

# Semi Detached?

The Development of Divergence in Social Housing  
Regulation Between Wales and England

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Thesis submitted to Cardiff University in partial fulfilment for the  
degree of Doctor of Philosophy

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## Summary

This thesis offers the first detailed assessment of the legislative and regulatory differences that have developed between Wales and England, in the social housing context, since the establishment of the National Assembly for Wales in 1999. The development of policy and legislative variation between the nations of the UK remains an underexplored aspect of devolution in the UK. This thesis aims to help fill this gap within the existing legal, socio-legal and policy literature on devolution and divergence. In undertaking this exploration, the thesis also seeks to make a contribution to the literature on housing law and policy.

In exploring patterns of divergence in social housing regulation between Wales and England, the thesis sets out to address four key issues. First, the thesis seeks to identify the timing of divergence between Wales and England. Secondly, it explores the legislative provisions in place today, and assesses the existence and extent of differences between both nations. Thirdly, the thesis considers the impact of legislative and regulatory differences in practice. Fourthly, it examines the factors that have impacted upon the divergence process.

The thesis uses a mixed methods approach in analysing the issues above. These methods include semi-structured interviews, doctrinal analysis, textual analysis, content analysis and an exploration of archival material. Deploying this range of methods means that the thesis makes a broader contribution to the literature on devolution and social housing. Amongst the key findings of the thesis is the identification, for the first of the point at which powers over housing were first devolved to Wales, and a development in our understanding of the complicated way in which divergence develops. The thesis concludes by reflecting on how these, and other findings, impact upon our understanding of devolution in Wales, and by discussing the implications for contemporary devolution and housing debates.

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## 1. Introduction<sup>1</sup>

That devolution should generate substantive differences in public policy across the component parts of the United Kingdom may seem obvious, since that is precisely what it is meant to do. Yet in the protracted debates over more than thirty years relatively little systematic attention has been given to this or to its implications.<sup>2</sup>

Much has changed in the world of Welsh devolution since Michael Keating wrote his introduction to *Devolution in Practice: Public Policy Differences within the UK* in 2002.<sup>3</sup> Over the past decade and a half the powers of the National Assembly have increased markedly, from limited executive powers, to more significant primary law-making powers. In the 17 years since its establishment, the Assembly has operated under three different models of devolution, with further change to come.<sup>4</sup> From 2018 the National Assembly will, for the first time, be granted powers over taxation.<sup>5</sup> Furthermore, following the enactment of the Wales Act 2017, the model of devolution that is in place in Wales will be changed again, with the Assembly operating under the reserved powers model of devolution.<sup>6</sup> With such continuous change it is perhaps unsurprising that much of the academic study of devolution in Wales has focused either on developing an understanding of the devolution settlement, or on exploring the implications of future constitutional change. With the challenges presented by the Wales Act 2017 and Brexit looming ever larger on the horizon, questions around the devolution settlement in Wales have grown to become more pressing.<sup>7</sup> Whilst the significance of the existing literature should not be underestimated, this constitutional pressure has meant that some key aspects of devolution have been somewhat overlooked.

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<sup>1</sup> A reflexive writing approach has been adopted for this chapter. As is argued by Peter Kaufman, writing and thinking are '*inextricably linked*'. By adopting a reflexive approach to the introduction, this chapter is able to set out some of thinking that has underpinned this research project and explain why the thesis has developed as it has. Peter Kaufman, '*Scribo Ergo Cogito: Reflexivity through Writing*' 41(1) *Teaching Sociology* 71

<sup>2</sup> Michael Keating 'Devolution and public policy in the United Kingdom: divergence or convergence?' in John Adams and Peter Robinson (eds) *Devolution in Practice, public policy differences within the UK* (ippr 2002) 3 ch1

<sup>3</sup> *ibid*

<sup>4</sup> The first Welsh devolution settlement was the Government of Wales Act 1998. The second Welsh devolution settlement was the Government of Wales Act 2006, Part 3, Schedule 5. The third devolution settlement was the Government of Wales Act 2006, Part 5, Schedule 7.

<sup>5</sup> As a result of powers devolved under the Wales Act 2014, Part 2.

<sup>6</sup> Wales Act 2017, s 3

<sup>7</sup> New work has already been published concerning this constitutional change including two reports published by the Wales Governance Centre and the Constitution Unit. Wales Governance Centre and the Constitution Unit, *Challenge and Opportunity: The Draft Wales Bill 2015*, (Wales Governance Centre at Cardiff University, February 2016); and Wales Governance Centre and the Constitution Unit, *Delivering a Reserved Powers Model of Devolution for Wales*, (Wales Governance Centre at Cardiff University, September 2015)

One such area is the development of policy and legislative divergence, as noted by Pete Alcock writing in 2012;

relatively little analysis has taken place of the impact of this devolution on policy development in the new century, especially on a comparative basis across the four countries.<sup>8</sup>

My thesis has set out to examine this underexplored aspect of devolution. The decision to examine the development of divergence between Wales and England was not made solely on the basis that this is a phenomenon that has been neglected within the existing literature on devolution. The limited, yet important work that has already been published on divergence suggests that a study of the process could lead us to develop a better understanding of how devolution works in practice, and that it could further our knowledge of how policy and legislation is developed within a devolved UK. This thesis therefore sets out to examine the development of divergence between Wales and England within this broader context.

The literature published on divergence to date has some key characteristics. First, it has sought to address three principle questions: the extent to which policy differs between the nations of the UK;<sup>9</sup> whether the differences that have developed between the nations on paper are reflected in practice;<sup>10</sup> and what factors have contributed to the divergence process.<sup>11</sup> Second, the literature has been primarily developed within the social sciences, with very little work being published by legal academics on the divergence process.<sup>12</sup> Finally, the literature on divergence has primarily focused on two policy areas; health and education.<sup>13</sup> The thesis attempts to address some of the major weaknesses within this literature. The approach used in this thesis aims to take law and legal perspectives seriously. Given its subject matter which addresses both constitutional and policy arrangements, the thesis operates at the boundaries of law and other disciplines - history, politics and policy analysis. Rather than presenting a black-letter or doctrinal analysis, it is in the broad socio-

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<sup>8</sup> Pete Alcock, 'New Policy Spaces: The Impact of Devolution on Third Sector Policy in the UK' [2012] 46 (2) Soc Policy Admin 219, 220

<sup>9</sup> For example, Pauline Jas and Chris Skelcher 'Different Regulatory Regimes in Different Parts of the UK? A Comparison of Narrative and Practice in Relation to Poor Performance in Local Government' 40(1) [2013] Local Government Studies 468

<sup>10</sup> For example, Stephen Peckham, Nicholas Mays, David Hughes, Marie Sanderson, Pauline Allen, Lindsay Prior, Vikki Entwistle, Andrew Thompson and Huw Davies 'Devolution and Patient Choice: Policy Rhetoric versus Experience in Practice' 46(2) [2012] Soc Policy Admin 199

<sup>11</sup> For example, Scott Greer 'The politics of health-policy divergence' in John Adam and Katie Schmuecker *Devolution in Practice 2006, Public policy differences within the UK* (ippr 2005) ch7

<sup>12</sup> Exceptions include Alan Trench who has edited some books in the area, for example; Alan Trench (ed) *The State of the Nations 2008* (Imprint Academic 2008)

<sup>13</sup> See 1.2 for a discussion on the literature on divergence.



legal tradition. It also sets out to add to the body of work on devolution and policy divergence, moving beyond the areas of health and education, on which most attention has been focused. To achieve this goal this thesis explores the development of legal divergence in relation to housing, one of the policy areas that has attracted limited academic scrutiny.<sup>14</sup> Social housing regulation is the particular focus for this thesis.<sup>15</sup> Given this focus, the thesis also seeks to make a contribution to the literature on housing law and policy.<sup>16</sup>

To explore the development of divergence in this previously overlooked policy area, the thesis is divided into three parts. Part 1, explores the historical development of divergence between Wales and England in the social housing context. In this Part, the thesis, for the first time, identifies when housing functions were initially devolved to Wales,<sup>17</sup> and charts its historical development. Part 2, provides a snapshot of the extent of the differences that exist between social housing regulation in Wales and England in the present day. This Part demonstrates how, to appreciate the extent of the differences that have developed, it is necessary to explore both the legislation, and the regulatory documents that have originated at Westminster and Cardiff Bay. Part 3 turns to an exploration of the factors that have contributed to the development of these differences. It considers the complicated nature of the divergence process and highlights how the process is not linear in nature. Chapter 9, the thesis's conclusion, provides an opportunity to reflect on the findings of these three sections. In addition to this, the conclusion considers some of the broader constitutional implications of the thesis's findings, questioning how they impact upon our understanding of devolution in Wales.

My introduction is divided into six sections. Section 1.1 sets out to define some of the key concepts that appear in this thesis, setting out what they will mean within the context of my thesis. Section 1.2 moves on to discuss the existing literature on devolution and divergence in general. It sets out what the literature can teach us about the divergence process, and notes the aspects of the field that are in greatest need of further, original research. Having done so, section 1.3 moves on to explore the literature on housing, devolution and divergence. This section demonstrates the clear need for academic research to be undertaken into the development of divergence within the housing context, and highlights

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<sup>14</sup> The reasons for this are set out in 1.3

<sup>15</sup> *ibid*

<sup>16</sup> David Cowan argues that separation of housing law and housing policy into separate disciplines is a '*false division*'. Cowan argues that '*One simply cannot understand, let alone appreciate, the one without the other.*' This thesis therefore seeks to make a contribution to the discipline of housing law and policy, as advocated by Cowan. David Cowan, *Housing Law and Policy* (Cambridge University Press 2011)

<sup>17</sup> See Chapter 3 in particular.

the original contribution this thesis makes to the literature.<sup>18</sup> Section 1.4 explores the research questions that have formed the basis for my thesis, namely:

- (i) To what extent has social housing regulation in Wales and England diverged?
- (ii) What factors have contributed to the development of divergence and convergence in social housing regulation between Wales and England?
- (iii) What is the point of divergence between Wales and England?
- (iv) Why were powers over housing first devolved to Wales and how did the devolution settlement develop over time?

The section discusses some of the challenges that were faced during this research project, setting out how these influenced the research questions that were adopted. Section 1.5 sets out the structure of the thesis. This section sets out the way that the thesis answers its research questions, noting some of the key themes that reappear throughout. These include the fact that divergence can develop because of the actions of both the UK and Welsh Government, that divergence can develop on a number of levels, and the fact that a number of factors have an impact on the divergence process, meaning that law can converge as well as diverge. The research methods adopted by this thesis will then be discussed in Chapter 2. Finally, section 1.6 provides a summary of the work contained within this introduction.

### 1.1 Key terms and concepts

'Regulation', 'social housing', 'divergence' and 'convergence' are four key terms that underpin the conceptual work undertaken within this thesis. It is therefore important to consider what is meant by each term. The purpose of this section is not to contribute to any debate around what is meant by each term, but, rather to set out how they are used within the context of this thesis.

'Regulation' is a term that appears consistently throughout this thesis. It has been described as *'a phenomenon that is notoriously difficult to define with clarity and precision, as its meaning and the scope of its inquiry are unsettled and contested'*.<sup>19</sup> There are numerous reasons why regulation has proven to be such a difficult concept to define. Regulation has been described as a concept that does not travel well with *'no parallel word or even concept'* appearing in some non-English-speaking countries.<sup>20</sup> Commentators on various parts of the

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<sup>18</sup> The focus of 1.3 will be on the extent of the literature that has developed on housing and divergence. A summary of the broader literature that has developed on social housing governance, operation and development can be found in 2.1.

<sup>19</sup> Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation, text and materials* (first published 2007, Cambridge University Press 2007) 3

<sup>20</sup> Julia Black 'Critical Reflections on Regulation' (2002) 27 *Austl. J. Leg. Phil.* 1

political spectrum use the term in very distinctive ways.<sup>21</sup> It is a concept that has drawn the attention of academics working within a range of academic disciplines and traditions, including socio-legal studies,<sup>22</sup> politics<sup>23</sup> and economics.<sup>24</sup>

Some analyst define regulation broadly, others, in a more narrow manner. Relatively narrow definitions focus on *'deliberate attempts by the state to influence socially valuable behaviour which may have adverse side-effects by establishing, monitoring and enforcing legal rules'*,<sup>25</sup> whilst broader definitions encompass *'all forms of social control, whether intentional or not, and whether imposed by the state or other social institutions.'*<sup>26</sup> As there's such varied literatures addressing regulation it is difficult to identify themes common to all, but, in general, the study of regulation has broadened over time to consider a wider range of actors, and institutions.

There has been a widespread presumption that the role of the state has changed since the late 1970s. Many scholars of regulation have argued that European states tended to move away from Keynesian economics and the idea of the welfare state.<sup>27</sup> Services that had once been in the hands of the public sector were increasingly being provided by private businesses, with the state regulating their activities.<sup>28</sup> These scholars described the replacement of the welfare state by the regulatory state.<sup>29</sup> Such a state was concerned with *'steering the flow of events, as opposed to providing and distributing'*.<sup>30</sup> Subsequently the regulatory state concept was challenged and regulatory capitalism proposed as a better descriptor.<sup>31</sup>

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<sup>21</sup> For example, on the left see Bob Jessop, *The Future of the Capitalist State*, (first published 2002, Cambridge University Press 2002); and on the right, George J. Stigler, 'The Theory of Economic Regulation' (1971) 2 The Bell Journal of Economics and Management Science 3

<sup>22</sup> Black (n20)

<sup>23</sup> Mick Moran 'Review Article: Understanding the Regulatory State' (2002) 32 British Journal of Political Science 391

<sup>24</sup> Stigler (n21)

<sup>25</sup> Morgan and Yeung (n19)

<sup>26</sup> *ibid*

<sup>27</sup> Amongst the academics that discuss this phenomenon are Giandomenico Majone, *Regulating Europe* (Routledge 1996) 55; John Braithwaite, *Regulatory Capitalism, How it works, ideas from making it work better*, (Edward Elgar Publishing 2008); Anthony I. Ogus, *Regulation, Legal Form and Economic Theory* (Clarendon Law Series, OUP 1994); David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) ANNALS AAPSS 598; Colin Scott, 'Accountability in the Regulatory State' (2000) 27 JLS 38

<sup>28</sup> *ibid*

<sup>29</sup> *ibid*; others have used the term 'hollow state' H. Brinton Milward and Keith G. Provan 'Governing the Hollow State' (2000) 10 Journal of Public Administration Research and Theory 359

<sup>30</sup> John Braithwaite *Neoliberalism or Regulatory Capitalism* (Regulatory Institutions Network Research School of Social Sciences Australian National University Canberra 2005) 1

<sup>31</sup> For example, Braithwaite (n27)

Regulatory capitalism draws on the idea that it is not just the state that regulates the activities of private businesses.<sup>32</sup> As non-state regulation has grown in prominence, theorists of regulatory capitalism have argued that the regulatory state no longer provides a useful label.<sup>33</sup> It is argued that the label does not fully reflect these new activities and relationships, beyond the direct control of the state.<sup>34</sup> This shift has prompted new ideas for the study of regulation.

For example, the concepts of decentred regulation<sup>35</sup> and regulatory space have become increasingly influential amongst scholars of regulation.<sup>36</sup> These two concepts are closely related. The concept of decentred regulation suggests that command and control, undertaken by the state, through the use of legal rules does not reflect accurately the way that regulation is undertaken, nor does it explain regulatory failure.<sup>37</sup> The role of other actors and techniques that go beyond command and control, should also be considered as aspects of regulation.<sup>38</sup> The notion of regulatory space reinforces the view that regulatory activity may be undertaken by a variety of actors and interest groups, including both state and non-state organizations.<sup>39</sup> Theorists of regulatory space suggest that we should consider not only the activities of the non-state actors but also the role of culture in the regulatory process.<sup>40</sup> Some analysts argue it is culture that created a '*degree of cohesion*' that allowed for the creation of space within which legal regulation could be undertaken.<sup>41</sup> They tend to suggest that understanding the cultural dynamic is crucial to expanding our understanding of regulation.<sup>42</sup>

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<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> Black (n20)

<sup>36</sup> Bettina Lange 'Regulatory Spaces and Interactions: An Introduction' (2003) 12(4) SLS 411; and Leigh Hancher and Michael Moran 'Organising Regulatory Space' in Leigh Hancher and Michael Moran *Capitalism, Culture and Economic Regulation* (Oxford Clarendon Press 1989)

<sup>37</sup> Black (n20)

<sup>38</sup> *ibid*

<sup>39</sup> Lange (n36) 414, Hancher and Moran (n36)

<sup>40</sup> Lange (n36) 414

<sup>41</sup> *ibid*

<sup>42</sup> *ibid* Others, have argued that the regulatory space concept should be expanded further with 'regulatory territory' being a better label for the concept. Morag McDermont 'Territorializing Regulation: A Case Study of "Social Housing" in England' (2007) *Law and Social Inquiry* 373. McDermont argues that a regulatory space cannot 'just be seen for what it is now' but consideration should also be given to its historical development. Furthermore, McDermont argues that the term 'territory' is more reflective of the way that regulatory actors interact, with each side battling to define their territory and what is under their control.

Some academics have criticised the narrow focus of the literature on a few regulatory techniques and particular government and market approaches to regulation.<sup>43</sup> Their literature suggests the need to examine other regulatory techniques and architectures.<sup>44</sup>

In this thesis I have viewed social housing regulation through the lens of activities undertaken by the state, or bodies acting on behalf of the state. In using this perspective, I aim to bring the subject of devolution into sharper focus. Clearly, as the wider literatures on regulation suggests, there is a sense that regulation is an emergent product of the interaction between different state institutions, and non-state actors, operating at different levels. There are different ways to approach a regulatory study in this field, the emphasis here on state activities reflects the focus of the thesis on devolution. In line with the broader approach to regulation discussed above, however, the thesis also takes other actors into account in relation to the state's attempts to regulate social housing, such as lenders.

A second key term that is used throughout this thesis is 'social housing'. In their introduction to *Regulating Social Housing, Governing Decline* David Cowan and Morag McDermont discuss, in detail, the difficulty of providing a definition for this term.<sup>45</sup> They consider three characteristics that have been used to make a distinction in typology between social housing, and private rental and owner occupation homes.<sup>46</sup> The characteristics are: (1) that social housing is provided to those in need; (2) that social is provided on grounds that are not primarily driven by profit; and (3) that social housing providers are regulated by the state.<sup>47</sup> Cowan and McDermont argue that these characteristics do not make an useful distinction between these types of housing.<sup>48</sup> Given these difficulties, they argue that the term social housing reflects the '*mentalities of Government*'.<sup>49</sup>

Analysing legislation can help to reveal government mentalities around social housing. The ways in which the term social housing is used in legislation could define, or at least set some

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<sup>43</sup> For example; Neil Gunningham and Darren Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection' (1999) *Law and Policy* 49; and Peter Grabosky, 'Beyond Responsive Regulation: The expanding role of non-state actors in the regulatory process' (2012) *Regulation and Governance* 114; Charles F Sabel, Johnathan Zeitlin 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) *ELJ* 271; Joanne Scott, David M Trubek 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) *ELJ* 1; and Lisa Blomgren Bingham, Lisa Nabatchi, Rosemary O'Leary 'The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government' (2005) *PAR* 547

<sup>44</sup> *ibid*

<sup>45</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Cavendish Publishing 2006) 3

<sup>46</sup> *ibid*

<sup>47</sup> *ibid*

<sup>48</sup> *ibid* 6 For example, Cowan and McDermont cite controls exercised by government over the private rental sector as one problem with this definition.

<sup>49</sup> *ibid* 7

parameters around the definitions of social as a concept in law. In Wales, there is no definition of social housing in legislation. Yet ‘social housing’ in Wales is given meaning indirectly: Registered Social Landlords (RSLs) are permitted by legislation to undertake certain activities – the provision of homes at low cost rents, on a not for profit basis – which we can assume is what the Welsh Government considers to be activities relating to ‘social housing’.<sup>50</sup> In England, a definition of ‘social housing’ can be found in legislation. This definition is broader than the definition provided in Wales and includes the provision of homes for ‘*low cost home ownership accommodation*’,<sup>51</sup> by both profit making and non-profit making organisations.<sup>52</sup>

The difference in approach between the governments is interesting. The legislation in Wales matches the three characteristics of social housing discussed above closely. In England the government seems to have moved beyond this position, with profit making bodies being considered as providers as social housing, and organisations being permitted to construct homes for those who are not in need. These variations suggest that there is a difference in mentality between the Welsh and UK Government on what constitutes social housing. The thesis will seek to explore this issue further, questioning why these differences have developed.<sup>53</sup>

‘Divergence’ and ‘convergence’ are both terms that are used regularly in comparative work undertaken on policy and legislative development within the devolved UK.<sup>54</sup> No single definition of either term has emerged a definitive in the existing literature and it is sometimes unclear how they differ from other terms such as difference and variation.<sup>55</sup> Nevertheless, both terms appear to have been used consistently to refer to processes in the literature.<sup>56</sup> Divergence is used to describe the process of the law and policy becoming more different, whilst convergence the law and policy becoming more similar.<sup>57</sup> The fact that both terms refer to processes has important implications for this thesis. Each government can enact legislation which is different, but which does not lead to the development of divergence. For

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<sup>50</sup> Housing Act 1996 s 2

<sup>51</sup> Housing and Regeneration Act 2008, s 80

<sup>52</sup> *ibid*

<sup>53</sup> Particular focus is given to this in section 7.1 which discusses the role of politics and ideology on the development of divergence.

<sup>54</sup> A full discussion can be found in 1.2 below.

<sup>55</sup> *ibid*. For example, the Devolution in Practice series, does not contain a definitions section, and neither are the meanings of the terms discussed in any of its chapters. John Adams and Peter Robinson (eds) *Devolution in Practice, public policy differences within the UK* (ippr 2002); John Adams and Katie Schmuecker (eds) *Devolution in Practice, public policy differences within the UK 2006* (ippr 2005); Guy Lodge and Katie Schmuecker (eds) *Devolution in Practice 2010* (ippr 2010).

<sup>56</sup> *ibid*

<sup>57</sup> *ibid*

example, if the law in both nations was already different prior to the enactment of new legislation, divergence would only develop if the new legislative provisions led to the law becoming more different than was previously the case. To understand the development of legislative and policy divergence and convergence, it is therefore important to consider the way that law and policy have developed over time.

## 1.2 The literature on divergence

An underlying assumption found in some of the academic work on devolution is that the development of policy variation is a purpose of devolution.<sup>58</sup> The establishment of the National Assembly for Wales, the reconvening of the Scottish Parliament and the reopening of the Northern Irish Assembly under a 'permissive' devolution settlement, created the space within which policy variation could develop.<sup>59</sup> With Northern Ireland's unique political make up,<sup>60</sup> and the popular perception of Wales and Scotland being to the left of England,<sup>61</sup> it is clear how political devolution could lead to the development of divergence. The fact that political devolution created the environment within which these political differences could lead to the development of policy variation across the UK does not mean that the development of such variation was a purpose of devolution. Charlie Jeffrey argues:

it will be a sign of maturity of devolved politics when divergence is not regarded as a necessarily good thing in itself, and there is no political advantage to be gained from either introducing new policy initiatives or decrying various initiatives simply because they appear to be similar to the situation in Whitehall.<sup>62</sup>

Furthermore, empirical research undertaken since 1999 suggests that the perceived political differences between the nations of the UK may not be as prevalent as first anticipated. The work of leading analysts such as Charlie Jeffrey,<sup>63</sup> Guy Lodge,<sup>64</sup> Katie Schmuecker,<sup>65</sup> and John Curtice,<sup>66</sup> published in 2006 and 2010 respectively, highlights that the citizens of all four nations of the UK broadly share the same opinion on a number of key issues. Not only does the data gathered show that UK citizens broadly share the same opinion on policy

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<sup>58</sup> Keating (n2)

<sup>59</sup> John Adam and Katie Schmuecker 'Introduction and overview' in John Adam and Katie Schmuecker *Devolution in Practice 2006, Public policy differences within the UK* (ippr 2005) 3 ch1

<sup>60</sup> *ibid*

<sup>61</sup> *ibid*

<sup>62</sup> Charlie Jeffery 'Devolution and divergence: public attitudes and instructional logics in John Adam and Katie Schmuecker *Devolution in Practice 2006, Public policy differences within the UK* (ippr 2005) 48, 49 ch2

<sup>63</sup> *ibid*; and Charlie Jeffrey, Guy Lodge and Katie Schmuecker, 'The devolution paradox' in Guy Lodge and Katie Schmuecker (eds) *Devolution in Practice 2010* (ippr 2010) ch2

<sup>64</sup> *ibid*

<sup>65</sup> *ibid*

<sup>66</sup> John Curtice, 'Policy divergence: recognising difference or generating resentment' in Guy Lodge and Katie Schmuecker (eds) *Devolution in Practice 2010* (ippr 2010) ch3

matters, it also suggests that the people of the UK wish to see a degree of policy uniformity across all four nations.<sup>67</sup> This phenomenon has been labelled the devolution paradox, with the populations of the devolved nations supporting the transfer of powers to the devolved institutions on the one hand, whilst being reluctant to see policy and legislative variation develop on the other.<sup>68</sup> An example of where the devolution paradox is said to have led to the development of convergence can be found in relation to health policy in Wales, with the Welsh Government adopting a policy that was more in line with England with regard to NHS waiting times following public pressure.<sup>69</sup>

Whilst the development of policy and legislative variation may not be the purpose of devolution, clear evidence has emerged over the previous decade and a half that shows that such variation has emerged. The first decade of the twenty-first century saw the publication of a number of books that, to varying degrees, charted the development of divergence. These included *The State of the Nations* series,<sup>70</sup> *The impact of devolution on social policy*,<sup>71</sup> and perhaps most significantly, the *Devolution in Practice* series.<sup>72</sup> The *Devolution in Practice* series comprised three books, published in 2002, 2005 and 2010.<sup>73</sup> The leading experts on devolution and social policy contributed chapters to the books, exploring the extent by which policy had diverged. The instances of divergence charted by the contributors to these books were diverse and reflected the varying extent by which dissimilarities had developed at different points during the first decade of the twenty-first century. Whilst public policy, housing and the economy were three devolved areas that drew consistent academic interest throughout the books,<sup>74</sup> the two areas that attract the greatest scrutiny were health, and education and early childhood policy.<sup>75</sup> This would suggest that these were the areas that saw the greatest degree of divergence develop during the early years of the devolved administrations, or that it was within these areas that the differences that had developed was of most interest to academic researchers.

