and there has been major impact on the TS portfolio. Consumer protection is also not devolved. That position is set out in the Government of Wales Act 2006. (GWA 2006).¹⁹ The UK decision to leave the EU raised questions: eg, concerning potential devolution of consumer protection.

A combination of reasons led the thesis to consider TS in Wales. This did not exclude considering TS more broadly (eg, in the UK) or comparatively (eg, with Northern Ireland) so long as TS consideration also applied to Wales.

¹⁸ BIS, 'Reform of Competition and Consumer Bodies' (press release, 2010).

<<https://www.gov.uk/government/news/reform-of-competition-and-consumer-bodies>> accessed 21 April 2019.

¹⁹ Sch 7A.

Chapter 2 - Research Strategy, Design and Implementation

This chapter explains the thesis research strategy, the research design and implementation of that design. This involves consideration and discussion of research category, research design category, research methods and their implementation, data analysis and ethics.

Category of Research

Identifying the research category for the thesis helped define its general orientation and signpost potential research methods. The thesis falls within two categories: legal research and social research. Each category required the application of different sets of research methods for data gathering. That application was not mutually exclusive as the legal framework can inform social research: legal research methods could be deployed to identify and apply relevant law while social research methods could be deployed to gather other data. Also, given the extensive use of legal references, it was decided to use the Oxford Standard for the Citation of Legal Authorities (OSCOLA) as the most appropriate referencing system.²⁰

Legal Research

Legal research involves deploying methods that identify relevant types of law and their content:²¹ eg, common law, EU law and Parliamentary law; a type would need to be considered and relevant legal authority identified. Essentially, the research methods relate to searching legislation, law reports, databases, books, journals and their ilk. The law identified might be contained in, say, an Act of Parliament, an EU Directive or a Supreme Court decision.

Identifying relevant law was important; and in identifying the historical legislative narrative of how TS developed there was a need for access to repealed and extant legislation. Awareness of potential relevant authoritative sources was required, as

²⁰ As to OSCOLA, see: Faculty of Law, University of Oxford, *OSCOLA: The Oxford University Standard for Citation of Legal Authorities* (Donal Nolan and Sandra Meredith eds, 4th edn, Hart Publishing 2012).

²¹ As to legal research see, eg: John Knowles, *Effective Legal Research* (4th edn, Sweet & Maxwell 2016); Lisa Cherkassky and others, *Legal Skills* (Palgrave Macmillan 2011).

well as access to them. Searching strategies were then devised and implemented to gather relevant data.

Sometimes, law can be clear: eg, there are the CPUTRs 2008, and LAs must enforce the CPUTRs 2008 in their capacity as LWMAs. In epistemological terms, that knowledge is undisputed. But sometimes law can be less clear. Two circumstances are identified, and a distinction made between them.

There is the situation where the law is seemingly complex, or uncertain, but legal research can establish an informed position. Therefore, say, there is a legal issue concerning legislative interpretation about the effect of a word or phrase. Through legal research methods (eg, identification and consideration of applicable legislation and case law) the legal position can be established. There is no need to carry out social research. Figure 1 sets out a TS case study concerning application of legal research methods.

Figure 1
***Blakemore v Bellamy* - TS Case Study re Application of Legal Research Methods**

The case concerned the meaning of 'in the course of a trade or business' under the TDA 1968; which created offences for which it had to be proved that a person was acting in that capacity: see, eg, ss 1 and 14 (now repealed).

This situation was considered in *Blakemore v Bellamy*.²² The defendant (D) was a postman but in his spare time renovated cars and then sold them, sometimes at a profit. D was charged with an offence under the TDA 1968, s 1.

D had bought and sold eight cars over 15 months. Magistrates acquitted D stating this was a hobby and he was not acting in the course of a trade or business. The High Court confirmed that interpretation and stated that 'trade or business' were to be given their ordinary meanings and that normally a hobby would not fall within the accepted understanding of the terms.

Having regard to the case study, TSOs needed to deploy legal research methods to identify and consider both the TDA 1968 and judicial precedent such as *Blakemore v Bellamy* to decide what the law was before applying it.

Second, there is the situation where legal research cannot clarify the issue; which leads to social research: eg, if it needs to be decided if an LWMA is effectively discharging its legal duties. One possibility might be a court decision in judicial

²² (1983) 147 JP 89.

review proceedings making a declaration on the point. But that situation is dependent on court proceedings. As proceedings must be initiated by an interested party, coupled with obvious resource implications, the situation is unlikely.

Even if it did arise, assistance might be limited as the issue could demand deeper or wider enquiry: eg, following a court declaration that an LWMA was not discharging its legal duties, deeper enquiry might include a review of TS prosecutions while wider enquiry might involve comparative study involving other LWMAs.

In this situation, guided by the framework established by legal research, social research can step in to complete the task, through use of methods such as interviews and questionnaires involving consumers, traders and other stakeholders. This also illustrates the complementary nature of deploying legal and research methods.

Social Research

Bryman defines social research as 'academic research on topics relating to questions relevant to the social scientific fields, such as sociology, human geography, social policy, politics and criminology.'²³ Concerning the thesis, if legal research is separated-out, the remaining research can be categorised as social research relating to social policy and politics. It can also be argued that in a broader sense law is a social scientific matter and, that with legal research separated-out, the remaining social research has law related aspects: eg, in assessing the effectiveness of a law.

Research Strategy

Social research, conventionally, distinguishes between quantitative and qualitative orientations. Quantitative research is more concerned about 'quantification in the collection and analysis of data'²⁴ while qualitative research follows an 'unstructured, flexible and open approach to enquiry [and] aims to describe [rather] than measure'.²⁵ This distinction between quantitative and qualitative research has practical implications, and four are considered below and related to the thesis. After that, the general orientation of the thesis is discussed.

²³ Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 4.

²⁴ Ibid 35.

²⁵ Ranjit Kumar, *Research Methodology: A Step-by-Step Guide for Beginners* (3rd edn, Sage 2010) 394.

1. Research methods: Types of research methods are conventionally associated with each approach. The questionnaire and structured interview are associated with quantitative research because they can be directed towards ‘quantification in the collection and analysis of data’. Conversely, the focus group and semi-structured interview are associated with qualitative research because they can facilitate an ‘unstructured, flexible and open approach to enquiry...’. For the thesis, the semi-structured interview was used as a research method for primary data gathering: ie, a method associated with qualitative research.

2. Inductive and deductive study: Quantitative research is normally associated with deductive study and qualitative research with inductive study. The thesis is inductive as its aim was critiquing TS in Wales. It was about generating theory in the sense of suggesting theoretical approaches for application to TS in Wales: ie, an approach associated with qualitative research.

3. Epistemology: According to Bryman the epistemological orientation for quantitative research is the natural science model and, eg, a related epistemological position is positivism.²⁶ The model has a quantitative association as, eg, a laboratory experiment involves structured activity. As social research involves the study of social reality, qualitative research has become associated with interpretivism.²⁷

The thesis involves study of social reality (Wales and TS are social constructs) and the epistemological orientation was interpretivist rather than positivist: eg, critiquing TS involved more than consideration of statistics such as numbers of successful prosecutions. It involved matters grounded in social reality like promotion of deterrence against UCPs. This was relevant to critiquing and an interpretivist approach was identified as more appropriate: ie, an approach associated with qualitative research.

²⁶ Only ‘knowledge confirmed by the senses’ is valid (Bryman (n 23) 28).

²⁷ A social scientist must ‘grasp the subjective meaning of social action’ (ibid 30).

4. Ontology. According to Bryman the ontological orientation for quantitative research is objectivism²⁸ while for qualitative research it is constructivism.²⁹ As to ontological orientation for the thesis, a constructivist approach was taken, Wales has been created by social actors and Wales continues to develop: eg, on its devolutionary path. A constructivist approach, again, is something associated with qualitative research.

General orientation: The above analysis signposted the thesis having qualitative orientation. But applying the thesis' aim to the definition of qualitative research suggested otherwise. The thesis could not be described as unstructured as there was an aim and objectives. Moreover, the thesis aim was to measure, rather than describe. Although, critiquing TS in Wales was not numerical measurement, it was measurement because there was application of judgement. Conversely, applying the thesis aim to the definition of quantitative research was also problematic. Although measurement was involved, it was not 'quantification'. Legal research does not have a qualitative/quantitative distinction, yet the point of much legal research is to carry out non-quantifiable measurement to enable a judgement to be made.³⁰

The thesis concerns Wales and TS, and their interrelationship, which includes identification of developments, and application of judgement (eg, concerning models for TS delivery). Applying conventional quantitative and qualitative definitions were problematic. While aspects were qualitative as intention was to 'describe', it did not stop there. It was also necessary to anticipate potential developments and associated implications on the delivery of TS. Given contextual dynamics, there was a need for application of judgement informed by evidence (ie, an act of measurement) but not of quantification. It was, therefore, decided to reject the quantitative and qualitative classification. Moreover, legal research makes no such distinction. In summary, the thesis is placed in both legal and social research categories and the research strategy can be expressed as follows:

A structured, flexible and open approach to enquiry for the purposes of aiming to measure through data gathering and analysis involving both legal and social research methods. The enquiry is set in a social reality setting

²⁸ 'Social phenomena and their meanings have an existence that is independent of social actors' (ibid 33).

²⁹ 'Social phenomena and their meanings are continually being accomplished by social actors' (ibid).

³⁰ Judgement (ie, an act of measurement) might, eg, relate to whether there has been a breach of law or what action is required for legal compliance.

involving interpretivist epistemological and constructivist ontological orientations.

Research Validity

In evaluating social research two qualities commonly cited as important are reliability and validity.³¹ Kumar defines reliability as 'the ability of a research instrument to provide similar results when used repeatedly under similar conditions'.³² He defines validity as referring to the 'appropriateness of each step in finding out what you set out to [find]'.³³ Some writers have suggested that social research should be evaluated by different criteria. So, Guba and Lincoln suggested trustworthiness and authenticity.³⁴

Reliability and validity were rejected on the basis that the term 'validity' should not be applied in a restricted technical sense but given its standard dictionary meaning. Something is valid if it '[has] a sound basis in logic or fact'.³⁵ That 'sound basis' might vary: eg, it might be more technical with survey-based research than with semi-structured interview-based research. It relates to the overall integrity of the social research (and will also incorporate qualities such as trustworthiness and authenticity).

The discussion so far has related to social research. The approach can also be applied to legal research. Lawyers refer to 'authority' when seeking to establish what the law is. Therefore, eg, there is judicial precedent and cases decided in the Supreme Court have higher authority than cases decided in the Court of Appeal. Legal research involves investigation of various legal sources to identify relevant authority. Deploying the term 'validity' in its broad dictionary sense is appropriate. Therefore, eg, the 'sound basis' for a legal view arrived at through legal research might be derived from legal authority.

An alternative approach for evaluating research has been the use of questions: eg, Spencer and others suggested 18 questions to ask when evaluating qualitative

³¹ See, eg, Bryman (n 23) 168-175 and 389-399.

³² Kumar (n 25) 396.

³³ Ibid 402.

³⁴ Yvonna S Lincoln and Egon C Guba, *Naturalistic Inquiry* (Sage 1985); Egon C Guba and Yvonna S Lincoln, 'Competing Paradigms in Qualitative Research' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage 1994).

³⁵ *Concise Oxford English Dictionary* (12th edn, Oxford University Press 2011).

research.³⁶ In evaluating research validity appropriate questions must always be asked. However, the danger is that the list ceases to be an aid and becomes a checklist when uncritically applied.

Bryman, in the context of social research, asserts that bias and the 'intrusion of values' can occur throughout the research process and encourages the researcher to be alert to their presence and be self-reflective about their influence.³⁷ Their presence can deflect from a dispassionate approach to research and undermine research validity. Self-reflection was incorporated into the research process, whether social or legal research: eg, assumed knowledge was checked. Moreover, in process terms in order to minimise bias, deliberative procedures were implemented into the data gathering and data analysis: eg, concerning formulation of areas of questioning with interviews or specific questions for the NAW and PCC surveys, or, in relation to data analysis, applying Braun and Clarke's six-phased approach³⁸ (this is discussed below).

Thus, validity was embedded into the research design and its implementation in its broad dictionary sense. In practical terms, the appropriateness of each step in seeking to meet the thesis' aim was assessed with reference to that quality.

Research Design Category: Case Study

Social research commentators identify categories of research design.³⁹ Each category has generated critical literature; placing the thesis into a category meant the associated critique could then be applied. The thesis fitted most obviously into the case study type design. In referring to 'case' Bryman states:

The most common use of the term 'case' associates the case study with location, such as a community or organization. The emphasis tends to be upon intensive examination of setting.⁴⁰

³⁶ Liz Spencer and others, *Quality in Qualitative Evaluation: A Framework for Assessing Research Evidence* (Government Chief Researcher's Office 2003).

³⁷ Bryman (n 23) 39.

³⁸ Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3.2 *Qualitative Research in Psychology*, 77.

³⁹ Bryman, eg, identifies experimental, cross-sectional, longitudinal, case study and comparative designs (Bryman (n 23) 45).

⁴⁰ *Ibid* 67.

Kumar says that to be called a case study 'it is important to treat the total study population as one entity'.⁴¹ The 'case' for the thesis is TS in Wales; there is coherence to that classification and the research is an 'intensive examination of setting.' The total thesis population can also be treated as one entity: ie, those delivering TS in Wales (eg, TSOs), those affected by delivery (eg, consumers and traders) and those influencing its delivery (eg, policy formulators such as politicians). Kumar confines 'entity' to population, but this seems unduly restrictive. The 'entity' being studied was wider than population and included, eg, the associated legal framework and administrative arrangements. The 'case' also was broader than 'location, such as a community or organisation', as it included the legal framework.

One criticism of the case study is that its findings lack external validity in that they cannot be generalised because they are unique to the case.⁴² It is not necessarily the purpose of a case study research design to generate generalised research findings but that absence of external validity places greater emphasis on internal validity. 'The concern relates to the quality of the theoretical reasoning in which the case study research engages'.⁴³ As the essence of case study is the 'intensive examination of setting', this skew is not surprising.

Having regard to externality, although the emphasis was on Wales, there was also an element of comparative design, as how TS is delivered outside Wales was considered. These external sources informed and provided some external validity.

[Aim and Objectives, and their Revision](#)

Chapter 1 discussed formulation of the thesis aim and objectives. As explained, these were revised when the original aim was found to be too limiting.

[Research Methods](#)

Given the historical investigation of objective 1 (Chapter 1 sets out the thesis' aim and objectives), secondary sources for data gathering were identified as the most appropriate. Objective 1 was fulfilled through writing the Literature Review (Chapters 4 to 9). This involved a mix of legal and other secondary research methods

⁴¹ Kumar (n 25) 126.

⁴² Bryman (n 23) 71.

⁴³ Ibid.

in first identifying relevant literature followed by data gathering. Prominent in contribution was legislation: eg, TS delivery is a legal requirement and there was a legal trail in TS development. LG and devolution legislation were also relevant.

Legislation can establish an historical narrative. But legislation does not exist in a vacuum; it is the product of policy making. There were other contributors including case-law, government commissioned and other reports, and academic literature. These were used when considered authoritative and relevant (ie, valid). The Literature Review identified minimal academic literature specific to TS and nothing specific to TS in Wales. While, eg, the Molony Committee Report⁴⁴ or the Hampton Report⁴⁵ can be regarded as authoritative and relevant, they are both government commissioned and not academic sources. There is also no peer reviewed journal for TS studies; there is the *Journal of Trading Standards* published by the Chartered Trading Standards Institute (CTSI) which combines a website⁴⁶ and bi-annual print publication.

Although more literature would have assisted, its absence was not fatal given the legislative trail and use of government commissioned and other official reports, together with academic literature on matters such as consumer law, LG and devolution. That absence can also be viewed positively as it demonstrates originality in the research area.

Data gathering in fulfilling objective 1 informed the process for fulfilling objectives 2 to 4. In their pursuit, there was a need for a mix of secondary and primary data gathering. As to secondary data gathering, there are considerable amounts of data in the public domain concerning public bodies and government policy. The purpose of secondary data gathering was to inform primary data gathering.

⁴⁴ Board of Trade, *Final Report of the Committee on Consumer Protection* (Cmd 1781, 1962). The committee is referred to as the Molony Committee, named after its chair JT Molony QC.

⁴⁵ Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement*. (HM Treasury 2005).

⁴⁶ See: <<http://www.journaloftradingstandards.co.uk/>> accessed 26 April 2019. It was launched in May 2018 and replaced *TS Today* (a monthly on-line magazine) and *TS Review* (a quarterly print journal). The Trading Standards Institute (TSI) acquired chartered status in 2015 when it was renamed as the CTSI. See: *Trading Standards Institute Royal Charter of Incorporation* (2015). <https://www.tradingstandards.uk/media/documents/governance/ctsi_charter.pdf> accessed 6 August 2019.

It was anticipated that most primary data gathering would be through interviews. The target population from recruiting participants has been defined as 'the entire membership of the group in which the researcher is interested and from which information can be collected'.⁴⁷ Guided by the framework imposed by the objectives, as originally formulated, enabled a sample frame to be settled; the intention was to follow a non-probability purposive sampling approach and carry out interviews with persons identified according to their expertise, role or influence. After initial consideration, the value of interviewing consumers per se was discounted and they were not included in the sample frame. The main reasons for taking this view were because each person included would still be a consumer in addition to having expertise etc (and thus also have a consumer perspective), and that persons representative of consumers' interests were also included. At the point where objectives 3 and 4 were reformulated, because of broader focus, subsequent mapping identified other potential candidates: eg, in other enforcement contexts. The test for membership was then to be able to place a person within the framework established by the mapping exercise.

The interview was chosen as the initial primary data gathering method because it had advantages over other methods such as questionnaires or focus groups. Kumar identifies several advantages including: its appropriateness for complex situations; its usefulness for collecting in-depth information; how data gathered can be supplemented (eg, from observation of non-verbal responses); and how questions can be explained (and misunderstandings overcome).⁴⁸ Disadvantages include: that interviewing is time-consuming and expensive; that the quality of data gathered depends on interviewer quality and interaction (another variable is interviewee quality); and that the researcher may introduce bias.⁴⁹ As to advantages, the interviews related to a complex situation and in-depth data were required; the flexibility of interview and the ability to probe facilitated this. But potential disadvantages were real and needed to be avoided or minimised. Conducting interviews is time-consuming but, if properly approached, can be productive in terms of data gathered. Also, depending on circumstances, interviews need not be

⁴⁷ Pam Moule and Gill Hek, *Making Sense of Research: An Introduction for Health and Social Care Practitioners* (4th edn, Sage 2011) 85.

⁴⁸ Kumar (n 25) 149–150.

⁴⁹ Ibid 150.

prohibitively expensive. As to other disadvantages, being aware of them was the first imperative, so that steps could be taken to avoid or minimise their impact. Minimising bias, eg, has been mentioned above.

It was decided that the questionnaire was not appropriate for initial data gathering because of the investigation's complex nature and the need for it to be in-depth. Although, a focus group involves interviewing, one of the principal aims of the initial data gathering was to speak separately with identified individuals for specific reasons. A focus group is not conducive to this. As a further disincentive, there are problems with focus groups which are not present with individual interviews: eg, two or more participants speaking at the same time.⁵⁰ Focus groups can also inhibit participation: eg, a collective view suppresses another view.⁵¹

As to the type of individual interview, Bryman notes two main types: unstructured and semi-structured interviews.⁵² Semi-structured interviews are more likely to be appropriate where there is a 'fairly clear focus, rather than a very general notion of wanting to do research on a topic...so that the more specific issues can be addressed'.⁵³ Although there was an element of general exploration, the aim had a focus beyond a 'general notion' and it was decided that semi-structured interviews were appropriate.

Although other methods were initially ruled out, their future use was left open as the process of investigation might lead to their need. Subsequently, two cases arose in which alternative primary data gathering methods were used.

The first case involved undertaking on-line surveys of candidates standing for election in May 2016 to the NAW (NAW candidate survey) to the office of Police and Crime Commissioner (PCC) in England and Wales (PCC candidate survey). These elections were identified as an opportunity to gather data about the extent of knowledge about TS and devolution (NAW candidate survey) and TS and policing

⁵⁰ Bryman (n 23) 517.

⁵¹ Solomon E Asch, "Effects of Group Pressure on the Modification and Distortion of Judgements", in Harold. Guetzkow (ed), *Groups, Leadership and Men*, (Carnegie Press, 1951, 177-190; cited in Bryman (n 23) 518.

⁵² Bryman (n 23) 469.

⁵³ Ibid 472.

(PCC candidate survey). An on-line survey that could be completed anonymously was judged appropriate. Exploration of TS profile was part of the rationale for the surveys, the issue having emerged in interviews.

The second case involved making information requests to each LA in Wales under the Freedom of Information Act 2000 (FOIA 2000) in April 2017. There was an investigation of the impact of Chapter 3 of Part 3 of the Consumer Rights Act 2015 (CRA 2015); this required letting agents to publicise fees payable by tenants and was enforced by LAs as LWMAs). As the FOIA 2000 gives individuals a legal entitlement to request information from public authorities, this was identified as the appropriate data gathering method. The rationale for data gathering was related to how LWMAs were delivering an aspect of TS in Wales and, again, exploring TS profile.

Ethics

Ethical issues arise with primary data gathering⁵⁴ but can also arise with secondary data collection.⁵⁵ The starting point for carrying out an assessment about ethical issues was Cardiff Metropolitan University's (CMU) Ethics Framework.⁵⁶ More particularly, Cardiff School of Health Sciences' (CSHS) Ethics Framework⁵⁷ required that research activity involving human participants must have prior CMU approval. Reflecting the tenor of the CMU framework, it also included general ethics principles which apply to research activity. These included minimisation of harm, protection of the dignity of participants, voluntary informed consent by participants, confidentiality of information, anonymity of participants, independence and impartiality of researchers and compliance with the law.

⁵⁴ 'Research involving primary data collection always raises issues of ethics that must be addressed.': Economic and Social Research Council, *Framework for Research Ethics* (rev ed, Economic and Social Research Council 2012) 3.

<<http://www.esrc.ac.uk/about-esrc/information/research-ethics.asp>> accessed 29 September 2012. This was current when considered.

⁵⁵ 'Whilst the secondary use of some datasets may be relatively uncontroversial...novel use of existing data...will raise issues of ethics.'(ibid).

⁵⁶ CMU, *Ethics Framework: Our Values in Action* (2009).

<http://www3.cardiffmet.ac.uk/English/Research/Documents/Cardiff%20Met_Ethics_Framework.pdf> accessed 21 April 2013. This was current when considered.

⁵⁷ CSHS *Ethics Framework* (ver 4, 2012) 2.

<<http://www3.cardiffmet.ac.uk/English/Research/Documents/CSHS%20Research%20Ethics%20Framework%20V4%202013.pdf>> accessed 21 April 2013. This was current when considered.

Building on these statements, two sets of principles were considered as an aid to evaluating the CMU and CSHS ethical frameworks and their application (see below). These principles provided better expression of what was required from an ethical standpoint and in combination covered the territory embodied in the CMU and CSHS ethical frameworks with one exception: the requirement for legal compliance.

Edward Dienar and Rick Crandall principles

Dienar and Crandall divided ethical principles in social research within four categories: harm to participants, lack of informed consent, invasion of privacy and deception.⁵⁸ These principles have been followed by others;⁵⁹ the principles were applied in the thesis.

1. Harm to participants: Risk of physical harm was not considered to be significant. Interviews were planned at prearranged times in appropriate settings during working hours. The surveys and FOIA 2000 requests involved no face-to-face contact. Because of the need to protect confidentiality of information, there was risk of non-physical harm (such as reputational harm) for interviewees and survey participants if protection was not secured; therefore, eg, interview transcripts were password protected. No risk of non-physical harm was identified for the FOIA 2000 requests. Concerning secondary data gathering, the risk of harm to others was considered minimal as data would be derived from documentation in the public domain or otherwise obtained with consent.

2. Lack of informed consent: It was not considered that this would be a problem for the interviews or the surveys. Participants would be adults. Each would be informed in advance about the research and that participation was voluntary. A participant information sheet would be supplied. Participants would also be asked to confirm agreement to involvement. In the case of secondary data gathering, consent was only relevant if data was not in the public domain. In those circumstances the person, from whom consent would be obtained, would be fully informed of the purpose for its proposed use. This might arise, say, in an interview where reference

⁵⁸ Edward Dienar and Rick Crandal, *Ethics in Social and Behavioral Research*, (University of Chicago Press 1978).

⁵⁹ Eg, Bryman (n 23) ch 6.

was made to a document. As the FOIA 2000 requests process was legally controlled, informed consent was not relevant.

3. Invasion of privacy: The thesis did not involve the pursuit of personal data and it was considered unlikely that this category would be relevant; this proved to be the case.

4. Deception: In some research situations the use of deception might be contemplated for data gathering. No such situation was identified or arose.

Economic and Social Research Council principles,
There was regard to the *Framework for Research Ethics* produced by the Economic and Social Research Council (ESRC) as an aid to evaluation. It has broader application than Dienar and Crandall's four categories. '[S]ix key principles' were at the forefront and principles 1 and 6 were identified as covering something new.⁶⁰

1. Research should be designed, reviewed and undertaken to ensure integrity, quality and transparency. This is concerned with the overall process. CMU's research degree requirements helped facilitate compliance with this principle.

6. The independence of research must be clear, and any conflicts of interest or partiality must be explicit. Again, this is concerned with the overall process. It is also linked with the ESRC first principle as a conflict of interest can affect 'integrity, quality and transparency'. This principle can also be extended to cover the perception of conflicts of interest or partiality. Avoidance of actual or perceived conflicts of interest and partiality was embedded in the research design and implementation. Also, CMU's research degree requirements helped facilitate compliance with this principle: eg, through the role of supervisors.

Legal Context

Dienar and Crandall's and the ESRC principles do not mention the requirement for legal compliance, which is mentioned in both the CMU and CSHS ethical frameworks. For research activity appropriate action must be taken to ensure legal compliance.

⁶⁰ Economic and Social Research Council (n 54) 2-3.

Achieving this, though, can be problematic as it needs awareness of what is required and how it might be achieved. While there are others, three main examples were identified as having legal implications: IP, data protection legislation⁶¹ and the tort of negligence. Each had impact in influencing the research design and its implementation. IP law was relevant because of the need to protect copyright and respect the copyright of others.⁶² Data protection was relevant as personal data were collected. The tort of negligence⁶³ was important as a duty of care was owed to others such as research participants.

Both ethical and legal concerns govern research conduct but the two may be in conflict. In that event the legal imperative would ordinarily take precedence, although there may be principled objection to the law's application.⁶⁴ However, given the nature of the thesis, the possibility of conflict did not arise.

Ethics Approval

Ethics approval was required from the CSHS Research Ethics Committee. Taking into account relevant principles, and the CMU and CSHS Ethical Frameworks, an application was completed and submitted. Ethics approval for primary data gathering by way of semi-structured interviews was obtained on 24 October 2011 for three years (Appendix 1). However, substantive primary data gathering was delayed until November 2012 following transfer to the PhD programme of study from the MPhil/PhD programmes of study (PhD transfer). Obtaining ethics approval before the PhD transfer informed the PhD transfer process for two main reasons.

The PhD transfer application required reference to the proposed research design and implementation. This included consideration of ethical issues, which was

⁶¹ Relevant legislation until 2018 was the Data Protection Act 1998. This was replaced by the General Data Protection Regulation (Regulation 2016/679/EU of the European Parliament and the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ([2016] OJ L119/1)) and the Data Protection Act 2018.

⁶² For copyright and other IP law, see: Charlotte Waelde and others, *Contemporary Intellectual Property: Law and Policy* (4th edn, OUP 2016).

⁶³ For the tort of negligence, see: John Cooke, *Law of Tort* (13th edn, Pearson 2017).

⁶⁴ One example might be to protect the identity of a participant; compare with a journalist who must '[p]rotect[] the identity of sources who supply information in confidence and material gathered in the course of her/his work': National Union of Journalists, *NUJ Code of Conduct* (2011). <<https://www.nuj.org.uk/about/nuj-code/>> accessed 23 September 2017.

informed by obtaining ethics approval. Second, having ethics approval in place for the PhD transfer application was viewed as strengthening the application.

Subsequently there were approval extensions (Appendices 2 to 5). The second extension also extended the approval's ambit to cover the NAW and PCC candidate surveys (Appendix 3). Although much of the substantive data gathering had been completed by March 2017 continued ethics approval was obtained to allow flexibility for further interviewing on specific issues.

FOIA 2000

Information requests were made in April 2017 to each LA in Wales under the FOIA 2000. As there is a legal entitlement to make FOIA 2000 requests, there was no requirement for ethics approval. However, there was consultation with supervisors about the requests' appropriateness. Account was also taken of the ethical principles underpinning research to ensure that there was no conflict with those principles.

Secondary Data Gathering and Processing

Secondary data gathering and processing were unproblematic given that data were in the public domain. Sources included legislation, case law, government commissioned and other formal reports, academic literature, government policy announcements and official statistics. Identification of relevant sources was achieved through a variety of search methods. These included:

- Starting with a legislative source and from it identifying other sources: eg, in establishing a legal trail of legislation the WMA 1985 identifies the Weights and Measures Act 1963 and repeals it.⁶⁵
- Data gathering might start with an authoritative academic text which would lead to other data sources through references cited: eg, for EU law and consumer protection, use of Mathijsen's *A Guide to European Union Law*⁶⁶ assisted in identifying the overarching EU legal framework.
- Monitoring of government and other authoritative websites to identify relevant materials: eg, reports, legislative proposals and other policy output. So,

⁶⁵ WMA 1985, s 98 and sch 13.

⁶⁶ Pierre SRF Mathijsen, *A Guide to European Union Law* (10th edn, Sweet & Maxwell 2010).

monitoring the UK Parliament website and examination of the Queen's Speech 2013 identified intention to introduce a draft Consumer Rights Bill.⁶⁷

- Searching authoritative databases and websites followed-up by more refined searching: eg, searching the official EU website⁶⁸ to identify EU policy initiatives or searching the legal database LexisNexis to identify relevant case law.

Searching was in part guided by existing knowledge, eg, about relevant law. This was a useful starting point as it provided focus. But the disadvantage was that something might be missed where, eg, knowledge might be partial or wrong. Potential for error was recognised and effort made to avoid it using techniques such as checking assumed knowledge and self-questioning.

The method of data extraction depended on the type of data. There were purely factual data such as statistical data; legal data might involve this. But there were also additional data derived from factual data. In Chapter 3 there is reference to the Constitutional Reform Act 2005, section 1, and the meaning of 'rule of law'. The existence of section 1 and its content was factual but interpreting its meaning and effect (ie, the derived data) required analysis and judgement. Themes or narratives were other things that were extracted: eg, consumer protection could be identified as a theme and its emergence over time as a narrative.

Primary Data Gathering and Processing

As mentioned, primary data gathering comprised three elements: interviews, electronic on-line surveys, and FOIA 2000 requests. Implementation of each element is now considered.

Interviews

The sampling method adopted was purposive as individuals who were identified as having something to contribute were approached. This was combined with convenience sampling: eg, when deciding who to recruit between potential interviewees who had similar characteristics. This aspect is discussed in greater depth in Chapter 10.

⁶⁷ This resulted in the CRA 2015.

⁶⁸ <<https://europa.eu/>> accessed 28 September 2019.

Potential interviewees were initially approached by email, which included the participant information sheet (Appendix 6) and participant consent form (Appendix 7). Its purpose was to elicit if a person agreed in principle to be interviewed. Subject to that, finer detail could then be agreed. It was also emphasised that participation was voluntary with an associated right to withdraw.

There was a mixture of face-to-face, telephone and email interviews. For face-to-face and telephone interviews arrangements were established to suit the interviewee: eg, for a telephone interview a time and date would be agreed at which to telephone the interviewee. Typically, it was agreed that the interview would not continue beyond a certain length: say, one hour. The interviewee would be informed beforehand about the broad structure and areas for discussion.

Most telephone and face-to-face interviews were audio recorded. On four occasions notes were taken instead; this occurred in the early stages of data gathering and would not have been done if repeated.⁶⁹ A transcript or note of interview was prepared, which would often be supplemented by relevant extracts from emails concerning follow-up issues. The draft was submitted to the interviewee for comment. In the case of email interviews, this involved an exchange of emails in which the interviewee could respond to questions. The exchange would then be edited to produce an overall record of interview.

Interview Data Analysis

The approach to data analysis was to use Braun and Clarke's six-phased process to thematic analysis⁷⁰ as a template. Although this is associated with qualitative analysis, and qualitative/quantitative labelling has been rejected, as an approach it has practical merits and was adapted. They define thematic analysis as a method for 'identifying themes and patterns of meaning across a dataset in relation to a research question'⁷¹ But as with the discussion about processing of secondary data, there were other types of data gathered, ie, factual data and data derived from

⁶⁹ But in all four cases an adequate note of interview was recorded. In one case technical issues prevented audio recording. In the others, there was a belief that manual notetaking was sufficient.

⁷⁰ Braun and Clarke (n 38) 77.

⁷¹ Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (Sage 2013) 175.

interpretation such as legal data. How their approach was adapted is considered below.

Phase 1, data familiarisation: This was achieved through the mechanical processes that led to a record of interview. It began with listening or reading and continued with preparation of the interview record.

Phase 2, generating initial codes: Coding arises after familiarisation, when initial thoughts are generated about what data are suggesting. Although codes are part of the analytical process, they are distinguished from themes. Codes are part of data organisation, while themes are a product of interpretive analysis.

Braun and Clarke's approach is rooted in psychology and their approach to 'coding' was adapted. The interview dataset had legal and political elements. For each interview, the record was read, annotations made, and from those annotations a note produced, limited to two sides of size A4 paper (an issue note). This was inductive, in which matters arising from the interview were listed under 'issues arising'. Next, broader issues were identified and placed under 'wider application': eg, interview data might have been about an LWMA no longer providing consumer advice to the public (an 'issue arising') and consumer education then listed under 'wider application'. One significant difference with coding was that while producing issue notes involved data organisation, there was interpretive analysis through the inductive process. Issue notes could also record factual data.

Although phase 2 flowed from phase 1, there was overlap because there could be revision of an issue note due to re-reading an interview record.

Phases 3 to 6 were integrated and ongoing in application, although the distinctive elements could be identified as part of the data analysis. The phases are:

- **Phase 3, searching for themes**
- **Phase 4, reviewing themes**
- **Phase 5, defining and naming themes**
- **Phase 6, writing-up**

Braun and Clarke's process referred to the interpretive process beginning at phase 3. Here this began at phase 2 through the generation of the issue note. For the thesis, phase 3 involved physically placing all the issues notes together and reviewing them to identify patterns from which themes could be identified together with factual data. Phase 4 involved identifying a group of 'candidate' themes and refining them to ensure that they were supported by the data and were coherent. Phase 5 was the endpoint at which themes were confirmed and defined (six overarching themes were identified). Phase 6 then proceeded with writing-up (see Chapter 10). The whole process also involved reference to interview transcripts or notes.

NAW and PCC Candidate Surveys: Data Gathering and Processing

A recurring theme during the research was the low profile of TS. Two opportunities were identified to explore TS and its profile: concerning devolved politics in Wales; and concerning the police and TS. On 5 May 2016, there were parallel sets of elections to the NAW and to the office of PCC for police service areas in England and Wales. Candidates at each set of elections were invited by email to participate in an on-line survey. Emails sent to candidates contained a link to the survey which could be completed anonymously on-line. Questions were drafted in consultation with supervisors. The process also involved considering guidelines for asking survey questions suggested by Babbie:⁷² eg, to ensure that it was clear what was being asked 'as the possibilities for misunderstanding are endless, and no researcher is immune'.⁷³

As the intention was to elicit the extent of candidate knowledge (or interest), questions were deliberately worded so that they did not suggest possible answers: eg, question 8 of the NAW candidate survey asked:

In what way do you think that [TS] can contribute to the delivery of Welsh government?

There was no suggestion for candidates to consider about how TS might make any contribution to Welsh Government (WG) delivery: eg, improving well-being, promoting economic benefits.

⁷² Earl Babbie, *The Practice of Social Research* (13th edn, Wadsworth Cengage Learning 2013) 230.

⁷³ Ibid 232.

Although the main driver was to explore profile issues, questions were framed to explore the broader issue of the relationships between TS and the WG for NAW elections and TS and the police for the PCC elections.

NAW Candidate Survey

The NAW comprises 60 elected members: 40 representing constituencies elected on the simple majority system; and 20 representing 5 regions (4 per region).⁷⁴ Candidates were asked to complete the on-line survey concerning their knowledge of TS and its relationship with devolution. The survey questions are set out in Appendix 8.

A first email (with a participant information sheet) was sent to candidates shortly before the election (Appendices 9 and 10) and a follow-up email sent after the election (Appendix 11).⁷⁵ There were 247 constituency candidates and an attempt was made to contact each one. In each of the regional elections, electors had at least 10 choices.⁷⁶ Attempts to contact regional candidates was more targeted for (mainly) reasons of practicality (there were 271 candidates standing). Identifying individual contact details from up to 12 candidates in a list was often difficult or not possible.⁷⁷ And for time reasons, unless obvious, the search for details was prioritised, starting with candidate lists of groups more likely to have representation in the NAW: eg, there was no search in respect of the Communist Party of Britain or Abolish the Welsh Assembly Party. Also, no attempt was made to identify candidate details for the Official Monster Raving Loony Party due to the nature of that party.

Party Manifestos

Allied to the NAW candidate survey, and having regard to the issue of TS profile, a search was undertaken for TS and police related references in manifestos of what were judged to be the six main registered political parties with candidates standing

⁷⁴ Although an individual candidate can stand for election, the choice of vote is invariably between registered political parties. See: GWA 2006, pt 1.

⁷⁵ This started on 22 April 2016. The survey was closed on 14 June 2016.

⁷⁶ South Wales Central region had the most with 13 choices. See:
<<http://senedd.assembly.wales/mgElectionAreaResults.aspx?XXR=0&ID=297&RPID=1508599703>
> accessed 26 April 2019.

⁷⁷ It was common that there were no contact details that could be identified.

for election.⁷⁸ Police related references were searched for comparative purposes. Other parties' electoral literature was not considered, mainly for reasons of practicality and questioning the likely benefit.

Follow-up

TS and its relationship with devolution, informed by the findings of the survey, was further explored in an interview with an elected NAW member.

PCC Candidate Survey

There were 40 separate PCC elections for police service areas in England and Wales. Although the thesis is Wales focussed, the relationship between TS and the police is common to both England and Wales. Therefore, candidates were approached at all those elections. There were 188 election candidates, and an attempt was made to contact each one. The survey questions are set out in Appendix 12.

A first email (with a participant information sheet) was sent to candidates shortly before the election (Appendices 13 and 14) and a follow-up email sent after the election (Appendix 15).⁷⁹

Surveys' Data Analysis

There was a separate data analysis process for each survey but as the process, with one exception, was effectively the same, they are considered together. Again, the Braun and Clarke phased approach was adapted. After initial reading and familiarisation (phase 1), each question, together with responses, were looked at separately and themes identified (phase 2). Consideration was then given to those themes in an overall context (phase 3). From that a group of 'candidate' themes were identified and refined (phase 4). Themes were then confirmed and defined (phase 5): eg, that TS had low profile with participants and that knowledge was restricted to consumer protection. Writing-up followed (phase 6) (see Chapter 11).

One aspect of material difference between the surveys was that the NAW candidate survey included analysis of six manifestos. Unlike data analysis for the main

⁷⁸ Searches were undertaken of manifestos for Plaid Cymru, the Wales Green Party, the Welsh Conservative Party, the WLP, the Welsh Liberal Democrat Party and UKIP.

⁷⁹ As n 75.

secondary data gathering, the focus was to identify specific references. This exercise was complementary to the NAW candidate survey and informed analysis of data gathered.

FOIA 2000 Data Gathering and Analysis

Again, as an inductive exercise, Braun and Clarke phased approach was adopted. After initial reading and familiarisation (phase 1), first analysis involved statistical analysis (phase 2). The next stage focused on searching for themes (phase 3). From that a group of 'candidate' themes were identified and refined (phase 4). Those themes were then confirmed and defined (phase 5): eg, that TS had low profile with WG and LG. Writing-up followed (phase 6) (see Chapter 12).

Bringing It All Together

Distinct data gathering and analysis processes have been discussed. Overall findings provided the base for the discussion, conclusion and recommendations (see Chapter 13).

Research Design limitations

While this chapter seeks to justify the research design and its implementation it also acknowledges limitations. Earlier, in the context of research validity, potential for bias and values to intrude on the research was acknowledged. This acknowledgement is important as it enables measures to be taken to minimise their influence. That potential influence has been acknowledged and measures taken as previously described.

Summary

The chapter has explained the thesis research strategy together with the research design and its implementation. Chapter 3 considers the critical theoretical framework in which the thesis is placed.

Chapter 3 - Critical Theoretical Framework

It is necessary to place TS in a theoretical framework. It helps develop critical understanding of TS. So, in Chapter 1, legal metrology, consumer protection and business protection were identified as strands to TS. These strands can be placed in a broader framework; doing so provides a touchstone for the evaluation of current TS arrangements and informs a critical response. Using justice as a critical lens might point to gaps in, or ineffective, consumer protection caused through inadequate resourcing or structural issues; or that lens might highlight inadequate business protection out of which unfairness arises. In placing TS in a theoretical framework, this chapter considers TS under four categories: economic efficiency; rule of law; human rights and justice; and promotion of well-being. These have been chosen to reflect the thesis focus on TS and Wales.

Economic Efficiency and TS

An efficient economy can be defined as one in which the system for economic exchange has integrity and there is optimum efficacy in its workings. Two main ways in which TS can contribute to economic efficiency are mentioned: legal metrology arrangements; and effective working of the law of contract for regulating exchange.

Legal metrology: A system of common measurement is part of the economic infrastructure. Thus, Birch asserted that:

Trust and confidence inherent in the measurement system is a significant component of the social capital of all societies and contributes to the maintenance of a civil society.⁸⁰

Swann identified four main areas where measurement has important beneficial economic impact:⁸¹ increasing business productivity, supporting innovation, reducing transaction costs between buyer and seller, and helping those who have an interest in 'product characteristics to ensure quality, safety, purity, dosage accuracy and so on'.⁸² Two contributing causes to economic efficiency are noted within Swann's areas: the psychological and the technical. As to the psychological, while touching on consumer and business protection (eg, re dosage accuracy or safety),

⁸⁰ John Birch, *Benefit of Legal Metrology for the Economy and Society* (International Committee of Legal Metrology 2003) 9.

⁸¹ GM Peter Swann, *The Economics of Metrology and Measurement* (National Measurement Office 2009).

⁸² *Ibid* 67.

this can contribute to economic efficiency because of trust and confidence in the measurement system. As to the technical, the measurement system can contribute towards economic efficiency by removing barriers. Therefore, eg, in relation to reducing transaction costs:

One of the most common sources of market failure is asymmetric information between buyers and sellers, where the buyer cannot distinguish good products from bad and therefore does not buy. Often this arises because measurement is difficult or expensive.⁸³

Legal metrology facilitates achievement of the benefits associated with a system of measurement. In more practical terms the 1951 Hodgson Committee Report⁸⁴ asserted that legal metrology had three main purposes, two of which were:

[1]...to establish a uniform system of weight and measure for use throughout the country...[so that there is]...a common language of quantity between buyer and seller.[2]...to provide some system of control over all weighing and measuring equipment...to ensure that it conforms...that it is kept in an accurate condition and that its nature and construction do not facilitate the perpetuation of fraud by the user...⁸⁵

TS focuses on the second purpose as TS is a 'system of control' to ensure legal compliance with measurements. If there is an effective system in place, this facilitates public confidence in the integrity of the system of common measurement and contributes to its efficacy because of public trust that develops.

Law of contract: The law of contract provides the economic cement that binds commercial activity. Two main aspects to its effective working are: clarity concerning rights and obligations; and systems for resolution of disputes and enforcement.

Clarity concerning contractual rights and obligations promotes confidence in economic exchange: eg, under the CRA 2015 consumers have statutory rights when entering into contracts with traders for goods, digital content or services.⁸⁶ Education is important for ensuring that traders and consumers are aware of rights

⁸³ Ibid iv.

⁸⁴ Board of Trade, *Report of the Committee on Weights and Measures Legislation* (Cmd 8219, 1951). The committee is referred to as the Hodgson Committee, named after its chair Edward Hodgson.

⁸⁵ Ibid 1.

⁸⁶ Pt 1.

and obligations. TS has a role and can contribute to the efficacy of legal arrangements through advice to, and education of, traders and consumers.

As to the systems for resolution of disputes and enforcement, this covers the criminal or civil justice systems, or alternative systems (eg, through arbitration or ombudsmen). TS is a public enforcer and so is part of the enforcement system. Carrying out criminal and civil enforcement arising from breach of contract is a core activity. It can also contribute to private (civil) enforcement through advice to those affected by breach of contract. The integrity of those systems is important. TS can materially contribute to their efficacy.

Overview

TS contributes to economic efficiency through effective legal metrology practice and promoting effective working of the law of contract. It is important though to place TS contribution into a broader landscape. There are influences which will impact on TS effectiveness. These include the resourcing of TS and the effectiveness of others such as those who dispense justice.

The Rule of Law and TS

There is linkage between the rule of law and effective TS delivery. Ineffective TS delivery detracts from the rule of law. The core constitutional position of the rule of law in the UK is formally confirmed in the Constitutional Reform Act 2005:

This Act does not adversely affect...the existing constitutional principle of the rule of law.⁸⁷

As TS must enforce law, it must have a corresponding duty to promote the rule of law. But for this duty to have relevance there needs to be some precision about the term and its practical application. The Constitutional Reform Act 2005 provides no definition.

Dicey asserted that the rule of law is a core principle embedded in the UK constitution.⁸⁸ He gave it three meanings: that the way in which the state exercises its power must not be arbitrary, must be controlled by law and be limited; that

⁸⁷ S 1.

⁸⁸ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1885).

everyone must be subject to the law; and, that the general principles of the constitution are as a result of judicial decision making concerning rights of individuals through case law, contrasted with the declaration of rights through a written constitution.⁸⁹ Although Dicey is associated with the principle, it encompasses something that is much older: eg, echoing the principle, Aristotle said:

[W]e do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant.⁹⁰

More recently, at the birth of the United States of America, Paine wrote: 'that in America the law is king.'⁹¹ The principle in broad terms is associated with notions that society should be governed by laws, as opposed to arbitrary actions, and that no person should be above the law. This is consistent with Dicey's first two meanings. It can be argued that Dicey's third meaning suggests that the rule of law refers to substantive content (ie, guaranteeing basic rights). Such an argument has been contested. Thus, Raz wrote:

It is evident that [the] conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, majorities, or any other way. It says nothing about fundamental rights, about equality, justice⁹²...The law may,[eg], institute slavery without violating the rule of law.⁹³

Raz justifies this by saying that:

If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function⁹⁴...Sacrificing too many social goals on the altar of the rule of law makes the law barren and empty.⁹⁵

In his view, the term has become a slogan and to avoid this it should not be confused with such things as 'democracy, justice, equality...[or] human rights of any kind'.⁹⁶ That is not to say that those other values should not be pursued but they do not form part of the rule of law.

⁸⁹ Gary Slapper and David Kelly, *The English Legal System* (Cavendish 2004) 15–16.

⁹⁰ Aristotle, *The Nichomachean Ethics* (William David Ross tr, written c350 BCE, OUP 2009) 91.

⁹¹ Thomas Paine, *Common Sense* (1776, OUP 1995) 34.

⁹² Joseph Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (OUP 1979) 214.

⁹³ Ibid 221.

⁹⁴ Ibid 211.

⁹⁵ Ibid 229.

⁹⁶ Ibid 211.

Conversely, the preamble to the Universal Declaration of Human Rights (UDHR) declares that 'human rights should be protected by the rule of law'.⁹⁷ The preamble to the European Convention on Human Rights (ECHR)⁹⁸ similarly links the rule of law for the 'collective enforcement of certain of the rights stated in the [UDHR]'. The European Court of Human Rights (ECtHR) said that the ECHR 'draws its inspiration' from the rule of law.⁹⁹

Consideration of human rights within the critical theoretical framework is linked to the ECHR and not to other human rights conventions or documents. This is for two reasons: first, because the ECHR has universal application in the UK (and not to a particular group such as children or disabled people) and, second, because the ECHR has domestic effect due to the Human Rights Act 1998 (HRA 1998).

How can the principle be defined? Is it the narrower procedural version favoured by Raz or the more content-based definition envisaged by the UDHR? Bingham distinguishes these as 'thin' (Raz) and 'thick' (UDHR) definitions. He states that 'I would roundly reject [Raz's definition] in favour of a 'thick' definition, embracing the protection of human rights...'.¹⁰⁰ Bingham also provides a general definition of the rule of law:

The core of the existing principle is...that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.¹⁰¹

He then breaks down that definition to "try and identify what the rule of law really means to us'. He argues that it involves eight 'suggested [sub-]principles'.¹⁰² These have the merit of drilling into the detail of the general principle and providing a base from which to explore its application.

The key distinction between Raz and Bingham's sub-principles relates to human rights. According to Bingham's fifth sub-principle '[t]he law must afford adequate

⁹⁷ United Nations, *Universal Declaration of Human Rights* (1948).

⁹⁸ The full title is the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁹⁹ *Engel v The Netherlands* (no 1) (1976) 1 EHRR 647, 672, para 69.

¹⁰⁰ Tom Bingham, *The Rule of Law* (Reprint edn, Penguin 2011).

¹⁰¹ *Ibid* 8.

¹⁰² *Ibid* 37.

protection of fundamental human rights.’ Raz would reject this. But Bingham cannot be accused of sloganising or of trying to incorporate a multitude of other values. He gives a definition that attempts to have some precision and practical application. Moreover, if promotion of the rule of law as a value permits slavery, it can be argued that the gloss on the ideal fades. Admitting protection of fundamental human rights overcomes this, especially if the term can be expressed in a practical and (relatively) precise way. In considering the Constitutional Reform Act 2005, should ‘rule of law’ be interpreted in a ‘thick’ or ‘thin’ sense? There has been no judicial decision directly on the point. The HRA 1998 states that ‘[s]o far as it is possible to do so, primary legislation...must be read and given effect in a way which is compatible with [ECHR] rights.’¹⁰³ Given the link from the UDHR to the HRA 1998¹⁰⁴ via the ECHR, a judicial decision is more likely to side with Bingham rather than Raz, and the ‘thick’ interpretation preferred.

It was stated before that the TS is under a duty to promote the rule of law, but that for this to be relevant there must be some precision about its meaning and practical application. Bingham has enabled this to be done. TS enforcement therefore can make a direct contribution to upholding the rule of law. This applies, especially, to the way that the TS exercises its power (sub-principle 4). But the ability of TS to carry out enforcement is affected by others. These extraneous influences are relevant to TS critical evaluation. By way of illustration:

- Concerning, accessibility to the law (sub-principle 1), although it can lobby for law change and contribute to consultation procedures, TS is not a law maker.
- As to upholding equality before the law (sub-principle 3), some aspects of enforcement effectiveness are within TS control, but other aspects are not if there is less enforcement due to reduced resourcing. The same distinction with regards to enforcement can be made for upholding sub-principle 5 (adequate protection of fundamental human rights). Performance will depend on the skill in which the TS plans its work within available resources.
- TS does not administer the civil justice system (sub-principle 6). If accessibility to the system is decreased through, say, court closures, that is outside TS control.

¹⁰³ S 3.

¹⁰⁴ Also, a court when determining any question that arises in connection with an ECHR right must take into account, among other things, any ECtHR case law (HRA 1998, s 2).

- TS is not responsible for the establishment and administration of fair adjudicative procedures (sub-principle 7).
- TS is not responsible for upholding the rule of law outside of the UK (sub-principle 8).

Further exploration of the application of Bingham's sub-principles to TS is set out in Appendix 16.

Overview

The rule of law is a core UK constitutional principle. LAs as LWMAs have a duty to enforce TS law and it must follow that in doing so the rule of law is promoted and upheld. But what that duty requires can only be measured if there is some certainty about the meaning of 'rule of law'. This has been provided through Bingham and includes the protection of human rights. The TS duty to protect and uphold the rule of law, therefore, extends to the protection of human rights.

Human Rights & Justice and TS

Under the HRA 1998, it is unlawful for a public authority, such as an LWMA, to act in a way which is incompatible with an ECHR right¹⁰⁵ and a statutory tort is created for a breach where loss arises to a person.¹⁰⁶ There are two duties, therefore, concerning human rights: under the HRA 1998 and, if Bingham's argument is accepted, within the duty to promote the rule of law.

As to the effect of those duties, in 2018 the UK Supreme Court in *Commissioner of Police of the Metropolis v DSD and another*,¹⁰⁷ drawing on ECHR caselaw, ruled that the positive obligation imposed by article 3 of ECHR extends to there being an operational duty to conduct a proper enquiry into behaviour amounting to a breach of article 3. The main area of dispute in the case concerned the nature of the positive obligation imposed by article 3 and, in particular whether the obligation related to systemic failures but not operational failures. The case involved the rights of two victims who had been sexually assaulted by the convicted sex offender, John Warboys. TS cases can involve article 3 consideration: eg, cases involving aggressive

¹⁰⁵ S 6.

¹⁰⁶ S 7.

¹⁰⁷ [2018] UKSC 11.

commercial practices. The discussion about the case study in Figure 2 below mentions this. As to the extent of that positive obligation, the Supreme Court case extends that duty in article 3 cases to operational failures. It is unlikely that the duty would be similarly extended to all ECHR failings and a more appropriate starting point would concern systemic failings, such as breach of statutory duty to enforce law as a result of insufficient resourcing and where enforcement deserts emerge. The Supreme Court considered matters in the context of the HRA 1998 and, as it was not argued, not the rule of law. That said, it would seem illogical if the extent of obligation was to be different dependent on the source of the obligation, especially as the same ECHR case law would be relevant in each of the two contexts.

There follows specific consideration about human rights in a TS context and the relationship between human rights and justice. If rights are denied, or there is discrimination in the enjoyment of rights, unfairness and injustice can arise. Human rights can be protected by effective TS delivery. Justice can be reflected in economic outcomes.

What are Human Rights?

Sen draws a distinction between rights as ethical claims and rights that are enshrined in law. Human rights are the former and are:

really strong ethical pronouncements as to what should be done. They demand acknowledgement of imperatives and indicate that something needs to be done for the realization of these recognized freedoms that are identified through these rights.¹⁰⁸

They have normative value; and may be the moral bases for legal rights (as giving effect to 'ethical pronouncements'). The Preamble to the UDHR asserts that 'human rights should be protected by the rule of law', a statement that is premised on the assumption that human rights are ethical claims. Sen makes the distinction as others have argued against the "softness" or the 'mushiness' of the conceptual grounding of human rights'.¹⁰⁹ Placing human rights in an ethical framework can overcome this objection. Ethical claims by their nature can be 'soft' or 'mushy'. Conversely, legal

¹⁰⁸ Amartya Sen, *The Idea of Justice* (Penguin 2010) 357–358.

¹⁰⁹ Ibid 356. Eg: Jeremy Bentham wrote that the French Revolution claim of 'rights of man' was 'simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts'; Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution* (1792).

claims can introduce precision and enforcement.¹¹⁰ An effectiveness of a legal claim can be judged in its own circumstances. Its underlying rationale might be to advance a moral claim (eg, the right to life) but the legal claims that promote that moral claim can exist in various contexts (eg, the law of murder and manslaughter or law about workplace or product safety). There also must be articulation about the content of those moral claims. Sen describes the UDHR as an ‘articulated recognition of human rights’ and a ‘template for new laws...to legalize those human rights across the world’.¹¹¹

Another aspect of Sen’s analysis is an emphasis on obligations as well as rights and ‘the need to accept some social obligations to promote or safeguard’ such rights;¹¹² ensuring meaningful enjoyment of human rights must mean placing reciprocal obligations on others. If rights are to apply, reciprocity of obligation and non-discrimination in their enjoyment are essential for conditions of justice. The legal framework and its effectiveness are key contributors to achieving justice. The concept of justice and its application are explored later.

ECHR

The UDHR is a template for the ECHR.¹¹³ Thus the rights set out in the ECHR (ECHR rights) promote human rights that have been identified as ethical claims in the UDHR. And to emphasise the distinction established by Sen, ECHR rights are to be distinguished from the human rights that they promote. This is more than a semantic distinction; conceptually it enables human rights to be advanced other than through law:

Because of the importance of communication, advocacy, exposure and informed public discussion, human rights can have influence without necessarily depending on coercive legislation.¹¹⁴

¹¹⁰ Bentham, Sen argues, fails to distinguish between ethical and legal claims and confines the term ‘right’ unjustifiably to a legal context (Sen (n 108) 361–362).

¹¹¹ Ibid 359. For other examples of articulations see: *Declaration of Independence* (United States of America, 1777) and, what agitated Bentham, *Declaration of the Rights of Man and Citizen* (France, 1789).

¹¹² Sen (n 108) 358.

¹¹³ The Preamble to the ECHR refers to ‘taking the first steps for the collective enforcement of certain of the rights stated in the [UDHR].’

¹¹⁴ Sen (n 108) 365.

HRA 1998

At a UK level ECHR rights were strengthened due to the HRA 1998. ECHR rights were given domestic effect by enabling those rights to be enforced in UK courts. As mentioned, under the HRA 1998, it is unlawful for a public authority, such as an LWMA, to act in a way which is incompatible with an ECHR right.

ECHR, UDHR and TS: The Relationship

The role of promoting human rights within the rule of law was previously discussed. However, and referring to Sen's distinction, human rights promotion is not confined to law: eg, it could be through consumer education and public discussion of issues. TS can contribute in this wider role through education and advice to consumers and business.

Appendix 17 compares relevant UDHR rights with ECHR rights and makes comment from a TS perspective. The overall key point is that ECHR rights flow from UDHR rights and TS effort contributes to their promotion.

ECHR Application to TS

The general application of the ECHR to TS is now explored. It is helpful to identify categories of application as this assists consequent analysis. Examination of TS law from an ECHR rights and human rights perspective can place it into three categories:

- **Category 1:** This covers a person subject to investigation or prosecution. This would include a trader whose premises is subject to routine inspection.
- **Category 2:** This covers a person suffering detriment arising from breach of TS law: ie, a victim.
- **Category 3:** This covers a person not falling within category 1 or 2. It is a default category and includes a witness who is not within category 2 or a person about whom information has incidentally been gathered as result of covert observation. It also includes people who are more indirectly affected by TS enforcement: eg, people who have confidence to trade because there is accuracy of measurement.

Category 1 ECHR rights are formally recognised. There are regimes that address ECHR rights issues: eg, regimes established by the Police and Criminal Evidence Act 1984 (PACE 1984) or the Regulation of Investigatory Powers Act 2000 (RIPA 2000).

Specific emphasis relates to upholding article 6 (right to a fair trial) and article 8 (right to respect for private family life). As people subject to investigation can be subject to prosecution and, if convicted, punished, it is not difficult to understand why these regimes are in place.

For category 2, there is no comprehensive framework for the protection of ECHR rights of victims. In two cases it can be argued there is some protection. First, there can be protection in specific areas such as child protection (Children Act 1989, Part V), slavery and forced labour (Modern Slavery Act 2015, Part 5) or adult safeguarding (SSWWA 2014, Part 7). There is linkage to ECHR rights because of the regimes established.

Second, it can be argued that creation of offences promotes protection of ECHR rights: eg, the law against murder upholds article 2 (right to life) or the law against theft and fraud upholds article 1 of the First Protocol (protection of property). There is direct correlation between ECHR rights and the laws that protect them. But that connection will not always be made where, say, there are a set of specific and detailed regulations because as ‘regulations’ they are identified as part of regulatory burden (or ‘red tape’). One such example is the Plugs and Sockets etc. (Safety) Regulations 1994.¹¹⁵ These are enforced by TS. Admittedly, ‘Safety’ in the title does provide an indication of purpose but it is suggested that a link between TS enforcement and article 2 is not in practice made, yet safe plugs and sockets save lives. The technical way in which the regulations’ explanatory note is drafted illustrates this approach, masking the underlying rationale of protecting people from harm, eg:

These Regulations re-enact with modifications the provisions of the [previous regulations] and make provision for the first time for certain requirements to be satisfied in relation to appliances.

Also, with category 2 although such laws in themselves protect ECHR rights, TS enforcement processes do not reflect this: eg, where alleged offences are investigated the natural focus will be on category 1 people and protection of their ECHR rights.

¹¹⁵ SI 1994/1768.

As to category 3, this is not explored in depth as the focus is on categories 1 and 2. The PACE 1984 and RIPA 2000 regimes do take account of ECHR rights of category 3 people. The *Which?* Case study below also touches on category 3.

It has been argued that TS has a duty to promote protection of ECHR rights under the rule of law, in addition to a duty under the HRA 1998 to not act in a way which is incompatible with ECHR rights. For those duties to be fulfilled there needs to be understanding of ECHR rights implications to TS practice. Crucially, making a distinction between the ECHR rights of a trader (T) engaging in UCPs (a category 1 person) and a consumer affected by T's actions (a category 2 person) can facilitate that process. Yet, in undertaking the thesis, no narrative or debate was identified concerning TS enforcement and category 2. A possible implication is that there is failure to carry out those duties for category 2. Reciprocity of obligation was previously linked to securing human rights in practice. If there is discrimination in the enjoyment of ECHR rights between category 1 and 2 people, there is breach of article 14 (no discrimination in enjoyment of ECHR rights).

ECHR: Application to TS: Case Studies

Having explored the general application of ECHR rights there follows more applied consideration through use of case studies. Consideration is given to the potential application of ECHR rights to TS practice and related areas.

Figure 2
Case Study - A Vulnerable Person¹¹⁶

This concerned a female 82-year-old retired schoolteacher (P) living independently in a privately owned detached house who was cold-called by two 'youngish and scruffy' males. They said they had been doing some work for neighbours and noticed that P's garage roof needed repairing. One went onto the roof and said repairs were necessary to stop it collapsing. P was also told if there was water ingress there would be major problems with the electrics and she might be left without electricity. P was worried at this thought and was told repairs would cost around £200. She authorised them to do the work.

They were there nearly all day and then told P the actual cost was £2000. When she said she didn't have the money at the house their mood changed, and they became 'nasty'. They then offered to drive her to her bank to allow her to collect the money. Their mood had changed again, and she thought this offer 'kind'. She accepted it, collected the money, paid it over and was taken back to her home. They then drove away.

Subsequent inspection of the roof by a friend revealed that no repairs had been carried out. P did not report the incident as she thought no-one would be interested and she felt a 'bit silly'. Subsequently she felt unsafe in her home because she was worried about them returning as they knew she had money in the bank. P had also worried at what might have happened had she not had the money to pay them. In addition, P also said that she now kept more money in the house because, if she had to pay someone in the future, she would not want that person to get nasty and be escorted to the bank again. To help P feel safer her son had fitted a chain to the front door and displayed a notice saying that P would not buy things at the front door.

Vulnerable Person Case Study: Relevant ECHR Rights, Application and Wider Consideration

P is a category 2 person. The most obvious applicable ECHR rights are article 3 (prevention of torture, inhuman or degrading treatment or punishment), article 5 (right to liberty and security), article 8 (right to respect for private and family life) and article 1 of the First Protocol (protection of property).

P was subject to an unpleasant experience. Behaviour by a person in a dominant position exercising undue influence over another (especially where that other person is vulnerable) can amount to degrading treatment (article 3).

Under article 5 everyone has the right to liberty and security of person. Through this experience both liberty and security of P was adversely affected. She was

¹¹⁶ The case study is summarised from a record of interview with P contained in an undergraduate dissertation: Jacqueline Hotchkiss, 'Victim or Statistic? The Psychological and Social Impact of Being a Victim of a Scam Including Research Investigating the Reporting of Scams and Referral to Other Agencies' (UWIC 2009).

‘persuaded’ to have the work done and then pressurised to pay an excessive price and go to the bank to collect money. After the event, she felt vulnerable in her own home in case the people returned.

Under article 8 everyone has the right to respect for their private life and home. There was breach of that right. The experience was unjustified and a direct intrusion on P’s home with consequential adverse effect on how she then lived her life.

Under article 1 of the First Protocol everyone is entitled to the peaceful enjoyment of their possessions. The experience involved interference with the ‘peaceful enjoyment’ of her home and money. And this had continuing effect.

The case study involves potential offences under the CPUTRS 2008,¹¹⁷ which TS has a duty to enforce. These ECHR rights have potential application in similar style cases involving exploitation of vulnerable people in which TS is routinely involved.

ECHR rights might also apply to activity as it affects traders: eg, UCPs can undermine legitimate trading. Although the effect is more indirect, in P’s case, traders affected are category 2 people. Concerning article 5, a person’s ability (liberty) to lawfully trade might be restricted or prevented because he or she is undercut by illegitimate trading. Although not drawn from the case study, concerning article 1 of the First Protocol, the right of a trader to protection of his or her IP property can be undermined due to counterfeiting.

¹¹⁷ SI 2008/1277.

Figure 3 Case Study – Whirlpool¹¹⁸

In November 2015, Whirlpool the owner of the Hotpoint, Indesit and Creda brand names announced a product repair programme for approximately 5.3 million faulty tumble dryers manufactured between April 2004 and September 2015 and sold in the UK. Investigations into reports of fires led to the alert. Pending repair or replacement, owners were told by Whirlpool that dryers could still be used but must not be left unattended and be cleaned after every use. The advice and repair programme had been agreed with Peterborough TS (PTS). This was an 'outreaching repair campaign to modify the affected products, rather than a product recall.'¹¹⁹

In December 2016 *Which?* started judicial review proceedings against PTS concerning its handling of the case. This followed a London Fire Brigade investigation that a Whirlpool tumble dryer was to blame for a tower-block fire in Shepherd's Bush, and PTS's failure to review matters. PTS subsequently changed its position and required Whirlpool to warn owners to stop using dryers until they were repaired. The judicial review application did not then proceed.

Whirlpool Case Study: Relevant ECHR Rights, Application and Wider Consideration
The people affected are category 2 people. The primary ECHR rights applicable here are article 2 (right to life), article 5 (right to liberty and security) and article 1 of the First Protocol (protection of property). Articles 2 and 5 are relevant because of the potential for loss of life or potential interference to security of person caused by injury due to an unsafe product. A defective product can also be linked to damage to property thereby adversely affecting a person's right for it to be protected and have 'peaceful enjoyment' (article 1 of the First Protocol). The preventative role that the TS can play is highlighted in this case study. TS is responsible for enforcing a range of product safety legislation (see Chapter 4).

¹¹⁸ Sources: Kevin Peachey, 'Danger Dryers in 11-Month Repair Wait' *BBC online* (11 March 2016) <<http://www.bbc.co.uk/news/business-35744313>> Accessed 13 March 2016); *Which?*, 'We Launch Legal Challenge to Trading Standards Over Dryer Fires' [February 2017] *Which?* 5; Peter Vicary-Smith, 'A Win on Whirlpool, but Is There Cause to Celebrate?' [April 2017] *Which?* 15.

¹¹⁹ The statement was included as an appendix to a letter from the Managing Director of Whirlpool UK to the Chair of the House of Commons Business, Innovation and Skills Select Committee (Maurizio Pettorino letter to Iain Wright (25 February 2016)).

Figure 4
Case Study – Which?

*Which?*¹²⁰ is a UK registered charity membership organisation that exists ‘to make things better for consumers’¹²¹ in their purchase of goods and services. It promotes consumer interests through a variety of methods (eg, a monthly magazine, a website and other media platforms, direct activity to persons or organisations) by, eg, reviewing and testing products, offering independent advice, carrying out research and campaigning.

Which? Case Study: Relevant ECHR Rights, Application and Wider Consideration
Those people involved with *Which?* will do so as category 3 people. The primary ECHR rights applicable here are article 10 (freedom of expression) and article 11 (freedom of assembly and association).

Article 10 includes the ‘freedom to hold opinions and to receive and impart information and ideas’. This includes the right for consumers to freely form opinions about products for sale and impart and receive related information. *Which?* purposively contributes to this through its core activity. Under article 11 there is the right to freedom of peaceful assembly and free association with others. As an organisation *Which?* associates with consumers and exercises the right of freedom of assembly: eg, at press conferences convened to further consumer causes. These rights are also relevant to others that seek to further consumer interests: eg, print and broadcast media, and consumer organisations. Articles 10 and 11 are also relevant to traders through promoting products or forming membership groups to protect or advance interests.

As the role of *Which?*, the Whirlpool case study demonstrates how this can have direct TS impact. Promotion of consumer interests through the application of articles 10 and 11 can lead to more educated consumers who do not therefore need to rely on TS. Effective application of those rights through campaigning and lobbying can lead to action (as in the Whirlpool case study) or law reform and other ECHR rights are then better protected such as article 2 (right to life) or article 5 (regarding security of person).

¹²⁰ *Which?* Is the brand name for the Consumers' Association.

¹²¹ From the ‘*Which?* Promise’.

Case Studies' Summary

The case studies illustrate the relevance of ECHR rights to TS in practical application. They demonstrate the relevance of ECHR rights and TS to category 2 people and, in the case of category 3 people, those in wider society. In particular, TS enforcement can impact the enjoyment of ECHR rights for category 2 people. And a failure to enforce those rights could amount to a failure of the two duties on TS to protect human rights.

One theme emerging from the case studies' exploration concerns the application of ECHR rights to traders. As a preliminary point: how can a trader with corporate status have ECHR rights? By definition, it is not human. Three bases have been identified and these are set out in Appendix 18.

Justice

To Rawls justice is pivotal in societal arrangements: 'Justice is the first value of social institutions, as truth is of systems of thought'.¹²² The pursuit of justice is also a societal rallying cry for others such as the police service and the courts (there is the 'justice' system). Justice has a high profile.

Rawls' theory of justice as fairness is rooted in a contemporary application of social contract theory. Alongside the likes of Hobbes¹²³ and Locke¹²⁴ before him, Rawls derives his guiding principles by which society should be ordered through considering what people would agree to as a condition of entry into societal arrangements. Rawls believed two principles of justice would be chosen. The first principle is that:

[E]ach person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others.¹²⁵

This has priority over the second principle which is concerned with the distribution of resources:

[S]ocial and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all.¹²⁶

¹²² John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999) 3.

¹²³ Thomas Hobbes, *Leviathan* (1651).

¹²⁴ John Locke, *Second Treatise of Government* (1689).

¹²⁵ Rawls (n 122) 53.

¹²⁶ *Ibid.*

In summarising those principles Rawls states:

All social values - liberty and opportunity, income and wealth, and the social bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.

Injustice, then, is simply inequalities that are not to the benefit of all.¹²⁷

Linking this to human rights, Sen argues that ensuring meaningful enjoyment of human rights must mean placing reciprocal obligations on others. Therefore, if this does not happen, there are inequalities and injustice in consequence. This moral claim is given legal effect through article 14 (no discrimination in enjoyment of ECHR rights). If inequalities can be linked to specific ECHR rights, there will be discrimination in breach of article 14. Rawls' principles therefore provide a test to apply to identify inequality and consequential discrimination between people in the enjoyment of ECHR rights.

Therefore, under the first principle there is the right of a person to trade unless incompatible with a similar right for others. It might be incompatible where there is abuse of a dominant market position by a trader. Competition law designed to restrict monopoly behavior can be justified according to the first principle. Similarly, consumer protection measures might be justified where there is inequality of bargaining power between (potentially) contracting parties.

As to the second principle, powers given to TSOs to enforce legislation are not given to others (there is therefore inequality in the distribution of power). However, inequality can be justified as those powers' exercise is reasonably expected to be to everyone's advantage: ie, promoting fair trading. And the position of TSO is an office which is open to all.

Injustice can arise from inadequacy in enforcement: eg, related to resourcing. For Rawls' first principle to apply, rights must be effectively upheld. Therefore, in addition to legal pronouncement, issues such as resourcing and competence are relevant, as are issues of integrity.

¹²⁷ Rawls (n 122) 54.

In applying Rawls' principles to these contexts a distinction is drawn between distributive and corrective justice (a distinction previously drawn by Aristotle). Distributive justice is concerned with the 'distributions of honour or money or other things':¹²⁸ eg, while it can be argued that inequality of bargaining power for consumers has been substantively addressed through distributive justice measures, this has not been the case for trader-to-trader activity.

Corrective justice is concerned with rectifying unfairness that might arise in transactions between individuals. Aristotle wrote from a civil perspective so in the case of injustice the wrongdoer should provide restoration to the wronged.¹²⁹ Actions for breach of contract, or in tort, involve the pursuit of corrective justice. By analogy responding to breach of the criminal law involves the pursuit of corrective justice. Punishment can be viewed as restoration to society for harm caused by the wrongdoer. TS enforcement is related to corrective justice.

In assessing the overall effectiveness of TS the corrective justice role of LWMAs can be considered by application of Rawls' principles in conjunction with taking account of distributive justice. Distributive justice matters having influence on corrective justice outcomes include resourcing and structural efficiency. There can also be less obvious but external influences such as the effectiveness of the court system. The Woolf Report,¹³⁰ which led to reform of the civil justice system, painted an unimpressive picture of that system at that time. If individuals cannot enforce rights, those rights are worthless and part of the deterrence for non-compliance is removed. Thus, the less scrupulous trader may feel better able to act unlawfully and not face consequences (whether criminal or civil). This can increase the need for corrective justice activity by TS.

Overview

Adopting Sen's analysis, the distinction is drawn between human rights as moral claims and law which advances those moral claims. The UDHR articulates human rights as moral aims and these are advanced as legal claims under the ECHR.

¹²⁸ Aristotle (n 90) 83.

¹²⁹ Aristotle (n 90).

¹³⁰ Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HM Stationery Office 1996).

Significantly, attached to enjoyment of those rights are duties of obligation. In particular, with reference to reciprocity of obligation, article 14 prohibits discrimination in the enjoyment of ECHR rights. If there is discrimination and breach of article 14, injustice can arise. The TS role in protecting human rights contributes to securing justice. Rawls' principles of justice help identify contexts where injustice might arise.

Promotion of Well-being and TS

Promotion of well-being is included because it is a key policy priority for devolved government in Wales. The SSWWA 2014 and the WFGWA 2015 reflect this priority. The WFGWA 2015 is the main focus but the SSWWA 2014 is the starting point as it defines 'well-being'.¹³¹ It is a broad definition and includes a person's well-being concerning physical and mental health, protection from abuse, education and social and economic matters. For an adult, it also includes control over day-to-day life. TS can impact on individuals' well-being.

The WFGWA 2015 imposes a well-being duty on public bodies such as LAs to carry out 'sustainable development',¹³² which is defined as:

the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle...aimed at achieving the well-being goals.¹³³

The sustainable development principle means that public bodies for which the NAW is responsible 'must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs'.¹³⁴

There are seven well-being goals - a Wales that: is prosperous; is resilient; is healthier; is more equal; has cohesive communities; has a vibrant culture and thriving Welsh language; and is globally responsive¹³⁵ Most obviously TS can contribute towards economic well-being: eg, a fair and safe trading environment can promote a Wales that is prosperous and resilient. There is also cross-over with

¹³¹ S 2.

¹³² S 3.

¹³³ S 2.

¹³⁴ S 5(1).

¹³⁵ S 4.

contributing towards social well-being and a more equal Wales: eg, effective consumer protection enforcement can secure greater equality of bargaining power.

The WFGWA 2015 establishes the Future Generations Commissioner for Wales who is responsible for oversight of performance by public bodies.¹³⁶ The effect of the WFGWA 2015 is to place promotion of well-being as an overall core theme for devolved government and LG in Wales. The WFGWA 2015 also established public services boards each LA in Wales. Membership includes the LA and their role is to produce and review local well-being plans.¹³⁷ As part of LG, TS must therefore contribute to discharging that overall duty.

The SSWWA 2014 can also have related impact. People working under the SSWWA 2014 must seek to promote the well-being of people who need care and support and, also, their carers.¹³⁸ The SSWWA 2014 also establishes a safeguarding regime for adults at risk¹³⁹ (people experiencing, or at risk of, abuse and who are unable to protect themselves)¹⁴⁰ Abuse covers financial abuse (eg, having things stolen, being defrauded, being put under pressure in relation to money or other property, and having money or other property misused).¹⁴¹ There is an interface between the SSWWA 2014 and consumer protection: eg, concerning enforcement under the CPTRS 2008 against UCPs. Such practices often target vulnerable adults and financial abuse arises. The case study in Figure 2 illustrates this. TS can materially contribute to the effective working of the SSWWA 2014.

Overview

There is a duty on public bodies in Wales to carry out sustainable development and must set well-being objectives to meet the well-being goals. This is a core duty, and promotion of well-being must be considered when looking at TS in Wales, together with the more specific well-being duty established under the SSWWA 2014 for people at risk of harm.

¹³⁶ Pt 3.

¹³⁷ WFGWA 2015, pt 4.

¹³⁸ S 5.

¹³⁹ Pt 7. The Care Act 2014 establishes an adult safeguarding regime in England. See: Sally Lee, 'The New Landscape of Adult Safeguarding' in Lee-Ann Fenge, Sally Lee and Keith Brown (eds), *Safeguarding Adults: Scamming and Mental Capacity* (Sage 2017).

¹⁴⁰ S 126(1).

¹⁴¹ S 197(1).

Summary

There is an interrelationship between categories: promotion of economic efficiency through effective application of the law promotes the rule of law; effective promotion of the rule of law means that human rights can be protected because consumers are protected from economic abuse; in consequence, consumers have greater confidence in a fair-trading environment which improves economic efficiency; all this can contribute to the promotion of well-being for both traders and consumers (especially economic and emotional well-being). Having set out a critical theoretical framework, the development of TS is considered in Chapter 4.

Chapter 4 – Development of TS

Chapters 4 to 9 constitute the thesis' Literature Review. Chapter 4 first considers LG in Wales, as it establishes the structural base for TS. The market and freedom of contract is next considered. The belief in the free-market is a prominent theme in late 18th and early 19th century thinking. The law that developed reflected that prominence and has continuing effect. Conversely, the comparatively recent development of consumer protection is a reaction against the unchecked effect of the free-market.¹⁴² There then follows consideration of development of the TS portfolio. Finally, Chapter 4 discusses LWMA funding arrangements together with examination of the legal framework supporting TS enforcement (described as 'legal resourcing').

Local Government in Wales

Each principal council in Wales is the LWMA for its area. Examining how LG has evolved is central to the associated development of how TS is delivered in Wales. Also, as Wales was annexed to England in 1535, in examining LG in Wales it is necessary to look at LG in England and Wales.

The feudal system was the basis for social order until the 16th century. This was based on a social order of hierarchy with the monarch at the apex. Three types of civil authority emerged: the parish, the county (shire or 'Shyre') and the incorporated town (borough). There were two structural models: the parish/county and borough models. Parishes within a county exercised functions relating to law and order, provision of common amenities and to the relief of the poor. At the county level, justices of the peace were appointed by the Crown. They had various other functions including responsibility for highways and bridges and 'weights and measures'. The boroughs were urban areas outside the counties that had obtained privileges from the monarch through their grant by charter. These privileges included the right to conduct their own administration and to have their own justices of the peace. It is from these two models that the system of LG in England and Wales emerged.¹⁴³

¹⁴² Eg: the regulation of commercial money-lending by the Consumer Credit Act 1974.

¹⁴³ Kingsley Bryce Smellie, *A History of Local Government* (4th edn, Allen & Unwin 1968); Tony Byrne, *Local Government in Britain* (6th edn, Penguin 1994).

Annexation of Wales to England was effected by the Laws in Wales Act 1535¹⁴⁴ and Laws in Wales Act 1542.¹⁴⁵ The long title to the Laws in Wales Act 1535 encapsulates its intent:

An Acte for Lawes & Justice to be ministered in Wales in like forme as it is in this Realme [ie England].

The overall effect was that Wales was:

[i]ncorporated annexed united and subjecte to & under the Imperiall Crowne of this Realme, as a verrye member and joynte of the same.

An effect of this 'settlement' was that England and Wales was created as a single legal jurisdiction.¹⁴⁶ That jurisdiction has continued to the present (although increasingly questioned because of devolution).

LG in contemporary form can be traced back to the Local Government Act 1888 (LGA 1888). This amended 'the Law relating to [LG] in England and Wales'¹⁴⁷ and established an elected council for each administrative county.¹⁴⁸ Functions were transferred to each council from justices of the peace and from other sources such as government departments. This included legislation relating to 'weights and measures'.¹⁴⁹ The transfer also included holders of the office of inspector of weights and measures becoming council officers.¹⁵⁰ The LGA 1888 also created county borough councils based on existing boroughs; the broad effect was they had the same functions as county councils.¹⁵¹ TS in nascent form became part of LG.

The Local Government Act 1894 continued LG reform and established elected councils for urban districts and rural districts within county council areas (apart from London). The LGA 1888 also established a council for the county of London.

¹⁴⁴ 1535, 27 Hen 8 c 26.

¹⁴⁵ 1542, 34 & 35 Hen 8 c 26.

¹⁴⁶ Paradoxically the Laws in Wales Act 1542, except for Monmouthshire, gave Wales a separate system of courts from England with the creation of the court of Great Sessions which survived until 1830. Nevertheless, it was a single legal jurisdiction as English law was administered by that court. (Thomas Glyn Watkin, *The Legal History of Wales* (University of Wales Press 2007)).

¹⁴⁷ Long title.

¹⁴⁸ S 1.

¹⁴⁹ S 3(xiii).

¹⁵⁰ S 118(13).

¹⁵¹ Ss 31-39.

Subsequently, the London Government Act 1899 divided the county into metropolitan boroughs (aside from the City of London) with an elected council for each. Functions were transferred from London County Council, which continued in existence with a more strategic role.

Following these changes three structural models were in place in England and Wales: the single-tiered county borough council; the two-tiered system for London with London County Council and metropolitan borough councils; and the two-tiered system outside of London with county and district councils. But nothing was rooted in any distinction between England and Wales. It was not until the LGA 1972 that such a distinction did emerge. The LGA 1972 re-organised LG in England and Wales (outside of London and the Isles of Scilly). Although much of the LGA 1972 applied to both England and Wales it contained some separate provision. Part I made provision for England and Part II for Wales.

For Wales, the LGA 1972 established a two-tiered system of principal areas and councils. The first-tier principal area was the county and the second-tier principal area was the district. Eight county councils and 37 district councils were created.¹⁵² Responsibility for delivering TS rested with county councils as LWMAs.¹⁵³ The LGA 1972 Act also settled the land definition of Wales as ‘the combined area of the [eight] counties’ established by the LGA 1972.¹⁵⁴ The GWA 2006 clarified the maritime extent of Wales as ‘includ[ing] the sea adjacent to Wales out as far as the seaward boundary of the territorial sea’.¹⁵⁵

The current LG structure in Wales is governed by the LGA 1972, as amended by the Local Government (Wales) Act 1994 (LGWA 1994). The LGWA 1994 abolished the two-tiered system of principal councils and replaced it with a unitary (or one-tiered) system comprising 22 county and county borough councils. District and county council functions were combined and exercised from 1 April 1996 by each new principal council for its area. In the new structure, the number of LWMAs increased from eight to 22. This had significant implications for TS. One implication

¹⁵² S 20.

¹⁵³ S 201.

¹⁵⁴ Interpretation Act 1978, sch 1.

¹⁵⁵ S 158(1).

was that Environmental Health (EH), previously a district council function, and TS were now delivered by the same LA, thus facilitating more integrated working arrangements for TS and EH.

Although it made no specific reference to TS, the rationale for reorganisation set out in the government White Paper was to avoid duplication and inefficiency (supposedly) characteristic of a two-tiered system and to establish LAs ‘firmly-rooted in their communities’.¹⁵⁶ TS was raised, however, in proceedings for the Local Government (Wales) Bill over concern that a new LWMA ‘would on its own be too small to deliver effective [TS] control.’ That argument did not prevail but can be viewed as a portent for what subsequently developed.¹⁵⁷

The Market and Freedom of Contract

Earlier (especially 19th century) attitudes towards trading influenced the law. The law of contract reflected this; there was prevailing belief in contractual sanctity. Consideration about this is necessary as: the emergence of consumer protection can be viewed as a response; earlier prevailing thinking has continued presence in the law of contract; and the legacy of beliefs from that time is also linked to recent policy initiatives such as deregulation. All of this has had a direct effect on TS.

Laissez-faire

The counterbalance to consumer protection is freedom of contract: ie, that individuals should be free to enter into contractual relations unhindered by legal restriction. That position is encapsulated in the doctrine of *laissez faire*. It means, literally, ‘allow to do’ and can be defined as:

a policy non-of interference, especially [through] abstention by governments from interfering in the workings of free-market.¹⁵⁸

The doctrine is underpinned by economic and philosophical theory. As to the economic, it is argued that the market works to best effect if people pursue their

¹⁵⁶ Welsh Office, *Local Government in Wales: A Charter for the Future* (White Paper, Cm 2155, 1993) 2.

¹⁵⁷ ‘Local Government (Wales) Bill (HL Deb 10 February 1994, Vol 551, Cols 1774-783)’. Lord Elton had moved an amendment to the bill requiring that a single TS authority, or regional TS authorities, for Wales be established.

¹⁵⁸ *Concise Oxford English Dictionary* (n 35).

own interests as the only way 'in which it is possible to make a profit in a sustainable way is by giving people what they want'.¹⁵⁹ As Smith observed:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self-interest.¹⁶⁰

The theories associated with Adam Smith and others such as Thomas Malthus were in their time referred to as 'political economy'.

Concerning philosophical underpinning, the free-market and the rights of the individual are at the core of classical liberalism,¹⁶¹ as it emerged during the Enlightenment. More particularly, there was utilitarianism, encapsulated by Hutcheson who said:

[T]hat action is best, which procures the greatest happiness of the greatest numbers.¹⁶²

Bentham linked utilitarianism to political economy. In discussing the utilitarianism of Bentham, Atiyah summarises Bentham's 'assertions' of principle:

Restrictions on freedom of contract are restraints on liberty, and, prima facie, all restraint on liberty is an evil and needs to be justified.¹⁶³

Atiyah further notes how throughout the period 1770-1870 political economy and utilitarianism were complementary:

They both shared a belief in individualism, as a value and as a social mechanism; they believed in freedom of contract as a general principle; they accepted as a starting-point that individuals generally know their own interests best; both were concerned with maximizing – the one wealth and the other happiness – without worrying how the resulting wealth or happiness was distributed.¹⁶⁴

Against this background it is unsurprising that there was consequential influence on the judiciary. Atiyah has argued that the:

concept of freedom of contract was at the very heart of classical economics, and there is ground for thinking that the common lawyers may have taken over the concept from the economists in the early part of the nineteenth

¹⁵⁹ Jonathan Wolff, *Ethics and Public Policy: A Philosophical Inquiry* (Routledge 2011) 173.

¹⁶⁰ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) ch 1, bk 2.

¹⁶¹ John Locke is regarded as a founder of classical liberalism. He argued for the rights and freedoms of the individual and that the power of government should accordingly be limited. See: Locke (n 124).

¹⁶² Francis Hutcheson, *An Enquiry Concerning Moral Good and Evil* (1725) ss III & VIII.

¹⁶³ Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979) 325. As to Bentham's economic writings see: Werner Stark, *Jeremy Bentham's Economic Writings* (Allen & Unwin 1954).

¹⁶⁴ Atiyah (n 163) 324.

century....[I]t is impossible to doubt the influence of political economy on the law of contract during this period.¹⁶⁵

Free Trade Restrictions and the Bentham Test

Yet the notion of a market wholly unhindered by legal restriction is unsustainable and, referring to Bentham, despite a restraint on liberty being *prima facie* an evil, some restriction could be justified (passing the 'Bentham test'). The Adulteration of Food and Drinks Act 1860 was passed:

to stop publicans putting salt in beer and bakers chalk dust in bread...Competition between brewers, or between bakers, seeking their own self-interest did not do the trick.¹⁶⁶

Legal metrology itself restricts freedom to contract because it requires trade to be carried out subject to particular 'weights and measures': eg, using the metric system of measurement, not the imperial system. And sometimes freedom to contract is prohibited: such restrictions are described by Wolff as 'blocked exchanges'.¹⁶⁷ Modern examples of blocked exchanges include sale of products to people under the age of 18: eg, alcohol.¹⁶⁸ A 19th century example was the Factory Act 1878 which prohibited employment of children under the age of ten.

Although not described that way at the time, Atiyah even identifies pre-20th century examples of consumer protection legislation; these include adulteration of food and drink and legal metrology.¹⁶⁹ Prevention of fraud was often the rationale for such law but its effects could be wider:

[I]t was very common for Parliament to legislate on the principle of preventing modes of behaviour which facilitated fraud, whether or not fraud was actually committed'.¹⁷⁰

At first sight, an assertion that consumer protection as a discrete area is relatively recent seems contradicted by Atiyah. That assertion and Atiyah, however, can be reconciled when he acknowledges that it is '[only] in modern times does consumer protection appear as a recognized legislative principle.'¹⁷¹ While there was concern

¹⁶⁵ Ibid 294.

¹⁶⁶ Wolff (n 159) 174.

¹⁶⁷ Ibid 176.

¹⁶⁸ Licensing Act 2003.

¹⁶⁹ Other examples included hallmarking, merchandise marks, Hackney carriages, and alcohol (Atiyah (n 163) 544–562).

¹⁷⁰ Ibid 545.

¹⁷¹ Ibid.

in specific areas that consumers needed protection, an overarching concept had not emerged. Both the 1951 Hodgson Committee Report¹⁷² and 1962 Molony Committee Report¹⁷³ support this analysis (see below). In that earlier time, the presumption was that there should be unrestricted freedom of contract. Limited exceptions could be justified under the Bentham test.

As to the common law, the principle of freedom to contract was central to development of the law of contract, with judicial reluctance to intervene in contracts (supposedly) freely entered. However, it was not an absolute principle and reluctance could be overcome; there is parallel with the legislative narrative. The law sometimes did provide limited protection especially where fraud or misrepresentation was involved. Again, protection can be justified as having passed the Bentham test: eg, the tort of deceit enabled a contractual party to obtain redress for losses arising from false statements knowingly made by the other party.¹⁷⁴

Also, the courts sometimes implied terms into a contract where there was a lack of express provision. Thus, in *Jones v Bright* (1829)¹⁷⁵ it was held that if a person sells goods for particular purpose, it is an implied term that they are fit for purpose and that, if they are not, there is a legal remedy. In that case a person purchased copper from a manufacturer to sheathe a ship. The copper lasted only four months and not the expected four years.

Another related protection measure was the development of the doctrine of fundamental breach in the context of exclusion clauses. According to this doctrine if a party to a contract has committed a fundamental breach of contract, reliance on an exemption clause is unlikely to exempt that person from liability. In *Chanter v Hopkins* (1838) Lord Abinger, chief judge of the Court of Exchequer, explained 'if a man offers to buy peas off another, and he sends him beans, he does not perform his contract'.¹⁷⁶

¹⁷² Hodgson Committee Report (n 84).

¹⁷³ Molony Committee Report (n 44).

¹⁷⁴ Re the tort of deceit, see: Frances Quinn, *Tort Law* (Pearson 2012).

¹⁷⁵ (1829) 5 Bing 533.

¹⁷⁶ (1838) 4 M&W 399. An illustration of the application of the doctrine is *Yeoman Credit Limited v Apps* [1962] 2 QB 508.

Caveat Emptor

Associated with a belief in the free-market is the maxim *caveat emptor* or 'let the buyer beware'.¹⁷⁷ Conceptually, it is an adjunct to belief in the free-market. But, despite that linkage, *caveat emptor* has been explained in a practical context. Thus, in mediaeval times:

[Trading] was in markets and fairs where the goods were openly displayed. The cloths could be examined, farm produce picked over. Because it was taken for granted in those dealings that the buyer relied on his own judgement - only a fool would rely on the word of a stranger he might never see again - the idea of caveat emptor merely reflected the actual practice.¹⁷⁸

If *caveat emptor* can be explained as a response to actual practice, departure from it can similarly be explained. The 'broad principle' proclaimed by Sir William Best in *Jones v Bright*¹⁷⁹ to imply that goods are fit for purpose is an example of departure to 'protect persons who are necessarily ignorant of the qualities of a commodity they purchase'.¹⁸⁰ In other words, protection is justified, having met the Bentham test. Other more modern examples include:

- A private individual and an international corporation do not have similarity of bargaining power. Making unfair contract terms unlawful and preventing exclusion of specific contractual rights (eg: that goods are of satisfactory quality and fit for purpose) helps redress that power inequality.¹⁸¹
- With distance selling, the opportunity to inspect goods only arises after purchase. Therefore, giving a buyer cancellation rights compensates for inability to inspect prior to purchase.¹⁸²

But the law of contract was technical and could produce unfairness: eg, the doctrine of privity of contract meant that a person who was not a contractual party could not sue for breach, even if an intended beneficiary. The doctrine still has effect subject to limited exceptions where its application has been restricted.¹⁸³ It is also

¹⁷⁷ Ie: 'in the absence of fraud or breach of....warranty, the buyer of goods buys at [her or] his own risk.' David M Walker, *The Oxford Companion to Law* (OUP 1980) 194.

¹⁷⁸ Sir Gordon Borrie and Aubrey L Diamond, *Consumer, Society and the Law* (3rd edn, Penguin 1973) 17.

¹⁷⁹ See n 175.

¹⁸⁰ Ibid.

¹⁸¹ See the CRA 2015.

¹⁸² See SI 2013/3134.

¹⁸³ Eg: the Contracts (Rights of Third Parties) Act 1999 allows a person who is not a contractual party to enforce a term in some circumstances.

noteworthy that exceptions arising coincide with the development of consumer protection.

Judicial reluctance to offer protection is evident in how the tort of negligence developed.¹⁸⁴ It was not until *Donoghue v Stevenson* (1932)¹⁸⁵ that it was established that a general duty of care could be owed by a person to others affected by that person's acts or omissions. The case also showed the effect of the doctrine of privity of contract. Donoghue suffered shock and gastro-enteritis when a decomposed snail was found in a bottle of ginger beer that she was consuming. But Donoghue had not bought the drink and had no contractual relationship with the seller and no rights under the law of contract.

Overview

Consumer protection as a discrete area was not present during the evolution of the free-market and the law of contract in the 19th century. There were some measures that gave consumers protection, but these were not part of any identified conceptual framework known as 'consumer protection'. There were limited exceptions to the prevailing belief in freedom of contract in situations where the Bentham test was passed. The demand for greater contractual or trading freedom is a continuing feature in policy formulation as evidenced in calls for deregulation and the cutting of 'red tape'.

Development of the TS Portfolio

In 2014 the TSI published research it had commissioned identifying legislation likely to be enforced by TS.¹⁸⁶ The research identified 263 different pieces of legislation. Much of it had been acquired relatively recently,¹⁸⁷ a finding consistent with development of the TS portfolio considered below. Another feature was the diverse range: eg, consumer protection, legal metrology, product safety, age

¹⁸⁴ Re the tort of negligence, see: Cooke (n 63).

¹⁸⁵ [1932] AC 562.

¹⁸⁶ Jonathan Spicer, 'Schedule of Duties Imposed on Weights and Measures Authorities, Local Authorities, Food Authorities and Feed Authorities and Other Legislation Likely to Be Enforced by Trading Standards Services' (36 Bedford Row 2014).

¹⁸⁷ According to the Local Government Association over 200 of the 263 pieces of legislation had been created since 1990 (LGA, 'Remodelling Public Protection: The Future of Councils' Regulatory Services: A Discussion Paper' (2015) 4).

restricted product supply, food, and animal health and welfare. Also, legislation was enforced under various legal bases. In addition to the LWMA base, there was enforcement as food authority (FA) (eg, Food Safety Act 1990) or, simply, as LA (eg, Animal Health Act 1981). In other cases, no enforcer was specified (eg, Gambling Act 2005). The array of legislation is indicative of the ad hoc way TS has developed. As mentioned, in Chapter 1, the focus of the thesis is on the TS portfolio related to the LWMA. However, necessary reference is made to other areas where complementary to LWMA consideration: eg, for comparison between FA and LWMA models. Given the historical significance of legal metrology and the designation of LWMA, legal metrology is the starting point for considering TS portfolio development.

Legal Metrology

A system of accurate measurement (ie, for capacity, length or weight) provides a technical lingua franca through which commercial activity can take place. The system also helps prevent fraud and impacts on safety (eg, in measuring dosages of medicines or drugs). It has been said that:

Without it there can be no civilisation and no society but the primordial. It is the first essential tool of material creation and the private and public economy are its dependents. The accuracy of weights and measures thus becomes a first duty of government...¹⁸⁸

These are high claims, but accuracy of measurement is, certainly, core to economic life. For the system to be effective it follows that it should be uniformly applied, accurate, verifiable and enforceable. Its practical application can be seen in 1215. Magna Carta stated:

There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russet, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly.¹⁸⁹

Systems of ascertaining quantity did exist but that there was not one uniformly applied standard 'throughout the Kingdom'. Local variations persisted and in the preamble to the Weights and Measures Act 1824 it stated:

[D]ifferent weights and measures...are still in use in various Places...and the true Measure of the present standards is not verily known, which is the Cause of great confusion and manifest Frauds.

¹⁸⁸ O'Keefe: *The Law of Weights and Measures* (LexisNexis 1996) para 1.

¹⁸⁹ British Library (tr), *Magna Carta* (1215) para 35.

Things, however, began to change and, according to the Hodgson Committee,¹⁹⁰ the units of the imperial system were ‘fully established’ in GB through the combined effect of the Weights and Measures Acts 1824 and 1878.¹⁹¹ The Weights and Measures Act 1878 was also identified by the Hodgson Committee as the ‘foundation of present-day weights and measures law’.¹⁹² Other features of current legal metrology law that emerged at that time include:

- appointment of inspectors of weights and measures (IWMs),¹⁹³
- provision for the secretary of state to hold examinations to ascertain ‘whether persons possess sufficient skill and knowledge for the proper performance of the functions of [IWMs]’.¹⁹⁴

In parallel was the development of LG, which has been previously considered. The LGA 1888 established elected county and county borough councils to which responsibilities for Acts concerning ‘weights and measures’ were given. The structural change established the foundation for the LWMA model.

The Hodgson Committee in 1951 concluded that the law was ‘cumbersome and complex’ and needed consolidation.¹⁹⁵ It made 50 recommendations¹⁹⁶ but despite this it was not until the Weights and Measures Act 1963 that legislation followed, and then not embodying all the recommendations.

One recommendation of note was that legal metrology should continue to be an LA responsibility but that it should be reserved for larger LAs where work would necessitate the appointment of at least three IWMs.¹⁹⁷ In practice, for England and Wales therefore, it meant county and county borough councils, and not district councils. The recommendation was related to securing efficiency of provision through economies of scale. The Weights and Measures Act 1963 reflected the

¹⁹⁰ Hodgson Committee Report (n 84). This was the first full review of weights and measures law since a Royal Commission review between 1867 and 1870 (Hodgson Committee Report (n 84) 2).

¹⁹¹ Ibid 5.

¹⁹² Hodgson Committee Report (n 84) 1.

¹⁹³ Weights and Measures Act 1834, ss V, VIII & X, For current equivalent provision, see: WMA 1985, s 72(1).

¹⁹⁴ Weights and Measures Act 1889 s 11. For current equivalent provision, see: WMA 1985, s 73(1).

¹⁹⁵ Hodgson Committee Report (n 84) 3.

¹⁹⁶ Ibid 132–136.

¹⁹⁷ Ibid 114–116.

Hodgson Committee's line and in England and Wales the function (with limited exceptions) was given to county and county borough councils. Each was also formally designated as an LWMA, something not previously done.¹⁹⁸ It is not difficult to conceive, therefore, that the Hodgson Committee would have disapproved of the effect of the LGWA 1994 that reduced the number of LWMAs in Wales from eight to 22.

As to the rationale for legal metrology, the Hodgson Committee asserted that it had three main purposes. Two have been mentioned: establishing a uniform system of measurement; and providing a system of control over measuring equipment to confirm accuracy. The third purpose was 'to protect the public against the giving of short weight or measure'.¹⁹⁹ In substantive terms, the third purpose is consumer protection and was described as 'the most recent development and which at present applies only to limited sectors of trade',²⁰⁰ a statement that supports the assertion that consumer protection as a discrete subject area is relatively new.

To further these objectives, the committee observed that a national system of enforcement had emerged (supported by criminal sanctions) and administered by LAs overseen by the Board of Trade.²⁰¹ That system was centred on appropriately qualified office holders (IWMs) to whom powers were given. Subsequently, this system was to provide a home for other matters, especially those relating to consumer protection. The main current weights and measures legislation is the WMA 1985, a consolidating Act, which repealed the Weights and Measures Act 1963.²⁰²

Traditional functional areas other than weights and measures
Although legal metrology is the original core component of TS, there were other functions carried out by IWMs from the onset. These included explosives, petroleum and food.

Explosives and Petroleum: The LGA 1888 transferred functions to LAs under the Explosives Act 1875 and the Petroleum Act 1871 concerning storage of explosives

¹⁹⁸ S 34(2).

¹⁹⁹ Hodgson Committee Report (n 84) 1-2.

²⁰⁰ Ibid 1.

²⁰¹ Ibid 2.

²⁰² As n 65.

and petroleum. This transfer included holders of the offices of inspector of explosives and inspector of petroleum becoming county council officers.²⁰³ In practice this was undertaken by officers who were also IWMs. This practice continues with TSOs.²⁰⁴ When carrying out these functions the LA is not acting as LWMA. Legally speaking TSOs involved do so as LA authorised officers. However, and related to explosives, LWMAs do act for the enforcement of fireworks legislation,²⁰⁵ so there is practical linkage in LA explosives' functions and LWMA fireworks functions being exercised through TSOs. Concerning petroleum, it is unsurprising that TSOs are involved given the relevance of legal metrology to the sale of petrol where the LA will have an enforcement role as the LWMA.

Food: The Sale of Food and Drugs Act 1875²⁰⁶ created offences concerning the safety of food and its composition. It also required the appointment of public analysts to whom food purchased could be sent for analysis to monitor legislative compliance.²⁰⁷ IWMs were given powers to procure samples for analysis.²⁰⁸ TSOs continue to do this although the legal basis is not through the LWMA route.²⁰⁹ In practice, and in broad terms, 'authorised officers' for food safety and hygiene are EH officers and those for food composition and related matters including food labelling (referred to often as food standards) are TSOs. The current legislation is the Food Safety Act 1990 (FSA 1990). The FSA 1990 is enforced by an LA in its area as the FA. In Wales, FAs are the principal councils,²¹⁰ so each LA is both the FA and LWMA. A person is authorised to act under the FSA 1990 by the FA.²¹¹ Legally speaking, therefore, where a TSO is enforcing the FSA 1990, the TSO is acting on behalf of an LA as an FA and not as an LWMA.

²⁰³ S 118(13).

²⁰⁴ The current legislation for explosives is SI 2014/1638 and the petroleum is SI 2014/1637.

²⁰⁵ See SI 2015/1553.

²⁰⁶ Ss 3-9.

²⁰⁷ S 10.

²⁰⁸ S 13.

²⁰⁹ For a background to food safety legislation, see: Brian W Harvey and Deborah L Parry, *The Law of Consumer Protection and Fair Trading* (6th edn, OUP 2000) 431. For a more detailed historical perspective see: *Butterworths Law of Food and Drugs* (Lexis Nexis 1990) div 5.

²¹⁰ S 5(1A).

²¹¹ S 5(6).

The Molony Committee and Consumer Protection

The Hodgson Committee Report²¹² identified part of legal metrology's function as stopping 'the perpetuation of fraud by the user' and 'to protect the public against the giving of short weight or measure'.²¹³ While not expressly acknowledging consumer protection, it implicitly acknowledged the link between legal metrology and consumer protection.

Consumer protection was developing as an area of social concern: eg, an international driver was USA President Kennedy's March 1962 speech where he articulated four basic consumer rights: safety, be informed, choice and be heard.²¹⁴ Shortly after the speech the Molony Committee Report was published in July 1962.²¹⁵

The Molony Committee's terms of reference were:

to review the working of the existing legislation relating to merchandise marks and certification trade marks, and to consider and report what changes if any in the law and what other measures, if any, are desirable for the further protection of the consuming public.

The Molony Committee defined a consumer as a person 'who purchases...goods for private use or consumption'.²¹⁶ For consumer protection legislation, that definition in general terms still applies, although it has been extended to include purchasing services.²¹⁷ This is a qualified meaning of 'consumer' as a person who uses or consumes a product can do so whether in a private or commercial capacity. Despite 'consumer protection' in the report's title, and in the terms of reference to 'protection of the consuming public,' the Molony Committee considered that 'consumer protection' could not be defined as it was an 'amorphous conception'.²¹⁸ It was a 'convenient label for a great variety of measures designed to safeguard and assist the shopper'.²¹⁹ It also said that part of consumer protection's 'basic vocabulary' was a 'uniform system of units of weights and measures, nationally used and enforced'.²²⁰

²¹² Hodgson Committee Report (n 84).

²¹³ Ibid 1-2.

²¹⁴ John F Kennedy, 'Special Message to the Congress on Protecting the Consumer Interest' (United States Congress, 15 March 1962). For text see: <<https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx>> accessed 6 May 2019.

²¹⁵ Molony Committee Report (n 44).

²¹⁶ Ibid 1.

²¹⁷ Ibid 2.

²¹⁸ Ibid 8.

²¹⁹ Ibid 7.

²²⁰ Molony Committee Report (n 44) 3-4.

Had the Molony Committee reported in the early part of the 21st century it is difficult to envisage that it would have seen consumer protection as an amorphous concept, given current prominence. However, in 1962 it was emerging and seemingly not obviously generally applicable to trading activity. This fits with the Hodgson Committee observation that ‘protect[ing]’the public against the giving of short weight or measure’ was a ‘recent development’ and only applied ‘to limited sectors of trade’.²²¹ There is no logical justification why it should apply in any limited way. An obvious example of generic consumer protection law is the CPUTRs 2008.

The Molony Committee made 214 principal findings²²² and identified these as relating, as appropriate, to five categories concerning: safety and quality; information; assessment of merits; means of redress; and ‘restraint of objectionable sales promotion methods’.²²³ There are echoes of President Kennedy’s basic consumer rights. In general terms, the recommendations represented a conceptual shift towards increased state intervention and policing of consumer trading.

In particular, increased state intervention was to have practical manifestation through the development of TS. The Molony Committee concluded that the Merchandise Marks Acts 1887 to 1953²²⁴ had not been adequately enforced,²²⁵ as no single authority was placed under a duty to enforce it.²²⁶ It discounted imposing a duty to enforce on the Board of Trade.²²⁷

The Molony Committee concluded that a duty to enforce should be imposed on LAs who were enforcing legal metrology.²²⁸ This responsibility needed to reside in the largest units of LG (mirroring what the Hodgson Committee stated) and that LA officers should have appropriate enforcement powers.²²⁹ The Molony Committee recommended that the Board of Trade (or, where relevant, the Ministry of

²²¹ Hodgson Committee Report (n 84) 1-2.

²²² Molony Committee Report (n 44) 299–315.

²²³ Ibid 48.

²²⁴ This is a collective reference to Merchandise Marks Acts in 1887, 1891, 1894, 1911, 1926 and 1953.

²²⁵ Molony Committee Report (n 44) 224-225.

²²⁶ Molony Committee Report (n 44) 225.

²²⁷ Ibid.

²²⁸ Ibid 225-226.

²²⁹ Ibid 226.

Agriculture, Fisheries and Food) should have an overriding interest to prosecute cases of national interest and in undertaking a co-ordination function. It also noted that the Board of Trade could promote a uniform enforcement policy.²³⁰ This was a portent, given the role subsequently performed by the Board of Trade and its successors.²³¹

As a direct result of the Molony Committee recommendations the Merchandise Marks Acts 1887 to 1953 were replaced by the TDA 1968. It created offences and enforcement duties were placed on each LWMA for its area.²³² The LWMA and its officers were given enforcement powers.²³³ Thus LWMA enforcement duties were extended beyond legal metrology to include trade descriptions. The TDA 1968 is a milestone in the development of TS.

The Crowther Committee and Consumer Protection

The next milestone concerned consumer credit: the Crowther Committee reported in March 1971.²³⁴ Its terms of reference included:

- i. to enquire into the present law and practice governing provision of credit to individuals for financing purchases and services for personal consumption;
- ii. to consider the advantages and disadvantages of existing and possible alternative arrangements for providing such credit, having regard to the interests of consumers, traders and suppliers of credit including depositors;
- ...
- iv. to make recommendations.

The Crowther Committee was damning in its criticism of consumer credit law and reform was expressly linked to economic efficiency.

[R]eform of the existing legal tangle is badly overdue, and that liberation of the consumer credit industry from the antiquated provisions, and from the official restrictions, that hobble it will enable it to make an increasing contribution to the efficiency of the national economy and standard of living of the public.²³⁵

²³⁰ Ibid 227.

²³¹ Since 2016 this has been BEIS.

²³² S 26(1).

²³³ Ss 27-28.

²³⁴ DTI, *Consumer Credit: Report of the Committee* (Cmnd 4596, 1971). (The Crowther Committee Report). The committee is named after its chair, Lord Crowther.

²³⁵ Ibid iv.

The Crowther Committee defined 'consumer' as a person who is receiving credit for private purposes.²³⁶ It considered the need for consumer protection in credit transactions and set out the ideal position where protection would not be required as all contracts would be framed to maintain a fair balance between parties.²³⁷ However, there were things which prevented this, which included: lack of consumer knowledge; consumer inertia; consumer improvidence; consumers having other more pressing problems; trading malpractices; and inequality of bargaining power.²³⁸ The Crowther Committee stated:

it has long been recognised that freedom of contract has little meaning in consumer transactions. Bargaining power lies with the supplier and this is particularly the case where the transaction involves the extension of credit.²³⁹

There was a need for consumer protection in credit transactions and a distinction was drawn between forms of protection. It concluded that although legal protection was important 'there are limits to what the law can achieve, and that other forms of protection are also necessary.' These included 'consumer education; the provision of credit counselling and management services; [and] extra-judicial machinery for the reception and redress of grievances.'²⁴⁰ The Crowther Committee placed its analysis more widely than in review of the law. The pertinence of that analysis is evident as current approaches to consumer protection alongside enforcement place emphasis on education, support and non-court-based dispute resolution. Importance of these approaches has grown as TS enforcement has reduced due to reduced resourcing.

But returning to the function of consumer protection legislation, the Crowther Committee identified three primary tasks:

- **Redress bargaining inequality:**²⁴¹ Suggested measures to redress this included the disclosure of essential information, prohibiting false and misleading information, giving consumers contractual rights which cannot be excluded, and restricting harsh contractual provisions.

²³⁶ Ibid 231.

²³⁷ Ibid.

²³⁸ Ibid 231-234.

²³⁹ Ibid 233.

²⁴⁰ Ibid 234.

²⁴¹ Ibid.

- **Controlling trading malpractices:**²⁴² The law should prohibit these and sanctions should be applied for breach. There could be ‘restriction or deprivation of the civil remedies that would otherwise be open to the creditor; the imposition of criminal penalties; the granting of injunctions; and, through the operation of a licensing system...’: ie, broader enforcement than the criminal law.
- **Regulation of creditors’ remedies for default:**²⁴³ This task involves regulating the rights that creditors would have when taking enforcement action against consumers.²⁴⁴

The Crowther Committee made recommendations for the wholesale reform of consumer law with a view ‘to maintain[ing] a fair balance between the creditor and the debtor.’²⁴⁵ When specifically considering law enforcement, the Crowther Committee stated pithily that ‘[l]aws and regulations are useless unless they are enforced’. So that the law should not be ‘useless’, included in the recommendations, in addition to criminal and civil sanctions, was for enforcement through administrative supervision under a Consumer Credit Commissioner by way of requiring credit providers and others to be licensed.²⁴⁶ Under the umbrella of the Consumer Credit Commissioner, there was a need for ‘a volume of investigation and inspection to be done in the field, all over the country’²⁴⁷ and raised the prospect that this might be carried out by LWMAs whose functions had been ‘greatly enlarged’ following the TDA 1968. The Crowther Committee also noted ‘that it [was] an appealing suggestion that one sort of consumer protection should be amalgamated with another,’²⁴⁸ especially, with the ‘multiplicity of [LAs]...[being] replaced by larger...authorities’ in the context of LG reform then being considered.²⁴⁹ Implicit is the view, held by both the Hodgson and Molony Committees, that effective enforcement is more likely to be achieved by larger LAs.

²⁴² Ibid 234-235.

²⁴³ Ibid 235.

²⁴⁴ The Crowther Committee gave the example of where, despite consumer default, a court might allow consumers to retain possession of goods subject, eg, to payment of instalments.

²⁴⁵ Crowther Committee Report (n 234) 235.

²⁴⁶ Ibid 327.

²⁴⁷ Ibid 338.

²⁴⁸ Ibid 338-339.

²⁴⁹ Ibid 338.

In identifying the need for consumer protection legislation, the Crowther Committee, unlike the Molony Committee, did not view consumer protection as an 'amorphous conception' or, unlike the Hodgson Committee, as applying 'only to limited sectors of trade'. The Crowther Committee considered that it had general application to the consumer credit trade and suggests that consumer protection had developed as a discrete social policy area.

The Consumer Credit Act 1974 (CCA 1974) was enacted and followed the Crowther Committee Report's recommendations. A consumer credit licensing and enforcement regime was established. The role of Credit Commissioner was entrusted to the Director General of Fair Trading with the 'field' work being undertaken by LWMAs. Both the Director General of Fair Trading and LWMAs were given a duty to enforce the CCA 1974.²⁵⁰ The Director General of Fair Trading and LWMA officers were given enforcement powers.²⁵¹ Starting with the TDA 1968, the CCA 1974 continued expansion of the TS portfolio.

Although comment made by the Crowther Committee was in the context of consumer credit, the comment also had application when considering consumer protection in a general sense: eg, with reference to redressing bargaining inequality and controlling trading malpractices. Equally, of general application, is the need for effective enforcement so that the law is not 'useless'.

Despite 'consumer' being in the title of the CCA 1974, it was not defined but 'individual' was, as it was 'individuals' who received protection; and an individual included 'a partnership consisting of two or three persons not all of whom are bodies corporate':²⁵² ie, smaller sized business was protected. Ordinarily the focus on consumer protection is at the expense of business protection.

Product Safety and Consumer Protection

Consumer protection extends to protection from physical harm due to unsafe products. The Consumer Protection Act 1961 (CPA 1961) 'was inspired by the need for preventative legislation in respect of dangerous goods identified by the Molony

²⁵⁰ S 161(1).

²⁵¹ Ss 162 & 164.

²⁵² S 189(1).

Committee.²⁵³ The CPA 1961 enabled making of regulations to prevent or reduce the risk of death or injury from specific goods. Breach was an offence and enforcement powers were given to LAs²⁵⁴ but not as LWMAs and there was no duty to enforce the CPA 1961.²⁵⁵ Concerns about consumer safety persisted and in 1976 there was a Green Paper.²⁵⁶ In setting out concerns about consumer safety in the home, it stated:

About 7,000 people in [GB] die each year from accidents in the home, over a tenth of them from fires...In addition over 100,000 receive hospital in-patient treatment from home accident injuries.²⁵⁷

Unsafe products contributed, and the Green Paper discussed 'how the law can best ensure that goods which reach consumers are safe to use as the public may reasonably expect'.²⁵⁸

The Consumer Safety Act 1978 replaced the CPA 1961. It strengthened enforcement. This time there was a duty to enforce, and it was imposed on each LWMA.²⁵⁹ The enforcement regime was next strengthened by the Consumer Safety (Amendment) Act 1986.²⁶⁰ LWMAs were given broader enforcement powers: eg, ability to serve suspension notices to prohibit supply of goods²⁶¹ and to apply to court for forfeiture and destruction of goods.²⁶²

Incremental strengthening of product safety consumer protection continued. One deficiency was that protection only applied to a product for which there were specific regulations. The obvious remedy was to impose a general duty that consumers must be supplied with a safe product to provide default protection where there was no product specific legislation. The Consumer Protection Act 1987 (CPA 1987) replaced the Consumer Safety Act 1978 and remedied the deficiency. It introduced a general duty to supply only safe products to consumers, breach of

²⁵³ Harvey and Parry (n 209) 258.

²⁵⁴ Sch, para 7.

²⁵⁵ Ibid.

²⁵⁶ Department of Prices and Consumer Protection, *Consumer Safety: A Consultation Document* (1976).

²⁵⁷ Ibid foreword.

²⁵⁸ Ibid.

²⁵⁹ S 5(1).

²⁶⁰ Following publication of: DTI, *The Safety of Goods* (White Paper, Cmnd 9302, 1984).

²⁶¹ Ss 3-4.

²⁶² Ss 6-7.

which constituted an offence.²⁶³ Enforcement duties remained unchanged and each LWMA in GB must enforce Part II.²⁶⁴ There are related enforcement powers.²⁶⁵

Subsequently, the general duty was replaced in regulations implementing an EU directive. The current regulations are the General Product Safety Regulations 2005²⁶⁶ (GPSRs 2005). The GPSRs 2005 establish a separate but complementary regime to the CPA 1987. It is the duty of a LA to enforce the GPSRs 2005 and the LA is given enforcement powers. One significant difference between the CPA 1987 and GPSRs 2005 regimes is that the GPSRs 2005 empower an enforcement authority to issue a recall notice for an unsafe product, another material addition to the enforcement armory.

There is one legal point: the GPSRs 2005 are not enforced by LAs as LWMAs. In practice, however, the GPSRs 2005 are enforced by TSOs. As the CPA 1987 is required to be enforced by LWMAs, it makes sense that the two regimes are enforced by the same officers.

There are many product safety regulations (ie, product specific legislation) that LWMAs enforce. They have also been influenced by EU law requirements. As an indication of range, see:

- Cosmetic Products Enforcement Regulations 2013.²⁶⁷
- Electrical Equipment (Safety) Regulations 2016.²⁶⁸
- Furniture and Furnishings (Fire) (Safety) Regulations 1988.²⁶⁹
- Gas Appliances (Enforcement) and Miscellaneous Amendments Regulations 2018.²⁷⁰
- Nightwear (Safety) Regulations 1985.²⁷¹
- Pedal bicycles (Safety) Regulations 2010.²⁷²

²⁶³ S 10.

²⁶⁴ S 27(1)(a).

²⁶⁵ Ss 28-29.

²⁶⁶ SI 2005/1083.

²⁶⁷ SI 2013/1478.

²⁶⁸ SI 2016/1101.

²⁶⁹ SI 2018/389.

²⁷⁰ SI 1995/1629.

²⁷¹ SI 1985/2043.

²⁷² SI 2010/198.

- Personal Protective Equipment (Enforcement) Regulations 2018.²⁷³
- Plugs and Sockets etc. (Safety) Regulations 1994.²⁷⁴
- Tobacco for Oral Use (Safety) Regulations 1992 (SI 1992/3134).²⁷⁵
- Toys (Safety) Regulations 2011.²⁷⁶

The list illustrates the diverse nature of products from which safety concerns arise. While some cases might be obvious (eg, for gas appliances or electrical equipment) some are less so. For nightwear, there were accidents involving the fire of nightwear.²⁷⁷ For furniture and furnishings, a direct cause of the product safety regulations was a fire to a Woolworths store in Manchester in which 10 people died; one reason for the fire was excessive flammability of furniture at the store.²⁷⁸ Another example concerned bunk beds (young children became trapped after falling through gaps in restraining structures surrounding the upper bed). Until 2012 there were specific regulations concerning bunk-beds.²⁷⁹

Another point concerning product safety is the capacity for safety concerns to arise about a specific product creating an immediate demand for TS intervention with a major call on its resources. The Whirlpool case study in Figure 3 refers. Another example was for exploding 'hoverboards' (self-balancing scooters) in the 2015 Christmas period.²⁸⁰

²⁷³ SI 2018/390.

²⁷⁴ SI 1994/1768.

²⁷⁵ SI 1992/3134.

²⁷⁶ SI 2011/1881.

²⁷⁷ A Richard Horrocks, Shonali Nazaré and Baljinder Kandola, 'The Particular flammability Hazards of Nightwear' (2004) 39 *Fire Safety Journal* 259.

²⁷⁸ For background see: 'Upholstered Furniture (Safety)' (HC Deb 22 May 1980 vol 985, cols 834-92). This was a debate concerning the (draft) Upholstered Furniture (Safety) Regulations 1980 (SI 1980/725). Also, listen to: BBC Radio 4, 'First-Hand Accounts of the Woolworths Fire in Manchester in May '79 That Killed Ten People', *In Living Memory* (9 March 2011).

<<http://www.bbc.co.uk/programmes/b00z5hr0>> accessed 23 August 2017.

²⁷⁹ SI 1987/1337. This was revoked by SI 2012/1805 (on the basis that SI 1987/1337 was no longer necessary as there was adequate protection under the GPSRs 2005). As an illustration of the issue, see: Sofia Petka, 'Children's Bed Maker Issues Warning After Sudden Death of Seven Month Old Baby' *Metro.co.uk* (27 December 2016).

<<http://metro.co.uk/2016/12/27/childrens-bed-maker-issues-warning-after-sudden-death-of-seven-month-old-baby-6346538/>> accessed 8 August 2019.

²⁸⁰ Due to, eg, defective fuses, batteries, cables or chargers the product was in danger of exploding or catching fire. See: Judith Gordon, 'The Big Bang! Exploding Hoverboards: Safety Crisis Puts Trading Standards in Spotlight' (2016) 127 *TS Today* 16; and CTSL, 'Thousands of Unsafe "Hoverboards" Detained Over Past Seven Weeks' (press release, 2016).

Intellectual Property Enforcement

A duty to enforce the offence of unauthorised use of a trademark was first placed on LWMA's by the Trade Marks Act 1994.²⁸¹ At the same time provision was made²⁸² to amend the Copyright, Designs and Patents Act 1988 so that similar duties were placed on LWMA's for copyright infringement²⁸³ and illicit recordings offences.²⁸⁴ But this was not brought into force until 2007²⁸⁵ after the Gowers review of IP had highlighted inconsistency in TS enforcement capacity.²⁸⁶ The Gowers review cited both business and consumer protection as justification for extending TS capacity:

IP crime not only affects legitimate local businesses but can have a detrimental effect on consumers, since counterfeit products may be of substandard quality and even in some cases lead to safety concerns.²⁸⁷

TS remit for IP was further extended when the Intellectual Property Act 2014²⁸⁸ created an offence under the Registered Designs Act 1949 of copying a design in the course of business.²⁸⁹ TS was given enforcement powers.²⁹⁰

Age Restricted Product Supply

Another discrete area of work that has developed under the LWMA has been enforcement concerning age restricted supply of products. Again, this is comparatively recent with periodic addition. Thus, eg, LWMA's enforce provision in the:

- Video Recordings Act 1984: eg, concerning supply of 'video works'²⁹¹ to persons who have not reached an age displayed on a video work: eg, 14 or 18.
- Fireworks (Safety) Regulations 1997:²⁹² eg, concerning supply of fireworks to persons aged under 18.
- Cigarette Lighter Refill (Safety) Regulations 1999²⁹³ concerning supply of cigarette lighter refill canisters containing butane to persons aged under 18.²⁹⁴

²⁸¹ S 93.

²⁸² Criminal Justice and Public Order Act 1994, s 165(2).

²⁸³ S 107A.

²⁸⁴ S 198A.

²⁸⁵ SI 2007/621.

²⁸⁶ Andrew Gowers, *Gowers Review of Intellectual Property* (HM Treasury 2006) 105.

²⁸⁷ Ibid.

²⁸⁸ S 13.

²⁸⁹ S 35ZA.

²⁹⁰ S 35ZB.

²⁹¹ Video works include video recordings, video films and computer games (s 16A).

²⁹² SI 1997/2294.

²⁹³ SI 1999/1844.

²⁹⁴ S 54A.

- Licensing Act 2003 concerning sale of alcohol to persons aged under 18.²⁹⁵
- Anti-Social Behaviour Act 2003 concerning sale of aerosol spray paint to persons aged under 16.²⁹⁶
- Children and Families Act 2014 concerning purchase of tobacco or nicotine products on behalf of persons aged under 18.²⁹⁷

More recently, and significantly, in response to public concern over increased criminality²⁹⁸ the Offensive Weapons Act 2019 Act gave LWMAs enforcement powers for offences under that Act and related legislation.²⁹⁹ This includes restricting the sale and delivery of corrosive products to persons aged under 18,³⁰⁰ and similarly restricting the delivery of bladed products and articles.³⁰¹ Related legislation included the Knives Act 1997 (concerning unlawful marketing of knives)³⁰² and the Crossbows Act 1987 (concerning sale of crossbows to persons aged under 18).³⁰³

EU Law and TS

The EU has had significant influence on TS. Given the core aim of the EU is establishment of the ‘internal market’ based upon such things as ‘a high level of protection’ and with a duty to promote ‘social justice and protection’³⁰⁴ that influence is unsurprising. With the UK leaving the EU, the influence will remain as, for reasons of ensuring continuity, the European Union (Withdrawal) Act 2018 establishes that EU-derived law will take effect as domestic law.³⁰⁵

After passing the European Communities Act 1972 (ECA 1972), the UK joined the European Economic Community³⁰⁶ (EEC), and EU law took precedence over UK law.

²⁹⁵ S 154.

²⁹⁶ S 54A.

²⁹⁷ S 91.

²⁹⁸ See HM Government, *Serious Violence Strategy* (2018), in which a role was identified for TS concerning restricting the supply of bladed and corrosive products.

²⁹⁹ S 64.

³⁰⁰ Ss 1 & 4.

³⁰¹ Ss 39 & 42.

³⁰² S 1.

³⁰³ S 1.

³⁰⁴ Art 3.3 of the Treaty on European Union (TEU): [2010] OJ C83/1.

³⁰⁵ S 2.

³⁰⁶ When the TEU (or Maastricht Treaty) came into force on 1 November 1993 it renamed the EEC as the European Community (EC) and also established the EU. The TEU has been modified by successive

As stated by the EU Court of Justice in *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* :³⁰⁷

[T]he Community constitutes a new legal order in international law, for whose benefits the states have limited their sovereign rights, albeit within limited fields...

In the UK, legal authority for acceptance of this position derived from the ECA 1972.³⁰⁸ The European Union (Withdrawal) Act 2018 reverses that position and repeals the ECA 1972.³⁰⁹

The primary sources of EU law are the Treaties establishing the EU and how it functions. There are two Treaties (both are consolidating texts): the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The TFEU contains the EU's secondary law-making powers and, in exercise of its competencies, the EU must 'adopt regulations, directives, decisions, recommendations and opinions'.³¹⁰ Regulations and directives are most relevant. The use of directives has been at the forefront for the exercise of EU competence affecting TS.

The EU and the Emergence of Consumer Protection

EU law for TS has most obviously manifested itself for consumer protection. Consumer protection as a EU policy area can be traced back to 1975.³¹¹ As a concept it was then 'relatively recent' and had 'developed in response to the abuses and frustrations arising...at times from the increased abundance and complexity of goods and services afforded the consumer by an ever-widening market'.³¹² Market conditions had changed so that the 'balance between suppliers and customers [had]

Treaties and, from change brought about by the Treaty of Lisbon, the EU has 'replace[d] and succeed[ed]' the EC (see TEU, art 1).

³⁰⁷ (26/62) [1963] ECR 1. This position was restated and expanded in *Costa v ENEL* (6/64) [1964] ECR 585.

³⁰⁸ ECA 1972, s 2(1).

³⁰⁹ S 1.

³¹⁰ TFEU, art 288.

³¹¹ *Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy* (Council Resolution, OJ C92/1 1975). The programme was annexed to the resolution: [1975] OJ C92/2.

³¹² *Ibid*, para 6.

become weighted in favour of the supplier'.³¹³ The consumer had become 'merely a unit in a mass market'.³¹⁴ The preliminary programme concluded that:

- [C]onsumer interests may be summed up by a statement of five basic rights:
- (a) the right to protection of health and safety,
 - (b) the right to protection of economic interests,
 - (c) the right of redress,
 - (d) the right to information and education,
 - (e) the right of representation (the right to be heard).³¹⁵

From this articulation, consumer protection developed as a specific area of EU competence with Article 153 of the Treaty establishing the European Community (TEC). This has been replaced by Article 169 of the TFEU which reads so far as material:

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

There are other express references to consumer protection in the TFEU.³¹⁶ Consumer protection is also embedded in the Charter of Fundamental Rights of the European Union: 'Union policies shall ensure a high level of consumer protection.'³¹⁷

Consumer protection EU secondary law making has mainly been achieved through directives. There has also been EU law provision relating to legal metrology (often also touching on consumer protection): eg, the Measuring Instruments Regulations 2016.³¹⁸ In implementing EU obligations enforcement functions have invariably been given to LWMAs. A list of relevant legislation is set out in Appendix 19; although not exhaustive, the legislation is intended to be representative of the type of EU obligation and includes measuring instruments, medical devices, package holidays, general product safety, distance selling, UCPs, consumer credit and timeshares. There are also examples of legislation which, at face value, were not obvious candidates for inclusion in the TS portfolio: eg, the Energy Performance of

³¹³ Ibid, para 6.

³¹⁴ Ibid, para 6.

³¹⁵ Ibid, para 3.

³¹⁶ Arts 12 & 114.3.

³¹⁷ [2000] OJ C364/1, art 38.

³¹⁸ SI 2016/1153.

Buildings (England and Wales) Regulations 2012,³¹⁹ and the Construction Products Regulations 2013³²⁰ and the Recreational Craft Regulations 2017.³²¹

The use of regulations in consumer protection is less common but one example which has direct impact on TS is the Regulation on consumer protection cooperation.³²² The Regulation sets out a framework and conditions for cooperation between national authorities responsible for the enforcement of consumer protection laws in member states.

In 2012 the European Commission adopted the European Consumer Agenda which sets out the EU strategy for consumer policy.³²³ This replaced an earlier 2007 strategy³²⁴ and covers the period till 2020. There are four basic objectives³²⁵ and the relevance of TS activity for each can be established. On leaving the EU, the UK may take a different stance towards consumer protection, but any change is likely to be incremental and over time. EU influenced consumer protection will have continuing relevance. Consumer protection also has influence in an international context because of the 1985 UN Guidelines for Consumer Protection.³²⁶

EU Law and TS in Wales

EU law has effect throughout the EU and there are obligations on member states to ensure that the EU law is implemented. This explains why, eg, consumer protection is not devolved to Wales. Where EU obligations are implemented there can be no distinction within member states concerning the content of that law. However, that position changes on the UK leaving the EU and, in principle, presents the potential for devolution to Wales of consumer protection.

³¹⁹ SI 2012/3118.

³²⁰ SI 2013/1387.

³²¹ SI 2017/737.

³²² Regulation 2006/2004/EC of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ([2006] OJ L364/1).

³²³ European Commission, 'A European Consumer Agenda – Boosting Confidence and Growth', (2012).

³²⁴ European Commission, 'EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them' (2007).

³²⁵ Improving consumer safety; enhancing knowledge; improving implementation, stepping up enforcement and securing redress; and aligning rights and key policies to economic and societal change.

³²⁶ United Nations General Assembly, *United Nations Guidelines for Consumer Protection* (Resolution A/RES/39/248, 16 April 1985).

Miscellaneous

En route, other additions to the TS portfolio include enforcement functions under the Hallmarking Act 1973, the Estate Agents Act 1979 and the Legal Services Act 2007.

TS Funding

For the most part, funding of TS for LWMAs is through general LG funding.³²⁷ For Wales, each year the WG sets a standard spending assessment (SSA) for each principal council. Within the SSA there are 'areas' of council activity and a notional figure is fixed for each; the sum of those figures constitutes the SSA. These areas therefore are the SSA building blocks, eg, one area relevant to TS is consumer protection. LA funding flows with reference to the SSA and has three elements: non-domestic rates, council tax and revenue support grant.³²⁸ According to the SSA calculation, each LA sets its budget and its rate of council tax.³²⁹

Although the 'building blocks' of the SSA comprise figures calculated for areas of LA council activity, the funding received by each LA is unhypothecated; and an LA has flexibility in how it is applied. This can place greater strain on actual TS spend because there is competition for funding allocation from other service areas such as education or social services. This position has been exacerbated because of sustained decreased LG resourcing where service areas such as education and social services have secured an element of protection through higher priority in contrast with 'unprotected' services such as TS.³³⁰ However, there is limited direct grant funding for LWMA purposes (see Chapter 9).

³²⁷ The Local Government Finance Act 1988 establishes the legal framework for the LG finance system in England and Wales.

³²⁸ Collectively they are known as Aggregate External Finance. Non-domestic rates are collected at an all-Wales level and are distributed according to a standard formula.

³²⁹ For further information concerning SSAs in Wales see: WG, *Welsh Local Government Revenue Settlement 2018-2019: Background Information for Standard Spending Assessments* (2018). <<https://gweddill.gov.wales/docs/dsjlg/publications/localgov/180504-green-book-2018-19-en-v2.pdf>> accessed 9 August 2019.

³³⁰ See: Joseph Ogle, Daria Luchinskaya and Michael Trickey, *Austerity and Local Government in Wales: An Analysis of Income and Spending Priorities, 2009-10 to 2016-17* (Wales Public Services 2025, 2017); and Guto Ifan and Cian Sion, *Cut to the Bone? - An Analysis of Local Government Finances in Wales, 2009-10 to 2017-18 and the Outlook to 2023-24* (Wales Governance Centre 2019).

An LWMA has legal duties; if funding received is insufficient to fulfill these duties, it fails to meet legal requirements. An LA therefore, cannot choose to not deliver TS. But if the actual resource it deploys is insufficient, de facto default can arise and 'enforcement deserts' emerge.³³¹

TS Legal Resourcing

Resourcing refers to the supply of something to support and facilitate directed effort. It can relate to, eg, the supply of finance, personnel, equipment, access to expertise and training. It can also refer to the quality of the legal regime that supports the effort; although intangible, that legal presence is a 'supply' - hence 'legal resourcing'. In a TS context this includes:

- Extent of legal coverage: eg, whether there is a law that makes X unlawful.
- If there is, potential consequences where X arises: eg, whether it is imprisonable.
- Available investigative powers: ie, the range and effectiveness of powers available to investigate X: eg, powers of test purchase, entry, inspection, search and seizure.
- Means of enforcement where X arises: ie, enforcement through the criminal courts (criminal enforcement), the civil courts (civil enforcement) and issue of civil penalties or administrative control such as licensing (administrative enforcement).

Each of these materially impacts on TS effectiveness: eg,

- If X is regarded as wrong, but does not break the law, TS has no power to stop X.
- If an offence arose, with no power of imprisonment, lenient sentences might not deter traders from X, or might deter TS from enforcement.
- If an offence arose and sentencing powers were adequate, but TS investigative powers were not, this could undermine enforcement.
- If an offence arose and sentencing and investigative powers were adequate, but the only formal enforcement mechanism was criminal enforcement, this could restrict the effectiveness of enforcement. In some cases, civil enforcement might be more proportionate.

³³¹ See: Committee of Public Accounts, *Protecting Consumers – the System for Enforcing Consumer Law* (2011) 10.

The following discussion of TS legal resourcing suggests there has been material recent improvement to legal resourcing.

CPUTRs 2008 and the Fraud Act 2006

There has been material and recent change to TS legal resourcing. By way of illustration, X can refer to UCPs, which can arise in several ways: eg, through dishonest activity, misleading activity or aggressive activity. The CPUTRs 2008³³² made UCPs involving consumers unlawful. Some types of UCPs were previously unlawful (eg under the TDA 1968,³³³ or dishonesty offences under the Theft Act 1968³³⁴ could apply to trade) but there was no general prohibition. Thus, eg, aggressive marketing involving vulnerable people, commonly regarded as wrong, did not in itself breach the law.³³⁵ That position changed when the CPUTRs 2008 came into force.

The CPUTRs 2008 created specific offences of misleading action,³³⁶ misleading omission,³³⁷ aggressive commercial practice,³³⁸ specific commercial practices³³⁹ and a residual (default) offence of UCP.³⁴⁰ A person convicted in the Crown Court can be imprisoned for up to two years, fined an unlimited amount, or receive both.³⁴¹ But in the magistrates' court a convicted person cannot be imprisoned and until 2016 the maximum fine that could be imposed for an offence was £5000.³⁴² While TS was empowered to challenge such behaviour, available sentencing powers in a magistrates' court might deter TS enforcement unless a case was sufficiently serious for the Crown Court (and, conversely, not deter traders from less serious UCPs).

Fraud is a connected example where legislative change has had significant impact on TS enforcement capability. The Fraud Act 2006 (FA 2006) was based on a draft

³³² SI 2008/1277.

³³³ S 1.

³³⁴ Eg, s 15.

³³⁵ Breaches of other law might arise: eg, under the Protection from Harassment Act 1997.

³³⁶ Reg 9.

³³⁷ Reg 10.

³³⁸ Reg 11.

³³⁹ Reg 12.

³⁴⁰ Reg 8.

³⁴¹ Reg 13.

³⁴² Ibid. The £5000 limitation was removed by the Legal Aid, Sentencing and Punishment of Offenders Act 2015, s 85(1).

by the Law Commission for England and Wales.³⁴³ At that time, there was no general offence of fraud: eg, it identified eight specific offences involving deception in the Theft Act 1968 and Theft Act 1978.³⁴⁴ It recommended creation of a general offence as this would simplify and improve the law and be ‘a useful tool in effective prosecutions’.³⁴⁵ Although not TS specific, the FA 2006 has TS application and is complementary when, say, combined with the CPUTRs 2008: eg, in more serious TS cases a trader might be charged with CPUTRs 2008 offences and fraud.

The CPUTRs 2008 and the FA 2006 undoubtedly represented an improvement in TS legal resourcing, although further improvement could be made such as extending the power of imprisonment to magistrates for CPUTRs 2008 offences. Another area for improved legal resourcing concerns UCPs involving traders. While the FA 2006 applies whatever the trading context, the CPTURs 2008 are confined to consumers. The scope of generic business protection is far more restricted and is limited to prohibition of advertising which misleads traders.³⁴⁶ Therefore, there is differential TS legal resourcing between consumers and traders.

LWMA Enforcement Powers

Originally, TS enforcement powers were contained in each piece of legislation: eg, in the WMA 1985, TDA 1968 and CPUTRs 2008. This is to be contrasted with a set of generic powers: eg, police powers in the PACE 1984. Following government consultation,³⁴⁷ that position changed with the CRA 2015 which established a generic set of powers applicable to LWMA legislation.³⁴⁸ There are clear improvements, including better accessibility and transparency: the powers are now set out in one place to which a TSO (and others) can refer. The powers also apply to the range of LWMA legislation: eg, a TSO investigating counterfeit goods might consider offences under the Trade Marks Act 1994, the Copyright, Designs and Patents Act 1988 and the CPUTRs 2008. Previously, a TSO would need to refer to each concerning enforcement powers; although there was similarity, there was a

³⁴³ Law Commission, *Fraud* (Law Com No 276, 2002).

³⁴⁴ *Ibid* 7.

³⁴⁵ *Ibid* 3.

³⁴⁶ SI 2008/1276.

³⁴⁷ BIS, *Enhancing Consumer Confidence Through Effective Enforcement: Consultation on Consolidating and Modernising Consumer Law Enforcement Powers* (2012).

³⁴⁸ Sch 5.

potential for difference. After the CRA 2015 change there was much needed clarification. Powers are also now more in-depth and broader: eg, TSOs now have power to enter premises to observe trading,³⁴⁹ as well as power to purchase a product.³⁵⁰ Another CRA 2015 improvement has been in widening the scope of investigatory and enforcement powers. An LWMA in England and Wales now has power to investigate and bring criminal or civil proceedings in LWMA matters outside its area within England and Wales.³⁵¹

While there has been improvement of legal resourcing there has been criticism. One purpose of the review of powers was to avoid 'unnecessarily hindering law-abiding businesses'.³⁵² The practical manifestation is that routine premises inspection now normally requires at least two working days' notice.³⁵³ This was viewed by some as an unjustified restriction on the exercise of enforcement powers.³⁵⁴ Another criticism is that powers do not extend to connected non-LWMA offences. In the counterfeiting example above, FA 2006 offences might also be relevant. Any evidence of fraud obtained through use of CRA 2015 powers would need to be legally justified as having been obtained incidentally to the proper exercise of those powers.

Means of Enforcement

TS enforcement broadened beyond criminal enforcement. Moreover, other means 'often act as an inducement to compliance without the need to invoke...formal sanctions'.³⁵⁵ Civil enforcement powers were given to LWMAs by the Stop Now (EC Directive) Regulations 2001³⁵⁶ but are now in the Enterprise Act 2002, Part 8. Originally this included obtaining enforcement orders (akin to injunctions) and undertakings but the range of sanctions was extended by the CRA 2015³⁵⁷ to include

³⁴⁹ Sch 5, para 22.

³⁵⁰ Sch 5, para 21.

³⁵¹ Sch 5, pt 6.

³⁵² BIS (n 347) 7.

³⁵³ Sch 5, para 23.

³⁵⁴ See, eg, Consumer Rights Bill (HL Deb 1 July 2014, Vol 1754, Cols 1662-1694). This is a record of the Second Reading debate in the House of Lords in which this issue was discussed.

³⁵⁵ Richard Macrory, *Regulatory Justice: Making Sanctions Effective: Final Report* (Cabinet Office 2006) 15.

³⁵⁶ SI 2001/1422.

³⁵⁷ Sch 7.

‘enhanced consumer measures’. There are three categories of measure: eg, there is the redress category which includes:

measures offering compensation or other redress to consumers who have suffered loss as a result of...conduct which has given rise to [an] enforcement order or undertaking.³⁵⁸

Consumers, therefore, can gain redress without having to take separate action, a departure from the traditional approach.

Civil enforcement is a valuable addition to TS capacity. It can be a more appropriate way to stop something. Civil enforcement can be easier to establish due to the lower standard of proof in a civil court. It can be a useful precursor to criminal enforcement.³⁵⁹ It can also be used to educate, rather than punish, a trader, especially where non-compliance has not been deliberate.