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<sup>67</sup> *ibid*; Jeffrey, Lodge and Schmuecker (n63); and Jeffrey (n62).

<sup>68</sup> Jeffrey, Lodge and Schmuecker (n63)

<sup>69</sup> Jeffrey (n62) 47; Peckham et al (n10); and Katherine Smith and Mark Hellowell, 'Beyond Rhetorical Differences: A Cohesive Account of Post-devolution Developments in UK Health Policy' 46(2) *Soc Policy Admin* 178

<sup>70</sup> Robert Hazell (ed) *The State of the Nations, The first year of devolution in the United Kingdom* (Imprint Academic 2000); Alan Trench (ed) *State of Nations 2001, The second year of devolution in the UK* (Imprint Academic 2001); Robert Hazell (ed) *The State of the Nations 2003* (Imprint Academic 2003); Alan Trench (ed) *Has Devolution Made A Difference? The state of the Nations 2004* (Imprint Academic 2004) and Trench (n11)

<sup>71</sup> Derek Birrell, *The Impact of Devolution on Social Policy* (The Policy Press 2009).

<sup>72</sup> Adams and Robinson (n55); Adams and Schmuecker (n55); Lodge and Schmuecker (n55)

<sup>73</sup> *ibid*

<sup>74</sup> Appearing consistently as themes in the *Devolution in Practice Series*

<sup>75</sup> More chapters were written about these two areas in the *Devolution in Practice Series* than any other.



Whilst the National Assembly's first decade of operation saw a number of books published that provided a snapshot of the extent by which policy variation had developed in a number of different devolved areas, these become less prevalent at the turn of the decade. The last book in the *Devolution in Practice* series was published in 2010, whilst the last in the *State of the Nations* series was published in 2008. The instances of divergence set out within the books may, therefore, no longer be correct. There appear to be two reasons for the fact that there was a reduction in the number of books published that examined policy variation. First, some have suggested that funding has become less easily accessible for those developing books on devolution.<sup>76</sup> Secondly, it has become increasingly difficult to provide an overview of the differences that have developed between the nations of the UK across a broad number of policy areas in one resource. By 2010 the publishers of *Devolution in Practice* had chosen to omit explicit discussion of education and transport policy from their latest edition of the book despite the fact that both policy areas had been 'important themes' in the conferences that had preceded the book's publication.<sup>77</sup> With the devolved administrations having been developing policy and legislation for a further seven years, and the legislative powers of the National Assembly for Wales increasing in 2011, the difficulties faced by the editors of *Devolution in Practice* in 2010 in attempting to cover a number of devolved areas would appear to be even greater for any editor or author attempting the same task today.

Whilst the body of work that explores the development of divergence across a number of devolved areas may have reduced in recent years, a number of academic journal articles have been published that have examined the development of divergence in individual policy areas. This work has been incredibly diverse. Articles that, to one extent or another, explore the extent by which divergence has developed have been published in journals ranging from the *Journal of Education Policy*,<sup>78</sup> to *Local Government Studies*,<sup>79</sup> and from *Social Policy and Administration*,<sup>80</sup> to *Planning, Practice and Research*.<sup>81</sup> Even though the articles published within these and other journals explore very different policy areas, they do share certain characteristics. The articles have been published, almost exclusively, within social science

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<sup>76</sup> Alan Trench 'Books and information sources' (*Devolution Matters*) <https://devolutionmatters.wordpress.com/devolution-the-basics/information-sources/> accessed 2 November 2016.

<sup>77</sup> Guy Lodge, Katie Schmuecker and Adam Coutts 'Preface' in Guy Lodge and Katie Schmuecker (eds) *Devolution in Practice, public policy differences within the UK 2010* (ippr 2010) ch1

<sup>78</sup> Jim Gallacher and David Raffe 'Higher education policy in post-devolution UK: more convergence than divergence?' 27(4) [2011] *J Educ Policy* 467

<sup>79</sup> Jas and Skelcher (n9)

<sup>80</sup> Pete Alcock (n8)

<sup>81</sup> Janice Morphet and Ben Clifford 'Policy Convergence, Divergence and Communities: The Case of Spatial Planning in Post-Devolution Britain and Ireland' 29(5) [2014] *Planning, Practice and Research* 508

journals.<sup>82</sup> This means that the body of work that explores the legal significance of divergence remains underdeveloped. Another common characteristic is that most of these articles do not only focus on one particular policy area, they only explore the extent by which divergence has developed with regard to certain policies within that area, for example, access to higher education,<sup>83</sup> or patient choice within the NHS.<sup>84</sup> Whilst this permits the authors of these articles to explore the extent by which divergence has developed in these particular areas in more depth, it does mean that there are very significant gaps in our understanding of where dissimilarities have developed. This, combined with the fact that the instances of divergence noted in the existing literature may have already, or may soon become dated, means that we should view the published academic work on divergence as providing us with guidance as to within which of the devolved areas variation has developed, not as a completely accurate resource on the extent of the differences in place today.

Despite the fact that there is clear evidence of policy differences appearing between the nations of the UK, the body of work that has developed on divergence does suggest that the impact of these differences may be less significant in practice. Perhaps the policy area that has attracted the greatest academic study with regards to the impact of divergence in practice is health policy. A number of academics draw attention to the fact that promoting '*patient choice*' has been one of the primary health policies of successive Westminster Governments since the New Labour era.<sup>85</sup> This approach has been in stark contrast to the policies that the devolved Governments have adopted, with the devolved administrations rejecting the use of the market and competition in providing patient choice, in particular.<sup>86</sup> In practice, it would seem that there is far less variation between the levels of choice available to patients in all four devolved nations.<sup>87</sup> Instances of this phenomenon have also been found in education policy,<sup>88</sup> and within policy on the third sector,<sup>89</sup> amongst others.

The academic literature on the impact of divergence in practice, whilst important, is lacking in two regards. First, given that there is not yet a comprehensive body of work on the extent

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<sup>82</sup> Exceptions include Caroline Hunter 'Editorial. Devolution and beyond' 17(5) [2014] J.H.L 91. This is discussed in greater detail in 1.2

<sup>83</sup> Gallacher and Raffe (n78)

<sup>84</sup> Peckham et al (n10); and Marie Sanderson, Pauline Allen, Stephen Peckham, David Hughes, Menna Brown, Grace Kelly, Debbie Baldie, Nicholas Mays, Alison Linyard and Anne Dugid 'Divergence of NHS choice policy in the UK: what difference has patient choice policy in England made?' 18(4) [2013] Journal of Health Services Research & Policy.

<sup>85</sup> *ibid*

<sup>86</sup> *ibid*

<sup>87</sup> Peckham et al (n10)

<sup>88</sup> Gallager and Raffe (n78)

<sup>89</sup> Pete Alcock (n8)

by which divergence has developed on paper between the nations of the UK, it is also not possible to complete a comprehensive comparison between divergence in theory and practice. Second, much of the literature that explores the extent by which divergence has developed in practice does so within the context of comparing government rhetoric with policy in practice.<sup>90</sup> There would appear to be very little work that examines the impact of legislative variation in practice. The Governments in Cardiff Bay and Westminster may have in some instances enacted legislation that contain differing provisions but which lead to minimal divergence in practice. This is a phenomenon in need of further examination if the literature on divergence is to be developed.

The final aspect of divergence that the existing body of literature explores is the factors that contribute to, or constrain its development. Whilst no consistent terminology has been adopted in reference to these factors in the literature on divergence, there do seem to be some factors that appear prominently. These factors include the role of 'policy and politics', the nature of the devolution settlement, the existence of structural differences between Wales and England, and pressures exerted by the 'market'. Understanding how these factors impact upon each other allows us to deepen our awareness of the way that divergence develops and shapes our understanding of the way that devolution works within the UK.

Despite the empirical research undertaken towards the end of the last decade that suggested that the people of the UK were far closer politically than had been the popular perception,<sup>91</sup> and the academic work undertaken on the devolution paradox,<sup>92</sup> it is argued by some, that the different political environment within the nations of the UK has contributed to the development of divergence, even in the period prior to 2007, when Labour was the party of Government in Wales, Scotland and at Westminster.<sup>93</sup> It is suggested that the fact that the Labour Party in Wales and Scotland were challenged by Plaid Cymru and the Scottish National Party respectively, pulled the political centre of gravity in the devolved nations to the left.<sup>94</sup> By contrast the major opposition for Labour at Westminster came from the Conservative party, which pulled the debate to the political right, leading to differing policy being pursued within different parts of the UK.<sup>95</sup> In addition to these party political differences, there were also ideological differences within the Labour party at this time. These ideological

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<sup>90</sup> See the academic work undertaken on patient choice for example, as discussed above.

<sup>91</sup> Jeffrey, Lodge and Schmuecker (n63) for example.

<sup>92</sup> *ibid*

<sup>93</sup> It should be noted that Labour governed as part of a coalition government with the Liberal Democrats in Wales between 2000 and 2003, and in Scotland between 1999 and 2007.

<sup>94</sup> Jeffrey (n62); and Greer (n11)

<sup>95</sup> See discussion on patient choice above.

tensions are perhaps best illustrated by Rhodri Morgan's famous 'clear red water' speech, in which he emphasised the importance of social universalism to his Welsh Government in an attempt to draw a contrast with the approach taken by New Labour at Westminster.<sup>96</sup> With each of the UK's nations having been governed by different political parties since 2010, the UK's political environment would appear to be more conducive to the development of divergence.

A second factor that appears within the literature on the factors that impact on the divergence process is the character of the devolution settlement. There appear to be three relevant elements here. These can be summarised as; the impact of overlap between the powers of the UK and the devolved governments,<sup>97</sup> government expenditure,<sup>98</sup> and the control of supranational organisations.<sup>99</sup> The first two elements are closely connected. Whilst housing, health and social welfare are policy areas that have been devolved to the National Assembly and the Scottish Parliament, a united social security system remains in place across Wales, Scotland and England. It is argued that the decisions made by the UK Government over social security can have '*major implications*' for devolved areas, leading to the different governments of the UK adopting similar policies.<sup>100</sup> Not only are the decisions of the UK Government said to impact on the devolved nations in those policy areas where a degree of overlap exists, but it is argued by some, that the block grant system of distributing finance to the devolved nations can place political and practical pressure on the devolved governments to adopt similar policies to the ones being pursued by the Westminster Government.<sup>101</sup> The final element within this factor is the transfer of power to supranational organisations. It is suggested that this transfer of power places limitations on the powers of the devolved administrations to develop divergent policy and encourages collaboration between the nations of the UK.<sup>102</sup>

The roots of the third factor noted as potential driver of divergence within the academic literature is to be found in each of the UK's nations. It is suggested that the structural differences between the nations of the UK has an impact on the policy developed within each nation. These structural differences include differences in topography, demographic

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<sup>96</sup> Rhodri Morgan, 'Clear Red Water Speech' (the National Centre for Public Policy, 11 December 2002)

<sup>97</sup> Birrell (n71)

<sup>98</sup> Michael Keating, Paul Cairney and Eve Hepburn 'Policy Convergence, Transfer and Learning in the UK under Devolution' 22(3) *Regional and Federal Studies* 289

<sup>99</sup> Gallacher and Raffe (n78)

<sup>100</sup> Derek Birrell 'Devolution and approaches to social policy' in Guy Lodge and Katie Schmucker (eds) *Devolution in Practice 2010* (ippr 2010) 134 ch8

<sup>101</sup> David Heald and Alasdair McLeod 'Beyond Barnett? Financing devolution' in John Adam and Peter Robinson (eds) *Devolution in Practice, public policy differences within the UK* (ippr 2002) ch10

<sup>102</sup> Morphet and Clifford (n81); Gallacher and Raffe (n78)

and economic conditions. The literature notes, for example, that the size and scale of the policy communities in the devolved nations, differs greatly to that of the community that has established itself at Westminster over many decades.<sup>103</sup> It is argued that this allows and encourages the devolved administrations to develop differing approaches to policy making, with the devolved Governments developing a more collaborative approach than their counterparts at Westminster.<sup>104</sup>

The final factor to appear prominently within the literature on divergence is the role of ‘the market’. This is predominantly discussed within the context of the desire of UK politicians to maintain a common market across the UK. An example of where the pressure exerted by ‘the market’ has impacted on devolved policy can be found with regard to higher education. David Raffee argues that the desire of the Welsh Government to ensure that Welsh students were not treated unfavourably when applying for a space at a University in England had an impact on their proposals to reform secondary education qualifications.<sup>105</sup> He argues that it was these concerns that meant that the Welsh Baccalaureate was developed in line with the regime in place in England, limiting the extent by which differences developed between Wales and England.<sup>106</sup> It would appear that this is a factor that could figure more prominently in a post Brexit UK.<sup>107</sup>

The academic research that has been undertaken to examine the factors that encourage the development of divergence and convergence suggests that this is a complicated process, a theme that reappears throughout this thesis. There appears to be a number of reasons why further research is required to develop our understanding of it. First, the passage of time may mean that the impact of a number of the factors uncovered by previous academic research has changed in recent years. For instance, any academic research published before 2015 would not have been able to explore the potential implications of a majority Conservative Government in Westminster on divergence. It is therefore necessary to regularly review the factors that contribute to the development of divergence so as to ensure that our understanding of the process is accurate. Second, given the significant gaps that appear in the body of work that examines divergence more generally, there are a number of policy areas within which very little analysis has been undertaken as to the factors that impact on the development of divergence. Given that the factors that impact on development of divergence may differ in

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<sup>103</sup> Adams and Schumacher (n55)

<sup>104</sup> *ibid*

<sup>105</sup> David Raffee ‘Devolution and divergence in education policy’ in John Adams and Katie Schmucker (eds) *Devolution in Practice 2006, Public policy differences within the UK* (ippr 2005) ch4

<sup>106</sup> *ibid*

<sup>107</sup> For example, see Richard Percival ‘Brexit and Devolution: The UK Government’s Bind’ (*Welsh Brexit*, 20 April 2017) <http://blogs.cardiff.ac.uk/brexit/2017/04/20/brexit-and-devolution-the-uk-governments-bind/> (accessed 20 April 2017)

each of these areas, this means that there is a lack of understanding of the way that divergence develops. Further research within these devolved areas may discover that there are other factors that impact upon the development of divergence that have not been unearthed to date. One policy area that could benefit from such further research is housing. On the one hand, housing as a policy area has not been adequately covered in the literature that has developed on divergence, on the other, the development of legislative and policy divergence between the nations of the UK has not been adequately discussed within the literature published on housing law and policy. This thesis aims to address this weakness.

### 1.3 The literature on housing and divergence

As demonstrated by Section 1.2 there is a clear need for further research to be undertaken into the divergence process, to further our understanding of the process itself, and our understanding of the way that law and policy are developed within the devolved UK. This section will set out why the thesis has chosen to focus on the development of divergence in social housing regulation between Wales and England. This section will focus closely on the literature that has been developed with regards to housing and divergence. A broader discussion on the literature that has developed on social housing regulation, governance and operation is set out in Chapter 2.

As discussed, housing is a policy area that has not been sufficiently explored in the literature on divergence, whilst the divergence process has not been adequately examined in the literature on housing law and policy. This is not to say that the development of divergence in the housing context has been completely ignored. In her editorial for the *Journal of Housing Law* in 2014, Caroline Hunter states '*since devolution, housing law in both Scotland and Wales has increasingly diverged from that in England*'.<sup>108</sup> Hunter identifies two aspects of housing law which she argues has seen the development of particularly significant divergence; homelessness law and private sector regulation.<sup>109</sup> Hunter's editorial was not the first time homelessness had been identified as an aspect of housing policy within which divergence had developed.<sup>110</sup> Almost a decade earlier, Robert Smith, a social scientist at Cardiff University had identified homelessness and social housing as two policy areas within which differences had developed.<sup>111</sup> Whilst this academic work provides a useful starting point for the study of divergence in housing law and policy between the nations of the UK,

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<sup>108</sup> Hunter (n82)

<sup>109</sup> *ibid*

<sup>110</sup> Robert Smith 'Devolution and divergence in social-housing policy in Britain' in John Adams and Katie Schmuecker (eds) *Devolution in Practice 2006, Public policy differences within the UK* (ippr 2005) ch8

<sup>111</sup> *ibid*. In addition to Smith, Derek Birrell and Steve Wilcox had also identified social housing as an aspect of housing policy within which divergence had developed. Birrell (n71); and Steve Wilcox, 'Devolution and housing' in Guy Lodge and Katie Schmuecker *Devolution in Practice 2010* (ippr 2010) ch11

this work has, at times, lacked detail,<sup>112</sup> or has become dated.<sup>113</sup> It would seem clear that housing is a policy area within which further research is needed if we are to develop our understanding of divergence. It was for this reason that this thesis chose to focus on this policy area.

Although the body of academic work that explores the development of divergence within the housing context is limited, a number of leading housing policy and law academics have published work that explores the policy and legislative initiatives of both the Westminster and the devolved Governments over the previous twenty years. Much of this work has not been comparative in nature, with the exception of some work that has set out how the other nations of the UK and nations further afield could learn from particular policy initiatives.<sup>114</sup> This does not reduce the significance of this work. It plays a vital role in developing our understanding of both housing policy and legislation in each of the UK's nations whilst also providing an indication as to within which areas divergence has developed.

Social housing regulation is one aspect of housing law and policy that has attracted some academic comment over this period. 2006 saw the publication of David Cowan and Morag McDermont's *Regulating Social Housing: Governing Decline*.<sup>115</sup> The book provides a comprehensive exploration of the factors that had contributed to the development of social housing and the role of regulation within the social housing sector. Whilst exploring the development of the social housing sector and regulation across the UK as a whole, the book does not specifically explore the impact of devolution on this process. Robert Smith's chapter in *Devolution in Practice 2006* does note that responsibility for the regulation of local authority and housing association homes had been devolved to Wales and Scotland but provides little comment beyond this observation.<sup>116</sup> The implications of the devolution of

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<sup>112</sup> The work of Hunter (n82); and Birrell (n71); in particular, only provide a very brief summary of the areas within which differences have developed.

<sup>113</sup> For example, in his work Steve Wilcox discusses the policy variations that had developed with regard to the right to buy. In the years since the publication of his work, the right to buy has been abolished in Scotland. In Wales, the Welsh Government has the power to suspend the right to buy in individual local authorities and is bringing forward legislation to abolish the right to buy in its entirety. In England on the other hand, the right to buy has been extended to the properties of housing associations. Wilcox (n111);

Aspects of Robert Smith's work have also become dated. At the time of his chapter's publication, only Bridgend County Borough Council had transferred their social housing stock to stock transfer housing associations. By 2016, 11 out of 22 Local Authorities had done so. This means that his observation that fewer Local Authorities in Wales had transferred their social housing stock to the third sector than was the case in England is of less significance. Smith (n111)

<sup>114</sup> For example, Peter Mackie 'Homelessness Prevention and the Welsh Legal Duty: Lessons for International Policies' 30(1) [2015] *Housing Studies* 40

<sup>115</sup> Cowan and McDermont n(45)

<sup>116</sup> Smith (n111) 126

social housing regulation would become increasingly clear in the months and years following the publication of these two books.

In December 2006 Professor Martin Cave was commissioned to review the way that social housing regulation was undertaken in England.<sup>117</sup> Over the following five years three further reviews were undertaken into social housing regulation across the UK; a Scottish Government Review in Scotland,<sup>118</sup> the Essex Review in Wales,<sup>119</sup> and the Department for Communities and Local Government Review in England.<sup>120</sup> These Reviews resulted in the Governments of Wales and Scotland, and the Westminster Government in England enacting new legislation and making regulatory changes, leading to the possibility that the way that regulation is undertaken in each of the three nations is now different.<sup>121</sup> Whilst there has been very limited study of the impact of these changes on the development of regulatory variation, there has been academic work undertaken to explore the importance of these legislative and regulatory changes within each of the three nations.

Some of this work has been rather descriptive in nature. For example, a piece published in the *Journal of Planning & Environment Law* in 2009 provides legislative comment on the Housing and Regeneration Act 2008, the legislation enacted in England in the wake of the Cave Review.<sup>122</sup> The piece merely sets out the steps that had led to the enactment of the Housing and Regeneration Act 2008, and provides an overview of the Act's provisions and content.<sup>123</sup> Others provide some analysis on the likely impact of these changes as they were developing at the time. Simon Hoffman's article in the *Journal of Housing Law* in 2010 explores the potential impact of transferring legislative competence over housing to the National Assembly for Wales on social housing regulation, particularly in light of the recommendations of the Essex Review, made just a few months earlier.<sup>124</sup> There are others, however, who provide a more critical analysis of the content of the Reviews and the legislative and regulatory proposals that followed in their wake. David Cowan's article in the *Journal of Housing Law* in 2008 delivers a particularly robust critique of the approach of the

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<sup>117</sup> The Cave Review Of Social Housing Regulation, *Every Tenant Matters: A Review of Social Housing Regulation* (June 2007)

<sup>118</sup> Scottish Government, *Firm Foundations: the future of housing in Scotland* (October 2007)

<sup>119</sup> Affordable Housing Task and Finish Group, *Report to the Deputy Minister for Housing* (June 2008)

<sup>120</sup> Department for Communities and Local Government, *Review of Social Housing Regulation*, (October 2010)

<sup>121</sup> The legislation included the Housing and Regeneration Act 2008, the Housing (Scotland) Act 2010, the Localism Act 2011 and the Housing (Wales) Measure 2011.

<sup>122</sup> 'Legislative Comment. The Housing and Regeneration Act 2008' [2009] J.P.L. 46

<sup>123</sup> An example of another descriptive piece is Andrew Dymond and Christopher Handy 'Regulation of social landlords – the new regime' 15(4) [2012] J.H.L. 77

<sup>124</sup> Simon Hoffman 'Legislative competence in housing for Wales: an assessment of likely impacts' 13(3) [2010] J.H.L. 41



Labour Government at Westminster to housing policy, questioning the significance of its legislative proposals and the approach taken to Cave Review.<sup>125</sup>

The broader body of academic work that has developed on social housing regulation, governance and operation, whilst not directly exploring the divergence process, does suggest that it is an aspect of housing policy within which differences have developed. This literature will be explored in more detail in 2.1. The literature does not only suggest that the way that regulation is undertaken across the UK differs in the present day, it also suggests that this divergence may have deeper historical roots. This literature is at times inconsistent,<sup>126</sup> with some suggesting that housing powers were first devolved to Wales prior to the 1950s.<sup>127</sup> Despite this disagreement within the literature Alan Murie's extensive guide to the history of social housing regulation in the UK makes it clear that there were differences between the way that social housing regulation was undertaken in the nations of the UK before the establishment of the National Assembly for Wales and the Scottish Parliament.<sup>128</sup> It would appear that exploring the development of divergence within social housing regulation does not only provide us with an opportunity to further our understanding of the phenomenon in the present day, but also gives us an opportunity to develop our grasp of how divergence and devolution developed over time. Such an exploration provides us with an opportunity to deepen our understanding of the divergence process, allowing us to examine it during a period prior to political devolution.

#### 1.4 Research questions

Having explored the literature on divergence and explored its development within the housing context, the chapter now turns to look at the research questions adopted by my thesis. The literature review set out that the body of academic work concerning divergence has attempted to address three questions: (1) to what extent has policy and legislative variation developed between the nations of the UK? (2) Is the impact of divergence on paper being felt in practice? (3) What factors impact upon the divergence process? Given the weakness identified within the literature review in relation to each of these three questions,

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<sup>125</sup> Cowan accuses the UK Government of producing 'an enormous amount of hot air and navel-gazing.' Dave Cowan 'A review of reviews' 11(3) [2008] J.H.L. 51

<sup>126</sup> The work of three authors give different indications as to what should be considered the point of divergence between Wales and England. Alan Murie's work suggests that it is before the 1970s, Malcom J Fisk's suggests it's not until the 1960s whilst the work of John Gilbert Evans suggests that the point of divergence lies in the 1950s at the latest. Alan Murie, *Moving Homes, The Housing Corporation 1964-2008* (Politico's Publishing 2008); Malcom J Fisk 'Historical perspectives on housing developments' in Robert Smith, Tamsin Stirling and Peter Williams (eds) *Housing in Wales, The Policy Agenda in an Era of Devolution* (Chartered Institute of Housing 2000) ch2; John Gilbert Evans *Devolution in Wales, Claims and Responses, 1937 – 1979*, (Cardiff University of Wales Press 2006) 56

<sup>127</sup> Evans (n126)

<sup>128</sup> Murie (n126)

there is a pressing need for further research to be undertaken to address all of them. This thesis will only focus on two of these broader questions: the extent by which variation has developed, and the factors that have an impact upon the divergence process. The reasons for this will be set out below.