There has also been the development of administrative enforcement. As to civil penalties (ie, imposition of a monetary penalty), these might be differently described but, eg, includes penalty charge notices (PCNs). PCNs can be issued for breach of a legal requirement and non-payment is treated as a debt and is enforceable in a civil court: ie, it is not a criminal response. TS has acquired powers to impose PCNs in certain circumstances: eg, the Consumers, Estate Agents and Redress Act 2007 amended the Estate Agents Act 1979 to give powers to TSOs to issue a PCNs for an estate agent’s failure to join an approved consumer redress scheme.³⁶⁰

Licensing is not as relevant to TS as being licensed (or otherwise authorised) is often not a prerequisite to carry out trading. But there are exceptions such as with commercial credit activity under the CCA 1974 or with professions such as solicitors:³⁶¹ eg, a solicitor breaching the CPUTRs could be disqualified from working as a solicitor. There is also ‘negative licensing’: ie, where authority is not required to do something but a person can be disqualified: eg, from working as an estate agent³⁶²

³⁵⁸ Enterprise Act 2002, s 219A(2)(a).

³⁵⁹ Previous civil enforcement can help better establish evidence in later criminal enforcement.

³⁶⁰ Estate Agents Act 1979, s 23B.

³⁶¹ Solicitors Act 1974.

³⁶² Estate Agents Act 1979, s 3.

or being a company director.³⁶³ Administrative enforcement related to licensing (or its potential exercise) can be effective. A requirement for licensing, or potential for disqualification, is a material support for TS effort if the surrounding regime is effective.

Summary

TS is rooted in LG and the LWMA model has emerged. The TS portfolio has expanded exponentially from its original legal metrology base. The emergence of consumer protection was the catalyst. The TDA 1968 started this and legislation meeting EU obligations contributed. A glance at TS enforcement obligations gives an insight into their overall range. But questions arise over the appropriateness of some of that allocation.

Resourcing impacts on TS delivery. For legal resourcing to have effect in practice there must be supported resourcing in such areas as finance, personnel, training and the like. As the Crowther Committee commented: 'Laws and regulations are useless unless they are enforced'.³⁶⁴

TS and devolution in Wales are next considered in Chapter 5.

³⁶³ Company Directors Disqualification Act 1986.

³⁶⁴ Crowther Committee Report (n 234) 337.

Chapter 5 - TS and Devolution in Wales

Devolution has meant the establishment of legislatures and executives in Northern Ireland, Scotland and Wales.³⁶⁵ Associated with that, devolution has entailed giving legislative competence to those nations: eg, for health, education and LG. Legislative competence, though, is asymmetrical and Wales has less devolved competence compared with Northern Ireland or Scotland: eg, the justice system and policing are not devolved to Wales. The position in Wales has also been fluid with a gradual increase in competence.

One feature of devolved government in Wales has been the influence of human rights from international sources in addition to the ECHR.³⁶⁶ However, these other sources are not explored as in this thesis human rights have been placed in relation to the ECHR (see Chapter 3).

Devolution has had implications for TS, and they are discussed below. Before doing so, two things are considered, as they inform that discussion: the history of devolution in Wales; and absence of a separate legal jurisdiction for Wales.

History of Devolution in Wales

The Welsh Office was established in 1964 with the appointment of the first Secretary of State of Wales (SSW).³⁶⁷ The SSW's portfolio included responsibility for LG, housing, planning and highways.³⁶⁸ Over time the SSW's portfolio increased with administrative transfer of functions. The SSW was a member of the UK Government cabinet. Albeit an administrative arrangement within UK Government, this was the first significant devolutionary step for Wales. But the SSW portfolio did not include such things as the justice system or policing,³⁶⁹ unlike the portfolio of the Secretary of State for Scotland.³⁷⁰

³⁶⁵ Relevant legislation is the Northern Ireland Act 1998, the Scotland Act 1998 and the GWA 1998.

³⁶⁶ Eg, United Nations Convention on the Rights of the Child (see: Rights of Children and Young Persons (Wales) Measure 2011, s 1).

³⁶⁷ For a history of the Welsh Office see: Russell Deacon, *The Governance of Wales: The Welsh Office and the Policy Process 1964-1999* (Welsh Academic Press 2002).

³⁶⁸ Ibid 234. Agriculture transferred in 1969 and education in 1970.

³⁶⁹ In the House of Lords Second Reading of the Wales Bill in 2016, Lord Hunt, when SSW (1990-1993), recalled how there was discussion about the transfer of policing to the Welsh Office but that 'it was stopped by the bureaucracy of Whitehall' (Wales Bill (HL Deb 10 October 2016, Vol 774, Col 1730).

³⁷⁰ See: John S Gibson, *The Thistle and the Crown: A History of the Scottish Office* (Stationery Office Books 1985).

Devolution followed, but at the second attempt.³⁷¹ The GWA 1998 established the NAW in 1999,³⁷² and SSW functions were transferred to the NAW.³⁷³ Under that settlement legislative competence of the NAW was limited to subordinate law-making, whereas the Northern Ireland Assembly and Scottish Parliament had primary law-making powers.

Another initial difference from Northern Ireland and Scotland was that the NAW discharged both legislative and executive functions;³⁷⁴ in Northern Ireland and Scotland, as well as legislatures, there were separately established executives. Following a review by the NAW in 2002³⁷⁵ the term 'Welsh Assembly Government' (WAG) was created to describe the executive arm of the NAW. The GWA 2006 gave a legal basis to that distinction by establishing WAG as a legal entity,³⁷⁶ and to which NAW executive functions were then transferred. Subsequently, WAG was renamed as WG by the Wales Act 2014.³⁷⁷

The GWA 2006 also provided for the NAW to take on primary law-making powers subject to a referendum.³⁷⁸ Those enhanced powers arrived following that referendum in March 2011. The legislative competence of the NAW is set out in the GWA 2006.³⁷⁹ The legal mechanism for defining legal competence changed after the Wales Act 2017 amended the GWA 2006. Previously devolved matters had to be expressly conferred on the NAW. This became known as the conferred powers model. After the Wales Act 2017 change, a matter was devolved unless expressly reserved to the UK Parliament (the reserved powers model) and places Wales in line

³⁷¹ A royal commission report in 1973 recommended the establishment of devolved bodies for Scotland and Wales (Royal Commission on the Constitution, *Report of the Royal Commission on the Constitution* (Cmd 5460, 1973)). The Wales Act 1978 was passed and provided for the establishment of an elected Welsh Assembly, subject to a referendum. In 1979 devolution was rejected at that referendum (Russell Deacon, *Devolution in Britain Today* (2nd edn, Manchester University Press 2006)).

³⁷² Devolution returned in 1997 with the election of a Labour government. There was publication of a White Paper (Welsh Office, *A Voice for Wales: The Government's Proposals for a Welsh Assembly* (White Paper, Cm 3718, 1997)). The Referendums (Scotland and Wales) Act 1997 was passed providing for referendums in Scotland and Wales on devolution. This time Wales narrowly voted for devolution (Deacon (n 371) app 4).

³⁷³ See SI 1999/672.

³⁷⁴ This followed the precedent of the Wales Act 1978.

³⁷⁵ NAW, 'Assembly Review of Procedures: Final Report' (2002).

³⁷⁶ S 45(1).

³⁷⁷ S 4.

³⁷⁸ Ss 103-105.

³⁷⁹ S 108A, schs 7A and 7B.

with Northern Ireland and Scotland, whose respective legislative competence has been defined according to the reserved powers model from the outset. Schedule 7A to the GWA 2006 sets out those matters which are reserved to the UK Parliament

It was claimed that ‘a reserved powers model would provide a more coherent, stable and better functioning devolution settlement for Wales’.³⁸⁰ The change was broadly welcomed,³⁸¹ especially, as under the conferred powers model there had been disputes between Welsh and UK Governments concerning the extent of NAW legislative competence, resulting in resolution by the Supreme Court.³⁸² A more stable settlement, it was hoped, would make for clearer demarcation of competence and free-up resource to better deliver devolution. In that event there was potentially more opportunity for TS contribution to policy formulation and delivery, in ways as discussed below.

Absence of a Separate Legal Jurisdiction in Wales.

Williams argues that there are three common characteristics of a separate legal jurisdiction but that in any event recognition is ‘ultimately a political matter’.³⁸³ The common characteristics are a defined territory, a distinct body of law and a structure of courts and legal institutions. Wales is a defined territory. It has increasingly a distinct body of law, but it does not have a distinct structure of courts and legal institutions.

The UK legal system comprises three legal jurisdictions: England and Wales, Northern Ireland and Scotland. That position can be explained through historical circumstances. Scotland had its own Parliament until 1707,³⁸⁴ as did Ireland until 1801.³⁸⁵ In each case, separate legal systems of Ireland and Scotland were retained.

³⁸⁰ HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020 2015) 12.

³⁸¹ See eg: Wales Governance Centre, Cardiff University and The Constitution Unit, University College London, *Delivering a Reserved Powers Model of Devolution for Wales* (2015); <https://www.tradingstandards.uk/media/documents/governance/ctsi_charter.pdf> accessed 6 August 2019.

³⁸² See eg: *Agricultural Sector (Wales) Bill*, *Reference by the Attorney General for England and Wales* [2014] UKSC 43.

³⁸³ John Williams, ‘The Emerging Need for a Welsh Jurisdiction’ [2010] Agenda 38.

³⁸⁴ Following the Treaty of Union, union was given effect on 1 May 1707 by the Union with England Act 1707 and the Union with Scotland Act 1706.

³⁸⁵ Union was given effect on 1 January 1801 by the Act of Union (Ireland) 1800 and the Union with Ireland Act 1800.

Associated with this was the retention of separate court systems and legal professions. Wales' entry into the 'union' did not follow this path. Wales had developed its own laws under the 10th century ruler, Hywl Dda.³⁸⁶ But this did not continue and, as mentioned in Chapter 4, England and Wales was created as a single legal jurisdiction by the Laws in Wales Acts 1535 and 1542, the effect of which was to extend the laws of England to Wales.

Because of devolution and, especially, since the acquisition of primary law-making powers, laws applicable only to Wales have increased significantly and a distinct body of Welsh law has emerged. In consequence, the issue of a Wales legal jurisdiction has been prominent.³⁸⁷ But the justice system (defined with reference to the civil and criminal courts and tribunals systems), with limited exceptions, is not devolved. Notably, the heading in the GWA 2006 under which relevant reservations are placed is titled 'Single legal jurisdiction of England and Wales',³⁸⁸ this can be interpreted as a declaration of Parliamentary intention against a separate Wales legal jurisdiction. One of the consequences of the lack of a separate jurisdiction is a lack of control or influence in Wales in the delivery of the justice system. TS, as a law enforcer, is rooted within the justice system.

TS and Devolution in Wales

Exploration of TS and devolution in Wales can be considered from three aspects: defining what is or is not devolved in a TS context; concerning non-TS matters which are reserved, and which have impact on TS; and concerning the relationship between TS and matters which are devolved.

Legal Competence and TS

The GWA 2006 sets out reserved matters. In a TS context, this includes weights and measures, consumer protection, product safety and IP, although in the case of consumer protection and product safety the following is excepted:³⁸⁹

Food, food products and food contact materials.

³⁸⁶ John Davies, *A History of Wales* (Allen Lane 1993) 88.

³⁸⁷ See eg: Alys Thomas, 'A Welsh Jurisdiction?', *key Issues for the Fourth Assembly* (National Assembly for Wales 2011). The Commission on Justice in Wales recommended that '[T]he law applicable in Wales should be formally identified as the law of Wales, distinct from the law of England. (Commission on Justice in Wales, *Justice in Wales for the People of Wales* (2019) 489).

³⁸⁸ Sch 7A.

³⁸⁹ Ibid.

Agricultural and horticultural produce, animals and animal products, seeds, animal feeding stuffs, fertilisers and pesticides.

Therefore, the NAW has legislative competence for consumer protection and product safety if the legislation relates to food or animals. However, TS for practical purposes is reserved. Yet TS is delivered through LG, which is devolved. A distinction can be drawn between structural arrangements for its delivery (falling within LG) and the substance of TS (which is reserved): eg, there would be legal competence to establish a joint body of LAs in Wales to deliver TS. This could be described as a national TS service although its legal basis would be LG. That competence would not extend to making change to the TS portfolio.

At a devolved level, as TS is reserved, there could be a lack of incentive to take an interest where, in policy terms, there is no direct influence. This might be exacerbated where there is competing call on time and other resources from devolved matters such as health, education, social services and housing. Although, having the power to make structural changes to how TS is delivered, there must be political will to effect change. It can be questioned how that is going to happen if there is no direct influence over TS policy. There is an attendant risk that TS takes low priority.

Legal competence for LG in Wales could also impact on TS if there was reconfiguration of LG areas, leading to, say, fewer LWMAs: eg, the Williams Commission recommended that the number of LAs in Wales be reduced to '12, 11 or 10'³⁹⁰ and WG subsequently adopted a policy of seeking a substantial reduction. But no reduction was achieved, and after the NAW general election in 2016 the policy was not pursued further.³⁹¹

³⁹⁰ Commission on Public Service Governance and Delivery, *Full Report of Commission on Public Service Governance and Delivery* (2014) 338. The Commission was called the Williams Commission after its chair Sir Paul Williams.

³⁹¹ WG, 'Working Together to Reform Local Government: Cabinet Secretary Sets Out Building Blocks for More Resilient Local Authorities' (press release, 4 October 2016); <<http://gov.wales/newsroom/localgovernment/2016/reform-local-government/?lang=en>> accessed 11 September 2017.

Reserved Matters having TS Impact

It is necessary to look at other reserved matters which have relevance to TS: eg, the justice system, policing and police governance. These are devolved for both Scotland and Northern Ireland and initial logic suggests that they should be for Wales. But these are features associated with a separate legal jurisdiction which those countries have, but Wales does not. Over time, as there is increased Wales-only law, the establishment of a Wales legal jurisdiction is conceivable.

Justice System: There is TS linkage to the justice system: eg, TS enforcement involves court action (or its threat). The court system effectiveness impacts on TS enforcement efficacy. Whether the NAW should have competence has been raised: eg, in the One Wales Agreement, which formed the basis of the WLP and Plaid Cymru coalition programme of government following the NAW general election in 2007.³⁹² The Commission on Welsh Justice has called for devolution of the justice system.³⁹³ The Howard League for Penal Reform has called for the devolution of youth justice.³⁹⁴ Roderick Evans, as a High Court judge, said '[S]pending criteria and administrative templates set in London for England and Wales may be suitable for England but not necessarily suitable for Wales'.³⁹⁵ Malcolm Pill, as a Lord Justice of Appeal, asked 'If a Welsh public body decides where hospitals are built in Wales, should not a Welsh public body decide where courts are built?'.³⁹⁶ Figure 5 considers a case study by way of practical illustration.

³⁹² Labour Party Wales and Plaid Cymru, *One Wales: A Progressive Agenda for the Government of Wales* (2007).

³⁹³ Commission on Justice in Wales (n 387).

³⁹⁴ Howard League for Penal Reform, *Youth Justice in Wales: Thinking Beyond the Prison Bars* (2009).

³⁹⁵ Roderick Evans, 'Devolution and the Administration of Justice' (Lord Callaghan Memorial Lecture, Swansea, 19 February 2010).

<<http://www.iwa.wales/click/2010/02/devolution-and-the-administration-of-justice/>> accessed 11 September 2017.

³⁹⁶ Malcolm Pill, 'Address to Legal Wales Conference' (Legal Wales Conference, Cardiff, 9 October 2009).

<<http://legalwales.org/downloads/legal-wales-conference-cardiff.pdf>> accessed 11 September 2017.

Figure 5
Case study - Courts in Wales

Following a court estate review in England and Wales in 2010 the Ministry of Justice (MOJ) announced the closure of 93 magistrates' courts (12 in Wales) and 49 county courts (4 in Wales).³⁹⁷ One court was Barry Magistrates' Court. With its closure, the Vale of Glamorgan was left without a magistrates' court. Potential users needing to access an alternative facility, presumably, in either Cardiff or Bridgend.

And that position was exacerbated after a further MOJ review in 2015 led to closure of 10 more courts, including Bridgend Magistrates' Court.³⁹⁸

Such changes must have had practical impact on how the Vale of Glamorgan County Borough Council as an LWMA was able to deliver TS: eg, the need for greater use of resources to take magistrates' court action because of greater distance etc could act as a deterrent to taking action.

Location of, and accessibility to, a court is materially relevant to TS enforcement. The decision to close Barry Magistrates' court was not made by a Welsh public body and, it could be argued, was according to 'templates set in London for England and Wales [which] may be suitable for England but not necessarily suitable for Wales'. If a review of the Welsh estate had been carried out by WG, a different outcome can be envisaged. In support of this assertion, in response to the 2015 MOJ review, WG said:

Communities currently serviced by the courts...will be affected by unreasonable and in some cases unacceptable increases in journey times and increased costs, which may become a barrier for court users...Proposed closures may impact on local administration of justice, particularly where there would no longer be a court building in the town...The proposals do not provide any analysis or consideration of the Welsh language needs of the population and service providers in Wales.³⁹⁹

'Prosecutors' are part of the justice system reservation.⁴⁰⁰ Effectiveness of prosecution arrangements for TS cases is important. Devolution of prosecutions would allow for alternative models for delivery to be considered. (The prosecution function is considered in Chapter 6.)

Policing and Police and Crime Commissioners: These are reserved matters⁴⁰¹ but policing and its governance are devolved in Scotland and Northern Ireland. This

³⁹⁷MOJ, 'Court Reform: Delivering Better Justice' (press release, 14 December 2010).

<<http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/news/newsrelease141210a.htm>> accessed 11 September 2017.

³⁹⁸MOJ and HM Courts & Tribunals Service, 'Response to the Proposal on the Provision of Court and Tribunal Estate in England and Wales' (2016).

³⁹⁹WG, 'The Welsh Government's Response to the UK Government's Consultation on HM Courts and Tribunals Service Reform' (2015) 3-4.

⁴⁰⁰GWA 2006, sch 7A.

⁴⁰¹Ibid.

position is consistent with each country having its own legal jurisdiction and having competence for the justice system. TS works with the police. Therefore, there is need for co-ordination between TS and the police, whether at strategic or operational levels.

TS and Devolved Matters

Matters such as education and training, health and health services, social services, housing and Welsh language are devolved, and TS can contribute to their effective delivery. In setting out a critical theoretical framework for the thesis in Chapter 3, promotion of well-being was identified: eg, consumer protection and a fair-trading environment have been linked to health and well-being. According to WAG in 2009:

Unchallenged debt problems can often lead to increased levels of stress and anxiety. Over-indebtedness can often lead to physical and mental health problems.⁴⁰²

Education of the consumer or trader forms part of TS and can contribute to economic well-being. As part of the effort to combat financial exclusion, education could include equipping consumers with greater financial skills. Application of knowledge gained could include the consumer or trader who becomes more effective in that role.

TS has a role in protecting the well-being of children and adults. Concerning children, an example is enforcement of laws for age restricted supply of products such as cigarettes and alcohol. For adults, it can involve protection from financial abuse. The Welsh language will also be relevant as TS will be delivered through both the mediums of English and Welsh. There will be other matters where TS can contribute.

Summary

Devolution in Wales is recent, and although devolved competence has increased, it remains significantly less when compared to Northern Ireland and Scotland. Core to this asymmetrical position is the reservation of the justice system and policing and the absence of a Wales legal jurisdiction for Wales. This has implications for TS.

⁴⁰² WAG, *Taking Everyone into Account: Financial Inclusion Strategy for Wales* (2009) 14.

As TS is largely not devolved, WG has no responsibility for TS policy formulation. But as LG is devolved, WG does have devolved competence concerning structural arrangements for TS delivery. And TS can contribute to the effective delivery of devolved government. In view of the TS manifesto commitment,⁴⁰³ presumably, the value of TS was identified. And in 2011, after the NAW election, Carl Sargeant (then) Minister for Local Government and Communities described TS as:

integral to several of the [WG's] key agendas on social justice, financial inclusion, tackling poverty and food safety.⁴⁰⁴

This is a clear official acknowledgement of the relevance of TS to devolved policy. The issue arising is whether in practice that role is realised.

Comparative contexts in relation to TS are next considered in Chapter 6.

⁴⁰³ WLP (n 1) 22.

⁴⁰⁴ Carl Sargeant letter to Julie Morgan (29 July 2011). This correspondence arose from making representations to Julie Morgan AM. concerning the proposal to establish a national TS service in Wales.

Chapter 6 - TS and comparative contexts

This chapter considers comparative contexts which inform critical evaluation of TS in Wales. These are:

- **TS and Northern Ireland:** Northern Ireland shares geographical similarities with Wales, yet TS there is delivered differently.
- **Other LA enforcers:** Food and health and safety are other examples of LA enforcement. There are associated enforcement regimes.
- **Prosecutions:** Unlike England and Wales, in Scotland and Northern Ireland TS criminal cases are prosecuted independently of TS.
- **Legal metrology and consumer protection separation:** Legal metrology and consumer protection fall within TS in the UK. Elsewhere there are often separate arrangements: eg, in the Republic of Ireland.

TS and Northern Ireland

There are more obvious similarities between Northern Ireland and Wales than England and Wales, eg:

- In mid-2018 the estimated populations for England, Northern Ireland and Wales were 55,977, 000, 1,882,000 and 3,139,000 respectively.⁴⁰⁵
- The land areas for England, Northern Ireland and Wales are 130,423 square kilometres, 14,121 square kilometres and 20,766 square kilometres respectively.⁴⁰⁶

There are different arrangements for TS delivery in Northern Ireland. They are through devolved government, and not LG. This means there is a single authority responsible for TS delivery and not an LWMA for each LA area. That authority is DFENI,⁴⁰⁷ a department of Northern Ireland government.⁴⁰⁸ Administratively, the Trading Standards Service for Northern Ireland (TSSNI) sits within DFENI. While acknowledging that there are differences (eg, about language and faith), given similarities in population and size of area, in critically evaluating TS in Wales, there

⁴⁰⁵ Office for National Statistics, *Statistical Bulletin: Population Estimates for UK, England and Wales, Scotland and Northern Ireland: Mid 2018* (Office for National Statistics 2019) 9.

⁴⁰⁶ The Times, *The Times Atlas of the World* (Times Books 1997).

⁴⁰⁷ DFENI was previously known as the Department of Enterprise, Trade and Investment. It was renamed by the Departments (Northern Ireland) Act 2016, s 1(3).

⁴⁰⁸ The Northern Ireland Assembly was created by the Northern Ireland Act 1998. For a history of devolution in Northern Ireland, see: Deacon (n 371).

is a case for looking at Northern Ireland and its TS model, and how that model might apply in Wales.

Devolved Functions

Unlike Scotland and Wales consumer protection is devolved in Northern Ireland. The difference can be explained historically. Devolution was originally established in Northern Ireland by the Government of Ireland Act 1920 which created the Parliament of Northern Ireland. Devolution for Scotland and Wales was established for the first time, respectively, by the Scotland Act 1998 and the GWA 1998. The Northern Ireland Constitution Act 1973 set out those matters which were excepted or reserved. Consumer protection was not mentioned. To have repatriated consumer protection in the Northern Ireland Act 1998 would have been inconsistent with the 1973 Northern Ireland devolution settlement.

In practice, however, as much consumer protection legislation is EU derived it is questionable whether the difference has had major practical effect, as the requirement is to implement EU legislation throughout a member state. In practice consumer protection legislation applies to the whole of the UK, and there is no separate Northern Ireland provision.⁴⁰⁹ But following UK exit from the EU that position changes and a barrier to separate provision regarding consumer protection is removed.

There is greater legal capacity for making differential arrangements for TS delivery in Northern Ireland than in Wales. Under the GWA 2006 any rearrangement for delivery must fall within LG. In Northern Ireland there is legal capacity to move from devolved government to LG. There is no corresponding ability in Wales to make a move in the opposite direction. To establish TS in Wales outside of LG would require further devolution or an Act of Parliament.

TSSNI Portfolio

There are also differences between TSSNI and the LWMA portfolios. The TSSNI portfolio does not include product safety; this is an LG function. Animal health,

⁴⁰⁹ Eg, SI 2013/3134.

explosives, food and petroleum are also not part of the TSSNI portfolio So, non-LWMA functions undertaken by TSOs in GB are not present.

Prosecution Arrangements

As in Scotland, but unlike England and Wales, TS criminal cases in Northern Ireland are prosecuted by an independent prosecutor. Prosecution arrangements are considered below.

TS and EH

As TS in Northern Ireland is outside of LG there is separation from EH and unlike GB there has been no development of 'regulatory services' (see Chapter 7).

TSOs as Civil Servants

TSSNI workers are members of the Northern Ireland Civil Service (NICS). LA workers are not civil servants. Members of NICS are subject to a civil service code⁴¹⁰ which regulates their working conduct and promotes core values of 'integrity, honesty, objectivity and impartiality'.⁴¹¹ There are procedural safeguards to help secure effective working of the code in practice, including the ability of a civil servant to report a matter to the Civil Service Commissioners of Northern Ireland.⁴¹² The Commissioners perform a regulatory and adjudicatory role and are independent of both government and NICS.

LG workers in Wales are subject to a code of conduct which promotes general principles of 'integrity, honesty, impartiality and objectivity'.⁴¹³ Again, there are mechanisms for upholding the code including investigation and reporting by LA monitoring officers. Appointment of a monitoring officer is a statutory requirement,⁴¹⁴ and that person must ensure that the LA, its members and employees uphold the code. While there may be similarity between the roles of civil

⁴¹⁰ Northern Ireland Government, *Northern Ireland Civil Service Code of Ethics* (Northern Ireland Government 2011). There are similar separate codes for other UK civil servants (HM Government, *Civil Service Code* (Minister for the Civil Service 2015)).

⁴¹¹ NICS Code, para 2.

⁴¹² NICS Code, para 18. Re Civil Service Commissioners of Northern Ireland, see: <<http://www.nicscommissioners.org>> accessed 9 August 2019.

The Civil Service Commission performs a similar role for the UK Home Civil Service. See: <<http://civilservicecommission.independent.gov.uk>> accessed 9 August 2019.

⁴¹³ NAW, *Code of Conduct for Qualifying Employees of Relevant Authorities in Wales* (2001). The code is made under SI 2001/2280 (W 170).

⁴¹⁴ Local Government and Housing Act 1989, s 5.

service commissioners and a monitoring officer, a monitoring officer is an employee of the LA and does not have the independence of civil service commissioners.

Differences between conditions of employment as civil servant or LA employee can have practical impact on how TS is delivered: eg, it might arise in political influence on that delivery. In comparative evaluation of TS delivery, a useful counterpoint is a chief officer for a police force in England and Wales who must be operationally independent but accountable.⁴¹⁵ By extension, an enforcer like TS must act lawfully, take account of public opinion in setting priorities and be efficient and accountable. Mechanisms for oversight should seek to achieve that but not be such that they inhibit operational independence. The key is to secure arrangements that best balance accountability and independence in practice. Arguably, this can be better achieved under the civil service model because of the more independent status of civil servants.

Other Matters

As part of devolved government TS is more naturally placed to have higher profile than under the LWMA model. As part of DFENI, TS is also more likely to have influence in broader economic (and other) policy formulation. As a single authority for Northern Ireland, resourcing is less problematic than under the LWMA model because of economies of scale and more secure funding.

Overview

While there are similarities of population and land area between Northern Ireland and Wales, differences in the respective systems for TS must be identified to inform comparative evaluation. These include:

- Differences in devolution settlements.
- One enforcement authority for Northern Ireland, 22 for Wales.
- Differences in portfolios.
- Differences in profile and resourcing arrangements.
- Differences in prosecution arrangements.
- TS is delivered by devolved government in Northern Ireland. In Wales it is by LG.
- TSSNI workers are civil servants, LWMA workers are not.

⁴¹⁵ The Police Reform and Social Responsibility Act 2011 sets out the respective remits for chief constables and PCCs.

- Northern Ireland arrangements have not permitted development of ‘regulatory services’.

Local Government Enforcement: Comparative Regimes

TS is not the only enforcement undertaken by LG. Other enforcement undertaken includes food and health and safety (HS).

Food Enforcement and the Food Safety Act 1990

LAs enforce TS law as LWMAs. LAs also enforce food law as food authorities (FAs): eg, LAs enforce the Food Safety Act 1990 (FSA 1990) as FAs. The FAs in Wales are the principal councils; each LA is both FA and LWMA.⁴¹⁶ The FSA 1990 establishes a food enforcement regime, creates offences and gives enforcement powers to FA officers.⁴¹⁷ There is similarity in the food and TS enforcement regimes but there is difference between oversight of LA activity when acting as FA or LWMA. That difference relates to the Food Standards Agency (FSA) and its role.⁴¹⁸ Its main aim is to:

protect public health from risks which may arise in connection with the consumption of food (including risks caused by [production or supply]) and otherwise to protect the interests of consumers in relation to food.⁴¹⁹

Its functions also include developing, or assisting developing, policies concerning food safety and interests of consumers and ‘providing advice, information or assistance in respect of such matters to any public authority’.⁴²⁰ The FSA’s powers extend beyond advice and assistance though and include powers of compulsion.

Codes of practice for FA guidance are issued under the FSA 1990 regarding recommended practice for enforcement (and FAs must have regard to a code).⁴²¹

There are separate codes for England, Northern Ireland, Scotland and Wales.⁴²²

⁴¹⁶ S 5(1A).

⁴¹⁷ S 5(6).

⁴¹⁸ The FSA was established by the Food Standards Act 1999. See Ministry of Agriculture, Fisheries and Food, *Food Standards Agency: A Force for Change* (White Paper, Cm 3830, 1998).

⁴¹⁹ S 1(2).

⁴²⁰ S 6.

⁴²¹ S 40.

⁴²² See: HM Government, *Food Law: Code of Practice (England)* (2017), Department of Health Social Services and Public Safety, *Food Law: Code of Practice (Northern Ireland)* (2016), Scottish Government, *Food Law: Code of Practice (Scotland)* (2019) and Welsh Government, *Food Law: Code of Practice (Wales)*, (2018).

Furthermore, there are default powers: eg, an FSA can give directions requiring an FA to comply with a code.⁴²³ A direction is enforceable through a court order.⁴²⁴ In extremis, where one FA fails to discharge a duty, another FA or the FSA can take its place.⁴²⁵ With the role of codes, the FSA and default powers, there are specific mechanisms for oversight and coordination available to help secure effective FA action. Nothing similar is associated with TS delivery.

Workplace HS Enforcement

The Health and Safety at Work etc. Act 1974 sets out the regime ‘for securing the health, safety and welfare of persons at work’⁴²⁶ and establishes an HS enforcement regime, creates offences and provides for the appointment of enforcement inspectors with associated powers.⁴²⁷ The Health and Safety at Work etc. Act 1974 established the Health and Safety Executive (HSE) as the agency with overall responsibility for HS enforcement in GB.⁴²⁸

HS enforcement is shared with LAs:⁴²⁹ eg, HS enforcement for shops is the responsibility of LAs. In Wales, these are the principal councils: ie, an additional capacity to FA and LWMA. Like the FSA, the HSE has oversight functions concerning LA HS enforcement: eg, LAs must act in accordance with guidance given by the HSE.⁴³⁰ Concerning that directing role, the guidance states:

In his report...Professor Ragnar Löfstedt⁴³¹ recommended that [the] HSE be given a stronger role in directing [LA HS] inspection and enforcement activity...This National Code has been developed in response to this recommendation and as an outcome of the Red Tape Challenge on [HS]. It is designed to ensure that [LA HS] regulators take a more consistent and proportionate approach to enforcement.⁴³²

There are also default powers whereby the HSE can report a failing LA to the Secretary of State who can declare that LA to be in default and issue remedial

⁴²³ S 40.

⁴²⁴ Failure to comply could be treated as contempt of court. See Contempt of Court Act 1981.

⁴²⁵ S 42.

⁴²⁶ Long title.

⁴²⁷ Pt 1.

⁴²⁸ S 10.

⁴²⁹ Re demarcation of responsibility, see SI 1998/494.

⁴³⁰ S 18(4).

⁴³¹ Ragnar Löfstedt and Department for Work and Pensions, *Reclaiming Health and Safety for All: An Independent Review of Health and Safety Legislation* (2011).

⁴³² HSE, *National Local Authority Enforcement Code: Health and Safety at Work: England, Scotland & Wales* (2013) 2.

directions. In extremis, the Secretary of State can also make an order transferring HS from that LA to the HSE, with the costs of HSE action being paid for by the LA.⁴³³

Overview

There are differences between the FSA and the HSE as, unlike the FSA, the HSE has significant enforcement responsibilities which it shares with LAs. What they share though is oversight concerning LA enforcement. This includes the ability to issue guidance or codes and default powers. While in practice the exercise of default powers is unlikely, their potential exercise can provide stimulus for LA compliance. There is no parallel position concerning TS enforcement, and it is something that could be considered for TS enforcement.

Another aspect to consider from the FSA and HSE models for TS is, if there was to be an equivalent TS body with powers of oversight, whether that body would also have enforcement responsibilities like the HSE. If so, questions arise about how to achieve demarcation of enforcement responsibilities.

TS and Prosecutions

TS prosecution arrangements contribute to TS effectiveness, whether through case or court presentation. Prosecutions in England and Wales are brought by LAs as part of their LWMA function. In practice, this means proceedings are taken by lawyers working for those LAs. The extent of separation of investigation and prosecution varies depending on such things as internal procedures, the size of the LA or the relative expertise of lawyers and TSOs. But, ultimately, it is the same corporate body that both investigates and prosecutes.

However, in Northern Ireland and Scotland there are independent TS prosecutors. In Northern Ireland, it is the Public Prosecution Service for Northern Ireland (PPSNI)⁴³⁴ and, in Scotland, it is the Crown Office and Procurator Fiscal Service (COPFS).⁴³⁵

⁴³³ S 45.

⁴³⁴ The PPSNI is guided by a code of practice: PPSNI, *Code for Prosecutors* (2016).

⁴³⁵ The COPFS is guided by a code of practice: COPFS, *Prosecution Code* (Crown Office 2001).

Prosecutions of offences in England and Wales investigated by the police are undertaken by the Crown Prosecution Service (CPS), and in accordance with principles contained in a statutory code.⁴³⁶ A prosecution must pass a two-stage test; first, that there is sufficient evidence to justify prosecution (the evidence test) and, second, it is in the public interest to do so (the public interest test). Although the code is issued to guide the CPS, its principles are applied by other enforcers such as TS.

The CPS was established by the Prosecution of Offences Act 1985 and took over prosecutions from the police. This followed a Royal Commission on Criminal Procedure,⁴³⁷ which recommended establishment of an independent prosecution body: making conduct of prosecutions the responsibility of a person who was both legally qualified and not identified with the investigative process. One argument for separation was ‘that the investigator, by virtue of [her or] his function, is incapable of making a dispassionate decision on prosecution.’⁴³⁸ In separating the two, so it was argued, helped to ‘ensure that prosecutions are initiated only in those cases in which there is adequate evidence and where prosecution is justified in the public interest’.

Applying that logic to TS prosecutions in England and Wales, there is risk that the ability to make a dispassionate decision about prosecution is compromised, as it is the same body both investigating and prosecuting. The PPSNI and the CPOFS are independent of LG and so there a clear divide between investigation and prosecution. In principle, they bring greater independence to prosecutions than an LA.

There are other issues in addition to dispassionate TS prosecution decision-making. An LA in England and Wales has legal functions broader than prosecution. There will not be a dedicated focus to prosecution. Also, as that LA’s functions will extend to its area, an area far smaller than Northern Ireland or Scotland, there are likely to be stark differences between resourcing for LA legal functions and the PPSNI or COPFS.

⁴³⁶ CPS, *Code for Crown Prosecutors* (2018). The code is issued under the Prosecution of Offences Act 1985, s 10.

⁴³⁷ Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (Cmnd 8092 1981).

⁴³⁸ *Ibid* 133.

At face value, with their dedicated focus and economies of scale, the PPSNI and COPFS are repositories of greater expertise and capacity than an LA. There are also risk factors associated with prosecutions and the PPSNI and COPFS are seemingly better placed to be resilient to financial and reputational damage from unsuccessful prosecutions.

Such differences, in principle, impact on effectiveness of enforcement. Lack of expertise within a resource starved LA might mean, say: that cases are not prepared as required; there is insufficient capacity to pursue cases; cases are not pursued because of concern over financial consequences if unsuccessful; and a court, when sentencing for TS offences, sentences inappropriately because prosecutors cannot properly inform the court of case complexities and circumstances.

Case Studies

There are two case studies to give practical illustration: Figure 6 contains a TS case study and Figure 7 a non-TS case study, but which has comparative relevance.

Figure 6

Case Study - Vance Miller and Others

⁴³⁹Oldham Metropolitan Borough Council (OMBC) prosecuted Vance Miller and others for conspiracy to defraud. The central allegation was that false representations were made that kitchens were made of real or solid wood. The investigation was originally initiated by TS in July 2006 and a Crown Court trial ran from September to December 2009 when Judge Jonathan Foster QC stopped it for abuse of process. At the time, it was reported this was the ‘biggest ever’ TS prosecution.⁴⁴⁰ The decision to stop generated considerable adverse publicity for OMBC, both nationally⁴⁴¹ and locally.⁴⁴² The judge made his final ruling in open court in January 2010 and said:

The investigation was flawed from the start by the Head of [TS’s] unsubstantiated belief that complaints were increasing and Vance Miller’s businesses should be closed down...That belief continued throughout the investigation and compromised his objectivity.

OMBC commissioned an independent review which identified concerns about OMBC’s handling of the case.⁴⁴³ These included:

- The case was run with inadequate resources.
- There was an absence of effective corporate examination and scrutiny of the proposal to prosecute before the decision was made to proceed.
- The case was not identified as a corporate risk and therefore not included in the OMBC risk register.

The review calculated that the total financial exposure for OMBC arising from the case was just over £2.1 million. This was made up of £1.14 million for OMBC’s own costs and just under £1 million for defence costs, which OMBC had been ordered to pay.

Comment: The estimated financial cost to OMBC did not include potential liability for civil claims.⁴⁴⁴ A case which generates adverse publicity can always occur, but the

⁴³⁹ The summary has been prepared largely from: Stewart Dobson, ‘Independent Review of Vance Miller Case: Summary of Review Report’ (2010).

<<http://committees.oldham.gov.uk/documents/b952/Cabinet%2010112010%20-%20Additional%20Reports%2010th-Nov-2010%2018.00%20Cabinet.pdf?T=9&nobdr=2>> accessed 13 September 2017.

⁴⁴⁰ See, eg: Local Government Lawyer, ‘“Biggest Ever” Trading Standards Prosecution Collapses in Court’ *Local Government Lawyer Online* (15 January 2010).

<http://localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=877%3Abiggest-ever-trading-standards-prosecution-collapses-in-court&catid=56%3A litigation-articles&q=&Itemid=8> accessed 13 September 2017.

⁴⁴¹ See, eg: The Telegraph, ‘Judge Criticises Trading Standards Boss for Bringing “flawed” Case against Kitchen Salesman’ *The Telegraph Online* (13 January 2010).

<<http://www.telegraph.co.uk/news/6976344/Judge-criticises-trading-standards-boss-for-bringing-flawed-case-against-kitchen-salesman.htm>> accessed 13 September 2017.

⁴⁴² See, eg: Manchester Evening News, ‘Kitchen Boss Fraud Case Thrown Out’ *Manchester Evening News Online* (13 January 2010).

<<http://www.manchestereveningnews.co.uk/news/greater-manchester-news/kitchen-boss-fraud-case-thrown-880407>> accessed 13 September 2017.

⁴⁴³ Dobson (n 439).

⁴⁴⁴ Eg, potential claims might have arisen under the Human Rights Act 1998, s7, or in the torts of negligence or misfeasance in public office. Re the tort of misfeasance in public office see: Mark Aronson, ‘Misfeasance in Public Office’, *Misconduct in Public Office: Issues Paper 1 - The Current Law* (Law Commission for England and Wales 2016).

concerns identified are, probably, less likely to arise in PPSNI, COPFS or CPS cases because of, eg, economies of scale, independence from the investigation, in-house expertise and experience. A more dispassionate and experienced prosecutor with greater expertise (thereby allowing better application of the evidence and public interest tests) might have led to a different outcome. Prosecution is a core function of the PPSNI, COPFS and CPS, but not OMBC.

The PPSNI, COPFS and CPS are likely to have greater resilience than an LA such as OMBC. There is a real risk that an LA having a negative experience would be inhibited from bringing future proceedings, even if properly managed, if the risk of harm (financial or reputational) is judged as too great.

Figure 7 **Case Study - RSPCA**

An independent review of the prosecution activity of the Royal Society for the Prevention of Cruelty to Animals, (RSPCA) was carried in 2014.⁴⁴⁵ The RSPCA has charitable status and campaigns to further animal welfare in England and Wales. It investigates and prosecutes around 83% of animal welfare cases. It is not a public body and its prosecutions are private prosecutions. The RSPCA has an investigations arm (the Inspectorate) and a prosecutions department.

The review was commissioned by the RSPCA after criticism about its prosecutions. Criticism was twofold: it was inappropriate that an organisation should investigate and prosecute; second, it has other roles which are not compatible with its role as a prosecutor.

Concerning the first criticism, the review did not see this as an 'insuperable impediment' as other organisations combine investigations and prosecutions. The key requirement was for them to be separated (and they were, between the Inspectorate and prosecutions department).⁴⁴⁶

Concerning the second criticism, this was more problematic especially given RSPCA campaigning and lobbying. There was a need for decisions to be objective and impartial and 'free from any extraneous and improper influence; and for that seen to be so'.⁴⁴⁷ External and internal accountability would be key elements in securing legitimacy.

The review concluded that prosecution decision-making was insufficiently dispassionate and that the public interest test was not being applied effectively. The review also found that there was no external accountability for prosecutions and only limited internal accountability. This lack of accountability was a concern and was neither 'in the interests of the RSPCA or the public.'⁴⁴⁸

⁴⁴⁵ Stephen Wooler, 'The Independent Review of the Prosecution Activity of the Royal Society for the Prevention of Cruelty to Animals' (2014).

⁴⁴⁶ Ibid 17.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid 12.

Comment: The review concluded that effective separation of investigation and prosecution functions can be established within a single organisation but arrangements must ensure necessary objectivity and impartiality. In the case of an LA, especially a smaller LA, establishing such arrangements could be problematic.

The review concluded that the public interest test was not being applied effectively because of the lack of dispassionate assessment; by extension, there must be a similar risk concerning the evidence test. This criticism could also apply to an LA. A lack of RSPCA internal and external accountability was identified. The RSPCA is a private organisation. This is less likely to be relevant with an LA prosecution as there is inbuilt accountability: eg, through elected politicians, the press, the electorate.

The RSPCA suffered reputational damage because of adverse publicity.⁴⁴⁹ This was the driver for the review and detracted from its core function of furthering animal welfare. Similarly, and as case study in Figure 6 demonstrates, ill-judged TS investigations and prosecutions can generate adverse publicity with attendant reputational damage and loss of public confidence.

Overview

In the event of the devolution of the justice system, establishment of an independent prosecution service in Wales is possible. Investigations and prosecutions would then be separated, so that there could be more ‘dispassionate decision[s] on prosecution’. Additionally, such a dedicated body could develop critical mass, expertise and resilience; something not easily achievable within an LA legal department, given the size of LAs and other calls on resources.

But even if investigation and prosecution are not undertaken by separate bodies, establishing the basic TS unit at a larger size than the current LWMA model could lead to greater critical mass and economies of scale permitting effective de facto separation of the two functions. The RSPCA independent review concluded that this

⁴⁴⁹ As an example of adverse publicity, see: Melissa Kite, ‘Why Is the RSPCA Killing so Many Pets - and Taking Their Loving Owners to Court? Statistics Show Charity Is Now Destroying Half the Animals It Comes into Contact With’ *Daily Mail online* (16 August 2014). <<http://www.dailymail.co.uk/news/article-2726348/Why-RSPCA-killing-pets-taking-loving-owners-court-Statistics-charity-destroying-half-animals-comes-contact-with.html>> accessed 13 September 2017.

was achievable, presumably a view informed by the RSPCA size and area of operation. Establishing a single body for TS in Wales, as in Northern Ireland, might give critical mass to also enable that separation.

Legal Metrology and Consumer Protection Separation

TS has developed in a piecemeal way and has been identified with the fusion of legal metrology and consumer protection enforcement, but each comprising a distinctive strand of TS (see Chapter 4). Because of that difference there is an argument for establishing separate enforcement frameworks for each. That position is commonly replicated outside the UK: eg, in Ireland, legal metrology is the responsibility of the National Standards Authority of Ireland⁴⁵⁰ and consumer protection is the responsibility of the Competition and Consumer Protection Commission.⁴⁵¹

Overview

While the other comparative contexts mentioned are premised on continuation of TS as a discrete service area, separation of legal metrology and consumer protection is not. Because that separation exists elsewhere, this must be considered when critically evaluating TS in Wales.

Summary

Four comparative contexts have been considered that inform critical evaluation of TS in Wales. While three are premised on continuation of TS as a discrete service area, separation of legal metrology and consumer protection is not and, if adopted, would represent a radical departure from the current position.

In Chapter 7 the relationship between TS and regulation is explored.

⁴⁵⁰ Established by the National Standards Authority of Ireland Act 1996. See: < <https://www.nsai.ie/Our-Services/Measurement.aspx> > accessed 19 December 2017.

⁴⁵¹ Established by the Competition and Consumer Protection Commission Act 2014. See: < <https://www.ccpc.ie/> > accessed 19 December 2017.

Chapter 7 - Regulation and TS

TS has been described as a regulator exercising regulatory functions, and an inference from that description is that TS deals with 'regulation'. This chapter explores implications of this position.

Regulation

Ogus states that 'regulation' has 'acquired a bewildering variety of meanings'⁴⁵² but cites Selnick for a 'central meaning' as:

A sustained and focused control exercised by a public agency over activities that are valued by a community⁴⁵³.

According to Ogus the emphasis on 'valued activities' excludes 'traditional areas of criminal law and the concerns of the criminal justice system.' By extension, regulation falls outside policing as policing is concerned with areas of traditional criminal law: therefore, trade is a valued activity (TS focus) but theft is not (police focus). While there is superficial attraction to this distinction, it breaks down on closer analysis. In the context of pollution regulation:

The emphasis on 'valued activity' has the advantage of including most pollution regulation (where, [eg], manufacturing industry is a valued activity), but excluding traditional criminal law (theft not being a valued activity). However, it has the disadvantage of excluding some non-valued activities that are covered by pollution regulation ([eg], the deliberate fly tipping of waste by individuals) and may also include some non-regulatory activities (such as fraud where business is valued but fraud is not).⁴⁵⁴

The above can be applied in a TS or police context: eg, TS can investigate fraudulent trading (a non-valued activity); the police promote safe driving (a valued activity) through enforcement of road traffic law. It can also be argued that the law of theft promotes trading (a valued activity), as people's lawfully acquired property is protected. Although the distinction can be challenged, according to it, TS is concerned with 'regulation'. Before the implications of this distinction are further explored, the term regulator is considered.

⁴⁵² Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (reissue, Hart Publishing 2004) 1.

⁴⁵³ Philip Selznick, 'Focusing Organizational Research on Regulation' in Roger Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press 1985) 363.

⁴⁵⁴ Chris Hilson, *Regulating Pollution: A UK and EC Perspective* (Hart Publishing 2000) 1.

TS as a Regulator

The adjective ‘regulator’ has emerged as used to describe those carrying out enforcement functions, with the notable exception of the police. Under the Legislative and Regulatory Reform Act 2006 (LRRRA 2006) TS is regarded as a regulator (see Chapter 8). This is consistent with a position that accepts that TS is concerned with regulation.

But is it correct to describe TS as a regulator? The noun ‘regulate’ can be defined as to ‘control or supervise by means of rules and regulations’.⁴⁵⁵ This is consistent with Selnick’s ‘sustained and focused control’. Applying this to TS is problematic. The definition sits more comfortably with, eg, a body such as the Water Services Regulation Authority (Ofwat) whose duty is to protect the interests of consumers by promoting effective competition between water and sewerage service providers. It does this backed by legal powers, which include enforcement powers, but they are wider and are consistent⁴⁵⁶ with Ofwat having a controlling or supervisory function. Ofwat describes itself as the ‘economic regulator of the water sector in England and Wales’.⁴⁵⁷

Conversely, the noun ‘enforce’ can be defined as to ‘compel compliance with (a law, rule, or obligation)’ or ‘cause to happen by necessity or force’.⁴⁵⁸ This is a better description of what TS does and is consistent with the usual statutory language whereby an LWMA must enforce legislation.⁴⁵⁹ TS is an enforcer rather than a regulator.

Regulation and Regulator: Implications for TS

It is argued that there are implications that flow from the distinction. TS is part of a wider picture of enforcement which includes police enforcement. TS routinely works with the police concerning, say, age restricted product supply or IP law enforcement. The police is not described as a regulator, yet TS is. But in broad terms their functions are similar and may be summarised as follows: to secure legal compliance, to promote measures preventing non-compliance, and to act where

⁴⁵⁵ *Concise Oxford English Dictionary* (n 35).

⁴⁵⁶ See Water Industry Act 1991.

⁴⁵⁷ <<http://www.ofwat.gov.uk/>> accessed 11 August 2019.

⁴⁵⁸ *Concise Oxford English Dictionary* (n 35).

⁴⁵⁹ See eg, CPUTRs, reg 19.

there is non-compliance. There are differences in how this may be achieved. Securing compliance for TS is more likely to happen through advice than for the police, but the ultimate intention of each is to promote legal compliance.

This can affect perception of the role of non-police enforcers if they are regarded as regulators, and by extension concerned with regulation. If TS is perceived with 'regulation' and not 'law', it has the potential to undermine the importance of what it does, as 'regulation' does not have the gravitas of 'law' or an association with 'crime and punishment'.⁴⁶⁰ There are related associations such as with the 'criminal' justice system, the social science of criminology, and political agendas such as 'law and order'. 'Crime' has a high public profile as can be evidenced by a cursory glance at the content of news reporting and political debate. This prominence is evident in government policy. Self-evidently, to give effect to that policy requires resourcing. Regulation does not have similar prominence. However, regulation does have some political profile, but the emphasis tends to be about the extent of regulation (eg, with deregulation), and not about its worth (eg, achieving regulatory justice). Therefore:

Regulation is necessary for proper ordering of any economy to ensure that its people - and their investments - are protected. However, poor and excessive government regulation limits growth for no good reason.⁴⁶¹

The theme also ties in with discussion in Chapter 4 (about the 'market and freedom of contract').

On a related theme, a distinction between 'criminal' and 'other' offences can be found with statutory interpretation where courts have decided if mens rea is required for an offence to be established. Through case-law,⁴⁶² a presumption normally arose that offences required mens rea, but one exception was where prohibited acts were not 'criminal in any real sense, but [were] acts which in the public interest are prohibited under a penalty';⁴⁶³ although these 'non-criminal' offences are not referred to as regulatory in the case-law,⁴⁶⁴ But the adjective

⁴⁶⁰ Perhaps, unsurprisingly, no regulatory equivalent to Dostoevsky's novel of that name has been identified (Fyodor Dostoevsky, *Crime and Punishment* (1866)).

⁴⁶¹ Conservative and Unionist Party, *Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future: The Conservative and Unionist Party Manifesto 2017* (2017) 15.

⁴⁶² Eg: *Scherras v De Rutzen* [1895] 1QB 918, *Sweet v Parsley* [1970] AC 132 and *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1985] AC 1.

⁴⁶³ *Scherras v De Rutzen* 922.

⁴⁶⁴ Described as 'quasi-criminal' by Lord Reid in *Sweet v Parsley*, 149.

'regulatory' has been used elsewhere. An example is Catherine Elliott and Francis Quinn's *Criminal Law*⁴⁶⁵ in which they define a regulatory offence as:

one in which no real moral issue is involved and usually (though not always) one for which the maximum penalty is small - the mass of rules surrounding the sale of food are examples.⁴⁶⁶

They also stated that regulatory offences were generally considered to be the type created by 'rules on hygiene and measurement standards within the food and drink industry, and regulations designed to stop industry polluting the environment'.⁴⁶⁷ But this analysis is flawed. Lack of food hygiene can lead to death, non-compliance with measurement standards can be fraud and industrial pollution can impact on people, possessions and the environment; therefore, to describe related offences as involving 'no real moral issue' is simply wrong. Perhaps as a sign of a challenge, there was the issue of sentencing guidelines by the Sentencing Council for England and Wales for environmental offences in 2014⁴⁶⁸ and for food hygiene and health and safety offences in 2015.⁴⁶⁹

Regulatory Services

A feature of LWMAAs that are single-tiered LAs (as in Wales) is brigading of TS and other LG services such as EH and licensing under 'regulatory services'. Licensing, itself, is another umbrella term and includes such matters as licensing of alcohol, gambling, taxis, private hire vehicles and street trading. Again, TS is associated with 'regulation', although the term 'regulator' for licensing is probably more appropriate given the ability of an LA to control or influence an activity through means other than enforcement. Also, placing TS under 'regulatory services' presents the risk that TS (and its scrutiny) becomes obscured.

Summary

There is substantive difference between regulation and enforcement. TS is not a regulator, and to suggest it is, misrepresents the position and obscures proper analysis and evaluation of TS and its effectiveness. The police do not enforce

⁴⁶⁵ Catherine Elliott and Francis Quinn, *Criminal Law* (8th edn, Pearson 2010).

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid 38.

⁴⁶⁸ Sentencing Council for England and Wales, *Environmental Offences: Definitive Guideline* (2014).

⁴⁶⁹ Sentencing Council for England and Wales, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline* (2015).

'regulation' and are not described as a regulator. It enforces the law. That is also the role of TS.

The origins of the distinction can be explained historically through, eg: the distinction between 'criminal' and other offences; the definition of regulation, with reference to valued activities; and law such as the LRRRA 2006. But there is a need to see through the perception. The difference between the two can be reflected in significant differentials in terms of public awareness or interest, policy development and resources. Breach of 'regulation' does not have the same attendant industry, although breaches are still 'crime' and consequences can have similar import: eg, a person can suffer serious harm or death through an unsafe product or experience significant financial loss through a UCP. The introduction of sentencing guidelines for environmental and food hygiene offences challenges that distinction but there remain separate paradigms associated with what is 'regulatory' and 'criminal'. The issue has been introduced here because it is considered in practical application to TS in Chapter 8, which covers the period 1997 to 2010.

Chapter 8 - New Labour and TS: 1997-2010

The Labour Party (or New Labour, as it was restyled) formed the UK Government in 1997 and continued in power until 2010. There were significant developments that affected TS and the period from 2000 has been described as a '[f]ire storm of [c]hange'.⁴⁷⁰ Relevant change included devolution, the HRA 1998, and continued addition to the TS portfolio to meet EU consumer protection obligations. Tied in with 'better regulation,' especially, there was fresh focus on approaches to enforcement and to service delivery.

Devolution

Legislation was enacted to give devolution to Scotland, Northern Ireland and Wales, and although not TS specific had material impact on TS delivery. Devolution has been considered in Chapter 5.

Human Rights Act 1998

The HRA 1998 was enacted which, among other things, made it unlawful for public authorities such as LWMAs to act in a way which is incompatible with ECHR rights.⁴⁷¹ This has been considered in Chapter 3.

Better Regulation and Best Value

One of the Labour Party's clarion calls was for 'better regulation': ie, 'regulation that will improve, not hinder, business competitiveness'.⁴⁷² A Better Regulation Task Force (BRTF) was established. In 1997 it identified five principles of better regulation: proportionality, accountability, consistency, transparency and targeting;⁴⁷³ to be applied 'where regulation is poorly designed or overly complicated [as] it can impose excessive costs and inhibit productivity'.⁴⁷⁴ There was an emphasis on the extent of regulation and about how its reconfiguration could support commercial effort.⁴⁷⁵

⁴⁷⁰ Michael Jeffs and Jim Humble, *A History of the Trading Standards Institute* (TSI 2014) 146.

⁴⁷¹ S 6.

⁴⁷² Tony Blair, 'Tough on Red Tape' *Financial Times* (9 March 1998) 18.

⁴⁷³ BRTF, *Principles of Good Regulation* (2003) 2.

⁴⁷⁴ Ibid.

⁴⁷⁵ An indicator of the policy's priority was the 2007 renaming of the DTI as the Department of Business, Enterprise and Regulatory Reform.

Another initiative was for LAs to achieve 'best value'. This had legal manifestation in the Local Government Act 1999 and LAs were required to:

make arrangements to secure continuous improvement in the way... functions are exercised, having regard to a combination of economy, efficiency and effectiveness.⁴⁷⁶

For better regulation, a White Paper⁴⁷⁷ set out the agenda which involved: promoting competitive markets; enabling people to become 'demanding' consumers; encouraging responsible business to follow good practice; avoiding the burden of unnecessary regulation; and protecting the public from unfair trading and unsafe products. Better regulation involved avoiding unnecessary burdens, but consumer education and empowerment can also be identified. If consumers have skills, knowledge and information, it was argued, there is increased competitiveness and, through greater awareness of potential detriment, enhanced consumer protection.

The Audit Commission reported concerning how best value might be achieved within TS.⁴⁷⁸ Linking into the White Paper agenda, it considered how TS could 'modernise' to meet requirements. There was an emphasis on service evaluation and performance management. Competition was a recurring theme, and how it is a means of securing best value through alternative sourcing of services. This could take the form of collaborative working with other LAs but, also:

There seems no inherent reason why some aspects of [TS] services could not be provided by a private sector or not-for-profit organisation.⁴⁷⁹

The two initiatives had practical impact: there was emphasis on securing legal frameworks that supported commercial effort and on the means of service delivery to achieve best value. Arguably, this emphasis came to greatest prominence, with the publication of two reviews in March 2005: the Hampton Report⁴⁸⁰ and the BRTF Report.⁴⁸¹

⁴⁷⁶ S 3(1).

⁴⁷⁷ DTI, *Modern Markets: Confident Consumers* (White Paper, Cm 4410, 1999).

⁴⁷⁸ Audit Commission, *Measure for Measure: The Best Value Agenda for Trading Standards Services* (1999).

⁴⁷⁹ Ibid 90.

⁴⁸⁰ Hampton (n 45).

⁴⁸¹ BRTF, *Regulation - Less Is More: Reducing Burdens, Improving Outcomes* (2005).

The Hampton Report

The Hampton Report:

consider[ed] the scope for reducing administrative burdens by promoting more efficient approaches to regulatory inspection and enforcement, without compromising regulatory standards or outcomes.⁴⁸²

It considered the work of 63 national 'regulators' (including TS) and 468 LAs. It made 35 recommendations: some were 'regulator' specific; others were overarching and reflected general principles about inspection and enforcement. It had seminal significance for TS: eg, concerning change in enforcement approach. But, also, TS lost prominence following placement within regulatory services.

The Hampton Report identified themes around which regulation should be organised. One theme was 'consumer and trading standards'⁴⁸³ about which there was a 'multiplicity of local providers and some major national interests but no clear coordinating body' and a 'lack of strategic focus on [TS]'.⁴⁸⁴

The Hampton Report further considered coordination of LA 'regulatory services'. It defined those as services provided by TS and EH.⁴⁸⁵ Clear benefits were identified for LA delivery: eg, it enabled 'understand[ing] and reflect[ion of] local needs' which facilitated '[g]ood intelligence and good relationships [which] are vital to effective regulation'.⁴⁸⁶ Nevertheless given the 'diffuse structure of [LA] regulation' several concerns were identified which 'increase[d] uncertainty and administrative burdens for business'.⁴⁸⁷ Lack of coordination between TS and EH meant that a business might receive an unnecessary inspection or 'conflicting advice'. Lack of central coordination resulted in local replication of effort⁴⁸⁸ and LA regulatory services needed to be better coordinated.⁴⁸⁹ This required strategic leadership to improve performance and consistency of 'regulators'.

⁴⁸² Hampton (n 45).

⁴⁸³ Ibid 64.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid 70.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid 75.

For Consumer and Trading Standards it recommended the establishment of a new body (the Consumer and Trading Standards Agency (CTSA)) ‘with significant resource’ to ‘deliver a more coherent enforcement network and to improve [LA] performance’.⁴⁹⁰ The CTSA ‘would have the responsibility of overseeing the work of [LAs] on [TS] issues, as the [FSA] does in respect of food.’⁴⁹¹ Self-evidently, TS arrangements at that time were not seen as satisfactory.

The Hampton Report set out core principles for effective regulation.⁴⁹² These included the use of comprehensive risk assessment before deploying resources; inspection not taking place without a reason; that businesses should face proportionate and meaningful sanctions; and there should only be intervention when there is a ‘clear case for protection’. Also, ‘regulators should recognise a key element of their activity [is] to allow, or even encourage economic progress’. There is obvious connection with the BRTF five better regulation principles. In combination with applying the Hampton principles of effective regulation, there was a fundamental shift in approach towards enforcement: eg, there was a move away from routine inspections because they are judged not to be evidence based.

Accountability

The Hampton Report judged ‘regulators’ were not accountable, thereby reducing incentives to work in a collective and consistent way.⁴⁹³ It recommended establishment of the Better Regulation Executive to ‘hold regulators to account for their performance’.⁴⁹⁴ The Hampton Report also identified that the National Audit Office (NAO) could have a role in assessing ‘regulatory services’ performance by LAs.⁴⁹⁵

Sanctions

In its consideration of sanctions, it identified that the deterrent effect of fines imposed in the magistrates’ court are often low as they ‘do not reflect the gain a

⁴⁹⁰ Ibid 65.

⁴⁹¹ Ibid 64.

⁴⁹² Ibid 43.

⁴⁹³ Ibid 76.

⁴⁹⁴ Ibid 78.

⁴⁹⁵ Ibid 76.

business has taken from its illegal activity’.⁴⁹⁶ Infrequency of contact by magistrates with ‘regulatory’ cases and the subject area complex nature contributed.⁴⁹⁷

The Hampton Report recommended that the Sentencing Council for England and Wales consider issuing guidance for ‘regulatory offences’.⁴⁹⁸ But as an indication of priority, it was not until 2014 that guidelines were first issued: for environmental offences;⁴⁹⁹ and then in 2015 for corporate manslaughter, and HS, food safety and hygiene offences.⁵⁰⁰ There was nothing TS specific, although guidelines issued for ‘mainstream’ offences could be applicable to TS: eg, for fraud.⁵⁰¹

It can be argued that the absence of TS specific guidelines relates to the relative profile of TS in comparison with HS and food safety. Also, for each, there was a ‘coordinating body’ (the HSE and FSA respectively) which could exert influence. For TS there was no such body (like the proposed CTSA). As to the range of sanctions available to ‘regulators’, it recommended a comprehensive review of sanctions regimes and that ‘[a]dministrative penalties ‘should be introduced as a tool for all regulators; these can be imposed directly ‘without the intervention of a court’.’⁵⁰²

The BRTF Report

There is obvious connection between the Hampton and BRTF Reports. The BRTF Report considered options for reducing the administrative cost of regulation to business and argued that the regulatory burden could be considerably reduced through ‘simplification’. This involved: deregulation; consolidation (combining legal requirements in a clear and manageable way); and rationalisation (replacing sector specific legal requirements with those of more general application). The government was urged to adopt a “one-in, one-out” approach to regulation: ie, for every new ‘regulation’, one should be removed. As with the Hampton Report, how the law was enforced was identified as important; and it repeated its five principles for good regulation. The emphasis again was to support commercial activity. While

⁴⁹⁶ Ibid 39.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid 40.

⁴⁹⁹ Sentencing Council for England and Wales (n 468).

⁵⁰⁰ Sentencing Council for England and Wales (n 469).

⁵⁰¹ Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences Definitive Guideline* (2014).

⁵⁰² Hampton (n 45) 40.

the Hampton Report was to be remembered in name, 'better regulation' as embodied in the BRTF Report was to have complementary impact, even if the BRTF Report was not identified.

Legislative and Regulatory Reform Act 2006

The LRRRA 2006 was influenced by both reports. Part 1 had two main purposes: to 'remove or reduce burdens'⁵⁰³ and to 'promote regulatory principles'.⁵⁰⁴ As to the first purpose, this went to the core of the BRTF Report. As to the second purpose, the regulatory principles were that 'regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent' and 'should be targeted only at cases in which action is needed.' These embodied the BRTF principles of 'good regulation'. They also touched on Hampton Report principles. This directly applied to TS as (in the language of the two reports) TS carry out 'regulatory activities'.

The influence of each review and applicability to TS was repeated in the LRRRA 2006, Part 2. Thus, a person exercising 'regulatory functions' must have regard to the regulatory principles⁵⁰⁵ and any related code issued. A code has been issued.⁵⁰⁶ TS exercise 'regulatory functions'⁵⁰⁷ and must have regard to both the principles and the code.

The Rogers Report

The Hampton Report had identified better coordination between government departments and LAs as necessary to promote consistency between LAs⁵⁰⁸ and to decide how to prioritise action (there was a need for 'the involvement of Government at the centre').⁵⁰⁹ The Rogers Report⁵¹⁰ for England carried out an independent review and made recommendations on 'around five policy areas' that

⁵⁰³ S 1.

⁵⁰⁴ S 2.

⁵⁰⁵ S 21.

⁵⁰⁶ BIS, *Regulators' Code* (2014).

⁵⁰⁷ See: SI 2007/3544.

⁵⁰⁸ Hampton (n 45) 75.

⁵⁰⁹ Ibid 76.

⁵¹⁰ Peter Rogers, *National Enforcement Priorities for Local Authority Regulatory Services* (Cabinet Office 2007).

were central government priorities for LAs in carrying out 'regulatory services'.⁵¹¹ Regulatory services were defined as referring to TS, Licensing and EH⁵¹² and six national enforcement priorities were defined.⁵¹³

While the concept of national enforcement priorities for LAs makes sense to produce better coordinated effort, it presupposes that there is a lever to influence their implementation. A lever will exist if the government department with policy responsibility directly funds, or where a body (such as the FSA or HSE) has controls over, LA activity. Establishing the CTSA was intended to fill this role. BEIS, the main policy UK Government department for TS, does not have a lever, because it does not fund LG and, in any event, LG funding is not ring-fenced. This leaves LAs free to apply resources to TS as they choose: ie, reflecting local priorities.

The Rogers Report recommendations were given legislative effect by the Regulatory Enforcement and Sanctions Act 2008 (RESA 2008) for England and Wales. The RESA 2008 is considered after consideration of one more 'report' consequential on the Hampton Report.

The Macrory Report

The Hampton Report included recommendations about a range of sanctions available to regulators. These were taken forward in the Macrory Report.⁵¹⁴ While part of the 'better regulation' agenda, the emphasis was on more effective sanctions to improve enforcement efficacy. It was concerned with legal resourcing. It argued that while advice and incentives are important, effective sanctions are also important they underpin advisory functions. The existence of sanctions 'often act as an inducement to compliance without the need to invoke [them]'.⁵¹⁵ But too heavy a reliance on criminal sanctions in a 'regulatory system' can reduce the enforcement effectiveness. Reasons for this included: that criminal sanctions are often insufficient deterrent, especially where low fines are imposed; prosecution can be

⁵¹¹ Ibid 6.

⁵¹² Ibid 4.

⁵¹³ Ibid 12.

⁵¹⁴ Macrory (n 355). Macrory had already published two earlier reports: Richard Macrory, *Regulatory Justice: Sanctioning in a Post-Hampton World: Discussion Paper* (Cabinet Office 2005). Richard Macrory, *Regulatory Justice: Sanctioning in a Post-Hampton World: Consultation Document* (Cabinet Office 2006).

⁵¹⁵ Macrory (n 355) 15.

disproportionate; a syndrome known as compliance deficit was identified (ie, where, because of cost and time in taking cases to court, non-compliance is not addressed); and convictions for 'regulatory non-compliance' had lost 'criminal' stigma.⁵¹⁶

The Macrory Report stated that the range of enforcement sanctions available was limited and should be extended. It recommended administrative penalties be made available such as the issue of fixed monetary penalties. It also recommended alternative court sentencing options; such as profit orders (where a proportion of profit is paid rather than a fixed fine) and publicity orders ('reputational sanctions can have more of an impact than even the largest financial penalties').⁵¹⁷

The Macrory Report is important because of its contribution to informing debate about effective enforcement. It was not centered on reducing burdens for business and given its emphasis on effective sanctions can be viewed as disclosing a counter-narrative.

[Regulatory Enforcement and Sanctions Act 2008](#)

The RESA 2008 implemented recommendations in the Hampton, Rogers and Macrory Reports.⁵¹⁸ The Hampton Report identified the need for better coordination of LA 'regulatory' work (and recommended establishment of the CTSA). This was taken forward but not how the Hampton Report recommended. The focus was on LA 'regulatory services' and not TS. There was no CTSA. But the Local Better Regulation Office⁵¹⁹ (LBRO) was established. It was charged with securing that LAs in England and Wales exercised 'relevant functions' effectively, in a way which did not give rise to unnecessary burdens and which conformed to the regulatory principles.⁵²⁰

⁵¹⁶ Ibid 15-16.

⁵¹⁷ Ibid 83.

⁵¹⁸ It also implemented recommendations contained in: BERR, *Next Steps on Regulatory Reform* (2007).

⁵¹⁹ S 1.

⁵²⁰ S 5.

In broad terms ‘relevant functions’ was defined as functions falling within ‘regulatory services’, which included TS.⁵²¹ To secure relevant functions being exercised this way (and flowing from the Rogers Report), the LBRO was required to establish priorities for LAs to take into account when allocating resources.⁵²² Reflecting devolution, separate sets of priorities were required for England and Wales. Four priorities were set for Wales:⁵²³ The LBRO was also empowered to give guidance to LAs about how they should exercise functions⁵²⁴ and in default to issue directions requiring compliance with guidance.⁵²⁵ The LBRO was also empowered to give associated advice to UK Government ministers and WG.⁵²⁶

Although there was no CTSA, for the first time there was in place a legislative framework, with the LBRO at its centre, providing for coordination of TS. But the LBRO was not comparable to a body such as the FSA or HSE with significant capacity for intervention and a policy role. LAs were to have regard to priorities in allocating resources to regulatory services but there was no duty of compliance. Although there was a power of direction, this related to compliance with taking guidance into account, and therefore LA discretion remained. The RESA 2008 did not challenge the LWMA as the model through which TS is delivered. It also made no principled distinction between LA ‘regulatory services’ and matters within those services such as TS. It can be argued that one consequence was that TS became increasingly obscured, despite being a statutory requirement, with attendant adverse effect for TS, especially, in resource allocation.

As a vehicle to secure securing consistency of approach the RESA 2008 provided for the ‘primary authority’ (PA) where one LA is nominated as PA⁵²⁷ to provide advice and guidance to a trader (T) (for which it might charge T)⁵²⁸ and, also, give advice and guidance to other LAs about how they should deal with T in their areas.⁵²⁹ Before another LA can take enforcement action against T, it must inform PA. If PA

⁵²¹ S 4.

⁵²² S 11.

⁵²³ LBRO and WAG, *National Enforcement Priorities for Wales* (2010).

⁵²⁴ S 6.

⁵²⁵ S 7.

⁵²⁶ Ss 9-10.

⁵²⁷ Ss 25-26.

⁵²⁸ S 31.

⁵²⁹ S 27.

disagrees, it can stop the LA by issuing a legally enforceable direction.⁵³⁰ Thus, in a TS context, assuming T complies with PA's advice and guidance given as an LWMA, T is then able to trade outside PA's area and other LAs cannot normally contradict the effect of PA's advice and guidance. There is therefore cross-boundary consistency of approach towards T.

However, there are principled objections. These include: conflict of interest between PA and T for potential enforcement if T is paying for advice and guidance; it is discriminatory between T and those traders who do not have the means to enter into PA arrangements; PA arrangements are inevitably complex and bureaucratic given the large number of LWMAs. As Tombs observed:

The [PA] scheme represents a fundamental shift in the nature of local regulation and enforcement...since it reduces inspection, exacerbates the power imbalance between regulators and regulated, builds in checks against regulation and enforcement, and operate on a marketised, contract-based system.⁵³¹

Moreover, the PA concept masks a fundamental flaw in the LWMA model. If TS was established according to a model which had as its base an area far larger than the LWMA (such as Wales), the ability for consistency towards T is improved through that structural arrangement.

Macrory Report recommendations were implemented through 'civil sanctions' which could be imposed by a regulator⁵³² for an offence.⁵³³ Civil sanctions included fixed monetary penalties,⁵³⁴ non-compliance notices,⁵³⁵ restoration notices,⁵³⁶ and stop notices.⁵³⁷ But the ability to impose civil sanctions did not apply automatically and had to be given.⁵³⁸ Although TS did acquire powers to impose administrative penalties, it was not by this route.⁵³⁹

⁵³⁰ S 28.

⁵³¹ Steve Tombs, *Social Protection After the Crisis: Regulation Without Enforcement* (Reprint edition, Policy Press 2017) 172–73.

⁵³² S 37. An LWMA falls within the definition of 'regulator'. The definition excludes the police service.

⁵³³ S 36.

⁵³⁴ Ss 39–41.

⁵³⁵ Ss 42–45.

⁵³⁶ Ss 42–45.

⁵³⁷ Ss 46–49.

⁵³⁸ Eg: re environmental civil sanctions see SI 2010/1157 and SI 2010/1821.

⁵³⁹ Eg: Estate Agents Act 1979, s 23B.

Drawing on Chapter 7

The developments considered above (especially as manifested in the LRRRA 2006 and RESA 2008) can be viewed as actively and purposively promoting the identification of TS as a regulator (and concerned with regulation), and thus exacerbating the difference between (the previously mentioned) paradigms associated with what is 'regulatory' and what is 'criminal'.

New TS Initiatives

There were Labour Government TS related initiatives. These were distinctive for two main reasons: they were structured on a regional or national basis; and funded directly by UK Government. The identified need for regional or national provision highlighted increased cross-boundary activity and need for better coordinated response. Direct funding also enabled leverage concerning influence and oversight not present through the LWMA funding model. These initiatives related to consumer advice, illegal moneylending and 'scams and rogue traders'.

Consumer Direct (CD): The concept of a national consumer telephone helpline was outlined in the 1999 White Paper.⁵⁴⁰ The aim was to empower and protect consumers through advice and information. It was fully established in 2006 in GB as CD.⁵⁴¹ and intended to support TS effort. Provision of initial advice obviated TS need to do this and improved TS capacity to deal with other matters. CD was also a source of intelligence.⁵⁴² The legal basis for establishing CD was under the Enterprise Act 2002.⁵⁴³

Illegal money lending: As part of its financial inclusion agenda, in 2000 the UK Government established pilot schemes in Birmingham and Glasgow to challenge illegal moneylending.⁵⁴⁴ After evaluation,⁵⁴⁵ illegal moneylending units were established throughout GB. An all-Wales unit, the Wales Illegal Money Lending Unit

⁵⁴⁰ DTI, *Modern Markets* (n 477) 38-39.

⁵⁴¹ Jeffs and Humble (n 470) 154. For background re CD see: Consumer Direct, 'Consumer Direct Project - Background' (nd).

<<https://web.archive.org/web/20070203081830/http://www.consumerdirect.gov.uk:80/project/background.htm>> accessed 14 September 2017.

⁵⁴² Compass Partnership, 'DTI Consumer Helplines Study: Final Report' (2002).

⁵⁴³ Pt 1.

⁵⁴⁴ Policis and Personal Finance Research Centre, *Illegal Lending in the UK: A Research Report* (2006).

⁵⁴⁵ Policis and Personal Finance Research Centre, *Evaluation of the DTI Illegal Money Lending Pilots* (2007).

(WIMLU) was set up in 2007, hosted by Cardiff TS.⁵⁴⁶ Legally speaking, illegal moneylending units were rooted in the LWMA model, as it involved joint-working of LWMAs: eg, 22 in Wales.

Scambusters: In 2005 UK Government published its consumer strategy which set out a commitment to establish regional TS Scambuster teams (subsequently renamed as regional investigation teams (RITs)):

to focus on the worst and hardest-to-tackle scams and rogue traders, which may be beyond the capacity of individual [LAs] to deal with...[T]hey must use the intelligence coming out of [CD] (as well as other intelligence) to target their actions.⁵⁴⁷

The all-Wales RIT (WIT) was launched in April 2009, hosted by Newport TS.⁵⁴⁸ As with WIMLU, legally speaking, it was rooted in the LWMA model.

Summary

The Labour government impact on TS was unmistakable. More broadly there was devolution and the HRA 1998. There was also better regulation, and the establishment of the LBRO, the PA scheme and a Regulator's Code. But the opportunity to establish the CTSA was not taken up. The LWMA model was effectively untouched; perhaps the most obvious manifestation was the PA scheme, a cumbersome adjunct to that model. The assertion that TS was a regulator and concerned with regulation (and not an enforcer concerned with crime) was directly promoted and manifested itself in legislation. Placing TS with EH and licensing under regulatory services also had an obscuring effect for TS, which the CTSA could have helped challenge. But there were specific TS initiatives such as CD, IMLUs and RITs which did things in different ways. They were cross-boundary initiatives and funded directly from central government.

⁵⁴⁶ Stephen Hay, 'Illegal Money Lending Project: Report for the National Assembly of Wales' Communities and Culture Committee Inquiry into Financial Inclusion and the Impact of Financial Education' (IMLU 2010).

⁵⁴⁷ DTI, *A Fair Deal For All: Extending Competitive Markets: Empowered Consumers, Successful Business* (DTI 2005) 21.

⁵⁴⁸ Wales Heads of Trading Standards, 'Scambusters' (2013).

<<http://www.tradingstandardswales.org.uk/scambusters/>> accessed 14 September 2017.

Chapter 9 - Consumer Landscape Changes and Reduced Resourcing

A coalition of the Conservative and Liberal Democrat Parties formed the UK Government in 2010 and embarked on sustained public expenditure reduction;⁵⁴⁹ ‘The deficit reduction programme [was to] take[] precedence’ over other things⁵⁵⁰ (the term ‘austerity’ encompassed its effect). The government also embarked on ‘consumer landscape’ reform (CLR). But there was a consistent theme. It continued challenging regulation because it inhibited commercial effort:

We will cut red tape by introducing a ‘one-in, one-out’ rule whereby no new regulation is brought in without other regulation being cut by a greater amount. We will...target inspections on high-risk organisations through co-regulation and improving professional standards.⁵⁵¹

In 2015 the coalition government was replaced by a Conservative government but there was no material change of direction. This chapter considers the impact on TS from 2010.

Consumer Landscape Reform

The government proposed reform of the consumer landscape⁵⁵² (ie, the institutions that comprise the providers of consumer information, advice, education, advocacy and enforcement). The proposals outlined were guided by three objectives:

[1]Reducing complexity of the consumer landscape...[2]Strengthening the effectiveness of consumer enforcement...[3]More cost efficient delivery, closer to the consumer front line.⁵⁵³

Regarding objective 3, a press release referred to ‘produc[ing] a more effective service for consumers at a lower cost to the taxpayer’.⁵⁵⁴ ‘[L]ower cost’ did not appear in the consultation document but it stated that:

Ensuring the cost-effectiveness of consumer advice, representation and enforcement is increasingly critical as public resources become more constrained.

⁵⁴⁹ See, eg: HM Treasury, *Budget 2010: Securing the Recovery - Economic and Fiscal Strategy Report and Financial Statement and Budget Report* (HC 451, The Stationery Office 2010).

⁵⁵⁰ HM Government, *The Coalition: Our Programme for Government* (Cabinet Office 2010) 35.

⁵⁵¹ Ibid 9.

⁵⁵² BIS, *Empowering and Protecting Consumers: Consultation on Institutional Changes for Provision of Consumer Information, Advice, Education, Advocacy and Enforcement* (2011).

⁵⁵³ Ibid 6.

⁵⁵⁴ BIS (n 18).

Given the emphasis on constraint to resources, an inference is that government had lower cost in mind, and is something consistent with government intention to reduce overall public expenditure.

Comptroller and Auditor General and Public Accounts Committee Reports

In 2011 the Comptroller and Auditor General (C&AG)⁵⁵⁵ delivered a report that reviewed the system for enforcing consumer law (the C&AG Report).⁵⁵⁶ It concluded that the system was not delivering value for money. It was too fragmented, and BIS had few levers to directly influence policy delivery. Moreover, more could be done 'to secure the [system's] overall cost-effectiveness'.⁵⁵⁷ Nevertheless, expenditure on consumer law enforcement seemed low when compared to financial consumer detriment⁵⁵⁸ (in 2008 the estimated overall cost of consumer detriment from unfair trading was £6.6 billion).⁵⁵⁹ Low expenditure was identified as extending to specific funding for regional and national projects.⁵⁶⁰ The system did not deliver value for money. Criticisms included:

- **Need to work collaboratively with more cross-boundary working:**⁵⁶¹ Incentives were weighted in favour of local priorities. The cost of detriment that needed to be tackled at regional and national levels was not routinely measured. But data available suggested that it was more than £4.8 billion.
- **Measures to strengthen cross-boundary working:**⁵⁶² BIS had established regional projects to 'address potential enforcement gaps' but longer-term arrangements were inadequate.
- **Evaluation:**⁵⁶³ There were deficiencies in the ability to effectively evaluate the enforcement system.

The C&AG report was considered by the House of Commons Committee of Public Accounts which published its own report in 2011 (the PAC Report). Its conclusions were consistent with those in the C&AG Report. These were:⁵⁶⁴

⁵⁵⁵ The C&AG is head of the NAO. The governing legislation is the National Audit Act 1983.

⁵⁵⁶ C&AG, *Protecting Consumers - the System Enforcing Consumer Law* (NAO 2011).

⁵⁵⁷ Ibid 11.

⁵⁵⁸ Ibid 12.

⁵⁵⁹ Ibid 13. This was an OFT estimate.

⁵⁶⁰ Ibid 11.

⁵⁶¹ Ibid 8-9.

⁵⁶² Ibid. 9-10.

⁵⁶³ Ibid 10.

⁵⁶⁴ Committee of Public Accounts (n 331) 5-6.

1. Accountability arrangements for protecting consumers are incoherent and fragmented.
2. The enforcement system for dealing with trader malpractices that occur at a regional and national level is inadequate, and instances of abuse fall through cracks between enforcement bodies.
3. The level of service available to consumers varies across the country and is inadequate in some areas.
4. The powers and penalties available to enforcement bodies are too weak to address serious forms of harm to consumers.
5. The level of financial risk taken on by enforcement bodies may discourage them from pursuing complex and difficult investigations.

Specifically, regarding TS and LAs, the PAC report pointedly stated:

[LAs] have discretion over the level of funding they provide for [TS]...There has been a decline in the profile of [TS] within [LAs], and some currently sit as low as the fifth tier in the [LA] management structure...Enforcement deserts exist where some [LAs] do not provide enough money to maintain adequate [TS] coverage.⁵⁶⁵

As well as reducing expenditure, government intention behind reform was about improving service effectiveness and efficiency. These reports identified issues of concern: eg, fragmentation of service provision leading to deserts, lack of oversight, and lack of effective evaluation.

But while there was some convergence of views between government and the reports about the need for improvement, there was difference over the level of expenditure needed. Implicit in the reports was that even if efficiency could be optimised, the scale of problem justified better resourcing. The government position, conversely, was that efficiency could be optimised at lower cost.

The C&AG Report did not openly question the model of service delivery because the C&PG's role is not to question policy.⁵⁶⁶ But analysis of C&AG criticism raises related questioning, eg:

- A body such as the CTSA might have had levers to directly influence policy delivery, such as the FSA does for the FA.

⁵⁶⁵ Ibid 10.

⁵⁶⁶ The C&AG reports to Parliament on the economy, efficiency and effectiveness with which public resources have been used.

- Whether better coordination and less fragmentation are more achievable for a body with dedicated funding established on a larger area basis than the LWMA.
- How separate independent prosecution arrangements might reduce risk of financial exposure for an investigator LWMA and make the LWMA less risk averse.

Consumer Landscape Reform Changes

The government announced details of the reform and these were implemented between 2012 and 2014. So far as relevant to TS, the changes are now summarised.⁵⁶⁷

Competition and Markets Authority (CMA): The Office of Fair Trading (OFT) and the Competition Commission were abolished, and the CMA established in place.⁵⁶⁸ Competition and consumer functions became contained within a single UK body, a reversal of previous policy. The CMA must promote competition for the benefit of consumers within and outside the UK.⁵⁶⁹

National Trading Standards (NTS): NTS is governed by a board that comprises an independent chair and representatives from regional TS groups in England and Wales. It is responsible for coordinating and prioritising cross-boundary enforcement in England and Wales. NTS took over oversight and management of national and regional projects from BIS. These projects are:⁵⁷⁰

- NTS Regional Investigation Teams, including WIT,
- NTS eCrime Team,
- NTS Safety at Ports and Borders Teams,
- NTS Scams Team,
- NTS Estate and Letting Agents Team.

NTS was also charged with developing intelligence working and building an associated infrastructure to support TS. NTS also established a tasking group to

⁵⁶⁷ Drawn from: NAO, *Update on Consumer Protection Landscape Reforms* (NAO 2014).

⁵⁶⁸ Enterprise and Regulatory Reform Act 2013, pt 3.

⁵⁶⁹ Ibid, s 25(3).

⁵⁷⁰ Source: NTS, 'Annual Report 2018-19' (2019).

consider requests for support for specific cases made by LWMAs, regional or national teams.

Until 2018 NTS had oversight and management of WIMLU (and its English equivalent). This transferred to the Financial Conduct Authority (FCA) after legislative change established a revised funding model.⁵⁷¹ The IMLUs now receive funding from HM Treasury, in place of BEIS, and that money is recovered from the financial sector by imposition of an industry levy. As the funding model is essentially self-financing, it is wholly different to the NTS funding model. Although the funding model has changed, the LWMA remains as the legal basis for the establishment of IMLUs.

Trading Standards Scotland (TS Scotland): TS Scotland is responsible for coordinating and prioritising cross-boundary enforcement in Scotland.⁵⁷² It performs a similar role for Scotland as the NTS does for England and Wales.

Consumer Advice: Responsibility for consumer advice was transferred in 2012 to Citizens Advice (CA) and CA Scotland.⁵⁷³ The CA Consumer Service helpline replaced CD. Consumer complaints to the helpline continued to be a source of intelligence for TS. CA and CA Scotland continued to refer matters directly to TS.

Consumer Advocacy: Consistent with taking over provision of consumer advice, consumer advocacy became the responsibility of the CA and CA Scotland on the abolition of the National Consumer Council.⁵⁷⁴

Consumer Code Approval Scheme and Business Education: The OFT originally ran the scheme. Its successor was the CTSI which also became responsible for business education subject to limited exceptions such as for unfair contract terms.

⁵⁷¹ Financial Services and Markets Act 2000, ss 333S-333T.

⁵⁷² Established by the Convention of Scottish Local Authorities.

⁵⁷³ See SI 2013/783. For background see: BIS 'Explanatory Document to SI 2013/783' (2013).

⁵⁷⁴ See SI 2014/631. For background see: BIS, 'Explanatory Document to SI 2014/631' (2014).

Consumer Protection Partnership (CPP): This was new. Its membership comprised publicly funded consumer bodies.⁵⁷⁵ The CPP was charged with identifying areas where there was, or was likely to be, consumer detriment and to prioritise and coordinate responses. It has an overarching function, consistent with trying to deliver a more coherent consumer protection system.

Estate Agent Regulation: Regulation of estate agents under the Estate Agents Act 1979 transferred from the OFT to Powys County Council, who established the NTS Estate Agency Team.⁵⁷⁶

Consumer Credit Authorisation: This was transferred from the OFT to the FCA,⁵⁷⁷ thus ensuring all financial services regulation was under the FCA.⁵⁷⁸ Again, this reflects a more coordinated approach. LWMAs continued to have a duty to enforce the CCA 1974.⁵⁷⁹

While the reform was partly about saving money, there was undoubted coherence to some changes: eg, establishment of NTS allowed coordinated deployment of government funding on cross-boundary initiatives. Whereas before, that process was directly overseen by BIS, now it was overseen by TS professionals. There was also a coordinated effort to develop intelligence-led work and an associated infrastructure. To illustrate how NTS applies its grant, Figure 8 shows the figures for 2018-2019.

⁵⁷⁵ CA, CA Scotland, the CMA, the Consumer Council for Northern Ireland, DFENI, the FCA, NTS, TS Scotland and the CTSI.

⁵⁷⁶ SI 2014/631. For background see: BIS, 'Explanatory Document to SI 2014/631' (2014). In April 2019 the team took on responsibility for regulating letting agents in England under the Tenant Fees Act 2019 (led by Bristol City Council). It was renamed as the NTS Estate and Letting Agency Team (NTS (n 570)).

⁵⁷⁷ See SI 2013/1881 and SI 2013/1882.

⁵⁷⁸ For background see: HM Treasury, 'Explanatory Memorandum to the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013 (SI 2013/1881) and the Financial Services Act 2012 (Consumer Credit) Order 2013 (SI 2013/1882).' (2013).

⁵⁷⁹ S 161.

Figure 8
Grant Spend by NTS 2018/2019⁵⁸⁰

Grant provider	Description	Amount
BEIS	Central Support	£818,182
BEIS	eCrime Team	£1,129,335
BEIS	Intelligence	£2,002,524
BEIS	National tasking Group	£2,677,295
BEIS	Other	£83,265
BEIS	Regional Coordination	£387,428
BEIS	RITs	£3,213,810
BEIS	Safety at Ports Team	£1,480,579
BEIS	Scams Team	£676,540
BEIS	Secondary Ticketing	£519,805
Home Office ⁵⁸¹	Knives	£356,739
Ministry of Housing, Communities and Local Government. ⁵⁸²	Estate Agents	£452,000
Total		£13,797,502

Other examples of a coherent and integrated approach include establishment of the CPP and placing consumer credit authorisation with the FCA, as the regulator of other financial services. Creation of the CMA also can be justified as creating a more integrated approach to promoting fair competition while protecting consumers.

Yet the LWMA model remained substantively untouched. Because of decreased resourcing overall LA funding was reduced. Most funding for LWMAs continued in the same unhypothecated way, and actual budget allocation reflects priority attached to competing bids within an LA. TS lost out to such service areas as education and social services. There was the combined adverse effect through reduced LA funding and internal priority setting. TS capacity and effectiveness were substantively reduced. BEIS as lead policy government department has no direct lever over how LA funding is applied, or in setting LWMA priorities. This is to be contrasted with its influence in national and regional initiatives via NTS.

The Effects of Reform and Reduced Resourcing

The practical effect of the benefits and criticisms of reform can be seen from the following case study drawn from the 2016/2017 NTS Annual Report⁵⁸³

⁵⁸⁰ NTS (n 570).

⁵⁸¹ See n 298.

⁵⁸² In 2017 the Ministry of Housing, Communities and Local Government took over as policy lead in this area in place of BEIS. Responsibility for grant payments followed in April 2018 (NTS, 'Annual Report 2017-18' (2018)).

⁵⁸³ NTS, 'Annual Report 2016-17' (2017) 60.

Figure 9
Case Study - Consumer Landscape Reform 'Pros' and 'Cons'

The NTS Scams Team (NTSST) identifies victims of scams and notifies LAs in whose area the victim lives. The LA can then act to protect those people. To ensure that effort is properly coordinated the NTSST approaches and enters into service level agreements with LA TSDs whereby LAs commit to engaging with victims identified in their area. In England and Wales 89% of LAs (150) have entered into SLAs, but 11% have not. Where a LA does not enter into a service level agreement, the NTSST approaches other agencies to try and secure the required assistance. There is widespread support for the NTSST and its work.

'Pros': NTSST has discrete funding from BEIS which is rooted through NTS. NTSST has a clear remit and focus: challenging fraudulent, and related, activity against vulnerable people is a national priority. There are coordinated arrangements to ensure that information obtained about vulnerable people is then actioned. This is an example of a good outcome arising from the reform.

'Cons': 11% of LAs in England and Wales had not entered into a service level agreement. The reasons for non-engagement are not identified but obvious candidates are lack of TS capacity and competing priorities. Having regard to an LWMA's duty to enforce consumer protection law, and broader adult safeguarding duties,⁵⁸⁴ it is difficult to identify other reasons for non-engagement.

Based on the case study, there is a real risk of people receiving less protection within those LA areas where there is no service level agreement. Prima facie, this is through insufficient resourcing and/or other matters taking priority locally. This raises questions about LWMAs being in breach of statutory duty through failure to enforce. While there may be public expenditure savings through decreased resourcing, there is a real risk of increased consumer detriment.

On that theme, in 2014 the BBC carried out an investigation of TS service provision.⁵⁸⁵ Requests for information under the FOIA 2000 were submitted to TSDs across England and Wales; 106 replied and responses showed a total of 713 TS posts had been lost in the previous five years. All but seven stated that they had lost TS posts. Two serious case studies were also identified where TS had not responded as required. In response to the question about whether the public were at greater risk

⁵⁸⁴ See, eg, SSWWA 2014, pt 7.

⁵⁸⁵ BBC Radio 5 Live, 'Trading Standards', *Adrian Goldberg - 5 Live Investigates* (2 November 2014).

from 'rogue traders' due to job losses, Leon Livermore, chief executive of the CTSI, responded:

They can't fail to be can they? Your two case studies demonstrated our inability...It shows the inability of the system to respond to individual consumer needs.⁵⁸⁶

In 2015, Raine, Mangan and Watt, in a report commissioned by BIS and the TSI concerning TS, said that reduced resourcing had led to changed priorities and ways of TS working leading to a 'reduced portfolio'.⁵⁸⁷ But nothing had changed legally speaking, and that reduced portfolio was de facto, not de jure. While reduction through stopping carrying out statutory discretionary activity is lawful, failure to carry out statutory mandatory activity is unlawful.

As to the effect of those changes, there had been 'a shift from proactivity and prevention to a more reactive and responsive approach.'⁵⁸⁸ En route there had been a loss of staff and expertise with less emphasis on specialism. This had led to a 'relatively weak, and probably diminishing, profile of [TS]' in the public eye and within LAs.⁵⁸⁹

The authors recommended that TS 'should devise and roll-out more campaigning programmes...to raise the public profile of [its] work'.⁵⁹⁰ This masks a fundamental point. LWMAs have a duty to enforce legislation. If the level of resourcing means that effectively there is no enforcement for, say, legal metrology or IP, there is a breach of statutory duty. The legal challenge to Liverpool City Council concerning proposed reduction to its TS service is an illustrative case study.⁵⁹¹ Implementing the recommendation effectively amounts to asking TS to demonstrate why it should discharge a statutory duty.

In 2016 the C&AG delivered a report (C&AG no. 2 Report)⁵⁹² that reviewed the performance of the consumer protection system following the C&AG Report.

⁵⁸⁶ Ibid.

⁵⁸⁷ John Raine, Catherine Mangan and Peter Watt, *The Impact of Local Authority Trading Standards in Challenging Times* (BIS and TSI 2015) 5.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

⁵⁹⁰ Ibid 8.

⁵⁹¹ See Carina Bailey, 'About Time' (2016) 125 *TS Today* 17.

⁵⁹² C&AG, *Protecting Consumers from Scams, Unfair Trading and Unsafe Goods* (NAO 2016).

Although there were limited data on the overall size of consumer detriment, the estimate of loss to consumers in 2014-15 was at least £14.8 billion⁵⁹³ (compared to the £6.6 billion 2008 estimate contained in the C&AG Report). In contrast, in 2015-16 it was estimated that £165 million was spent on the consumer protection system;⁵⁹⁴ of that total, £124 million went to LWMAs (£15 million to LWMAs in Wales), a reduction from £213 million for 2009-10, referred to in the C&AG Report). In addition, £13.5 million went to NTS and £1.2 million to TS Scotland. As to the trading environment, consumers were subject to threats which were increasingly wide-ranging and complex, especially with the growth in e-commerce. Fraudulent activity was also identified as being more targeted.⁵⁹⁵

The C&AG no. 2 Report concluded that there was better overall coordination of consumer protection through bodies such as NTS and the CPP.⁵⁹⁶ However, previous criticism was repeated that BEIS had little control over most resourcing, (ie, to LWMAs), making effective prioritisation difficult. The system of funding meant that LAs are incentivised to prioritise local issues.⁵⁹⁷ It was acknowledged that reduced resourcing had led to gaps in enforcement. LWMAs had lost 56% of full-time equivalent staff since 2009. There had also been 46% reduction in notional budgets for TSDs since 2011, and that in smaller LWMAs resourcing was no longer sufficient to take significant enforcement action.⁵⁹⁸

Concerning NTS funding, £13.5 million was deemed to be low given the nature of the problem. The government's response had also not kept pace with the increase in on-line consumer fraud.⁵⁹⁹ The C&AG report had also identified shortcomings within intelligence and data systems. Improvements were acknowledged with the development of intelligence-led enforcement supported by an intelligence framework. However, there were gaps and:

[T]here are a number of local [TS] services that record very few intelligence logs, with 11 services recording one or no logs in 2015-16 compared with the average of 223. We found a strong correlation between the number of

⁵⁹³ Ibid 7.

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid 8.

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid 9.

⁵⁹⁹ Ibid 11.

intelligence logs and funding for [TS], suggesting that capacity rather than culture is the constraining factor.⁶⁰⁰

Also, in the period 2012-13 to 2015-16, contacts to the CA consumer helpline fell from around 1.2 million to just over 950,000, an 18% reduction. Data derived from such contact are a valued source of intelligence. Consumers were identified as turning increasingly to social media or self-help on-line materials to pursue consumer issues.⁶⁰¹

The report acknowledged improvement in the consumer protection framework since 2011, and that consumer protection bodies had ‘achieved good impacts with limited resources’.⁶⁰² The system in place would also generate further improvements but overall it was not demonstrating value for money. Commerce was changing, and consumer detriment was increasingly national and international, but the system had not adapted. Much funding for the system was at a local level:

where the Department has little influence, has suffered from declining status, significantly reduced capacity, and gaps in coverage which leaves consumers inadequately protected.⁶⁰³

Legal Metrology Capacity

The two C&AG reports were concerned with review of the consumer protection system; they were not concerned with legal metrology. But reduction in LWMA resourcing was applicable to legal metrology as well as consumer protection. As to specific indicators for legal metrology, under the WMA 1985 each LWMA must submit an annual report on the arrangements for the Act’s enforcement.⁶⁰⁴ For 2011/2012 there were 193 LWMA returns (95% participation rate) and these revealed that the number ‘of full time equivalents of staff actively engaged in weights and measures work [was] 503, equating to an average of 2.6 staff per authority’.⁶⁰⁵ For 2014/15 there were 200 returns (99% participation rate) and these revealed that the number of full-time equivalent staff had reduced to 257⁶⁰⁶ (a reduction in

⁶⁰⁰ Ibid 27.

⁶⁰¹ Ibid 23.

⁶⁰² Ibid 10.

⁶⁰³ Ibid.

⁶⁰⁴ WMA 1985, s 70.

⁶⁰⁵ National Measurement Office, ‘Weights & Measures Act 1985: Section 70 Returns: Annual Report 2011-12’ (2012) 4.

⁶⁰⁶ National Measurement and Regulation Office, ‘Weights & Measures Act 1985: Section 70 Returns: Annual Report 2014-15’ (2015) 5. No later reports have been published.

246 or 49%), equating to an average of 1.3 members of staff for each participating LWMA. Therefore, in substantive terms, there had been a halving of full-time equivalent LWMA members of staff engaged in legal metrology work in three years.

Also, in the 2014/15 report it stated:

[LWMAs] were given the opportunity...to feed back...about their foremost concerns relating to weights and measures. The main theme generated from responses is of the familiar annual struggles of time, budget and the battle to gain priority status against other competing [TS] activities. This was also reflected in the previous three years reports.⁶⁰⁷

Therefore, while LWMA budgets face pressures from competing priorities such as education and social services, it is reported that legal metrology takes lower priority than other TS matters (eg, presumably, consumer protection) where it came to division of reduced LWMA budgets.

At the NTS level there is an absence of legal metrology. Consumer protection is the dominant theme and is reflected in projects such as the NTSST, RITs and IMLUs. A search of the NTS annual report for 2016-2017 and 2018-2019 found no reference to 'weights or measures' or 'metrology'.⁶⁰⁸ A similar search was carried out on the NTS annual report for 2017-2018. Again, no reference was found to 'metrology' but there was reference to one 'weights and measures' prosecution. The case had originated following a customer complaint and was brought by the London Borough of Camden with RIT support.⁶⁰⁹ Although a legal metrology case, it appears as an isolated exception to usual NTS business.

Four objectives were found under the heading of 'Protecting Consumers – Safeguarding Businesses'. Specifically, objective 1 referred to:

[p]rovid[ing] a framework for the effective and efficient sharing of intelligence in order to identify and tackle emerging threats, and support [TS] across England and Wales.⁶¹⁰

NTS therefore promotes intelligence-led enforcement activity and the absence of NTS activity that is legal metrology specific is, therefore presumably, because there

⁶⁰⁷ Ibid.

⁶⁰⁸ NTS (n 583) and NTS (n 570).

⁶⁰⁹ NTS (n 582) 39.

⁶¹⁰ Ibid 3.

is no such intelligence. That assessment might be correct. But it might be due to failure in intelligence gathering. A legacy of the Hampton Report was that there should be ‘no inspections without a reason’.⁶¹¹ Where inspections are complaints driven, they will arise. However, they usually do not arise without a complaint unless there is otherwise good reason. With legal metrology, often there will be no complaints because detriment is small and passes unnoticed or is insufficiently significant to cause complaint. But although unreported individual detriment may be small, collectively it can be significant and produce a large financial benefit for a trader. The case study in Figure 10 is illustrative.⁶¹²

Figure 10
Case Study - Legal Metrology

Lanchester Dairies, from County Durham, pleaded guilty to five charges under weights and measures law at Peterlee Magistrates’ Court in March 2016. The company was fined £3,500 and ordered to pay costs of £1,660 and a victim surcharge of £350. The business was inspected in October 2015 by Durham TSOs after receiving information from Northumberland Council colleagues. Up to 4,800 cartons of milk rolled-off the production line every hour. When TSOs tested 55 bottles randomly selected, each one litre bottle was ‘inadequate’ and one litre cartons contained between 966.3ml and 1001.8ml of milk, while two litre cartons tested held between 1985.8ml and 2001.8ml, Durham Council’s solicitor said:

[T]he testing processes at the dairy plant [were] inadequate. Possibly thousands of packages have left that dairy underfilled. It is not possible to say how long this has been going on for, the general manager admitted that this testing process has been in place since 2003.

Individual detriment was small and unlikely to have been noticed. There was also no allegation of dishonesty. Yet, over time this is likely to have resulted in significant benefit to the trader and placed it at an unfair advantage over competitors. The report also indicated that following the inspection the business was now legally compliant. The value of routine inspections is neatly demonstrated.

But it might not be about economic benefit and detriment. Measurement is important in medicine where dosage is involved. Imprecision can cause health detriment, including death. Although not related to dosage, but health-related, a national project concerning medical weighing equipment carried out by the National

⁶¹¹ Hampton (n 45) 1.

⁶¹² Drawn from: Laura Hill, ‘Lanchester Dairies Blame Political Correctness After Being Fined for Underfilling Milk Bottles’ *ChronicleLive online* (1 April 2016).
<<http://www.chroniclelive.co.uk/news/north-east-news/lanchester-dairies-blame-political-correctness-11125105>> accessed 15 September 2017.

Measurement and Regulation Office, which ran from April 2014 to March 2015 involving 54 LAs, found an equipment non-compliance rate of 23%.⁶¹³

The analysis suggests that detriment can be identified through routine inspections or through something such as a complaint. But often there will not be a complaint and thus there is no intelligence to lead. Another compounding reason is that even if there is legal metrology intelligence, there is a lack of legal metrology coding for its recording:

[David] Templeton [Metrology Lead Officer for the Society of Chief Officers of Trading Standards in Scotland] made the point that, when the intelligence-led priorities system was set up, metrology was too complex to include - so there was no mechanism for recording weights and measures issues. He added: 'We don't record it, it's not a problem; it's not a problem you don't resource it; you don't resource it and this spiral of decline continues - and that's what the situation is.'⁶¹⁴

TS Workforce Survey

Periodically the CTSI carries out TS workforce surveys and these provide useful snapshots. The 2016 TS Workforce Survey⁶¹⁵ predates the C&AG no. 2 Report⁶¹⁶ but is mentioned out of chronological sequence as its findings can then be considered against the background of the more independent C&AG no. 2 Report.

The 2016 TS Workforce Survey considered responses from 122 TSDs out of 192. In Wales, there were only eight responses. Compared with the 2014 TS Workforce Survey,⁶¹⁷ there was a 46% reduction in real terms in budgets between 2010-11 and 2016-17. 81% of respondents considered that budget cuts had impacted adversely on TS ability to protect consumers. Two-thirds of respondents reported budgets, including income generation targets, which on average amounted to 9.5% of the overall budget. 23% of respondents reported receiving direct grant funding from NTS. It was estimated that TS overall staffing levels had dropped by 11.5% since

⁶¹³ National Measurement and Regulation Office, 'National Legal Metrology Project Report 2014/15: Medical Weighing Equipment' (2015) 3.

⁶¹⁴ Carina Bailey, 'Time to Get Our Priorities Straight?' (2017) 126 *TS Today* 12.

⁶¹⁵ CTSI, 'Workforce Survey' (CTSI 2016).

⁶¹⁶ The Workforce Survey was published in June 2016 while the C&AG no. 2 report was published in December 2016.

⁶¹⁷ NTS and TSI, 'Trading Standards Workforce Survey: Report of the TSS 2014 Survey' (TSI 2014).

2014. (And this followed the 2014 TS Workforce Survey having identified a reduction in 43.5% from the 2009 TS Workforce Survey).⁶¹⁸

Respondents indicated that TS, licensing and EH were often incorporated in the same organisational structure, although increasingly TS was being housed jointly with community safety. In terms of titles, 'regulatory services' was the most common, but titles also included 'community safety' and 'public protection'. As to management structure, all heads of service of respondents sat at tier 3 or below (chief executives sitting at tier 1), with the majority sitting at tiers 4 and 5. According to responses there had been an overall reduction in seniority since the 2014 survey: eg, in 2014 18 heads of service in England Wales sat at tier 3, whereas in 2016 it was 9. Respondents also rated the overall involvement with TS of their chief executive and cabinet member with TS responsibility. Significantly, cabinet members were rated as having more involvement than chief executives: eg, 61% of chief executives were rated as having very little involvement, compared to 26% of cabinet members.

As a self-reporting exercise, the 2016 TS Workforce Survey was not independent, and the response rate was incomplete at 63.5% (122 respondents out of 192). But when read with the C&AG no. 2 Report there was broad agreement concerning: the extent of budget reduction; reduction in staffing levels; reductions having adverse impact on service delivery; and the low profile and priority of TS within LAs. Symptomatic of that low profile and priority was the low seniority of TS heads of service and the lack of involvement of chief executives with TS.

HealthWatch Study

To give practical context to those general circumstances, Figure 11 sets out findings of research which specifically explored the effectiveness of the consumer protection system.

⁶¹⁸ TSI and OFT, 'Trading Standards Workforce Survey: State of the Nations Report 2009: Report of the TSS 2009 Survey' (TSI 2010).

Figure 11

Case Study - HealthWatch

This study⁶¹⁹ was undertaken by HealthWatch, a registered charity, into websites making unsubstantiated claims concerning health benefits of products for sale. The study was designed to focus on enforcement of the CPUTRs 2008.⁶²⁰ There had been a previous pilot study which concluded that enforcement of consumer legislation involving misleading health related claims was ineffectual.⁶²¹

Ten websites were selected that were making health related claims and which did not provide supporting evidence. Those claims were marketed widely across LA boundaries, establishing potentially a large target population. Volunteers asked traders to provide evidence. None did but three removed claims. A further letter was sent to traders warning them that failure to comply would prompt a complaint to the authorities. One further trader removed a claim.

38 complaints were submitted to TS, via CA, involving six traders. 13 TSDs were identified as having had complaints forwarded to them. Only 18 complaints drew a response from TS. Complaints were followed up by volunteers for six months. Two traders received advice from TS and removed their claims. Two traders were referred to the The Medicines and Healthcare Products Regulatory Agency which took no action. In total only four enforcement actions by TS were identified (involving two traders), although two complaints were unresolved after six months.

Conclusions:

[1] Submitting complaints to [TS] regarding misleading health-related claims is extremely labour-intensive and does not encourage vigilance by consumers.

[2] Most complaints to [TS] regarding health-related claims do not attract any enforcement action.

[3] Approaches to enforcement among [TS] offices are highly variable, showing little or no standardisation⁶²²

Study limitations

Two limitations were identified. There were many missing data points. Reasons for this included difficulty of communicating with TS, and the withdrawal of so many investigators because of the effort involved. Second, it was not known if the dataset represented a valid sample of TS operations in the UK. However, because of the workload encountered, it was not considered practicable to commit to a larger study.⁶²³

In isolation, the research findings are not generalisable. But, when considered, with other sources, they are consistent with what has already been suggested. The study, eg, highlights fragmented and inconsistent enforcement activity. Another feature revealed is inaccessibility of TS and how this this acted as a disincentive for pursuing

⁶¹⁹ Leslie B Rose, *Research Report: Testing the Effectiveness of Consumer Legislation for Health-Related Claims* (HealthWatch 2017).

⁶²⁰ SI 2008/1277.

⁶²¹ Leslie B Rose, Paul Posadzki and Edzard Ernst, 'Spurious Claims for Health-Care Products: An Experimental Approach to Evaluating Current UK Legislation and Its Implementation' (2012) 80 *Medico-Legal Journal* Vol. 80 Part 1, 13–18 13.

⁶²² Rose (n 619) 17.

⁶²³ Ibid.

a complaint. The study limitations cited embody that point. If so many investigators withdrew because of the 'effort involved', it might also be asked whether consumers are similarly discouraged from pursuing a matter with TS.

Wales since 2010

There was the TS manifesto commitment in 2011.⁶²⁴ But, notwithstanding the discrete reference, after the election TS was considered under a general review of LG. WG referred to the Simpson Report,⁶²⁵ published before the NAW election, as its base for moving forward. Although stating that an all-Wales TS service remained a 'aspiration', there was significant reference to considering the recommendations of the Simpson Report in WG's response to UK Government concerning proposed reform of the consumer protection landscape.⁶²⁶ 'The Simpson Report had reported about delivery of the range of LG services and considered TS in that broader context. It recommended that:

where regulatory risks are regional or national the regulatory service collaborate to deliver on a regional or national basis. This is the case in matters such as illegal money lending, [TS], food standards and food hygiene, air quality and land contamination.⁶²⁷

The Simpson Report also set out a timetable for implementation of recommendations which included a 'Compact detailing the development of collaborative and national service delivery... agreed by the Assembly Government and WLGA [Welsh Local Government Association] ...'.⁶²⁸ That agreement was signed in July 2011.⁶²⁹ Concerning TS, there was a two-stage process. The first was for '[WG] to confirm policy intent of [TS]' and following that '[LG] and [WG] [were] to review scope for collaborative service delivery' in TS.⁶³⁰

The response of WG essentially was to accept the Simpson Report and require collaboration but the nature of that collaborative effort was left to LG. Therefore, it

⁶²⁴ WLP (n 1) 22.

⁶²⁵ Joe Simpson and others, 'Local, Regional, National: What Services Are Best Delivered Where? A Report to Carl Sargeant, AM, Minister for Social Justice and Local Government.' (2011).

⁶²⁶ Carl Sargeant letter to Ed Davey, 'Welsh Government Response to UK Government Consultation on Institutional Changes for the Provision of Consumer Information, Advice, Education, Advocacy and Enforcement' (September 2011).

⁶²⁷ Simpson and others (n 625) 43.

⁶²⁸ Ibid 57.

⁶²⁹ WG and WLGA, 'A Compact for Change between the Welsh Government and Welsh Local Government' (2011).

⁶³⁰ Ibid 13.

could have taken the form of a single LG TS service in Wales but there were clearly other collaborative models. A review was commissioned by Welsh Heads of TS and the WLGA which considered various options for collaborative working. It concluded that:

the most likely option for collaborative service model that does not disconnect totally from local areas, has a manageable governance structure and can deliver service improvements seems to be the 6-area model.⁶³¹

Although there were examples of collaborative effort, none followed the 6-area model and there was no all-Wales service.

Review of TS

Due to decreased resourcing of LG, and especially TS, concerns emerged over the continued sustainability of TS. But in how those concerns might be addressed revealed fundamental differences between the representatives of LG (the Local Government Association (LGA)) and TS (the CTSI).

In January 2015, the LGA published a discussion paper that considered the future of regulatory services⁶³² (defined as comprising EH, TS and licensing)⁶³³ and identified their public protection role as a 'core connecting theme'.⁶³⁴ In starting a debate, it was premised on the basis that regulatory services remained together and as part of LG.

In May 2015, the CTSI published its vision for the future of TS.⁶³⁵ It called for a strategic review of TS in GB and described the LWMA model as 'broken'.⁶³⁶ It argued for establishing strategic UK TS authorities funded directly from central government to ensure delivery of priorities and legislative enforcement. It proposed that a governance model could include elected councillors, business and third sector representatives. It rejected a call for larger shared services (ie, involving TS, EH and

⁶³¹ Wendy Martin, 'Trading Standards in Wales: Options for Different Collaborative Delivery Arrangements: Interim Report: A Report to the Welsh Heads of Trading Standards and the Welsh Local Government Association' (2012) pt 10.2. The 'six areas' referred to preferred combinations of LA areas that WG announced at that time.

⁶³² LGA (n 187).

⁶³³ Ibid 2.

⁶³⁴ Ibid 3.

⁶³⁵ CTSI, 'Vision for the Future of Trading Standards' (2015).

⁶³⁶ Ibid 1.

licensing) in favour of dedicated TS units. The rationale was that the role of TS is to 'ensure a safe and fair trading environment where business growth is supported, fair competition encouraged and consumers protected'⁶³⁷ and that 'unlike [EH] and licensing, which generally deal with problems on [a] premises by premises basis, [TS] is much more business and supply chain focused'.⁶³⁸ The document was not detailed and asked government to commission a more in-depth analysis but it did question fundamental assumptions about TS.

The LGA response in January 2016 highlighted the difference of view.⁶³⁹ It stated that concerns had been expressed about the CTSI position and that this had caused the LGA to undertake a review of TS. As part of this, a stakeholder group comprising councillors, LA chief executives and directors, plus representatives of the Association of Chief Trading Standards Officers, CTSI and NTS had been convened; there had been interviews and group workshops. The key messages that emerged from the discussions included: that TS should remain fully integrated with LG;⁶⁴⁰ that established arrangements for managing local, regional and national TS work provided a solid base for the management of TS work at its different levels;⁶⁴¹ and that services should be managed at a larger size to provide the most sustainable future for TS services at a local level.⁶⁴²

The LGA accepted those 'key messages' and that TS should 'remain within [LG] with local control...[with] separate governance arrangements for...regional and NTS work.'⁶⁴³ As to structures, sharing services and creating larger units needed to be considered to ensure future sustainability.⁶⁴⁴ It also said that such an arrangement 'would allow greater capacity for development of commercial approaches (ie, income generation) which have an important role to play in supporting regulatory services.'⁶⁴⁵ The report specifically rejected that TS should be disaggregated from wider regulatory service arrangements to establish larger TS units; there was a need

⁶³⁷ Ibid 4.

⁶³⁸ Ibid 3.

⁶³⁹ LGA, 'LGA Trading Standards Review: Summary Report' (2016).

⁶⁴⁰ Ibid 6.

⁶⁴¹ Ibid 7.

⁶⁴² Ibid.

⁶⁴³ Ibid 10.

⁶⁴⁴ Ibid.

⁶⁴⁵ Ibid.

for those regulatory professions to work together more closely and in larger units.⁶⁴⁶ TS was viewed as firmly rooted in LG regulatory services.

The CTSI was a member of the stakeholder group, as were NTS and Association of Chief Trading Standards Officers' members, and the key messages that emerged in the LGA review, on one interpretation, undermined the CTSI call for a strategic review of TS. But when viewed objectively, that call was not unreasonable. Parliament has given LWMAs a duty to enforce legislation and there was evidence of overall failure to fulfil that duty. Taken together, a call for review was justified. Moreover, if, as the LGA argued, to ensure future LWMA sustainability of TS provision, there needed to be shared service provision with other LWMAs, one interpretation is that the LWMA model is, indeed, 'broken'.

In between this CTSI and LGA exchange, UK Government published a White Paper⁶⁴⁷ concerning improving economic productivity and prosperity. As part of that there would be a review of TS 'to ensure that consumer enforcement capability effectively supports competition and better regulation objectives.' Although a 'review', because of its focus, it was not the strategic review called for by the CTSI. The review was undertaken but its findings were not published. The government announced that it would be taken forward as part of its 'Red Tape Review',⁶⁴⁸ established in March 2016.

When the UK Government merged the TS review with the Red Tape Review, a theme was identified: ie, specific TS consideration being countered and leading to broader consideration with other service areas. This was the fourth occasion. The others were when: the LGA responded to the CTSI request for a TS strategic review; the Simpson Report recommendations took precedence over the TS manifesto commitment; and, the Hampton Report recommendation to establish the CTSA was not followed. Again, such change can be linked to TS profile and priority given to TS.

⁶⁴⁶ Ibid 11.

⁶⁴⁷ HM Treasury, *Fixing the Foundations: Creating a More Prosperous Nation* (White Paper, Cm 9098, 2015).

⁶⁴⁸ The review was formally titled 'Cutting Red Tape Review of Local Authority Regulation and Enforcement.' See: 'Trading Standards: Written Question and Answer' (19 July and 3 August 2016, HL 1312);

<<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-07-19/HL1312/>> accessed 18 June 2019.

Low profile and priority of TS within LG has been previously identified. Failure to publish suggests TS has similar status within central government.

In April 2018 (just over two years later) there was a consumer Green Paper of which consumer enforcement was part. There was a familiar critique but this time it came from the UK government:⁶⁴⁹

It has become more challenging for NTS and [TS Scotland] to pursue more complex enforcement cases...and also riskier, particularly for complex cross-boundary enforcement cases. The incentives to take such cases are weak and there is no overarching framework of accountability to encourage [LAs] to ensure consumers are protected.⁶⁵⁰

As a Green Paper, it did set out proposals for reform but asked the question:

What changes are needed to ensure local and national enforcers work together within an effective framework for protecting consumers? ⁶⁵¹

The question though alluded to effectiveness of structural arrangements and not the effectiveness of resourcing arrangements. Also, the Green Paper had a consumer protection focus and contained no reference to legal metrology. It is considered further in Chapter 13.

Office for Product Safety and Standards (OPSS) etc

In January 2018 the UK Government announced the establishment of OPSS whose role is to identify consumer risks and manage responses to large-scale product recalls and risks. It therefore has a coordinating role for product safety, working with LWMAs. This represented a policy volte face.

In 2016, commissioned by the BIS, an independent report was published concerning product safety recalls in the UK.⁶⁵² It identified lack of leadership and coordination and recommended establishment of a national product standards agency to fill that role. Such agencies exist outside the UK: eg, there is the US Consumer Product Safety Commission.⁶⁵³ The government's first response was that it did 'not believe that

⁶⁴⁹ BEIS, *Modernising Consumer Markets: Consumer Green Paper* (Cm 9595, 2018).

⁶⁵⁰ Ibid 55.

⁶⁵¹ Ibid 57.

⁶⁵² Lynn Faulds Wood, 'UK Consumer Product Recall: An Independent Review' (BIS 2016).

⁶⁵³ See <<https://www.cpsc.gov/>> accessed 11 September 2018.

setting up a new public body in the current financial climate would be an effective use of taxpayers' money'.⁶⁵⁴

Probably, the main trigger for the change was a Parliamentary select committee report published in January 2018⁶⁵⁵ which lamented the lack of progress since the 2016 report. Two weeks later the OPSS was established. The Grenfell Tower Fire in June 2017 was a driver as it was believed to have started by a fridge freezer catching fire. There were other high-profile cases such as Whirlpool tumble dryers (see Chapter 3). Both Grenfell and Whirlpool were mentioned in the committee report. Although having a coordinating role, OPSS has no powers. Its birth was through administrative, and not legal, arrangements. This development is also discussed in Chapter 13.

In June 2016 the UK voted to leave the EU. The detailed implications for TS are unclear and these are explored in Chapter 13.

Summary

Reduced resourcing and the CLR impacted on TS. While reform was in part about service improvement, another driver was to reduce public expenditure. There was sustained and significant reduced TS resourcing from 2010, calling into question TS sustainability. One positive development from reform was regional and national TS projects but, even so, there were, again, questions about sufficiency of resourcing. TS, also, has increasingly low profile at all levels. And the call for less regulation contributed, as it obscured the UK Government's approach to a review of TS. Concerning TS strands, legal metrology has lower profile compared to consumer protection. In Wales despite the TS manifesto commitment, TS was not taken forward as a specific matter. In the meantime, the UK voted to leave the EU. Other embryonic developments in 2018 were the establishment of OPSS and the Green Paper consultation about consumer enforcement.

Chapters 4 to 9 constitute the thesis' Literature Review. Findings from primary research are next considered in Chapters 10 to 12.

⁶⁵⁴ BIS, 'UK Consumer Product Recall Review: The Government Response to the Independent Recall Review by Lynn Faulds Wood' (BIS 2016) 5.

⁶⁵⁵ Business, Energy and Industrial Strategy Committee, *The Safety of Electrical Goods in the UK* (HC 2017-19, 503).

Chapter 10 – Findings from Interviews

This chapter sets out findings from interviews undertaken. References to interviewees are anonymised. Each is allocated the prefix 'I' and a unique number: eg, I1. There were 51 interview sessions. This included interviewing four people twice and one person three times; in each case there was a significant time gap between interviews and, among other things, this enabled longitudinal consideration. Two of the interviews involved two people. Therefore, there were 47 people interviewed in total. A longitudinal element was also present in general through the interview process: eg, the continuing effect of reduced resourcing was something from which a narrative could be developed.

As mentioned in Chapter 2, the sampling method adopted was purposive as individuals who were identified as having something to contribute were approached. This was combined with convenience sampling: eg, when deciding who to recruit between potential interviewees who had similar characteristics. A characteristic could relate to past or current position and some interviewees were identified as having more than one characteristic. Categories of characteristic were created according to, eg, working experience such as in TS or the police. In the case of 'TS' an additional characteristic was created for 'legal metrology' because of how interviewees identified themselves. No similar additional designation was required for 'consumer protection'. In relation to the private sector characteristic, three interviewees were involved in larger organisations while the others were either self-employed or directors of small enterprises. A breakdown of interviewee characteristics is set out in Figure 12.

Figure 12
Interviewee Characteristics

Characteristic	Number of Interviewees
Academic	3
CA	2
EH	3
FSA	2
Journalism	1
Legal	5
Legal metrology	4
Licensing	1
Outside GB	4
Police	6
Politics	3
Private sector	9
TS	21

The chapter is structured around six overarching themes: Low TS profile; TS and reduced resourcing; TS and Change; Helping Oneself; Other Ways of Doing Things; and Challenges to TS. Three case studies are also set out in Appendix 20. Each arises from interviews: one is a Wales LWMA case (CS1), one is a WIT case (CS2) and one is a Wales LWMA/WIT case (CS3). The three are placed together as there are common and inter-related issues. Reference is also made to CS1, CS2 and CS3 throughout the chapter. Before consideration of the themes, the starting point, though, is the TS manifesto commitment as this was the catalyst for the thesis.

[Wales Labour Party Manifesto Commitment](#)

The commitment was wholly unexpected:

No one was consulted on it...It just appeared. And I think Welsh Labour even thought 'How the hell did it get in and what we can do with it?'... And we spoke to the WLGA and they said 'We know nothing about it except that it is there'. [I23]

Look nobody had ever considered having a single [TS] service for Wales. We [didn't] know what the arguments [were]. [I30]

There was also a lack of clarity about how the commitment arose:

Where that initially came from I don't know. It is still lost in the ether somewhere as to who initially came up with the idea. [I30]

Nobody knows where this Welsh National [TS] service came from. [I3]

There was a suggestion that it had been included in error:

Some thoughts were that there was a misunderstanding...[caused by] reading about the Welsh Illegal Money Lending Unit. [I3]

The explanation that it was an error was suggested independently from an informed source. Both surprise at its origin and subsequent developments are consistent with this interpretation.

After the election Carl Sargeant, (then) WG Minister for Local Government and Communities, was asked for an update on the TS manifesto commitment and, although stating that TS was 'integral to several of the [WG's] key agendas on social justice, financial inclusion, tackling poverty and food safety', he emphasised that TS was 'non-devolved' and that BIS had lead responsibility for TS.⁶⁵⁶ He further stated that WG and BIS officials would be liaising concerning the (then) proposed changes to the consumer landscape which included:

proposals to give [TS] services greater responsibility for consumer enforcement functions, operating on a regional and national basis, broadly in line with our aspiration for an all-Wales service.⁶⁵⁷

There was nothing in the response that pointed to WG taking forward the TS manifesto commitment. The minister was unlikely to admit publicly that it was an error; the BIS consultation could be viewed as a convenient excuse for WG not to act.

The TS manifesto commitment was not taken forward and 'just died a death [I23]'. Subsequent developments after the election led to TS consideration being subsumed with consideration of the Simpson Report⁶⁵⁸ and regulatory services delivery (see Chapter 9). This development raises issues about TS profile in Wales.

Low TS Profile

The TS manifesto commitment could be interpreted as showing that TS had a relatively high profile in a devolved context. However, interview findings suggest

⁶⁵⁶ Sargeant (n 404).

⁶⁵⁷ Ibid.

⁶⁵⁸ Simpson and others (n 625).

otherwise. The chapter next explores TS and its profile as it is argued there is a causal link between profile and resourcing.

Although TS is not devolved Carl Sargeant viewed TS as 'integral' to WG 'key agendas'. The question is whether TS makes that contribution. The answer suggests it does not, and the reason is because it is not devolved:

If [TS] isn't devolved, then there's nothing you can do....I think Carwyn [Jones, Wales First Minister,] said...[that] our Programme for Government is about what we can achieve...There's no point in focusing beyond...what we can't do. So perhaps that explains why [TS] is left to the UK Government. [I39]

I have spoken...to...[WG officials] about the lack of a [TS] portfolio and profile within [WG]. And the answer comes back that there is no resource to be able to put somebody in place to deal with that; and the service is seen as...not devolved to [WG]. [I30]

That position resonated with what was reported in Scotland. Scottish politicians had a lack of understanding about TS ability to contribute to devolved policy delivery. That lack of understanding arose, in I40's view, because those politicians are not responsible for TS as it not devolved.

Although not devolved, if TS is integral to WG 'key agendas', there could be devolved administrative arrangements for there to be a TS voice. But none exist, in contrast with EH, much of which is devolved. I30, a LG policy worker, commented:

[T]here is a Chief [EH] Officer who sits within [WG] civil service and he has a day-to-day responsibility for dealing with [EH] matters...[T]here is somebody on hand...who can talk...about [EH] matters. And that...means...access to ministers [who] ask questions...and that person feeds the minister with information about his policy area. We haven't got that with [TS].

There is seemingly a 'profile issue' for TS at a devolved level. Although WG resources LAs to deliver TS, it does not have policy responsibility. So, there is lack of incentive to link TS and WG outcomes, despite being able to meaningfully contribute to the WG well-being agenda. If TS was devolved that link could more readily be made.

Another reported aspect of low profile of TS in Wales was in LG: eg, as reflected in the TS head of service having a low position in the LA staffing structure and not being able to have influence:

Some heads of service are five tiers down. They are lost in a large directorate...you've got no chance of fighting the cause then higher up. [I21]

We know that the current heads of [TS] in a [LA] context sit probably at fourth, fifth, sixth tier within the [LG] structure. And there are any number of barriers in-between that level of officer and getting to the table where financial decisions are made in terms of funding services in the future. [I30]

The low position of TS heads of service in LAs is consistent with the TS 2016 Workforce Survey findings discussed in Chapter 9, and which reflected the position in GB, not just Wales. Another factor identified as contributing to low profile was the effect of structural arrangements where TS is placed with other services under shared organisational structures:

[There is a Department for Public Protection] which is effectively half of our Directorate [of Environment]...So public protection, [TS], community safety...catering, [EH], health improvement, all that sort of stuff, registrars, licensing, burials...and the Directorate...includes planning, highways, public services. So, it's massive. [T]here is a cabinet member who has public protection amongst other things. [I3]

Low profile in Wales was also linked to LG re-organisation in 1996, when the single-tiered unitary structure replaced the two-tiered district and county structure:

When I first started, we had a county [TSO] who was a chief officer and who was on the council's management board along with all the others...We had our own committee. And then 96 came...So, we've gone from second-tier head of service...to fifth. [I10]

Under the two-tiered structure EH, as a district council service, was separate from TS and each could more naturally have a prominence.

There was low profile of TS with the public, as judged by TSOs:

I think it's quite low, I think even amongst my own friends...If you mention [TS], people [ask] 'Well what do you do?' [I33]

I feel like it's like one of those departments which are...under the radar. But if everything went wrong...and [TS] was no longer there, you would obviously see a huge effect...subconsciously people take us for granted, consumers. They don't know we are there. [I36]

Nomenclature was also mentioned as a reason why there was lack of public knowledge:

'Regulatory Services'... people don't know what that means. [I18]

I am not sure that they[, the public,]...understand what Regulatory Services mean. [I26]

Interviewees indicated that low profile is not helpful when it comes to securing appropriate resourcing, especially as there is competition for allocation with higher profile service areas:

I know that one [TS] manager...told me that they want to make headlines because they have to fight against child services for their budget. And the child services are always making the headline....They are...fighting for headlines and fighting for publicity and then funding. [I11]

The view about how higher profile can have impact was repeated by I17, a former LA cabinet member, whose portfolio had included TS:

And for any politician, unfortunately, the squeaky wheel gets the oil. So, the focus always seemed to be on other things that were more risky...or had a higher political profile [than TS].

Interviewees identified that the preventative nature of TS also contributed to low profile. It is only when things go wrong that publicity is generated. If nothing has gone wrong, there is no publicity. So, it is difficult to assess TS impact:

And I think one of the difficulties we have is we don't measure...our performance very well. And, therefore, we're always going to remain very low profile. [I33]

And Public Protection services are those where you sometimes don't realise the value of them until they are gone...And a lot of work is done by myself...to ensure that the importance of the...preventative work that we can do, [is promoted]. [I15]

And making the same point but about EH, and which could also apply to TS:

I picked up a...phrase[]...about 'unconscious recipients of service'; things like clean air and so on.... The public values them, but they don't know where they come from. [I23]

In a TS context this might refer to a fair or safe trading environment. And as is implicit in the last two quotations, such services are provided for everyone. Education and social services have higher profile, but they are not provided for everyone. I26, a LG councillor, observed:

I suppose at the cabinet level the big issues for [LG]...are always around education and social services. And, actually, they are service areas that not everybody receives. Whereas...regulatory services...affect everybody. But...because the other services focus on the vulnerable people they tend to take a higher profile.

On a TS related matter, I19, an interviewee from the charitable sector, gave a practical illustration of a campaign to raise the profile of No Cold Calling Zones (NCCZs) within LG (TS is involved in their establishment):

I have written to every single councillor in Wales and I have given them the complete works [about NCCZs]...Only a few of them replied, but I know they all got it.

The lack of response is suggestive that NCCZs had low profile. And even if a LG councillor was aware of NCCZs, this did not necessarily extend to related awareness about TS. I39, a LG councillor, asked if I39 associated NCCZs with TS, responded:

I didn't until you said but yes. It does make perfect sense that it is...I think the answer is I don't think about it enough for it to register in that way.

This response chimes with what I15, a TSO, stated:

People don't realise: 'what you do that as well?' ...like some of the doorstep stuff or [NCCZs]. Some of the things they might not think is us...We are not very good...are we, in terms of raising the profile of what we do?

And in terms of the relative profiles of TS and EH in LG, EH was reported to have a higher profile in than TS:

[EH] has a slightly higher profile than [TS]. [EH] in my experience [as an LG councillor] have a relatively big daily role. [I39]

So [EH] in particular; everybody was concerned about public health standards...health inspections of food premises...In terms of profile all the risks appear to be on the [EH] side. [I17]

Another suggested contribution to low profile was that TS is not considered holistically:

[TS] cuts across an awful lot of departments. And I question sometimes whether or not there is a top down holistic whole view of what [TS] does...And because I don't think there is that overview...government doesn't understand, the demands on the service. So you have got a very piecemeal approach to policy development...I think that that reflects Westminster, [WG] and, also, [LG]. [I30]

Comment: Despite 'warm words' from Carl Sargeant about TS, the profile of TS seems low at the devolved level and, also, within LG, a finding consistent with the low profile of TS within LG identified and discussed in Chapter 9 (eg, in TS

Workforce Surveys⁶⁵⁹ the PAC report⁶⁶⁰ and the report of Raine, Mangan and Watt⁶⁶¹). Low profile with the public was also mentioned by interviewees, a position consistent with low profile elsewhere. Low profile of TS within central government was also identified in Chapter 9 concerning the delayed review of TS. I1 commented how the review had been 'morphed into....a red tape review' in March 2016.⁶⁶² In short, a review of TS became part of a wider review which had higher priority. Low profile does not enhance claims for resource allocation.

TS and Reduced Resourcing

Reduced resourcing and its effects were discussed in Chapter 9. There are various implications. Here, specific aspects are identified and discussed while others are signposted and considered elsewhere. Consistent with findings in Chapter 9, reduced resourcing has impacted on TS capacity. Two comments from TSOs are illustrative:

[D]ue to our decreasing resources we generally tend to operate on a reactive basis. And even [then] we are still really struggling...[As] an example...if we seized 10 mobile 'phones off someone, we might only be able to get three examined due to budget constraints. [I29]

By the nature of the cuts you have literally got nearly a half less people to do it, so they are never going to get through the same amount of complaints. [I22]

Reduced resourcing means that there must be decisions about where cuts should fall. This involves setting priorities and one way involves distinguishing between work legally required to be done (mandatory work) and other work (permissive work). So:

There's no sort of strategic thinking. What happens is the council decides on how it's going to save money and what it says is that:

We will first of all keep everything that's [mandatory work] and we will identify everything that is [permissive work] and will make decisions about which [permissive] services we're going to give up. [I40]

⁶⁵⁹ CTSI (n 615), NTS and TSI (n 617), TSI and OFT (n 618).

⁶⁶⁰ Committee of Public Accounts (n 331).

⁶⁶¹ Raine, Mangan and Watt (n 587) 5.

⁶⁶² See: 'Trading Standards: Written Question and Answer' (n 648).

Consumer and business advice is permissive work and routine free provision has been withdrawn. Another incentive to withdraw is the ability to charge for business advice under PA arrangements:

Because [LAs] are cash strapped...they are not doing...business advice. 'We haven't got time because we haven't got people. But sign up to our [PA] and we will give you some advice'. [I3]

I28, a CA manager, explained how in I28's area, TS had stopped providing a consumer advice service and, such was the demand, this was having displacement impact on CA:

The loss of the consumer service...of the local [TS] team. We are quite early on...but there is a lot of anecdotal discussion around from our advisers around the increase they are seeing in demand for consumer help and advice.

According to I30, withdrawal of these permissive services also has ethos implications for LG. The prevailing ethos to that point had been that TS was:

funded by [LG] to provide a service...to consumers and...business both of which pay their local rates and taxes etc, and should therefore receive, within limits, a service...The model of charging for business advice...is something which doesn't necessarily sit comfortably with [LG]. [I30]

Priority setting between different types of mandatory work was also identified. Two examples are mentioned: IP law and legal metrology enforcement. These are discussed below.

TS capacity might be affected in other ways such as through workforce contraction where staff leave and are not replaced. It can also relate to training support for TS staff. So, eg:

[T]he one thing that everybody cuts in the time of austerity is training and students, which is so short-sighted. [I10]

I'm looking to do my portfolio but as budgets have been slashed, the first to go was the training budget. And so, it's a real uphill struggle...to fund me...Also finding the assessors...all the people that were assessors seemed to have left the authority recently. [I18]

There is less funding for training but experienced staff leaving and not being replaced also impacts, in I18's case, with the loss of portfolio assessors. Also, experienced staff leaving means that expertise cannot then be shared and passed on.

[New staff] don't get the experience...Part of that is that they are working in [LAs] where there is nobody to pass on the skills. [I3]

Conversely, reduced resourcing of training, sometimes, had led to improved efficiency:

[I]f you go back a few years you had, it was really just down to each individual [LA] to send their officers on whatever training they came up with. Things have changed a lot... and...there is a lot of joined up work now. [I10]

I7, a TSO manager, contrasted the effect of reduced resourcing with better 'tools' having improved TS capability.

[I'm] excited and frustrated at the same time. You...can see all these opportunities that we've got...So there is this feeling of frustration that we have got all this work to do, and we've got the tools to do it now...just that we are being pulled back because of the pressure of cuts... [I7]

The 'tools' to which I7 refers include new legislation, all-Wales initiatives such as WIT and to intelligence-led working.

Adverse impact on TS capacity asks questions of TS ability to fulfil its legal duties. This is mentioned in comment about CS1 (see Appendix 20). Because of resourcing pressure enforcement gaps can develop. The PAC report commented:

Enforcement deserts exist where some [LAs] do not provide enough money to maintain adequate [TS] coverage.⁶⁶³

Where there is an enforcement desert, it must, also, follow that the LWMA breaches its duty to enforce legislation. I7 remarked:

I am not doing everything I should be doing in order to reach...a minimum standard....[Other] small [LAs are] starting off with almost no staff, and they are getting cut...It is a massive threat to consumer protection now caused by the budget cuts...There are [LAs] out there that cannot be coping.

IP and legal metrology enforcement were two examples mentioned where there were enforcement gaps. Referring to IP, I20, an IP enforcement consultant, stated that although TS has enforcement duties IP has sometimes taken lower priority. So:

Talking about austerity...40% of cuts, a lot of [TS] authorities have actually said that they won't deal with IP unless there is a safety aspect attached to it.

In consequence some cases proceed by way of private prosecutions.⁶⁶⁴ Thus:

⁶⁶³ Committee of Public Accounts (n 331) 10.

⁶⁶⁴ See, eg: Kerry Broome, 'Cammed, Encoded, Distributed, Convicted.' (2014) 123 *TS Today* 34.

[the Federation Against Copyright Theft] have always done private prosecutions. PPL,⁶⁶⁵ music industry, have done a few...[C]ounterfeiters still need to be prosecuted and if [TS] can't afford to do it or don't want to... because it doesn't fit their objectives, the industry have to find another way. [I20]

Perversely, perceived economic benefits resulting from unlawful trading sometimes acted as incentive to withdraw from enforcement. As a practical illustration, I20 cited a case of a local market operating to the significant detriment of legitimate traders:

Why would anybody buy from [legitimate traders] when they can go down to the market and buy it a lot cheaper?...And [it] had been operating for 10 years without...any proper action being taken. It's changed now thankfully... [A]s far as [TS] were concerned, it was in the 'too hard' box and it brought economy to the area. [I20]

Lack of enforcement undermines the rule of law. But where part of TS enforcement is geared towards supporting economic growth (as may be set out in an LA enforcement policy), perceived economic benefits for reducing enforcement effort, perhaps, can be understood, although not excused.

As to legal metrology, findings were in line with Literature Review findings concerning a substantial reduction in IWMs. Two TSOs described the implications.

If you look at the number of active [IWMs]...the number of personnel has gone down...We don't do inspections. There is no time to...So now, therefore, most of my colleagues are reactive...[I1]

And there's fewer...inspectors...And there are some [LAs], despite the...[WMA 1985] that place[s] a statutory obligation on a [LWMA] to employ [IWMs], there are some [LAs] operating without them. [I40]

For instance, Cheshire East Council did not have a duly appointed CIWM for two years as the person purportedly appointed did not have the required qualification. The position was only resolved after a challenge.⁶⁶⁶

⁶⁶⁵ PPL licenses the use of recorded music.

⁶⁶⁶ Bill Norman letter to Graham Russell, 'Cheshire East Borough Council - Appointment of Chief Inspector of Weights and Measures' (12 October 2016). See also: Mark Smulian, 'Council Admits Chief Inspector of Weights and Measures Was Not Properly Qualified' *Local Government Lawyer Online* (8 March 2018). <http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=34500%3Acouncil-admits-chief-inspector-of-weights-and-measures-was-not-properly-qualified&catid=190%3Aregulatory-articles&Itemid=122> accessed 29 June 2018.

Comment: Issues arising from reduced resourcing include: increasing need for self-help by consumers and traders; questioning the continuing sustainability of TS; reduced resourcing being a catalyst for new ways of TS working; and how improved structural and legal arrangements have not had best effect due to under-resourcing. Also, less enforcement consequential on reduced resourcing exposes consumers and traders to greater detriment. The impact of reduced resourcing is further present below.

TS and Change

Interviews demonstrated various ways in which TS has changed and also enabled identification various influences behind change: eg, economic, political, technological and cultural. Although TS and change is the overarching theme, it is explored under various sub-themes: CLR, Consumer Advice, Intelligence-led Working, Increased Criminality and the TS/Police Interface. PA model, TS Delivery Outsourcing and Legal Resourcing.

Consumer Landscape Reform

According to the UK Government two main drivers for the CLR were to improve both the effectiveness and cost-effectiveness of consumer protection arrangements (see Chapter 9). Although establishment of IMLUs, RITs and PA schemes occurred before 2010 they are integral to the reform. Only aspects of the reform that emerged in interviews are considered: eg, the CMA, CPP and NTS eCrime Team are not mentioned.

NTS: There were mixed views about NTS. The more dominant view was positive. In contrast with BIS, which had previous oversight of RITs and IMLUs, NTS was recognised as bringing TS experience to that role:

BIS, whilst the officers that we were dealing with were competent and they were good civil servants...they didn't have in-depth knowledge of [TS]...So, it does seem that there is a better understanding by [NTS]...of the work of the teams. [I7]

That 'better understanding' was identified as having improved effectiveness concerning resource allocation, combined with better oversight of its application.

I think it's incredibly valuable. It's someone in the centre independent of [LG] that understands how we work in [LG] and what the pressures are. And they're in control of...smaller and smaller purse strings. But at least they have

their [TS] professionals...who have got an understanding of what we do and what is needed. So the money that they have, they tend to use it wisely. [I3]

A separate benefit identified was that, unlike the CTSI, it gave an independent voice for TS, which better contributed to policy discussion and improved TS profile.