#### 1.4.1 To what extent has policy and legislative variation developed between the nations of the UK?

It would appear imperative that any research project that explores the divergence process within the devolved UK considers the extent by which policy and legislative variation has developed. It would be impossible to examine the impact of divergence in practice, and the factors that have influenced the divergence process if there was no understanding of the extent by which the law and policy were different. To gain a clear understanding of the differences that now exist between the nations of the UK, the literature on divergence suggests that it is necessary to focus on one policy area in depth. The growth in the body of law, and the increasing number of policy initiatives emanating from both the devolved administrations and the UK Government has made it increasingly difficult for researchers to explore the extent of the differences that exist between the nations of the UK in both breadth and depth.<sup>129</sup> Given the need to develop the body of literature on divergence across almost all devolved areas, this thesis could have explored the process within many different fields. Education and health policy are the two devolved areas that have attracted the greatest academic interest within the divergence context to date.<sup>130</sup> As discussed above, however, housing, in particular social housing regulation, is an area within which divergence has been under-researched. It was decided that this thesis would seek to contribute to this underdeveloped area of study.

Having decided to focus on the development of divergence within social housing regulation, there was a further consideration to keep in mind when drafting the research questions for the thesis; what would be its territorial extent? Would the thesis attempt to explore the divergence process across all the nations of the UK or focus on two? The decision was made to focus on Wales and England. It was decided that exploring the extent by which differences had developed in social housing regulation across all four nations of the UK would potentially mean that the thesis lacked the ability to explore the divergence process in sufficient depth. Given that my thesis was being undertaken at Cardiff University, and was funded by an Arts and Humanities Council Comparative Doctoral Award with support provided by Blake Morgan Solicitors, conducting a comparison between Wales and England

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<sup>129</sup> See 1.2 for a more detailed discussion.

<sup>130</sup> *ibid*

was the obvious choice. The University's location, close to the National Assembly and the Welsh Government's offices, and Blake Morgan's position as one of the largest law firms in Wales provided unique opportunities to engage with stake-holders and policy makers to develop an understanding of the way that regulation was undertaken in Wales, both formally and informally. The fact that regulation in England is the responsibility of the Westminster Government on the other hand means that the decisions taken on social housing regulation on the eastern side of Offa's Dyke do continue to have some impact in Wales.<sup>131</sup> This, coupled with the closer administrative ties that exist between Wales and England, led to the decision to explore the extent by which social housing regulation had diverged between these two nations. Three research questions were developed in this context:

- To what extent has social housing regulation in Wales and England diverged?
- What is the point of divergence between Wales and England?
- Why were powers over housing first devolved to Wales and how did the devolution settlement develop over time?

#### 1.4.2 What factors impact upon the divergence process?

Having developed two research questions about the extent of the differences that have developed between Wales and England, the next consideration for this research project was whether the thesis would merely provide a detailed account of the extent by which divergence had developed, or would it also explore the extent by which divergence had developed in practice, or consider some of the factors that had, had an impact on its development? The first of these approaches was quickly dismissed. As noted in the literature review, the academic work that only explores the extent by which variation develops can quickly become dated. Whilst this work can provide a useful resource for those who wish to explore the extent that divergence has developed at a given point in time, and can assist legal historians who wish to chart the development of divergence, it was felt that limiting the thesis to only charting the divergence that had developed with regard to social housing regulation would not assist us in developing our understanding of the process and devolution more generally. It was therefore decided that the thesis should, in addition to exploring the extent by which variation had developed between Wales and England, consider the impact of divergence in practice, or it should explore the factors that impacted upon the divergence process. Such an exploration would also help further our understanding of either the way that legislation and policy apply in practice, or our understanding of how legislation and policy are developed, within the devolved UK.

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<sup>131</sup> See discussions on welfare spending and the Barnett formula in section 1.1 above.

It became clear while undertaking this research project that it would not be possible to examine both the impact of divergence in practice and the factors that drive the process in depth. A decision was therefore made to focus exclusively on the factors that impact upon the divergence process. This decision was reached on two primary grounds. First, difficulties were encountered when approaching registered providers in England for research interviews.<sup>132</sup> Such interviews would have permitted the project to consider the experiences of Welsh and English housing associations of regulation in practice. Second and perhaps most importantly, in November 2015 the Office for National Statistics (ONS) published a decision that was to have a significant impact upon social housing regulation.

In November 2015, the ONS decided that, given the extent of the control exercised by the UK Government over registered providers of social housing in England through regulation, they should be reclassified as part of the public sector.<sup>133</sup> The decision had enormous implications. The debt of English registered providers, some £60 billion was transferred, from the private sector onto the public balance sheet.<sup>134</sup> In response, the UK Government enacted legislation to deregulate the social housing sector in England, in an attempt to reverse the ONS' decision.<sup>135</sup> Shortly after the ONS reached its decision in England, it became apparent that a similar decision would be reached if the ONS were to review the classification of Welsh RSLs.<sup>136</sup> In the spring of 2016 the ONS announced that they would take such a review and by September 2016 they made public their decision to reclassify Welsh RSLs.<sup>137</sup> It appears almost certain that the Welsh Government will follow the lead of its counterparts in Westminster, changing the way that regulation is undertaken in Wales in a bid to reverse the ONS's decision.<sup>138</sup> Given that the literature currently in place on the factors that drive divergence does not seem to have considered the impact of international

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<sup>132</sup> This is discussed in greater detail in 2.2.3.

<sup>133</sup> Office for National Statistics 'Classification announcement: "Private registered providers" of social housing in England' (30 October 2015).

<sup>134</sup> Housing association change adds £59 billion to UK debt (*Business Reporter*, 20 November 2015) <http://business-reporter.co.uk/2015/11/20/housing-association-change-adds-59-billion-to-uk-debt/> accessed 15 June 2016

<sup>135</sup> The Housing and Planning Act 2016

<sup>136</sup> Steffan Evans 'Adding £2.3bn of debt to the accounts – social housing deregulation as an early test for the minority Welsh Government' (LSE British Politics and Policy Blog, 10 May 2016) < <http://blogs.lse.ac.uk/politicsandpolicy/adding-2-3bn-of-debt-to-the-national-accounts-social-housing-deregulation-as-an-early-test-for-the-minority-welsh-government/>> accessed 23 July 2016

<sup>137</sup> Office for National Statistics 'Economic statistics sector classification - classification update and forward work plan: Mar 2016' (29 March 2016); and Office for National Statistics 'Statistical classification of registered providers of social housing in Scotland, Wales and Northern Ireland: September 2016' (29 September 2016)

<sup>138</sup> A Welsh Government spokesperson said: 'We are exploring a legislative solution to the issue of reclassification, and housing associations can be confident that it will be resolved' Heather Spurr 'Governments pledge to reverse ONS reclassification' (*Inside Housing*, 30 September 2016) < <http://www.insidehousing.co.uk/governments-pledge-to-reverse-ons-reclassification/7017032.article>> accessed 2 November 2011.

accountancy standards on the process, it was felt that moving the focus of the thesis to examining the factors that have impacted upon the divergence process, provided an opportunity to further our understanding of it, making a valuable contribution to the literature on the divergence process within the devolved UK.

The fact that the existing literature on the factors that impact upon the divergence process did not explore the role of the ONS highlighted a further need to focus on this research question. No academic work had been undertaken, prior to this thesis, which had explored the factors that contribute to the development of divergence in social housing regulation.<sup>139</sup> Given that it appeared likely that a study of social housing regulation would unearth evidence that a previously unidentified factor impacted upon the way divergence developed between Wales and England, this led to the question of whether the factors that had already been identified within the literature on divergence, had the same impact upon the divergence process in the social housing context? It became clear that exploring the factors that had contributed to the development of policy and legislative variation in social housing regulation could strengthen our understanding of the divergence process as a whole, and the way that policy and legislation is developed in Wales and England. The thesis has therefore set out to address the following question:

- What factors have impacted upon the development of divergence and convergence in social housing regulation between Wales and England?

There was one further reason why this research question was addressed. Understanding the divergence process is key, if our understanding of the devolution settlement, in particular, our understanding of the way that the Westminster parliament and the devolved administrations operate, is to be improved. An examination of the factors that have an impact on the divergence process allows us to develop our knowledge of the way that policy spill overs impacts upon the work of both the Welsh and UK Governments. It also provides us with an opportunity to develop our awareness of the way that Welsh law develops, leading to questions that could have an impact on the ongoing debate concerning the creation of a distinct Welsh legal jurisdiction, and the debate concerning the codification of Welsh law. My thesis will review some of these broader constitutional questions as it progresses and will reflect on how the thesis' findings impacts upon our understanding of Wales's devolution settlement in its conclusion.

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<sup>139</sup> There has been some work, however, within the literature on Housing Law and Policy that has explored the development of social housing regulation. See section 1.2

## 1.5 The structure of the thesis

Having set out the research questions that my thesis will address in section 1.4, this section turns to consider how these questions will be addressed, and will note some of the key themes that reappear throughout the thesis. The thesis can be divided in three. Part One, comprising Chapters 3 to 5, will explore the historic development of housing devolution in Wales, searching for the point of divergence in social housing regulation between Wales and England. Part Two, comprising only Chapter 6, explores the extent by which social housing regulation differs in Wales and England today. Part Three, comprising Chapters 7 and 8, explores the factors that have contributed to both the development of divergence and convergence, examining how these factors work with and against each other. The Conclusion in Chapter 9 looks back over the findings of the thesis, highlighting the areas within which future research is required.

### 1.5.1 Chapter 2 Sector and Methods

Before seeking to address the thesis' three research questions, Chapter 2 sets out to place the thesis in its broader context and to consider the research methods it has utilized. The purpose of this section is to highlight the context within which the legislative and regulatory divergence, discussed within the remainder of the thesis, developed. This chapter will focus specifically on developments over recent years within the social housing, and the impact they may have had on the nature of the social housing sectors in Wales and England. The chapter will then move on to consider the methods employed within the thesis, noting their limits and possibilities.

### 1.5.2 Part 1: The historic development of divergence in social housing regulation

Part 1 of the thesis explores the historic development of patterns of divergence and differences in social housing regulation across Wales and England. This analysis makes an original contribution to our knowledge and understanding of divergence and devolution. It highlights how, even in an era of limited devolution, differences were beginning to emerge between social housing policy in Wales and England, suggesting that divergence precedes political devolution. Furthermore, Part 1 will argue that devolution within housing did not develop as a result of a 'processes of thinking' but was rather the consequence of a series of politically expedient, ad-hoc decisions.

With the existing literature on social housing and Wales suggesting that divergence precedes political devolution, it is clear that, in order to understand present day divergence, it is necessary to uncover its historical roots. Part 1 does so with the aim of addressing three research questions in particular:

- What is the point of divergence between social housing regulation in Wales and England??
- What factors have impacted upon the development of divergence and convergence in social housing regulation between Wales and England?
- Why were powers over housing first devolved to Wales and how did the devolution settlement develop over time?

As noted in 1.3 there is no consensus within the academic literature on housing and devolution over when housing functions were first devolved to Wales.<sup>140</sup> Indeed, with the exception of Malcom J Fisk's chapter in *Housing in Wales, The Policy Agenda in an Era of Devolution* there has been very limited study of the history of housing in Wales, with a particular gap in the literature on the role that housing has played in the development of devolution.<sup>141</sup> By drawing on this previously unexamined archival material I have been able to establish, for the first time, that housing policy in Wales diverged from the English position as early as 1 May 1940.

On 1 May 1940, limited administrative housing functions were devolved to the Welsh Board of Health.<sup>142</sup> This was the first time that housing in Wales was to be administered separately to housing in England. The significance of this decision and the process that led to it, is discussed in Chapter 3.<sup>143</sup> Having established 1 May 1940 as the initial point of divergence between Wales and England, the remainder of Part 1 charts the development of housing devolution in Wales, and examines the extent by which divergence grew over the following decades. The remainder of Chapter 3, and Chapters 4 and 5 discuss a number of important steps along the devolution and divergence journey. These include the establishment of a separate Welsh Office within the Ministry of Housing and Local Government,<sup>144</sup> the establishment of the post of Secretary of State for Wales<sup>145</sup> and the establishment of Tai Cymru as an independent Welsh regulator of housing associations.<sup>146</sup>

The historic study of the development of housing devolution and divergence concludes at the turn of the first decade of the 21<sup>st</sup> century. Chapter 5 explores the way that both the divergence processes and devolution developed during the early years of the National

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<sup>140</sup> Murie (n126); Fisk (n126); and Evans (n126)

<sup>141</sup> Fisk (n136)

<sup>142</sup> Circular 2005, sent by the Ministry of Health to the County and County Borough, Town, Urban District and Rural District Council in Wales and Monmouthshire, 26 April 1940 National Archives File HLG 158/ 3

<sup>143</sup> In particular, in section 2.3

<sup>144</sup> See section 2.4

<sup>145</sup> See section 3.1

<sup>146</sup> See section 3.3

Assembly and provides a link between the historical aspect of the thesis and a more contemporary study of divergence.

### 1.5.3 Part 2: Divergence today

Part 2 sees the focus of the thesis turn to the contemporary period. Chapter 6 sets out to provide a snapshot of the extent by which divergence has developed between Wales and England on 31 January 2017.<sup>147</sup> In doing so Part 2 addresses the thesis's first research question:

- To what extent has social housing regulation in Wales and England diverged?

In order to explore the extent of the divergence that has developed between Wales and England, Chapter 6 focuses on three key areas of regulation; registration,<sup>148</sup> tenant protection,<sup>149</sup> and the regulatory controls cited by the ONS in their reclassification decisions.<sup>150</sup> This approach was adopted so that the extent by which divergence has developed can be examined in detail in these three areas, as opposed to providing a brief overview of regulation more generally. In doing so the thesis is able to explore the extent by which divergence has developed between both primary and secondary legislation, and between the regulatory frameworks that are in place in both nations.

### 1.5.4 Part 3: What causes divergence?

The final part of this thesis explores the factors that have contributed to the divergence process. This work can be found spread over two chapters. Chapter 7, discusses the role of political and constitutional factors; specifically the impact of the devolution settlement and policy and politics on divergence. Chapter 8 meanwhile considers the impact that issues within the social housing sector have had on divergence, namely; accountancy techniques and the ONS, private finance and the structural differences that exist between Wales and England. The research undertaken for the purposes of this thesis suggest that each factor does have an impact on the divergence process, contributing to both the development of policy and legislative variation and convergence. In undertaking this analysis, Part 3 addresses the thesis's third research question:

- What factors have impacted upon the development of divergence and convergence in social housing regulation between Wales and England?

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<sup>147</sup> A discussion as to why the extent of the differences set out in this thesis should only be considered correct as of 31 January 2017 is set out in 2.1.

<sup>148</sup> See section 6.1

<sup>149</sup> See section 6.2

<sup>150</sup> See section 6.3



### 1.5.5 Conclusion and broader significance

The Conclusion will provide the thesis with an opportunity to both reflect on its findings, and to consider their broader significance. The Conclusion will focus on the original contributions made to the literature on divergence in Part 3 of the thesis, which examines the factors that impact upon the divergence process. These findings give us a clearer understanding of the way that legislation and policy on social housing regulation is developed in both Cardiff Bay and at Westminster.

To ascertain the broader significance of these findings, the Conclusion will consider, in the first instance, the relationship between devolution and divergence. Reflecting on the findings of my thesis, it will consider whether the development of a degree of divergence is an inevitable consequence of devolution. Having explored this connection, the Conclusion will move on to consider some of the broader changes facing the housing sector, a sector, that it is argued, is currently in a state of flux. The findings of the thesis give us a better understanding of some of the factors that impact upon the work of both legislatures as they try and deal with the 'housing crisis'.

The chapter will conclude by considering some of the broader constitutional questions that arise from this research project. The conclusion will consider questions that have arisen about what constitutes 'Welsh law', the codification of the 'Welsh law' and the future of the untied legal jurisdiction of England and Wales. The findings of this thesis would seem to suggest that the debate, currently ongoing in relation to these big constitutional questions would be improved if greater consideration was given to the divergence process. They also suggest that if the study of divergence continues to be overlooked, that there is a risk that the people of Wales could be at a disadvantage to the people of England.

### 1.5.6 Key themes

Whilst the thesis can be divided into three parts, there are a number of themes that appear consistently throughout each of these. These include the fact that divergence can develop because of the actions of both the UK and Welsh Government, that divergence can develop on a number of levels, and the fact that a number of factors have an impact on the divergence process, meaning that law and policy can converge as well as diverge. Each of these themes has an impact upon our understanding of the divergence process and the way that devolution works in practice. This sub-section will briefly set out their significance.

Since political devolution became a reality in the UK at the turn of the millennium there has been a growing body of academic work that examines the devolution process. Much of this academic work has focused on the new devolved institutions in Belfast, Cardiff and Edinburgh. The establishment of new legislatures in those three nations has not been the

only impact that devolution has had on the UK. Devolution has meant that a new body of law and policy has developed, legislation which is enacted and policy that is implemented, by the UK Government, but which only applies in England. Until the introduction of English Votes for English Laws in 2015, no formal mechanism had existed within the Westminster Parliament that recognised its dual role as a legislature for the United Kingdom as a whole and as the de facto legislature for England. Perhaps as a consequence of this a-symmetrical devolution settlement, an erroneous presumption has been evident in some of the discourse surrounding devolution and divergence, namely, that the development of divergence is a consequence of the actions of the devolved legislatures.<sup>151</sup> Whilst this may be true in a number of instances, a theme that keeps reappearing throughout this thesis is the fact that divergence can develop as a result of the actions of both the devolved and UK Governments. If we are to fully understand the impact of devolution on policy development and legislation in the UK then it is important that this is considered in all future discussions on divergence.

A second important theme that reappears throughout this thesis is that divergence and convergence can develop at a number of levels - and the levels do not necessarily push in the same direction. These levels include primary legislation, secondary legislation and regulatory frameworks. The thesis demonstrates how, on occasions, despite the existence of similar primary legislation, the Governments in Cardiff and Westminster have developed very different approaches to its implementation, for example, developing different approaches to regulation and registration.<sup>152</sup> On other occasions, the Governments have approached issues very similarly, despite the existence of very different legislative provisions.<sup>153</sup> This phenomenon, and the reasons for it are discussed throughout the thesis. This finding furthers our understanding of how policy and legislation is developed and implemented in the UK, emphasizing the need to look beyond headline policy announcements and primary legislation, to achieve a fuller understanding of law and policy.

A third theme that reappears consistently throughout the thesis is the fact that a number of factors contribute to the divergence process. These factors can lead to the law diverging further, or converging, emphasizing the fact that divergence is not a linear process. The thesis identifies five factors that have impacted on divergence between Wales and England. These include political and ideological differences, technocracy, structural differences,

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<sup>151</sup> For example, see Lord Crickhowell's comments during the Wales Bill's second reading. Lord Crickhowell talks of '*diverging Welsh laws*' as a result of '*emerging body of law made by the Welsh Government*'. He makes no reference to diverging English laws. HL Deb, 10 October 2016, vol 774, col 1684. See also the discussion in sub-section 9.3 on the Wales Act 2017.

<sup>152</sup> See sub-section 6.1.2 for more information

<sup>153</sup> *ibid*

pressures exerted by the financial sector and the nature of the devolution settlement. In exploring this process, the thesis makes a valuable contribution to the literature on policy development within the devolved UK, both supporting and challenging some of the published literature.

## 1.6 Conclusion

The introduction has clearly identified gaps or weaknesses within the literature on devolution in the UK, in particular within literature that has developed on policy and legislative divergence. As discussed in Section 1.2, this literature has primarily developed within the social sciences and has focused on specific policy areas.<sup>154</sup> This focus has meant that the development of divergence within other policy areas remains underexplored. There is also a clear need for the divergence process to be examined by academics from other disciplines, including the law, if the phenomenon is to be accurately understood. My thesis attempts to address both these weaknesses, by exploring the development of divergence in social housing regulation between Wales and England.<sup>155</sup> To plug this gap in the academic literature my thesis sets out to address four research questions:

- (v) To what extent has social housing regulation in Wales and England diverged?
- (vi) What factors have contributed to the development of divergence and convergence in social housing regulation between Wales and England?
- (vii) What is the point of divergence between Wales and England?
- (viii) Why were powers over housing first devolved to Wales and how did the devolution settlement develop over time?

As set out in 1.5, the thesis will address these three questions in three parts. The first part will focus on the historic development of devolution and divergence within the social housing context. The second will explore the extent of the differences that are in place between Wales and England in the present day. Whilst the third will examine the factors that impact upon the divergence process. Through this examination my thesis will not only developed the academic understanding of the divergence process but will also make a valuable contribution to the broader body of work on Welsh devolution.

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<sup>154</sup> Namely health and education.

<sup>155</sup> The reasons for this focus are given in Section 1.2

## 2. Sector and methods

Having set out the general scope of the thesis in Chapter 1, Chapter 2 turns to look at some of the broader literature that has developed on social housing, and the methods used in addressing the thesis's research questions. The Chapter is divided into two. Section 2.1 seeks to provide a synopsis of the extensive literature on social housing governance, operation and financing. The purpose of this section is to place the work of this thesis within the broader academic literature that has been published on social housing, with particular regard to the literature on the operation of housing associations. The chapter also gives an overview of the social housing sector in Wales and England. Section 2.2 goes on to consider the thesis's methodology and research methods, setting out both their limits and possibilities.

### 2.1 The literature on social housing and housing associations

As set out in 1.2 and 1.3, housing is a subject area that has been to some extent overlooked within the literature that has developed on legislative and policy divergence in the UK, whilst divergence is a process that has largely been overlooked in the literature on housing. The last decade has seen a significant growth in the literature published on the development of the social housing sector generally. This literature has an international dimension with the development of the sectors in Australia<sup>1</sup> and the Netherlands, attracting significant academic comment.<sup>2</sup> There has been a great deal of academic commentary on the development of the social housing sector in England. Section 2.1.1 will demonstrate how this literature argues that, with a reduction in the availability of public funds for the construction of social housing, housing associations have turned to the private sector for increasingly innovative forms of finance.<sup>3</sup> It is argued in the literature, that this pursuit of private finance has seen a number of organisations develop an 'entrepreneurial'<sup>4</sup> approach leading to a rise of 'hybrid' organisations.<sup>5</sup> Having considered the literature on England, the chapter will turn to look at Wales. The literature that has developed on 'hybridity' and 'entrepreneurialism' in England is

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<sup>1</sup> For example; Ilan Wiesel, Gethin Davison, Vivienne Milligan, Peter Phibbs, Bruce Judd and Michael Zanardo, 'Developing sustainable affordable housing: a project level analysis' (2012) Australian Housing and Research Institute; and Victor Gruis and Nico Nieboer, 'Government regulation and market orientation in the management of SH assets: Limitations and opportunities for European and Australian landlords' (2007) *European Journal of Housing Policy* 45

<sup>2</sup> For example; Victor Gruis, 'Organisational archetypes for Dutch housing associations' (2008) *Environemnt and Planning C 26: Politics and Space* 1077; and Victor Gruis and Nico Nieboer, 'Shifting back – Changing organisational strategies in Dutch social housing' (2014) *Journal of Housing and Built Environment* 1

<sup>3</sup> For example Connie P.Y. Tang, Michael Oxley and Daniel Mekic, 'Meeting commercial and social goals: institutional investment in the housing association sector' (2017) *Housing Studies* 411

<sup>4</sup> For example Nicola Morrison, 'Selling the family silver? Institutional entrepreneurship and asset disposal in the English housing association sector' (2017) *Urban Studies* 2856

<sup>5</sup> Nicola Morrison, 'Institutional logics and organisational hybridity: English housing associations' diversification into the private rented sector' (2016) *Housing Studies* 897

not present in Wales. 2.1.2 will therefore provide a summary of the social housing sector in Wales, as it stands at 6 June 2017, in relation to the published academic work from England and beyond.

### 2.1.1 The development of the sector in England

As of 1 August 2016, 1,769 housing associations were registered with the Homes and Communities Agency (the social housing regulator in England) as providers of social housing in England.<sup>6</sup> These organisations varied significantly in size and scale, from the G15<sup>7</sup> to small almshouses.<sup>8</sup> In 2015, these organisations provided a total 2,708,611 homes across all housing tenures, playing a significant role in housing the nation.<sup>9</sup> Chapters 3, 4 and 5 will chart the development of these organisations over previous decades. This section, however, will draw attention to some of the current debates ongoing within the social housing sector, as to how the sector is developing and how it may change in future. In doing so this section will set the landscape within which any divergence in social housing regulation has developed.