From a political point of view [TS] needed a voice that was stronger than [CTSI]. Because...[CTSI], albeit is a representative of the [TS] profession, is a limited company, sells its wares, and not all [TSOs] are members...So, it hasn't got the same...political voice...You also get a stronger message where they can interact from a policy perspective. [I20]

I think it's raised the profile nationally of some of our work. [I15]

On the negative side, there were two main criticisms. The first was that NTS was not fully representative of TS because its focus was on consumer protection and it neglected legal metrology (also identified in Chapter 9):

[NTS] does not have a portfolio that covers all [TS] work...There is no representation of metrology. [I1]

The second criticism related to a lack of awareness about NTS:

I think as far as local delivery [is concerned], [NTS] has no impact. [I3]

I think [a] negative is, they don't promote themselves amongst the [TS] profession. I provide training for staff and they haven't got a clue about what [NTS] do...[I20]

NTS Scams Team: The NTSST was viewed as being effective, focused and addressing an issue not previously substantively addressed. The NTSST identifies victims, or potential victims, of fraud (eg, through so-called 'suckers' lists) and then notifies LAs of those people in their areas. TS can then respond:

The Scams Team is brilliant; they have done more than you can expect. It's an area where we in [TS] have been crap at in the past...We had about a dozen names a month of people who were on the list. And we have been calling to them: helping where we can; telling them it's a scam...[I3]

But carrying out TS follow-up work has resource implications:

I think that's been very successful in highlighting vulnerable people in our area. The difficulty is...that it's time intensive and to call on an elderly person...and sometimes you need to...revisit. [I33]

Well, of course [LAs] say 'We don't have the resources to deal with this'. This is completely additional work...And you've got all these...people, who have been victims of a scam who need...support. [I10]

These findings are consistent with discussion in Chapter 9 and that the overall effectiveness of intervention was inevitably linked to resourcing. Also, one inference is that the issue cannot effectively be challenged at an LA level and there is need for a cross-boundary response, which the NTSSST provides.

NTS Illegal Money Lending Teams: WIMLU was judged as dealing with something not previously substantively addressed by TS at an LA level:

Loansharking prosecutions were unheard of. The loansharking teams were brought in, throwing in all the police expertise that they have brought...It's meant...there is somebody who is capable of dealing with [loan sharks]. [I7]

It just wasn't within the remit of a smaller service to take on because that's not the way [TS] used to operate. It used to be...go and deal with legitimate businesses and make sure that they were complying. [I10]

So, because loan sharks were...seen to be a national problem, the government said 'We will put extra funding into a scheme'. [I4]

I10's comment suggests Illegal money-lending was not being addressed and, as with the NTSSST, is cross-boundary and cannot effectively be challenged at an LA level. The comment also implies a change to TS working in dealing with more inherently criminal behaviour such as fraud and intimidatory UCPs. I7's reference to police expertise in IMLUs makes a complementary point.

The benefits identified of the IMLU arrangement (as it involves cross-boundary arrangements) include focus of purpose and of expertise:

[T]here is something about being able to share intelligence around...that I think is more difficult over 22 than through a single expert body. [I31]

[Y]ou have got that specific resource that is not bogged down with the day-to-day minutiae that is just there to do that case. It works [I22]

But sufficiency of resourcing was again an issue. WIMLU is relatively small and its remit is all-Wales:

I do also know that they have got a huge geographic area to cover and they have challenges in being able to deal with all that comes in their direction, with the amount of resource that they have. [I31]

Subsequent to I31's comments, WIMLU's resourcing arrangements were put on a more secure footing during 2017/18 as it now receives funding from HM Treasury,

in place of BEIS, and that money is recovered from the financial sector by imposition of an industry levy by the FCA.⁶⁶⁷

It also emerged that WIMLU was relatively independent of LWMAs due to its specialist nature and because its work would not otherwise be done:

Because they have got a very narrow area of work they're resourced, they don't need assistance from us...We speak to each other. But we don't have a very close working relationship...we don't need to. [I3]

They deal with a completely separate bit of work which [TS] are happy to hand over to them. [I8]

The findings about illegal money-lending are consistent with findings of a 2006 report⁶⁶⁸ which identified an absence of knowledge about the subject, a lack of effective response and a link with broader criminality (see Chapter 8).

Regional Investigation Teams: WIT was viewed very differently to WIMLU. It was viewed as under greater LWMA scrutiny due to:

...people coming to [WIT]...having a vested interest in giving [WIT] work, staying in communication...about how that job is developing, whether [WIT is] delivering... [I8]

Tension is, probably, inevitable, between LWMAs and WIT because LWMAs are unable to retain work for resourcing reasons:

We...had a...case which we have had to task up to them, reluctantly I'd say...We want to be doing them ourselves. But they get funded for these big jobs. [I9]

However, although there can be tension, because a RIT's remit is regional, its focus is broader, and it can identify criminality of which LAs were previously unaware:

Half those [LAs] didn't know they had had these offences committed in their area till [WIT] told them about it...[when] asking for permission to prosecute them. [I8]

Because of crossover there is a need for LWMAs and WIT to work collaboratively for effective working: eg, a cross-boundary prosecution imposes a need for collaborative effort. Moreover, legally, prior to change effected by the CRA 2015 a

⁶⁶⁷ NTS (n 570), 81.

⁶⁶⁸ Policis and Personal Finance Research Centre (n 544).

WIT prosecution originating in more than one LWMA area had to be brought by all LAs in whose areas the prosecution originated. A TS lawyer described the position at that time:

[Despite] the fact that [WIT] might as a so-called body be prosecuting, it is still in effect being prosecuted by a whole host of [LAs]....And so, I think what the difference is, is in ensuring all...[LAs] are aware of the case, that all...sign over their right to prosecute the case to [WIT]...When I started...doing this sort of work there was no collaborative working, or very, very little...And now there's an awful lot more. [I11]

Therefore, a prosecution was taken forward by one LA on behalf of itself and other LAs. However, this was not the most efficient working model. CS2 in Appendix 20 gives practical illustration:

[I]t was a conspiracy across 15 jobs, eight authorities; and it was just a complete and utter mess. So that probably [should have taken] half the time it's taken it to bring this to where we are now, taken up with this legal nonsense that we had to go through with one lead authority prosecuting on behalf of the other seven. [I8]

This is to be contrasted with CS3 in Appendix 3. This was a case following the CRA 2005 change which permitted an LWMA in England and Wales to investigate and bring criminal or civil proceedings in LWMA matters outside its area within England and Wales.⁶⁶⁹ This was a WIT investigation which covered multiple LWMA areas which was handed to a single LA for prosecution. Comparing the current and previous position I8 commented:

It's greatly improved and taken the shackles off us a bit.

The effectiveness of collaborative working can be influenced by range of factors which might relate to culture, resourcing, competence or even awareness. As an example which touches on each:

We had a case...where the bill was getting up to £60,000 and my Head of Legal said 'We can't fund this any further'. Unfortunately it was too late to put through [to WIT]... And it was a stark learning curve for me...I think that we have to operate in a different mindset now. And we have to be assessing our cases quite early on. [I15]

Under-resourcing of WIT was identified and how this influenced operational capability:

⁶⁶⁹ Sch 5, pt 6.

But the [WIT] team cannot deal with all the scams that are going on in South Wales. [I9]

There needs to be more resources in things like [RITs]...So the whole thing needs to be beefed up to be able to deal with it effectively. [I33]

Uncertainty of BEIS resourcing was also a factor identified. Although there has been recurrent funding for WIT and the other RITs since their establishment, there has been on annual basis, with the attendant lack of clarity about the extent of funding beyond that point:

Well I think nothing is ever nailed on. And no-one ever talks longer than for 12 months really whenever looking at things. [I8]

Although WIT was established to complement LWMA effort, sometimes, LWMAs had been unable or unwilling to take on work because it could be undertaken by WIT.

[LAs] say 'If they're out there, we are not going to do our bit. Let them do it.' [I4]

We get involved with [WIT] when we need to. But because we are of a size, we can take on the larger investigations which are mainly based around [the LA area]...Whereas some [LAs] say 'We can't do this. Please help us'. [I3]

RITs have contributed to changed ways of TS working such as cross-boundary investigation and prosecution. Other change arose from the nature of the work; RITs were established to challenge more naked criminality as opposed to more historic TS work of securing business compliance with legal requirements. This meant more criminal instigations and adopting working practices associated with the police. For crime scenes, eg:

We tried to carry out some training with some specialists that we had from the police to make [TS] people forensically aware; so when they get a call to doorstep crime they were going in with half an eye on treating it as a crime scene...They weren't recognising those opportunities. [I8]

Change in TS working was reflected in the broadened legislation. TS usage including more generic criminal legislation, eg:

On our warrants, it used to be just [TS] legislation. But now we've got the Fraud Act, the Theft Act. We've got the Criminal Attempts Act. [I10]

And police influence through, say, former police officers working in RITs was viewed as having helped TS develop skills:

I think it has helped to a certain extent on things that you would traditionally like the police's assistance with...identity parades, expert evidence, video

interviewing...which perhaps traditionally the [LAs] wouldn't have the expertise in. [I11]

And [WIT] bring a lot of experience from the police...in terms of regional investigations...You are aware of far more things than you were before; [eg,] avenues for investigation. [I10]

Responses to the need for a different approach to working were both positive and negative. Where an LWMA did not respond positively this might be for cultural reasons or a lack of resources.

I think...those [LAs] who want to progress...are learning a newer way of working. ...[T]here's probably an equal number that won't; and that is because they don't want to and some because, again they are few, [they]...can't. [I8]

A lot of authorities still don't use RITs. They see them as an outsider [I20]

CA Consumer Service: This change is considered below in the broader context of consumer advice.

Comment: Government intention to improve the effectiveness and cost-effectiveness of the consumer landscape was demonstrated in interview findings. Most, obviously this was also present in the case of NTSST. But also present was a related interface between cost-effective and insufficient resourcing. Factors like increased criminality and cross-boundary activity were direct influences on the need for reform too.

Consumer Advice

There is a link between civil and criminal contravention. Therefore, it is not surprising to find TS working arrangements take account of that relationship:

[TS] always used to provide consumer advice...We then moved to a model where [CD] was established...for answering those...first-tier consumer advice problems...simple advice...Anything which was more complicated...and required a criminal investigation potentially was referred back into [TS]. [I30]

Two significant influences were identified on consumer advice provision: reduced resourcing leading to withdrawal of consumer and business advice as it is permissive work (previously discussed); and the CA Consumer Service replacing CD.

CD was abolished but the function of giving first-tier advice was transferred to the CA Consumer Service. In a comparative context, similar, but more integrated, arrangements were identified in Northern Ireland and Jersey. In Northern Ireland Consumerline carries out that role and is housed with TSSNI in DFENI. In Jersey, Jersey TS provides a consumer advice service as part of its portfolio.

Consumer advice provision provides access and support directly to consumers. It also provides a source of intelligence which informs TS work. These benefits also apply to advice undertaken by TS directly to consumers (second-tier advice). As this is permissive work, LWMAs have no duty to deliver second-tier advice.⁶⁷⁰ Until 2010 second-tier advice was routinely delivered by LWMAs but this has largely been withdrawn:

The provision of, [eg], a small claims advisory service was a [permissive] service. So the first thing we lost was small claims...However, the intelligence that you would obtain from that was really valuable...The same with consumer advice...You lose that connection with your local area and that's what's happened. [I40]

Because of that withdrawal, as well as TS losing 'connection with [its] local area', consumers are also deprived of a service:

[T]here is potentially a gap of where consumers had an expectation previously that they would get some help and advice and assistance. [I30]

However, with the CA Consumer Service, the intention was that first-tier advice and its associated generation of intelligence should continue. The closure of CD was regretted by interviewees as CD was viewed as a provider of good quality advice and its database was a valued source of intelligence. These findings were consistent with what the C&AG Report found.⁶⁷¹

I think [CD] was a good agency and they were fairly well resourced. They were dedicated to the advice aspect. They were very focused on purely offering the remit of civil advice. [I15]

Overall views expressed about the replacement service by CA were not positive.

There is also concern that the referrals which used to come from [CD], should now come from [CA], have reduced significantly in number; and the quality of that intelligence coming from [CA] is also reduced. And, so, the intelligence patterns which [TS] can work from have been restricted. [I30]

⁶⁷⁰ WMA 1985, s 69(5).

⁶⁷¹ C&AG (n 556).

I think it's got a purpose and I think it is better for being there...But, yes, I think the quality has gone down...It is useful, but it just isn't as good as it used to be. [I22]

One positive aspect mentioned concerned the higher profile of CA. The C&AG Report stated that CD had 'a relatively low level of public awareness'.⁶⁷² Higher profile could mean greater public awareness of the helpline and thereby facilitate greater use. Two comments from TSOs are illustrative:

What was interesting was the recognition that the [CA] brand was stronger than [CD]. [I7]

I think [CA] are very good [at] getting themselves out there, getting themselves known. And that's a criticism I have of [TS]. A lot of people don't know who we are. [I18]

Consistent with this, when a CA manager was asked about [CAs] standing with UK Government, WG and LG, the response was

I think our brand recognition with those groups is really, really strong. [I28]

However, 'brand recognition', on its own is not enough if there are concerns about service quality. As to why CA Consumer Service was regarded as less effective than CD:

The problem being was that they put it out to tender... they obviously went for the lowest bidder...I don't think they could run it with the price that they gave. [I18]

And it's all down to finance. And the money they have been given to run the call centres is probably not enough. And their contract with the private company, who really are interested in their service level agreements, and wrap-up times, which never happened in [CD]. [I3]

As mentioned, the original contract to provide the service was outsourced to a private contractor. This came to an end in April 2017, at which point the service was brought in-house and delivered directly by CA.⁶⁷³

One other disadvantage identified with the CS service was structural. I1 explained how CD was integrated into the TS framework, and that previously there was better overarching co-ordination to ensure alignment of effort between TS and CD.

⁶⁷² Ibid 18.

⁶⁷³ CA, 'Annual Report 2016/17' (2017).

Comment: Consumer advice helps empower and protect consumers. It also is source of intelligence. LWMA consumer advice has been largely withdrawn and those benefits are similarly reduced. Although CD was regarded as effective, there is no obvious reason why that level of service cannot be duplicated by CA. The suggestion is that such duplication did not arise in practice. The decision to bring matters in-house can be interpreted as designed to address that position.

Intelligence-led Working

The value of intelligence in informing TS work has been identified. As part of the CLR changes there was emphasis on the role of intelligence. NTS was charged with developing intelligence working and building an associated infrastructure to support TS. As to 'intelligence':

Intelligence is not what is collected; it is what is produced after collected information is evaluated and analysed.⁶⁷⁴

There are, of course, resource implications relating to collation of information, its evaluation and analysis and, after that, the application of intelligence on strategy and practice.

In developing the infrastructure to support TS, NTS adopted the Intelligence Operating Model:

[The Intelligence Operating Model is] a very similar thing to [the police national intelligence model] but it is putting the onus on each layer of enforcement (local, regional and national) in saying how they should be operating. You should be scanning intelligence, you should be looking at threats at each level. There needs to be analysis. [I7]

The local layer is the LWMA and the regional layer equates to operational areas of RITs. Therefore, given WIT, Wales is classified as a region. For each region there is a regional intelligence analyst (RIA) and for each LWMA there is a local intelligence liaison officer (LILO):

[Y]ou have a [RIA]...which will be based around the [RIT]... And then each [LA] does have a LILO. [I1]

Although at the base of the structure, the LILO has an essential role:

[A LILO's] job, effectively, [is] to feed information into...an intelligence database. And that intelligence database should then be used to plan services...The use of it, the uptake of it, the embracing of it, is very patchy. [I40]

⁶⁷⁴ NTS Board, 'Trading Standards Integrated Operation Model - Strategic Overview' (2013) 15.

Insufficient resourcing is one reason for that lack of 'embrace':

Don't forget under [TS]...[the LILO] has got [other roles]...So they've got all these little hats to wear. So how can you give me time [to be the LILO] if there's only two people? [I1]

Differences in engagement to intelligence working between LWMAs was reported by others:

I deal with intelligence day-by-day now, which....I just didn't do in[, former employer, LA1]. There is much more direction and you are expected in[, current employer, LA2] to submit intelligence and you are expected to look at the database. [I36]

There is an implication of cultural differences between the approaches of LA1 and LA2 to intelligence-led working. Another reason can be efficiency related. Lack of engagement can also be impacted by insufficient resourcing:

I have spoken to...[LAs], particularly in London, where they have been reduced to basically just being token officers, just to say they were doing the statutory minimum... In [one area in Southern England], eg, I spoke to...an officer there. They have 2½ full time [TSOs] to cover [the area]. [I18]

Such a view between insufficient resourcing and lack of engagement with intelligence lead working is supported by the C&AG no. 2 Report:

[T]here are a number of local [TS] services that record very few intelligence logs, with 11 services recording one or no logs in 2015-16 compared with the average of 223. We found a strong correlation between the number of intelligence logs and funding for [TS], suggesting that capacity rather than culture is the constraining factor.⁶⁷⁵

Paradoxically, perhaps, decreased resourcing was also identified as a reason for more intelligence-led working:

At the level of cuts...even the statutory duties, I don't think anything is sacrosanct now...And what we have had to do is be more focused with our work. It needs to be more intelligence-led, risk-based assessment of the work as well. [I15]

I can see why [NTS] have pushed an Intelligence Operating Model as a way forward because the less and less resources you get you have got to become more intel-led, more priority-led. [I22]

⁶⁷⁵ C&AG (n 592) 27.

This apparent paradox can be explained if a distinction is made between resourcing that does not allow an LWMA to effectively function (case 1) and resourcing that does allow this (case 2). Case 1 would be the situation to which I18 refers (TS 'reduced to...token officers...doing the statutory minimum'). In case 2, although there might be reduced resourcing, as there is sufficient to allow intelligence-led working, a critical mass is reached and, as I15 and I22 suggest, intelligence can then be a useful tool.

The success of intelligence working includes intelligence sharing. So, if there is failure to share by, say, not inputting on a database, others cannot use that information. While under-resourcing, again, might be a reason, cultural, structural or political (with a small 'p') reasons were also identified:

The thing is that each [LA] is only concerned with, sometimes...internal things really, and don't look at the wider picture. You also find as well, is that there is not that much interest in sharing of information. It's more about 'This is happening on my patch. I will deal with it. I haven't got time to share it with anybody else'. [I21]

WIT was identified with intelligence sharing. It was 'one of the key things...that [WIT] does [I15].' This is unsurprising. Given the structural arrangements for RIT working, there is a natural incentive to share intelligence. Contrastingly, for an LWMA, as I21 suggests, structural arrangements may be a disincentive.

Sometimes effective enforcement is simply not possible without intelligence-led working: eg, concerning illegal money-lending:

I think in order to be successful...it's very hard to break into those circles of illegal lenders. It's intelligence-led isn't it? You're relying on people coming forward with the information because it's completely locked down because of the type of people. [I33]

This chimes with comment above that before the establishment of IMLUs, illegal money-lending was unenforced. The need for intelligence-led working also arises from the changing nature of TS work:

[TS work has] moved away from going around and inspecting shops and pubs and things to being more intelligence-led. It's more on-line work, there's a lot more fraud and scams and doorstep crime out there now...When I first started you just didn't have that kind of thing. [I10]

A distinction was drawn between intelligence gained proactively and intelligence gained through complaint:

Clearly, there would always be complaint garnered intelligence but the former was important, in particular, in attempting to better assess understanding and appreciation of particular issues, which in turn could lead to more effective policy-making. However proactive intelligence gathering to a large extent is resource driven. [I5]

This is relevant to routine inspections, something traditionally associated with legal metrology and historic TS working. Routine inspections have ongoing resource implications and, post-Hampton, '[n]o inspection should take place without a reason'⁶⁷⁶ based on identified risk or intelligence became an embedded mantra. The effect on legal metrology is reported below (under TS Portfolio Uncertainty) as leading to a de facto starvation of intelligence.

There were two other contexts identified by interviewees. The first relates to IP law enforcement. The Intellectual Property Office Intelligence Hub:

was set up...in 2005...to make sure there was a bit more co-ordinated activity between industry, law enforcement and government; and...resources on the ground should be used on an intelligence-led approach rather than just 'fingers in the air wondering who to look at'. [I]t now manages the national intelligence database for IP crime. [I20]

TS (with others) are encouraged to use it and both access and share data. The IP Office initiative is complementary to TS developments.

The second example concerns serious and organised crime. The Crime and Courts Act 2013 established the National Crime Agency. Its role is to combat serious and organised crime working with other enforcers. One consequence has been the establishment of the Government Agency Intelligence Network (GAIN) whose role is:

to coordinate...government agencies [and] non-government agencies to, where appropriately, come together, share intelligence and to disrupt serious and organised crime...It's almost a throwback to...the old Al Capone sort of approach. So, if you don't get them for one, you get them for something else. [137]

As part of GAIN there are regional arrangements. One region covers the Dyfed-Powys, Gwent and South Wales police areas. TS is part of that arrangement,

⁶⁷⁶ Hampton (n 45) 7.

coordinated by WIT. TS presence signposts TS linkage to serious and organised crime. TS involvement includes information sharing and joint-working:

If we have got someone of interest to us we can lodge that with the GAIN coordinator who will...ask...partner agencies if they've got anything. And they can come back to us and say "yay" or "nay". [I8]

[T]he tobacco industry came...with some information...to say that there were two stores...selling counterfeit cigarettes and non-duty paid and illicit whites...There were links to suspected illegal immigration...and...concern about possible exploitation of migrant labour...[P]olice, [TS] and Immigration Enforcement...had simultaneous visits...We recovered around about £20,000 worth of cigarettes. There were two immigrants who were working unlawfully...So that's the way it will work and we now are looking for that more tactical intervention. [I37]

CS2 in Appendix 20 is an example in which there was GAIN involvement ('[I]t is a portal for us to get the help we need' [I8]).

Comment: Development of intelligence-led TS working can be linked as a response to reduced resourcing and to different challenges. Reduced resourcing has placed a focus on a more risk based and priority-led approach and the use of intelligence contributes. But the beneficial effect can be lost if there is insufficient resourcing (hence the 'paradox' described above). However, sometimes an intelligence-led response is sometimes the only effective way to respond as otherwise it is just 'fingers in the air wondering who to look at'. Also, as the GAIN example illustrates, intelligence-led working can be essential for meaningful working with other agencies.

Increased Criminality and the TS/Police Interface

TS work has changed with greater focus on challenging outright criminality, as opposed to effort directed to achieve compliance with the law. This can be identified in interview responses. Much of the CLR recognises this development: eg, with establishment of NTS, RITs, IMLUs, NTSST and the NTS eCrime Team. This has necessitated new ways working (eg, intelligence-led working) and the acquisition of new skills traditionally associated with the police: eg, relating to crime scene investigation, evidence gathering, interviewing, charging practice, case management and court process. Because of this link to criminality there is also more joint-working with the police. One TSO stated:

We are actually looking at fingerprinting and that kind of thing now. So, we are going into the crime scene and ensuring that we've got our gloves on, ensuring that pictures are taken of the evidence in situ. And just doing things that people possibly would expect of a police officer more than a [TSO]...I think the level of criminality has definitely increased. We work quite closely with the police as well now. [I29]

Increased criminality has also placed greater focus on the TS/police interface. Two main strands emerged in interviews concerning this. The first concerned a necessary and inevitable working relationship, especially, where TS undertake investigations. Police support is often essential because it involves, say, use of police powers of arrest and bail (the dependency strand). CS1 and CS2 in Appendix 20 are examples involving the dependency strand. The second strand concerns contesting where the division between TS and police remit is drawn (the contested strand). This obviously arises with doorstep crime or 'scamming' where TS might argue it is a police matter because it is fraud and the FA 2006 is not TS legislation. Conversely, the police might argue that it is a TS matter because the issue is rooted in contract and is therefore a 'civil matter'. Both the dependency and contested strands were present in CS1 in Appendix 20. As to the contested strand:

It [was] a police case. We said from the outset...The police didn't want to take it on...You tend to find with a lot of frauds that it goes to the police and [they say] 'Oh it's a civil matter because it's a civil dispute'...The police don't touch them. [I9]

Concerning the dependency strand, nevertheless, the police provided effective support:

Throughout this case I haven't had a problem at all. They got someone out of prison for me to interview in the police station. They produced people for me. They provided us with all the Intel...they could not have provided any more for us throughout that investigation. [I9]

Other interviewees reported real issues concerning the contested strand where the police would routinely refer things to TS. But they also reported improvements:

Well the police are actually coming on board more....[T]hey are far more receptive now to the concept of...tackling this as a crime; whereas it used to be referred to as 'civil matters'. I was at a meeting...and they were telling me that the phrase...is now outlawed...So there is genuine progress. [I9]

When I first took over...literally [the police] wanted to push every single case to [TS] And I was like quoting the Fraud Act and explaining how the Fraud Act worked, to say 'This is a police matter.' However, I am glad to say it's changed...and that certainly wasn't the experience of just [my LA]. [I22]

Again, I22 also acknowledged the dependency strand

However, we couldn't work stuff without them either. We need them.

As to why the police might refer 'civil matters' to TS, increased pressure on police resources is one candidate. But a basis rooted in the offending can be identified. I38, a consumer journalist, reflected this when discussing doorstep crime and a broadcast consumer affairs programme (P) in which I38 had been involved:

I suppose because you've made a contract with these people and...there'll be legal niceties between them. Yes. I mean [P] wouldn't do distraction burglary. So I suppose maybe...that [TS] don't do distraction burglary. The police don't do cowboy builders. There is a line though isn't there. [I38]

Where crime is rooted in contract, it is a 'civil matter' as well. But so is distraction burglary. However, in that case the civil root is in trespass. Yet it was not reported as being referred to as civil matter. The objection to 'civil matter' is that its use denies the criminal root or minimises its significance.

It is a crime against the person. It is robbing people of huge amounts of money, far more than they would probably lose in a street mugging. And yet in the past it's been pretty much left to [TS]. [I19]

Related to this aspect, Day, identified that although similar in victim and offender profile, distraction burglary and 'rogue trading' are treated very differently with respect to recording practices. Distraction burglary has a nationally used definition and crime code where rogue trading does not. As a consequence, it was difficult to measure the true extent and impact of rogue trading.⁶⁷⁷ Day defined rogue trading as:

Any incident where an individual, or individuals, target[s] a consumer deliberately overcharging for unsatisfactory goods and/or services. This includes charging for unnecessary work, damaging property in order to obtain money or work, charging for work not carried out, leaving work unfinished and intimidating behaviour in order to extort money.⁶⁷⁸

One explanation for that historical difference in approach can be linked to the criminal law. Burglary is a long-established offence.⁶⁷⁹ UCPs, which would cover

⁶⁷⁷ Tim Day, 'Lost in the System: Locating Rogue Trading Incidents in Police Statistics' (2015) 17 Crime Prevention and Community Safety 189.

⁶⁷⁸ Ibid 189.

⁶⁷⁹ The current offence is set out in the Theft Act 1968, s 9.

rogue trading, have only been criminalised since the CPUTRs 2008 came into force (and then only in relation to consumers).

In practice there is a common criminality with rogue trading and distraction burglary. They are inter-related as I38 acknowledged. There is need for police education:

I recognised, and certainly the [TS] people that I link in with...that people don't understand the nature of [TS] work and how these are frauds. They're not civil matters and there was a tendency for police in many cases, to effectively send people away when people complained of 'that dodgy builder'...As a direct result...we launched an education and awareness programme...So that has improved. We haven't won the battle...because of the turnover of police officers and experience...there needs to be a continual sort of process. [I37]

Comment: Increased criminality has had significant implication for TS workload and new skills have been required to meet the challenge. Structural changes can also be linked and the TS/police interface has developed. As evidenced by CS1 in Appendix 20 the dependency and contested strands of that interface are inter-related but they raise issues that need to be separately addressed.

PA Model

Incentive to enter PA arrangements can be linked to reduced resourcing (see I3's comment above under TS and Reduced Resourcing). It represents a changed way of working and there was correlation with criticisms identified in Chapter 8 such as it interferes with independent LWMA enforcement:

What's happened with [PAs] is an absolute disgrace. [LAs]...used to be completely independent...[Y]ou have big business...hand-selecting individual friendly [LAs] and paying them significant amounts of money in order to...protect them against prosecutions. [I11]

You cannot tell me that someone whose job is funded by [X] acts independently of [X]. And I talk to...these officers, who are the [PA], who talk about 'we', meaning 'we' being [X]. They become corporatized. [I23]

[M]ost enforcement [officers] hate it, with a vengeance...Go into a big organisation that is covered by a [PA]. They cannot do it unless they go to that [PA] and ask for permission...Which tends to tie a good enforcement officer's hands behind their back. [I2]

As to benefits, it helps LA staff involved in PA arrangements establish productive relationships with traders. Traders also receive advice that can be implemented across LA boundaries without unjustified challenge:

And I think [LAs] have found considerable benefit...in terms of understanding business better and of providing their staff with some opportunities to develop personally. [I30]

[I]f they're giving this assured advice to...businesses who operate throughout the UK, then it works. [I3]

But there are other traders not in PA arrangements who do not receive business advice because LAs are not resourced to deliver this:

I think that [PA] perhaps works for [a signed-up business]...[but] it doesn't help [TS] enforce the rest of the law in their area...[I]f you look at [LA Y] who've got...a team...to do [PA]...[t]hose...staff are paid for by [signed-up businesses]...But it's on cost recovery. So, they don't do any other work for [TS]...The smaller, medium enterprises will in some areas miss out...[I]t becomes a bit of a postcode lottery. [I3]

Comment: Two benefits are mentioned of the PA model. Good working relationships between TS and traders can contribute to trader legal compliance (relationship benefit). Assured advice can lead to consistency of advice on a cross-boundary basis (consistency benefit). However, those benefits could be otherwise achieved, eg: the relationship benefit through TS providing free advice to traders; the consistency benefit through TS being delivered on a cross-boundary basis (eg, relating to Wales).

TS Delivery Outsourcing

At a time of reduced resourcing alternative models for public service delivery have received attention. Outsourcing to the private or third sector is common: eg, social care is often contracted out by LAs to private providers. This is politically contentious. I41, an LG expert who had specifically looked at alternative models for public service delivery, touched on the issue:

[T]here are some really sensitive...difficult, areas where not only should there be those clear lines of accountability to statutory bodies. But they should be directly provided...And I think the sort of subtext to [objection to outsourcing] is, where you...weaken the accountability, no matter how...motives are in conflict with delivering on those sorts of duties. So...introducing a profit motive into it, or whatever...I think the likelihood is that [policing] would be a red-line area wouldn't it?

According to this argument certain things must be delivered directly by public bodies, and 'red-lines' drawn around them. Such cases incorporate sensitive and difficult areas where there should be clear lines of accountability. Child protection can be identified as a candidate. It is a sensitive and difficult area and moral arguments against outsourcing can be mustered especially if commercial considerations come into play.

I41 suggests policing is a candidate for a red-line. By analogy, other enforcement such as TS enforcement should be too. TS enforcement involves application of the rule of law. It can make allegations of criminal behaviour which, if established, can lead to loss of reputation or liberty. There must be public trust in what it does. If that position is accepted, TS enforcement should not be outsourced.

TS has been outsourced by North Tyneside Council and Barnet London Borough Council. In each case outsourcing was to Capita, a commercial entity. On 141's analysis, as Capita is a commercial entity, there is the prospect of the profit motive conflicting with service delivery. I1, a TSO, referring to North Tyneside, commented:

The noises that they have been making is that they want income generation. We all said at the start...that it is very difficult to generate income through a statutory duty...And now they have found...they are not able to...They are not able to generate the incomes they perhaps thought might be able to.

Against this background, I1 also mentioned that the TS staff working with Capita had decreased after two members had been allowed to leave:

So by losing these staff through voluntary redundancy, I do not think they are too unhappy about that. Because their wage bill is lower. And they are a business...

I23, a LG lawyer, identified legal issues in such an arrangement:

Capita can deal with the day-to-day running of the service but if the [LA] regulatory services team want to prosecute...they have to go back to the [LA]. They prosecute in the name of the [LA]...What worries me a lot as a lawyer [is] I wonder how the [LA] delegates power to an organisation over which it has no control. I don't know how you do that...The function remains exactly the same. It's just the management of the service is done by someone else....The only benefit it has got is that no one has got sufficient interest to challenge it.

I23 also identified potential conflict of interest because:

Capita run catering on building sites, and health and safety etc. And at some point, you are going to come up against them...

I23's analysis highlights how accountability can be blurred where there is outsourcing. I41 made a related point which has potential application:

[Y]ou can build in a quite high level of ongoing scrutiny and accountability into the new model, but it's still susceptible to being changed down the line.

Establishing appropriate accountability is likely to be less challenging where there is direct delivery of service. As I23 mentions, despite outsourcing, enforcement duties remain with the LA. Arrangements, therefore, on any sensible basis, must include contingency planning which contemplates bringing services back in-house: eg, although not related to the TS service, Barnet London Borough Council in 2018 undertook a review of other services outsourced to Capita with a view bringing those services back in-house.⁶⁸⁰

I41 mentions how accountability might be weakened if motives conflict with the purpose of the outsourced service (the primary duty). Even if there is no outsourcing, accountability might be weakened if there are extraneous motives which influence primary duty performance: eg, under PA arrangements traders pay for 'assured advice' which can influence primary duty considerations about enforcement.

A case study identified in interview with I46 (a Dutch legal metrology specialist) concerned the privatisation of the Netherlands legal metrology system and how the enforcement element was subsequently returned to public ownership. Privatisation is a more extreme form of outsourcing as it involves transfer of ownership and is intended to be permanent.

⁶⁸⁰ See: Barnet London Borough Council, 'Review of Capita Contracts – Strategic Outline Case' (2018); <<http://barnet.moderngov.co.uk/documents/s47263/Capita%20Realignment.pdf>> accessed 5 July 2018.

Figure 13
Case Study - Outsourcing of the Netherlands Legal Metrology System

In 1987 there was privatisation of the Netherlands Weights and Measures Department, a part of the Netherlands Ministry of Economic Affairs (MEA). But because of concern over the mixture of legal and commercial activity, and to have a clearer division of remit, the company was then divided into three companies:

- VSL as a standards and calibration laboratory,
- NMI for type-Approval, verifications and reverification,
- Verispect as an inspection and market surveillance body.

Verispect's position was reviewed and from 1 January 2016 its function was returned to public ownership.

In between 1987 and 2016, the MEA continued to want some control over Verispect and arrangements put in place included: MEA acquiring shares in Verispect; Verispect could not be sold without MEA approval; Verispect could only do market surveillance and inspections (not wider commercial activity); measures relating to objection and appeal procedures of Verispect decisions.

As to why Verispect was returned to public ownership, I46 acknowledged arguments for this had included: that inspection should be seen as independent of the sector being inspected; and that commercial pressures dilute public ethos. There was also a concern Verispect, a private company, was delivering a public function for which a Dutch minister was accountable:

The [MEA] wanted to have some control over Verispect because Verispect performed a public task for which the minister was ultimately responsible. The privatisation of Verispect was considered by a number of governments as being a flaw...The present government felt that a public task with polic[ing duties] should be carried out by a public organisation...[I46]

Comment: Issues identified relate to the integrity of TS process at two levels: at a direct level such as with outsourcing, and regarding the mechanics for TS delivery; and at an indirect level, where it relates to an influence on TS delivery: eg, under the PA model. These raise questions about the appropriateness of such arrangements because of their potential impact, especially, on the application of the rule of law. The Netherlands legal metrology case study raises relevant issues which can be applied to TS.

Legal Resourcing

As a counterpoint to reduced funding, interviewees identified changes in legal resourcing as having strengthened TS capability (I7, above, referred to this and about being 'excited' about 'opportunities'). The main TS specific legislation cited was the CPUTRs as the criminal law was extended to apply generally to UCPs.

The [CPUTRs] has meant that we can deal with threats that that we weren't able to deal with [before]...We are using the Fraud Act more [I7]

In conjunction, a related beneficial TS working practice had also developed through combined use of the CPUTRs and, although not TS specific, the FA 2006; the possibility of being convicted for fraud could influence pleas to CPUTRs offences:

We've had cases...where the defendant has pleaded guilty to the [CPUTRs] on the basis that the Fraud Act charges are dropped. [I29].

Other improvements reported in legal resourcing included civil enforcement under the Enterprise Act 2002 and pursuing confiscation of assets under the Proceeds of Crime Act 2002:

[I]f I issue that trader with an undertaking that says sign this to promise to do no more than comply with the existing law...and they fail to do so, I will go to court. And I will get an enforcement order...And if they breach the enforcement order...that's contempt. And [the judge] will punish contempt. I40]

A big one for us is proceeds of crime. And that's a big tool....We've got more capabilities of really hitting the criminal where it hurts. [I29]

But on occasion there was also a negative response to improved TS capability because of cultural reasons: eg, interviewees reported that the use of civil enforcement was variable:

There are lots of [LAs] that won't look at [civil enforcement] because they...view themselves as being a criminal enforcement agency. [I40]

Interviewees also reported favourably concerning the CRA 2015 changes. This reporting were essentially twofold: establishing a generic set of powers applicable to LWMA legislation;⁶⁸¹ and permitting an LWMA in England and Wales to investigate and bring criminal or civil proceedings in LWMA matters outside its area within England and Wales.⁶⁸² As to the former, this was recognized as a significant improvement in administrative terms:

It's completely consolidated everything and it is easier for us to know what powers we've got under the court process. And it's easier...It's all contained [in one piece of legislation]. [I36]

As to the latter change, the benefits of that have already been mentioned above (concerning the CLR and RITs) and the impact of that change in application in CS3

⁶⁸¹ Sch 5.

⁶⁸² Sch 5, pt 6.

in Appendix 20. CS3 involved a large-scale investigation covering multiple LWMA area, and the benefit arising (because an LWMA was able to investigate and prosecute cases from outside its area) was clearly demonstrated. The change was also identified as having real value at more local level:

[I]t seemed bizarre that you could rip off someone living in the uneven house numbers on one street but because the border ran up the middle of the road - the even numbers were prosecuted by one [LA], and the odd numbers prosecuted by another. It seemed absolutely bizarre. So, I think the bit where you can help your neighbour out in the area that sort of borders your area would make sense, wouldn't it...And the other thing...it makes sense that if one [TSO] deals with both sides of the border if you like. Because obviously resources are obviously so thin now, aren't they. [I8]

Comment: While I7 mentions 'frustration' about not fully realising new opportunities because of reduced resourcing, this is a reminder that, financial resourcing is not the only contributor to effectiveness of impact. CS3 in Appendix 20 provides a practical illustration of the benefits of improved legal resourcing, in particular, when compared to CS2 (also in Appendix 20). That said, financial resourcing also impacts on the practical effectiveness of change brought about by improved legal resourcing. Hence I7's frustration.

Helping Oneself

Trader regulation, self-regulation and self-help emerged as connecting issues in interviews and are placed under the overarching theme of 'Helping Oneself'. They are complementary to TS effort and, where effective, TS focus can be applied elsewhere. They will always be present but reduced enforcement contributes to their development.

Trader Regulation

Regulation of traders is common and there are different regulatory regimes. These can control entry into professions (eg, medicine, law or accountancy) and impose professional practice requirements, breach of which can lead to disqualification. There can also be sanctions against impersonation: eg, a person must not be described as a pharmacist unless appropriately qualified and registered.⁶⁸³ If the regime is effective, there is both consumer and business protection. Consumers are

⁶⁸³ Medicines Act 1968.

reassured about pharmacists' status and competence, and pharmacists' ability to practice is not undermined by unregulated practitioners. Such regimes are complementary to TS effort if regulation is genuinely directed towards fair and safe practice.⁶⁸⁴ Effective trader regulation can also provide reassurance when TS carry out risk assessments. Referring to both consumer and business protection I34, an accountant, explained:

Regulation is hugely important...it provides...the public, with a service that is consistent, that is in [its] interests...And, in the event of something going wrong, there is recourse...I can be struck off...[I]t also acts as a safety net for the professional adviser to say 'Well there's a third party, my regulator, who will tell you whether I have been acting accordingly'.

But a deficiency in accountancy regulation concerns a lack of protection for the use of 'accountant', something that has potential to undermine public trust (contrast this with the use of 'pharmacist').

[T]he word 'accountant' is not protected in the [UK]... there are organisations that put "accountant" above their door but they're not regulated...They can act as accountants and effectively they're just on the payroll of the businesses that use them. [I34]

While some professions have long established regulatory regimes that is not always the case. Regulation of estate agents is relatively recent⁶⁸⁵ and introducing regulation to new areas continues: eg, I34 identified regulation of letting agents:⁶⁸⁶

[L]etting agents...could be collecting tenants' money, be holding it on behalf of landlords...They had nothing to say that they had to actually ring-fence that money like a solicitor...or an accountant would for client monies. [I34]

The need for further regulation can develop in response to technological change and new trading practices: eg, crowdfunding:

We're...see[ing] stories...where unscrupulous businesses have raised lots of money through crowdfunding on the net and then disappeared. Now I'm wondering who is licensing or regulating those platforms? [I34]

The private investigation industry was another example identified where there was a need for regulation. I35, a private investigator, was frustrated by its absence:

⁶⁸⁴ But self-interest can sometimes get in the way: '[P]rofessionals, like doctors, actuaries, accountants, and lawyers manage to maintain high wages through... erecting virtual "green belts" to make it hard for potential competitors to set up shop.' Tim Harford, *The Undercover Economist* (Abacus 2007).

⁶⁸⁵ Estate Agents Act 1979 and the Consumers, Estate Agents and Redress Act 2007.

⁶⁸⁶ SI 2018/751.

[T]here are rogues in our industry...They'll never go away unless you've got licensing...licensing would make a difference, I think. And corruption is certainly out there.

That position was echoed by the Association of British Investigators (ABI):

The market is unregulated and plagued by rogue operators. And that makes life difficult for everyone concerned...The ABI campaigns tirelessly for regulation in our profession'⁶⁸⁷

Effective regulation can be of real benefit to TS because the focus for enforcement effort can be elsewhere. Contrasting regulatory arrangements between accountants and private investigators gives practical context.

Trader Self-regulation

Self-regulation refers to voluntary arrangements by traders to promote legal compliance (often to a higher 'best practice' standard). Self-regulation can be by a single trader (eg, through an effective in-house complaints procedure) or sector wide (eg, through a code of practice where traders adopt enforceable minimum standards). I34 commented:

[S]elf-regulation is...more about best practice [, eg, the] private sector adopts internal audit on a voluntary basis. And...some of those things then...become almost expected...because...best practice is going to get you into a situation where you can compete for business. [I34]

I34 also identifies a business case for self-regulation through best practice. In an otherwise unregulated environment this can, especially, be an incentive: eg, the ABI has promoted self-regulation through:

[a] voluntary code of ethics and standards. Members adhere to this, so ABI membership is worn as a badge of quality.⁶⁸⁸

As a further example of self-regulation, I16 (a food industry consultant) mentioned third-party accreditation in the food industry:

In the early days...you would have had technical auditors from...major retailers coming out to audit...a manufacturer. That cost...retailers a lot of money and possibly part of the decision to go to a third-party accreditation was commercial. The other benefit...is a more robust due diligence system...That undoubtedly has driven food safety forward in Britain...[T]hird party accreditation is...important...because... of the cuts...[TSOs], [EHOs] are reduced in numbers...It goes back to the risk assessment...people supplying

⁶⁸⁷ See: <<https://www.theabi.org.uk/>> accessed 21 June 2019.

⁶⁸⁸ See:<<https://www.theabi.org.uk/about>> accessed 21 June 2019.

the retailers will have third party accreditation. Those major companies will also seek third party accreditation from their raw material suppliers...They have two-day audits with a thousand questions. [TS]and [EH] don't have that time.

Three main points can be made. Here self-regulation is large scale and has material impact. If it works, there is a genuine basis for confidence that the trading environment is fair and safe.

Self-regulation can also be a response to reduction in trader advice and education by TS (or others). So, routine inspections (where advice is given, and relationships forged) have largely disappeared. There is the PA scheme under which traders pay for advice, something beyond the reach of many traders. The need for support continues especially when a trader enters the market. There is opportunity for others:

But developing a food company where do you go for advice? Luckily us, and it is shown by the growth here...You get a bad name, you lose custom...[W]e are now developing as a potential research/support mechanism. [I16]

Self-regulation can only apply to those that submit. For those that stand outside, other approaches such as criminal enforcement will be needed:

It's as in any criminal activity. Generally, you find that the people who are going to commit crimes within the food chain are not the people who are going to put themselves forward for self-regulation. [I16]

Therefore, there is still a need for effective TS (and other) enforcement where self-regulation does not apply.

Self-help

This is action by consumers or traders to protect their interests and to avoid or minimise detriment. In policing, this covers 'crime prevention'. In trading, it can be about consumers having knowledge and confidence about their legal rights and realising them (empowerment purpose). This can impact trader behavior if consumers make different purchasing choices. Another aspect can be about stopping consumers entering into transactions (precautionary purpose): eg, NCCZs can prevent trading between consumers and dishonest traders.

But facilitating self-help is dependent on such things as advice, education and sufficiency of resourcing. Withdrawal of advice by TS has already been discussed. Establishing NCCZs requires TS input, something less likely due to reduced resourcing. As to alternative facilitation, social and traditional media's role was identified in interview. I38, a consumer journalist, described the role of consumer journalism and mentioned both empowerment and precautionary purposes:

[TS and TV have] both got the same broad aim in that we don't like ['rogue' traders]. And we want them to stop ripping people off. Our role is we can warn people....We could be seen to be investigating...by informing people, giving them good advice that they could use about stuff that was relevant to their lives...And...because we're all consumers...we should know our rights and we do get taken for a ride....It's not just about jailing these guys...making people aware that this sort of stuff is going on is a good preventative educational thing.

As to trader self-help, a common feature is collective arrangements such as a trade union or a representative trade body. I25, a trade union worker in the creative industries, explained:

It is a problem for anybody that enters into an agreement without knowing what they are entering into, which is a lot of [people]. They don't know how to conduct their business...So, we try and ensure that they have a net around them at the top of the cliff...to stop the ambulance being sent out to the bottom.

Private enforcement is another aspect of self-help. Concerning IP enforcement, it was explained above how private prosecutions were being brought by representative trade bodies because of TS withdrawal. But there will be people who do not access collective arrangements due to ignorance, lack of arrangements or because it is not affordable:

I began designing and writing my own books...and when I began to try to market those I became aware of my vulnerability in terms of people stealing my ideas. I can anecdotally go over the measures that I took to attempt to protect myself...I wouldn't know who to turn to or what to do [if things went wrong] or what my rights were. [I24]

I35 explained how much of I35's private investigation work derived from police withdrawal of support for traders. I35 illustrated that position:

I think it's massively felt by...our clients that commercial frauds, commercial crimes are accepted, [business] can afford [them]...We average about 50 thefts a year of plant...[We] involve the police because...it's part of insurance. And they just never ever turn up...We investigate it. We generally find it...We've got tracking devices on everything...So, I don't think the modern police officer has time to even consider giving people prevention advice.

From this reflection, it is about police withdrawal from both trader crime prevention and investigatory work. Here traders have the means to introduce self-help measures, so:

The majority of the companies, they have what they call preventative programme surveillance...However, all the companies run hotlines, tip lines, confidential informant lines. And then we react to whatever intelligence is provided. [I35]

Reference was also made by I35 to private prosecutions:

I think that is a big area that will develop. But yet again, it's the cost involved. It's got to be a large amount, just to pay the barristers' fees, to look at it.

A comparison can be made with TS withdrawal from IP enforcement. There has also been the development of private investigation and prosecution capacity. But developing that capacity is dependent on having sufficient resources; the trader who does not have those is more exposed because the state has withdrawn:

[W]'ve worked for small businesses that have had issues and they have to weigh up whether they can afford the costs, as simple as that... [T]hey generally get put off. [I35]

Comment: TS efforts to secure legal compliance are part of a broader effort which includes regulation, self-regulation and self-help. No matter how well TS is resourced each of these has its place: eg, the role of the media was identified in CS1 and CS2. But there is a real issue if due to TS withdrawal these are not meaningfully present because, say, a trader cannot afford a private prosecution, or a consumer suffers detriment and has no effective means of redress.

Other Ways of Doing Things

This chapter now considers alternative ways for practice arrangements flowing from interviews. These relate to: legal metrology and consumer protection separation; food and HS enforcement, other LG enforcement regimes; consideration of TS contexts in Barbados, Northern Ireland and Jersey; and investigation and prosecution separation.

Legal Metrology and Consumer Protection separation

Under the LWMA model legal metrology and consumer protection sit together. But outside the UK there are often separate structural arrangements. I42, a former TSO and legal metrology specialist, commented:

I think nearly all [EU] member states have a dedicated metrology function. So, the NSAI in Ireland is responsible for the implementation of legal metrology and the enforcement of legal metrology. In France it's an organisation called the DRIRE. In Germany it's the Länder...[As an example outside of the EU,] California...[has] a dedicated weights and measures authority...And I think it is in my opinion by far and away the most appropriate model because I think as time has developed, all of these individual sectors become more and more technically challenging.

The Netherlands is another example. Consumer protection is the responsibility of the Netherlands Authority for Consumers and Markets. Interestingly, in the Netherlands, legal metrology itself has been viewed as having sub-strands and these are reflected in the structural arrangements. I46, a Dutch legal metrology specialist, described the legal metrology system there:

The Dutch Metrology System...consists of 1. [A] standard[s] laboratory that is a private company...2. [A] number of Notified Bodies which are private companies...3. And an inspection and market surveillance Body that is an agency of the government...The system works.

With the Netherlands arrangements in mind, having regard to criticisms of LWMA and legal metrology delivery (eg, how consumer protection has a higher profile within TS), questions arise about how these sub-strands to legal metrology can begin to be meaningfully addressed under the LWMA model.

Although not under the LWMA model, in Northern Ireland, legal metrology and consumer protection are part of TS and it suggests the possibility of de facto separation through structural arrangements:

I have done a lot of work in Northern Ireland...I think it works well because it's that single 1.2 million people, something like that, 1.4 million people. And they have got enough critical mass there that they can still have the competence to do a really good, or reasonably good, legal metrology service. I am a big fan of it. I think it is one of the best run legal metrology departments in the UK...And it is almost because the size, the structure...They [have] their own laboratory...You could see the same model working with Wales easily. [I42]

FSA and HSE

Food and HS enforcement represent comparative models within LG. Food enforcement is coordinated through the FSA and HS enforcement through the HSE. Although, the models are not the same there are broad similarities. Each shares the ability to direct LA effort and hold LAs to account, something not present for TS.

Concerning the FSA, FSA officials interviewed (I12 and I13), while acknowledging available powers to direct LAs, emphasised that informal mechanisms took priority, where possible, as it more readily promoted effective joint-working. More generally, the nature of the FSA (operating at UK, devolved and local levels) meant it could not function effectively unless there was real partnership working. However, LAs were still subject to legal requirements such as producing an annual service plan and being subject to audit; things not present for TS:

So, there is a separate Food law plan...which we have to produce for the FSA. We have [an HS] plan...under the Health and Safety at Work Act. [I15]

That structural difference means potential difference in consequences for less effective performance. One LA manager whose portfolio included both TS and food enforcement described a predicament:

I am going to be audited by the [FSA]...I don't do enough food inspections because I am dealing with reactive issues and people being conned. So, there is always a balancing act. It's like if I deal with investigations, I can't do all the inspections that need to be done. [I7]

How that predicament was faced is unknown. However, *prima facie*, the consequences of completing insufficient food inspections are likely to be greater than a failure to sufficiently progress TS investigations. Immediate potential consequences for the former could be an unfavourable report placed in the public arena generating bad publicity: something more likely for an FSA audit. The FSA regime provides for accountability and intervention. Those aspects are not present for TS:

[The FSA] have powers to come in and audit [LAs]. They have a performance management framework in place. [LAs] will absolutely worry themselves to death if they ever thought that they were going to get any sort of robust inspection, critique or bad press from the [FSA]. But we don't have the same thing for [TS]...Look at the...Whirlpool debacle with tumble dryers...And that's why there's a real postcode lottery about different [TS] functions across the...United Kingdom. [I40]

This can also provide leverage where food enforcement officers argue for resource allocation:

[EH] can always turn around to the purse holders and say there's a competence issue here and the [FSA] have picked this up at an audit. Or there's a potential time bomb that could go off and we need to fix it. [I40]

TS lacks similar oversight. There was the Hampton Review proposal to establish a CTSA 'with powers over [TS] work... analogous to those of the [FSA] over food'⁶⁸⁹ but that was not implemented:

And the proposals...for [a CTSA] that in effect would set the policy and the performance requirements for [LAs] was really a big step forward...It never came to fruition. [I40].

Comments about the FSA and its influence can also apply to the HSE. However, there is one significant difference. The FSA is essentially a coordinating body. The HSE, also, has an enforcement role and there is division of enforcement responsibility between the HSE and LAs. That demarcation is set out in secondary legislation.⁶⁹⁰ One former LA HS officer explained that position:

[P]redominantly the HSE are responsible for the higher risk industries. So, they'll look after schools, power stations, national health trusts, but also factories and the like...[LAs] tend to be responsible for retail premises, warehousing, food premises unless it's a food factory...So there's an overlap...So [the HSE] will employ an...enforcement liaison officer who is there...to help with some of these overlaps. [I14]

This split of enforcement responsibilities is relevant to TS as through the NTS model there is a division of enforcement responsibilities between LAs and regional and national teams such as IMLUs and RITs. Arrangements for division of responsibility are based largely on intelligence assessment as to whether an issue is local, regional or national. The split between HSE and LAs for HS enforcement is an example of an overall framework for division of responsibility together with a mechanism for dispute resolution. Neither of these features is present for TS, and they are needed: eg, to help fill the 'enforcement deserts' identified in the PAC Report. ⁶⁹¹

Barbados, Northern Ireland and Jersey

There were interviews with people in comparative TS contexts. These were in Northern Ireland (I44), Jersey (I43) and Barbados (I45). The arrangements for Northern Ireland through TSSNI have been described in Chapter 6. In Barbados, with TS equivalent arrangements (BTS), there is a split between legal metrology and consumer protection delivery but BTS sits within the same government department. Consumer advice is also available under related arrangements. In Jersey UK

⁶⁸⁹ Hampton (n 45) 69.

⁶⁹⁰ SI 1998/494.

⁶⁹¹ Committee of Public Accounts (n 331) 10.

arrangements are reflected in adoption of the TS classification (JTS) (so legal metrology and consumer protection sit together) but TS delivery arrangements are more akin to Northern Ireland. JTS sits within a Jersey government department. JTS provides consumer and business advice services. Administrative arrangements for both BTS and JTS cover the whole jurisdiction (the estimated populations of Barbados and Jersey are 275,000⁶⁹² and 105, 500⁶⁹³ and their respective land areas are 430 and 116 square kilometres.⁶⁹⁴ Both BTS and JTS are overseen by a government minister. A common set of characteristics were identified in the arrangements for each jurisdiction that are not present in the LWMA model. These are now set out:

BTS, JTS and TSSNI constitute single administrative units for their jurisdictions: Unlike the LWMA there are economies of scale which can provide advantages concerning strategic planning, the means to muster an articulated representative voice, an ability to work without geographic boundaries within the jurisdiction and service investment. A comment from I1, a TSO working for an LWMA, reflected this last aspect concerning Northern Ireland:

I do have meetings with people from [Northern Ireland TS]...They have got a consistency....Where I am jealous of them is that they are able to spot future training demands and they are constantly training their people. Whereas in the English and Welsh authorities they are not training anyone...[S]o they are able to predict what the demands are going to be on the service and plan for those. [I1]

BTS, JTS and TSSNI form part of devolved or central governmental arrangements: Unlike the LWMA, each forms part of wider economic policy delivery which brings with it (because of, say, ministerial access) a corresponding ability to inform and be informed about economic policy delivery.

BTS, JTS and TSSNI staff are civil servants. In Northern Ireland an independently administered code of practice regulates the relationship between civil servants and government ministers. LWMA staff do not have similar arrangements. In theory,

⁶⁹² UN Department of Economic and Social Affairs, *2016 United Nations Demographic Yearbook* (2017).

⁶⁹³ Statistics Jersey, *Jersey Resident Population 2017 Estimate* (Estates of Jersey 2018).

⁶⁹⁴ The Times (n 406).

civil service arrangements permit less political interference than corresponding LWMA arrangements.

BTS, JTS and TSSNI accountability is through ministerial responsibility: Ie, the appropriate government minister is answerable for BTS, JTS and TSSNI to the relevant democratically elected body. Prima facie, TS is more naturally accountable than under LWMA arrangements where TS has low profile and, in consequence, there is a lack of oversight.

Ring-fenced funding arrangements for BTS, JTS and TSSNI: funding arrangements are ring-fenced and more protected than under the LWMA model.

Provision of consumer advice is a feature common to BTS, JTS, TSSNI and LWMA arrangements. However, with LWMA arrangements the CA Consumer Service is less integrated than with BTS, JTS and TSSNI. This is probably inevitable given that the LWMA model provides for multiple administrative units.

Investigation and Prosecution Separation

This was discussed in Chapter 6 and the issue of LA capacity as a prosecutor arises from CS1 and CS2 in Appendix 20. As mentioned in Chapter 6 there are different models for TS criminal prosecutions between England and Wales (Model 1) and Scotland and Northern Ireland (Model 2). Model 1 is where the same body both investigates and prosecutes (here, the LA). Model 2 is where investigation and prosecution are carried out by separate bodies (here: in Northern Ireland, investigation by DFENI and prosecution by the PPSNI; and in Scotland investigation by the LA and prosecution by the COPFS). There is also the example of Model 2 in England and Wales where police cases are prosecuted by the CPS.

The central argument for Model 2 is that it introduces an independent and fairer approach to prosecutions; this was a key justification for establishing the CPS when it took over prosecutions from the police following well publicised miscarriages of justice. Commenting on the CPS, one former member of the judiciary drew a distinction between theory and practice:

There is obviously a problem where the investigator and prosecutor is the same body...The idea of having an independent prosecuting authority was a

very good idea in principle...In practice, it has not been a good thing...They are politically driven. They want to do more and more. They don't have the resources. Very often they don't have the people of adequate ability to do them. But there is...sometimes...that lack of ability, or determination, to make difficult decisions. [I32]

This view about failings in implementation was echoed by a defence solicitor who had found LA lawyers in practice to be more independent than the CPS:

I personally have certainly found that the [LA] lawyers in [Cardiff] are very competent and are probably more amenable to making sensible decisions than the [CPS]...They work for the [LA]. They take instructions and it is quite apparent that they give advice to those who are instructing them, who are always within the [LA]...[T]hey are more prepared to make decisions...if those decisions are proper decisions to make, than will the supposedly independent [CPS]...[The CPS] are fuelled with fear, overworked, pressure from all sources. They are very much driven by managers, politicians. Nobody can make a decision...They are not independent from government. They will not make decisions...will not risk criticism. [I27]

From I27's description it can be inferred that although these are Model 1 arrangements, in I27's experience, there is independence in how LA lawyers undertake their work reflecting a de facto separation of investigation and prosecution functions with LAs. This was something identified by others. One TSO described its practical manifestation:

[LA lawyers] will say not to take a case. There is no issue with them about it at all. They quite often will say 'No, don't take it'. [I10]

The best practice theoretical position is that investigation and prosecution functions should be separated. Model 2 achieves this, but Model 1 can achieve this too through administrative arrangements. An independent review of the RSPCA did not see Model 1 as an 'insuperable impediment' to satisfactory arrangements providing there was effective separation of functions (see Chapter 6).⁶⁹⁵ The comments of I17 and I10 hint at such separation within LAs. But for separation of functions to be effective requires, among other things, sufficient resourcing:

[I]f the investigating officer needs legal advice he goes off to the legal department and says 'Will you...give us legal advice? But then when we prosecute we will pass the file to another independent member of the legal department who will look at it...But there's not enough capacity in legal departments for...a proper independent view by a lawyer of files...There's not that level of expertise within [LG] certainly. [I23]

⁶⁹⁵ Wooler (n 445).

This lack of sufficient expertise was evident in both CS1 and CS2 (see Appendix 20) as in each case there was a need for ad hoc legal support. Expertise is further dissipated because of the range of legal work undertaken by LA lawyers. Although made in a licensing context, the following comments are relevant:

[L]awyers in [LAs] are pulled pillar to post...[The] solicitor who looks after us... her portfolio is so wide...[S]he's dealing with social services cases, she's dealing with education cases, employment tribunals.... [I]t's jack of all trades. [12]

Issues are likely to be exacerbated in smaller LAs. This especially has relevance in Wales, where there has been consistent argument that there are too many LAs and they should be reduced in number.⁶⁹⁶ Decreased resourcing of LAs generally since 2010 is likely to also to have had impact on LA legal departments.

At a practice level, there can also be cultural and expertise differences between lawyers in Model 1 and Model 2 arrangements. Exploring these aspects, I6, a barrister with experience of both prosecuting and defending LA cases, as well as sitting as a Recorder in LA cases, commented:

Where I think the difference arose [between LA and CPS lawyers]...was with familiarity and being comfortable with the prosecution process. So, it is, I suppose, making the transition from enforcing the law by discussion and encouragement...to that contentious process of prosecuting somebody before the courts...I think there is an inherent difficulty in that transition because, if your mindset is that basically what you want to do is to encourage people to keep the law...you have to switch to prosecuting somebody...Secondly...there is a raft of specialist prosecution skills which [LA] lawyers would not have the opportunity to acquire because of, perhaps, lack of proper training and the low volume of work of that kind.

The comments are also applicable to investigations. The analysis is informed by a difference between police and TS enforcement requirements. TS enforcement will often be about securing legal compliance by encouragement and informal means. The following extract from an LA enforcement policy in Wales is illustrative:

[W]e will...adopt[] a positive, proactive and balanced approach to ensure compliance...Effective enforcement is critical to supporting economic growth. We seek regulatory compliance whilst recognising that prevention is better than cure, assisting businesses and others in meeting their legal obligations through education and advice whilst not imposing unnecessary burdens.⁶⁹⁷

⁶⁹⁶ See, eg: WG, *Green Paper Consultation Document - Strengthening Local Government: Delivering for People* (2018).

⁶⁹⁷ Newport City Council, 'Public Protection Enforcement Policy' 2-3:

Prosecution is not expressly mentioned because, it seems, the focus is supporting economic growth. TS needs to respond in a range of ways: eg, to work with traders to facilitate compliance, but also prosecute where, say, there is serious and organised criminality. The TS response must be multi-layered. So, WIT and WIMLU can be judged as more prosecution focused. Although, they exist under Model 1 arrangements, they address concerns identified by I6. Their focus is not on securing compliance through encouragement. Also, core prosecution skills can be developed. CS2 and CS3 in Appendix 20 provide an illustration.

Prosecution as a term is conventionally restricted to criminal process. The term must be extended to civil enforcement (ie, enforcement action related to a civil court) and administrative enforcement (ie, issue of civil penalties or administrative control such as licensing). There must be consistency of approach and principles that apply to criminal process should be replicated: ie, first, that there is sufficient evidence to justify action (the evidence test) and, second, it is in the public interest to take action (the public interest test).⁶⁹⁸ Proper application of both tests involves independent review and by logical extension this, too, needs a degree of separation between investigation and prosecution.

Although Model 2 applies to criminal enforcement in Scotland and Northern Ireland, this is not the case for civil enforcement. Interviews established that in Northern Ireland this is the responsibility of lawyers in the in the Solicitor's Office of DFENI and that in Scotland it is the responsibility of lawyers in the LA bringing the case. These are Model 1 arrangements. But to have effective separation between investigation and prosecution requires capacity and resourcing. Prima facie, given economies of scale, achieving that position is more problematic in a smaller body (eg, an LWMA in Wales) than a larger body (eg, DFENI).

Specifically, as to administrative enforcement.

[T]here is... a move towards increased use of fixed penalty tickets...That's affecting [LAs]. [I22]

<<http://www.newport.gov.uk/documents/Policies/Public-Protection-Enforcement-Policy-November-2013.pdf>> accessed 29 June 2018.

⁶⁹⁸ See CPS (n 436).

In that instance lawyers are less likely to be used at all which puts greater pressure on TS to properly apply the evidence and public interest tests. Promoting and upholding such practice can be underpinned by things such as promoting working protocols (including review procedures): eg, TS enforcers publish enforcement policies which can set out:

...what happens when we find infringements of [TS] law. It has also been designed to help promote an efficient and effective approach to enforcement, - one that will improve regulatory outcomes without imposing unnecessary burdens on businesses...This document seeks to explain how we make our decisions.⁶⁹⁹

Publishing a policy is one thing, effective implementation is another. A policy can only have meaningful effect if it is applied, otherwise it is irrelevant. While things such as culture will have their part, effective resourcing also does. At a time of reduced resourcing and given the nature of the LWMA (ie, 22 in Wales), the ability to muster appropriate multi-layered responses can be called into question.

Comment: The FSA and HSE provide useful comparative reference points concerning how TS within the LWMA might work more effectively. But these should not be the starting point for consideration of TS delivery: that should be to question if the TS classification is appropriate: eg, based on arrangements elsewhere, there is a respectable argument for separation of legal metrology and consumer protection. Arrangements in Barbados, Northern Ireland and Jersey also identified potentially beneficial characteristics not present under the LWMA model.

Separation of prosecution and investigation can be established under Model 1 or Model 2. And as the CPS findings suggest, effective arrangements also depend on implementation. Lack of sufficient legal and operational capacity can lead to cases not being investigated and prosecuted (CS1 in Appendix 20 shows this). TS enforcement requirements are complicated by the need for a multi-layered approach. Resourcing is key but also economies of scale. Successful implementation was envisaged under Model 2 for the RSPCA which covers England and Wales, a far larger structural base than an LWMA.

⁶⁹⁹ Northern Ireland Trading Standards Service, 'Trading Standards Enforcement Policy'; <<https://www.economy-ni.gov.uk/publications/trading-standards-service-enforcement-policy>> accessed 29 June 2018.

Challenges to TS

Challenge to the continuing nature of TS as a discrete entity emerged as a theme during interviews. Issues sharing this 'challenge' characteristic have been placed under three headings: regulatory services brigading, TS portfolio uncertainty and TS professional identity fissures.

Regulatory Services Brigading

The brigading of TS with EH and licensing under regulatory services (or other combinations) was one theme: eg, Bridgend County Borough Council, Cardiff County Council and the Vale of Glamorgan County Borough Council in 2015 established an integrated structural framework involving TS, EH and licensing and named Shared Regulatory Services.⁷⁰⁰ Such arrangements suggest there is a general LA enforcement entity involving operational integration which includes TS. Superficially such collective arrangements make sense. There are commonalities concerning investigation, prosecution and associated processes. But these disciplines have developed separately, responding to different needs. So, the legal basis of TS is the LMWA (not the regulatory services authority). Concerning the respective rationales for TS and EH a former LG lawyer commented.

[EH] is linked very closely to public health, health outcomes/inequalities and so on. [TS] is generally linked to the economic development of the country... It means that the ethos underpinning the two is slightly different. [I22]

The public health role of EH was also emphasised by I5, an EH academic. That distinction between TS and EH is supported on broader analysis. Pursuit of fair trading, consumer protection, business protection and accuracy of measurement in trading are core to TS effort. Despite differences, all are related to trading. There is an economic focus to TS. One TSO commenting about stated:

I think it goes back to our old mission statement...That was to promote a fair, safe and equitable trading environment. [I1]

There may be overlap with health outcomes (eg, ensuring products safety promotes better health outcomes) but in promoting a fair and safe trading environment there is an economic focus. That said:

⁷⁰⁰ See: <www.srs.wales/en/Home.aspx> accessed 21 June 2019.

[T]he skills that they use are largely the same. Investigation skills and the datasets are the same. They both deal with businesses; so the dataset that they will have about businesses is equally useful, but for different purposes....[W]ith the exception of food standards and food hygiene, they tend to operate separately. [I22]

Investigation and prosecution of whatever nature requires a similar approach. And although food standards and food hygiene (and by implication food safety) are said to not operate separately, the roles of each can still be placed within that broad distinction: ie, where the respective focuses of TS (economic) and EH (health) are apparent. Food standards relates to such things as composition and labelling. There is an overlap with food hygiene and safety as inaccurate labelling regarding composition might have safety implications but that is not inevitable. A feature of the, so-called, '2013 Horse Meat Scandal' (where, although described as beef, meat products contained horse meat) was that this was food crime and a not food safety issue.⁷⁰¹ I22 also referred to elements of TS and EH that operate separately. A TSO elaborated:

I personally think the disciplines are too different...[eg]...Noise Pollution...That is completely separate to anything that [TS] would do...Then you've got Communicable Disease, which is a part of [EH]...And it's so specialist, that it could not be done by [TS]... And there are certain jobs that can only be done, [eg], by a Weights and Measures Inspector. [I18]

Another distinction made between TS and EH concerned their operating bases. EH is more premises based and, therefore, more local. I5 thought that this distinction was the basis for EH previously being a district council function in Wales, and TS a county council function. That division remains in England where the two-tiered structure continues and is also reflected in Northern Ireland where EH is a LG function and TS is a devolved government function. Commenting on TS, I42 stated:

You could go down to the local baker. And he went 20 miles each way. So the enforcement parameter...would be based on the original shires. I think it is probably within the last 50 years, where trade has moved from local to regional to national to international...the original model is...anachronistic. Rather than kind of premises based, I think it was where people traded.

The view that EH is more localised than EH was also supported in a 2012 report to Welsh Heads of Trading Standards and the WLGA:

⁷⁰¹ See: Chris Elliott, *Elliott Review into the Integrity and Assurance of Food Supply Networks – Final Report: A National Food Crime Prevention Framework* (HM Government 2014).

It is generally accepted that the demands on [TS] services in terms of level 2 (regional work) and level 3 (national/GB wide work) is higher than that for [EH], where the majority of service pressures demand an expert localised response.⁷⁰²

Although the term 'licensing' is used in a general sense, there are discrete licensing regimes. Because licensing seeks to control and manage trading, it is a regulatory system. LAs in England and Wales are repositories of various licensing functions. The remit of one Wales LA, as described by its head of licensing, covered:

[T]he Licensing Act...2003 (Alcohol and Entertainment Licencing); the Gambling Act of 2005...taxis and private hire under the Local Government (Miscellaneous Provisions) Act [1976]; street trading under the other Local Government (Miscellaneous Provisions) Act of [1982] (the later one). We also do all the charities collections...hypnotism licencing. We do the Sunday Trading Act 1994...And Scrap Metal Dealers which came in 2013. [I2]

Licensing and TS have an interface: eg, trading in a licensing context (supply of alcohol, gambling, taxi hire etc) can have TS implications under the CPUTRs because UCPs are committed and a licence to trade may be suspended or revoked. But the rationale for each is different. Licensing is about the regulation of a discrete trading activity. TS rationale is about promoting a generic fair and safe trading environment.

Interview findings were that TS, EH and licensing are distinct disciplines underpinned by different rationales and related specialist areas. This also reflects the legal distinction between the LWMA and the various legal bases for EH (such as the FA) or for specific licensing regimes (such as under the Licensing Act 2003). TS has a separate de facto and de jure existence from both EH and licensing. This has planning and resourcing implications for TS delivery. If that distinction is not recognised, or is obscured, because of regulatory services (or other) labels, this reduces the profile of TS and its ability to claim for appropriate resourcing.

TS Portfolio Uncertainty

If there is uncertainty about what TS comprises, it undermines effort to further its cause as there is disagreement about focus. Three aspects that contribute to TS portfolio uncertainty were identified.

⁷⁰² Martin (n 631) 9.

The first concerns legal metrology and its relationship with consumer protection. It was recognised that legal metrology was the original base for TS and that consumer protection developed later:

[T]he [TDA 1968]...That was the first of legislation the [LWMA] was given on top...And then...it snowballed to everything now. [I42]

Related to this was a change in terminology. Although the LWMA remained, LA weights and measures departments became known as TSDs. While there is crossover between legal metrology and consumer protection (eg, with respect to fraud), each has a different purpose. Legal metrology:

is ultimately part of an infrastructure of the trading economy...[But] the role of legal metrology enforcement is greater than that. It is responsible for ensuring consumer confidence...making people believe that they can trust transactions. [I42]

Consistent with what was discussed in Chapter 9, legal metrology was identified as having a low profile within TS and being less valued. One manifestation was its absence from NTS work:

[NTS] does not have a portfolio that covers all [TS] work. There is no representation of metrology...When you ask...‘Why?’ It’s because ‘We do not get any funding to represent metrology, the weights and measures side of things’....It is a battle...It’s only [representing]...the sexy or the more publicly interesting part of our portfolio. [I1]

As to NTS, it is responsible for the oversight and management of (mainly) BEIS funded projects such as the NTSST and RITs which have a consumer protection focus. Two prominent reasons emerged for this failure to secure resourcing. The first relates to its lack of comparative ‘sexiness’:

[I]f somebody’s been short changed by a few pence...where’s the harm? But if you’ve got a...pensioner who has been swindled out of...their life savings, you’ve got a real-life story [which] tugs at the heart strings. But the same business that swindled somebody out of a few pence will be doing that on a systematic basis and it amounts...to an enormous amount of money...And then...think about the unfair competitive advantage that they’re getting over [law abiding] businesses... [I40]

The second reason concerns lack of evidence to support resourcing, due to lack of TS intelligence code allocation and implementation of the Hampton Review. As to intelligence coding, other TS matters were allocated intelligence codes, but legal metrology was not. So:

[T]here's no intelligence recorded...because we don't have the codes to do it initially. But if there's no intelligence, there's no problem...[I]f there's no problem, it's not a priority. If it's not a priority, it doesn't need resources. If it doesn't need resources, leave it as it is. [I40]

As to the Hampton Review principle that there must be a reason for an inspection,⁷⁰³ this resulted in withdrawal from routine inspections. But:

[i]n legal metrology...it is virtually impossible to collect the evidence. Because unless the short measure is big the consumer will not know...So, the problem with the Hampton Report - why weights and measures always comes down the list...is you can't create the evidence to prove that there is [a problem]. [I42]

Lack of priority was also reflected within LWMAs leading to 'some authorities operating without [a CIWM] in breach of a statutory obligation.' [I40]. The example of Cheshire East Council is mentioned above. I42 cited an example where, due to no in-house candidates, a person remained as CIWM despite ceasing to be a substantive LA employee. I42 described that person as 'still nominally the [CIWM] for [X] Council'.

As legal metrology is not part of the NTS remit and is overshadowed by consumer protection, its role as part of TS can be challenged. Despite legal requirements there is de facto exclusion from the TS portfolio.

The second aspect concerns differences about what is, or opinion about what should be, included within the TS portfolio. As to practice, there are differences between Northern Ireland TS and the GB TS portfolios. I44, a TSO in Northern Ireland, explained how the Northern Ireland portfolio does not include product safety, food and animal health and welfare.⁷⁰⁴ Conversely, the portfolio of GB TS includes those matters.⁷⁰⁵ Animal health and welfare is not an LWMA function, yet GB LA structural arrangements place it as part of TS. It was also part of the TS Qualifications Framework (TSQF) but, significantly, not from 2019 in the successor framework, the

⁷⁰³ Hampton (n 45) 7.

⁷⁰⁴ See: <<https://www.economy-ni.gov.uk/topics/consumer-affairs/trading-standards-service>> accessed 21 June 2019.

⁷⁰⁵ See eg: <<http://www.srs.wales/en/Trading-Standards/Trading-Standards.aspx>> accessed 21 June 2019.

CTSI Professional Competency Framework (CPCF)⁷⁰⁶ (the CPCF is discussed below). There are different views about whether it should be included as reflected in the following:

[T]he key thing for me is that...[TS]...does four main things...metrology...fair trading...product safety...food/animal health. [I40]

I don't think [TS] should be [doing animal health]...I mean animal health is a relatively specialised set of knowledges...Animal health, animal welfare, fertilizers and feeding stuff and all that kind of stuff: it should be done nationally, implemented regionally. [I42]

For the thesis a decision was made to define TS by reference to whether it was an LWMA function. Accordingly, animal health and welfare was excluded. It is just one example where TS enforce law which sits outside the LWMA. The schedule of legislation enforced by TS completed by Spicer graphically makes that point.⁷⁰⁷ Extending the portfolio beyond the LWMA blurs clarity about identifying TS portfolio content.

The third aspect concerns the rapid expansion of legislation required to be enforced by the LWMA. The development of consumer protection through EU membership, in particular, has fuelled this. Spicer's schedule is again illustrative. I42 commented:

The last time I looked at the warrant I still have it's about 60 pieces of legislation. And the issue is they are largely unconnected.

The range is so broad that knowledge is inevitably dissipated, especially if there is lack of connection within that range. It is also exacerbated by reduced resourcing and development of 'enforcement deserts'. If law is not enforced, maintaining even working knowledge is placed at risk.

I40 in commenting about a lack of TS leadership stated:

[M]anagement is doing things right. Leadership is doing the right things. And we suffer from a crisis of leadership in our profession because we are so broad.

Uncertainty about the TS portfolio arises from the aspects described and TS breadth contributes. I40 links lack of TS leadership to its breadth. Overall uncertainty

⁷⁰⁶ CTSI, *Regulations: Trading Standards Qualifications Awarded by the Chartered Trading Standards Institute* (2019).

⁷⁰⁷ Spicer (n 186).

undermines effort to further the cause of TS as there is disagreement about its focus. In other words, there is no leadership.

TS Professional Identity Fissures

TS claims to be a profession. 'Leading the [TS] profession' is a CTSI strapline. Throughout interviews there was routine express and implied reference to TS as a profession: eg, I40's quotation above and:

My immediate experience of [TS], in particular, was that it was a very, sort of, technical, professional operation. [I17]

Prima facie, TS's claim seems justified. However, issues emerged which had potential impact on its sustainability as a profession.

Many professions have professional bodies that control entry and regulate the conduct of its members. Failure to abide by requirements can lead to disciplinary action by the professional body and exclusion from the profession. I34, an accountant, described that position:

I'm a member of the Association of Chartered Certified Accountants...Under that professional body I have a practicing certificate, which means I can practise as an accountant...[M]y practising certificate [can be] taken away if I don't comply with the standards...set. [I34]

TS has no comparative professional features. The CTSI is not a professional body in that sense. It is:

a not-for-profit membership organisation founded in 1881 to support and represent [TS] in the UK and abroad.⁷⁰⁸

A comparison with the medical profession is illustrative. The membership organisation is the British Medical Association;⁷⁰⁹ the professional body (of which there is no TS equivalent) is the General Medical Council.⁷¹⁰ As a profession, therefore, TS has less ability to manage its affairs. There is no requirement to be registered or licensed to be a TSO. If a TSO is guilty of misconduct, a TSO cannot be professionally disqualified from being a TSO, although misconduct might mean being unable to continue to be a TSO through LWMA sanction.

⁷⁰⁸ See: <<https://www.tradingstandards.uk/about-ctsi>> accessed 21 June 2019.

⁷⁰⁹ See: <<https://www.bma.org.uk/>> accessed 21 June 2019.

⁷¹⁰ See: <<https://www.gmc-uk.org/>> accessed 21 June 2019.

One important implication concerns meeting professional on-going education and training needs; members undertaking continuous personal and professional development (CPPD) is a response to their meeting. CTSI encourages CPPD:

to participate in the CPPD Scheme in order to fulfil their obligations under [CTSI's] Code of Conduct.⁷¹¹

But there is no TS professional body to require members to undergo CPPD, as is a feature of professions with professional bodies: eg, completing CPPD requirements is necessary for continued practice as a nurse or midwife.⁷¹² But for TS:

[T]here's no requirement for any competence or [CPPD]...[S]ome people are very good and try and maintain their competence, but that's all done on a personal basis. Others couldn't care less. I40]

Another feature attributable to lack of TS control or influence over its professional affairs concerns the use of 'Trade Standards Officer'. Unlike other professional titles (such as 'pharmacist'),⁷¹³ its use is not legally protected. There is variation in definition.

Within Wales, because each module [in the TSQF] was given a points value, then Wales said a TSO would be 70 points...But in other [LAs] it was much lower. In 2 or 3 [LAs] it was whoever worked in [TS] was automatically given the title 'Trading Standards Officer'. [I1]

This imprecision was illustrated when I22 described how when appointed as a TSO, I22 did not view that TSO status had been achieved:

When I became a TSO, I was a part qualified TSO. So, I was still working on my metrology, my food law exams.

To summarise, a TSO: does not have to be registered to practice or undertake CPPD; cannot be disqualified; and there is debate about who can be regarded as a TSO. These are not characteristics that enhance the professional status of TS.

There is a qualification framework which the CTSI administers. The system in place until 2019 was the TSQF which was modular based and lead to the Diploma in Consumer and Trading Standards. Prior to the TSQF there was a stand-alone

⁷¹¹ CTSI, *CPPD Handbook 2018* (2018) 2–3.

<[https://www.tradingstandards.uk/media/documents/practitioners/training--development/cppd-handbook-2017.pdf](https://www.tradingstandards.uk/media/documents/practitioners/training-development/cppd-handbook-2017.pdf)> accessed 13 July 2018.

⁷¹² The professional body is the Nursing & Midwifery Council; <<https://www.nmc.org.uk/>> accessed 21 June 2019.

⁷¹³ Medicines Act 1968.

qualification, the Diploma in Trading Standards (DTS). The TSQF replaced the DTS as it had become financially unsustainable. I3 and I1, both TSO products of the DTS regime, commented in relation to the TSQF:

I think something had to be done because the DTS was unsustainable, less and less people doing it...So, something had to change. They went for this modular approach. And very much driven by employers. [I3]

I think you should be fully qualified, not piecemeal...so we need to go back in the ideal world to the situation where you have a fully rounded officer who is knowledgeable in all those areas. That then goes to cost. [I1]

One other benefit identified with the DTS regime concerned professional identity. Imprecision about who can be regarded as a TSO was identified above but according to I47, a former TSO and TS academic, because of the overarching nature of the DTS:

You had to be qualified in everything to be called a [TSO]...You needed to have the DTS.

That position changed with the introduction of the TSQF. Consequently, according to I3:

You are not in control of your profession...So the comprehensive nature of the qualification...has all been diluted. [I3]

The TSQF was replaced in 2019 by the CPCF. As to why, the CTSI stated:

With falling candidate numbers and increasing costs it is vital that our [professional qualifications] framework not only effectively supports the needs of employers, individuals and the profession but does so in a cost-effective way.⁷¹⁴

According to this, while the review is in part a response to meet the TS future needs, financial sustainability is also at the core, a point made more directly by I1:

The rationale is financial. TSQF is, in the words of CTSI, completely unsustainable. When...the universities pulled out, and South-western Regional Assembly pulled out...that left [CTSI] responsible for providing the training, as well as providing the qualification. [I1]

The CPCF does not replicate the DTS but is more structured and holistic than the TSQF. There are three qualifications available which are intended to align with higher education levels in the National Qualifications Framework (stage 1 (TS

⁷¹⁴ CTSI, 'What Does a TSO of the Future Look Like?' (2015).

<https://www.tradingstandards.uk/media/documents/practitioners/quals/what_does_a_tso_of_the_future_look_like.pdf> accessed 15 July 2018.

Practitioner Certificate) with level 4, stage 2 (TS Practitioner Diploma) with level 5, and stage 3 (TS Advanced Practitioner) with level 6).⁷¹⁵ Stage 1 comprises compulsory elements; Stage 2 has an option element, but (significantly) legal metrology is a compulsory element;⁷¹⁶ Stage 3 requires a written project.⁷¹⁷ Also, significantly, animal health and welfare is no longer an element in the qualifications available.⁷¹⁸ It is too early to judge the effect of this or other changes.

I1 mentioned that the CTSI has to provide training for its qualifications, this increases CTSI financing pressures. At a time of reduced LA resourcing this becomes more problematic. I1 also mentions 'the universities pull[ing] out'. Several universities, including Cardiff Metropolitan University, had established TS undergraduate TSI accredited degree programmes. On graduating, the student would be able to gain exemption against elements of the TSQF (or, before that, the DTS). Two former TSOs identified a financial incentive:

[I]f you had a degree-based course...you could use the educational grant system. [14]

For local authorities [where they were responsible for training], it meant that [they] would have to pay for the training and they would have to pay for the exams....Whereas if they were getting a graduate coming in, the graduate had paid for all of those themselves. [I47]

But this route was optional and degree programmes were discontinued as recruitment faltered. The above demonstrates tension between training and qualification arrangements that are intended to produce good quality TSOs while making the process affordable, and against the background of reduced LA resourcing. Asked about the standard of new TS recruits, I42 responded:

Poor and not high enough. I think the problem we have as a profession is that we've changed the exam to meet demands and as the demand has fallen the standard has gone down. [I42]

The implication is that the standard of TSO has fallen, and because of cost pressures; on the CTSI's own admission there was a need for the qualification framework to be

⁷¹⁵ CTSI (n 706) 3.

⁷¹⁶ See: CTSI, *List of Reasons for Mandatory Areas in New Framework* (2019).

⁷¹⁷ CTSI (n 706) 11.

⁷¹⁸ See: CTSI, *New Framework and Subjects Not Included* (2019).

cost-effective. I47 also identified concerns over quality assurance in CTSI arrangements concerning qualification:

It's quite internal in [TS] although people from universities are involved. But those examiners for different subjects, I don't think they're all university-based. I think some of them are from within [LAs]. But you don't have the overarching quality control that you would have if you've got the [EH] degree that is being issued by the University. I don't think you've got those measures in place. I think there could be quite a discrepancy between the quality of things in different papers, largely determined by the examiner.

With the outset of the CPCF, and with those comments in mind, an obvious avenue of enquiry would be to see if there is that intended alignment between the stages and levels 4 to 6 of the National Qualifications Framework is achieved in practice.

Resourcing is also core to TS recruitment. And appropriate recruitment is a prerequisite for professional sustainability. At a time of reduced resourcing recruitment is a major challenge:

Well it is not so much of a recruitment problem, we can't recruit....[I]n my [LA] land, there's a moratorium on new posts. If anybody leaves...[y]ou can't fill that post so you can't invest in the future. [I1]

The future is even more difficult to predict. We know that we are struggling for resources. That's not going to get any better. We know that we have got an ageing officer cohort. We are not having the same number of people coming into the service that we have done...And I guess that number is decreasing significantly. [I30]

Professional sustainability is placed at risk because of reduced recruitment. But even where there was recruitment, there was concern related to the quality of recruits to TS (as I42 refers). And concerning the role of fair trading officer, which can be en route to appointment as a TSO:

[T]he person specification for [FTO]...the essential criteria is just GCSEs and because of that it feels like it reduces the service somewhat. To excel as [an FTO] you need to be far better educated...And HR departments...have restricted their recruitment policy to 'internal only', and also people within the redeployment pool as well. And...the calibre of candidate you get isn't too great. [I18]

The cumulative effect of issues suggests the TS profession lacks effective control of its affairs. This is exacerbated at a time of resourcing pressures. So, LAs cut back on TS and do not recruit TS staff which in consequence leads to less LA demand for TS

training and qualification. Resulting fissures can develop in the TS professional edifice.

Comment: Although each heading considered had a different basis, they have been grouped as each can be interpreted as challenging the nature of TS as a discrete entity. It is not inevitable that the challenge will succeed but, on the evidence, the possibility exists.

Overview

The six overarching themes are set out in Figure 14 together with brief comment.

Figure 14
Comment on Themes

Theme	Comment
Low TS profile	Despite the manifesto commitment TS has low profile at a devolved level. This low profile is reflected elsewhere. The overall effect is lack of influence especially when it comes to resource allocation.
TS and Reduced Resourcing	Reduced resourcing has led to TS having significant capacity loss and not being able to fulfil legal duties.
TS and Change	Change to some extent has been to better meet new challenges but it has also been to accommodate reduced resourcing. Also, some of the change has not had best effect due to insufficient resourcing. There has been no principled overview undertaken of how TS should be delivered.
Other Ways of Doing Things	Resourcing aside, there are issues about the continuing appropriateness of the LWMA model, especially, with development of cross-border trading.
Helping Oneself	TS withdrawal has led to more self-directed effort by traders and consumers.
Challenges to TS	Aspects of TS cause its future sustainability as a discrete professional entity to be questioned.

Chapter 3 placed TS in a critical theoretical framework involving four categories: economic efficiency; rule of law; human rights and justice; and promotion of well-being. Interview findings had implications for each category. These are more specifically considered in relation to Literature Review and primary research findings in Chapter 13. Chapter 11 next considers findings from NAW and PCC election candidate surveys.

Chapter 11- NAW & PCC Candidate Surveys

Themes that emerged when carrying out interviews included low TS profile (generally and in Wales) and the TS/police interface (as part of TS and Change). Two opportunities were identified to explore these further: namely, on-line surveys of candidates standing for elections to the NAW and the office of PCC for 40 police service areas in England and Wales. Both sets of elections took place in May 2016. While each survey provides a snapshot, and in isolation their significance is limited, when combined with findings of the Literature Review, and interviews, they inform broader analysis and evaluation.

For each survey it is not known how many candidates were successfully contacted as lack of response might have been through non-receipt of the request. Some candidates were not contactable because no email address was identifiable. Others were not contacted because emails sent were returned as undelivered. In those cases, where possible, emails were resent to alternative email addresses.

TS and Devolution

The NAW candidate survey was designed to explore the extent of candidates' awareness about TS. This is against a background of TS not being devolved and therefore not the responsibility of WG or the NAW. Relevant reserved matters include IP, consumer protection, product standards, product safety and liability, and weights and measures.⁷¹⁹

Main Political Party Manifestos

Allied to the NAW candidate survey, and having regard to TS profile, searches were undertaken of manifestos for what were judged to be the six main political parties with candidates standing for election to the NAW, namely: Plaid Cymru (PC);⁷²⁰ the United Kingdom Independence Party (UKIP);⁷²¹ the Wales Green Party (WGP);⁷²² the Welsh Conservative Party (WCP);⁷²³ the Welsh Labour Party (WLP);⁷²⁴ and the Welsh

⁷¹⁹ GWA 2006, Sch 7A,

⁷²⁰ PC, *The Change Wales Needs: 2016 Manifesto*, (2016).

⁷²¹ UKIP, *Raising the Dragon: UKIP Manifesto: Welsh Assembly Elections 2016: A Strong Voice for Wales* (2016).

⁷²² WGP, *Manifesto 2016: For People. For Planet. For Wales* (2016).

⁷²³ WCP, *Securing Real Change for Wales: Welsh Conservative Party National Assembly for Wales Election Manifesto 2016* (2016).

⁷²⁴ WLP, *Together for Wales: Welsh Labour Manifesto 2016* (2016).

Liberal Democrat Party (WLDP).⁷²⁵ The searches had two focuses: TS related and policing related. Potential findings were viewed as informing analysis of NAW candidate survey data.

TS Related Focus

There was no direct reference to TS in the manifestos. There were some incidental references to matters in which TS would have direct involvement: eg, both PC and the WLDP referred to consumer rights⁷²⁶ and the WLDP stated that it would:

[s]implify the process for 'No Cold Calling Zones', to protect older people from unscrupulous rogue traders and doorstep scams.⁷²⁷

But there was no mention about TS and its involvement in securing consumer rights and the establishment of NCCZs. Financial inclusion was also present but, again, how TS might contribute (through, say, consumer education or enforcing the law against unlicensed moneylending) was not acknowledged. So, PC asserted:

Financial Inclusion and financial life skills are a crucial part of building resilient communities and tackling poverty.⁷²⁸

And to help deliver social justice, the WCP promised to:

[s]upport credit unions to ensure their sustainability, working with them to improve financial inclusion and access to affordable finance.⁷²⁹

Each manifesto contained areas of policy to which TS delivery could contribute (eg, concerning economic policy or social justice) but TS potential contribution was not acknowledged. For example, the WGP explained:

We will... [s]upport the development of local markets and market places... We will work to connect producers and consumers... We will [support]... the development of a level playing field for small and medium sized businesses.⁷³⁰

Policing Related Focus

As policing is also not devolved, the intention was to compare respective search findings from policing related and TS related focuses. In contrast with TS, references were made in four of the six manifestos to policing and its interface with devolved

⁷²⁵ WLDP, *Manifesto 2016: A Wales That Works for You* (2016).

⁷²⁶ PC (n 720) 159; WLDP (n 725) 96.

⁷²⁷ WLDP (n 725) 62.

⁷²⁸ PC (n 720) 159.

⁷²⁹ WCP (n 723) 42. There were also reference to financial inclusion in the WLP Manifesto (n 724) 7.

⁷³⁰ WGP (n 722) 8.

policy. These were the manifestos for PC, the WCP, the WLP and the WLDP: eg, PC stated:

Under the current arrangements, [PC] will continue to work with all relevant agencies and organisations to reduce crime in all parts of Wales, with a strong focus on community policing.⁷³¹

PC also stated:

We will work with third sector organisations and the police to better protect older people from exploitative scams and will raise awareness.⁷³²

While the police has a role, so does TS, yet it was not referenced.

The WLDP stated that:

No one can fulfil their potential if they live in fear. By ensuring our laws are upheld, we can build strong communities with opportunity for all.⁷³³

In upholding the law there was reference to the role of the police but not to TS. The WCP supported crime prevention initiatives such as funding to help recruit special constables and supporting the role of police community support officers.⁷³⁴ And the WLP acknowledged that ‘safe communities are important to people’ and identified the role the police play in securing that environment.⁷³⁵ It also said it would work with PCCs to fight cybercrime.⁷³⁶

Welsh Labour Party’s 2011 NAW election manifesto

The reservation of TS functions combined with the absence of TS reference in party manifestos suggested that TS had low priority in devolved policy. But absence of reference to TS in the 2016 manifestos must be contrasted with the TS manifesto commitment⁷³⁷ and Carl Sargeant’s, (then) Minister for Local Government and Communities, description of TS in 2011 as:

integral to several of the [WG’s] key agendas on social justice, financial inclusion, tackling poverty and food safety.⁷³⁸

⁷³¹ PC (n 720) 161.

⁷³² Ibid, 159.

⁷³³ WLDP (n 725) 61.

⁷³⁴ WCP (n 723) 45.

⁷³⁵ WLP (n 724), 9.

⁷³⁶ Ibid.

⁷³⁷ WLP (n 1) 22.

⁷³⁸ Sargeant (n 404).

Summary of Findings

Policing had an obviously higher profile than TS in the manifestos. There was no direct reference to TS, but policing was directly referenced in four of them. Moreover, the referencing expressly linked policing (a reserved matter) with the delivery of devolved policy. No similar link was made with TS.

A distinction can be drawn between UKIP and WGP (whose manifestos contained no policing references) and the four other manifestos. Before the 2016 election those four parties had continuous presence in the NAW since its establishment. Conversely UKIP and the WGP had never had a presence in the NAW. The four other parties' manifestos were produced against a background of experience in devolved politics (which was not the case with UKIP and the WGP) and it can be argued that the relevance of policing arose from practical reflection on that experience. Due to the lack of TS references it can be argued that nothing similar arose for TS.

NAW Candidate Survey

Out of 61 initial responses, 25 respondents completed the survey. As to why those contacted did not respond or, if they did respond, did not then complete the survey, two themes emerged: insufficient knowledge and insufficient time. One person explained:

I don't know enough about the area so have looked at your questions but didn't fill in.

Two respondents explained:

I'd normally be happy to help but less than two weeks before polling day and 15 minutes is impossible to find...

It is with considerable regret that I must inform you that [X]'s schedule is completely full for the coming months, and thus will not be able to commit to the time required to respond to your questionnaire on this occasion.

Although not directly stating so, one respondent alluded to lack of time:

Thank you for contacting me...As I know you'll appreciate I'm campaigning flat out at present.

Although insufficient knowledge and insufficient time have been identified as reasons for not completing the survey, it is not possible to gauge the respective

contribution of each. That said, lack of TS knowledge was one factor and one explanation for lack of TS knowledge could be due to low TS profile.

One respondent to the PCC candidate survey suggested that that survey could have been more accessible. The format for each survey was similar but no similar comment was made in relation to the NAW candidate survey.

Responses to questions are now considered. In summarising responses, where appropriate, they are placed within identified themes.

Q1: What do you think is the role of [TS]?

There were 25 responses which are summarised in Figure 15.

Figure 15
NAW Candidate Survey Q1- Role of TS

Category of response	Response
1. Discounted	One response.
2. Consumer or public protection	12 responses, eg: <ul style="list-style-type: none"> 1. To protect customer interests. 2. To act as a guardian of standards for the public. 3. Consumer, business, and public protection in trading.
3. Promotion of fair, quality assured and legally compliant trading	15 responses, eg: <ul style="list-style-type: none"> 1. Ensuring public trading complies with standards and guidelines. 2. To stop fraud, scams, rip offs and other problems with goods bought. <p>Three also mentioned consumer or public protection, eg: To ensure that consumers are protected and that trading is conducted 'fairly'.</p>

Promotion of fair, quality assured and legally compliant trading is linked to consumer or public protection. Also significant were aspects that were not, or only briefly, referenced. Only one response directly referenced business protection. No response directly referred to legal metrology, consumer education, business education or product safety.

Q2: Do you think in practice that [TS] fulfils that role?

Candidates were given 3 choices (not sure, yes or no). There were 25 responses and these are incorporated into Figure 16.

Q3: Please give reasons for your response to question 2.

There were 25 responses which are summarised in Figure 16.

Figure 16
NAW Candidate Survey Qs2 & 3 - Does TS fulfil its Role etc

Q2 response	Q3 response
1. Not sure	Six responses, eg: 1. I'm not entirely sure of how [TS] go about their job. 2. I'm unaware how effective [TS] is.
2. Fulfilling role	11 responses, eg: 1. Frequent prosecutions reported in the media. 2. [TS] are generally sensible, and generally deal with issues when companies behave badly. 3. I'm a Councillor and see the work of our [TS] dept. 4. I have used [TS] service and they have been effective.
3. Not fulfilling role	Eight responses, eg: 1. Due to limited resources whatever the economic climate TS are never adequately equipped. 2. Countless matters are not covered or ignored. 3. Because it is impossible to control to the extent required.

There were two bases for lack of awareness about whether TS fulfils its role: ignorance about TS; and a lack of operational knowledge. Each can be reflective of low profile. As to what informed judgement that TS fulfilled its role, there were three bases: media reporting; observation of TS in practice; and personal experience. Contrastingly (based on wide media reporting, visible presence and wide societal

interaction with the police), many people's awareness of the police will be informed by more than one of those bases, emphasising the contrasting TS and police profiles. There were three bases for TS not fulfilling its role: resourcing, efficiency and capacity related. Although they may overlap (eg, capacity could be influenced by resourcing), they were judged as distinct: eg, capacity could refer to TS's ability to fulfil its role, even if TS was efficient and resourced, because the LWMA delivery model is flawed. Response 3.3 can be interpreted in this way.

Q4: What do you think are the positive aspects of the service delivered by [TS]?

There were 23 responses which are summarised in Figure 17. Some responses referred to more than one aspect.

Figure 17
NAW Candidate Survey Q4 - Positive Aspects of TS Service Delivery

Category of response	Response
1. Negative response	One response: None.
2. Qualified response	Two responses, eg: It is good that they are there, but there needs to be an improvement.
3. Means of support	Five responses, eg: Somewhere to turn to if you have a problem.
4. Education	One response - and linked with enforcement.
5. Enforcement related	Six responses, eg: Fulfilling their role effectively when they can do an excellent job of dealing with bad practices and bringing those responsible to book.
6. Ethos	Two responses, eg: They are generally fair, and deal with problems that arise.
7. Public trust - providing confidence and reassurance	Seven responses, eg: Vulnerable people and other residents feel they can trust [TS] to fight their corner.
8. Standards setting	Two responses, eg: Setting standards is important, not least because it builds public confidence.

Positive aspects identified do not exist in isolation and there is connection. So, there can be public confidence in TS because of effective enforcement and education about what trading law requires. This, then, promotes standards about what legal compliance entails. Part of this achievement can be because of the positive ethos of TS in doing its work. All this can encourage confidence in being able to approach TS as a means of support.

As to the specific aspects:

- Public trust in TS was the most identified aspect. There is a link to other aspects, as they contribute to public confidence.
- Means of support can be effective even if TS is not contacted because, in the event of a problem, a person has knowledge TS is contactable.
- Although education was identified, the respondent did not distinguish between business and consumer education. Also, this is to be contrasted with the responses to question 1 where no response referred to education.
- Education and enforcement can each promote compliance. Education can also flow from enforcement: eg, there can be behavioural change from a trader in consequence.
- No response directly referred to protection of business legitimate interests or legal metrology.

Q5: For any positive aspects identified in question 4, what you think of the factors that contribute to this outcome?

There were 23 responses which are summarised in Figure 18. Some responses referred to more than one factor.

Figure 18
NAW Candidate Survey Q5 - Factors Contributing to Positive Aspects of TS
Service Delivery

Category of response	Response
1. Negative	The respondent had answered 'None' to question 4.
2. Unclear	One response.
3. Not able to answer	Three responses, eg: Not sure as I have only seen on tv the work they do.
4. Deterrent effect	One response, eg: Trader fear
5. Effective law	One response.
6. Information/intelligence	One response.
7. Interaction with public	One response.
8. Partnership working	One response.
9. Local presence	Two responses.
10. Media profile/publicity	Three responses, eg: 1. We hear the name '[TS]' quite a lot in the media. 2. I think a large number of people [know] that if they feel they have been ripped off by a business then they can contact [TS].
11. Outcomes	Two responses, eg: Successful prosecutions.
12. Public trust - providing confidence and reassurance	Three responses, eg: 1. People need to know someone is there. 2. They are...generally trusted by Business and the Public.
13. Raising awareness	One response: People begin to understand what is acceptable, and where there is redress.
14. Resourcing	Two responses, eg: Sufficient resources.
15. Staff quality	Five responses, eg: 1. Well trained. knowledgeable officers. 2. Committed and loyal staff.

Again, the factors do not exist in isolation: eg, effective intelligence and partnership working can lead to good enforcement outcomes which in turn raise TS profile, deter wrongdoing and increase public trust in TS. As to specific aspects:

- Although numbers are not statistically significant, staff quality was the most identified factor.
- Positive outcomes were identified. Something that emerged in interviews and the Literature Review is that TS does not measure its impact effectively.
- The media can be involved in raising TS profile and awareness of what it does. 'Media' can have two meanings: the traditional print and broadcast media, and social media. Each has a role. The response in 10.1 is interpreted as referring to broadcast media. Where TS does get media publicity a question then arises about the relationship between that publicity and the profile of TS.
- Sufficiency of resourcing was a surprise identification given overall reduced TS resourcing. Two explanations can be offered: that the response is not informed or that an individual TS service might be relatively better resourced.

Q6: What aspects of the service that [TS] delivers could be improved?

There were 24 responses which are summarised in Figure 19. Some responses referred to more than one aspect.

Figure 19
NAW Candidate Survey Q6 - Aspects of TS Service Delivery that could be Improved

Category of response	Response
1. Not able to answer	Three responses
2. All encompassing	One response: All of it.
3. Access	Four responses, eg: More information on role and how to contact them.
4. Awareness raising of TS	Six responses, eg: Understanding what they actually do how they do it - if I make a complaint to [TS], what happens then? What type of thing can I actually complain about?
5. Efficiency	Four responses, eg: 1. Responding more quickly and effectively when concerns are raised. 2. With greater resources and expertise, [TS] could do more, and more effectively.
6. Evidence of impact	One response: Greater clarity on those standards, clearer evidence that it is being implemented such as sanctions, fines, etc.
7. Ineffective law	One response.
8. Inspections	One response: Random shop visits to check if reductions are real.
9. Partnership working	One response: Working in conjunction with the H&SE and FSA.
10. Resourcing	Seven responses, eg: 1. Given more budget they could chase and prosecute more illegal trading. 2. More staff, better training.

As before, matters identified do not exist in isolation: eg, reduced resourcing impacts on achieving outcomes and carrying out inspections. TS awareness raising and access improvement arrangements are also more difficult where there is reduced resourcing. As to specific aspects:

- Difficulty over public access to TS was an issue raised in interviews, especially, concerning 'channel shift' (moving from traditional access through face-to-face or telephone to on-line access).⁷³⁹ This was also an issue reported in the HealthWatch case study in Figure 11.
- Difficulty over access is also not conducive to raising awareness of TS which, in turn, can be linked to TS profile.
- Although only mentioned once, 'random' inspections were raised. This is contrary to current received wisdom following the Hampton Report that inspections should be risk and intelligence-led.

Q7: For any aspects identified in question 6, what you think could be done to achieve improvement?

There were 23 responses which are summarised in Figure 20. Some responses referred to more than one ground for improvement.

⁷³⁹Abavus Limited, 'The Ultimate Guide to Channel Shift: An Overview of Different Approaches to Channel Shift and Practical Suggestions for How Best to Manage the Channel Shift Process' (Abavus Limited nd) 7.
<<https://abavus.co.uk/wp-content/uploads/2014/11/ultimate-guide-to-channel-shift-white-paper.pdf>> accessed 8 June 2018.

Figure 20
NAW Candidate Survey Q7 - Ways for Improvement of TS Service Delivery

Category of response	Response
Not able to answer	Three responses.
Unclear	One response.
Access	Three responses, eg: Provide more information in an accessible form to consumers.
Consistency	One response: A level playing field and fixed standards.
Cut bureaucracy	One response.
External involvement	Three responses, eg: More open to the public, having people who have approached the organisation have a say.
Legal Powers	One response.
Partnership working	One response.
Publicity	Four responses, eg: Roadshows, talks, shopfront, advertising campaign in laymen's terms.
Resourcing	Eight responses, eg: 1. Better more consistent resourcing. Improved staff training. 2. More [TSOs].

Unlike the responses to questions 4 and 5, the responses to question 6 and 7 were more blurred in terms of the territory covered: eg, insufficiency of resourcing was mentioned in both sets of responses. There was also a relationship demonstrated between matters identified in the responses to questions 4 and 5 and matters in response to questions 6 and 7: eg, effectiveness of law, outcomes and evidence of impact. Because of the merging of issues raised between questions 6 and 7, aspects of comment relating to questions 6 are also applicable here. As to specific comment:

- Consistency of approach was identified. Under the LWMA model this is difficult because each LA has its own priorities and resources and there is lack of central control over LWMA action. Structural reform could address this.
- Cutting bureaucracy seems out of kilter in a situation where better resourcing is the most identified way to service delivery improvement.
- External involvement can be linked to TS scrutiny and transparency.

Q8: In what way do you think that [TS] can contribute to the delivery of Welsh Government?

There were 23 responses which are summarised in Figure 21.

Figure 21
NAW Candidate Survey Q8 - Ways that TS can contribute to WG Delivery

Category of response	Response
Discounted	One response was not meaningful.
Question not understood	Five responses - One expressly stated: I don't understand the question. Other responses demonstrated this inferentially, eg: 1. They can make sure the government is made accountable. 2. One response suggested that TS could have a 'watchdog' role and prompt WG to address local issues with the public.
Unable to answer	Six responses.
Can contribute	Nine responses - Five identified a contribution to the trading environment, eg: Assurance that [TS] and consumer protection can contribute to maintaining trading relations. Others identified contributions to: 1. A fairer Wales. 2. Delivering safer communities. 3. Improving public health.
Cannot contribute	Two responses.

Based on responses, five respondents did not understand what was being asked. Conversely, given the nature of other responses, 11 people did understand the question's intended purpose. As explained in Chapter 2, the question was deliberately framed this way to avoid influencing the response. While lack of clarity is a possible contributor to misunderstanding, another possible contributor is a lack of understanding in respondents about TS and its potential relevance. As to specific comment:

- The most common potential way that TS could contribute was in an economic context.
- Although other potential ways were identified in community safety, public health and equality contexts, each was only mentioned by one respondent.
- The respondents who were unable to give an answer demonstrated a lack of knowledge about TS and its relevance.
- The respondents who said TS cannot contribute did not explain reasons for that assertion.

One of the findings of the NAW 2016 manifesto searches was an absence of express reference to TS and its relevance to delivery of devolved matters, which suggested an absence of awareness (contrasted with awareness of policing and its relevance). That absence of (or limited) awareness, is reflected in the responses to question 8.

Q9: Please add anything else you consider appropriate not mentioned previously

There were 6 substantive responses which are set out in Figure 22.

Figure 22
NAW Candidate Survey Q9 - Additional Comment

Category of response	Response
Nothing further to add	Three responses.
Devolution related	Three responses, eg: 1. It is a function the assembly could not afford. 2. Devolved implementation has risks, and arguably the whole set up should be devolved, but this...will lead to inconsistency.
TS related	Three responses, eg: 1. I have had to use [TS] myself, but I did not feel helped or supported...There are so many loopholes for unscrupulous companies to slip through the net. 2. Excellent action taken against mail scammers. 3. It is hard to be sure that trading is fair, the public are at risk.

Devolution related responses raise issues connected with a move to devolve TS. They do not link TS as a reserved function with its potential to contribute to the delivery of devolved government. This could, however, be because question 8 specifically touched on this. The TS related responses touch on enforcement, to both its difficulties and successes. Although not mentioned by name, 'excellent action taken against male scammers', is consistent with previously positive reporting about the NTSSST and its work.

Summary of Findings

A significant number of responses indicated (expressly and by implication) that respondents had limited or no knowledge of TS. This was also acknowledged as a factor for not completing the survey. Where there was knowledge about TS, responses also suggested that it was incomplete. In broad terms the perception was that TS was concerned with consumer protection and the promotion of fair, quality assured and legally compliant trading. Legal metrology, business protection and product safety were not directly acknowledged. Also, linkage was not made with broader enforcement involving the police and connected criminality. These findings suggest that TS has low profile in a devolved context and its potential to contribute to delivering devolved government is, effectively, not recognized; something consistent with findings from the Literature Review, interviews and party manifesto searches.

PCC Candidate Survey

The PCC candidate survey was designed to explore the extent of awareness about TS and its relationship with policing; each is an enforcement agency and there is often partnership working between the two. The survey questions and a summary of responses are set out and considered below. Out of 41 initial responses, 21 respondents proceeded to complete the survey. As to why those contacted did not respond or, if they did respond, did not then complete the survey, three themes emerged: insufficient knowledge, insufficient time and survey format.

One respondent explained:

Thank you for your invitation to complete your survey. I am afraid as a candidate I don't have enough information to answer your questions.

On a related theme two people stated:

I understand the study and it is of interest to me but could I ask that I delay my response until I...have really had a chance to get into the [TS] relationship/effectiveness and understand what is (and is not) happening etc.

Much better done after the election when candidates are pcc's and would have a greater idea of the work you talk about.

While understanding the viewpoint, a core purpose of the survey was to elicit understanding of extant knowledge that candidates possessed: ie, not after a period of investigation and reflection. Exploring the extent of knowledge at the point of the request was judged important to facilitate assessing the profile of TS with candidates. Based on the responses, the two respondents' knowledge about TS was limited.

One person stated: 'Apologies but time just doesn't permit.' On the same theme, another person responded:

Thanks a lot for this email. I would normally be happy to take the time out to fill this in. Could I ask that I complete this after the election...

One person explained:

There is only a very small box to enter [a] reply which scrolls along and you cannot check what has been written. Some of these answers are not simply one liners, and a more user-friendly format [is] required.

This was the only occasion that the issue was reported but it cannot be discounted as an issue for others. It may have had the effect of discouraging others' completion of the survey. That said, the NAW candidate survey was in similar format, but the issue had not been reported there.

Although insufficient knowledge and time have been identified as reasons for not completing the survey (and, also, format as a potential contributor), it is not possible to gauge the respective contribution each made. However, lack of TS knowledge was one factor and one explanation for lack of TS knowledge could be due to low TS profile. Responses to questions are now considered. In summarising responses, where appropriate, they are placed within identified themes.

Q1 What do you think the role of [TS] to be?

There were 21 responses which are summarised in Figure 23.

Figure 23
PCC Candidate Survey Q1 - Role of TS

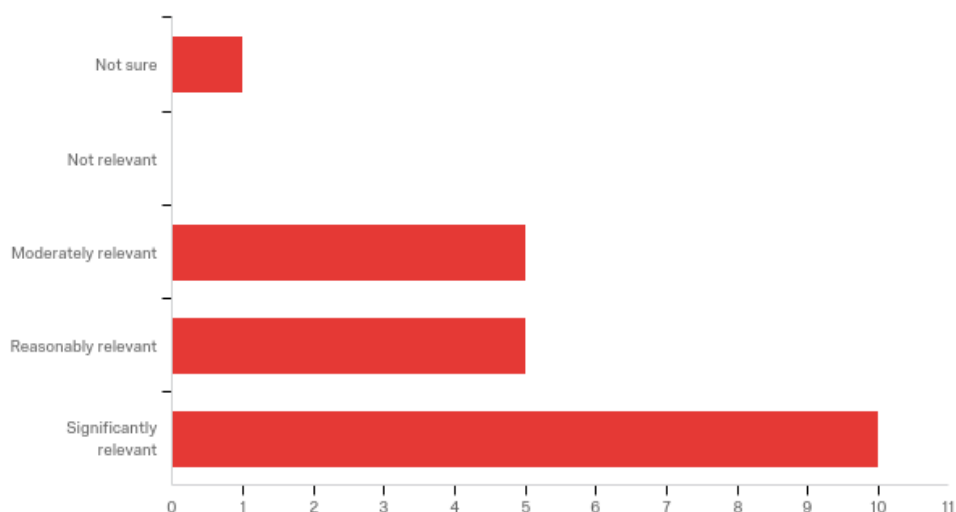
Category of response	Response
1. Discounted	One response.
2. Consumer/public protection	12 responses, eg: 1. Protecting the public from rogue traders and sub-standard products. 2. To safeguard and uphold the rights of consumers...
3. Securing fair, safe and legally compliant trading	15 responses, eg: 1. To ensure that traders conform to standards legally expected of them. 2. To ensure that goods and/or services are genuine, do what they are said to do and have been subject to safety testing. There was overlap with category 2. Seven responses were placed in categories 1 and 2, eg: To safeguard and uphold the rights of consumers and help enforce compliance with the relevant legislation...
Education	One response.

Securing fair, safe and legally compliant trading is linked to consumer or public protection. The responses are also broadly similar to NAW candidate responses about the TS role (Q1). As with NAW candidate responses, it was also significant that aspects of the TS role were not, or only briefly, referenced. No response directly referred to business protection or legal metrology. Education was mentioned once, but no distinction was made between business or consumer education. Unlike the NAW candidate survey there were references to product safety, counterfeit goods and underage sales. Given the nature of their candidature, perhaps, these references by PCC candidates can be explained due to greater knowledge about types of criminality than NAW candidates.

Q2: How relevant do you consider [TS] enforcement to be to Police enforcement?

Five options were offered and these and the 21 responses are set out in Figure 24.

Figure 24
PCC Candidate Survey Q2 - Relevance of TS Enforcement to Police Enforcement



Although the number of answers tallies with the number of respondents, one person ticked two boxes, and another did not answer the question. However, 19 stated that there was a relevance between [TS] and Police enforcement.

Q3 Please give reasons for your response to question 2.

There were 21 responses are summarised in Figure 25.

Figure 25
PCC Candidate Survey Q3 - Reasons for Q2 Response

Category of response	Response
1. Unclear	Three responses.
2. Complementary roles	Seven responses, eg: 1. Policing should concern itself with straightforward harm reduction, and trading regulation is slightly outside the expertise of Officers. 2. Because of the overlap on enforcement of law.
3. Facilitating TS enforcement	Three responses, eg: Because I believe that access to premises has to have Police involvement in order to get a warrant to enter premises - not certain though.
4. Partnership working	Nine responses, eg: 1. Close cooperation between the police and [TS] is the best way to keep the public safe from dangerous products and fraudulent traders. 2. Depends on the circumstance but there needs to be cross agency working as this can help detect criminal activity across the board - such as the horse meat scandal involves animal movement licenses, trade description of products being sold, consumer safety and more. One response fell within categories 3 and 4: They do joint work and operate[] [in] common areas of law. However, [TS] needs police help with organised crime matters.

Three categories for the TS/police enforcement interface are identified; but there is a relationship between them and it is possible that sometimes all could be present: eg, offending common to 'doorstep crime' involves UCPs (TS enforcement) and

distraction burglaries (police enforcement). These enforcement roles are complementary which can encourage partnership working. Also, the police might facilitate carrying out TS enforcement: eg, by arresting suspects on TS's behalf enabling TS to carry out interviews at police stations. These respective roles were also identified within the interview data such as in the enforcement work of WIT (CS1 and CS2 in Appendix 20 demonstrate the police performing a facilitative role for TS).

Q4: In what areas of enforcement do you think there is a relationship between Police and [TS] work?

There were 21 responses which are summarised in Figure 26. Some responses referred to more than one area.

Figure 26
PCC Candidate Survey Q4 - Areas of Enforcement Where TS and Police Relationship

Category of response	Response
1. Unclear	Two responses.
2. Question 3 categories (complementary roles, facilitating TS enforcement and partnership working)	Seven responses, eg: 1. Police respond to criminal acts. [TS] respond to unfair trading. They often come together. 2. Gathering intelligence for joined up law enforcement. 3. [I]f there is a likelihood of violence towards TS officers.
3. Consumer credit/illegal money-lending	Eight responses, eg: Loan sharks.
4. Counterfeit/illegal goods	Eight responses, eg: 1. Counterfeit goods. 2. Illegal imports.
5. Dishonesty	Five responses, eg: 1. Fraudulent...products 2. [S]cams.
6. Product safety	Two responses, eg: Publicity around dangerous items.
7. Protection of vulnerable individuals	Two responses, eg: Protecting the vulnerable and upholding the laws.
8. Rogue/doorstep trading	Four responses, eg: Apprehending rogue traders and referring then to [TS].
9. Serious and organised crime	Four responses, eg: 1. Modern slavery...money laundering facades. 2. [O]rganised crime detection.
10. Weights and measures [legal metrology]	One response: [H]istorically weights and measures and other road traffic matters such as tachograph offences.
11. Other responses	Specific other areas identified were E-safety and road traffic.

There is some overlap with question 3 concerning repetition of the three categories but additional aspects were identified such as the role of intelligence. The responses also begin to unpick the detail concerning the TS and police interface, eg:

- Product safety, counterfeit goods, UCPs, fraud and illegal moneylending are all identified.
- Much of such activity can be classed as serious and organised crime.
- Protection of more vulnerable individuals was a common theme.

These are also consistent with interview data gathered.

It was suggested that there is a relationship between police and TS work and weights and measures. But it also (seemingly) placed weights and measures with road traffic matters. One explanation is that the respondent misunderstood the role of legal metrology and TS. This is one of only two references to legal metrology by PCC candidates.

Q5: For any areas identified in question 4, please explain why you think there is a relationship and how important you think is that relationship

There were 20 responses which are summarised in Figure 27.

Figure 27
PCC Candidate Survey Q5 - Areas of Enforcement where TS and Police Relationship: Why and How Important

Category of response	Response
1. Not sure	One response.
2. Question 3 categories (complementary roles, facilitating TS enforcement and partnership working)	<p>Apart from the category 1 response, all responses could be linked to question 3 categories eg:</p> <ol style="list-style-type: none"> 1. There is a relationship because of the involvement of both in Community Safety Partnership. It's important to share intelligence for a joined up holistic approach. 2. People who break one law break others which is why operations undertaken by police, [TS], road tax, Inland Revenue, overloading lorries and fly tipping etc all come together. 3. Police have specialist teams working on organised crime, TS do not. It's a very important link.
3. TS law non-compliance and broader criminality	<p>One response emphasised the relationship between TS law non-compliance and broader criminality [G]ood [TS] regulation can prevent crime and squeeze fraudulent trading out of the market.</p>
4. Mutual interest	<p>Although related to partnership working, mutual interest of the police and TS emerged as a point of emphasis, eg:</p> <p style="padding-left: 40px;">How trading in counterfeit unsafe products (a TS matter) could cause death (manslaughter is a police matter).⁷⁴⁰</p> <p>One response mentioned weights and measures:</p> <p style="padding-left: 40px;">Mutual interest – weights and measures, product description.</p>

⁷⁴⁰ This has been summarised as the respondent did not confirm agreement to the use of anonymised quotations.

5. TS/police public profile	<p>One response alluded to the respective public profiles of the police and TS:</p> <p>Because police are the public face of law application.</p>
6. TS/police interface	<p>Two responses. There was a plea for clarity about who does what:</p> <ol style="list-style-type: none"> 1. I think there are shifting boundaries in areas such as cybercrime that police and TS need to work out between them. 2. I think it would be better if there was greater clarity as to what police do and what TSOs do...a clearer definition of responsibilities would be helpful to public and professionals alike.
7. Importance of TS/police relationship	<p>As to how important is that relationship, only 4 answers mentioned 'important' - each thought it was significantly important, eg:</p> <p>Illegal/shoddy goods most important if any potential health/injury issue.</p> <p>However, other answers inferentially addressed the point and no answer suggested the relationship was unimportant, eg:</p> <p>Joint objective to protect the public.</p>

There is an interrelationship between categories 3 and 4; eg, the connection between TS law non-compliance and broader criminality can develop a sense of mutual interest between TS, the police and other enforcement agencies. Awareness and articulation of that interest can promote co-ordinated and partnership working. For this to be achieved requires input from all parties: ie, TS, police, other enforcement agencies and actors such as PCCs and policy makers (GAIN is an example of this approach in practice – see Chapter 10)). That input can only happen if a party has awareness of other parties. The extent of TS awareness can be influenced by its profile.

There is a reference to weights and measures being of mutual interest to TS and the police. But how this arises is not explained. This is the second references to legal metrology; they are from separate respondents. There was no reference to legal metrology in response to question 1 (role of TS), and this and the other reference are not viewed as significant.

Demarcation of the TS and police interface is an issue that emerged in interviews concerning UCPs and associated dishonesty. There can be a real practical issue in drawing that dividing line. However, the importance of the TS and police relationship was acknowledged in the responses.

Q6: For any areas identified in question 4, is that relationship between [TS] and Police reflected in working arrangements and operational practice?

- a. If yes, please comment on those arrangements and practice.**
- b. If no, why do you think this is the case?**

There were 20 responses which are summarised in Figure 28.

Figure 28
PCC Candidate Survey Q6 - Whether TS/Police Relationship in
Working Arrangements and Operational Practice

Category of response	Response
1. Unclear	Two responses.
2. Do not know/unsure	Nine response, eg: 1. So far, I can only comment on this because I watch the BBC TV programme called <i>Fake Britain</i> . 2. Until taking up the post current arrangements are unknown.
3. Yes	Five responses, eg: 1. Yes, they are coordinated through Community Safety Partnerships and are pioneering the way we tackle crime locally. 2. Yes, [TS] shut down illegal traders, the police work with the [TS] to arrest illegal traders and take them out of business.
4. Yes but...	Five respondents gave qualified responses, eg: 1. Yes, but both are significantly affected by central government cutbacks. 2. Yes, but the exchange of intelligence can be improved and the level of partnership working increased.

Although respondents recognised the importance of the relationship between TS and the police, nine did not know, or were unsure, about whether the relationship was reflected in application. Two other responses were discounted as they were unclear. One explanation for that lack of clarity could relate to lack of knowledge about TS.

The respondent who admitted that he or she was only able to comment on the relationship because of the television programme *Fake Britain* was interesting. It was an explicit admission that the respondent had no personal knowledge about that relationship and it emphasised the potential role of the media in raising TS

profile. Respondents to the NAW candidate survey also mentioned media reporting of TS; this links to the relationship between that publicity and the profile of TS.

Respondents identified that the TS and police relationship could be improved with better partnership working and improved resources. Those two factors are interlinked as the ability to work in partnership presupposes a capacity to do so.

Q7: Please add anything you consider appropriate not mentioned previously

There were 8 responses which are summarised in Figure 29.

Figure 29
PCC Candidate Survey Q7 - Additional Comment

Category of response	Response
1. Discounted	One response.
2. Counterfeit goods	The harmful effect of counterfeit goods was emphasised in three responses, eg: Major concern would be about health implications of counterfeit alcohol/tobacco, it can cause injury to anyone.
3. Partnership working	Seven respondents referred to the need for partnership working, eg: [TS] need to be part of a multi-agency crime prevention hub.
4. Other	Other Issues identified were: 1. Police facilitating TS enforcement. 2. Mutual interest of TS and the police. 3. Rogue trader victim impact. 4. TS communication to educate the public about 'what to look for when buying goods'.

The responses to question 7 did not raise anything new but did re-emphasise issues: eg, the need for partnership working between TS and the police.

Summary of Findings

Lack of knowledge about TS was acknowledged as an inhibiting factor for completion of the survey. Where there was knowledge about TS, responses also

suggested that such knowledge was incomplete. In broad terms the perception was that TS was concerned with consumer protection and the securing fair, safe and legally compliant trading. Legal metrology and business protection were not directly acknowledged. Lack of in-depth knowledge about TS was reflected in the response to question 6 (whether the relationship between TS and the police is reflected in application). This is suggestive of TS having relatively low profile with PCC candidate respondents.

However, there was sufficient general awareness about TS enabling identification of the need for partnership working between TS and police. Linkage was made with broader enforcement involving the police and connected criminality. This is consistent with findings from the Literature Review and interviews.

NAW and PCC Candidate Surveys' findings - Points Arising

Both surveys suggest a lack of awareness of TS. Each largely saw TS as confined to consumer protection and not including legal metrology or business protection. PCC candidates identified more detailed aspects of TS working than the NAW candidates: eg, PCC candidates referred to counterfeit goods or doorstep trading where NAW candidates made more generalised references such as to protection of consumers. One explanation for this difference lies in the type of candidate. PCC candidates, by definition, have an interest in crime and law enforcement. That is their focus. NAW candidates have a far broader focus.

Arguably, that explanation can also apply to appreciation about the need for partnership working between TS and the police. This was something apparent to PCC candidates, but it was not a theme identified in NAW candidate responses. However, there is a caveat. The PCC candidate survey was specifically intended to explore the relationship between TS and the police. That was not the focus of the NAW candidate survey and questions did not directly address the relationship. However, questions did not specifically exclude making that connection: eg, that relationship might have been identified in explaining the role of TS. Although the PCC candidate respondents demonstrated greater knowledge about TS, this is relative and, as previously explained, there was a lack of detailed knowledge among PCC candidates.

Each survey also contained responses which identified that TS received publicity through broadcast and print media. This is one way in which TS profile can be raised. But the findings of the manifesto searches and each survey suggests that TS profile is low. The implication is that the media profile of TS has had limited impact on its overall public profile.

Chapter 12 considers a Wales TS specific case study.

Chapter 12 - A Wales TS Case Study: Publication of Letting Agents' fees

Related to the issue of TS and its priority in Wales, an opportunity was identified to explore this aspect within a specific issue. This was taken forward by making requests for information under the FOIA 2000 to each LA in Wales.

Background

A new addition to the TS portfolio came about due to Chapter 3 of Part 3 of the CRA 2015. It imposed a duty on letting agents in England and Wales to publicise fees that they charge by requiring a list of fees to be displayed at agents' premises and to be published on agents' websites (LAF publication).⁷⁴¹ Failure to comply could result in a financial penalty being imposed of up to £5000.⁷⁴² The duty to enforce LAF publication was imposed on each LWMA in England and Wales for its area.⁷⁴³ LAF publication was concerned with consumer protection because it was about transparency of information for consumers. However, significantly, although consumer protection is a reserved matter,⁷⁴⁴ LAF publication was devolved.

The first practical manifestation of that devolution was different dates for the coming into force of LAF publication between England and Wales: in England, it was 27 May 2015⁷⁴⁵ and, in Wales, it was 23 November 2015.⁷⁴⁶ Chapter 3 also permitted WG to issue guidance which LWMAs must have regard to when enforcing Chapter 3.⁷⁴⁷ Although LAF publication is related to consumer protection it is also related to housing, which is devolved,⁷⁴⁸ and it must also be considered alongside the Housing (Wales) Act 2014, Part 1 (which is concerned with the regulation of private sector housing). Under Part 1 letting agents and landlords must be licensed when carrying out lettings and other related activity.⁷⁴⁹ Carrying out unlicensed activity is an

⁷⁴¹ S 83.

⁷⁴² Sch 9. The financial penalty is paid to the LWMA that imposed it, and if not paid voluntarily can be recovered by an order of the county court.

⁷⁴³ S 87.

⁷⁴⁴ See the GWA 2006, sch 7A.

⁷⁴⁵ See SI 2015/965.

⁷⁴⁶ See SI 2015/1904 (W 276).

⁷⁴⁷ S 87.

⁷⁴⁸ See the GWA 2006, sch 7A,

⁷⁴⁹ Ss 9 & 11.

offence.⁷⁵⁰ WG must also issue a code of practice⁷⁵¹ and it is a mandatory condition of a licence that a licence holder complies with the code.⁷⁵² A licence can be revoked if there is a breach of a condition.⁷⁵³ The code states that '[a]n agent must disclose to a prospective tenant all fees so all the costs payable if entering a tenancy agreement are clear and understood.'⁷⁵⁴ Therefore, breach of LAF publication requirements by an agent can lead to licence revocation under the Housing (Wales) Act 2014 as well as financial penalty under the CRA 2015.

Policy context

In the immediate periods preceding and following coming into force of LAF publication in Wales and the issue of the code of practice, the charging of letting agent fees to tenants received significant publicity: eg,

- Shelter Cymru in early 2016 carried out a 'mystery shop' survey of 85 letting agents across Wales by visiting agents' websites, or telephoning agents, to ascertain what fees were being charged to tenants and how they were displayed. Shelter Cymru found that over half of those agents were in breach of LAF publication requirements and concluded there was 'widespread disregard for the law'⁷⁵⁵
- There was a follow-up e-petition to the NAW which closed at the end of 2016 and which pressed for banning letting agents' fees to tenants.⁷⁵⁶
- On 7 December 2016 there was a UKIP Cymru debate in the NAW concerning letting agent fees.⁷⁵⁷

⁷⁵⁰ Ibid.

⁷⁵¹ S 40. See: WG, *Code of Practice for Landlords and Agents Licensed under Part 1 of the Housing (Wales) Act 2014* (2015).

⁷⁵² S 22.

⁷⁵³ S 25.

⁷⁵⁴ WG (n 751) 4.

⁷⁵⁵ Shelter Cymru, 'Letting Go: Why It's Time for Wales to Ban Letting Agents Fees' (2016) 3.

⁷⁵⁶ 'E-Petition to National Assembly for Wales: Ban Letting Agent Fees to Tenants' (2016). <<https://www.assembly.wales/en/gethome/e-petitions/Pages/petitiondetail.aspx?PetitionID=1028>> accessed 12 May 2018.

⁷⁵⁷ 'UKIP Cymru Debate: Letting Agents Fees', *NAW Record of Proceedings* (2016).

<<http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=4011&language=en&assembly=5&c=Record%20of%20Proceedings#C448626>> accessed 12 May 2018.

- In the AM Bill Ballot held in January 2017, five AMS proposed Bills that would have taken action concerning letting agents' fees, but none were successful in the ballot.⁷⁵⁸

Overview

TS is a reserved matter but LAF publication is devolved. This extension of competence complements WG policy implementation under the Housing (Wales) Act 2014 and occurred when the issue had prominence in devolved politics. This meant that there was a difference between LAF publication and other TS matters in Wales. TS matters would not normally be devolved and expressly connected to a devolved competence (ie, housing) and be concerned with something which had high profile (ie, letting agent fees charged to tenants).

Two findings of the NAW candidate survey carried out in 2016 were that TS had low profile in Wales and its potential to contribute to devolved government delivery was, effectively, not recognised. Because of the difference between LAF publication and other TS matters in Wales, this prompted consideration about carrying out an investigation about the impact of LAF publication. Shelter Cymru's view there was 'widespread disregard for the law' was also a driver.

As this was devolved and, therefore, something over which the NAW and the WG have competence, there was an interest in exploring to what extent letting agents' fees were an issue for political parties. A search of the six main political parties' manifestos at the NAW election in May 2016 had been undertaken for the NAW and PCC candidate surveys. As LAF publication had come into force in Wales in November 2015,⁷⁵⁹ a further search was undertaken of the same manifestos relating to LAF publication.

Each manifesto contained housing policy proposals. Although a TS function, the LAF publication can be identified as an aspect of housing policy. However, in the six manifestos, only PC and the WLDP referred to letting agents. PC promised:

⁷⁵⁸ NAW, 'List of Pre-Ballot Proposals - Fifth Assembly (2016-2021)' (2016).

<https://www.assembly.wales/en/bus-home/bus-legislation/bill_ballots/Pages/Pre-ballot-proposals.aspx> accessed 12 May 2018.

⁷⁵⁹ See SI 2015/1906 (W 276).

more effective regulation of letting agencies, which drive up the cost of private renting through unscrupulous practices and hidden fees. We will also abolish letting agency fees and extend the fit and proper person's test for landlord licensing to letting agents.⁷⁶⁰

And the WLDP said it would:

[r]eplace letting agency fees on tenants with a schedule of set charges for specified services to ensure cost transparency [and] [i]ntroduce a charter setting out obligations for landlords and letting agents...⁷⁶¹

While each refers to letting agents' fees, the concern with letting agents is broader than just publication of fees. But even so, in each case it contemplates regulation of letting agents and their conduct,⁷⁶² something to which, from November 2015, TS was under a duty to contribute, and as a devolved duty. Yet in each case that TS role is not acknowledged.

London and LAF publication

In a comparative context, in March 2017, Sian Berry, a member of the London Assembly, published a report concerning the impact of LAF publication in London.⁷⁶³ This followed asking each London Borough in December 2016 to provide data on its enforcement activity since the LAF publication came into force in England in May 2015. In summarising the findings, the report stated:

The London-wide results...show that very little enforcement of these new rules is being done...Only a handful of borough [TSOs] appear to be responding to reports of bad practice with real investigations and enforcement action.

In total, following more than 1,350 complaints, just 444 visits have been made, 363 warning letters sent, and only 99 notices of intent and 52 final notices issued across London.

Final notices have been issued by just eight boroughs and fines by just four...leaving renters in every other area of London effectively unprotected by the current rules.⁷⁶⁴

⁷⁶⁰ PC (n 720) 150.

⁷⁶¹ WLDP (n 725) 44.

⁷⁶² In the case of the WLDP, contemplation of regulation is implicit.

⁷⁶³ Sian Berry, 'Letting Them Get Away With It.' (2017).

<https://www.london.gov.uk/sites/default/files/letting_them_get_away_with_it_sian_berry_am_mar2017.pdf> accessed 12 May 2018.

⁷⁶⁴ Ibid 2.

LAF publication function and Wales: Freedom of Information Act 2000 requests

Sian Berry's precedent provided an obvious stimulus and a similar survey was undertaken of LAs in Wales in April 2017 with requests for information under the FOIA 2000. In April 2017 each LA in Wales was asked questions for its area since LAF publication came into force in November 2015. These questions mirrored Sian Berry's, and are set out in Figure 30.

Figure 30
FOIA 2000 Questions to LAs

1. How many complaints have been received?
2. How many visits have there been to a letting agency?
3. How many warning letters have been issued?
4. How many notices of intention to impose a financial penalty have been served?
5. How many notices imposing a financial penalty have been served and what is the total amount of any penalties imposed?
6. What is the total amount recovered of any financial penalties?

Each LA in Wales responded,⁷⁶⁵ and their responses are set out in Figure 31.

⁷⁶⁵ All LAs had responded by mid-June 2017.

Figure 31
LA Responses to FOIA 2000 Questions

LA	Q1 Complaints received	Q2 Visits made	Q3 Warning letters issued	Q4 Notices of intention to impose financial penalty	Q5 Financial penalty notices served	Q6 Amount of financial penalties £
Blaenau Gwent	0	24*	0	0	0	0
Bridgend	0	2	0	0	0	0
Caerphilly	1	18	0	0	0	0
Cardiff	25	10	1	0	0	0
Carmarthenshire	15	13	0	0	0	0
Ceredigion	0	1	0	0	0	0
Conwy	0	0	0	0	0	0
Denbighshire	1	0	0	0	0	0
Flintshire	1	0	0	0	0	0
Gwynedd	1	0	0	0	0	0
Merthyr Tydfil	0	0	0	0	0	0
Monmouthshire	0	20	0	0	0	0
Neath Port Talbot	0	0	0	0	0	0
Newport	0	6	1	0	0	0
Pembrokeshire	1	1	0	0	0	0
Powys	0	0	0	0	0	0
Rhondda Cynon Taf	2	13	0	0	0	0
Swansea	0	0	0	0	0	0
Torfaen	0	12*	0	0	0	0
Vale of Glamorgan	0	0	0	0	0	0
Wrexham	0	0	0	0	0	0
Ynys Mon	0	0	0	0	0	0
Total	47	120	2	0	0	0

* Blaenau Gwent TS and Torfaen TS have joint-working arrangements and answered question 2 with reference to visits to estate agents, rather than to letting agents. Each stated that where those estate agents were also letting agents 'advice was

verbally given in relation to the new [CRA 2015] and [its] requirements'. The response from each LA did not clarify the number of estate agents that were not letting agents.⁷⁶⁶

The data gathered suggest that the function had low profile at an LA level. Findings include:

- Eight LAs reported a 'nil' return to each question.
- Of 47 complaints received (Q1) 40 came from two LAs. Five LAs received one complaint only and one received two complaints. The remaining 14 LAs received no complaints.
- Concerning numbers of visits made to letting agencies (Q2), 11 LAs made no visits, five LAs made ten or fewer visits, five LAs made over ten visits. As mentioned, Blaenau Gwent and Torfaen responses were unclear.
- Only two LAs had issued warning letters (Q3).
- No LA had issued a notice of intention to impose a financial penalty (Q4).
- No LA had imposed a financial penalty (Q5).

Analysis and findings

The FOI 2000 survey provides a 'snapshot' about LA enforcement activity from November 2015 to April 2017. The London survey results presented 'show[ed] that very little enforcement of these new rules is being done across our city'. The figures from the Wales survey, taking account of contextual differences, suggest enforcement effort was less. Only two warning letters were issued and no notices imposing financial penalties were served. Two potential reasons can contribute to this state of affairs: that there is lack of enforcement activity; or compliance is secured by other means (eg, advice, self-regulation) so that formal enforcement is unnecessary. Given the evidence of Shelter Cymru, and other publicly expressed concerns about letting agents' fees, this latter explanation is less probable.

This interpretation is also supported when number of visits to letting agents is considered - in 11 LAs there were no visits. Out of 47 complaints received, 40 came from two LAs. For a complaint to be made, it requires knowledge about grounds for

⁷⁶⁶ No attempt was made to clarify this as the ambiguity did not materially affect overall analysis of LA responses.

complaint and how to make the complaint. In each case the LA can have impact in informing the public in its area. Overall the responses suggest low priority of LAF publication and its enforcement within LG: eg, given the size and character of Swansea it is difficult to take any other view (Swansea reported no formal complaints, no visits to letting agents and no other enforcement action).

Letting agents' fees had high political profile and LAF publication was one vehicle to address concerns but the opportunity was not taken. Alongside that, letting agents' fees continued to have high political profile and a decision was taken subsequently by WG in November 2017 after public consultation to abolish letting agents' fees altogether;⁷⁶⁷ but from November 2015 to April 2017 there is scant evidence of LA enforcement regarding LAF publication. However, during the same period WG was concerned with policy implementation in the private rented market through the Housing (Wales) Act 2014. Yet the role of TS in its enforcement of LAF publication either seems to have been not identified or not embraced. As a devolved matter there was competence for WG involvement and guidance could have been issued by WG which LAs (as LWMAs) were required to consider when enforcing LAF publication. No guidance was issued during the period to which the FOI 2000 questions relate.

⁷⁶⁷ WG, 'Written Statement - Fees Charged to Tenants in the Private Rented Sector' (2017).
<<https://gov.wales/about/cabinet/cabinetstatements/2017/feeschargedtotenantsprivatesector/?lang=en>> accessed 12 May 2018.

Chapter 13 – Discussion, Conclusion and Recommendations

Introduction

This Chapter first explores the current context of TS in Wales as established by the Literature Review and primary research findings. It then discusses the effectiveness of TS delivery under the LWMA model and identifies failings and three main reasons for those failings. The failings are then considered with reference to the critical theoretical framework mentioned in Chapter 3. The response to challenges TS faces is then considered and finally this is placed in a Wales context. The chapter finishes with a conclusion and recommendations.

Current Context

The Literature Review and primary research establish that the current context of TS in Wales and beyond is influenced by various factors. Prominent among these are reduced resourcing, the CLR, technological change, new challenges, increased emphasis on consumer protection, LG reorganisation, devolution, low profile and the UK decision to leave the EU. These factors are inevitably interrelated, but the distinct influence of each can be identified.

Reduced resourcing and the CLR are in part linked as one of the acknowledged drivers for the CLR was related to more cost-effective TS delivery (see Chapter 9). The effects of reduced resourcing on TS are well-documented. There has been reduced TS capacity at LWMA level. Contrastingly, there has been some improvement at a cross-boundary level; the CLR, through establishment of the NTS and its regime, has improved structural arrangements for meeting cross-boundary challenges. Findings concerning the work of the NTSST and IMULUs are examples where this has occurred.⁷⁶⁸ There has also been improved legal resourcing due to the CRA 2015 which has materially benefited TS capacity: eg, there is now a consolidated set of TS powers which includes the ability for LWMAs to investigate and take proceedings outside the LWMA area⁷⁶⁹ (eg, see CS3 in Appendix 20). The CRA 2015 can also be considered as part of the CLR. However, while there may have

⁷⁶⁸ IMLUs subsequently moved from NTS to FCA oversight in 2018.

⁷⁶⁹ Sch 5.

been improvements, ultimately the extent of their effectiveness depends on resourcing.

As to technological change, this has been a profound effect on trading behaviour. Trading now is increasingly cross-boundary: whether regional, national or international. The UK Government in 2018 implicitly accepted that position. The following quotation from the Consumer Green Paper is so premised:⁷⁷⁰

The enforcement challenge has changed...as more consumers are shopping on-line...rather than locally.⁷⁷¹

Related to this are new and different challenges. TS workload has changed dramatically. While it still has its traditional role of policing accuracy of measurement and descriptions, TS is also dealing with serious and organised crime: eg, as can be seen with WIMLU and WIT, cross-boundary responses are required involving application of criminal investigatory skills and techniques that have had to be learnt.