For over a decade, governments across the world have reduced the amount of public money spent on social housing.<sup>10</sup> This has presented a significant challenge for the sector. On the one hand, providers of social housing are expected to continue to meet their ‘social mission’ of providing homes for those who can’t afford what is on offer on the open market. On the other, the reduction in public funds has put pressure on providers to operate in a more commercial manner so that they can attract private finance, or so that they can develop their own revenue streams.<sup>11</sup> These competing pressures have led to the development of what have been dubbed as ‘hybrid’ organisations, organisations that exist in a grey area between the state, the market and the community, receiving funds from a range of sources and providing a diverse range of services.<sup>12</sup>

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<sup>6</sup> Homes and Communities Agency, ‘Current Providers of Social Housing’, (Gov.uk, 1 August 2016) <https://www.gov.uk/government/publications/current-registered-providers-of-social-housing> accessed 10 August 2016

<sup>7</sup> A group of London’s 15 largest registered providers. They manage 410,000 homes between them. G15, ‘About us’ (G15) <http://g15london.org.uk/about-us/> accessed 10 August 2016

<sup>8</sup> Register of providers n(6)

<sup>9</sup> Homes and Communities Agency ‘Private Registered Provider Social Housing Stock in England’ (Gov.uk, 29 September 2015)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/464349/SDR\\_2014-15\\_full.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/464349/SDR_2014-15_full.pdf) accessed 10 August 2016

<sup>10</sup> Tang et al n(3)

<sup>11</sup> Ibid and Morrison (n5)

<sup>12</sup> Tang et al n(3)

Hybridity is a concept that has been discussed internationally within the literature on social housing.<sup>13</sup> The literature on hybridity suggests that it is not just the reduction in public funds that has led to change within the social housing sector in England. Government policy has allowed, and in some cases encouraged, social housing providers to diversify in order to fund their social housing services.<sup>14</sup> Some organisations have taken full advantage of these new opportunities, entering into the private rental market,<sup>15</sup> establishing construction companies,<sup>16</sup> and taking on services previously provided by the state such as extra care facilities,<sup>17</sup> and work programmes.<sup>18</sup> Other organisations, have been more cautious in their approach.<sup>19</sup> Work published by Professors David Mullins and Hal Pawson in 2010 suggested that individual organisations were developing their own distinctive approach to hybridity.<sup>20</sup> They argued that whilst some organisations behaved like agents of the state, others were acting as profit driven entities.<sup>21</sup>

The concept of 'institutional entrepreneurialism' has been used to explain this difference in approach between organisations.<sup>22</sup> It is argued within the literature that organisations with '*prospector traits*'<sup>23</sup> are more likely to actively seek market opportunities than organisations with '*defender traits*'.<sup>24</sup> Whilst the ability of social housing providers to innovate is constrained by regulation,<sup>25</sup> it is argued that their ability to innovate is not limited to those areas where the Government has permitted diversification.<sup>26</sup> Research undertaken by Professor Nicola Morrison highlights how one '*prospector*' organisation co-sponsored a report calling for greater autonomy for social housing providers in England, highlighting how such organisations actively seek to change the social housing landscape.<sup>27</sup>

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<sup>13</sup> For example Gruis and Nieboer n(1)

<sup>14</sup> Tony Manzi and Nicola Morrison, 'Risk, commercialism and social purpose: Repositioning the English housing association sector' (2017) *Urban Studies* 1, 5

<sup>15</sup> Denise Chevin, '*Social hearted, commercially minded: A report on tomorrow's housing associations*' (April 2013, The Smith Institute) 29

<sup>16</sup> *ibid*

<sup>17</sup> *ibid* 30

<sup>18</sup> *ibid* 32

<sup>19</sup> *ibid* 28

<sup>20</sup> David Mullins and Hal Pawson, 'Agents of policy or profits in disguise?' in David Bills (ed) *Hybrid Organizations and the Third Sector Challenges for Practice, Theory and Policy* (Palgrave MacMillan, 2010) 207

<sup>21</sup> *ibid*

<sup>22</sup> Morrison n(5) and Victor Gruis, Nico Nieboer and Andrew Thomas, 'Strategic asset management in the social rented sector: Approaches to Dutch and English HAs' (2004) *Urban Studies* 1229

<sup>23</sup> *ibid* 2859 According to Morrison organisations with prospector traits '*continually redefine products and markets*'

<sup>24</sup> *ibid* According to Morrison organisations with defender traits '*direct attention to a clearly defined market segment and seek stability through the provision of a reliable product-market domain.*'

<sup>25</sup> *ibid* 2860

<sup>26</sup> *Ibid* 2868

<sup>27</sup> *ibid*

Diversification and innovation has not been the only consequence of the reduction in public funds within the social housing sector. As public money has become harder to come by, social housing providers have increasingly turned to the private sector for money. Historically housing associations have relied on long term bank loans.<sup>28</sup> Following the Financial Crisis, however, the cost of such loans has increased.<sup>29</sup> Housing associations have therefore searched for other sources of finance; institutional investment, in particular the capital bond market has become an increasingly important source of long term borrowing for the sector.<sup>30</sup> This has seen housing associations access funds from a new range of organisations, in particular pension funds and insurance corporations.<sup>31</sup> Access to the capital bond market is not just limited to the largest social housing providers in England. Whilst the largest organisations are able to issue bonds publicly, smaller organisations have the ability to privately place bonds on the market, whilst organisation with under 10,000 units are able to club together to issue 'club bonds'.<sup>32</sup>

Whilst securing funds from the bond market is no longer uncommon within the social housing sector in England, other sources of finance are still used by only a few organisations. Such forms of finance include 'equity type' investment,<sup>33</sup> where property is developed in partnership or through sale and leaseback agreements between social housing providers and investors such as pension funds,<sup>34</sup> and the derivatives market.<sup>35</sup> Such arrangements remain uncommon, however, partly because of the preference of the social housing regulator for housing associations to seek funds from the bond market,<sup>36</sup> and the perceived high risk of such sources of finance.<sup>37</sup>

Such diversification both in terms of the services offered by social housing providers and in terms of their sources of funding has had a significant impact on the sector. Organisations have been challenged to balance their social purpose with their new commercial needs. It is

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<sup>28</sup> Tang et al n(3) 415

<sup>29</sup> *ibid*

<sup>30</sup> *ibid* Between 2011/12 and 2013/14 63% of total external finance raised by registered providers was raised from the bond market.

<sup>31</sup> *ibid* This has seen housing associations purchase bonds globally. For more information see Thomas Wainwright and Graham Manville, 'Financialization and the third sector: Innovation in social housing bond markets' (2016) *Environment and Planning A* 819

<sup>32</sup> Tang et al n(3) 415

<sup>33</sup> *ibid* 416

<sup>34</sup> *ibid*

<sup>35</sup> Manuel B. Aalbers, Jannes van Loon and Rodrigo Fernandez, 'The Financialization of A Social Housing Provider' (2017) *International Journal of Urban and Regional Research* 572

<sup>36</sup> Tang et al n(3) 421

<sup>37</sup> This perception that such arrangements are high risk has increased following the financial difficulties encountered by Dutch housing association, Vestia - Aalbers et al n(35) and English housing association – Cosmopolitan Tang et al n(3) 421 whilst entered into such arrangements.

argued that some organisations have chosen to overly focus on the commercial dynamic.<sup>38</sup> Others, however, argue that such diversification presents the sector with opportunities.<sup>39</sup> Whilst there may be some debate as to the merits of diversification and hybridisation what seems beyond doubt is that the sector has changed the way that it operates because of these new challenges and opportunities.

Many housing associations have restructured over recent years. It is argued that one motive for this is has been the desire within some organisations to balance their social and commercial aims.<sup>40</sup> Another motivation for such restructuring has been the merger of a number of housing associations.<sup>41</sup> The merger of social housing providers has been a prominent feature of the development of the social housing sector over the past two decades with their promised efficiency savings proving attractive in an era of limited public funds.<sup>42</sup> Merged organisations have adopted a number of differing structures, ranging from structures that allow the merged organisations to preserve a degree of independence, to a fully integrated unitary organisation.<sup>43</sup> As organisations have become larger, adopted more complicated group structures and have become more commercially focused as a result of these pressures, another word has increased in prominence within the sector, 'risk'.

Social housing providers have long benefitted from borrowing sums from private lenders at preferential rates due to the fact that they are viewed as low risk organisations.<sup>44</sup> The perception of organisations as low risk has stemmed, in part, from the fact that they are regulated,<sup>45</sup> and the expectation that the state would take steps to protect social housing assets.<sup>46</sup> Whilst banks have become more cautious in the way that they lend money following the 2008 financial crash, the low risk reputation of the sector has attracted institutional investors.<sup>47</sup> The fact that no social housing providers collapsed during the financial crisis is said to be a particular attraction for institutional investors who are eager to

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<sup>38</sup> Nicola Morrison, 'Meeting the decent home standard: London housing associations' asset management strategies' (2013) *Urban Studies* 2569

<sup>39</sup> Tang et al n(3) 419 Tang For example, a number of social landlords have developed services that assist tenants in financial difficulty. The initial motivation for this has been to reduce rent arrears in line with new commercial goals, however, this has also got clear social benefits.

<sup>40</sup> Chris Skelcher and Steven Rathgeb Smith, 'Theorizing hybridity: Institutional logics, complex organizations, and actor identities: The case of nonprofits' (2014) *Public Administration* 433

<sup>41</sup> David Mullins, 'Competing Institutional Logics? Local Accountability and Scale and Efficiency in an Expanding Non-Profit Housing Sector' (2006) *Public Policy and Administration* 6

<sup>42</sup> *ibid* and Jacob Veenstra, Hendrik M. Koolma, Maarten A. Allers, 'Scale, mergers and efficiency: the case of Dutch housing corporations' (2017) *Journal of Housing and the Built Environment* 313

<sup>43</sup> David Mullins, *English Housing Mergers and Groups* (Third Sector Partnerships for Service Delivery Birmingham University, 2010)

<sup>44</sup> Tang et al n(3)

<sup>45</sup> *ibid*

<sup>46</sup> *ibid*

<sup>47</sup> *ibid*



diversify their credit risk.<sup>48</sup> There are concerns, however, that the more commercial approach adopted by a number of organisations undermines the low risk status of the sector.

As housing associations provide greater services and products at market rates, social housing providers become more vulnerable to changes within the housing market and the economy more broadly.<sup>49</sup> Housing associations have, historically been counter-cyclical organisations, as social housing providers take on more market functions, however, this has begun to change, with organisations becoming more pro-cyclical.<sup>50</sup> With these changes appearing at the same time as public funds have become scarcer for the sector in England, and at the same time as the adoption of more complex business models and structures, there is concern that housing associations are increasingly being exposed to risk.<sup>51</sup>

Private financiers are becoming increasingly aware of the risks of diversifications for the sector. Research undertaken Thomas Wainwright and Graham Manville found that social housing providers had been made aware that investors were not keen '*on complex business models, which deviate from social housing due to the higher risk*'.<sup>52</sup> Other research has found that institutional investors are making finance available at different prices dependent upon the perception of risk at individual organisation.<sup>53</sup> It would appear that the private funders are not only becoming aware of the risks of diversification but are increasingly playing a regulatory role, informing the sector of what activities and conduct social housing providers can undertake whilst continuing to borrow money at cheap rates.<sup>54</sup>

It is not just lenders and institutional investors that are now playing a regulatory role within the social housing sector. Another source of regulatory control for the social housing sector are ratings agencies. Housing Associations with high credit ratings can find investment on the open bond market, and are viewed as lower risk options by institutional investors.<sup>55</sup> Housing Associations are therefore heavily incentivised to follow any guidance and requirements set out by credit agencies as to how they should run their organisations. As set out in 1.2.3 such actions thesis. The thesis will consider, however, how such actions have

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<sup>48</sup> Ibid 418

<sup>49</sup> Manzi and Morrison n(14) 5

<sup>50</sup> Ibid 9

<sup>51</sup> Ibid 14

<sup>52</sup> Wainwright and Glanville n(31)

<sup>53</sup> Tang et al n(3) 419

<sup>54</sup> Another example in favour of this argument can be found in Nicola Morrison's research into the work undertaken by housing associations in the private rental sector. Morrison notes how the institutional investors at one provider were happy to continue to invest in its work despite its diversification into the private rental sector given that they felt that the provider had a 'clarity of purpose' with regards to this work. This was felt to contrast with other providers. Morrison n(5) 907

<sup>55</sup> Tang n(3) 418

contributed to the development of divergence and convergence in social housing regulation between Wales and England, in Chapter 8.

### 2.1.2 The social housing sector in Wales

As set out above, the extensive literature on the development of the social housing sector in England is not matched by a similarly large literature on social housing in Wales.<sup>56</sup> This section therefore provides a summary of how the social housing sector in Wales stands as of 6 June 2017, the date of submission for this thesis, referring to the literature that has developed in England and globally where appropriate.

In Wales, 93 housing associations are registered as Registered Social Landlords (RSLs) with the Welsh Government.<sup>57</sup> These organisations provide 139,104 social rented properties with a further 10,000 properties being provided by RSLs at non-social rates.<sup>58</sup> As with the social housing sector globally, RSLs in Wales have had to operate within an environment where public funds have become harder to come by.<sup>59</sup> Despite the reduction in the availability of public funds, Welsh Government grant still accounts for over half the funds used by Welsh RSLs to construct social housing.<sup>60</sup> Whilst the reduction in the availability in public funding may not have been as stark in Wales as in England, housing associations on the western side of Offa's Dyke have also diversified in an attempt to make up the shortfall in public funds. Amongst the new activities undertaken by Welsh RSLs are the provision of student housing,<sup>61</sup> the construction of homes for sale at market value,<sup>62</sup> and the provision of commercial premises.<sup>63</sup>

In line with their English counterparts Welsh housing associations have also increasingly turned to private finance as they seek to fund the construction of social housing. Unlike England, however, individual RSLs in Wales have not, to any great extent, sought access to money provided by institutional investors, with banks still being the biggest provider of

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<sup>56</sup> Some exceptions to this can be found in 1.2 and 1.3

<sup>57</sup> Welsh Government, Registered Social Landlord (*Welsh Government*, 26 May 2016) 10 May 2016 <http://gov.wales/topics/housing-and-regeneration/publications/registered-social-landlords-in-wales/?lang=en> accessed 10 August 2016

<sup>58</sup> National Statistics for Wales 'Social housing stock and rents, as at 31 March 2015', (*Welsh Government*, 6 August 2015) <http://gov.wales/docs/statistics/2015/150806-social-housing-stock-and-rents-31-march-2015-en.pdf> accessed 10 August 2016

<sup>59</sup> For example, one RSL in Wales revealed during interview that social housing grants now only covers 30% of the costs of developing some of its schemes. Interview with Chief Executive of Welsh RSL 4, (West Wales, 14 May, 2015)

<sup>60</sup> *The 2016 Financial Statements of Welsh Housing Associations* (Community Housing Cymru, 2016)

<sup>61</sup> The Public Accounts Committee *Inquiry into Regulatory Oversight of Housing Associations: Evidence Session 5* (National Assembly for Wales) 13 February 2017 para 130

<sup>62</sup> *ibid*

<sup>63</sup> *ibid*

private finance.<sup>64</sup> One potential explanation for this may be the relative small size of housing associations in Wales. Of the 34 RSLs in Wales that are developing new property, only two own more than 10,000 units.<sup>65</sup> Furthermore, the two large organisations, Pobl Group and Wales and West have only recently grown past the 10,000 mark, as a result of mergers. Pobl Group was established in March 2016 following a merger between Seren Group and Grŵp Gwalia, making it the largest RSL in Wales.<sup>66</sup> Wales and West on the other hand merged with Cymdeithas Tai Cantref in September 2016.<sup>67</sup> It remains to be seen whether either RSL will turn to institutional investors for funds, given their increased size.

Despite taking place within six months of each other both mergers developed in different ways. The impact of this difference is reflected in the group structures that both organisations have adopted. Pobl developed as a result of a commercial decision to merge, taken by the boards at Seren Group and Grŵp Gwalia. As a result, Pobl Group have decided to adopt a group structure that maintains the identity of the organisations that were in place prior to Pobl's establishment. Wales and West merged with Cantref on the other hand, following the latter organisation entering financial difficulty. As a result, Cantref was shut down as a separate organisation with its activities and assets moved over to Wales and West.

Diversification appears to have been a factor that contributed to Cantref entering financial difficulty. Local press reports suggest that Cantref found it difficult to let student accommodation that it had constructed in Aberystwyth and that this had put pressure on its finances.<sup>68</sup> Given the Cantref experience and the increased diversification seen within the social housing sector in Wales, it appears likely that, as in England, lenders are increasingly undertaking a regulatory role within the social housing sector in Wales.<sup>69</sup> The impact of this on state's regulatory activities will be examined, in detail in section 8.2.1.

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<sup>64</sup> Community Housing Cymru n(60) 39

<sup>65</sup> Tang n(3) notes how organisations with under 10,000 units need to club together to enter the bond market.

<sup>66</sup> Stephen Farrell 'Merger creates expanded housing provider' (*Insider Media Limited*, 15 March 2016) <<https://www.insidermedia.com/insider/wales/merger-creates-expanded-housing-provider>> accessed 21 November 2017

<sup>67</sup> 'A warm welcome to our new tenants' (*Wales and West*, 19 September 2016) <<http://www.cantref.co.uk/About-Us/News/Pages/welcome%20to%20our%20West%20Wales%20residents.aspx>> accessed 21 November 2017

<sup>68</sup> Jon Coles, 'NEWS Welsh Government investigates Cantref' (*Carmarthenshire Herald*, 13 August 2015) <<http://www.carmarthenshireherald.com/6211/welsh-government-investigates-cantref/>> accessed 21 November 2017

<sup>69</sup> In December 2016 the National Assembly for Wales' Public Accounts Committee opened an inquiry into Regulatory oversight of Housing Associations, partly as a result of the Cantref experience. At date of submission of this thesis, the Committee was yet to publish its report. Evidence given to the committee by the Council of Mortgage Lenders and Principality Building Society suggests that, as in England, lenders in Wales take a keen interest in the activities of social landlords, in particular, how their diversification activities impact

Shortly prior to the submission of this thesis the Welsh Government issued a new regulatory framework for RSLs in Wales.<sup>70</sup> As set out in 1.5.3 the extent of the divergence charted in this thesis should be considered correct as of 31 December 2016. The content of the new regulatory framework adopted in Wales will therefore not be considered in detail in this thesis. A summary of the new regulatory approach will be provided in 9.2, however, and a discussion of the factors that contributed to the development of this new framework will be provided in 8.1.

## 2.2 Methods and methodology

Having provided a brief synopsis of the literature that has developed on social housing governance and operation, and a summary of the social housing sector in Wales, the focus of this chapter now turns to the methods adopted when undertaking the research that underpins this thesis. As set out in 1.1, rather than presenting a black-letter or doctrinal analysis of the law, this thesis developed within the broad socio-legal tradition. As such, a number of research methods were utilized over the course of this research project. These methods and the reasons why they were adopted will be discussed in three sub-sections. 2.2.1 will discuss the archival research undertaken for the purposes of this thesis, 2.2.2, will discuss the methods that were used when examining text, whilst 2.2.3, will discuss the interviews that were undertaken during this research project. In setting out how and why these research methods were adopted and utilized, these sub-sections will set both their limitations and strengths in relation to the thesis.

### 2.2.1 Archival Research

As discussed in 1.5.2, there is no consensus within the literature on the history of Welsh devolution and the history of social housing in Wales as to when housing functions were first devolved to Wales. Given that the existing literature does suggest that divergence precedes political devolution, however, it is clear that to understand present day divergence, it is necessary to uncover its historical roots. Part 1 of the thesis sets out to do so and seeks to address two of the thesis' research questions:

- What is the point of divergence between social housing regulation in Wales and England??

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upon their risk profile. The Public Accounts Committee *Inquiry into Regulatory Oversight of Housing Associations: Evidence Session 4* (National Assembly for Wales) 30 January 2017 para 242

<sup>70</sup> Welsh Government, 'A revised and improved approach to delivery of housing regulation', (*Welsh Government*) < <http://gov.wales/docs/desh/publications/161215-regulatory-judgement-framework-en.pdf>> (accessed 6 January 2017)

- What factors have impacted upon the development of divergence and convergence in social housing regulation between Wales and England?
- Why were powers over housing first devolved to Wales and how did the devolution settlement develop over time?

The motivation for the historical analysis pursued in Part 1 is not primarily with history for its own sake. The analysis is also concerned with the ways in which this hitherto unknown history has shaped and continues to influence contemporary developments. The approach taken here shares some characteristics with other analysis of housing law and policy and of devolution. David Cowan and Morag McDermont's *Regulating Social Housing: Governing Decline* sets out 'not to provide a history as historians might view it, but in Foucauldian style we seek to develop a history of the present of social housing'.<sup>71</sup> In moving towards genealogy from his earlier 'archeological' approach, Foucault drew increased attention to a diagnosis of the current situation as the starting point for a genealogical analysis of how we came to be here. Analysis of the past of this kind unsettles conventional understandings of the present day.

In his legal analysis of the first phase of political devolution in Wales, Rawlings also draws on history to make sense of the current conjecture. He sets out in *Delineating Wales*, some of the key historical events that preceded the establishment of the National Assembly in 1999.<sup>72</sup> In exploring these events, Rawlings sets out to address two questions:

Be that as it may: what of the considerations – including the historical – that work to influence the design of the new constitutional and legal architecture? How is it for example that Wales currently has a framework of government that may safely be described as like nothing else on earth?<sup>73</sup>

Given the lack of clarity in the literature on devolution and social housing as to when housing functions were first devolved to Wales, it became apparent that it would be necessary to turn to primary materials to establish the point of divergence between Wales and England, to files held at the National Archives at Kew Gardens in particular.

The lack of clarity in the literature on housing devolution presented a significant challenge for the undertaking of archival research on the history of housing and devolution. Whilst the literature on devolution suggested that housing functions may have first been devolved to Wales at some point during the 1950s or prior to this, this did not provide much information

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<sup>71</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Cavendish Publishing 2006) xiv and 29

<sup>72</sup> Richard Rawlings, *Delineating Wales* (first published December 2003, University of Wales Press Cardiff 2003)

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<sup>73</sup> *ibid*

upon which to base a search of the files held at the National Archives. Fortunately, through conversations with a colleague who was also undertaking archival research into administrative devolution in Wales, I learned of the HLG 158 (EFI) series of files held at the National Archives. The HLG 158 series holds records created by the Welsh Office component of the Ministry for Housing and Local Government, including documents from the period of the Welsh Office's establishment, and some documents inherited from its predecessor, the Welsh Board of Health. The documents held within the series contained a rich source of information and included a diverse range of materials including official government publications, memos, communication and letters between civil servants and ministers, press clippings and extracts from Hansard. Through this information, I could locate further files from the period before and after the HLG 158 series.

In addition to exploring the documents held at the National Archives, I also examined documents held at the Guildhall Library in London. The decision to visit the Guildhall Library was reached having read Alan Murie's *Moving Homes, The Housing Corporation 1964-2008*.<sup>74</sup> In his book Murie refers to the Annual Reports published by the Housing Corporation. These references suggested that the Reports may have been able to provide valuable information as to the nature and the extent of divergence that had developed between Wales and England over the lifespan of the Corporation. Whilst Murie's book was of assistance in identifying a valuable primary resource, I did face a major difficulty in assessing these materials. Having initially suspected that the Reports were held at the British Library but being unable to find a record of them using the library's online search function I contacted one of the librarians. Through communication with her it became apparent that there is not one location that holds a full collection of the Housing Corporation's Reports. Birmingham University Library hold copies of the Reports from 1964/5 to 1986/7, the Guildhall Library hold copies from 1972/3 to 1991/2, and 1997/8 to 2007/8, Leeds Library hold copies from 1972/3 to 1987/8, and Trinity College Dublin hold copies from 1972/3 to 2001/2. Having initially intended to visit both the Birmingham University Library and the Guildhall Library to examine the Corporation's Reports I encountered a further problem. The Library at Birmingham University was closed to visitors during the period I had intended to visit. Whilst Alan Murie's work, the documents held at the National Archives and the Guildhall Library all offer an indication as to what information these Reports would contain, the fact that I was unable to examine the content of the Housing Corporation's first seven Reports does present an obvious limitation to my discussion on the role of the Housing Corporation in the 1960s. Fortunately, I was able to be

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<sup>74</sup> Alan Murie, *Moving Homes, The Housing Corporation 1964-2008* (Politico's Publishing 2008)

gain full access to the Corporation's Reports through most of the 1970s, 1980s and, with some exceptions, the 1990s and 2000s. The Reports therefore provided a valuable resource for my exploration of the development of divergence in social housing regulation between Wales and England.

### 2.2.2 Analysing textual sources

As the historic study of the development of housing devolution and divergence concludes in Chapter 5, the focus of the thesis, the resources examined, and the methods adopted changes. As set out in 1.5.3, Part 2 of the thesis sets out to provide a snapshot of the extent of the divergence that has developed between Wales and England. Part 3, meanwhile sets out to explore the factors that have both driven and constrained the development of divergence. To explore both the extent of the differences that have developed between Wales and England, and the reasons for it, a number of different textual sources were examined, including legislation, regulatory frameworks and policy documents. Three different research methods were adopted when inspecting these documents; a doctrinal analysis, a textual analysis and a content analysis.

The first of these methods to be adopted was a doctrinal analysis of relevant legislation and regulatory frameworks. Whilst this thesis is not doctrinal in nature, and seeks to predominately contribute to the socio-legal literature on devolution and housing law and policy, this approach was adopted so that the extent by which the law in Wales and England varied could be examined in detail and accurately. A difficulty that was encountered when utilizing this method concerned amendments made to the regulatory framework and the statutory basis for social housing regulation late on during the research period for this thesis. The Housing and Planning Act 2016 did not receive royal assent until May 2016.<sup>75</sup> This meant that the analysis of the law undertaken previously had to be revisited and updated at short notice, to ensure that the thesis reflected the changes made to regulation, and to certify that the instances of divergence set out in the thesis continued to be accurate. The situation in Wales proved to be even more difficult. Whilst the Welsh Government have committed to introduce new legislation concerning social housing regulation in Wales, at time of submission it was yet to publish any firm details on this.<sup>76</sup> The Welsh Government has announced, however, proposals to change the regulatory framework in Wales, and the way that it assesses compliance with that framework.<sup>77</sup> With the housing sector in a state of

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<sup>75</sup> Housing and Planning Act 2016

<sup>76</sup> Since submission the Welsh Government has tabled a bill that seeks to reverse to ONS's reclassification decision. This is briefly discussed in Chapter 9

<sup>77</sup> Welsh Government, 'A revised and improved approach to delivery of housing regulation', (*Welsh Government*) < <http://gov.wales/docs/desh/publications/161215-regulatory-judgement-framework-en.pdf>> (accessed 6 January 2011)

flux on both sides of the border, the decision was made to ensure that the doctrinal analysis, undertaken for the purposes of this thesis was accurate as of 31 December 2016. Further research will be required to monitor the impact of the changes facing the sector in future.

In addition to exploring the legislation and the regulatory frameworks that are in place in Wales and England, a textual analysis of other documents was undertaken as part of the research that led to the completion of this thesis. This work focused on the reviews that were undertaken into social housing regulation in both nations at the turn of the decade.<sup>78</sup> The aim of this work was to examine whether the instances of divergence that had been identified during the doctrinal analysis of the law could also be identified in the policy documents, and to explore some of the contextual differences within which these reviews were undertaken.

The final method used when analysing text as part of this research project was content analysis. This method was applied to the reviews into social housing regulation conducted in Wales and England from 2007 onwards and to the regulatory frameworks in place in Wales and England. These documents were explored using appropriate software to see whether there were significant differences between the language used in Wales and England regarding regulation.<sup>79</sup> The results of this analysis were then used to inform and refine the doctrinal and textual analysis of the same documents by providing an indication of the areas within which divergence may have developed most or least prominently. One final method was adopted as part of this research project, semi structured interviews.

### 2.2.3 Interviews

As set out in 1.4.2 a decision was made at the outset of this research project that the thesis should, in addition to exploring the extent by which variation had developed between Wales and England, consider the impact of divergence in practice, or it should explore the factors that impacted upon the divergence process. Initially the thesis intended to examine both questions. As such, a decision was made to adopt an additional research method, semi structured interviews. This research method was initially adopted so that a comparative study could be undertaken of the experiences of housing associations across Wales and England of regulation in practice. This sub-section will set out how the decision to limit the thesis's focus to an examination of the factors that contribute to the development of divergence and convergence impacted on how the data gathered through this method was

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<sup>78</sup> The Cave Review of Social Housing Regulation, *Every Tenant Matters: A Review of Social Housing Regulation* (June 2007); Affordable Housing Task and Finish Group, *Report to the Deputy Minister for Housing* (June 2008); and the Department for Communities and Local Government, *Review of Social Housing Regulation*, (October 2010)

<sup>79</sup> The software used was NVivo 10.



used in the thesis, and how that means that it has been used in a predominantly illustrative manner, amplifying arguments.

As set out above, the initial motivation for conducting semi-structured interviews for the purposes of this thesis was to undertake a comparative analysis of the experiences of Welsh RSLs and English registered providers, of regulation in practice. This initial intention is reflected in the structure that was adopted for the interviews. The interview questions adopted can be divided into three sections. The first section of the interview set out to explore a participant's experience of regulation in practice. Participants would be asked questions about their relationship with their regulator,<sup>80</sup> and about the way they felt that regulation impacted upon their day-to-day activities. The second section of the interview explored the impact of 'housing need' on participants. These questions were designed to assess whether the pressure that housing associations faced to provide homes impacted upon their activities. The final section of the interview explored the impact of 'finance' on the way that the respective participants operated in practice. Participants were asked questions about how their organisations borrowed money, and about the corporate structures of their organisations. The interviews closed by asking the participants to reflect on the questions that had been asked during the interview, and to consider whether they felt that one factor had a greater impact on their ability to operate than any of the others.

Having designed a schedule of questions the chief executives of Welsh RSLs and English providers were approached for interview. Prospective participants were approached via e-mail and were provided with a participant information sheet setting out the details of the project and a participant consent form. Several difficulties were encountered when approaching prospective participants. On the one hand, it proved difficult to find housing associations between which a comparison could be undertaken. When selecting housing associations to undertake a comparative analysis upon it is important to exclude, as much as possible, *'the differences that are caused through factors related to size and context of an organisation.'* Given the significant difference in size and scale between the sectors in Wales and England, as discussed in 2.1 above it is very difficult to find a provider of social housing in England that is operating under similar market conditions to a Registered Social Landlord (RSL) in Wales. Despite these difficulties, attempts were made to identify registered providers of social housing in England that had common features with Welsh RSLs. Having identified these registered providers a second problem was encountered. It was far more difficult to arrange interviews with housing associations that operated on the eastern side of the border to discuss their experiences of regulation in practice than it was to make similar

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<sup>80</sup> The Welsh Government in Wales and the Homes and Communities Agency Regulation Committee in England

arrangements in Wales. Without such access in England, it would be difficult to undertake an accurate comparison of the experiences of housing associations of regulation in practice. For this reason, and because of the Office for National Statistics (ONS)'s decision to reclassify registered providers in England as part of the public sector in October 2015, the decision was made to focus on the factors that have an impact on the divergence process.<sup>81</sup>

Whilst it may have been difficult to find chief executives of housing associations in England who were willing to be interviewed for the purposes of this thesis, such difficulties were not encountered to the same extent in Wales. In total the chief executives of five Welsh RSLs agreed to be interviewed. These interviews took place face to face, lasting between 30 minutes and one hour. Given assurances that their answers would be anonymised and that I was intending to interview other RSL chief executives,<sup>82</sup> the participants provided very honest answers.<sup>83</sup> These answers included open criticism of the Welsh Government and revelations about sensitive material regarding their organisations.<sup>84</sup> Whilst these interviews have provided very useful data, it is important to acknowledge some of its limitations. Whilst there are 92 RSLs registered with the Welsh Regulator, only five were interviewed for this thesis.<sup>85</sup> The information gathered from these interviews can therefore only be indicative of the views and experiences of RSLs in Wales. The five RSLs do, however, provide a cross section of the sector in Wales and include large, national organisations, and small urban, and small rural organisations. It should be noted that whilst the chief executives of five diverse organisations did agree to take part in the project an equal number did not. These Chief Executives did not reject an approach to be interviewed, they merely did not respond to the initial approach e-mail and a subsequent follow up message. Whilst it was possible to find suitable alternative RSLs to approach to interview, this may indicate that the participants who agreed to take part in the project were the most engaged within the sector, or had a particular view that they wished to share with me as a researcher. This had to be kept in mind when analysing their responses.

Whilst the interviewees provided very honest and interesting responses to the interview questions, the refocusing of the thesis to examine the factors that contribute to the

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<sup>81</sup> See 1.4.2 for a more detailed discussion.

<sup>82</sup> 'Elite' respondents are said to take a particular interest in knowing who else is being interviewed as part of a research project and I also encountered this phenomenon. Karen Duke 'Getting Beyond the "Official Line": Reflection on Dilemmas of Access, Knowledge and Power in Research Policy Networks' 31(1) [2002] *Jnl Soc. Pol.* 39, 47

<sup>83</sup> There is some evidence that 'elite' individuals are more prepared to present their own opinion than junior staff. Catherine Welch, Rebecca Marschan-Piekakri, Heli Penttinen and Marja Tahvanainen 'Corporate elites as information in qualitative international business research' 11 [2002] *International Business Review* 611, 616

<sup>84</sup> One participant did ask me to be careful how I used this information to ensure that individuals were not identified.

<sup>85</sup> Welsh Government register n(57)

development divergence limits how they can be utilized to address the thesis's research questions. The decision to refocus the thesis meant that data that had already been gathered had to be reviewed and reconsidered. It became apparent that some of this data was no longer applicable to my new research focus. Whilst some of the data was no longer applicable, other aspects did remain relevant and do play a part in the analysis set out in Part 3. The part played by this data, however, is mainly illustrative, supporting findings made through analysing textual sources.

In addition to the interviews undertaken with the chief executives of Welsh RSLs, two further interviews were undertaken as part of this research project; an interview with an employee of ONS and an interview with Kerry Mac Hale, the policy lead for social housing regulation at the Westminster Government. These additional interviews were undertaken because of the new events that were taking place within the sector, specifically the ONS's decision to reclassify English registered providers of social housing, and subsequently Welsh RSLs as part of the public sector. The interview with the ONS employee took place on a face to face basis, whilst Kerry Mac Hale was interviewed via telephone. Both interviews presented different challenges.

The decision to approach the ONS for an interview was taken shortly after their decision to reclassify English registered providers of social housing as part of the public sector.<sup>86</sup> When the ONS were first approached for an interview no announcement had been made about when a review would be undertaken into the status of Welsh RSLs. A few days before the interview the ONS announced that they would undertake a review of the status of Welsh RSLs, publishing their announcement during the autumn of 2016.<sup>87</sup> There were two primary motivations for undertaking this interview; developing a better understanding of the reasons that led the ONS to its decision in England, and to get an indication as to whether the ONS were likely to reach a similar decision in Wales. I received a very positive response from the ONS regarding my request for an interview with the condition that I ensured anonymity for the staff member who was willing to answer my questions. As with the interviews undertaken with the Chief Executives of Welsh RSLs, the interview was undertaken on a semi-structured basis. The interview with the ONS proved more difficult than these previous interviews. The participant at the ONS was bound by greater confidentiality requirements than the Chief Executives and was unable to provide me with '*privileged information*'.<sup>88</sup> Given the employee's reluctance to share '*privileged information*' during interview, the data gathered

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<sup>86</sup> Office for National Statistics 'Classification announcement: 'Private registered providers' of social housing in England' (30 October 2015)

<sup>87</sup> ONS forward work plan (n99)

<sup>88</sup> Interview with a member of the Office for National Statistics Classifications Team, (Newport, 8 April 2016)

through interview is again used primarily as an illustrate tool within this thesis, contributing limited new information.

The final interview undertaken as part of this project was undertaken with Kerry Mac Hale, the policy lead for social housing regulation at the Westminster Government. Initially I had approached the then Minister for Housing and Planning at Westminster, Brandon Lewis, for an interview following comments he had made at a Communities and Local Government Committee meeting in December 2015.<sup>89</sup> In the Committee meeting the Minister had said that the Government wished to see housing associations returned to the private sector as quickly as possible.<sup>90</sup> To do this the Minister stated that the Government would insert a number of amendments into the Housing and Planning Bill that was proceeding through the Houses of Parliament at the time, to deregulate the social housing sector.<sup>91</sup> The Minister was therefore approached in an attempt to gain further information on these proposals and to assess whether these changes had previously been under consideration or whether these changes were being introduced solely as a result of the ONS's work.

The Minister was approached via e-mail and a formal letter sent to his ministerial address. Seven weeks after the e-mail was sent I received a response from the Department for Communities and Local Government setting out that whilst the Minister was unable to provide me with an interview, the department's *'policy lead on Regulation of the Social Housing sector in England'*, Kerry Mac Hale, was willing to be interviewed via telephone. The interview was undertaken on 17 May 2016, only five days after the Housing and Planning Act 2016 received royal assent. This provided me with a unique opportunity to interview a civil servant that had played a leading role in the development of legislation, immediately following its enactment. Whilst this did mean that there were some secondary legislation that the Government had not put in place at the time of the interview, the proximity with which the interview was undertaken to the events that had led to these regulatory changes meant that Mac Hale could provide a detailed account of the reasons behind individual provisions within the act, and of the circumstances that had led to the Bill's enactment. In contrast to the interview with the ONS, Mac Hale was happy to provide direct and detailed answers to my questions, revealing that the Government *'would probably not'* have deregulated were it not for the ONS's decision.<sup>92</sup> In contrast to the other six interviews, the information provided by Mac Hale does provide information that is more than purely illustrative and provides a

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<sup>89</sup> Communities and Local Government Committee, *Housing Associations and the Right to Buy*, (Oral Evidence by Brandon Lewis MP, HC 370, 15 December 2015)

<sup>90</sup> *ibid* Q321

<sup>91</sup> *ibid*, the Housing and Planning Bill subsequently became the Housing and Planning Act 2016.

<sup>92</sup> Interview with Kerry Mac Hale, Policy lead on social housing regulation, UK Government (Telephone interview, 17 May 2016)

valuable insight into how the ONS's decision and other pressures has had an impact on how divergence develops.

To fully assess the impact of the ONS's decision on the development of divergence it would have also been desirable to have conducted an interview with Kerry Mac Hale's equivalent at the Welsh Government. The Welsh Government have been significantly slower in making legislative proposals to reverse the ONS's decision than what was seen at Westminster. As of 31 December 2016, the Welsh Government were yet to publish any concrete proposals on any new legislation that it would bring forward following the ONS's decision. Informal conversations held with members of the social housing sector in Wales and the Welsh Government indicate that whilst there will be legislative and regulatory changes made to the sector in Wales, it may take two years for any legislation to be enacted. Given that the Welsh Government are in the early stages of drafting their legislative response to the ONS' decision, it was decided that any formal interview would be able to provide data of limited value. The data gathered from the interview with Kerry Mac Hale would suggest that such an interview with the Welsh Government would, at the right point in time, provide very interesting information for an academic examining the development of divergence.

### 2.3 Conclusion

This chapter has sought to place this thesis within the broader literature that has developed on social housing. As demonstrated in 2.1, the nature of the social housing sector is changing globally, as the sector seeks to grapple with a reduction in the availability of public funds and a changing economic landscape. 2.1.2 shows that the sector in Wales has not been immune from such changes and pressures, with an increasing number of RSLs diversifying from their core purpose. The thesis will consider how some of these factors have contributed to the development of divergence in social housing regulation between Wales and England. As discussed in section 2.2 a number of methods have been adopted to consider how these, and other pressures have contributed to both push and to limit the development of divergence, allowing us to develop our understanding of the divergence process and devolution more broadly.

## 3. Disease and Political Pressure: The Early Years of Housing Devolution

Social Housing has been in existence, in one form or another for centuries. From the Alms-houses of the Middle Ages, to the philanthropists of the Industrial Revolution, to the state investment in housing following the First World War, all have played their part in developing what we today consider as social housing. This chapter provides a brief guide to this history, examining some of the greatest developments that took place during this era in Wales and England, focusing on the decision to devolve powers over housing to Wales, for the first time on 1 May 1940. Whilst undertaking this exploration, this chapter will consider how these developments have shaped the social housing sector in the present day.

Through this historical examination this chapter makes two primary claims. (1) It argues that the decision to devolve housing powers to Wales in May 1940 was not a result of a process of thinking, but, was the consequence of a series of ad-hoc, politically expedient decisions. (2) The chapter contends, that it was the decision to devolve these powers to Wales that created a space within which the housing sector in Wales could be viewed as distinct from the sector in England, for the first time. The chapter demonstrates that there is clear evidence that divergence developed between the two nations over this period, suggesting that the roots of the process precedes political devolution. Through examining the development of divergence during this period the chapter will consider which factors contributed to, or constrained its development.

### 3.1 The historical roots of the social housing movement

What we refer to today as Registered Social Landlords (RSLs) in Wales, or registered providers in England encapsulates a broad range of organisations. Amongst these, the roots of one type of organisation stretches deep into history, the Alms-houses. There is some evidence to suggest that the first Alms-houses were founded in England in the 11<sup>th</sup> century.<sup>1</sup> They provided housing healthcare and other associated services for the poor and were founded by the wealthy who felt under a Christian duty to support the poorest and the most vulnerable in their communities.<sup>2</sup> Despite the fact that Alms-houses continue to play an

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<sup>1</sup> Charles Vivian Baker, *Housing Associations* (The Estates Gazette Limited 1976) 1

<sup>2</sup> Helen Cope, *Housing Associations, The Policy and Practice of Registered Social Landlords* (2nd edn, Macmillan Press 1999) 7

important, if somewhat limited role, in the provision of social housing in Wales and England,<sup>3</sup> it is during the Industrial Revolution that we find the foundations of what we today would consider to constitute social housing.

With the growth of heavy industry in the second half of the nineteenth century the populations of Britain's industrial towns and cities boomed.<sup>4</sup> As they struggled to deal with the new demands placed upon their infrastructure, a lack of housing quickly became a major issue, with many families living in small, over-crowded houses, often in squalor.<sup>5</sup> These conditions were the perfect breeding ground for disease and revolution.<sup>6</sup> By 1852 the average life expectancy for a labourer in Merthyr was just 17<sup>7</sup> and following a cholera outbreak in London in 1840, and further typhoid outbreaks, there was growing realisation by policy makers that something had to be done to tackle this problem.<sup>8</sup> As the century progressed governments of different colours introduced legislation to try and improve the situation. Perhaps unsurprisingly given the context under which these policies were being developed, housing was viewed by government as a public health issue.<sup>9</sup> Focus was placed on slum clearances, the improvement of drainage and on the quality of housing.<sup>10</sup>

Whilst the steps taken by the Government over this period did improve the sanitary conditions of Britain's town and cities, its work was overwhelmingly focused on the removal of unfit housing, with little Government involvement in housing development.<sup>11</sup> Small steps were taken to try and remedy this. The Labouring Classes Dwelling Houses Act 1886 allowed the Public Works Loan Commissioners to lend money for the construction of labourers' dwellings.<sup>12</sup> By 1869 Liverpool became the first city to build council houses,<sup>13</sup> and the introduction of the Housing of the Working Classes Act 1890 made the process of

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<sup>3</sup> Of the 92 Registered Social Landlords in Wales, 8 are Alms-houses, whilst of the 1,762 Registered Providers in England, 141 are Alms-houses.

See Welsh Government 'Registered Social Landlords' (2 December 2016) <http://gov.wales/topics/housing-and-regeneration/publications/registered-social-landlords-in-wales/?lang=en> accessed 9 January 2017; and Homes and Communities Agency 'Current Registered Providers of Social Housing' (GOV.UK, 3 January 2017) <https://www.gov.uk/government/publications/current-registered-providers-of-social-housing> accessed 9 January 2017.

<sup>4</sup> The population of Glamorgan rose from 398,000 to 1,121,000 between 1871 to 1911 – Malcom J Fisk 'Historical perspectives on housing developments' in Robert Smith, Tamsin Stirling and Peter Williams (eds) *Housing in Wales, The Policy Agenda in an Era of Devolution* (Chartered Institute of Housing 2000) 19 ch2

<sup>5</sup> Cope (n2) 8

<sup>6</sup> Paul Reeves, *An introduction to Social Housing* (first published 1996, Arnold 1996) 12 and 13

<sup>7</sup> Fisk (n4) 20

<sup>8</sup> Reeves (n6) 20

<sup>9</sup> Enid Gaudie *Cruel Habitations, A History of Working-Class Housing 1780 -1918* (First published 1974, George Allen & Unwin 1974) 140

<sup>10</sup> *ibid*

<sup>11</sup> *ibid* 141

<sup>12</sup> *ibid* 259; Labouring Classes Dwelling Houses Act 1886

<sup>13</sup> John Burnett *A Social History of Housing 1815 – 1985* (2nd edn, Routledge 1993) 185

housing construction easier for local authorities by increasing access to finance.<sup>14</sup> Council housing was being developed in London by 1892, and in Manchester by 1896.<sup>15</sup> In 1897 Llandudno became the first Welsh local authority to construct council housing.<sup>16</sup> Other local authorities, such as Birmingham, did not develop their own construction programmes. The Act did not compel authorities to construct council housing, and many only instigated a programme of repair and renovation.<sup>17</sup> Consequently, local authorities were responsible for only 1% of the houses built before the First World War.<sup>18</sup>

The conditions that had led to successive governments taking steps to try and improve living standards during the industrial revolution also had an impact on the richest in society. Throughout the second half of the nineteenth century a broad range of philanthropists started investing in housing, with charitable trusts also playing a significant role in housing construction.

These organisations, whilst working towards broadly common goals developed very differently. In *Regulating Social Housing: Governing Decline* David Cowan and Morag McDermont highlight the differing approaches that existed with regards to housing management.<sup>19</sup> They compare those developed by charitable trusts such as the Guinness Trust to those developed by philanthropist Octavia Hill who placed a great deal of focus on the moral character of those she sought to assist.<sup>20</sup> Whilst these organisations may have operated in very different ways, in them we can see the forefathers of modern day housing associations.

Philanthropic activity played a less prominent role in Wales over this period. Whilst there were some model dwelling developments in both the Ebbw and Rhymney Valleys, these were the exception rather than the rule.<sup>21</sup> Perhaps surprisingly the owner-occupation sector played a prominent role in housing construction in Wales over this period.<sup>22</sup> The sector was developed with the assistance of building clubs and societies and was particularly prevalent in the south Wales Valleys.<sup>23</sup> These organisations had similarities with other mutual aid groups that had developed within the south Wales coalfield over this period, such as the

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<sup>14</sup> Housing of the Working Classes Act 1890; see Gauldie (n9) 293

<sup>15</sup> Burnett (n13) 185

<sup>16</sup> Fisk (n4) 25

<sup>17</sup> Burnett (n13) 184

<sup>18</sup> Ministry of Health, *Report of the Committee of Inquiry into the Anti-Tuberculosis Service in Wales and Monmouthshire* (Cmd 5423) - National Archives File MH 55/ 1195, Page 124

<sup>19</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Cavendish Publishing 2006) 30

<sup>20</sup> *ibid*

<sup>21</sup> Fisk (n4) 23

<sup>22</sup> *ibid* 21

<sup>23</sup> *ibid*



Tredegar Medical Aid Society. The distinct character and culture of industrial south Wales, which had led to the development of such organisations, was not as prevalent elsewhere in Wales, with private renting still being the predominant form of occupation in both the urban and rural areas outside of the valleys.<sup>24</sup> Whilst the prominence of private home ownership in Wales did mean that there were some differences between the Welsh and English housing markets on the brink of the First World War, the importance of these differences should not be exaggerated. What little state direction that was being applied to the housing sector in Wales was either on a British, or an English and Welsh, basis. The *laissez faire* attitude of the Government led to great regional variation in housing provision, but the differences were as great between various parts of Wales as they were between Wales and England. The south Wales Valleys may have had a higher percentage of owner occupation but given the lower rates of owner occupation across the rest of Wales it would appear wrong to describe this as a distinctly Welsh approach to housing. Whilst there may not have been a distinctive Welsh approach to housing over this period, the higher rate of home ownership in the south Wales Valleys demonstrate how local socio-economic factors can impact upon the nature of the housing in an area. These local and national structural differences were to continue to have an impact over the following decades, impacting upon the development housing policy and contributing to the development of both divergence and Welsh devolution.

### 3.2 The inter-war period

As the First World War ended the Prime Minister, David Lloyd George made a promise that became a watershed moment for the development of social housing provision across the UK. The 'Homes fit for Heroes' campaign made housing '*the pivot of post-war social policy*' and led to a fundamental change in how housing was viewed by the state.<sup>25</sup> Despite the developments over the previous decades, housing was still viewed as a matter for the private sector prior to the war.<sup>26</sup> Even the philanthropists that had helped develop housing during the industrial revolution were hostile towards state involvement in housing provision.<sup>27</sup> This view was to change during the war. The lack of quality, affordable housing that had been a problem throughout the industrial revolution became even more apparent with house building decreasing and the workforce being concentrated in areas that were manufacturing goods for the war effort.<sup>28</sup> In August 1917 the Salisbury Committee reported that an

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<sup>24</sup> *ibid*

<sup>25</sup> Burnett (n13) 220

<sup>26</sup> *ibid*

<sup>27</sup> Cowan and McDermont (n19) 30

<sup>28</sup> Gauldie (n9) 307

estimated 300,000 properties would be needed immediately at the end of the war.<sup>29</sup> These factors led to reform.

The Ministry of Health Act 1919 established the Ministry of Health. Under the powers that he had acquired under the Act, the Minister for Health, Dr Christopher Addison set about introducing legislation to try and tackle the housing crisis. The Housing and Town Planning Act 1919, or the Addison Housing Act as it became known, required local authorities to assess local housing need, and to carry out a scheme to improve housing availability in their areas.<sup>30</sup> Over three years, 170,000 homes were built across the UK.<sup>31</sup>

State led development was originally viewed as something that would only be necessary in the short term. There was an expectation that the private sector would again become responsible for housing development across Britain.<sup>32</sup> As the decade continued, further legislation moved the focus of housing development away from the state, to the private sector, but even some of these private developments were dependent on financial support from the state.<sup>33</sup> Between 1919 and 1934, 2,459,000 homes were built in Wales and England.<sup>34</sup> Only 31% of these were council homes, but of the remaining 69% constructed by the private sector, a quarter was constructed with some financial assistance from the state.<sup>35</sup> Whilst the private sector was still the largest provider of housing in Wales and England, the UK developed the largest public rented sector in the western world over this period.<sup>36</sup>

Despite the investment in housing in the post war years, housing associations played a peripheral role in the development of new homes. This looked as though it would change in March 1933 with the establishment of the Moyne Committee. The Committee of nine MPs, chaired by Lord Moyne, was established to consider the steps that could be taken to maintain working class properties, and to construct new homes for the working classes without public charge, through bodies such as public utilities societies.<sup>37</sup> The Committee published a report which made a number of recommendations that, if accepted, would have increased the role of housing associations.<sup>38</sup> These recommendations included giving local authorities the power to compulsory purchase working class housing in need of renovation on behalf of housing associations, and providing housing associations with access to loans

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<sup>29</sup> *ibid* 308

<sup>30</sup> Housing and Town Planning Act 1919, s 1, s 2

<sup>31</sup> Significantly less than the 500,000 that they had hoped to build in 1919 Burnett (n13) 226

<sup>32</sup> *ibid*

<sup>33</sup> Amongst these were the Chamberlin and Wheatley acts as discussed in John Burnett (n13) 231

<sup>34</sup> *ibid* 233

<sup>35</sup> *ibid*

<sup>36</sup> Cope (n2) 9

<sup>37</sup> Peter Malpass, *Housing Associations and Housing Policy, A historical Perspective* (MacMillan Press 2000) 95

<sup>38</sup> *ibid* 100

for up to 100% of the cost of acquisition and renovation of property.<sup>39</sup> Amongst other suggestions set out in the Report was the establishment of a Central Public Utilities Council, a body that was to have played a very similar role to the one that was later played by the Housing Corporation.<sup>40</sup> Despite receiving a warm response by many when published, the Committee's recommendation's soon faced difficulties. Some of the recommendations were immediately dismissed,<sup>41</sup> but the most significant opposition to the Committee's proposals came from local authorities, who were eager to maintain control and power.<sup>42</sup> By joining forces with private landlords and some within the civil service, local authorities successfully managed to halt the Report's more radical recommendations, maintaining the status quo and limiting the role of housing associations.<sup>43</sup> The Housing Act 1935, which was enacted after the publication of the Committee's Report, did provide the Minister with one power that would prove to be significant in future. The Minister was given the power to financially support a central association, or some other body, established for the purpose of promoting and advising housing associations.<sup>44</sup> This central association fell short of the Central Public Utilities Council recommended by the Commission but did lead to the establishment of the National Federation of Housing Societies (NFHS) as a trade body for Housing Associations.<sup>45</sup> The body and its successors were to play a key role in the development of housing associations over the following decades.