The growth of consumer protection as a discrete area of social policy has also had significant impact on TS, especially as it is an area of EU competence. Whereas TS is legal metrology rooted (the designation of LWMA reflects this), consumer protection has incrementally increased since the TDA 1968 started the process, and which has been fuelled by implementation of EU obligations. The consequence is that legal metrology has become obscured within the TS portfolio by consumer protection. The obvious example of this position is NTS, which despite its title in practice, does not have legal metrology within its remit:

[NTS] does not have a portfolio that covers all [TS] work. There is no representation of metrology...It's only [representing]...the sexy or the more publicly interesting part of our portfolio. [I1] [See Chapter 10]

Given the example of NTS, if legal metrology effectively is not understood by TS to be part of TS, this undermines the ability of TS to fully represent its own cause. 'Challenges to TS' was an overarching theme identified in Chapter 10 and one of its sub-themes was TS portfolio uncertainty; this is an aspect of that uncertainty. Related to this, it can also be argued that the accretion of consumer protection to the TS portfolio has also contributed to lack of critical focus on what the portfolio

⁷⁷⁰ BEIS (n 649).

⁷⁷¹ Ibid 54.

contains and the rationale for its presence. A perusal of the schedule of legislation enforced by TS completed by Spicer⁷⁷² supports this argument. Such a lack of critical focus, again, risks undermining the ability of TS to fully represent its own cause. All this can contribute to low TS profile too.

LG reorganisation in 1996 was also identified in interviews as an influence on the current TS context in Wales. TS had a higher profile when it was a county council function. The chief TSO occupied a higher position in the county (upper-tier of the two-tiered structure) than he or she does in the replacement single-tiered structure. Following reorganisation in Wales, TS and EH functions are within the same LA and regulatory services brigading has developed since then. The common theme reported was that EH has a higher profile within LG. Illustrative of that position, in comparing TS and EH, I26, an LA councillor, commented:

Well I think people have got a better understanding of the work of [EH]. And I think that will change because of the role that [EH] play in terms of Public Protection with the licensing of private landlords.

The issue of low profile at LG can also be related to reduced resourcing. TS as part of LG, has felt the effect to a greater extent as there has been a disproportionate reduction in its resourcing compared to other LG service areas such as social services and education. Therefore, at a time of reduced resourcing, TS has had the added battle of competing for resources with others who have stronger bargaining positions. Resourcing decisions are influenced by the priority of decision-makers. The combined findings of the Literature Review and primary research support the view that TS has low profile. Having low profile means the ability of TS to influence resourcing decisions is lessened.

Devolution, perhaps ironically, in Wales has not helped TS. The term 'ironically' is used because the catalyst for undertaking the thesis was the Welsh Labour Party manifesto commitment in 2011.⁷⁷³ Despite being elected to government, that commitment was not seriously taken forward. The suggestion emerged later that the manifesto commitment was made in error despite a WG ministerial assurance that TS was 'integral to...[WG] key agendas'.⁷⁷⁴ How things proceeded is consistent

⁷⁷² Spicer (n 186).

⁷⁷³ WLP (n 1) 22.

⁷⁷⁴ Sargeant (n 404).

with the interpretation that the commitment was made in error. The view that TS has low profile in a devolved context was supported by the NAW candidate survey (see Chapter 11). One reason for low profile that emerged in interviews was precisely because TS is not devolved; there is scant incentive for the NAW and WG to have regard to it because they are not responsible for TS policy setting (there was a similar interview finding from Scotland: see Chapter 10).

This is to be contrasted with EH where much of its work is related to devolved matters, such as public health⁷⁷⁵ and housing,⁷⁷⁶ and EH has its own chief officer in WG, a civil servant. There is therefore an EH voice in WG. Policing, however, like TS, is not devolved but has a profile at the devolved level and its connection with devolved policy delivery is recognised. Findings from searches of political party manifestos for the 2016 NAW election for TS and policing related references illustrated the difference between policing and TS (see Chapter 11).

The decision of the UK to leave the EU has significant implications for TS but the extent of these are uncertain. As the EU is a single trading area, leaving the EU means that the UK is outside that single market and trade between the UK and the EU will involve importation and exportation. Specifically, regarding importation, the need for market surveillance on incoming products increases on UK entry and continues to the point of sale. Leaving the EU provides issues for traders and consumers. For traders, these include compliance with importation and exportation requirements. There are also additional costs in meeting compliance requirements especially if there is increased divergence between UK and EU requirements. For consumers, it is about ensuring continued levels of protection against potential detriment. The challenges to TS relate to market surveillance and to compliance advice. Thus, where there is divergence between UK and EU requirements that creates additional work for TS and has resource implications.

Effectiveness of TS delivery and the LWMA model

Literature Review and primary research findings indicate that there are significant failings in aspects of TS delivery in GB under the LWMA model. As part of GB, these

⁷⁷⁵ Eg, see Public Health (Wales) Act 2017.

⁷⁷⁶ Eg, see Housing (Wales) Act 2014. Part 1 is concerned with regulation of private rented housing. EH involvement was mentioned by I26 in the previous indented in-text quotation.

failings apply to Wales. For instance, findings have identified specific aspects of TS where there is a lack of enforcement, especially concerning legal metrology and IP, and 'enforcement deserts' have arisen.⁷⁷⁷

Laws are created for a reason. Within a Parliamentary democracy laws represent an attempt to meet social need as judged by law makers. Therefore, if laws are made in accordance with democratic processes, there is a moral duty that they should be implemented. Implementation here refers not only to bringing legislation formally into force but to giving it practical effect. This translates into a legal duty as far as public bodies are concerned: eg, an LWMA must enforce legislation in its area,⁷⁷⁸ and public bodies such as LAs can be held to be in breach of legal duty through judicial review (see Whirlpool case study in Figure 3 regarding judicial review). And if law implementation (or specifically, in this context, enforcement) is frustrated by lack of resources or flawed structural arrangements (or both) there can be de facto failure of implementation. This might be unintentional because there are higher priorities and the law with lower priority is obscured in consequence. If law is not implemented because it is obsolete it should be removed or updated. But law about things such as legal metrology, IP, consumer protection and product safety is not obsolete, and that law is a necessary adjunct to a fair and safe trading environment. Where law is not implemented, in constitutional terms, the will of parliament is being frustrated. This is not acceptable. It is also not acceptable because it undermines promotion of principles that underpin constitutional integrity in a Parliamentary democracy such as the rule of law, human rights and justice.

Yet despite lack of enforcement and the objections mentioned TS is given increasing enforcement responsibilities. An example is the Offensive Weapons Act 2019 (see Chapter 4). Under the Serious Violence Strategy,⁷⁷⁹ £500,000 2018-19 and £500,000 in 2019-20 (via the NTS) was allocated to support LAs bring prosecutions concerning age-restricted supply of knives.⁷⁸⁰ Eleven LWMAs were given additional resourcing⁷⁸¹ but the overwhelming majority of LWMAs were not. Another example

⁷⁷⁷ Committee of Public Accounts (n 331) 10.

⁷⁷⁸ Eg, see CPUTRs, reg 19.

⁷⁷⁹ HM Government (n 298).

⁷⁸⁰ See Offensive Weapons Bill (HL Deb 30 January 2019, Vol 795, Col 306GC).

⁷⁸¹ NTS (n 570) 6.

is the Tenant Fees Act 2019, which only applies to England, under which landlords and letting agents are regulated concerning housing tenancies. As an incentive to encourage enforcement action, LWMAAs can retain and utilise the proceeds of financial penalties imposed.⁷⁸² Principled objections can be mustered to this approach as financial considerations can conflict with the primary duty of fair enforcement.⁷⁸³ That aside, such provision exists under the CRA 2015 concerning LAF publication, which was considered in Chapter 12. The evidence from Wales and London was that, despite such incentive, enforcement effort was low. Consistent with such legislation and related policy imperatives, NTS key priorities for 2019/20 include ‘Estate Agents and Lettings Agents regulation’ and ‘Tackling underage sales of knives’.⁷⁸⁴ If there are already significant failings in TS delivery, the question arising concerns how those failings are to be addressed despite these additional responsibilities. A similar point was made in November 2019 by a parliamentary select committee concerning the safety of electrical goods:

[TS] are struggling because they are primarily funded through [LG] grants, which have been cut, with other priorities taking precedence⁷⁸⁵....We are...concerned as to what role [TS]...can play in stopping the sale of unsafe electrical goods, because of the cuts they have faced.⁷⁸⁶

As to why there are significant failings in aspects of TS delivery, three main reasons are suggested. First, reduced resourcing is a clear contributor, but things are exacerbated by the funding model which does not provide for hypothecated funding. Because funding is allocated from overall LA allocations, TS can lose out to other LA services. I11 described that position:

I know that one [TS] manager...told me that...they have to fight against child services for their budget...They are...fighting for headlines and fighting for publicity and then funding. [See Chapter 10]

Second, the LWMA model lacks coordination and an ability to influence local decisions through central direction, so local priorities take the lead:

[LAs]...fund [TSDs] which prioritise enforcement...which support[s] local objectives...NTS and [TS Scotland] do not have enforcement powers themselves and therefore rely on [TSDs] to take enforcement action, which they fund.⁷⁸⁷

⁷⁸² Sch 3, para 10.

⁷⁸³ See: Huw Evans, ‘Ever Increasing Burdens’ (2018) 127(2) *TS Today* 15.

⁷⁸⁴ NTS, ‘Annual Business Plan 2019-2020’ (2019) 4.

⁷⁸⁵ BEIS Committee, *The Safety of Electrical Goods in the UK: Follow-Up* (HC 2019, 156) 4.

⁷⁸⁶ *Ibid* 34.

⁷⁸⁷ BEIS (n 649) 54-55.

This is to be contrasted with the FSA or HSE (see Chapter 6); NTS has no equivalent role. The Hampton Review in 2005 proposed to establish a CTSA ‘with powers over [TS] work...analogous to those of the [FSA] over food’⁷⁸⁸ but that was not implemented. This lack of influence was identified in the Literature Review and primary research findings. I40 commented:

[The FSA] have a performance management framework in place...But we don’t have the same thing for [TS]. [See Chapter 10]

It was also acknowledged by the UK Government in its 2018 Consumer Green Paper:

There is no overarching framework of accountability to encourage [LAs] to ensure consumers are protected.⁷⁸⁹

Third, through technological changes, trading is increasingly cross-border and often requires a cross-border response. It can be argued that the LWMA as a base is too small and that a base covering a larger area (such as Wales) would be better placed to meet cross-border challenges. This would have potential advantages including increasing capacity through economies of scale. Northern Ireland provides an example of a larger base, where noticeably TSSNI retains an effective legal metrology capability. This is to be contrasted with LWMAs in GB.

The CLR changes implicitly question the appropriateness of the LWMA model as new structures were established which operate on cross-boundary bases: eg, NTS in England and Wales, WIMLU and WIT in Wales. Yet although these new arrangements implicitly question the LWMA model, in practice they do not challenge it as they use the LWMA as a building block. Therefore, although WIMLU and WIT operate on an all-Wales, each is hosted by an LWMA and, in effect, there are collective arrangements involving 22 LWMAs. The Consumer Green Paper demonstrates that point where it acknowledges that NTS relies on LWMAs to take cases forward, as NTS does not have powers, and how It has become ‘more challenging...to pursue more complex enforcement cases.’⁷⁹⁰

⁷⁸⁸ Hampton (n 45) 69.

⁷⁸⁹ BEIS (n 649) 55.

⁷⁹⁰ Ibid.

Reduced resourcing has been identified as one reason that contributes to failings in TS delivery. Although this is under the LWMA model, insufficient funding under any model would contribute to its failings in practice. That said, there will be a relationship between effectiveness of structural arrangements and value realised from resources applied. Improved structural arrangements, taking into account the second and third reasons for failings in TS delivery, could contribute to more effective application of resources and better cost-effectiveness. But resourcing would still need to be sufficient to enable alternative structural arrangements to be effective.

The LWMA model was developed at a time where trading was far more local. On-line trading has increased cross-boundary trading materially. The law has developed to reflect such changes: eg, concerning electronic commerce⁷⁹¹ and cancellation rights for distance sales.⁷⁹² Although there has been regulatory services brigading, interview findings were that TS and EH are contrasting disciplines and will remain so (and the legal classifications reflects this: eg, between LWMA and FA designations). EH is more premises based while TS has a broader focus as it includes whole markets (although premises can be involved). I42 referred to this in explaining why the county was chosen as the original enforcement area:

The enforcement parameter...would be based on the original shires. Rather than kind of premises based, I think it was where people traded. [See Chapter 10]

That difference between TS and EH was reflected in the separation under the two-tiered LG structure which, in Wales, was replaced in 1996 by the a single-tiered structure.⁷⁹³

In considering the appropriateness of the LWMA model it is worth referring to the reports of the Hodgson,⁷⁹⁴ Molony⁷⁹⁵ and Crowther⁷⁹⁶ committees. Each considered that enforcement should be given to the largest units of LG.⁷⁹⁷ In accordance with

⁷⁹¹ SI 2002/1775 and SI 2002/2013.

⁷⁹² SI 2000/2334. The current law is contained in SI 2013/3134.

⁷⁹³ As a result of the LGWA 1994.

⁷⁹⁴ Hodgson Committee Report (n 84).

⁷⁹⁵ Molony Committee Report (n 44).

⁷⁹⁶ Crowther Committee Report (n 234).

⁷⁹⁷ Hodgson Committee Report (n 84) 114-116; Molony Committee Report (n 44) 226; Crowther Committee Report (n 234) 338.

this view where there was a two-tiered LG government structure, outside of London, TS was placed with the larger upper tier. In Wales this was the county. The implication of this view is that smaller single-tiered LAs are less suited to be LWMA. Therefore, from this perspective, the 1996 LG reorganisation in Wales can be regarded as retrograde. Although it did not prevail, this point was raised in proceedings for the Local Government (Wales) Bill over concern that a new LWMA 'would on its own be too small to deliver effective [TS] control.'⁷⁹⁸ That position has been exacerbated by the major development of cross-boundary trading since the single-tiered structure took effect.

[Failings in LWMA TS Delivery: Implications of the Assessment](#)

Chapter 3 placed TS in a critical theoretical framework involving four categories: economic efficiency; rule of law; human rights and justice; and promotion of well-being. This framework was devised to provide a touchstone for evaluation of TS. Fallings identified are now considered with reference to those categories.

Economic efficiency: In Chapter 3, as well as optimum efficiency in the system of economic exchange, economic efficiency was linked to that system having integrity so that there is confidence in it. Two main ways were mentioned in which TS can contribute to economic efficiency: legal metrology arrangements and effective working of the law of contract for regulating exchange. Literature Review and primary research findings suggest that in each area TS contribution has materially lessened.

Legal metrology capacity has substantially contracted, and more so than other 'sexier' TS work areas. Swann identified accuracy of measurement as having both technical and psychological benefits which contributed to beneficial economic impact.⁷⁹⁹ The two are interlinked. Accuracy of measurement facilitates trading which in turn increases public confidence in trading. (Birch referred to such trust being part of societal social capital).⁸⁰⁰ I42 also made that link and commented that legal metrology:

⁷⁹⁸ Local Government (Wales) Bill (n 157).

⁷⁹⁹ Swann (n 81).

⁸⁰⁰ Birch (n 80) 9.

is ultimately part of an infrastructure of the trading economy...[But] the role of legal metrology enforcement is greater than that. It is responsible for ensuring consumer confidence...making people believe that they can trust transactions. [See Chapter 10]

Literature Review and primary research findings do not currently suggest that there is a public crisis of confidence in the accuracy of measurement but that could change and an effective enforcement regime can help retain confidence. Practice changed after the Hampton Report so that 'no inspection should take place without a reason'⁸⁰¹ based on identified risk or intelligence. But according to I42 this is problematic in a legal metrology context:

[i]n legal metrology...it is virtually impossible to collect the evidence. Because unless the short measure is big the consumer will not know...So, the problem with the Hampton Report...is you can't create the evidence to prove that there is [a problem]. [See Chapter 10]

The legal metrology case study in Figure 10 supports I42's point. In that case the supply of short measures was identified following information received. Inspection therefore fell within the Hampton criteria. But the Durham Council solicitor concluded that:

Possibly thousands of packages have left that dairy underfilled. It is not possible to say how long this has been going on for, the general manager admitted that this testing process has been in place since 2003.⁸⁰²

Routine inspections could have identified issues much earlier. The Hampton criteria are not without merit (eg, arguments against blind 'fishing expedition' style inspections can be objectively justified fairly readily), but fault lies in their unthinking application. The absence of legal metrology from the NTS remit is perhaps indicative of that position. In defence of Hampton, inspections should be justified, but routine inspections can be justified especially in the particular context of legal metrology where detriment can go unnoticed and the scale of its repetition can mean overall detriment to consumers (and benefit to the trader) is high, as illustrated by the legal metrology case study in Figure 10.

Effective working of the law of contract can be affected by reduced enforcement as a trading environment can develop which is increasingly less based on the rule of

⁸⁰¹ Hampton (n 45) 7.

⁸⁰² Drawn from Hill (n 612).

law. If contractual rights are not upheld in transactions, consumer and business protection is less effective and market failures can develop. The vulnerable person case study in Figure 2 is illustrative. That case study can be viewed in efficiency terms. The experience had made P less confident as a consumer: eg, P would no longer buy things at her front door.

Also, withdrawal of advice to traders and consumers can have impact especially if in consequence a consumer is not ‘empowered’ and chooses not to enter a market through a lack of confidence about their rights or a concern that their rights will not be upheld. As an example of intended empowerment there was the appropriately titled 1999 Government White Paper, *Modern Markets: Confident Consumers*,⁸⁰³ which involved enabling people to become ‘demanding’ consumers. The CRA 2015 materially clarified and strengthened consumer rights but that improvement only has practical effect if those rights are known and upheld through effective advice, education, enforcement and resolution processes. TS withdrawal of consumer advice and the emergence of enforcement deserts frustrates empowerment effort.

Similarly, withdrawal of business advice can inhibit a trader’s market activity if there is lack of certainty concerning legal requirements. This is to be contrasted with the benefit for a trader where that trader enters into PA arrangements and receives ‘assured advice’: ie, advice that has effect throughout the UK, not just in an LWMA area. A trader who has not entered into those arrangements does not have that access to advice:

I think that [PA] perhaps works for [a signed-up business]...[but] it doesn’t help [TS] enforce the rest of the law in their area...The smaller, medium enterprises will in some areas miss out. [I3] [See Chapter 10]

TS withdrawal in these areas can lead to more self-directed effort by traders and consumers (as reflected in the ‘Helping Oneself’ theme: see Chapter 10). So, in the vulnerable person case study involving P (see Figure 2), if a NCCZ had been established in P’s area, that might have prevented the incident. Or better regulation of the building industry concerning who can carry out such work might have had

⁸⁰³ DTI (n 477).

similar effect. But ultimately there is a need for enforcement capacity. As I16 commented:

It's as in any criminal activity. Generally, you find that the people who are going to commit crimes...are not the people who are going to put themselves forward for self-regulation. [See Chapter 10]

The need for enforcement capacity extends also to situations where unlawful trading activity arises from mistake or ignorance by a trader, as opposed to intent. Business advice and inspections both contribute towards securing compliance, in addition to more formal enforcement action. Each can contribute to promoting economic efficiency.

Rule of law: Paraphrasing Bingham's definition of the term, everyone should be bound by and receive the benefit of the law.⁸⁰⁴ By definition, this applies to consumers, traders and TS. It was asserted above that reduced enforcement can undermine the rule of law and. I7, a TSO manager, in describing the effects of reduced resourcing, remarked:

I am not doing everything I should be doing in order to reach...a minimum standard....[Other] small [LAs are] starting off with almost no staff, and they are getting cut...It is a massive threat to consumer protection now caused by the budget cuts...There are [LAs] out there that cannot be coping. [See Chapter 10]

The effect of reduced TS enforcement ability was acknowledged in the Literature Review. For instance, following a BBC investigation into TS effectiveness involving two case studies, Leon Livermore, chief executive of the CTSI, in response to a question about whether the public were at greater risk from 'rogue traders' due to TS job losses, responded:

They can't fail to be can they? Your two case studies demonstrated our inability...It shows the inability of the system to respond to individual consumer needs.⁸⁰⁵ [See Chapter 9].

Another example (not previously mentioned) concerned a parliamentary select committee report about the fur trade and the incidence of real fur being sold as fake fur, involving breach of the CPUTRs 2008. The committee concluded:

It is illegal to give misleading information about the characteristics of goods. We are disappointed that there has been a lack of enforcement by [TSOs] in

⁸⁰⁴ Bingham (n 100) 8.

⁸⁰⁵ BBC Radio 5 Live, (n 585).

[LAs] against those retailers responsible. The Government must ensure that [LAa] are properly resourced to deliver these services.⁸⁰⁶

These comments chime with those made by another parliamentary select committee mentioned earlier concerning the sale of unsafe electrical goods.⁸⁰⁷

The position of the rule of law as a constitutional principle is expressly stated in the Constitutional Reform Act 2005. In Chapter 3 it was argued that as TS must enforce law, it must have a corresponding duty to promote the rule of law. In the cases mentioned above TS is failing in that duty and traders (who choose so) are not bound by the law, and consumers affected do not receive its benefit. As to the cause of that failure, insufficiency of TS resourcing is mentioned in each case.

Conversely, in some cases, because of new structural arrangements arising from the CLR, the rule of law has been more effectively promoted by TS; the work of WIMLU and NTSST being examples. Thus, I3 praised the work of the NTSST and remarked:

It's an area where we in [TS] have been crap at in the past. [See Chapter 10]

Similar sentiments were expressed by I7 concerning the work of WIMLU:

Loansharking prosecutions were unheard of...It's meant...there is somebody who is capable of dealing with [loan sharks]. [See Chapter 10]

Connectedly, in taking on oversight of RITs and IMLUs from BIS, NTS was also identified as bringing improvement:⁸⁰⁸

So, it does seem that there is a better understanding by [NTS]...of the work of the teams. [I7] [See Chapter 10]

I think it's incredibly valuable. It's someone in the centre independent of [LG] that understands how we work in [LG] and what the pressures are...So the money that they have, they tend to use it wisely. [I3] [See Chapter 10]

There has also been better legal resourcing which has improved TS capacity and, therefore, ability to promote the rule of law. This has included the CRA 2015 (which consolidated and extended TS enforcement powers) and the CPUTRs 2008 (which made UCPs involving consumers unlawful).

⁸⁰⁶ Environment, Food and Rural Affairs Committee, *Fur Trade in the UK* (HC 2017-19, 823) 9.

⁸⁰⁷ BEIS Committee (n 785).

⁸⁰⁸ IMLUs subsequently moved from NTS to FCA oversight in 2018.

For such improvements to have substantive beneficial effect requires sufficient resourcing. But this is against a background of sustained public expenditure reduction since 2010.⁸⁰⁹ Indeed, part of the rationale for the CLR had been to ‘produce a more effective service for consumers at a lower cost to the taxpayer’.⁸¹⁰

The inherent tensions in that position were expressed by I7:

[I’m] excited and frustrated at the same time...[W]e’ve got the tools to do [the work] now...just that we are being pulled back because of the pressure of cuts. [See Chapter 10].

That position was also reflected in the Consumer Green Paper where it stated that:

[T]he capacity of [LAs] to take national cases has reduced...It has become more challenging for NTS and [TS Scotland] to pursue more complex enforcement cases.⁸¹¹

And as to LA capacity, the CTSI 2017 workforce survey reported that 70% of respondents considered that they did not have sufficient staff expertise to cover TS legislation effectively,⁸¹² and therefore demonstrating:

[T]he continuing disconnect between the expectations of the law and the ability of [LAs] to maintain skills to reflect this.⁸¹³

On the same theme the C&AG reported concerns expressed by BEIS arising from reduced resourcing and that:

[I]t sees [TS] as a high-risk area in the medium term and is concerned about local reductions going too far.⁸¹⁴

Although the statement was made in the context of a study of LG in England the views expressed by BEIS are unlikely to be confined to LG in England. Commenting more generally on reduced funding for LAs in England the C&AG also reported:

Government funding for [LAs] has fallen by an estimated 49.1% in real terms from 2010-11 to 2017-18. This equates to a 28.6% real-terms reduction in ‘spending power’...Since 2010-11, spending on services has fallen by 19.2% in real terms. This is the net outcome of a 3.0% fall in spending on social care and 32.6% fall in spending on non-social-care services.⁸¹⁵

⁸⁰⁹ See, eg: HM Treasury (n 549).

⁸¹⁰ BIS (n 18).

⁸¹¹ BEIS (n 649) 55.

⁸¹² CTSI, ‘Workforce Survey 2017’ (2017) 9.

⁸¹³ Ibid.

⁸¹⁴ C&AG, *Financial Sustainability of Local Authorities* (NAO 2018) 64.

⁸¹⁵ Ibid 7-8.

Reductions in funding for LAs in Wales during a similar period are less but are comparable. According to Ogle and others, during the period 2009/10 to 2016/17 LA funding fell by 7.5%, equivalent to a reduction in £529 million.⁸¹⁶ As with England, a distinction was made between ‘protected’ and ‘unprotected’ services within LG, and there was greater reduction in funding for unprotected services than protected services. Thus, during that period funding for education and social services, as protected services, fell by around 2% but funding for Public Protection and TS,⁸¹⁷ as unprotected services, fell by around 28%.⁸¹⁸ A report by Ifan and Sion calculated that between 2009/10 and 2017/18 (and applying 2018-19 prices) overall LG expenditure outside of the protected services fell by 21.5%.⁸¹⁹

Despite improvements to TS capacity to promote the rule of law through such things as the CLR and legal resourcing, sustained decreased resourcing has had the opposite effect. Bingham also identified eight underpinning principles to the rule of law. Four have particular relevance: equality before the law,⁸²⁰ protection of human rights,⁸²¹ the proper exercise of power,⁸²² and accessibility of the law.⁸²³

Where there is lack of enforcement then the law does not apply equally to all, as unlawful trading can flourish unchecked and consumers and legitimate traders suffer detriment. This also means that their human rights are unprotected. Bingham’s links the rule of law to adequate protection of human rights. On that basis, as it has been asserted TS is under a duty to promote the rule of law, that must include a duty to protect human rights (human rights and the relationship with justice is considered below).

According to Bingham power must be exercised:

in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.⁸²⁴

⁸¹⁶ Ogle, Luchinskaya and Trickey (n 330) 2.

⁸¹⁷ No separate figures for TS were presented. The grouping of services comprised TS, EH, cemetery, cremation and mortuary services, and elements of street cleaning. Ibid 43.

⁸¹⁸ Ibid 24.

⁸¹⁹ Ifan and Sion (n 330) 24.

⁸²⁰ Bingham (n 100) ch 5.

⁸²¹ Ibid ch 7.

⁸²² Bingham (n 100) ch 6.

⁸²³ Ibid ch 3.

⁸²⁴ Ibid 60.

One way in which a power might become unreasonably exercised is if there is undue extraneous influence. I41 in Chapter 10, in the context of outsourcing, described the situation where 'motives are in conflict' with the purpose of the outsourced service (the primary duty) and how in consequence accountability is weakened. This issue was present in the case study concerning privatisation of the Netherlands legal metrology system (see Figure 13). In consequence, Verispect, the Netherlands legal metrology inspection and market surveillance body, was returned to public ownership. There has been limited outsourcing of TS but, according to primary research interview findings, where there has been interference with that primary duty is through PA arrangements, as encapsulated by I23:

You cannot tell me that someone whose job is funded by [X] acts independently of [X]. [See Chapter 10]

Another area of such influence identified in primary research concerned where an aspect of TS enforcement is geared towards supporting economic growth (as may be set out in an LA enforcement policy). Much of this can also be seen as a response to better regulation (or deregulation): see Chapter 8. I20 identified a perverse example concerning IP enforcement involving a local market being allowed to operate for ten years to the significant detriment of legitimate traders because for TS:

It was in the 'too hard' box and it brought economy to the area. [See Chapter 10].

Outsourcing, PA arrangements and TS supporting economic growth can affect the proper exercise of power because of their capacity to interfere with delivery of the primary duty and therefore make the exercise of power unreasonable.

As to accessibility, for Bingham, '[t]he law must be accessible...'.⁸²⁵ TS gives effect to accessibility to the law in two main areas. The first concerns access to TS for a person to make a complaint and request action. The second area concerns access to advice about the law so that a consumer or trader can better regulate their affairs. As to the first, a lack of transparency about TS contact arrangements was also identified when carrying out the primary research. I25, an LA councillor, described the process of channel shift in I25's LA (moving from traditional access, such as face-to-face or

⁸²⁵ Ibid 37.

telephone, to on-line access)⁸²⁶ and that, if not carefully implemented, confusion could arise:

So then if the connections are not made very clear on the website, I think people are very confused about the role of the different areas within those services.

Some responses to the NAW candidate survey mentioned a lack of information concerning TS contact arrangements and suggested where there could be improvement, eg: 'More information on role and how to contact them' and 'Easier to access and find local contacts'. I20 echoed those sentiments:

We're fortunate in that we've got a list of contacts. But you try and find a [TSO] if you are consumer these days and you want to make a complaint to [TS]. You have got to go through CAB. You got to go through all the different processes. To find a TS officer is a nightmare now.

The HealthWatch case study in Figure 11 also touches on this aspect as one of the issues identified was difficulty in communication with TS. In acknowledging limitations of the study, it included:

The main limitation of this study was the large number of missing data points. The principal cause of this was the difficulty of communicating with TS...Follow-up of complaints generated few data...again principally because of the difficulty of communicating with TS.⁸²⁷

As to the second area, although the nature of TS workload has changed in response to more naked criminality, much of what TS continues to be about is securing compliance of traders through advice and education concerning the law. Withdrawal of TS advice to traders materially affects that position as access to the law and its requirements is more difficult. Similarly, withdrawal of second tier consumer advice by LWMAs because it is permissive work has denied access to consumers about their legal rights. As an example, I28, a CA manager, reported how in I28's area, TS had stopped providing a consumer advice service and, such was the demand, this was having displacement impact on CA's workload (see Chapter 10).

Human rights and justice: According to Bingham, '[t]he law must afford adequate protection of fundamental human rights.'⁸²⁸ Therefore, as a duty for TS to promote the rule of law has been identified, this encompasses a duty to protect human rights.

⁸²⁶ Abavus Limited (n 739).

⁸²⁷ Rose (n 619) 16.

⁸²⁸ Bingham (n 100) ch 7.

Under the HRA 1998 there is a parallel duty that public bodies (which includes TS) must not act in a way that is incompatible with ECHR rights.⁸²⁹ The nature of these parallel duties is considered and applied to failings in TS delivery below but, first, the relationship with justice is considered.

Sen argues that meaningful enjoyment of human rights is based on reciprocity of obligation as well as enjoyment.⁸³⁰ This is complementary with article 14 of the ECHR, which provides that there should be no discrimination in the enjoyment of ECHR rights. The argument arises, therefore, that where is absence of reciprocity, or it is imbalanced to a material degree, that injustice can arise; especially, if human rights are viewed as fundamental ethical claims (as Sen views them).⁸³¹ In Chapter 3 Rawls' principles of justice (encapsulated by 'Injustice...is simply inequalities that are not to the benefit of all')⁸³² were identified as providing a test to identify injustice.

Therefore, in the vulnerable person case study in Figure 2 there was inequality of enjoyment between human rights enjoyed by P and others in society who because of their less vulnerable nature are not subject to such detriment. The repeated evidence from doorstep and distance UCPs and fraud is that more vulnerable people are targeted, and that vulnerability can arise from such things as age, illness, intellectual capacity, social and geographical isolation or a combination of these. Each of the three case studies in Appendix 20 is illustrative on this: in CS1 there was a call centre fraud involving vulnerable complainants; in CS2 the defendants worked as a group who deliberately targeted older victims to fraudulently carry out building or related work to their properties; and in CS3 the defendant carried out ultra-poor quality driveway repairs by cold-calling customers who tended to be older people living in remote properties. The victims that WIMLU and NTSST encounter often, also, conform to that demographic.

In those cases, through such UCPs there is inequality of bargaining power resulting in inequality of human rights enjoyment between people: ie, between the less and

⁸²⁹ S 6.

⁸³⁰ Sen (n108) 205–207.

⁸³¹ Ibid 358.

⁸³² Ibid 54.

more vulnerable people in society. In Rawlsian terms such inequality is, manifestly, not to the benefit of all and, according to that test, injustice arises.

Contrastingly, through legal resourcing, TS ability to challenge such behaviour has significantly improved. The CPUTRs 2008 (which made UCPs involving consumers unlawful) and the CRA 2015 (which consolidated and extended TS enforcement powers) have already been mentioned. There is also the FA 2006 (which revised the law of fraud and obtaining services dishonestly). And, again, the three case studies in Appendix 20 serve as illustrations of how that legal resourcing can be used effectively to challenge that behaviour and the injustice that arises in consequence. The ability to challenge such injustice has also been improved by structural change effected by the CLR. Earlier comment mentioned how the establishment of WIMLU and NTSST had enabled TS to challenge unlawful activity not previously challenged effectively by TS. RITs (including WIT) have also contributed in developing TS ability to investigate and prosecute cross-boundary cases (CS2 and CS3 in Appendix 20 are again illustrative).

Chapter 3 mentioned distributive justice ('distributions of honour or money or other things')⁸³³ and corrective justice (rectification of injustice).⁸³⁴ Legal resourcing and structural improvement can be regarded as distribution of 'things' and, accordingly, distributive justice measures, as they better enable injustice to be challenged, leading to corrective justice outcomes (conviction and punishment of offenders, and restitution to those suffering detriment). With effective enforcement, there can also be a deterrent effect whereby potential wrongdoers are deterred from unlawful activity over concern of adverse consequences. Again, this can be viewed in distributive justice terms as, although intangible, the 'thing' distributed is an influence that contributes to upholding the rule of law, protection of human rights, and to just outcomes.

But to return to the definition of distributive justice, one of the things mentioned was distribution of money. To apply that to TS, it refers to its resourcing to enable it to carry out its legal duties. Inadequate resourcing has undermined TS ability to do

⁸³³ Aristotle (n 90) 83.

⁸³⁴ Ibid.

that. Although a successful prosecution, the effects of inadequate resourcing can be seen in CS1 in Appendix 20 as there was adverse impact on the LWMA's capacity to do other TS work. The LWMA explained that despite the outcome it would probably not take on a similar case again:

We didn't initially think it was going to be this big. But it got to a point where we had to deal with it. If we had something of this scale again, it would have to be tasked to [WIT]. [I9] [See Appendix 20]

I9's statement, also, presupposes that WIT would be a position to take the case on, which would not necessarily be the case.

Literature Review and primary research findings have also identified how the effect of reduced resourcing has meant that enforcement effort is reduced or, in some cases, withdrawn. One of the themes identified in Chapter 10 from interviews was 'Helping Oneself', whereby TS withdrawal has placed greater emphasis on more self-directed effort by traders and consumers (whether alone or as part of a group). At one level this can achieve good outcomes as consumer and legitimate trader interests can be protected through such arrangements and TS is released to concentrate on areas of greater risk. Examples of Helping Oneself beneficial outcomes include regulation of professions (such as accountancy or pharmacy), third party accreditation (such as in the food industry) or consumer empowerment (such as through the efforts of organisations such as *Which?*). But sometimes Helping Oneself beneficial outcomes are not achievable. Two examples arise from the primary research. Because TS has reduced its IP enforcement effort there have been private prosecutions. In consequence some cases proceed by way of private prosecutions.⁸³⁵ Thus:

[the Federation Against Copyright Theft] have always done private prosecutions. PPL,⁸³⁶ music industry, have done a few...[C]ounterfeiters still need to be prosecuted and if [TS] can't afford to do it or don't want to... because it doesn't fit their objectives, the industry have to find another way. [I20]. [See Chapter 10]

The development of private prosecutions as an alternative to state prosecution also been supported by cases such as *R (Virgin Media Ltd) v Zinga*.⁸³⁷ Virgin Media Ltd (VML) brought a private prosecution against D alleging conspiracy to defraud

⁸³⁵ See, eg: Broome (n 664).

⁸³⁶ PPL licenses the use of recorded music.

⁸³⁷ [2014] EWCA Crim 52.

(VML's losses were an estimated £380 million). D was convicted and sentenced to 8 years' imprisonment. The Court of Appeal also held that VML, as a private prosecutor, could institute confiscation proceedings under the Proceeds of Crime Act 2002.⁸³⁸ A confiscation order of £8¾ million was made requiring D to pay this within 6 months or, in default, serve a further 10 years imprisonment. Although not a TS case, the case illustrates the potential effectiveness of private prosecutions as means of corrective justice. Furthermore, such cases are likely to have significant deterrent effect on others who might otherwise be tempted to engage in unlawful practice. VML, the Federation Against Copyright Theft and PPL, though, have the resources to bring private prosecutions. That will not be the case for many traders. If the state (such as through TS or the police) does not take action, those traders are left unprotected, and suffer detriment. There is inequality in the enjoyment of human rights between traders who can take action and those who cannot. Injustice arises in consequence of that inequality.

The second example concerns No Cold Calling Zones (NCCZs): ie, 'initiatives which purport to prohibit all (or certain categories of) uninvited callers from an area'.⁸³⁹ NCCZs can help restrict trading between consumers and dishonest traders as doorstep trading is controlled. According to I19, a charity campaign coordinator, NCCZs have a deterrent effect and also:

another effect that has been pointed out in lots of areas is that it has a real confidence boosting effect on communities and it actually brings communities together in the sense that they are more likely to watch out for their neighbours in a [NCCZ] because they are all in it together.

But to establish NCCZs requires initial investment, which has sometimes been a disincentive. I19 explained:

I have had cases where people in Neighbourhood Watch are trying to set up [NCCZs] and really come up against a lot of bureaucratic difficulty, probably because the council simply can't afford the time and the money to set up a zone in a particular area, but people want them...The evidence is that the vast majority of people do not want [cold-callers], so why do we need to have this expensive time consuming, resource intensive consultation, which is the main reason why they are not happening.

⁸³⁸ S 6.

⁸³⁹ OFT letter to LA TS Service, 'Cold Calling Control Zones/No Cold Calling Zones' (20 February 2008).
<<https://www.eastsussex.gov.uk/media/2830/nocoldcallingzoneletteroft.pdf>> accessed 6 January 2019.

On a related note the WLDP manifesto at the 2016 NAW election stated that the WLDP would:

[s]implify the process for [NCCZs], to protect older people from unscrupulous rogue traders and doorstep scams.⁸⁴⁰

Both I19 and the WLDP identify excessive bureaucracy to the process for establishing a NCCZ; which inevitably has resource implications. And, according to I19, an additional barrier to their establishment, is the lack of resources available to LAs to provide that initial investment. Again, this can be linked to reduced resourcing. Thus, returning to the case study involving P in Figure 2, if P's property had been within a NCCZ, that might have secured her protection and the injustice that happened prevented. Although this is an exercise in speculation, it gives some practical context.

Although there has been improved legal resourcing (one aspect of distributive justice) which better enables TS to challenge the type of injustice described above, financial resourcing has not allowed the full benefits to be applied to challenge that injustice. The case of *Zinga* provides a stark counterpoint to TS reality.

One finding from the Literature Review concerned the contrast between improved legal resourcing for consumers when compared to traders. Since the TDA 1968 the consumer protection element of the TS portfolio has significantly increased. There has been no parallel increase in business protection. UCPs provide an interesting example. UCPs can affect traders or consumers and undermine legitimate trading. The CPUTRs 2008 made UCPs involving consumers unlawful. This includes such UCPs as aggressive commercial practices, misleading omissions and misleading actions. A trader could be subject to the same practice as a consumer; but in the trader's case, the practice, in itself, would not be unlawful, where it would in the consumer's case. The scope of generic business protection is far more restricted and is limited to prohibition of advertising which misleads traders.⁸⁴¹ Legal resourcing protects the consumer more than the trader. As an enforcer of law, TS effort is inevitably more focussed on consumer protection rather than business protection because of the legislation TS has to consider. The purpose of TS though is to secure

⁸⁴⁰ WLDP (n 725) 62.

⁸⁴¹ SI 2008/1276.

a fair and safe trading environment: ie, so that it is fair and safe for both consumers and legitimate traders. If the focus of legislation is on consumer protection, the needs of legitimate traders can become obscured. Effective consumer protection might incidentally benefit legitimate traders because, say, traders practicing UCPs are stopped, thereby enhancing the ability of a legitimate trader to trade in the more equitable trading environment that is created. But the interests of legitimate traders will not have been at the forefront. The interests of legitimate traders are therefore displaced by the interests of consumers for two related reasons: less favourable legal resourcing and less attention exacerbated because of less favourable legal resourcing.

As an indication of the perception of TS role concerning consumer and business protection, the responses to question 1 about the role of TS in the NAW and PCC candidate surveys were informative (See Chapter 11). Only one response directly referenced business protection. Conversely, there were multiple references to consumer protection. Greater protection for consumers against UCPs than traders through legal resourcing and enforcement focus potentially means there is inequality of enjoyment of human rights between trader and consumer (especially if the trader is of limited means and cannot rely on Helping Oneself action): eg, in the case of Article 5 of the ECHR (liberty and security), the consumer's liberty to trade can be enjoyed more than the same liberty of the trader. Injustice can arise because of that inequality.

In Chapter 3 examination of TS law from an ECHR and human rights perspective was placed into three categories: category 1 (covering a person subject to investigation or prosecution); category 2 (covering a person suffering harm or detriment arising from breach of TS law); and category 3 (a default category covering those not falling within categories 1 and 2). Applying that analysis, it was concluded that category 1 ECHR rights were formally recognised and there was a comprehensive legal framework in place through, eg, regimes established by PACE 1984 or RIPA 2000. No such framework was identified for the protection of ECHR rights for category 2 people. Yet TS is under a duty to protect human rights (both under the rule of law and the HRA 1998). Neither the Literature Review nor primary research identified any narrative concerning TS enforcement and category 2. Or, perhaps to put it more

accurately, while the wish to protect consumers and legitimate traders from detriment might be acknowledged, the rationale for this was not articulated in human rights terms. Conversely, in relation to category 1 people, the narrative was viewed in those terms because the comprehensive legal framework was underpinned by protection of human rights: eg, Article 6 of the ECHR (right to a fair trial). If the human rights of category 1 people are acknowledged but not those of category 2, there is risk that there is discrimination in enjoyment of human rights between categories 1 and 2. That inequality cannot be justified and injustice can arise. Failings in TS delivery impact on category 2 people. Those failings can arise from insufficient resourcing, flawed structural arrangements, imperfect implementation or (as in the case of business protection) insufficient legal resourcing.

Promotion of well-being: This is Wales focussed as promotion of well-being is a key WG policy and is reflected in legislation through the SSWWA 2014 and WFGWA 2015, both of which apply to LAs. In Chapter 3 it was discussed how TS could contribute to promotion of well-being under that legislation. The WFGWA 2015 requires public bodies such as LAs to carry out ‘sustainable development’ which is aimed at achieving seven well-being goals. The WFGWA 2015 also established public services boards for each LA in Wales; their role is to produce and review local well-being plans. The SSWWA 2014 is concerned with promotion of well-being by LAs and others of people who need care and support. The SSWWA 2014 also establishes a safeguarding regime for adults at risk.

TS can contribute to LA work in each case. TS’s role is to promote a fair and safe trading environment. At its core is the promotion of economic well-being: eg, this can contribute to a Wales that is prosperous and resilient (two of the well-being goals under the WFGWA 2015). Related to that are promotion of other aspects of well-being. Stopping economic abuse can help improve emotional and mental well-being: eg, protecting vulnerable adults from the effects of dishonest trading activity can contribute to adult safeguarding under the SSWWA 2014. Ensuring unsafe products do not enter, or are removed from, the market promotes physical well-being. Although it is not devolved, TS can play a material role in promoting well-

being through the delivery of devolved government. Carl Sargeant (then) Minister for Local Government and Communities described TS as:

integral to several of the [WG's] key agendas on social justice, financial inclusion, tackling poverty and food safety.⁸⁴²

The role of TS was being acknowledged as a contributor to delivery of WG policy in those areas mentioned. Although, there was no direct reference to well-being, improved social justice and the like will involve improved well-being outcomes. Similarly, in setting out the TS manifesto commitment,⁸⁴³ there is a reference to protecting consumers from economic exploitation; again, this is an outcome that can be viewed in well-being terms.

Despite the assertion that TS can materially contribute to well-being outcomes, and WG's own expressions of TS worth, primary research findings do not link TS and WG policy to promote well-being. Earlier in the Chapter, it was identified how, despite those WG utterances, TS has low profile in a devolved context. This emerged in interviews, and in responses to the NAW candidate survey. Specifically, question 8 of the NAW candidate survey asked respondents 'In what way do you think that [TS] can contribute to the delivery of Welsh Government?'. There were 23 responses which are summarised in Figure 21. Although there was a suggestion that the question was misunderstood by five of the respondents (see Chapter 13), others (given the nature of their responses) did not, and well-being was not expressly mentioned.

Despite an express reference to TS in the manifesto commitment in 2011, there were no such references identified in the NAW 2016 manifesto searches (see Chapter 11). If there was no such reference in a candidate's party manifesto, it can be argued that making a connection between TS delivery and WG policy delivery (and specifically promotion of well-being) is not then an obvious connection for a candidate to make.

Chapter 12 findings are also suggestive that TS is not identified in terms of improved well-being. The CRA 2015 imposed a duty on letting agents in England and Wales to publicise fees that they charge by requiring a list of fees to be displayed at agents'

⁸⁴² Sargeant (n 404).

⁸⁴³ WLP (n 1) 22.

premises and to be published on agents' websites (LAF publication).⁸⁴⁴ Enforcement of LAF publication was given to LWMAs in England and Wales. Unusually, as an LWMA duty, this was devolved to Wales. Although LAF publication is related to consumer protection (protection of tenants from unfair exploitation: eg, Shelter Cymru reported that there was 'widespread disregard for the law'), it is also related to housing, which is devolved. More specifically LAF publication can be considered alongside Part 1 of the Housing (Wales) Act 2014, which is concerned with the regulation of private sector housing. Moreover, improving tenants' position concerning letting agents' fees can be viewed in well-being terms. There was therefore an opportunity for TS to materially contribute to an issue (and, also, a high-profile issue with well-being implications) in a devolved context. The findings from Chapter 12 suggest that LA enforcement activity was minimal, and that this had low priority within the LWMA. The findings also suggest that LAF publication had low priority with WG. In carrying out LAF publication enforcement LWMAs were required to take account of any guidance issued by WG.⁸⁴⁵ But no guidance was issued. LAF publication could have been linked to promotion of well-being by both LAs and WG but findings from Chapter 12 suggest it was not.

Response to challenges TS faces

Although there may be incidental references to Wales, before placing things specifically in a Wales context, the response to challenges faced by TS under the LWMA model is considered; this requires two parts. The first should involve a fundamental review of TS including questioning the rationale for its existence as a classification under which a range of enforcement functions is placed (fundamental review). A fundamental review would go beyond the call in 2015 by the CTSI for a strategic review of TS in GB, as that call did not involve questioning the TS classification⁸⁴⁶ (see Chapter 9). Similarly, the UK Government's review of TS originally announced in 2015⁸⁴⁷ and which was taken forward (via the 'Red Tape Review')⁸⁴⁸ in 2018 by the Consumer Green Paper⁸⁴⁹ cannot be claimed to be a fundamental review (see Chapter 9). Depending on the outcome of the fundamental

⁸⁴⁴ S 83.

⁸⁴⁵ CRA 2015, s 87(10).

⁸⁴⁶ CTSI (n 635).

⁸⁴⁷ HM Treasury (n 647),

⁸⁴⁸ See n 648.

⁸⁴⁹ BEIS (n 649).

review, the second part should involve consideration of the most effective way to deliver TS or its constituent parts (consequential review)

Fundamental review

Challenges to TS was an overarching theme identified in chapter 10. Portfolio uncertainty was part of this, and it involved three aspects:

- ***Legal metrology and its relationship with TS.*** Literature Review and primary research finding identified legal metrology as having low profile within TS and being less valued, as evidenced with its absence from NTS work. That said, as a response that potentially challenges that position, legal metrology is a compulsory element in the stage 2 qualification of the CPCF⁸⁵⁰ which came into effect in 2019 (see Chapter 10). It was not compulsory under the TSQF, the predecessor framework.⁸⁵¹ It is too early to judge the effect of the change.
- ***Debate about what should or should not be contained in the TS portfolio.*** There is the contrast between TSSNI and LWMA portfolios. TSSNI does not have product safety and animal health and welfare. Animal health and welfare is not itself an LWMA function, yet it is accepted in practice as part of the TS portfolio. Touching on this, animal health and welfare was part of the TSQF but, significantly, is not included as an element in the CPCF qualifications⁸⁵² (see Chapter 10). Again, it is too early to assess the implications of that change.
- ***The material expansion of legislation required to be enforced by the LWMA.*** The schedule of legislation enforced by TS completed by Spicer⁸⁵³ is illustrative. On this theme I42, when referring to the range of legislation which I42 was authorised to enforce, stated that 'the issue is they are largely unconnected.' (See Chapter 10).

TS is a UK construct that has developed incrementally and pragmatically. There may be overlap between legal metrology and consumer protection, but each has a different focus. This could justify making separate arrangements for their delivery outside the TS classification, as is the case in other jurisdictions such as in Ireland.

⁸⁵⁰ CTSI (n 706) 11.

⁸⁵¹ See: CTSI, 'Qualifications: Governance of the TSQF and Structure Guidance' (nd).

⁸⁵² CTSI (n 706).

⁸⁵³ Spicer (n 186).

While there can be that justification, it can also be argued that, despite their different focus, each contributes to secure a fair and safe trading environment (the underpinning rationale of TS) and that they can be housed together, as they are under the TS classification. But if each is to be retained under the TS classification, the effective delivery of each needs to be secured and, importantly, TS itself give greater recognition to legal metrology and its place as part of TS. Standing outside the LWMA model, but within the TS classification, interview findings suggest better recognition for legal metrology within TSSNI.

Also, with reference to Northern Ireland, the TSSNI portfolio is narrower, and has greater clarity. Extending the TS portfolio beyond the LWMA blurs that clarity. Similarly, the significant expansion of legislation required to be enforced by the LWMA obscures recognition of its underpinning rationale, resulting in the inter-connection between legislation not being seen. Two examples of legislation which, at face value, were not obvious candidates for inclusion in the LWMA TS portfolio were mentioned in Chapter 4. These were the Recreational Craft Regulations 2017⁸⁵⁴ and the Construction Products Regulations 2013.⁸⁵⁵ To further illustrate the contrast with the TSSNI portfolio, the legislation in each case expanded the difference between the TSSNI and LWMA TS portfolios, as enforcement responsibility for that legislation in Northern Ireland was given to district councils.⁸⁵⁶

A fundamental review of TS in this way would serve two purposes. It would enable rational and principled consideration of where best to place those matters which are in the TS portfolio. That might mean, say: that consumer protection and legal metrology are kept together within the TS classification; or abandoning the classification and separating the two strands. The other benefit from such a review is that it would help raise the profile of TS and its worth or, in the event of abandonment of the TS classification, of its constituent parts and their worth. As TS is not devolved, any such review could not take place at a Wales level.

⁸⁵⁴ SI 2017/737.

⁸⁵⁵ SI 2013/1387.

⁸⁵⁶ SI 2017/737, reg 66; SI 2013/1387, reg 14.

Consequential review

The second part involves consideration of the most effective way to deliver TS or its constituent parts. Chapter 6 considered TS comparative contexts.

TS classification retention – the single tiered model: If the TS classification is retained, arrangements in Northern Ireland stand outside the LWMA and provide an obvious comparative context. There is a single authority for Northern Ireland, and it is also part of devolved government and not LG. (the single-tiered model). As a single authority, resourcing is less problematic than under the LWMA model because of economies of scale and more secure funding. It also has greater capacity to develop expertise. In Chapter 10 interviewees referred to TSSNI and the benefits associated with that larger unit. I42 linked its successful legal metrology delivery to size and ability of TS to have its own laboratory, while also adding ‘You could see the same model working with Wales easily.’ I1 referred to investment in people and how TSSNI consistently invest in staff training in marked contrast to its LWMA counterparts (see Chapter 10).

TS is not part of devolved government, but LG is, and TS arrangements could be established on an all-Wales basis through the LG devolved competence: ie, establishing a single LWMA as a combined authority involving the 22 principal councils. If it had been implemented, the TS manifesto commitment could have been given effect in this way.

As well as Northern Ireland, Chapter 10 also considered Jersey and Barbados as other examples of single jurisdictions. In each case TS (or its equivalent) forms part of wider economic policy delivery which brings with it a corresponding ability to inform and be informed about that delivery (the strategic benefit). An all-Wales LWMA would still be LG rooted but given its size and likely profile it would be better placed to have some influence on WG policy and its delivery: eg through improved access to ministers and their civil servants. Greater accountability for TS delivery and security of funding are also more likely in such an arrangement as accountability and funding elements would form part of overall structural arrangements.

Accountability would also more likely be improved through TS having higher profile as what it does (or does not do) will be more readily noticed than under the LWMA

model, where oversight of TS delivery might be obscured by delivery in other LA service areas such as education or social services (the accountability benefit). I25, an LA councillor, explained how, in I25's view, scrutiny of LA service areas had a dual purpose:

[P]art of that is monitoring performance against performance indicators and so on; making sure that we fulfill our statutory requirements. But there is also another element to scrutiny which is about driving policy and changing policy. And so scrutiny at its best should be working like that.

I25 then described how scrutiny of TS was divided between two scrutiny committees within I25's LA and that, as a member of one of those committees, I25 couldn't recall discussing TS on more than two occasions within two years. Scrutiny of adult social services was also within the committee's remit and it was considered at each meeting. The dual purpose of scrutiny that I25 describes could not begin to have meaningful effect for TS performance and policy in I25's LA. There is a more realistic prospect of that dual purpose having that effect and, therefore, improving TS accountability in an all-Wales LWMA.

TS classification retention - the two-tiered model: The FSA and HSE enforcement models provide comparative LG enforcement models from which elements could be applied and incorporated into a revised LWMA enforcement model (the two-tiered model). The LWMA model's lack of co-ordination and ability to influence local decisions have been previously identified. The Hampton Review recommendation to establish a CTSA was in part about addressing that (giving the CTSA 'powers over [TS] work...analogous to those of the [FSA] over food')⁸⁵⁷ but that was not implemented. Those powers might include such things as powers of audit, direction and, in default, intervention. The UK Government in its 2018 Consumer Green Paper also acknowledged that there was an accountability deficit as regards LAs and consumer protection.⁸⁵⁸ From personal experience I40 identified the effect of such power:

[An LA] will absolutely worry themselves to death if they ever thought that they were going to get any sort of robust inspection, critique or bad press from the [FSA]. [See Chapter 10]

⁸⁵⁷ Hampton (n 45) 69.

⁸⁵⁸ BEIS (n 649) 55.

Establishing an overarching body with such power would increase leverage over LA action and could lead to more coordinated action but identified deficiencies in the LWMA model would remain. Two significant ones are mentioned. While the ability of TS to argue its case for resourcing within the LWMA might be strengthened because of external influences, LWMA funding arrangements would still apply and TS resourcing would continue to be unhypothecated. As now, other LA services such as education and social services would compete for allocation of that resource.

The second deficiency concerns LA capacity to take on larger, complex and cross-boundary cases, (as mentioned earlier in this chapter, something acknowledged by the UK Government in the Consumer Green Paper).⁸⁵⁹ NTS supports LWMA with additional resourcing with such a case but the allocation of resourcing must be premised on an LWMA having overall capacity to take on the case. Reduction in TS capacity since 2010 is well documented and the ability to take on those cases has reduced.

One remedy for lack of LA capacity to take on larger, complex and cross-boundary cases is for those cases to be taken on by the body that has powers of oversight. The HSE provides that model. As well as having powers of oversight HSE enforcement is divided between it and LAs. It would require legislation at a UK level but NTS could be established as a statutory agency with enforcement powers and powers of oversight over LA enforcement (and there could be a separate agency for Wales). Enforcement arrangements operating at LWMA and national levels following the HSE model would mean that there was no longer reliance on LAs to take on national cases. There would need to be a mechanism for demarcation of enforcement responsibilities between LAs and the national body. But current arrangements already identify work that is appropriate for NTS national projects and such an approach could be adapted in working out demarcation in practice: eg, related to such things as size and complexity. Demarcation between LAs and the HSE in HS work is broadly related to the nature of the activity and premises and would not be an appropriate basis for TS demarcation.

⁸⁵⁹ Ibid.

Like the single-tiered model there are likely to be strategic and accountability benefits under the two-tiered model. Establishing an overarching TS agency would enable it to adopt more strategic oversight of TS and, also, influence LWMA enforcement policy. It would also be better placed to influence wider economic policy and its delivery. Accountability benefits could apply at two levels: within the TS agency and the LWMA. As with the single-tiered model, the TS agency would have higher profile and its work would be more readily subject to scrutiny. At the LWMA level there could also be accountability benefits due to the external influence of the TS agency and its ability to hold TS activity in the LWMA to account (similar to the influence identified in the primary research findings concerning the FSA and the HSE).

TS classification non-retention: Based on evidence elsewhere, if the TS classification is not retained, the most obvious division would reflect the legal metrology and consumer protection strands. Such division is common outside of the UK and, given the extent of arrangements in other places that reflect that division, can be viewed as usual practice: eg, in Ireland, legal metrology is the responsibility of the National Standards Authority of Ireland⁸⁶⁰ and consumer protection is the responsibility of the Competition and Consumer Protection Commission.⁸⁶¹ The TS classification can be viewed as a UK construction. But, historically, the core focus of TS was legal metrology and over time its portfolio was extended to incorporate consumer protection (the retention of 'LWMA' reflects this heritage). Therefore, to abandon the TS classification and implement arrangements that reflect these separate strands could be judged as reverting to the historical norm concerning legal metrology. The rationale for making the change is that current legal metrology arrangements are not working as legal metrology is obscured by consumer protection within TS.

If such change was to be made there are different ways in which it could be implemented. Either of the single-tiered and two-tiered models mentioned before could be applied. Thus, there could be separate bodies established to enforce legal

⁸⁶⁰ Established by the National Standards Authority of Ireland Act 1996. See <<https://www.nsai.ie/Our-Services/Measurement.aspx>> accessed 19 December 2017.

⁸⁶¹ Established by the Competition and Consumer Protection Commission Act 2014. See <<https://www.ccpc.ie/>> accessed 19 December 2017.

metrology and consumer protection law for a single area (such as Wales). Or enforcement could be split between separate bodies and LAs but with associated powers of oversight for those bodies over LAs in a geographical area (again, such as Wales). Under either model, for the same reasons mentioned above, there are likely to be strategic and accountability benefits. Another potential beneficial outcome would be that legal metrology would no longer be obscured as it would have emerged from the shadow of consumer protection. This would feed into strategic and accountability benefits and could provide a more sustainable base for legal metrology enforcement.

Abandoning the TS classification so far has focussed on making a division between legal metrology and consumer protection as that is what the Literature Review and primary research findings signposted. Division could be made in other ways. Two other things of relevance arising from Literature Review and primary research findings are mentioned: product safety and business protection.

Product safety is part of consumer protection, but implementation arrangements can reflect a distinction between protection of physical harm and economic harm: eg, in the USA there is the Consumer Product Safety Commission⁸⁶² and the Bureau of Consumer Protection.⁸⁶³ As a move in this direction in January 2018 the UK Government established the Office for Product Safety and Standards (OPSS) (see Chapter 9).⁸⁶⁴ OPSS is its infancy and it is unclear how it will develop. Although part of consumer protection, the longer-term possibility exists that structural arrangements may develop that reflect the division between consumer protection from physical and economic harm, as seen in the USA.

As to business protection, a division between legal metrology and consumer protection does not expressly recognise business protection. Yet if the role of TS is promoting a fair and safe trading environment, this includes business protection as well as consumer protection, on the basis that each falls within 'fair and safe trading'. With separate arrangements for legal metrology and consumer protection, prima

⁸⁶² See: <<https://www.cpsc.gov/>> accessed 24 February 2019.

⁸⁶³ The Bureau is part of the Federal Trade Commission. See: <<https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection>> accessed 24 February 2019.

⁸⁶⁴ OPSS is part of BEIS: See: <<https://www.gov.uk/government/organisations/office-for-product-safety-and-standards>> accessed 24 February 2019.

facie, potential positive and negative outcomes can be identified concerning business protection. On the positive side, a separate legal metrology enforcement regime which is properly resourced, accountable and effective could benefit legitimate traders as their efforts should be less undermined by illicit activity. But on the negative side, after the division, consumer protection enforcement might be judged as restricted to just that and not extended to business protection. Legitimate traders might benefit incidentally because illegitimate trading activity threatening consumers is successfully challenged and this creates a fairer and safer trading environment. But the needs of legitimate traders will not be the focus and there is risk that they will not be adequately considered. One obvious counter to that possibility after the division is to not restrict non-legal metrology arrangements to consumer protection and to include business protection.

The need for adequate business protection was discussed earlier in relation to the critical theoretical framework and to greater role for Helping Oneself action. Part of the lack of adequate protection was identified as unsatisfactory legal resourcing (and highlighted, especially, when compared to consumer protection) and this is something over which enforcement arrangements cannot change. But the other part of lack of adequate protection identified was that business protection enforcement (rather like legal metrology enforcement) was obscured by the focus on consumer protection. That is something over which enforcement arrangements can have an influence.

TS classification aside - better ways of doing things

Irrespective of whether TS classification is retained, there are ways in which there can be improved enforcement. Sufficient resourcing and its efficient application are two ways already mentioned. Prosecution arrangements, avoidance of conflict of interest and distancing regulation from enforcement are now considered.

Prosecution arrangements: Arrangements concerning prosecutions were considered in Chapters 6 and 10; and 'prosecution' was given an extended meaning to refer to criminal, civil and administrative enforcement. Prosecution exists alongside investigation (under the broader classification of enforcement); a case cannot be prosecuted successfully unless sufficient evidence has been gathered in

the investigation. But although there is inextricable linkage between investigation and prosecution, they are distinct functions. As such, they require separate arrangements and need to be considered separately. Literature Review and primary research findings, however, made limited reference to the distinction between those functions and their significance.

One direct reference in the Literature Review related to legal resourcing and enhanced LWMA powers under the CRA 2015 allowing an LWMA in England and Wales to investigate and bring criminal or civil proceedings outside its area within England and Wales⁸⁶⁵ (see Chapter 4). The practical effect of that change is demonstrated by CS2 (pre CRA 2015 change) and CS3 (post CRA 2015 change) in Appendix 20. In CS2 criminal proceedings covering multiple LA areas were bureaucratically complex as the prosecution was technically a joint prosecution involving each LA. CS3 also involved criminal proceedings covering multiple LA areas but was bureaucratically much simpler as the CRA 2015 change enabled prosecution by a single LA.

There were indirect references in the Literature Review: eg, one of PAC Report's conclusions was that:

The level of financial risk taken on by enforcement bodies may discourage them from pursuing complex and difficult investigations...⁸⁶⁶ [See Chapter 9]

Although 'investigations' is referred to, in context, it inferentially refers also to 'prosecutions' as 'financial risk' will refer to both the financial costs of undertaking an investigation and to the costs of prosecution, especially if a case is lost and the other side's costs must be met. The Oldham Metropolitan Borough Council (OMBC) prosecution case study in Figure 6 is illustrative. After that case, because of financial costs incurred (and, also, reputational damage), it would not be surprising if OMBC had been 'discourage[d]...from pursuing complex and difficult investigations'.

In a consequential review of the most effective way to deliver TS or its constituent parts, there needs to be greater acknowledgement of investigation and prosecution as distinct functions, and how the effectiveness of each feeds into overall

⁸⁶⁵ Sch 5, pt 6.

⁸⁶⁶ Committee of Public Accounts (n 331) 6.

enforcement effectiveness. The obvious comparative starting point concerns different arrangements for criminal enforcement (ie, enforcement action related to a criminal court) between England and Wales (Model 1) and Scotland and Northern Ireland (Model 2). Under Model 1 the same body investigates and brings criminal proceedings (here, the LWMA) and under Model 2 these functions are undertaken by separate bodies (here, investigation by the LWMA (Scotland) and the TSSNI (Northern Ireland) and prosecution by the COPFS (Scotland) and the PPSNI (Northern Ireland)).

Prior to establishment of the CPS in England and Wales police enforcement was undertaken under Model 1 arrangements. Model 2 arrangements replaced this with the CPS taking over the prosecution function from the police. The CPS was established by the Prosecution of Offences Act 1985. This was following a Royal Commission on Criminal Procedure.⁸⁶⁷ One argument for separation of the investigation and prosecution functions was 'that the investigator, by virtue of [her or] his function, is incapable of making a dispassionate decision on prosecution.'⁸⁶⁸ The argument, therefore, is that separation brings greater objectivity and independence to prosecution. There are other potential advantages as prosecuting is the core function of the CPS, the PPSNI and COPFS. With that dedicated focus and economies of scale they will have greater expertise and resilience than an LA such as OMBC. Because of that, so the argument goes, they are likely to be less risk averse. But findings from the primary research drew a distinction between theory and practice. I32 commenting about the CPS said:

In practice, it has not been a good thing...They are politically driven. [See Chapter 10]

In a similar vein I27 commented that LA lawyers:

are more prepared to make decisions...if those decisions are proper decisions to make, than will the supposedly independent [CPS]. [See Chapter 10]

Both I32 and I27 had considerable experience of working in the criminal justice system. Significantly, while each was critical of the CPS in practice, each recognised the need in principle for independence in the prosecution function. While the Royal Commission on Criminal Procedure recommendation for creation of that

⁸⁶⁷ Royal Commission on Criminal Procedure (n 437).

⁸⁶⁸ Ibid 133.

independence resulted in the establishment of CPS, a separate body, to take on that function, it is conceivable that a single body can retain investigation and prosecution functions and perform each effectively if internal arrangements are sufficiently robust. The RSPCA case study in Figure 7 made this point. An independent review of RSPCA prosecution arrangements was undertaken in 2014.⁸⁶⁹ It concluded that Model 1 arrangements did not present an ‘insuperable impediment’ as other organisations combine investigations and prosecutions. The key requirement was for them to be separated.⁸⁷⁰ But to achieve effective separation presupposes that there are sufficient economies of scale and resourcing; and, also, cultural recognition and acceptance of those separate roles. I10, a TSO, inferentially alluded to an effective separation in I10’s LA:

[LA lawyers] will say not to take a case. There is no issue with them about it at all. They quite often will say ‘No, don’t take it’. [I10] [See Chapter 10]

But the effects of LG reorganisation in Wales in 1996 significantly reduced the capacity of an LA to have effective separation for TS enforcement; 22 LWMAs were established, where previously there had been eight. There has also been reduction in that capacity through sustained reduced resourcing since 2010. I23, a former LG lawyer, commented:

[T]here’s not enough capacity in legal departments for...a proper independent view by a lawyer of files...There’s not that level of expertise within [LG] certainly. [See Chapter 10]

The conditions enabling establishment of effective separate investigation and prosecution arrangements (although not inevitable) are more likely to arise in a reduced number of bodies than the current 22 LWMAs. The RSPCA is established over England and Wales, and the independent review undertaken concluded that effective separate arrangements could be implemented. The ability to establish effective separate enforcement arrangements for TS or its constituent parts (whether under Model 1 or 2) is more likely if those arrangements have effect for a larger area (such as Wales).

A finding that emerged in the Literature Review and primary research concerned the role of civil enforcement (ie, enforcement action related to a civil court), and how it can be complementary to criminal enforcement. Civil enforcement is a relatively

⁸⁶⁹ Wooler (n 445).

⁸⁷⁰ Ibid 17.

recent development and measures enabling TS capacity to carry out civil enforcement (such as under the Enterprise Act 2002, Part 8) can be judged as improved legal resourcing (eg see Chapter 4). Although, there are procedural differences between civil and criminal enforcement (such as different courts, rules of evidence and standards of proof), civil enforcement requires an approach consistent with criminal enforcement. Therefore, as with criminal enforcement, investigation and prosecution can be distinguished as separate processes with civil enforcement.

As mentioned, Model 2 arrangements for TS exist in Scotland and Northern Ireland. But this relates to criminal enforcement and not civil enforcement. In these countries Model 1 arrangements exist for civil enforcement (LWMA lawyers in Scotland, DFENI in Northern Ireland). As both criminal and civil enforcement are part of TS enforcement capacity, the logical position is that civil and criminal prosecution arrangements should be integrated as there are potential beneficial outcomes: eg, lawyers can develop integrated skillsets and there can be a better strategic approach to enforcement such as managing the appropriate demarcation between civil and criminal enforcement. A primary research finding was that TS enforcement requirements are complicated by the need for a multi-layered approach (see Chapter 10). Integrated arrangements can contribute towards TS being able to respond with that approach. The current Model 1 arrangements for TS in England and Wales do at least have the merit of accommodating this position. If Model 2 arrangements were to be established in England and Wales for TS enforcement, the CPS might be a candidate to take over TS prosecutions. But the CPS is a criminal prosecution agency and the idea that it could (or would want to) take over TS civil prosecutions seems problematic. In that case, implementation of such an arrangement would leave Model 1 arrangements for civil enforcement and the potential benefits of integrated civil and criminal prosecution arrangements would be lost.

If integrated civil and criminal prosecution arrangements are to have meaningful effect it, again, requires sufficient economies of scale and resourcing. If the current 22 LWMAs in Wales were replaced by a single authority (as in Northern Ireland), successfully establishing those integrated arrangements is more probable; as is the

ability to separate investigation and prosecution functions under Model 1 arrangements. The same arguments also apply if the classification was not retained and there was a division, say, reflecting legal metrology and fair trading (ie, business and consumer protection).

Discussion so far has referred to civil enforcement and criminal enforcement. Chapters 4 and 10 also referred to administrative enforcement (ie, issue of civil penalties or administrative control such as licensing). The discussion above in relation to civil enforcement and its relationship with criminal enforcement has equal application to administrative enforcement. Therefore, there should be integrated prosecution arrangements for the three prosecution approaches.

Avoiding conflict of interest: Earlier in the chapter, in consideration of the rule of law, outsourcing, PA arrangements and TS supporting economic growth were identified as affecting the proper exercise of power because of their capacity to make that exercise unreasonable. This is because in those situations there are extraneous influences on the primary duty of enforcement.

The Bribery Act 2010 is an obvious legal measure designed to challenge improper influence. Although not confined to an enforcement context it can apply to TS: eg, if a trader offers a financial advantage to a TSO as a reward for the TSO to improperly perform the TSO's work, the trader is guilty of an offence.⁸⁷¹ If the TSO accepts the offer, the TSO is also guilty of an offence.⁸⁷² The Bribery Act 2010 is designed to deal with corrupt behaviour. Extraneous influences on the performance of a TSOs' work, as identified through examples such as outsourcing, PA arrangements and TS supporting economic growth, are not in themselves examples of corrupt behaviour as they are lawful (and even encouraged).

But although lawful, primary research findings were that PA arrangements can influence primary duty considerations about enforcement: eg, where traders pay for 'assured advice'. So, eg:

⁸⁷¹ S 1.

⁸⁷² S 2.

[LAs]...used to be completely independent...[Y]ou have big business...hand-selecting individual friendly [LAs] and paying them significant amounts of money in order to...protect them against prosecutions. [I11] [See Chapter 10]

The Netherlands legal metrology case study set out in Figure 13 is illustrative. The Netherlands legal metrology system was privatised but the enforcement element (Verispect) was subsequently returned to public ownership. As to why, according to I46 (a Dutch legal metrology specialist), reasons included: that commercial pressures were diluting public ethos; and that inspection should be seen as independent of the sector being inspected. Each reason touches on performance of the primary duty: the first directly, the second indirectly (perceived lack of independence can affect public trust in integrity of arrangements). There was another concern related to accountability as Versispect, a private company, was delivering a public function for which a Dutch minister was accountable:

The [MEA] wanted to have some control over Verispect because Verispect performed a public task for which the minister was ultimately responsible. [I46] [See Chapter 10]

In the case study as well as wishing to restrict improper influence on the exercise of the primary duty there was also concern that there were deficiencies in accountability arrangements. Both were addressed by bringing in Verispect back into public ownership.

A consequential review of TS (or its constituent parts) can take account of potential influence, and attempting to avoid its effect can be built into arrangements. An obvious aspect concerns PA arrangements. These are an adjunct to the LWMA model. There is a need for consistency of advice between LWMA areas and 'assured advice' under PA arrangements provides a mechanism for this. That need is lessened if the units for enforcement are much larger than the area of a single LWMA (such as is the case with Northern Ireland or, potentially, Wales) as consistency of advice can be achieved administratively within that larger area. Moreover, given economies of scale, resourcing arrangements for such a body are likely to be more robust than for an LWMA and, thereby, obviating the need to charge traders for advice (and removing potential for improper influence).

Distancing regulation from enforcement: In Chapter 7 there was consideration of regulation and TS, and how TS has become seen as a regulator (eg, under the Legislative and Regulatory Reform Act 2006) rather than an enforcer of law such as the police. The role of TS, so it was argued, was that of an enforcer and not a regulator. This distinction, it was further argued, manifested itself in public perceptions which affected profile (eg, between offences which can be vowed as criminal and those which can be regarded as regulatory). Thus policing, as an enforcement (ie, non-regulatory) activity, has higher-profile and more public support than regulation. That public support translates into political support, which ultimately affects resourcing. If TS (or its constituent parts) could be viewed in a similar way, it might likewise benefit.

As part of improved enforcement, whether or not TS classification is retained, promoting the enforcement role of TS (or its constituent parts) is something that can take place together with distinguishing that role from the that of a regulator. That change in perception could improve the profile of TS (or its constituent parts) and how it is regarded. This is more likely to happen if there is a structural change (whether under a single or two-tiered model) as there is greater capacity to articulate the voice needed to convey that message. Also, because of meeting needs of TS (or its constituent parts) separately, such arrangements more obviously avoid the effect of regulatory services brigading, and which has had, according to interview findings, an obscuring effect on TS within LAs.

TS in Wales

As TS is not devolved and is a UK construct, consideration in this chapter so far has broadly been at a UK level. Now consideration is placed in a Wales context. The TS manifesto in 2011 suggested the possibility of a national TS service in Wales and was the catalyst for the thesis. As mentioned, Carl Sargeant (then) Minister for Local Government and Communities commented how TS was ‘integral to several of the [WG’s] key agendas.’⁸⁷³ But despite this, primary research findings are that the TS manifesto commitment was not seriously taken forward, and that TS has low profile in Wales (something highlighted by the NAW Candidate survey (see Chapter 11) and LAF publication case study findings (see Chapter 12)).

⁸⁷³ Sargeant (n 404).

The failings previously identified in LWMA TS delivery (self-evidently, as part of those arrangements) apply to Wales. But it is not open for WG to undertake a fundamental review of TS in Wales as TS is not devolved. After the UK leaves the EU the opportunity for such devolution is theoretically increased. As an EU member state must implement EU obligations, fulfilling such obligations is simpler if competence in those areas is retained at member state level. As enforcing EU obligations has had significant impact on TS (eg, especially in relation to consumer protection) there is logic to TS not being devolved while the UK is an EU member state. But that position no longer applies after UK exit from the EU. Whether there is such devolution, however, is another matter. There has to be the political will and, given Literature Review and primary research findings about low TS profile, the prospect of devolution in the immediate future seems improbable. That said, for historical reasons, consumer protection is devolved to Northern Ireland (see Chapter 6), so there is a precedent.

What, of course, can be achieved in Wales by WG is a review of arrangements for TS delivery within the LWMA model. The need for this is important especially having regard to the critical theoretical framework elements previously discussed. Another reason is from a constitutional position: that laws enacted should have practical effect until such time as those laws are changed.

The TS manifesto commitment did not consider the detail about establishing an all-Wales TS service but a single legal entity for Wales (comprising the 22 principal councils in Wales) would be legally permissible as an exercise of the LG (devolved) competence. Related to this, in Chapter 10 there was consideration of arrangements for TS delivery (or its equivalent) in Barbados, Jersey and Northern Ireland. In each case, arrangements apply to the whole territory. Compared to LWMA arrangements, benefits identified included increased economies of scale which can provide: advantages concerning strategic planning; the means to muster an articulated representative voice; an ability to work more effectively within the territory; and better overall service investment (say, in training or as between consumer protection and legal metrology). Furthermore, funding arrangements are ring-fenced and more protected than under the LWMA model. In TSSNI, for instance,

interviewees reported good resourcing of legal metrology (in addition to consumer protection) leading to an effective and resilient legal metrology service; something not reported under LWMA arrangements. Associated with this, comparable differences between investment in training was also reported between Northern Ireland and GB:

Where I am jealous of them is that they are able to spot future training demands and they are constantly training their people. [I1] [See Chapter 10].

There appears no reason in principle why an all-Wales TS service could not secure similar benefits. As to funding specifically, it would be hypothecated as money allocated to an all-Wales TS service could only be applied for that purpose.

As to accountability, in each case arrangements fell within the portfolio of a government minister who, in turn, was answerable to a democratically elected body. Prima facie, under those arrangements, TS (or its equivalent) is more naturally accountable than under LWMA arrangements where TS has low profile and, in consequence, there is a lack of oversight. As a single all-Wales TS focussed body, an all-Wales TS service would have a profile not currently available. This would presumably raise the profile of TS within Wales. And with this, there could be improved accountability. Governance arrangements could be more transparent, not obscured by regulatory services brigading or greater attention given to other LA service areas such as education or social services. Performance could be more readily judged against agreed objectives. And those objectives could be better aligned to reflect all-Wales priorities and delivery of devolved government. LAs, as members of an all-Wales TS service, would still have an influence but there would be no legal impediment to overarching WG co-ordination of strategic arrangements for an all-Wales TS service through priority setting.

Also, in each case, as part of devolved or central governmental arrangements, a broader benefit was identified: unlike with the LWMA, each forms part of wider economic policy delivery which brings with it (because of, say, ministerial access) a corresponding ability to inform and be informed about economic policy delivery. Establishing an all-Wales TS service could provide the catalyst for that development; and this could develop naturally, as a consequence of its establishment, through increased WG/all-Wales TS service interaction and working arrangements. A

practical manifestation could be the appointment of a civil servant within WG who leads in that policy area: something that is present for EH.

One other difference identified between arrangements in Northern Ireland, Barbados and Jersey and LWMA concerned the nature of the staff. In the former they are civil servants, whereas under the LWMA they are not. In Northern Ireland an independently administered code of practice regulates the relationship between civil servants and government ministers. LWMA staff do not have similar arrangements. LG workers in Wales are subject to a code of conduct which promotes general principles and there are mechanisms for upholding the code including investigation and reporting by LA monitoring officers (see Chapter 6). But while there may be similarity between the roles of civil service commissioners and a monitoring officer, a monitoring officer is an employee of the LA and does not have the independence of civil service commissioners.

In theory, civil service arrangements permit less political interference than corresponding LWMA arrangements. That said, no such narrative emerged from interviews and interviewees did not report political interference in operational TS matters. In fact, and contrary to that theoretical position, there was complaint of political interference in the operation of the CPS (see Chapter 10); yet its staff are civil servants. The implication from these contrasting positions is that the test should be whether there is operational independence in practice, while at the same time retaining accountability for performance. In Chapter 6, a comparative reference was made to chief constables for police forces in England and Wales who must be operationally independent but accountable.⁸⁷⁴ Those principles could (and should) be followed in governance arrangements for an all-Wales TS service.

The LAF publication case study in Chapter 12 provides for an exercise in speculation. In that case there was a rare example of a TS competence being devolved. It also facilitated delivery of another devolved competence (housing) and the issue (letting agent's fees charged to tenants) had high profile. The findings suggested that despite all these features being present in an aspect of TS work, when these would not normally be present, LAF publication was not taken seriously. If the duty of LAF

⁸⁷⁴ See n 415.

publication enforcement had been placed on an all-Wales TS service, because of the difference from current arrangements, it can be argued that that there would have been a greater chance of meaningful enforcement.

Support for this contention arises in two respects: that an all-Wales TS service would have economies of scale and sufficient resourcing to better enable it to fulfil its legal obligations; and that with higher profile associated with being an all-Wales TS focussed body, the link between TS and delivery of devolved government would more readily be made.

As to the second point, consideration of the influence of policing (a reserved matter) on delivery of devolved government provides an interesting comparison. Policing has an obvious high profile in Wales, and it seems a link with it and delivery of devolved government is made. Searches of the six main party manifestos for the 2016 NAW general election for police and TS related references suggested this (see Chapter 11). There was no reference to TS in the manifestos but there was reference to policing in four manifestos (PC,⁸⁷⁵ the WCP,⁸⁷⁶ the WLP⁸⁷⁷ and the WLDP⁸⁷⁸) and those references expressly linked policing with the delivery of devolved government. If TS was established at an all-Wales level, and had higher profile in consequence, a similar link with TS and devolved government may more readily be made.

Current all Wales arrangements for WIT and WIMLU can be mentioned as providing an example of the benefits flowing from dedicated focus and economies of scale. Each has developed skillsets associated with its area of operation. Each has also undertaken work not previously undertaken by LWMAs. This has occurred more obviously with WIMLU: interview findings established that it was taking on work not previously touched by TS. In contrast, LWMAs undertook the type of work WIT took on (such as investigating UCPs); but what has happened in practice is that WIT has taken on larger and cross-border cases which LWMAs do not have the capacity to undertake. In doing so WIT has also developed expertise which enables it to

⁸⁷⁵ PC (n 720).

⁸⁷⁶ WCP (n 723).

⁸⁷⁷ WLP (n 724).

⁸⁷⁸ WLDP (n 725),

better undertake such tasks than LWMA's. The three case studies in Appendix 20 are illustrative.

CS1 was an LWMA case but, such was the extent of the commitment it required, it materially interfered with the ability of the LWMA to carry out other TS work. On reflection, I9 explained that the LWMA would probably not take on a similar case again. CS2 and CS3 are examples of WIT cases. Each was complicated involving cross-border activity, which an LWMA would be unlikely to have had capacity to take on due to insufficient resourcing and expertise.

WIT and WIMLU also provide examples of contrasting financial resourcing arrangements to LWMA arrangements. Each has characteristics that are materially different from LWMA arrangements. Neither of their funding is drawn from a more general and unhypothecated financial pool in which there is fierce competition for allocation of resources, as is the case with LWMA arrangements.

In WIT's case, although its funding is part of a broader financial pool, that pool is TS dedicated, so competition for allocation is between other aspects of TS work. As WIT (and other RITs) are part of a planned framework, the allocation process is wholly different. They are not subject to low priority in that process. But one problem identified in interview with financial resourcing for WIT (and, by extension, other RITs) concerned uncertainty over BEIS resourcing; this is on an annual basis. Although such funding has been recurrent, it creates a lack of clarity about longer term resourcing and which impacts on how RITs function:

Well I think nothing is ever nailed on. And no-one ever talks longer than for 12 months really, whenever looking at things. [I8] [See Chapter 10]

The funding position with WIMLU is different though. Until 2018 NTS had oversight and management of WIMLU (and its English equivalent). This transferred to the FCA after legislative change established a revised funding model.⁸⁷⁹ WIMLU (and its English equivalent) now receive funding from HM Treasury and that money is recovered from the financial sector by imposition of an industry levy. The funding model is essentially self-financing and recurrent. As it is established by legislation,

⁸⁷⁹ Financial Services and Markets Act 2000, ss 333S-333T.

it allows for greater certainty about future funding than under the NTS funding model. Although under the NTS funding model there may be a reasonable expectation that funding will continue beyond one year, there is no guarantee. The WIMLU funding model, in contrast, allows for longer term planning: eg, with regard to appointment of staff on a temporary or permanent basis and in other investment decisions such as in training.

Although the NTS funding model has been identified as having advantages over the LWMA model concerning RITs, one thing identified in the Literature Review and primary research findings concerned the low profile of legal metrology within NTS. Therefore, although the NTS model provides for dedicated TS funding, legal metrology misses out. Accountability arrangements do not provide a lever to overcome this. Legally, TS enforcement is the responsibility of the LWMA, and this includes legal metrology. TS does not have high profile within LAs and there is not effective oversight of TS delivery. If there is not effective scrutiny of TS, effective scrutiny of legal metrology (as a TS strand) is improbable. Conversely, NTS, while being a dedicated TS body, does not have legal responsibility for TS enforcement and so is not legally accountable (as mentioned, this rests with LWMAs).

Establishing an all-Wales TS service could in principle overcome these issues. As a body established separate to the 22 principal councils in Wales, an all-Wales TS service would have dedicated TS focus. The legal effect would be to place the statutory duty to enforce TS on behalf of the 22 LAs. Like WIMLU, through the nature of such arrangements, such a body is also likely to have hypothecated and recurrent funding. In those circumstances, the public profile of an all-Wales TS service is likely to be high and scrutiny of what it does (or does not do) far greater than under current arrangements. In that context, there is improved likelihood of effective scrutiny of an all-Wales TS service's legal metrology functions.

Although establishing an all-Wales TS service would create an all Wales body, it would (legally speaking) be part of LG. While the main driver for its establishment would be to secure effective TS delivery in Wales (for reasons previously mentioned), there would still be a requirement for effective local delivery, as well as cross-border delivery. It could be argued that ceasing to have a separate TSD for

each LWMA could undermine that position. That said, there seems no obvious reason why an all-Wales TS service cannot accommodate local presence. TSSNI is an obvious source for comparison; TSSNI's headquarters are in Belfast but there are four regional offices.

Policing also provides a source for comparison as policing, like TS, requires local and cross-boundary delivery. Although there is no all-Wales police force, each of the four police areas in Wales covers multiple LA areas. There is a common structural arrangement for each police force area in England and Wales; the building block is the Basic Command Unit (BCU). Each police force is divided into BCUs. The intention is that local policing can be managed within a BCU.⁸⁸⁰ Cross-boundary policing can then be accommodated into police force arrangements into which BCUs feed. What the TSSNI and policing precedents show is that structural arrangements can be put in place which can have effect at local and cross-boundary levels. There seems no reason why such more localised arrangements cannot be put in place within an all-Wales TS service.

The establishment of an all-Wales TS service can also help secure TS delivery locally if, through economies of scale, there is the opportunity to develop capacity beyond that available to 22 separate TSDs and to undertake work not previously undertaken (especially having regard to the effects of reduced LWMA resourcing since 2010). Interview findings reported that establishment of WIMLU and the NTSST resulted in this outcome. Thus, with WIMLU, illegal money lending was not previously challenged, and victims were not getting redress. Although established on an all-Wales basis, it has had local effect in a field where previously there had not been effective TS delivery.

Establishing an all-Wales TS service would also enable focus on those matters identified before under 'Better Ways of Doing Things': prosecution arrangements; avoiding conflict of interest; and distancing regulation from enforcement. Concerning prosecution arrangements, as under the LWMA model, an all-Wales TS service would continue to have both investigation and prosecution functions (ie,

⁸⁸⁰ Dennis O'Connor, *Closing the Gap: A Review of the 'Fitness for Purpose' of the Current Structure of Policing in England and Wales* (HM Inspectorate of Constabulary 2006). See also: Huw Evans, 'Do We Need an All-Wales Police Force?' [2013] Planet: The Welsh Internationalist 111.

Model 1 arrangements) but, given projected economies of scale, there could be the opportunity to develop arrangements which provide for de facto separation so that the prosecution function can be exercised at arm's-length from the investigation function. Those arrangements could also help better integrate civil and criminal enforcement capacity (in both investigations and prosecutions).

In terms of avoidance of conflict of interest, establishment of an all-Wales TS service brings with it potential advantages. As a larger more resilient organisation, the possibility of contracting out of services is less likely; on the basis that one of the drivers for taking that direction is to save money. So, according to Barnet London Borough Council, in carrying out a review of contracts outsourcing services to Capita:

Both contracts have delivered significant financial benefits since their commencement...and Capita has been instrumental in delivering efficiencies, service improvements and increased income across a range of services.⁸⁸¹

As an illustration concerning increasing reliance in practice, I15, a TS manager, in discussing projected collaboration between three LWMAs commented:

I am looking at potentially a 25% reduction...in staffing levels, given the levels of savings that I have to find. Hence the collaboration project we are working on, which will hopefully help...reduce the impact and increase resilience and sustainability of the service.

On the basis that such a view is correct, an all-Wales arrangement, with collaboration involving 22 LWMAs, can further 'increase resilience and sustainability'. Also, since it would be an all-Wales arrangement with a dedicated TS focus, there would be likely to be improved accountability than under existing arrangements for such issues to be monitored: eg, in ensuring that the TS role as facilitator of economic growth does not improperly influence on its enforcement function.

With all-Wales arrangements, there would be the means to ensure consistency of advice to traders throughout Wales. Under the PA scheme traders pay for a 'assured advice' throughout England and Wales. One finding from interviews was that this interfered in the objectivity of those providing advice. An all-Wales arrangement

⁸⁸¹ Barnet London Borough Council (n 680) 3.

would obviate the need for such arrangements within Wales as the effect of advice given to traders could automatically apply to whole of Wales and not be restricted to the area of a single LWMA. In addition, given economies of scale, an all-Wales TS service is more likely to have capacity to provide advice to traders without requiring payment; so more traders would benefit than currently do.

An all-Wales TS service would extricate TS from regulatory services brigading as it would be established outside of the individual LA administrative arrangements (eg, it could not be placed together with EH and licensing). This would give TS greater ability to distance itself from a perception as a regulator and develop its profile as an enforcer.

The establishment of an all Wales TS service under current arrangements would mean it would work with NTS (as LWMAs presently do). In Scotland there are separate arrangements and TS Scotland has taken over aspects of work carried out by NTS for England and Wales (see Chapter 9). This is, again, BEIS funded. Considering this difference, current NTS administrative arrangements could be adapted to reflect an all-Wales TS service with the introduction of separate Wales arrangements: eg, regarding BEIS funding for enforcement work and development of intelligence assessment.

‘Challenges to TS’ was an overarching theme identified in Chapter 10 and one of its sub-themes was TS professional identity fissures. Contributors to challenging professional identity included: the lack of a professional body to regulate the TS profession; TSO qualification uncertainty; lack of CPPD requirements; differential definitions of TSO; reducing professional numbers and lack of recruitment; concern over quality control in recruitment; and overall resource in pressures. Having an all-Wales TS would not address all these issues (eg, it would not be legally possible to establish a professional body to regulate the TS profession) but some issues could be addressed. An all Wales TS service would have economies of scale and resilience not possessed by individual LWMAs. Resourcing would be hypothecated and recurrent which would allow investment decisions to be made (whether in recruitment, training or service delivery). Interview findings (Chapter 10) suggested that these were outcomes associated with arrangements in Northern

Ireland. The same could also be achieved with an all-Wales TS service. Other aspects such as quality control in recruitment, CPPD and an agreed definition of TSO could also apply throughout Wales. These are all things that could contribute to improved professional identity in Wales and which could then feed through to improved TS delivery.

An all-Wales TS service should be a more sustainable and resilient organisation than individual LWMAs; and therefore be in a better position to meet enforcement requirements and (having regard to those matters in the critical theoretical framework) to promote economic efficiency, the rule of law, and human rights and justice. Those arrangements are more likely to facilitate establishing and developing connection between TS and devolved government (something seemingly established with policing) and, specifically, promotion of well-being (which has also been placed in the critical theoretical framework).

Conclusion

Although the discussion called for a fundamental review of TS, under current arrangements, that can only happen at a UK level. That call is supported by problems identified with the delivery of TS under the LWMA model. However, the current low profile that TS has at UK Government level (as well as other levels) makes this unlikely to happen in the immediate (and probably longer-term) future. As a marker of that low priority, at the point of this thesis' submission there is no follow-up White Paper to the Consumer Green Paper⁸⁸² published in April 2018. As TS is not devolved, a fundamental review is not open to WG but a review of how it is delivered within devolved competence is possible. This was originally, inferentially, proposed in the TS manifesto commitment with the call for an all-Wales TS service. This was not taken forward despite that commitment, but the option to go ahead is still available to WG and potentially would bring with it a number of advantages that could lead to more effective TS delivery, including effective delivery of its component parts (such as consumer protection, legal metrology and business protection).

There is a legal duty for LWMAs to enforce TS legislation. Literature Review and primary research findings suggest that there are material failures in this regard.

⁸⁸² BEIS (n 649).

There are objections to this position for various reasons: it is constitutional objectionable if legislation enacted is not enforced; TS is under a duty to promote the rule of law (which includes a duty, according to Bingham, to promote human rights); there is a separate duty to promote human rights under the HRA 1988; there is an adverse effect on economic efficiency: and there is injustice in consequence. Also, to contribute to effective enforcement, there is a need to ensure TS contributes to delivery of devolved government (such as in the promotion of well-being) in a way that policing does.

Because of these objections, the situation needs to be challenged. Although insufficient resourcing is an issue, due to need for cross-boundary responses, the LWMA structural base as a single LA area in Wales is flawed; a position exacerbated by LG reorganisation in 1996 when the number of LWMAs in Wales increased from eight to 22. Although still rooted in the LWMA model, establishing an all-Wales TS service has potential to address current challenges, and provide a platform for greater transparency, improved accountability and higher profile for TS. It is also from this platform that there are increased prospects for greater alignment and integration with devolved government delivery and related policy formulation.

Devolution in Wales is relatively recent and is still in a state of flux. There are more UK reserved competencies for Wales than for Scotland and Northern Ireland. Logic suggests that over time there will be greater devolution to Wales so that there is greater equality between the respective devolution settlements. Devolution of the justice system is an obvious area. Also, consumer protection is devolved in Northern Ireland, but due to UK EU membership has not in practice been exercised. This, therefore, does hint to the possibility of future devolution in an aspect of TS. More immediately relevant are arrangements in Scotland. NTS arrangements cover England and Wales. There are separate arrangements for Scotland whereby TS Scotland is BEIS funded and performs a similar role as NTS provides for England and Wales. There is no reason in principle why there could not be similarly administratively devolved arrangements working alongside an all-Wales TS service. Such integrated arrangements could also improve accountability for TS delivery in Wales and help improve TS contribution to devolved government delivery.

In undertaking the thesis there are limitations and these must be acknowledged. Contextual limitations include fluidity on a range of fronts. Since 2010 there has been sustained reduced resourcing which has severely impacted TS delivery. Running in parallel there has been the CLR and devolution. More recently, there has been ongoing uncertainty created by the UK decision to leave the EU. Responding to these variables can be problematic especially if there is continuing change that requires revision of previous evaluation, and where this is compounded by lack of certainty about eventual outcomes (whether regarding TS, devolution, leaving the EU or otherwise). That said, despite this flux, the need to secure and maintain a fair and safe trading environment remains (for various, previously articulated, reasons) and there is legislation in place which must be given material effect in all areas. Although there is flux, there is that core objective.

Recommendations

There are three recommendations:

1. Pending implementation of recommendations 2 and 3, that WG undertake a review of arrangements for TS delivery in Wales to the extent permitted within its devolved competence. That review should include consideration of all-Wales arrangements which can provide for effective delivery of TS (and its constituent parts) together with the protection of human rights within that delivery. The review should also define the TS portfolio more critically (so that non-LWMA work is excluded) and articulate how TS delivery can contribute to devolved government delivery.
2. That the UK Government undertakes a fundamental review of TS and considers, in particular, if the TS classification should be retained and, if not, how the constituent parts should be divided: eg, having separate arrangements for consumer protection and legal metrology delivery. That review should include consideration as to the protection of human rights and appropriate consultation with interested parties including WG, Welsh LG and TS in Wales.
3. Subject to that fundamental review, that there is a consequential review by UK Government concerning appropriate arrangements for delivery of TS, or of its constituent parts (as divided following the fundamental review). That review should consider discrete arrangements for Wales and whether TS (or its

constituent parts) should be devolved to Wales. That review should also include consideration as to the protection of human rights and appropriate consultation.

Note: Other than post-viva amendments and corrections, there were no additions to this thesis after 30 November 2019.

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Appendices

Appendix 1: Ethics Approval 24 October 2011

THE CARDIFF SCHOOL OF HEALTH SCIENCES
YSGOL GWYDDORAU IECHYD CAERDYDD



Cardiff's **metropolitan** university
prifysgol **metropolitan** Caerdydd

Monday, 24 October 2011
cshs/ethics /approved

Evans, Huw
MPhil/PhD
Cardiff School of Health Sciences
Llandaf Campus
Cardiff CF5 2YB

Dear Applicant

Re: Application for Ethical Approval: A Critique of Trading Standards In Wales - Post Devolutionary Developments, Practice And Potential

Ethics Committee Application Reference Number : 3927

Your ethics application, as shown above, was considered at the meeting of the School Research Ethics Committee on 10/12/2011.

I am pleased to inform you that your application for ethical approval was **APPROVED** subject to the conditions listed below – *please read carefully*.

Conditions of Approval

Your Ethics Application has been given a reference number as above. This **MUST** be quoted on all documentation relating to the project (E.g consent forms), together with the full project title.

Any changes in connection to the proposal as approved, must be referred to the Panel/Committee for consideration.

A full **Risk Assessment** must be undertaken for this proposal, and be made available to the Committee if requested.

Any untoward incident which occurs in connection with this proposal must be reported back to the Panel **without delay**.

Yours sincerely



Dr Louise Fielding
Director of Research
Chair of School Research Ethics Committee
Cardiff School of Health Sciences

Tel : 029 20416456
E-mail : lfielding@uwic.ac.uk

PLEASE RETAIN THIS LETTER FOR REFERENCE

PO Box 377 Western Avenue Cardiff CF5 2YB UK
Tel: +44 (0)29 2041 6070 Fax: +44 (0)29 2041 6982
web: www.uwic.ac.uk

Blwch SP 377 Rhodfa'r Gorllewin Caerdydd CF5 2YB DU
Ffôn: +44 (0)29 2041 6070 Ffacs: +44 (0)29 2041 6982
gwe: www.uwic.ac.uk

Appendix 2: Ethics Approval 2 February 2015



Cardiff
Metropolitan
University

Prifysgol
Metropolitan
Caerdydd

ethics/amend-approved

02-Feb-2015

Evans, Huw
PhD

Dear Applicant

Re: Application for Amendment to Existing Ethical Approval

Project Title: A Critique of Trading Standards In Wales - Post Devolutionary Developments, Practice And Potential

Project Ref. Number: 3927

Amendment Number: 1

Your application to amend your existing ethics approval, as shown above, was considered by the School Research Ethics Committee on 2/2/2015.

I am pleased to inform you that the requested Extension **was APPROVED**, subject to the conditions listed below – *please read carefully*.

Standard Conditions of Approval

1. Please continue to quote the original Project Reference number on all documentation relating to work undertaken on the project (E.g. consent forms).
2. A revised **Risk Assessment** must be undertaken for this proposal if the amendment involves a change in the protocol, and be made available to the Committee if requested.
3. Any further changes in connection to the proposal or amendments as approved, must be referred to the Panel/Committee for consideration **without delay quoting your Project Reference Number**. Changes to the proposed project may have ethical implications that require further consideration.
4. Any untoward incident which occurs in connection with this proposal must be reported back to the Panel **without delay**.
5. If your project involves the use of **human samples**, your approval is given on the condition that you or your supervisor **notify the HTA Designated Individual** of your intention to work with such material by **completing** the form entitled "Notification of Intention to Work with Human Samples". The form must be submitted to the PD (Sean Duggan), **BEFORE** any activity on this project is undertaken

This amendment of approval expires on **30/09/2016**. Please set a reminder on your Outlook calendar or equivalent if you need to continue beyond this extended date.

Yours sincerely

PLEASE RETAIN THIS LETTER FOR REFERENCE

Cardiff School of Health Sciences
Western Avenue,
Cardiff, CF5 2YB
Rheolfa'r Gorrlewin,
Caerdydd, CF5 2YB

Telephone/Ffôn
+44 (0)29 2041 6070
Fax/Ffacs
+44 (0)29 2041 6982

www.cardiffmet.ac.uk

Prof. Jorge Erusalimsky
Chair of School Research Ethics Committee (SREC)

Tel : 029 2041 6853

E-mail : jderusalimsky@cardiffmet.ac.uk

Appendix 3: Ethics Approval 17 March 2016



Cardiff
Metropolitan
University

Prifysgol
Metropolitan
Caerdydd

Thursday, 17 March 2016
cshs/ethics /approved

Evans, Huw
Staff Research
Cardiff School of Health Sciences

Dear Applicant

Re: Application for Ethical Approval: A Critique of Trading Standards In Wales - Post Devolutionary Developments, Practice And Potential

Ethics Reference Number : 7927

Your ethics application, as shown above, was considered by the Applied Community Sciences & Protection Ethics Panel on 16/3/2016

I am pleased to inform you that your application for ethical approval was **APPROVED**, subject to the conditions listed below – *please read carefully*.

Standard Conditions of Approval

- Your Ethics Application has been given a Project Reference number as above. This **MUST** be quoted on all documentation relating to the project (E.g. consent forms, information sheets), together with the full project title.
- All documents must also have the approved University Logo and the Version number in addition to the reference and project title as above.
- A full **Risk Assessment** must be undertaken for this proposal, as appropriate, and be made available to the Committee if requested.
- Any changes in connection to the proposal as approved must be referred to the Panel/Committee for consideration **without delay quoting your Project Reference Number**. Changes to the proposed project may have ethical implications and so must be approved.
- Any untoward incident which occurs in connection with this proposal must be reported back to the Panel/Committee **without delay**.
- If your project involves the use of **samples of human origin**, your approval is given on the condition that you or your supervisor **notify the School** of your intention to work with such material by **completing Part One** of the form entitled "*Notification of Intention to Work with Human Relevant Material or Human Bodily Material*" which **must** be obtained from the PD (Sean Duggan), **BEFORE** any activity on this project is undertaken.

This approval expires on **16/3/2017**. Please set a reminder on your Outlook calendar or equivalent if you need to continue beyond this approval date. It is your responsibility to reapply / request extension if necessary.

Cardiff School of Health Sciences
Western Avenue,
Cardiff, CF5 2YB
Ysgol Gwyddorau Iechyd Caerdydd
Rhodfa'r Gorllewin,
Caerdydd, CF5 2YB

TelephoneFfôn
+44(0)29 2041 6070
FaxFfacs
+44 (0)29 2041 6982
www.cardiffmet.ac.uk

Yours sincerely

gKarani

Professor George Karani
Chair of Applied Community Sciences & Protection Ethics Panel
Cardiff School of Health Sciences

Tel : 029 20416855

E-mail : gkarani@cardiffmet.ac.uk

Cc: Sandry, Alan

PLEASE RETAIN THIS LETTER FOR REFERENCE



Cardiff
Metropolitan
University

Prifysgol
Metropolitan
Caerdydd

Cardiff School of Health Sciences
Western Avenue,
Cardiff, CF5 2YB
Ysgol Gwyddorau Iechyd Caerdydd
Rhodfa'r Gorrlewin,
Caerdydd, CF5 2YB

Telephone²**Ffôn**
+44 (0)29 2041 6070
Fax**Ffacs**
+44 (0)29 2041 6982
www.cardiffmet.ac.uk

Appendix 4: Ethics Approval 15 March 2017



Cardiff
Metropolitan
University

Prifysgol
Metropolitan
Caerdydd

Friday, 17 March 2017
cshs/ethics /approved

Evans, Huw
Staff Research
Cardiff School of Health Sciences

Dear Applicant

Re: Application for Ethical Approval: A Critique of Trading Standards In Wales - Post Devolutionary Developments, Practice And Potential

Project Reference Number : 7927

Your ethics application, as shown above, was considered by the Applied Community Sciences Ethics Panel on 15/03/2017.

I am pleased to inform you that your application for ethical approval was **APPROVED**.

Minor issues may still need addressing before you commence any work – if so these will be listed below.

Where changes to the information sheet, consent form and/or procedures are deemed necessary you must submit revised versions to the relevant ethics inbox. If you are a student – your supervisor must do this on your behalf.

Note: Failure to comply with any issues listed above will nullify this approval.

Standard Conditions of Approval

1. Your Ethics Application has been given a Project Reference number as above. This **MUST** be quoted on all documentation relating to the project (E.g. consent forms, information sheets), together with the full project title.
2. All documents must also have the approved University Logo and the Version number in addition to the reference and project title as above
3. A full **Risk Assessment** must be undertaken for this proposal, as appropriate, and be made available to the Committee if requested.
4. Any changes in connection to the proposal as approved, must be referred to the Panel/Committee for consideration **without delay quoting your Project Reference Number**. Changes to the proposed project may have ethical implications so must be approved.
5. Any untoward incident which occurs in connection with this proposal must be reported back to the Panel **without delay**.
6. If your project involves the use of **human samples**, your approval is given on the condition that you or your supervisor **notify the HTA Designated Individual** of your intention to work with such material by **completing** the form entitled *"Notification of Intention to Work with Human Samples"*. The form must be submitted to the PD (Sean Duggan), **BEFORE** any activity on this project is undertaken

Cardiff School of Health Sciences
Western Avenue,
Cardiff, CF5 2YB
Ysgol Gwydderau Iechyd Caerdydd
Rheolfa'r Gorflewin,
Caerdydd, CF5 2YB

Telephone: 0303
+44 (0)29 2041 6070
Fax/Facsimile
+44 (0)29 2041 6062
www.cardiffmet.ac.uk



Cardiff
Metropolitan
University

Prifysgol
Metropolitan
Caerdydd

This approval expires on **15/03/2018**. It is your responsibility to reapply / request extension if necessary.

Yours sincerely

Professor George Karani
Chair of Applied Community Sciences & Protection Ethics Panel
Cardiff School of Health Sciences

Tel : 029 20416855

E-mail : gkarani@cardiffmet.ac.uk

Cc: Sandry, Alan

PLEASE RETAIN THIS LETTER FOR REFERENCE

Cardiff School of Health Sciences
Western Avenue,
Cardiff, CF5 2YB
Ysgol Gwyddorau Iechyd Caerdydd
Rhodfa'r Gofflewin,
Caerdydd, CF5 2YB

Telephone/fôn
+44 (0)29 2041 6070
Fax/facs
+44 (0)29 2041 6982
www.cardiffmet.ac.uk



Cardiff
Metropolitan
University

Prifysgol
Metropolitan
Caerdydd

*Undated - but sent as an
attachment to an email dated 16.2.18*

Cardiff School of Education,
Cardiff Metropolitan University
Cyncoed campus,
Cyncoed Rd,
Cardiff,
CF23 6XD.

Re: Confirmation of Ethical Approval

This letter is meant as confirmation that the research conducted by Mr Huw Evans, in fulfilment of the degree of PhD entitled "**A Critique of Trading Standards In Wales - Post Devolutionary Developments, Practice And Potential**" has received ethical approval by the Cardiff School of Education's Research Ethics Committee.

The ethics code attributed to this project is: CSE20171808

Consequently, it is confirmed that the project meets the regulations outlined by the Cardiff Metropolitan University's Research Ethics Framework, and where appropriate the Human Tissue Authorities principles and conventions.

You are advised that a copy of this ethical approval letter should be presented in the appendices of your final thesis.

Yours sincerely,

Prof Gary Beauchamp
Associate Dean: Research
Cardiff School of Education
T: 02920 417262
E: gbeauchamp@cardiffmet.ac.uk

Cardiff School of Education
Dean of School:
Professor Dan Davies
Cyncoed Road, Cardiff,
CF23 6XD
Ysgol Addysg Caerdydd
Deon yr Ysgol:
Yr Athro Dan Davies
Heol Cyncoed, Caerdydd,
CF23 6XD

TelephoneFfôn
+44 (0)20 2041 6771
FaxFfacs
+44 (0)20 2041 6986
EmailEbost
cse@cardiffmet.ac.uk
www.cardiffmet.ac.uk

Appendix 6: Interview Participant Information Sheet
[Cardiff Metropolitan University Logo]

Participant Information Sheet

Cardiff Met reference number: 3927

Project researcher: Huw Evans

Title of Project: A Critique of Trading Standards in Wales - Post Devolutionary Developments, Practice and Potential

Aim of project

The aim is to investigate and critically evaluate how Trading Standards might most effectively be delivered in Wales. In assessing effectiveness the touchstone will be in assessing how successful that delivery might be in achieving an environment where fair trading is secured and protected.

Background to project

The project researcher is a lecturer in the Cardiff School of Health Sciences at Cardiff Metropolitan University who, through teaching commitments, has developed an interest in trading standards law. Prior to working as a lecturer, the project researcher worked as a solicitor in the Welsh Office and the National Assembly for Wales and was involved in the passing of the Government of Wales Act 1996 and its implementation (the legislation that established the National Assembly for Wales). The combination of those two interests directly led to the formulation of the project ie specific consideration of trading standards in a Wales context.

Participation in the Research Project

As part of the research project the project researcher is carrying out interviews with persons identified as potentially being able to contribute to furthering the project's aim eg trading standards officers, elected politicians, policy formulators. You have been identified as falling within that category of person.

Your participation in the project is entirely voluntary and you are free to withdraw at any time without penalty or giving a reason.

No direct and tangible benefit will arise from your participation but you will have the knowledge that you are making a material and valued contribution to the research project.

Are there any risks?

It is not considered that risks are significant in carrying out interviews. Time, date, place and length of interview will be agreed in advance. Unless otherwise agreed in writing, where information not in the public domain is obtained, its source will not be identified and confidentiality will be maintained. In particular, this is important in the case of a participant who works for or on behalf of an organisation and who is giving personal views. Information will also be presented in such a way to avoid

identification of a participant by implication eg if you agree to the use of anonymised quotations.

Your rights

Participation in the research project does not mean you forfeit any legal rights. In the unlikely event of something going wrong, Cardiff Metropolitan University fully indemnifies its staff, and participants are covered by its insurance.

What happens to the interview results?

The transcribed interviews will be studied and relevant data extracted and used in furtherance of the project aim e.g. as part of the completed project work, as informing a particular line of investigation, contributing to an evidence base, as part of a conference presentation, etc. The data extracted may also be used for further research activity subject to same terms eg in relation to confidentiality and anonymity.

Confidentiality

Interviews will be recorded and transcribed. You will be offered a copy of the transcript and invited to comment. Recordings and transcribed notes will be securely stored; to which only the project researcher and his supervisors will have access.

Names, addresses and other personal details will be kept separately from recordings and transcribed notes and be securely stored. Such recordings and notes will be accompanied by a coded reference through which only the project researcher or his supervisors can identify a participant.

You will be given a copy of this sheet to keep, together with a copy of your consent form

Contact Details:

Huw Evans

Cardiff School of Health Sciences/Ysgol Gwyddorau Iechyd Caerdydd
Cardiff Metropolitan University/Prifysgol Fetropolitan Caerdydd

Llandaff Campus/Campws Llandaf
200 Western Avenue/200 Rhodfa'r Gorllewin
Cardiff/Caerdydd
CF5 2YB

Ffôn: 029 2041 6887

E-bost: hdevans@cardiffmet.ac.uk

PARTICIPANT CONSENT FORM*

Cardiff Met Reference Number: 3927

Name of Participant:

Title of Project: A Critique of Trading Standards in Wales - Post Devolutionary Developments, Practice and Potential

Name of Researcher: Huw Evans

Participant to complete this section: Please initial each box.

1. I confirm that I have read and understand the information sheet for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily. ☐

2. I understand that my participation is voluntary and that I am free to withdraw at any time without penalty or giving a reason. ☐

3. I agree to take part in the above study. ☐

4. I agree to the interview being audio recorded. ☐

5. I agree to the use of anonymised quotes in publications. ☐

Signature of participant

Date

Name of person taking consent

Signature of person taking consent

Date

** When completed, 1 copy for participant & 1 copy for researcher*

Appendix 8: NAW Candidate 2016 Election Survey - Questions

Before answering questions, candidates were invited to confirm each of the following statements

- A.** I confirm that I have read and understand the information sheet for the above study. I have had the opportunity to consider the information and ask questions
- B.** I understand that my participation is voluntary and that I am free to withdraw.
- C.** I agree to take part in the above study.
- D.** I agree to the use of anonymised quotes in publications.

Questions

- 1.** What do you think is the role of Trading Standards?
- 2.** Do you think in practice that Trading Standards fulfils that role?
 - a.** Not sure **b.** yes **c.** No
- 3.** Please give reasons for your response to question 2.
- 4.** What do you think are the positive aspects of the service delivered by Trading Standards?
- 5.** For any positive aspects identified in question 4, what do you think are the factors that contribute to this outcome?
- 6.** What aspects of the service that Trading Standards delivers could be improved?
- 7.** For any aspects identified in question 6, what do you think could be done to achieve improvement?
- 8.** In what way do you think that trading standards can contribute to the delivery of Welsh Government?
- 9.** Please add anything else you consider appropriate not mentioned previously.

Appendix 9: NAW Candidate 2016 Election Survey - Candidate Email

Dear National Assembly for Wales candidate

I am a lecturer at Cardiff Metropolitan University who is studying for a PhD. My thesis concerns the Trading Standards service in Wales. As part of my study I'm writing to NAW candidates for the May 2016 elections seeking completion of a short on-line questionnaire. Ethics approval has been obtained (reference 3927).

NAW candidates are being approached as I wish to explore the relationship between Trading Standards and other policy functions delivered in Wales, and evaluate the contribution that Trading Standards makes (or is perceived to make) to the public good in Wales.

Therefore, it would be very much appreciated if you could complete the questionnaire, please - which can be accessed at:

[link]

It should take no more than 15 minutes to complete.

Your participation is entirely voluntary and responses will be kept confidential. The intention is to aggregate data from individual responses to identify themes or issues arising. More detailed information is contained in the attached participation sheet.

Thank-you for your time and attention. Please feel free to make direct contact to discuss anything.

Regards

Huw Evans

Appendix 10: NAW Candidate 2016 Election Survey - Participant Information Sheet

[Cardiff Metropolitan University logo]

Participant Information Sheet

Cardiff Met reference number: 7927

PhD researcher: Huw Evans

Title of PhD: A Critique of Trading Standards in Wales - Post Devolutionary Developments, Practice and Potential

Aim of PhD: The aim is to investigate and critically evaluate how Trading Standards might most effectively be delivered in Wales.

Background to PhD: The researcher lectures at Cardiff Metropolitan University and, through teaching commitments, developed an interest in Trading Standards law. Prior to being a lecturer, the researcher was a solicitor in the Welsh Office and the National Assembly for Wales. These experiences led to formulation of the PhD project.

Participation: As part of the PhD project the project researcher is carrying out a questionnaire survey of candidates standing for election the National Assembly for Wales (NAW) in May 2016 about their views and perceptions of Trading Standards - the intention is to get a 'snapshot', which will inform the investigation. Candidates are being asked to complete a short on-line questionnaire which should take no more than 15 minutes to complete.

Why are NAW candidates being asked? Although Trading Standards (for the most part) is not devolved it is delivered through local government (which is devolved) - and in association with other local government devolved functions. As part of the PhD project, the researcher is exploring the relationship between Trading Standards and devolved areas, together with related matters.

Your involvement: Your participation is entirely voluntary. No direct and tangible benefit will arise to you but you will have the knowledge that you are making a material and valued contribution to the PhD project. It is not considered that there are any significant risks in participating.

What happens to the questionnaire results? Completed questionnaires will be studied and relevant data extracted and used in furtherance of the project aim.

Confidentiality: Unless express permission is obtained, data will not be presented in such a way that any individual can be identified. Questionnaire responses will be securely stored on a password protected computer.

Contact Details:

[Included]

Appendix 11: NAW Candidate 2016 Election Survey - 2nd Candidate Email
Dear National Assembly for Wales candidate

I am resending my earlier e-mail inviting those who have not yet responded to please consider doing so. I have already had a number of responses but I received several comments from candidates that there may be more time to do this post the election – hence the mail.

I have tried to exclude sending this to people who have told me directly that they had responded. But because individual respondents completing the questionnaire are not identifiable, inevitably there will be some receiving this who have already done so. My apologies for this.

Thank-you for your time.

Regards

Huw

Appendix 12: PCC Candidate 2016 Election Survey - Questions

Before answering questions, candidates were invited to confirm each of the following statements

A. I confirm that I have read and understand the information sheet for the above study. I have had the opportunity to consider the information and ask questions

B. I understand that my participation is voluntary and that I am free to withdraw.

C. I agree to take part in the above study.

D. I agree to the use of anonymised quotes in publications

Questions

1. What do you think the role of Trading Standards to be?

2. How relevant do you consider Trading Standards enforcement to be to Police enforcement?

- a.** Not sure **b.** Not relevant **c.** Moderately relevant. **d.** Reasonably relevant
- e.** Significantly relevant

3. Please give reasons for your response to question 2.

4. In what areas of enforcement do you think there is a relationship between Police and Trading Standards work?

5. For any areas identified in question 4, please explain why you think there is a relationship and how important you think is that relationship.

6. For any areas identified in question 4, is that relationship between Police and Trading Standards reflected in working arrangements and operational practice?

- a.** If yes, please comment on those arrangements and practice.
- b.** If no, why do you think this is the case?

7. Please add anything else you consider appropriate not mentioned previously.

Appendix 13: PCC Candidate 2016 Election Survey - Candidate Email

Dear Police and Crime Commissioner Candidate

I am a lecturer at Cardiff Metropolitan University who is studying for a PhD. My thesis concerns the Trading standards service in Wales. As part of my study I'm writing to PCC candidates for the May 2016 elections seeking completion of a short on-line questionnaire. Ethics approval has been obtained (reference 3927).

PCC candidates are being approached as I wish to explore the relationship between Trading Standards and policing, and evaluate the contribution that Trading Standards makes (or is perceived to make) to the public good. Also, although the project relates to Wales, this relationship applies in England too – **hence the survey is not confined to PCC candidates in Wales.**

Therefore, please would you complete the questionnaire, which can be accessed at:
[Link]

It should take no more than 15 minutes to complete. Please could you also complete it within 14 days, if at all possible.

Your participation is entirely voluntary and responses will be kept confidential. The intention is to aggregate data from individual responses to identify themes or issues arising. More detailed information is contained in the attached participation sheet.

Thank-you for your time and attention. Please feel free to make direct contact to discuss anything.

Regards

Huw Evans

Appendix 14: PCC Candidate 2016 Election Survey - Participant Information Sheet

[Cardiff Metropolitan University logo]

Participant Information Sheet

Cardiff Met reference number: 7927

PhD researcher: Huw Evans

Title of PhD: A Critique of Trading Standards in Wales - Post Devolutionary Developments, Practice and Potential

Aim of PhD: The aim is to investigate and critically evaluate how Trading Standards might most effectively be delivered in Wales.

Background to PhD: The researcher lectures at Cardiff Metropolitan University and, through teaching commitments, developed an interest in Trading Standards law. Prior to being a lecturer, the researcher was a solicitor in the Welsh Office and the National Assembly for Wales. These experiences led to formulation of the PhD project.

Participation: As part of the PhD project the researcher is carrying out a questionnaire survey of candidates standing for election to the office of Police and Crime Commissioner (PCC) in May 2016 about their views and perceptions of Trading Standards and its relationship with policing - the intention is to get a 'snapshot', which will inform the investigation. Candidates are being asked to complete a short on-line questionnaire which should take no more than 15 minutes to complete.

Why are PCC candidates being asked? As part of the PhD project, the researcher is exploring the relationship between Trading Standards and Police enforcement, together with related matters. Also, although the project relates to Wales, this relationship applies in England too – hence the survey is not confined to PCC candidates in Wales.

Your involvement: Your participation is entirely voluntary. No direct and tangible benefit will arise to you but you will have the knowledge that you are making a material and valued contribution to the PhD project. It is not considered that there are any significant risks in participating.

What happens to the questionnaire results? Completed questionnaires will be studied and relevant data extracted and used in furtherance of the project aim.

Confidentiality: Unless express permission is obtained, data will not be presented in such a way that any individual can be identified. Questionnaire responses will be securely stored on a password protected computer.

Contact Details:

[Included]

Appendix 15: PCC Candidate 2016 Election Survey - 2nd Candidate Email

Dear Police and Crime Commissioner Candidate

I am resending my earlier e-mail inviting those who have not yet responded to please consider doing so (see link below). I have already had a number of responses but I received several comments from candidates that there may be more time to do this post the election – hence the mail.

I have tried to exclude sending this to people who have told me directly that they had responded. But because individual respondents completing the questionnaire are not identifiable, inevitably there will be some receiving this who have already done so. My apologies for this.

Thank-you for your time.

Regards

Huw

Appendix 16: Rule of Law - Tom Bingham's Eight Sub-principles and TS Application

Sub-principle	Application
1. <i>The accessibility of the law</i>: The law must be accessible and so far as possible intelligible, clear and predictable. ⁸⁸³	The legal framework guides trading activity, whether from the point of view of trader, consumer or TS.
2. <i>Law not discretion</i>: questions of legal rights and liability should ordinarily be resolved by application of the law and not the exercise of discretion. ⁸⁸⁴ Bingham does not argue that official decision-making 'should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No decision may be legally unfettered'. ⁸⁸⁵	Questions for TS are ordinarily resolved by application of the law. And even where there is discretion permitted, this will be exercised in accordance with recognised guidelines or principles: eg, a decision to prosecute involves two tests: application of the law (identifying potential offences and related sufficiency of evidence); second, if the first test is met, a decision is then made whether it is in the public interest to prosecute (exercise of discretion guided by a published enforcement policy). ⁸⁸⁶ Breach of the policy will render the organisation potentially subject to judicial review.
3. <i>Equality before the law</i>: the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. ⁸⁸⁷	The effectiveness of enforcement activity is a key feature to achieving equality: ie, to secure that the laws in practice apply to everyone. To a large part this depends on the robustness of the legal framework; such as consumers having rights which contribute to achieving equality of bargaining power; and TS having adequate powers. But even if the legal framework is sound, reduced effectiveness of enforcement activity through, eg, decreased resourcing can detract from securing equality.
4. <i>The exercise of power</i>: ministers and public officers at all levels must exercise powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred,	This applies directly to an enforcer such as the TS. TS has powers conferred on it and it must exercise those powers in the way described. There are consequences if this does not happen: eg, liability to judicial review, potential tortious liability, and

⁸⁸³ Bingham (n 100) ch 3.

⁸⁸⁴ Ibid ch 4.

⁸⁸⁵ Ibid 54.

⁸⁸⁶ CPS (n 436).

⁸⁸⁷ Bingham (n 100) ch 5.

without exceeding the limits of such powers and not unreasonably. ⁸⁸⁸	potential criminal liability such as for misconduct in a public office.
5. Human rights: the law must afford adequate protection of fundamental human rights. ⁸⁸⁹	Trading law can provide protection of such rights: eg, product safety law aims to prevent people suffering harm and contributes to upholding the right to life (article 2, ECHR) and the right to security of person (article 5, ECHR); laws designed to prevent UCPS such as aggressive and threatening selling can uphold a person's right not to suffer degrading treatment (article 3, ECHR).
6. Dispute resolution: means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve. ⁸⁹⁰	The ideal is that civil justice must be effective and accessible. Other dispute resolution mechanisms have a role: eg, arbitration or ombudsmen. The effectiveness of the overall dispute resolution system has a relationship with TS activity. Effective civil dispute resolutions can ensure consumers or traders obtain redress, and therefore promote fair trading. There is linkage between trading activity which has both criminal and civil consequences. If effective civil dispute resolution means that transgressors are held to account, this can reduce criminal activity. TS also provides advice and education to consumers and traders which can improve the effectiveness of people's efforts in seeking resolution and redress or preventing detriment.
7. A fair trial: adjudicative procedures provided by the state should be fair. ⁸⁹¹	Such procedures should be fair and extend to both civil and criminal matters. This should also include appropriate remedies.
8. The rule of law in the international legal order: the rule of law requires compliance by the state with its obligations in international law as in national law. ⁸⁹²	This has increasing significance to trade given the international context of much trading activity, especially, through the advance of on-line trading.

⁸⁸⁸ Ibid ch 6.

⁸⁸⁹ Ibid ch 7.

⁸⁹⁰ Ibid ch 8.

⁸⁹¹ Ibid ch 9.

⁸⁹² Ibid ch 10.

Appendix 17: UDHR, ECHR and TS

UDHR	ECHR	TS related comment
Article 3: Everyone has the right to life. .	Article 2: Everyone's right to life shall be protected by law	In a trading context this has relevance to, say, product safety.
Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.	Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.	Inhuman or degrading treatment can occur in the context of an economic relationship where there is unequal power distribution between parties: eg, in unlicensed moneylending where effective economic enslavement arises.
Article 3: Everyone has the right to...liberty and security of person.	Article 5: Everyone has the right to liberty and security of person. No one shall be deprived of [her or] his liberty save in the following cases in accordance with the procedure prescribed by law. The 'cases' are not reproduced but include, persons detained after lawful conviction for an offence]	On a narrow interpretation liberty could be confined to physical liberty. Such a limitation adopts a legalistic approach. If human rights are viewed as ethical claims that limitation is not sustainable. Clearly 'liberty' includes physical liberty but liberty as a concept is much wider as it incorporates 'freedom' in its broadest sense. So, for example, it can include economic liberty, whether of trader or consumer. The fact that specific freedoms are articulated (eg, expression, peaceful assembly and association) and their exercise would

		also fall within exercise of liberty should not detract from that wider interpretation.
Article 12: No one shall be subjected to arbitrary interference with [her or] his privacy, family, home or correspondence, nor to attacks upon [her or] his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.	Article 8: Everyone has the right to respect for [her or] his private and family life, [her or] his home and [her or] his correspondence	In a TS context, this is most obviously relevant to how TS exercises its enforcement role. Any interference in private matters (eg, in exercise of investigatory powers) must be justified and not arbitrary.
Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and seek, receive and impart information and ideas through any media and regardless of frontiers.	Article 10: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority regardless of frontiers.	In a trading context, this can apply to advertising, product reviews, journalism and other media coverage.
Article 20: Everyone has the right to freedom of peaceful assembly and association.	Article 11: Everyone has the right to freedom of peaceful assembly and freedom of association with others.	In a trading context, this can apply to membership of trade associations or consumer groups.
Article 17(1): Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of [her or] his property.	Article 1 of the First Protocol: Every natural or legal persons is entitled to peaceful enjoyment of [her,] his [or its] possessions. No one shall be deprived of [her,] his [or its] possessions except in the public interest and subject to the conditions provided for by law by the general principles of international law.	Implicit in the right to hold property is freedom to trade (as part of liberty). In a TS context, this is most obviously relevant to how the TS exercises its enforcement role. Any interference in peaceful enjoyment, (eg, exercising search and seizure powers) must not be arbitrary.

Appendix 18: ECHR and Corporations

Although some ECHR rights have no direct applicability to, and cannot confer protection on, a corporate person (eg, article 2 (right to life)) they will have indirect applicability. A trader having corporate status acts through its directing mind (its directors, senior officers). Those individuals, as natural persons will have ECHR rights. If they choose to exercise those ECHR rights through the vehicle of corporate personality, it can be asked whether application of those rights be restricted for that reason. They should not because ECHR rights apply universally and without discrimination (article 14 reaffirms this). Therefore, if ECHR rights apply to natural persons acting in their capacity as part of the directing mind of a corporate person, there is vicarious application of those rights through the corporate person.

Some ECHR rights have direct applicability to a corporate person. This might be through direct reference or through case law. Article 1 of the First Protocol (protection of property) confers protection on each 'natural or legal person'. Each person is entitled to 'peaceful enjoyment' of possessions. If there is a right to 'enjoy' possessions an ancillary right to acquire and dispose of possessions can be inferred. Specifically, this can incorporate trading. No one can be deprived of possessions 'except in the public interest and subject to...law'. This establishes linkage with article 6 (right to a fair trial). As to case law, eg, the ECtHR has also recognised that article 10 (freedom of expression) applies to corporate (legal) persons. Of prominence have been cases concerning freedom of the press.⁸⁹³ For trading, common application of article 10 would be in the contexts of advertising or lobbying.

If ECHR rights confer protection on a corporate person, then reciprocal duties regarding upholding others' rights must logically apply too. In a trading context one manifestation of this is consumer protection measures. Addressing inequality of bargaining between a consumer and a powerful corporate person can be viewed as upholding a consumer's freedom of choice and economic liberty of person under article 5. This aspect would also be relevant to business protection where, say, there is inequality of bargaining power between traders, or where illegitimate trading undermines legitimate trading.

⁸⁹³ See, eg: *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245. The ECtHR ruled that preventing publication of information by the *Sunday Times* about the drug thalidomide breached article 10.

Appendix 19: Examples of EU Law Conferring Functions on LWMAs

EU Law	UK Implementation Legislation
Directive 1998/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests ([1998] OJ L166/51)	Enterprise Act 2002, Part 8.
<p>Directive 1990/385/EEC on the approximation of the laws of the Member States relating to active implantable medical devices ([1990] OJ L189/17)</p> <p>Directive 1993/42/EEC concerning medical devices ([1993] OJ L169/1)</p> <p>Directive 1998/79/EC of the European Parliament and of the Council on in vitro diagnostic medical devices ([1998] OJ L331/1)</p>	Medical Devices Regulations 2002 (SI 2002/618)
Directive 1998/6/EC of the European Parliament and of the Council on consumer protection in the indication of prices of products offered to consumers ([1998] OJ L 80/27)	Price Marking Order 2004 (SI 2004/102)
Directive 2002/65/EEC of the European Parliament and of the Council concerning the distance marketing of consumer financial services ([2002] OJ L271/16)	Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095)
Directive 2001/95/EC of the European Parliament and of the Council on general product safety ([2002] OJ L11/4)	General Product Safety Regulations 2005 (SI 2005/1803) [Enforcement functions are given to LAs but not in their capacity as LWMAs. In practice, however, those functions are exercised by TSOs]
Directive 2006/114/EC of the European Parliament and of the Council concerning misleading and comparative advertising ([2006] OJ L376/ 21)	Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276)
Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices ([2005] OJ L149/22)	Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)
Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers ((2008) OJ L133/66)	Consumer Credit (EU Directive) Regulations 2010 (SI 2010/1010)
Directive 2008/122/EC of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts ([2009] OJ L33/10)	Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/ 2960)

Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys ([2009] OJ L170/1)	Toys (Safety) Regulations 2011 (SI 2011/1881)
Directive 2010/30/EU of the European Parliament and of the Council on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products ([2010] OJ L153/1)	Energy Information Regulations 2011 (SI 2011/1524)
Directive 2010/31/EU of the European Parliament and of the Council on the energy performance of buildings ([2010] OJ L153/13)	Energy Performance of Buildings (England and Wales) Regulations 2012 (SI 2012/3118)
Regulation 2011/305 EU of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products ([2011] OJ L88/5)	Construction Products Regulations 2013 (SI 2013/1387) [The regulations provide for the operation of Regulation 2011/305]
Regulation 2009/1223/EU of the European Parliament and of the Council on cosmetic products ([2009] OJ L342/59)	Cosmetic Products Enforcement Regulations 2013 (SI 2013/1478) [The regulations provide for the enforcement of Regulation 2009/1223]
Directive 2011/83/EU of the of the European Parliament and of the Council on consumer rights ([2011] OJ L304/64)	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)
<p>Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees ([1999] OJ L171/12)</p> <p>Directive 1993/13/EEC of the Council on unfair terms in consumer contracts ([1993] OJ LL 95/29)</p>	Consumer Rights Act 2015
<p>Directive 2013/29/EU of the European Parliament and of the Council on the harmonisation of the laws of member States relating to the making available on the market of pyrotechnic articles ([2013] OJ L178/27)</p> <p>Directive 2014/58/EU of the European Commission setting up a system for the traceability of pyrotechnic articles ([2014] OJ L155/28).</p>	Pyrotechnic Articles (Safety) Regulations 2015 (SI 2015/1553)
Directive 1994/62/EC of the European Parliament and the Council on packaging and packaging waste ([1994] OJ L365/10)	Packaging (Essential Requirements) Regulations 2015 (SI 2015/1640)
Directive 2014/30/EU of the European Parliament and of the Council on the harmonisation of the laws of the Member	Electromagnetic Compatibility Regulations 2016 (SI 2016/1091)

States relating to electromagnetic compatibility ([2014] OJ L96/79)	
Directive 2014/35/EU of the European Parliament and of the Council on the harmonisation of the laws of Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits ([2014] OJ L96/357)	Electrical Equipment (Safety) Regulations 2016 (SI 2016/1101)
Directive 2014/68/EU of the European Parliament and of the Council on the harmonisation of the laws of Member States relating to the making available on the market of pressure equipment) ([2014] OJ L189/64)	Pressure Equipment (Safety) Regulations 2016 (SI 2016/1105)
Directive 2014/31/EU of the European Parliament and of the Council on the harmonisation of the laws of Member States relating to the making available on the market of non-automatic weighing instruments ([2014] OJ L96/107)	Non-automatic Weighing Instruments Regulations 2016 (SI 2016/1152)
Directive 2014/32/EU of the European Parliament and of the Council on the harmonisation of the laws of the Member States relating to the making available on the market of measuring instruments ([2014] OJ L96/149)	Measuring Instruments Regulations 2016 (SI 2016/1153)
Directive 2013/53/EU of the European Parliament and of the Council on recreational watercraft and personal watercraft ([2013] OJ L354/90)	Recreational Craft Regulations 2017 (SI 2017/737)
Regulation 2016/425/EU of the European Parliament and of the Council on personal protective equipment ([2016] OJ L81/51)	Protective Equipment (Enforcement) Regulations 2018 (2018/390) [The regulations provide for the enforcement of Regulation 2016/425]
Directive 2014/53/EU of the European Parliament and of the Council on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment ([2014] OJ L153/62)	Radio Equipment Regulations 2017 (SI 2017/1206)
Regulation 2016/426/EU of the European Parliament and of the Council on appliances burning gaseous fuels ([2016] OJ L81/99)	Gas Appliances (Enforcement) and Miscellaneous Amendments Regulations 2018 (SI 2018/389) [The regulations provide for the enforcement of Regulation 2016/426]
Directive 2015/2302/EU of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements ([2015] OJ L326/1)	Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634)

Appendix 20: Three TS Case Studies

This appendix contains three TS case studies that arose from primary research interviews (CS1, CS2 and CS3). Reference is made to them in Chapters 10, 11 and 13.

Case Study 1 (CS1) – A Wales LWMA Case

This was a serious and large-scale call centre fraud tried in the Crown Court led by a QC. Charges included conspiracy to defraud, and fraud of, vulnerable complainants. Although TS took the lead, the Department for Work and Pensions was also involved as there were allegations of benefit fraud. There were 17 defendants and 14 were convicted. Sentences ranged from immediate and suspended custodial sentences to community orders.

There was investigatory and legal complexity: eg, use of CCTV, computer forensics, voice and handwriting analysis, surveillance, search warrants. There was joint-working with the police in the investigatory stage: eg, there were arrests and use of bail. There was execution of secondary search warrants: eg, of accountants' premises. Vulnerable witnesses had to be interviewed and supported: eg, there was a need to handle witnesses sensitively; when contacted by TSOs some witnesses thought they were being contacted by the fraudsters.

There were significant financial implications for the LWMA irrespective of the outcome; although successful, meaningful costs were not recoverable. Authority to proceed with the case was given by the LA chief executive. It cost more than the TS budget. There was some support funding through NTS (computer forensics, voice analysis, barrister and QC costs) as it was a unique case. Some costs were also shared with the Department for Work and Pensions.

Although linked to breaches of TS legislation there was a view that this should have been a police case due to its serious nature: eg, multiple and systematic fraud exploiting vulnerable people. Although the police co-operated with TS in the investigation: (eg, in searches, arrests, police force space and staff), the police had been unwilling to take the case.

There were huge implications for TS time because of time required to be dedicated to the case. Other more routine TS work was still required to be done but less of it could be done. This was against a background of reduced TS resourcing and, specifically, at that point reducing TS numbers of staff from 17 to 15. There was insufficient capacity within the in-house legal department to support the case and external private practice lawyers had to be recruited. On reflection about the experience, the LWMA would not take on a similar case again.

The media had played a beneficial role in the investigation through, eg, publicity resulting in potential witnesses coming forward. But the process had to be managed because there was also potential for publicity to hinder investigatory effort; publicity might unintentionally alert those subject to investigation about TS intentions and in consequence destroy or hide evidence ('covering of tracks'). There was also the possibility that media coverage might adversely affect a fair trial.

This case involved a group who deliberately targeted older victims to fraudulently carry out building or related work to their properties: eg, overpriced, substandard and often unnecessary driveway work and home repairs. The case covered eight LA areas. Victim losses were over £70,000. Immediate and suspended custodial sentences were imposed, as were criminal anti-social behaviour orders.

This was an example of serious and organised crime and there were also suspected links to other types of such crime; although separate from the case, the investigation suggested a connection with modern slavery. The investigation had been complex and the role of intelligence and intelligence databases a key feature. Types of evidence included fingerprint, CCTV and identity evidence. The use of DNA evidence had been restricted by cost. Vulnerable witnesses had to be interviewed and supported: eg, in attending identity parades.

As this case predated changes made by the CRA 2015, the LWMA model added legal complexity and bureaucracy. Although a WIT case, legally, the case was prosecuted by one LWMA on behalf of the eight LWMA in whose areas offences were alleged to have been committed. The host LWMA had insufficient in-house legal capacity to support the case. As a result, a lawyer was recruited to provide this service, and which was paid for by WIT.

Due to the case's serious nature police support had been obtained through the GAIN. The police had been an essential partner: eg, through use of arrest and bail, fingerprints, managing identity parades. Other enforcement agencies had been involved, such as the Department for Work and Pensions, HM Revenue & Customs, Companies House, and the Insolvency Agency, as there is often a link between types of fraudulent activity.

As in CS1, the media played a beneficial role in the investigation. Again, to secure the benefits and avoid disadvantages, there was a negotiated process. In this case the media had performed a proactive role as before WIT involvement there had been publicity by a television consumer affairs programme about the case. There was subsequent contact between the broadcaster and WIT and it was agreed how each could then proceed to their mutual benefit: eg, where a broadcast both engages the viewer ('good TV') and gives publicity which generates evidence to support the WIT investigation (while not adversely affecting a fair trial).

X carried out driveway repairs of very poor quality. X travelled around England and Wales cold-calling customers who tended to be older people living in remote properties. X was convicted of fraud involving several hundred thousand pounds and sentenced to a substantial prison sentence.

The case involved WIT working with a Wales LWMA (LA1). X started trading in the area of LA1 before expanding fraudulent operations elsewhere. Complaints brought initial allegations to light and financial investigations were carried out by WIT. X's bank account was examined, and payees contacted. Through this, additional complainants were identified. The cases were prosecuted by LA1: ie, this included cases arising in its area and elsewhere in England and Wales.

This case was taken after the CRA 2015 changed the law to allow an LWMA to investigate and bring cases outside its area throughout England and Wales. This benefited both LA1 and WIT (WIT is hosted by an LWMA). Other RITs had also been involved taking statements on behalf of WIT. WIT arranged with LA1 for LA1 to bring the prosecution.

Comment: The case studies encapsulate the changing nature of TS work: involving serious and organised criminal behaviour and exploiting vulnerable people which caused loss and distress. There was complexity and range of evidence gathering techniques and skills deployed. There was intelligence-led working. Effective partnership working was essential in each case, eg: how police can facilitate TS enforcement; how the effective use of GAIN can secure police involvement; how WIT and an LWMA can work effectively together on a case. Each case also showed aspects of the CLR in application: there was NTS funding in CS1; CS2 and CS3 involved WIT who are funded by NTS. The benefit of financial investigation capacity can also be identified; in particular, this was crucial in CS3 in identifying the extent of X's activity.

I think, the tool we've got with the financial investigation side opens up such a big view of the criminality...If you can get the bank account...and you can see the payments going in, then you can see just how big that job is really. [18].

Resourcing was an issue in CS1 and CS2; in each case the legal capacity of the LA was insufficient, resulting in ad hoc arrangements. At a general level this raises questions about LA capacity as a prosecutor. WIT has a prosecution focus and can develop its skills and expertise. But while the LWMA undoubtedly would have developed its own skills and expertise from the trial in CS1, in deciding it would not take on such cases again, it questioned whether the experience would have future benefit. In explaining why it would not probably take on a similar case again I9 also gave a practical illustration of the role of WIT:

We didn't initially think it was going to be this big. But it got to a point where we had to deal with it. If we had something of this scale again, it would have to be tasked to [WIT]

Also, CS1 adversely impacted on the LWMA's capacity to do other TS work. Because of priorities this could have resulted in withdrawal of enforcement effort in some areas raising questions about whether the LWMA is in breach of its legal obligations to enforce legislation. Traders and consumers left unprotected might have had to rely on support through other means.

Based on CS1, questions can be asked about the appropriateness of the LWMA model for TS delivery in such a case. The LWMA was not naturally resourced to take on the case. It was placed at financial risk but was able to secure outside support. Taking on the case meant the LWMA was restricted in the routine TS work it could do.

Following changes made by the CRA 2015 an LWMA is now able to investigate and bring proceedings throughout England and Wales. If this change had been in place at the time of CS2 it would have enabled the host LWMA for WIT, to have proceeded with less bureaucratic and legal complexity: eg, authority to prosecute cases outside of host LWMA area would not have been needed. CS3 is illustrative of that improved legal position. WIT was able to investigate and LA1 prosecute without the authority of other LWMAs in whose areas allegations originated. CS3 is also illustrative, of how, facilitated by the CRA 2015, there was effective partnership working between WIT and LA1. It can be argued that CS3 is illustrative of how legal change, combined with increased appreciation about the value of intelligence, has contributed to a cultural shift:

I think [there is] a broader view...not just because of the [CRA 2015] but because I think [LAs] realise the value of the intelligence... So, I think people are being more aware now that there's not walls built around your [LA] area...people are not so blinkered. [I8].

But although there is improved legal resourcing due to the CRA 2005, the appropriateness of the LWMA model for TS arrangements in Wales can still be questioned. The improvement does nothing to alter the size of the base unit in those arrangements (ie, the LWMA and its area). A base unit covering a greater geographical area could lead to greater economies of scale and other associated benefits.

Although the police provided significant support in CS1, it had been unwilling to take the case on itself. Yet it can be argued that it was more appropriate that the police should have investigated and brought proceedings, and not TS.

The serious and organised criminality, and how to meet its challenge, described in the case studies highlight issues about the application of the rule of law, protection of human rights (especially for Category 2 people) and securing of distributive and corrective justice outcomes. The well-being of those affected in each case is likely to have been adverse and TS intervention is likely to have had beneficial effect. Although the case studies do not directly touch on economic efficiency, indirect implications can be contemplated: eg, consumers might withdraw from economic activity due to concerns of potential economic abuse and legitimate traders' effort might be undermined by the illegitimate effort of others.

CS1 and CS2 also highlight the potential role the media can play with respect to TS effort but that the process must be managed due to potential disadvantages as well as the benefits.