### 3.3 Administrative devolution

#### 3.3.1 Tuberculosis

The fear of disease was one of the major drivers of the changes that took place within the housing sector and wider society during the 19<sup>th</sup> and early 20<sup>th</sup> century. One disease was causing particular concern in Wales, tuberculosis (TB). Between 1911 and 1913 the death rate from TB in Wales was 136 people for every 100,000, lower than the death rate in both England and Scotland.<sup>46</sup> By 1931 - 1933 the death rate in Wales had dropped to 101 for every 100,000, but whilst dropping, Wales now had the highest death rate in Great Britain.<sup>47</sup>

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<sup>39</sup> *ibid* 96, 97

<sup>40</sup> *ibid* 98. The role of the Housing Corporation is discussed in 3.1.1, 3.2 and 3.3

<sup>41</sup> *ibid* 100. For example, the recommendation to give local authorities the power to compel owners of property in need of renovation to sell their properties.

<sup>42</sup> *ibid*

<sup>43</sup> *ibid*

<sup>44</sup> Housing Act 1935, s 30

<sup>45</sup> Alan Murie, *Moving Homes, The Housing Corporation 1964-2008* (Politico's Publishing 2008) 53

<sup>46</sup> Welsh Board of Health *Enquiry into Tuberculosis Service in Wales and Monmouthshire; memoranda and statistics* National Archives File MH 55/ 1242

<sup>47</sup> *ibid*

In 1910, the *King Edward the Seventh Welsh National Memorial Association* was founded at a National Conference of public bodies in Wales with the aim of providing a monument for King Edward VII.<sup>48</sup> At the meeting it was agreed that the memorial should take the form a national campaign to tackle TB in Wales.<sup>49</sup> Following pressure from the Association an inquiry was established in 1938 to investigate *'the working of the arrangements for the prevention, treatment and after care of tuberculosis in Wales'*.<sup>50</sup> The *Committee of Inquiry into Anti-Tuberculosis Service in Wales and Monmouthshire* collected evidence through the first half of 1938 and was chaired by the Liberal National MP for Montgomeryshire, Clement Davies.<sup>51</sup> By December 1938 the Committee had drafted a report containing their findings, this was distributed throughout Wales in early 1939.<sup>52</sup>

Throughout the course of the inquiry witnesses raised many factors as the potential cause of Wales's TB crisis. Amongst the most prominent of these were poor nutrition, concerns about meat and dairy production, and the need to improve education of the disease in schools.<sup>53</sup> Perhaps the most striking theory put forward by witnesses was that the *'Celtic race'* was more susceptible and less resilient than the English to diseases. Whilst the Report concludes that it was *'unlikely'* that race would be a factor that would explain Wales' higher rate of TB, it did conclude that there was a more *'fatalistic and pessimistic'* response by those in Wales to the disease, which led patients to conceal their symptoms and delay treatment.<sup>54</sup>

For the purposes of my thesis, one further factor considered by Clement Davies and his team is of more interest, the condition of housing in Wales. The Report can be seen as a damning criticism of the state of housing provision in Wales. It declared:

The health of people is to a very large measure, dependent on good, sound, sanitary housing conditions, and their happiness upon their health and environment.<sup>55</sup>

Davies concluded that housing in Wales was not good, sound and sanitary, with the Report painting a particularly grim picture of the state of housing in rural areas:

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<sup>48</sup> Ministry of Health (n18) 9

<sup>49</sup> *ibid*

<sup>50</sup> Committee of Inquiry into the Anti-Tuberculosis Service in Wales and Monmouthshire *Notes of Evidence* - National Archives File MH 55/ 1244, Page 1

<sup>51</sup> *ibid*

<sup>52</sup> Letter from George Chrystal to John Rowland (1 December 1938) - National Archives File MH 55/ 1195

<sup>53</sup> Ministry of Health (n18) 8

<sup>54</sup> The use of the Welsh language term, *Diciau* was said to be evidence of this pessimistic approach. *ibid* 14

<sup>55</sup> *ibid* 124

The little towns have a very old history, in many instances covering centuries. They have been market towns throughout the years and the centres of rural areas that surround them. The houses in them are old and often dilapidated. Houses have been built down old yards – at one time the curtilages of larger house – and in old alleys, and they often consist of converted buildings which were erected for other purposes, for example, stabling and outhouses of a larger house. Down these yards and narrow alleys, there is little air and no sun. The old stone built houses have no damp course. In many of them the roofs and windows are still dilapidated. Often the windows will not open, and were not built to open. The hearths and grates are broken, and there is a general appearance of abject poverty. There are rows of these houses with no separate sanitary arrangements. Sometimes there is only one lavatory for the use of the occupants of several houses. In some towns, the water supply is far from satisfactory. There does not seem to be any standard either of quantity or even of purity.<sup>56</sup>

These conditions had a clear impact on Davies and his team as can be seen from the following passage:

We ourselves saw a number of these houses in Anglesey and Caernarvon, and they were a most distressing and pitiable sight. Many witnesses described them to us, but the description given by the witnesses, vivid as it was, did not convey the full picture. They have to be seen to be believed.<sup>57</sup>

Considering this, it is perhaps not surprising that the Report made a radical recommendation:

In our opinion nothing is to be done to make these houses habitable or even sanitary. The only thing to be done with them is to pull them down and to pull them down as soon as possible.<sup>58</sup>

The Report was critical of the work of many rural local authorities. It concluded that these problems had been known for years and that local authorities had failed to act on reports by Medical Officers of Health.<sup>59</sup> Indeed in some circumstances Medical Officers of Health felt that strings had been pulled to prevent the activation of their reports.<sup>60</sup> Davies and his team found some merit in these claims:

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<sup>56</sup> *ibid* 140

<sup>57</sup> *ibid* 142

<sup>58</sup> *ibid* 143

<sup>59</sup> *ibid* 138

<sup>60</sup> *ibid* 141

So little attention has been paid by some councils to the recommendations of the Medical Officer of Health that, seeing they are so keen on avoiding expenditure and keeping down rates, one wonders why they did not suggest long ago to the Government and the Legislature that they could do without a Medical Officer of Health and thereby save his salary and expenses.<sup>61</sup>

Davies's Report highlighted that these failures weren't just a contemporary issue but had deep historical roots. It noted that '*in spite of the effort of a few pioneers, the State and Local Authorities, with a few notable exceptions, took too little interest in the housing and the sanitary conditions of the people*' before World War One.<sup>62</sup> The Report demonstrated how little an impact 19<sup>th</sup> century housing legislation had, had in Wales and the extent of the housing shortage in the wake of the First World War.<sup>63</sup> Whilst showing an increase in house building following the Addison Housing Acts, Davies and his team concluded that Wales's housing needs had '*remained unsatisfied*'.<sup>64</sup> The Report showed that house building in Wales lagged behind England. Under the Addison, Chamberlain and Wheatley Acts 2,050 houses were erected per 100,000 people in Wales, when looking at England and Wales combined on the other hand, the number constructed was 3,020 per 100,000 people.<sup>65</sup> The inquiry took this analysis further and ranked each local authority in Wales by the number of homes that had been constructed, both with and without exchequer assistance.<sup>66</sup> The difference between the best and worst counties was striking. With exchequer support, Flint had constructed 4,550 properties per 100,000 habitants, whilst Merionydd had constructed a mere 470 per 100,000 habitants.<sup>67</sup> This discrepancy between local authorities was highlighted as a major cause of poor quality housing. The worst performing local authorities received severe criticism in the Report:

The failure on the part of Authorities in the lowers half of the table to exercise their functions and to take advantage of the grants made by Parliament seems more inexcusable when it is realised that the Authorities knew how bad the housing conditions were in those areas.<sup>68</sup>

Of the eight worst performing authorities, seven were in rural areas.<sup>69</sup> The Report acknowledged that the relative poverty of these authorities and the difficulties of

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<sup>61</sup> *ibid*

<sup>62</sup> *ibid* 124

<sup>63</sup> *ibid*

<sup>64</sup> *ibid* 126

<sup>65</sup> *ibid* 130

<sup>66</sup> *ibid* 138

<sup>67</sup> *ibid* 137

<sup>68</sup> *ibid* 138

<sup>69</sup> *ibid* 137

administrating over large distances did make their task harder, but they concluded that even after considering these factors, rural authorities were underperforming.<sup>70</sup> One Ministry of Health inspector went so far as to suggest that the sympathies of these local authorities were on the side of the property owners, not the tenants.<sup>71</sup> Davies and his team seem to agree with this belief:

We find that they have insufficient regard for their powers or their duties or the advice that was tendered to them by their officers. In fact, they have failed in their trusteeship as guardians of the health and welfare of the people who elected them.<sup>72</sup>

This criticism of rural local authorities continued throughout the rest of the Report. Of the performance of Cardiganshire, it stated:

The District Councils have been dilatory and apathetic. The County Council should have exercised a close surveillance over the District Councils. Their housing record for the working classes is a poor one.<sup>73</sup>

The Report concluded its section on Meirionydd with:

Their housing performance speaks for itself and further comment is superfluous.<sup>74</sup>

Whilst the Report said the following on the performance of Pembrokeshire:

we are of the opinion that the District Councils have failed in their duty to provide decent sanitary houses for people.<sup>75</sup>

In contrast to those damning remarks, the performance of authorities in urban areas was viewed in a more positive light. It was concluded that there were three reasons why performance of local authorities in urban areas was better than their rural counterparts. First, there was said to be a '*keener communal conscience*' in industrial areas which made people more ready to complain if conditions were bad.<sup>76</sup> Secondly, the greater competition for seats on councils in industrial areas meant that councillors were more active than councillors in

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<sup>70</sup> *ibid* 139

<sup>71</sup> Anti-tuberculosis Committee for Wales, *Anti-tuberculosis Committee for Wales Clement Davies Report - Housing 7* - National Archives File MH 55/ 1196

<sup>72</sup> Ministry of Health (n18) 139

<sup>73</sup> *ibid* 159

<sup>74</sup> *ibid* 174

<sup>75</sup> *ibid* 181

<sup>76</sup> *ibid* 142

rural areas.<sup>77</sup> Thirdly, due to the relatively recent migration to the industrial areas, houses were newer and more modern.<sup>78</sup> The socio-economic factors that had driven the growth of homeownership in industrial south Wales at the turn of the century, would seem to have resulted in better quality housing and living conditions. Whilst there were comparatively few problems with the housing stock in the south Wales coalfield, the structural issues that had contributed to the growth of TB in rural Wales were to have a significant impact on devolution and divergence.

The good performance of urban authorities did little to take attention away from the criticisms of the Report. Considering the strong language used and the direct criticisms levelled by the Report at individual Welsh local authorities, it is not surprising that it led to significant public and political reaction.<sup>79</sup> In a meeting of the Honourable Society of Cymmrodorion held on 31 March 1939, Clement Davies was forced to defend himself against accusations that he had written his Report for effect.<sup>80</sup>

Whilst local authorities and local councillors faced the brunt of Davies's criticism, central government and the Welsh Board of Health did not emerge unscathed. Witnesses had expressed that there should have been closer contact between the:

Ministry and the Welsh Board of Health on the one hand and the local authorities on the other; and that in the past the Ministry and the Board had not exercised, their powers of supervision and control sufficiently strongly against the local authorities who were backward or neglectful of their duties.<sup>81</sup>

The Report, therefore, also provided direct criticism of the UK Government. Given the highly critical nature of the Report and the significant public reaction that it generated, it was inevitable that the Government would have to react. On 20 March 1939 the Welsh Board of Health prepared a brief for the Minister of Health on the content of the Report.<sup>82</sup> The briefing highlighted that the committee took on a wider remit than was first imagined,<sup>83</sup> and made a number of critical remarks on the performance of smaller local authorities.<sup>84</sup> The briefing also

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<sup>77</sup> *ibid*

<sup>78</sup> *ibid*

<sup>79</sup> Until the publication of the Beveridge Report in 1943, the Davies Report was the best-selling official report in British history. John Davies, 'The Communal Conscience in Wales' (1998) *Transactions of the Honourable Society of Cymmrodorion* < <http://welshjournals.llgc.org.uk/browse/viewpage/llgc-id:1386666/llgc-id:1425397/llgc-id:1425544/getText> > accessed 7 June 2015

<sup>80</sup> *ibid*

<sup>81</sup> Anti-tuberculosis Committee (n71) 1

<sup>82</sup> Welsh Board of Health, *Anti-Tuberculosis Inquiry Report, Brief Prepared by the Welsh Board of Health for the Minister* (20 March 1939) – National Archives File MH55/ 1197

<sup>83</sup> Welsh Board of Health, *Anti-Tuberculosis Inquiry Report*, - National Archives File MH55/ 1197, Page 1

<sup>84</sup> *ibid* 51



highlighted that whilst a number of local authorities had failed to deliver, the ultimate responsibility for housing was located at the Ministry of Health in Whitehall.<sup>85</sup> The briefing sets out how the system operated:

It is the duty of each local authority to consider their housing need, including the need arising from slum conditions and overcrowding. Their reports, their proposals for meeting these needs and all information as to progress made carrying out the proposals are sent to the Ministry. Correspondence, consultation etc., are conducted direct with the authorities. These are matters of administration with which the Welsh Board of Health have so far not been directly concerned.<sup>86</sup>

The Welsh Board of Health was established by the Ministry of Health Act 1919. Officers would be appointed to the Board so as to exercise the powers of the Minister of Health in any way that he would deem fit.<sup>87</sup> Initially the Minister had decided to transfer very limited powers to the Welsh Board of Health.<sup>88</sup> By 1931 the Minister had decided to expand these powers.<sup>89</sup> The Board now carried out the Minister's general functions relating to supervising and co-ordinating public health services in Wales,<sup>90</sup> whilst responsibility for supervising and co-ordinating housing remained with the Ministry in Whitehall. As such, the Report's criticism of housing in Wales was not only a critique of the performance of Welsh local authorities but also a direct judgment on the performance of the Minister in Westminster.

The Welsh Board of Health's briefing note not only made it clear that they had no responsibility over housing, it also made it clear that they believed that the Minister at Westminster was at fault for several of the Report's findings. The briefing stated: *'the bad health conditions in parts of Wales disclosed in the Report have been known and brought to the notice of the Minister on a number of occasions.'*<sup>91</sup> It is not surprising that taking steps to minimise the political fallout of the Report was at the forefront of the Government's mind. On 17 March a conference took place so that the department could *'take stock'* of their position ahead of a Parliamentary debate that was to be held on 22 March.<sup>92</sup> In the conference attention was given to what the Minister could expect the opposition to draw attention to and

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<sup>85</sup> *ibid* Appendix XI

<sup>86</sup> *ibid*

<sup>87</sup> Ministry of Health Act 1919, s 5

<sup>88</sup> So limited in fact that the Board could not employ a cleaner without the consent of Whitehall. K O Morgan, *Rebirth of a Nation: A History of Modern Wales 1880-1980* (1<sup>st</sup> edn, OUP 1987) 205

<sup>89</sup> D Gareth Evans, *A history of Wales 1906-2000*, (1<sup>st</sup> edn, University of Wales Press Cardiff 2000) 104

<sup>90</sup> *ibid*

<sup>91</sup> Welsh Board of Health Briefing Note (n82)

<sup>92</sup> Notes of Conference held on the Clement Davies Report (Held 17 March 1939) - National Archives File MH55/ 1196

how they could counter this.<sup>93</sup> The decision was made to focus on the improvement in the performance of Carmarthenshire following a visit by an inspector, and the Minister announced in the parliamentary debate that he saw such visits as the key to future improvement.<sup>94</sup> A Housing Inspector was to visit each of the eight worst performing local authorities, to inspect the state of their houses and to educate members of staff at the local authorities about the financial support that was available to them.<sup>95</sup> By May 1939 these inspections were underway with letters sent to the relevant local authorities, notifying them of upcoming visits from housing inspectors.<sup>96</sup>

In addition to the above, the Minister considered one further proposal to tackle the problems highlighted by the Report, transferring functions over housing to the Welsh Board of Health.<sup>97</sup> The Minister announced to the House of Commons that he would not make any drastic changes to how health was administered in Wales without further consideration of the content of the Report.<sup>98</sup> Within twelve months the Minister had, had time to consider the Government's position. The conclusions he came to were to lead to a decision that would be of great significance for housing, devolution and Wales.

### 3.3.2 The reaction

On 8 March 1940 during a parliamentary debate, the Minister of Health, Walter Elliot was asked by the MP for Rhondda West, William John, whether he proposed to increase the powers of the Welsh Board of Health.<sup>99</sup> Elliot's response was clear:

It is my intention in future to exercise and perform through the Welsh Board of Health all the principle powers and duties of the Minister of Health in relation to Wales, subject of course, to central direction of broad policy.<sup>100</sup>

Elliot was equally clear in his response when asked a further question by William John, asking the Minister which powers would be transferred immediately to the Welsh Board of Health:

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<sup>93</sup> *ibid*

<sup>94</sup> *ibid*

<sup>95</sup> Minute sheet discussing reaction to the Clement Davies Report (3 May 1939) – National Archives File MH55/ 1196

<sup>96</sup> Letter from H.S. Hunter to the Clerk of the Cemaes Rural District Council – National Archives File MH55/1196; - with a full program of inspection being drawn up by the Ministry of Health - Minute sheet on the Welsh Housing Survey (15 May 1939) National Archive File MH55/ 1196

<sup>97</sup> Notes of Conference (n 91)

<sup>98</sup> *ibid*

<sup>99</sup> HC Deb, 8 February 1940, vol 357, cols 404-405

<sup>100</sup> *ibid*

We shall begin, of course, with housing and town and country planning; and other duties, I hope, will be transferred at as early a date as is administratively possible.<sup>101</sup>

On 1 May 1940, less than a month before the Dunkirk evacuations, powers over housing were transferred to the Welsh Board of Health.<sup>102</sup> Circular 2005 advised local authorities that all their correspondence regarding proposals for capital expenditure, dealings in land and other matters relating to housing should be directed to the Welsh Board of Health at Cathays Park Cardiff, with the exception of Byelaws which were still to be referred to the Ministry of Health in Whitehall.<sup>103</sup>

This finding demonstrates, for the first time, the clear link between Clement Davies's Report into TB in Wales and the decision to devolve administrative functions relating to housing. It suggests that 1 May 1940 should be considered as the point of divergence between Wales and England. For the first time, housing was to be administered differently in Wales and England. The decision to devolve housing functions to Wales was made, not as a result of a process that had considered the potential advantages and disadvantages of their devolution, but, rather on grounds of political expediency. Whilst minimising the political fallout from the Clement Davies Report may have been the primary driver behind the decision to devolve responsibility over housing to the Welsh Board of Health, the decision did lead to the possibility that the way in which housing was administered in both nations could differ.

The devolution of administrative functions relating to housing did not immediately lead to the development of a substantial variation between housing policy in Wales and England. The Welsh Board of Health had been founded to administer the Minister of Health's policies in Wales, not to develop a separate Welsh health policy. But by separating the administration of housing in Wales from England, Whitehall were, for the first time, recognising that Wales had separate housing needs. In effect, the Westminster Government were recognising that the housing sector in Wales was distinct from the sector in England. Whilst it seems probable that many of the issues raised by the Clement Davies Report regarding the condition of rural housing also existed in England,<sup>104</sup> Wales's smaller, more rural population had made this problem a more pressing, political and social concern. Such a recognition would over the coming years, pave the way for greater devolution of administrative and

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<sup>101</sup> *ibid*

<sup>102</sup> Circular 2005, sent by the Ministry of Health to the County and County Borough, Town, Urban District and Rural District Council in Wales and Monmouthshire, 26 April 1940 - National Archives File HLG 158/ 3

<sup>103</sup> *ibid*

<sup>104</sup> Enid Gauldie (n9) 21; Gauldie writes the following on non-industrialised areas: *'There, untouched by the growth of cities, herded together by causes other than lack of land around them, were rural slums of horror not surpassed by the rookeries of London'*.

policy functions over housing to Wales and it is for this reason that this thesis argues that 1 May 1940 should be considered the point of divergence between Wales and England.

### 3.4 Growing devolution

#### 3.4.1 The Welsh Office of the Ministry of Housing and Local Government

As with the First World War, house building had ground to a virtual stop during the Second World War. In Wales, 72,000 properties were damaged,<sup>105</sup> whilst 475,000 properties had been destroyed or made permanently uninhabitable across the UK.<sup>106</sup> In addition to the properties destroyed during the war, a population boom meant that there was a serious shortage of housing.<sup>107</sup> In the run-up to the 1945 general election, housing had become the primary concern for British voters.<sup>108</sup>

Under both the Labour and Conservative Governments that followed the war, the state was to play a crucial role in meeting this demand for new properties, with housing associations continuing to be on the fringes of housing development. By 1957, 2.5 million properties had been built across the UK, three quarters of these had been built by local authorities.<sup>109</sup>

Housing associations did have access to some of the funds now available to local authorities, but they continued to operate under financial restrictions, limiting their ability to construct new homes.<sup>110</sup> Despite this, housing associations did play a role in meeting demand in areas where there had been a shortage of state investment, in particular, housing for the elderly and minority communities.<sup>111</sup> Whilst this did lead to a growth in the number of housing associations, the state continued to predominantly channel its housing investment through local authorities.<sup>112</sup> The ability of housing associations to have an impact on the broader housing shortage remained constrained.

Housing had historically been viewed as a public health matter but there had been growing calls to reunite housing and planning in one department.<sup>113</sup> In 1951 housing was moved, from the Ministry of Health to merge with the Ministry of Town and Country Planning at the newly created Ministry of Local Government and Planning, subsequently renamed the

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<sup>105</sup> Fisk (n4) 30

<sup>106</sup> Burnett (n13) 284

<sup>107</sup> *ibid* 286

<sup>108</sup> Malpass (n37) 117

<sup>109</sup> Burnett (n13) 286

<sup>110</sup> Malpass (n37) 121; for example, housing associations were subject to rent control for a decade after the war.

<sup>111</sup> *ibid* 123

<sup>112</sup> *ibid* 127 – the membership of the National Federation of Housing Societies had increased from 180 to 679 in 1944

<sup>113</sup> Peter Malpass *Housing & the Welfare State – Development of Housing Policy in Britain* (Palgrave Macmillan 2005) 67; the establishment of a Ministry of Housing and Planning was a Labour Party Manifesto commitment.

Ministry of Housing and Local Government.<sup>114</sup> This decision was to lead to a change in the way housing was administered in Wales and England and constituted the next step in the development of devolution in Wales.

The Welsh Board of Health had played a role in the administration of housing in Wales for a decade by 1951 but with housing now moving from the Ministry of Health to the Ministry of Housing and Local Government, a meeting was held on 6 February 1951 between the Minister of Health, the Minister of Local Government, and the Welsh Parliamentary Party to discuss the impact of this re-organisation on the Welsh Board of Health.<sup>115</sup> The Ministers had to re-assure the Welsh Members of Parliament that the decision would not weaken the Welsh Board of Health.<sup>116</sup> This was to be done by establishing a Welsh Office within the Ministry of Housing and Local Government.<sup>117</sup> The Members and Officers of the Welsh Board of Health whose work concerned the functions transferred to the Ministry would now be answerable to the Minister of Housing and Local Government, but administrative steps were taken to ensure that '*the same degree of devolution as before the change*' was maintained.<sup>118</sup> By the end of 1951 all the powers that were transferred to the Welsh Board of Health under circular 2005 had been transferred to the Welsh Office of the Ministry of Housing and Local Government.<sup>119</sup> Once more the devolution settlement in Wales did not develop as a result of a process of thinking about what would be the best system of governance for the nation, but, rather as a consequence of other changes being made elsewhere.

The Welsh Office of the Ministry of Housing and Local Government was distinct from the remainder of the Ministry in many ways. The Welsh Office was '*virtually independent*' from the remainder of the Ministry on all office services, having direct dealings with the Ministry of Works and the Stationary Office.<sup>120</sup> New accounts were opened in the name of the Welsh Office with the Paymaster General<sup>121</sup> and a separate Whitley Council was developed for the staff of the Welsh Office.<sup>122</sup>

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<sup>114</sup> Minister of The Crown (Transfer of Functions) The Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No.1) Order 1951, No 142

<sup>115</sup> Ministry of Housing and Local Government, *Press Notice, Position of the Welsh Board of Health* (9 February 1951) - National Archives File HLG 158/ 3

<sup>116</sup> *ibid*

<sup>117</sup> *ibid*

<sup>118</sup> *ibid*

<sup>119</sup> Ministry of Housing and Local Government, *Functions exercised by the Welsh Office* - National Archives File HLG 158/ 3, Page 2

<sup>120</sup> Ministry of Housing and Local Government, *Welsh Office: Delegation of Establishment Work* - National Archives File HLG 158/ 3

<sup>121</sup> Ministry of Housing and Local Government (n119)

<sup>122</sup> Ministry of Housing and Local Government (n120)

This distinction was clearly felt to be important by the staff at the Welsh Office. In a letter to William Thomas, the Undersecretary of the Welsh Office of the Ministry of Housing and Local Government in 1953, the Establishment Officer at the Welsh Office complained that staff at the Ministry of Housing and Local Government treated them on the same footing as those working for an English Regional office, on staff matters.<sup>123</sup> The letter serves to highlight that there were limitations to administrative devolution in 1953, but its existence and the response it received does emphasise that the staff at the Welsh Office of the Ministry for Housing and Local Government had begun to consider themselves as different to those that were working at the Ministry's regional offices.<sup>124</sup> The Establishment Officer argued: '*This sort of thing never happened in the Welsh Board of Health days and it hardly seems consistent now with our position here...*'<sup>125</sup> In addition to this growing sense of distinctiveness felt by staff operating at the Welsh office, there is evidence to suggest that those at Westminster were also becoming increasingly conscious of the differences that existed between Wales and England. This can be seen in the consultation that took place between Whitehall and Cathays Park before making two key appointments.

The first appointment was that of Blaise Gillie as replacement for William Thomas, the Undersecretary of the Welsh Office of the Ministry of Housing and Local Government. Gillie was Scottish and the staff at Whitehall were concerned that such an appointment would be criticised in Wales on the grounds that he wasn't a Welshman.<sup>126</sup> It appears from the documents held at the National Archives that efforts were made to seek a Welsh replacement for William Thomas, but that none of suitable experience could be found.<sup>127</sup> The fact that those at Westminster were concerned about the reaction of Welsh MPs and the Welsh public to the appointment does emphasise the fact that the administration of housing in Wales was now viewed differently to the administration of housing in England.

The second appointment further supports this argument. Under section 24 of the Housing Act 1935, the Minister of Health established a Central Housing Advisory Committee, to seek advice on housing matters.<sup>128</sup> Despite the Statutory Rules and Orders of the Committee being titled, '*Housing, England*'<sup>129</sup> the committee worked on an England and Wales basis

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<sup>123</sup> Letter from the Establishment Officer at the Ministry of Housing and Local Government to Mr William Thomas (28 May 1953) – National Archives File HLG 158/ 3

<sup>124</sup> *ibid.* It also highlights the Establishment Officer's own frustrations at not being listed in the Imperial Calendar.

<sup>125</sup> *ibid*

<sup>126</sup> Ministry of Housing and Local Government, *Appointment of new Under Secretary, Welsh Office of Ministry of Housing and Local Government* (Draft Press Release, undated) - National Archives File HLG 158/ 3

<sup>127</sup> *ibid*

<sup>128</sup> Housing Act 1935, s 24; the statutory basis was updated by the Housing Act 1936

<sup>129</sup> Housing England (Statutory Rules and Orders) 1936, No 1115

and amongst its first appointees was Megan Lloyd George, the MP for Anglesey.<sup>130</sup> She continued in her role until 1956.<sup>131</sup> As with the appointment of the Under-Secretary at the Welsh Office, it was decided by the Ministry that its preference was to find a Welsh replacement.<sup>132</sup> Such a provision had not been made for any region in England. The Welsh Office of the Ministry for Housing and Local Government played a prominent role in assisting the Ministry in selecting her replacement. The Welsh Office suggested two names as possible candidates to replace Lady Lloyd George with the 72-year-old Sidney Foulkes being their clear preference.<sup>133</sup> Despite some reservations by the Minister about Mr Foulkes' age,<sup>134</sup> the decision was made on 31 December 1956 to follow their recommendation.<sup>135</sup> It seems that the Welsh Office was becoming increasingly significant as a force in the politics of administration. Administrative devolution had created a space where factors such as national identity and language could now directly impact on how housing was administered in Wales, in a way that had not been possible at the start of the previous decade.

### 3.4.2 Further developments

In a letter to Sir Thomas Sheepshanks, the Permanent Secretary of Ministry of Housing and Local Government in 1955, Blaise Gillie drew the Permanent Secretary's attention to an Administrative Panel established by the Council for Wales and Monmouthshire to consider the organisation of central government departments in Wales.<sup>136</sup> In his letter, Gillie indicated to the Permanent Secretary that he did not expect their department to be the central focus of the Panel's work given that the Ministry of Housing and Local Government, and the Welsh Board of Health were the two departments that were considered to have made a '*genuine affair*' of devolution.<sup>137</sup> Gillie did argue, however, that there were areas where greater powers could be devolved to the Welsh Office in order to avoid any '*needless opposition from holding back from devolution where it is not really necessary to do so.*'<sup>138</sup>

Perhaps the most significant of Blaise Gillie proposals were that powers over byelaws should be transferred to the Welsh Office, that the Welsh Office should have its own team of

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<sup>130</sup> She was first appointed in 1937; Ministry of Health and Local Government, *Central Housing Committee, Minute of Re-Appointment* (19 November 1940) – National Archives HLG 36/ 1

<sup>131</sup> Letter from S W C Phillips to Blaise Gillie (16 October 1956) – National Archives File 36/ 33

<sup>132</sup> *ibid*

<sup>133</sup> Letter from Blaise Gillie to S.W.C Phillips (2 November 1956) – National Archives File 36/ 33

<sup>134</sup> Letter from S W C Phillips to Blaise Gillie (7 November 1956) – National Archives File 36/ 33

<sup>135</sup> *New Appointments to the C.H.C.C* (Minute, 31 December 1956)

<sup>136</sup> Letter from Blaise Gillie to Sir Thomas Sheepshank (30 March 1955) – National Archives File HLG 158/ 3; the council had been established in 1949 as an advisory council. More information can be found in; John Gilbert Evans, *Devolution in Wales, Claims and Responses, 1937 – 1979*, (Cardiff University of Wales Press 2006) 44

<sup>137</sup> *ibid*

<sup>138</sup> *ibid*

inspectors and that a proportion of the Welsh Office's staff should be Welsh speaking.<sup>139</sup> Whilst the latter of these three proposals was not directly concerned with expanding the devolution settlement, all three proposals show a growing awareness of Wales as a distinct entity. By Christmas 1955 the decision had been made to devolve powers over byelaws to the Welsh Office with a circular issued in early January 1956.<sup>140</sup> By now all the functions of the Minister of Housing and Local Government under the Housing Acts had been transferred to the Welsh Office, with the exception of New Towns.<sup>141</sup> In addition to showing that there was a growing awareness of Wales as a distinct entity at Westminster, these changes, once again, highlight the impact that political expedience had on the development of housing devolution in Wales. Gillie proposed that these powers should be devolved to the Welsh Office, not because he thought their devolution would improve the administration of housing in Wales, but because he thought that devolving these powers would mean that the Welsh Office of the Ministry of Housing and Local Government was less likely to be criticised by the Council for Wales and Monmouthshire. Even prior to political devolution, politics was still a factor in making the way that housing policy was administered in Wales distinct from England. This political decision would lead to the desired outcome. Overall, the tone of the *Third Memorandum of the Council for Wales and Monmouthshire* was positive about the operation of the Welsh Office of the Ministry of Housing and Local Government. The Report was satisfied that the Office:

is not a regional office, but is an out-stationed unit of the Ministry operating with a good measure of autonomy in Wales where it applies on which it receives guidance from London.<sup>142</sup>

The Council was also pleased that further powers had been transferred to the Welsh Office, but concluded that the Welsh Office was less autonomous than the Welsh Board of Health.<sup>143</sup> Attention was drawn in particular to the lack of statutory underpinning for the Welsh Office, which, it was argued, would have given the Office a more independent status,

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<sup>139</sup> *ibid*

<sup>140</sup> Circular sent by Blaise Gillie on behalf of the Welsh Office, Ministry of Housing and Local Government, to the Local Authorities in Wales, (29 December 1955) Circular No 75/55 – National Archives HLG 158/ 3

<sup>141</sup> Ministry of Housing and Local Government, *Function Exercised by the Welsh Office*, Statement A - National Archives File HLG 158/ 3; advice on housing management could still be sought from Westminster after the transfer.

<sup>142</sup> Council for Wales and Monmouthshire, *Third Memorandum by the Council on its activities*, (Cmnd53, 1957) para 71 – National Archives File HLG 158/ 3

<sup>143</sup> *ibid*



and a clearer link to the Minister.<sup>144</sup> It was concluded, however, that these differences were slight and that overall the operation of the Office was a satisfactory one.<sup>145</sup>

Whilst satisfied with the work of the Welsh Office of the Ministry of Housing and Local Government, the Council were not as content with the operation of devolution in other departments. This led them to propose that a Secretary of State for Wales should be established.<sup>146</sup> Since 1951 the Home Secretary had also held the role of Minister for Welsh Affairs. In this capacity, the role of the Home Secretary had been to inform himself about Welsh life by visiting Wales, and to speak on behalf of Wales in Cabinet meetings.<sup>147</sup> Despite these changes, administrative powers relating to Welsh Affairs remained with the other Ministries at Whitehall.<sup>148</sup> Members of Parliament had questioned in 1951 whether the Home Secretary could successfully represent Welsh views if he had no responsibility over administrative functions concerning Wales.<sup>149</sup> The Council for Wales and Monmouthshire concluded that he could not, and that a Secretary of State for Wales should be appointed.<sup>150</sup>

The limitations on the Home Secretary's powers and the fact that some departments had not fully accepted devolution were not the only factors that had led the Council to this view. The Council drew attention to the fact that the Secretary of State for Scotland held all the powers of the Welsh Office of the Ministry of Housing and Local Government.<sup>151</sup> They also argued that, as many of the issues that concerned the Minister in Wales were *'markedly different to those in England'*, Wales needed its own Secretary of State so that Welsh concerns could be better represented.<sup>152</sup> A year had passed and there had been a change of Prime Minister before the Government made a full response to the Memorandum. The decision taken by the new Prime Minister, Harold Macmillan was to prove to be the next step along the path of divergence between housing administration in Wales and England.

### 3.4.3 The Prime Minister responds

In a letter to the Chair of the Council for Wales and Monmouthshire in December 1957, Macmillan dismissed the need to establish a Secretary of State for Wales.<sup>153</sup> In the letter he

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<sup>144</sup> *ibid* 226; such a statutory underpinning was in place for the Welsh Board of Health.

<sup>145</sup> *ibid* 229

<sup>146</sup> *ibid*

<sup>147</sup> To assist the Home Secretary with his work an additional under-secretary of state was also appointed. HC Deb 13 November 1951, vol 49 col 815-6

<sup>148</sup> *ibid*

<sup>149</sup> *ibid*

<sup>150</sup> Council for Wales and Monmouthshire (n142)

<sup>151</sup> *ibid* para 69

<sup>152</sup> *ibid* para 231

<sup>153</sup> Letter from Harold Macmillan to Alderman Edwards (11 December 1957) 1 – National Archives File HLG 158/ 3

set out his belief that the majority of the Welsh population agreed with him that '*their interests can best be furthered in association with England and English people*'.<sup>154</sup> MacMillan also dismissed the comparisons with Scotland, pointing to Scotland's greater population, and its separate legal system.<sup>155</sup>

Macmillan does concede the need for some reform. On the formation of his first cabinet in January 1957, Macmillan appointed Henry Brooke as the Minister for Housing and Local Government and the Minister for Welsh affairs. Macmillan notes in his letter to the Council for Wales and Monmouthshire that he believed that the decision to transfer responsibility for Welsh Affairs to the Ministry of Housing and Local Government, from the Home Office had been well accepted in Wales.<sup>156</sup> In his letter, the Prime Minister made further alterations to Wales' devolution settlement. Macmillan decided to appoint a Minister of State for Welsh Affairs to assist the Minister in his duties regarding Wales.<sup>157</sup> The Undersecretary of the Welsh Office was also to be renamed as the Welsh Secretary, and an Assistant Secretary was appointed to assist the Welsh Office's work.<sup>158</sup> The Prime Minister also set out plans to make arrangements for more devolution in other departments such as agriculture and education.<sup>159</sup>

Housing was now at the vanguard of devolution. Whilst the steps taken by the Prime Minister had stopped short of those wanted by the Council for Wales and Monmouthshire and had not transferred any further powers over housing to the Welsh Office of the Ministry of Housing and Local Government, they had reinforced the independence of the Office. It also meant that when future discussions on further devolution would take place, housing was to be one of the subject areas that would be at the centre of any change.

### 3.5 Conclusion

The decision to transfer responsibility for Welsh Affairs to the Ministry of Housing and Local Government did not resolve all the issues that existed within its Welsh Office prior to 1957. Staff dissatisfaction continued into 1958.<sup>160</sup> This came to a head with a Welsh Office Whitley Council statement on the Autonomy of the Welsh Office on 2 October 1958.<sup>161</sup> Interestingly,

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<sup>154</sup> *ibid*

<sup>155</sup> *ibid* 5

<sup>156</sup> *ibid*

<sup>157</sup> *ibid*

<sup>158</sup> *Ibid* 6

<sup>159</sup> *ibid*

<sup>160</sup> They were particularly concerned about the lack of opportunities for promotion that they felt were available for them as staff of the Welsh Office. Welsh Office, *Notes of a meeting held on 14 January 1958*, (14 January 1958) – National Archives HLG 158/ 3

<sup>161</sup> Welsh Office, Ministry of Housing and Local Government, Departmental Whitley Council Staff Side, *Statement on the Autonomy of the Welsh Office*, (2 October 1958) – National Archives HLG 158/ 3

the Whitley Council's concerns were limited to staff issues, with a contrast being drawn between the lack of autonomy in this regard and the *'full degree of responsibility placed upon the Welsh Office in its conduct of the business of the Ministry in Wales.'*<sup>162</sup>

The staff side dispute does serve to highlight the limitations that were in place on the Welsh Office of the Ministry of Housing and Local Government. The Office had not been established to pursue distinct Welsh policy approaches, but to administer the UK Government's policy in Wales. This should not lead to us to overlook the significance of the changes that had taken place in housing administration in Wales over the previous twenty years. The period between 1 May 1940 and December 1957 had been one of great development for housing devolution in Wales. By 1957 housing in Wales was administered separately to housing in England. This was significant advancement from the period prior to 1940 when, as demonstrated in sub-sections 2.1 and 2.2, there was very little that was distinctively 'Welsh' about either the administration or the nature of Welsh housing. Whilst the decision to devolve housing functions to Wales may not have been the result of a process of thought, its impact on the housing sector in Wales appears undeniable.

The findings of this chapter have clearly demonstrated that the decision to devolve powers over housing to the Welsh Board of Health created a housing sector in Wales that could be viewed as distinct from the one in England, and that these sectors had begun to gradually diverge from each other. The chapter has demonstrated how two factors had an impact on this process; politics, and structural differences between Wales and England. The impact of these two factors and others will be further demonstrated in the remainder of the thesis. Whilst the practical impact of these developments had remained limited, with very few differences appearing in housing policy and legislation between Wales and England, these developments were to be the bedrock upon which later, significant devolution were built upon, and from where future divergence grew. Chapter 4 will explore the next stage of this process.

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<sup>162</sup> *ibid*

## 4. From the Secretary of State to the National Assembly

The development of divergence in social housing regulation between Wales and England has deep historical roots. So far, the thesis has charted the development of this process for the first time. As set out in on 1 May 1940, limited administrative functions relating to housing were devolved to the Welsh Board of Health. The Welsh Board of Health's powers grew slightly over the following decade until the 1950s when its housing functions were transferred to a newly established Welsh Office at the Ministry of Housing and Local Government. The Office played an important role in the development of devolution in Wales. The period after its establishment saw greater powers over housing devolved to Wales, including the power to pass byelaws, and in 1957 the Minister of Housing and Local Government also became responsible for Welsh Affairs. During the next three decades, divergence between Wales and England, and the powers devolved to Wales increased significantly. This period, specifically the years between the establishment of the post of Secretary of State for Wales in 1964, and 1996, the year that the last piece of legislation concerning social housing regulation that applied to both Wales and England was enacted, is explored in this chapter.

This was a period of great change not just for Welsh devolution but also for the social housing movement more generally. As the immediate housing crisis that followed the Second World War eased, direct state involvement in housing construction declined. This was to lead to a shift in how social housing was developed. It was over this period that housing associations began to play an increasingly prominent role in the provision of housing. It is no coincidence that it is during this era that we also see the birth of modern social housing regulation, with the establishment of the Housing Corporation in 1964. Originally established as a funder of housing associations, by the 1970s the Corporation had taken on a full regulatory role. These developments in both housing and devolution were to become increasingly entangled over the next three decades. The Housing Corporation was to act as a driver for convergence within the social housing sector, taking power out of the hands of local authorities and providing more centralised direction for the sector. At the same time, the Secretary of State for Wales was to limit the impact of this process on Wales, thus driving divergence. By 1988 this process was to come to a head with the establishment of Tai Cymru as a separate social housing regulator for Wales, a decision that undoubtedly increased divergence between Wales and England. This process is examined in detail for the first time in this chapter. Through this exploration, this chapter will demonstrate how divergence was beginning to develop at several levels, and how a number of different factors were having an impact on the process in an era that predates political devolution. This

chapter, will demonstrate how the existence of administrative devolution permitted the social housing sector in Wales to continue to develop distinctly, and to diverge from the sector in England. It will also further emphasise how devolution within the housing context developed because of a series of ad-hoc decisions, not through a process of thinking. Developing an understanding of this period is key if we are to comprehend the Assembly's position on its inception in 1999 and if we are to fully appreciate the development of divergence in more recent times.

#### 4.1 The 1960s – A new era for devolution and housing

Two landmark events took place in the 1960s, specifically in 1964, which led to an important change in both the administration of social housing in Great Britain, and Wales's devolution settlement. The first of these was the establishment of the Housing Corporation. The Corporation was founded to promote and assist the development of housing associations.<sup>1</sup> Over time the Corporation's role was to evolve and it would eventually become the regulator of housing associations across Great Britain. At the same time, the post of the Secretary of State for Wales was established, with a seat at the cabinet and its own Welsh Office. As can be seen from discussions in Chapter 3, this was a development that had been called for over many years. Its establishment in 1964 was a crucial event in the development of Welsh devolution. Even though these events took place during the same year, they were largely unrelated developments. As both developed over the following thirty years they were to become increasingly intertwined. Studying their development will allow us to examine the growth in social housing regulation and Wales's increasingly distinct role within that process. This will highlight the extent of the differences that had developed between Wales and England by the 1990s.

##### 4.1.1 The Housing Corporation

The first indication of the more prominent role that housing associations were to play in the 1960s came with the enactment of the Housing Act 1961. Under the Act, the Exchequer made £25 million available as loans for housing associations.<sup>2</sup> This money was to be made available on the condition that the houses would be kept available for renting, and that rents would be no more than £4 a week excluding rates.<sup>3</sup> The £25million was to be shared between England and Wales with a separate £3 million being made available in Scotland.<sup>4</sup> The scheme was administered by the National Federation of Housing Societies (NFHS), with the Exchequer providing the NFHS with the funds that they would then provide to Housing

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<sup>1</sup> Housing Act 1964, s 1

<sup>2</sup> Housing Act 1961, Part 1

<sup>3</sup> Peter Malpass, *Housing Associations and Housing Policy, A historical Perspective* (MacMillan Press 2000) 135

<sup>4</sup> Alan Murie, *Moving Homes, The Housing Corporation 1964-2008* (Politico's Publishing 2008) 60

Associations as loans.<sup>5</sup> The scheme was considered to have been a success and by 1963 proposals were being made to extend it.<sup>6</sup> Some concerns remained, that, as a trade association, the NFHS lacked independence.<sup>7</sup> In part to counter this concern, the decision was made in May 1963 to establish the Housing Corporation.<sup>8</sup> This plan became a reality with the Housing Act 1964. The Corporation was established to:

promote and assist the development of housing societies, to facilitate the proper exercise and performance of the functions of such societies, and to publicise, in the case of societies providing houses for their own members no less than in the case of those providing houses for letting, the aims and principles of such societies.<sup>9</sup>

The Corporation was established on 1 September 1964<sup>10</sup> and had the power to provide loans,<sup>11</sup> an advisory service<sup>12</sup> and land for housing associations.<sup>13</sup> Despite having no regulatory functions at this time, the Housing Corporation did start to have an effect on the nature of housing associations. Early on, the Housing Corporation made moves to encourage housing associations to register under the rules of the Registrar of Industrial and Provident Societies.<sup>14</sup> The Corporation also attempted to encourage private investment.<sup>15</sup> This was done through providing housing associations with second mortgages<sup>16</sup> which meant that any private investors who provided the first mortgage would still get the primary security on the property.<sup>17</sup>

Despite this focus on investment and support, the area in which the Housing Corporation arguably had its most significant impact was housing administration. As discussed in Chapter 3, the administration and the development of housing had historically been under the control of local authorities. The formation of the Housing Corporation signalled a shift in direction, with powers moving to the centre, particularly with regards to funding. Housing Associations now had access to state funding without having to deal with local authorities.

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<sup>5</sup> *ibid*, 57

<sup>6</sup> Malpass (n3) 137

<sup>7</sup> Murie (n4) 57

<sup>8</sup> *ibid*, 64

<sup>9</sup> Housing Act 1964

<sup>10</sup> Murie (n4) 66

<sup>11</sup> Housing Act 1964, s 2

<sup>12</sup> *ibid*, s 7

<sup>13</sup> *ibid*, s 3

<sup>14</sup> Murie (n4) 67

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

This process of centralisation would become even more pronounced with the developments that were to follow in the 1970s.<sup>18</sup>

The establishment of the Housing Corporation would appear to be, a point of convergence in the history of housing in Wales and England. Prior to the formation of the Housing Corporation, housing associations did not have easy access to central government funding and, as such, associations were more reliant on the funds they received from local authorities or through philanthropy.<sup>19</sup> This had meant that associations developed very differently across the country.<sup>20</sup> By reducing the powers of local authorities, with regards to housing associations, the Government was reducing the scope for the regional variation. Over the coming decade operational variation also began to reduce as the Corporation encouraged associations to register under the rules of the Registrar of Industrial and Provident Societies. The extent of any potential convergence between Wales and England was to be limited by a development that followed only a few months later, the establishment of the Welsh Office.

#### 4.1.2 Welsh Office

Going into the 1964 general election, the Labour party's manifesto contained a pledge to appoint a Secretary of State for Wales.<sup>21</sup> Following their victory at the election, James Griffiths was appointed to the role on 18 October 1964,<sup>22</sup> and on 19 November, the Prime Minister made a statement to the House of Commons setting out the Secretary of State's functions. The Prime Minister announced that the Welsh Secretary was to have an office in Cardiff that was to be '*adequately staffed*', with a smaller office based in London.<sup>23</sup> The Secretary of State was to take over virtually all of the Minister of Housing and Local Government's executive responsibilities in Wales, with housing explicitly named as an area where executive functions would be transferred.<sup>24</sup>

The fact that housing was transferred to the Welsh Office was a consequence of Wales's devolution settlement prior to the 1964 election. As discussed, devolution had been a reality in Wales for many decades, with housing one of its key cornerstones. Prior to the appointment of the Secretary of State, housing in Wales had been administered through a

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<sup>18</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Cavendish Publishing 2006) 105

<sup>19</sup> As discussed in Chapter 3, section 3.1 in particular.

<sup>20</sup> As shown in Chapter 3, associations reacted to particular local concerns or to differing objectives. *ibid*

<sup>21</sup> John Gilbert Evans *Devolution in Wales, Claims and Responses, 1937 – 1979*, (Cardiff University of Wales Press 2006) 94

<sup>22</sup> *ibid*

<sup>23</sup> HC Deb, 19 November 1964, vol 702, cols 623 - 32

<sup>24</sup> *ibid*

separate Welsh Office within the Ministry of Housing and Local Government. The Minister for Housing and Local Government had also held the title of Minister for Welsh Affairs and in this light, it is unsurprising that powers over housing were transferred to the Secretary of State for Wales. A passage from the instructions given to the Parliamentary Counsel in preparation for the transfer of these functions, however, gives an indication as to the extent the civil servants at Whitehall were willing to see devolution go. The key passage reads:

The general approach to the splitting up of functions is that the day to day administration in Wales and Monmouthshire is handed over to the Secretary of State. The making of certain appointments is to be a joint exercise. Certain operations, however, such as the making of general regulations and the giving of general directions are to be reserved to the Minister with the object of securing uniformity of enactments. The giving of directions which only have a local effect and the making of local orders is transferred to the Secretary of State and within the field of general regulations he is given the any power to make regulations which only prescribe forms or the time and manner of doing anything. This is so that the regulations for Wales may provide, if it is so desired, forms which use the Welsh language.<sup>25</sup>

Whitehall imagined that the Welsh Office was to merely be a base through which its policy in Wales would be administered, not as a department that would be free to develop its own policies and ideas. Divergence was to be kept to a minimum. After a few months of consideration, the decision was made as to which functions were to be transferred. These were transferred to the Secretary of State for Wales on 1 April 1965 under Statutory Instrument 319.<sup>26</sup> It is apparent in all the documents that were exchanged between the concerned parties at Whitehall, that, the intention was to follow the approach set out in the instructions given to the Parliamentary Counsel. This can be seen in a note dated 15 December 1964. It stated that the Ministerial powers that were spread throughout the Housing Acts should all be transferred to the Secretary of State for Wales, as far as they applied to Wales and Monmouthshire, with the exception of those that covered general regulatory powers.<sup>27</sup> Whilst the powers devolved were administrative in nature, they provided

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<sup>25</sup> Ministry of Housing and Local Government, *Transfer of Functions to Secretary of State for Wales - Instructions to Parliamentary Counsel to prepare an Order in Council under the Ministries of the Crown (Transfer of Functions) Act 1946* – National Archives File HLG 124/ 171

<sup>26</sup> Ministers of the Crown (The Secretary of State for Wales and Minister of Land and Natural Resources) Order 1965, SI No 319, pages 6 and 7

<sup>27</sup> Secretary of State for Wales (Transfer of Functions) Order, (December 15 1965) - National Archives File HLG 124/ 171



the Secretary of State with significant power. These functions were to have a great impact on Welsh social housing over the coming decades.

Before finalising which functions ought to be transferred to the Welsh Office, discussions were held as to how these functions should be transferred. The debate amongst the civil servants at Whitehall over this bares a similarity to a more recent devolution debate, the debate over whether Wales should move from a conferred to a reserved powers model of devolution. This is clear from the following extract:

The defect in specifying exceptions, rather than the powers actually to be transferred in their application to Wales and Monmouthshire, is of course that any accidental omission will cause too much power to be transferred rather than too little; and that an amending order pulling back power that ought not to have been transferred would present obvious difficulty.<sup>28</sup>

It has been argued by some that such thinking underpins the UK Government's approach to Wales's devolution settlement today. It has been suggested that the Government's primary motivation for supporting a move to a reserved powers model of devolution in Wales, was a desire to pull back power, accidentally devolved to the National Assembly under the Government of Wales Act 2006.<sup>29</sup> The Supreme Court's interpretation of the Government of Wales Act 2006 is said to have seen greater powers devolved to the National Assembly than what the Westminster Government had initially intended, and that the new Wales Act 2017 is an attempt reverse this decision.<sup>30</sup> The Wales Act 2017 has drawn considerable criticism for this reason.<sup>31</sup> The difficulties that were faced by the Westminster Government as they sought to introduce the reserved powers model of devolution in Wales, would suggest that the analysis undertaken at Whitehall in the 1960s, as to the difficulties that accidentally devolving too much power to Wales would present, was correct.

There was a crucial difference between debate in 1964 and the more recent discussion over which devolution model should be implemented in Wales. Due to the nature of administrative

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<sup>28</sup> Secretary of State for Wales (Transfer of Functions) Order, *Housing Powers* – National Archives File HLG 124/171

<sup>29</sup> Professor Richard Wyn Jones, 'Professor Richard Wyn Jones' excoriating verdict on the Wales Bill plans for devolution' (Walesonline, 28 October 2016) < <http://www.walesonline.co.uk/news/politics/richard-wyn-jones-wales-bill-12091891> > accessed 14 November 2016

<sup>30</sup> *ibid*; in particular, the Supreme Court's decision in *Agricultural Sector (Wales) Bill - Reference by the Attorney General for England and Wales* [2014] UKSC 43

<sup>31</sup> Before its enactment the Wales Act 2017 was criticised by academics and politicians; for example; Wales Governance Centre and the Constitution Unit, *Delivering a Reserved Powers Model of Devolution for Wales*, (Wales Governance Centre at Cardiff University, September 2015); Wales Politics 'Carwyn Jones 'not yet ready to back Wales Bill'' (BBC News, 28 October 2016) < <http://www.bbc.co.uk/news/uk-wales-politics-37789638> > accessed 14 November 2016; and National Assembly's Constitutional and Legislative Affairs Committee, *Report on the UK Government's Wales Bill*, (National Assembly for Wales, October 2016)

devolution the Secretary of State's powers were limited to introducing secondary legislation and therefore all his powers were set out in primary legislation. As such, the debate at Whitehall was over which form of the conferred powers model of devolution should be implemented, not over whether the Secretary of State's powers should be set out under the reserved or the conferred model. In their initial conversations, the civil servants considered adopting a form that listed the legislation that conferred powers upon the Secretary of State, and to then set out which provisions within those were exempt. This was to be done for the sake of '*simplicity*'.<sup>32</sup> As the extract above suggests, there were some concerns that such a system would lead to functions being transferred to the Secretary of State unintentionally. So, a second option was considered. Under this model every single provision within an Act that was to confer powers onto the Secretary of State was to be listed.<sup>33</sup> Ultimately, it seems that simplicity was favoured, with the first of the two models adopted.<sup>34</sup> This approach remains the basis for the conferred powers model of devolution in place in Wales to this day, as can be seen from Schedule 7 of the Government of Wales Act 2006.<sup>35</sup>

The list of functions transferred to the Secretary of State was a long one. With regard to housing alone, the functions that were transferred to the Secretary of State were set out in 26 separate pieces of legislation.<sup>36</sup> This legislation spanned a period of six decades and included legislation that was implemented to tackle specific issues such as rural housing,<sup>37</sup> war damage,<sup>38</sup> and housing finance.<sup>39</sup> Amongst the housing functions now transferred to the Secretary of State for Wales was the power to approve Exchequer Subsidies to Housing Associations,<sup>40</sup> and to approve or decline proposals to establish Local Authority Redevelopment Areas.<sup>41</sup>

It was the functions exercised by the Secretary of State under the Housing Act 1964 that are of most interest to this thesis. These were arguably the most significant functions transferred to the Welsh Office in relation to the development of divergence in social housing regulation. It was this piece of legislation that founded the Housing Corporation. Under the Act, the Secretary of State could issue directions to the Corporation if it only concerned the exercise

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<sup>32</sup> Transfer of Function Order, *Housing Powers* (n28)

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> Government of Wales Act 2006, Schedule 7. Following the enactment of the Wales Act 2017 this model of devolution will be replaced by the reserved powers model of devolution.

<sup>36</sup> Ministers of the Crown (n25) Pages 6 and 7

<sup>37</sup> *ibid*

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> Under Housing Act 1961, s 1

<sup>41</sup> Under Housing Act 1957, s 55

or performance of its functions in Wales.<sup>42</sup> If there was a need to issue more general directions, the Secretary of State still retained power and such directions were issued jointly.<sup>43</sup> A number of other functions were transferred to the Secretary of State. The Secretary of State was to be the person that was to grant consent to the Corporation before it could undertake a number of its activities.<sup>44</sup> The Secretary of State could also provide a great deal of financial assistance to the Housing Corporation, local authorities and housing associations.<sup>45</sup> Perhaps of equal significance was the fact that the Secretary of State also had powers over the Corporation's constitution.<sup>46</sup> The powers were to be exercised jointly with the Secretary of State for Scotland and the Minister for Housing and Local Government.<sup>47</sup> This meant that the Secretary of State had a say over the membership of the Corporation, including the appointment and remuneration of the chairman.<sup>48</sup> These were functions that had not been transferred to the Welsh Office of the Ministry of Housing and Local Government upon the inception of the Corporation in 1964.

As with the developments of the 1940s and 1950s, the establishment of the Secretary of State for Wales in 1964, and subsequently the Welsh Office, did not lead to immediate changes to the nature of Welsh housing. The distinction between the administration of housing in Wales and the administration of housing in England, however, was becoming more pronounced. The powers that were transferred to the Welsh Office in March 1965 would lead, seemingly unintentionally, to a rapid increase in the divergence between housing in Wales and in England. This divergence would no longer be limited to housing administration but would have a broader impact.

## 4.2 The 1970s - Growing regulation and divergence

As the 60s turned into the 70s the role of the Housing Corporation expanded. By 1972 the Corporation's ability to lend money had increased following the enactment of the Housing Finance Act 1972, but it was the enactment of the Housing Act 1974 that was to significantly change the role of the Corporation.<sup>49</sup> This is a period that has been described as a watershed moment for housing associations.<sup>50</sup>

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<sup>42</sup> Housing Act 1964, s 1(2)

<sup>43</sup> *ibid*

<sup>44</sup> *ibid*, s 2

<sup>45</sup> *ibid*, s 9; subject to Treasury Consent

<sup>46</sup> *ibid*, Schedule 1

<sup>47</sup> *ibid*

<sup>48</sup> *ibid*

<sup>49</sup> Murie (n4) 92

<sup>50</sup> *ibid* 97

The Housing Act 1974 was enacted 34 years after what this thesis has argued is the point of divergence in housing administration between Wales and England. To date, this thesis has only briefly discussed social housing regulation. This is a consequence of the limited role played by housing associations over the previous decades with the state, through local authorities, being at the forefront of housing development across the UK. This had begun to change with the enactment of the Housing Act 1964. Housing Associations were now starting to play a much more prominent role in the delivery of social housing and had access to a much greater amount of public money. The changing nature of the sector was also to lead to a change in the Housing Corporation's role. The Housing Act 1974 set about establishing the Housing Corporation as a regulator of housing associations. This could be viewed as the birth of social housing regulation in the UK, or as had been argued by some, the birth of centralised regulation in the UK in all areas.<sup>51</sup>

#### 4.2.1 Growing regulation and centralisation

The Housing Act 1974 expanded the duties of the Housing Corporation. For example, the Corporation was now under a duty to register housing associations and to monitor their performance.<sup>52</sup> These duties remain in place to this day for the regulators in Wales and England.<sup>53</sup> In addition to registering and monitoring the performance of registered associations, the Act also limited the availability of certain grants and loans to those housing associations that had registered.<sup>54</sup> These steps increased the power of the Corporation at the expense of local authorities.<sup>55</sup>

With new powers transferred to the Housing Corporation, it is perhaps not surprising that the Corporation made completing the registration process one of its top priorities.<sup>56</sup> Amongst the requirements an association had to satisfy to be registered were that it did not trade for profit and that it was established to provide housing for letting.<sup>57</sup> By 1976/7, it reported that it had nearly completed the task, registering 2,400 associations.<sup>58</sup> The focus of the Corporation now turned to monitoring associations. Following consultation, the decision was made that monitoring could be best achieved by requiring housing associations to complete an annual return that contained such information as; the location of their housing stock, total staff

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<sup>51</sup> Cowan and MacDermot (n18) 105

<sup>52</sup> Housing Act 1974, s 1

<sup>53</sup> In Wales under the Housing Act 1996 and in England under the Housing and Regeneration Act 2008

<sup>54</sup> Housing Act 1974, s 1(2)(c)

<sup>55</sup> To the extent where the Housing Corporation was imposing housing associations developments on them with little or no consultation beforehand. Cowan and MacDermot (n18) 105

<sup>56</sup> Housing Act 1974, s 17

<sup>57</sup> Housing Act 1974, s 13(2) This is one area within which divergence has developed between Wales and England in the present day and is discussed in detail in Chapter 5, in particular in section 5.1.2

<sup>58</sup> Housing Corporation, *Report 1976/7*, Page 4

numbers and the disclosure of interests.<sup>59</sup> In addition to this, the Corporation began a programme of ‘*monitoring visits*’ to housing associations, with the new system in place by the publication of the Corporation’s Annual Review in 1977/78.<sup>60</sup> The Corporation also had the power to appoint individuals to conduct statutory inquiries into the affairs of registered associations,<sup>61</sup> and to appoint or remove members of an associations committee based on the results of such an inquiry.<sup>62</sup>

This increase in the Housing Corporation’s responsibilities led to a change in its operation. In 1974, there was a 40% increase in staffing at the Corporation.<sup>63</sup> In addition to this the Corporation was split in two, one part dealing with investment, the other with regulation.<sup>64</sup> These two parts would then work together on any application for funding, sharing information.<sup>65</sup> In addition to these operational changes the Housing Corporation also established regional offices. These offices had been established over the previous decade and were to consider the proposals of housing associations at a regional level.<sup>66</sup> This was a move that further reinforced the supremacy of the Corporation, ensuring that it was the primary driver of housing association work, even at a local level.<sup>67</sup>

All these changes suggest that the convergence in social housing administration that had been evident in the 1960s had continued into the 1970s. Indeed, it could be argued that as social housing regulation evolved in the 1970s that there was very little variation, if any at all. The administrative devolution that had taken place in Wales over the previous three decades, however, meant that the impact of the Corporation’s new regulatory powers affected Wales in a different manner, and reinforced the differences that had already developed between Wales and England.

#### 4.2.2 Regulation and Wales

Regional offices were not only opened by the Housing Corporation in England. Two Scottish Offices were established, whilst a Welsh regional office was also established in Cardiff under the control of the Chief Officer for Wales.<sup>68</sup> The Office in Cardiff was originally established as

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<sup>59</sup> *ibid*

<sup>60</sup> Housing Corporation, *Report 1977/8*

<sup>61</sup> Housing Act 1974, s 19

<sup>62</sup> *ibid*, s 20

<sup>63</sup> Murie (n4) 100

<sup>64</sup> *ibid*

<sup>65</sup> *ibid* 101

<sup>66</sup> Offices were established in Croydon, Potters Bar, Exeter, Leicester, Wolverhampton, Manchester and Leeds. *ibid* 104

<sup>67</sup> *ibid*

<sup>68</sup> *ibid*

the regional office for Wales and the South West of England,<sup>69</sup> but by 1974 the decision had been taken to establish a separate Regional Office for the South West in Exeter. The Corporation itself suggested in 1979 that there were two reasons for this decision. First that it was necessary to *'to meet the challenge of the 1974 Housing Act'* and secondly that such a move was necessary so that the Corporation could *'concentrate in Wales on the principality's particular problems'*.<sup>70</sup> These suggestions highlight just how important the developments of the 1970s were to both social housing and devolution. The fact that the Corporation felt that it could not operate effectively under the Housing Act 1974, without needing to restructure itself, shows how social housing regulation had changed the sector. This argument is supported further by the increase in staff numbers at the Corporation, as outlined above. But perhaps of more importance to this thesis is the suggestion, in the excerpt above, that the Corporation viewed Wales as increasingly distinct from England.<sup>71</sup> This interpretation can be supported by a number of other developments that took place in the mid-1970s. Separate brief reports were prepared on the activities of the Corporation in both Wales and Scotland, and these were then discussed with other agenda papers.<sup>72</sup> The Annual Reports of the Corporation also evolved dramatically to give more focus to Wales and Scotland. In 1973, the activities of the Corporation in Wales were discussed in two short paragraphs.<sup>73</sup> By 1975/6 the activities of the Corporation in Wales had been allocated a column,<sup>74</sup> by 1977/8 this had grown to a full page,<sup>75</sup> and by 1978/9 there were three pages dedicated to the work of the Housing Corporation in Wales.<sup>76</sup> These developments also provide further evidence that suggests that structural differences between Wales and England do have an impact on the development of divergence. In noting that Wales had *'particular problems'*<sup>77</sup> the Housing Corporation were, in effect acknowledging that Wales's economic, geographical and socio-linguistic condition meant that it had different needs to England. With the Housing Corporation deciding to develop a distinctive approach when operating in Wales because of these *'problems'*, it appears beyond doubt that the structural difference between nations can contribute to the development of divergence.

The role played by the Secretary of State for Wales in the operation of the Corporation also became increasingly prominent over this period. The Secretary of State was involved in the

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<sup>69</sup> Housing Corporation, *Report 1972/3*, Page 6

<sup>70</sup> Housing Corporation, *Report 1978/79*, Page 13

<sup>71</sup> Murie (n4) 119 and Housing Corporation (n52) Page 11

<sup>72</sup> Murie (n4) 119

<sup>73</sup> Housing Corporation (n69)

<sup>74</sup> Housing Corporation, *Report 1975/6*

<sup>75</sup> Housing Corporation (n60)

<sup>76</sup> Housing Corporation (n70)

<sup>77</sup> Housing Corporation (n70)

consultation that took place over the format of the Housing Corporation's Annual Return,<sup>78</sup> and dwelling construction and saving targets were set out along national lines.<sup>79</sup> The impact of devolution was not just limited to how the Corporation was administered or to how the Corporation published its information, but also extended to its financing. As noted, the Secretary of State for Wales had the power to provide advances to the Housing Corporation under the Housing Act 1964. It is over the course of the 1976/77 and 1977/78 financial years that the significance of the devolution of this power becomes apparent.

During the 1976/77, financial year the Housing Corporation was faced with significant cuts to its budget for 1977/78. The first cut was announced in July 1976. The Corporation was expected to save £15 million from its budget in England and a further £1 million from its budget in Wales.<sup>80</sup> By December 1976 the Corporation was faced with an even greater cut. The Government announced that the Corporation's budget would be cut by £57million the following year, a cut so severe that it would have led to the freezing of all remaining new work for the 1976/77 year and a reduction by 50% in the work planned for 1977/78.<sup>81</sup> Importantly, this was only a cut in the Corporation's budget in England and no cut was announced for the budgets of the Corporation in Scotland or Wales.<sup>82</sup> Clearly, the differences between the administration of social housing in Wales and England was beginning to have a real impact in practice.

Not only was Wales spared the worst of the cuts to the Corporation's expenditure, but it received further financial and non-financial support throughout the decade. In the 1976/77, financial year the Welsh Office had worked with the Corporation to scrutinise the standards and costs of acquisition and improvement units,<sup>83</sup> whilst in 1979/80, having spent its initial budget, the Corporation received a further £500,000 from the Secretary of State for Wales.<sup>84</sup> The provision of social housing in Wales and the work of housing associations were clearly becoming increasingly distinct from England. Furthermore, whilst the divergence in housing administration between Wales and England had historically had very little impact on the nature of Welsh housing and broader civil society, the 1970s was the decade that saw a change in this regard.

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<sup>78</sup> Murie (n4) 108

<sup>79</sup> *ibid* 121 and 124

<sup>80</sup> Housing Corporation (n58) Page 3

<sup>81</sup> Housing Corporation (n60) Page 4

<sup>82</sup> *ibid*

<sup>83</sup> Housing Corporation (n58)

<sup>84</sup> Housing Corporation, *Report 1979/80*

In 1976, the National Federation of Housing Associations (NFHA) established a Welsh Housing Association Committee (WHAC).<sup>85</sup> The WHAC was described by the Corporation as the Welsh arm of the NFHA and the Corporation welcomed what it dubbed as a '*corporate voice*' for the Welsh social housing movement.<sup>86</sup> This was not the only development that showed a growing awareness that Wales and England now operated differently when it came to social housing. In March 1976, the Welsh Consumer Council published a survey of the allocation policies for Council Housing in Wales, whilst the TUC published *Housing in Wales* a document that looked at the condition of Welsh housing.<sup>87</sup>

Despite this growing divergence between the administration of housing in Wales and in England, it is important to distinguish between this and the extent by which divergence was developing with regard to social housing regulation specifically. Wales and England both shared one common regulator, the Housing Corporation, and as a result, associations in Wales were subject to the same standards and requirements as their counterparts in England. Variation in social housing regulation, the primary focus of this thesis, therefore remained minimal. Despite the best efforts of civil servants at Whitehall to secure uniformity between Wales and England, the growing differences between '*day to day administration*' of housing in Wales and England, would prove to have a significant impact on the development of regulation over the next decade.<sup>88</sup> It is important to note the context within which these day to day differences had developed. As has been discussed, despite the growth in devolution over this period, there were very limited differences between primary legislation in Wales and England. Despite this, housing associations in Wales were now receiving extra money than their English counterparts, and organisations such as the Housing Corporations were operating differently in Wales. These differences demonstrate how divergence can develop at a number of different levels. The Housing Corporation was not obliged by statute to develop a distinctive approach when operating in Wales. These differences emerged a result of the decision of the staff at the Corporation. Much of the divergence that had developed during this era therefore did not develop at the primary legislative level but rather as the result of the decisions of those who were tasked with implementing the legislation.

The growth in day to day differences between Wales and England over this period was to have a long-term effect. The fact that housing in Wales was being administered and discussed in ways that were so different to England, would lead to calls for further

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<sup>85</sup> Housing Corporation (n68) Page 11

<sup>86</sup> Housing Corporation (n64) Page 15

<sup>87</sup> Welsh Consumer Council, *Council housing: a survey of allocation policies in Wales* (Welsh Consumer Council 1976) and Wales TUC, *Housing in Wales* (Wales TUC 1974)

<sup>88</sup> Transfer of functions (n25)



devolution. By the end of the 1980s, these calls had led to the foundation of a separate regulator for housing associations in Wales.

### 4.3 The 1980s – The Thatcher years

Despite the continuing growth of both the Housing Corporation and Welsh devolution throughout the 1970s, both faced uncertain futures as they entered the 1980s. In 1979, the people of Wales had voted overwhelmingly against the establishment of an Assembly,<sup>89</sup> whilst the budget of the Housing Corporation was becoming increasingly stretched.<sup>90</sup> The devolution referendum was not the only time that the people of Wales would go to the ballot box in 1979. On 3 May, there was a General Election, from which Margaret Thatcher and her Conservative Party emerged victorious. The legacy of her Government has been long debated. What seems beyond debate is that her Government had a significant impact on the country and on the housing sector.

One of the policies most synonymous with the Thatcher administration is the ‘right to buy’. The virtues of the policy have long been debated and have resurfaced recently due to the expansion of the policy to cover housing associations in England.<sup>91</sup> Whilst undoubtedly significant, this thesis will primarily focus on developments that were to take place in the second half of the 1980s; the expansion of the Housing Corporation, and the establishment of Tai Cymru/ Homes for Wales.

#### 4.3.1 The right to buy

The notion of tenants being able to purchase their council homes was nothing new by the time that it became a Conservative Party manifesto pledge in 1979. Discretionary sales had been available since the interwar period and had increased in popularity since the 1950s.<sup>92</sup> The Conservative’s policy was to go further than what had gone before, however, and was viewed by Thatcher herself as one of the key reasons for the Conservative’s victory at the General Election.<sup>93</sup> The policy was put into law with the enactment of the Housing Act 1980 and expanded further by the Housing Act 1985. The 1980 Act offered tenants substantial discounts to help them buy their homes,<sup>94</sup> and provided the Secretary of State with the

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<sup>89</sup> By a margin of 79.7% to 20.3%. Richard Rawlings, *Delineating Wales* (first published December 2003, University of Wales Press Cardiff 2003) 48

<sup>90</sup> Murie (n4) 136

<sup>91</sup> Housing and Planning Act 2016, Part 4, Chapter 1

<sup>92</sup> David Mullins and Alan Murie, *Housing Policy in the UK*, (first published 2006, Palgrave & Macmillan 2006) 95

<sup>93</sup> HC Deb, 15 May 1979 vol 967, col 90

<sup>94</sup> Housing Act 1980, s 7

power to intervene to assist tenants if local authorities were dragging their heels.<sup>95</sup> Many housing associations were not required by law to comply with the 'right to buy', despite this being the initial intention of the Conservative Party.<sup>96</sup> In spite of this, by the end of the 1980/1981 financial year, over 4,500 housing association tenants had requested to buy their properties.<sup>97</sup>

The passage of the policy from a manifesto pledge to legislation was not entirely smooth. Whilst criticism from the opposition may have been anticipated, its progress also faced difficulties due to internal wrangling in Whitehall. Amongst the departments that presented such difficulties was the Welsh Office. The Parliamentary Counsel had identified the '*problem of Wales*' by January 1980.<sup>98</sup> The '*problem*' being, deciding on which powers should be exercised by the Secretary of State for Wales under the Bill, and determining how these should be set out.<sup>99</sup> The discussions between the Welsh Office, the Department of the Environment and the Office of the Parliamentary Counsel on how to resolve this problem were frank at times. Nowhere was this more apparent than in a letter sent by the Welsh Office on 1 February 1980, in response to correspondence by the Parliamentary Counsel.<sup>100</sup> The Counsel had discussed how provisions could be placed into the Bill to ensure that the Secretary of State for Wales could make separate but identical regulations or orders for Wales.<sup>101</sup> The Welsh Office believed that it had already been agreed that the Secretary of State for Wales would be permitted to carry out such functions both separately and differently.<sup>102</sup> In its response the Welsh Office states:

As you are aware, we are most anxious, and indeed our Secretary of State expects, to be able to exercise regulation making and order making powers separately and differently as respects to Wales.<sup>103</sup>

The Welsh Office's concerns were supported by the Department of the Environment who asked the Parliamentary Council to revisit the Bill unless it could assure both itself and the Welsh Office that the legislation would allow the formation of both separate and different

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<sup>95</sup> Housing Act 1980, s 23. These powers were used against the Local Authority in Norwich Mullins & Murie (n92) 97

<sup>96</sup> Murie (n4) 141

<sup>97</sup> Housing Corporation *Report 1980/81*

<sup>98</sup> Letter from Edward Caldwell at the Office of the Parliamentary Counsel to Jim Medcalf at the Department of Environment (23 January 1980) - National Archives File HLG 124/ 171

<sup>99</sup> *ibid*

<sup>100</sup> Letter from Mrs J M Booker at the Welsh Office to Miss M Gent at the Department of Environment (1 February 1980) - National Archives File HLG 124/ 171

<sup>101</sup> Letter from Edward Caldwell (n98)

<sup>102</sup> Letter from Mrs J M Booker (n100)

<sup>103</sup> *ibid*

provisions for Wales.<sup>104</sup> The Wales Office was, in effect arguing for a space to develop a distinct Welsh approach to implement a common Wales and England policy. This debate demonstrates the significance of one of the thesis' key themes, that divergence can develop at a number of levels. The Wales Office's request for powers to develop separate regulations under the Act, shows that it had appreciated it was possible to develop a distinctive Welsh approach when making regulations, even when it was tasked with implementing a common Wales and England policy that was set out in primary legislation.

#### 4.3.2 The role of the Housing Corporation

As has been noted, the Housing Corporation entered the 1980s under some pressure. The Corporation had already faced cuts to its budget and with the election of a Conservative Government there were fears that the Corporation would be disbanded during a cull of the quangos.<sup>105</sup> Whilst the Corporation was spared, things did not carry on as before.<sup>106</sup>

The 1980/81 financial year was a year of great change for the Corporation. Faced with a tightening financial belt the Corporation underwent some considerable reorganisation in an attempt to operate in a '*slimmed down*' form.<sup>107</sup> In the 5 years leading to 1979/80 the number of staff employed at the Corporation had more than doubled as a result of the Corporation's increased workload.<sup>108</sup> In 1980/81, the number of posts across both Wales and England was cut from 689 to 545.<sup>109</sup>

In addition to this cut in staff the Corporation underwent further restructuring. The Corporation announced plans to bring all responsibility and staffing for the registration, supervision and control of housing associations under one roof at its Headquarters.<sup>110</sup> Monitoring officers would be based at the regional offices, but would be answerable to Headquarters.<sup>111</sup> Financial efficiency was not the only motivation behind this decision. This structure would permit the Corporation to separate monitoring functions from other day to day work.<sup>112</sup> This would mean that the Corporation could ensure that there was a clear separation between its investment and supervisory functions.<sup>113</sup>

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<sup>104</sup> Letter from J M Medcalf at the Department for the Environment to E G Caldwell at the Parliamentary Counsel (11 March 1980) National Archives File HLG 124/ 171

<sup>105</sup> Murie (n4) 82

<sup>106</sup> Housing Corporation (n84) Page 4

<sup>107</sup> Housing Corporation (n97) Page 4

<sup>108</sup> Housing Corporation (n84)

<sup>109</sup> Housing Corporation (n97) Four people were dismissed in Wales with the position in Scotland still being finalized when the Report was published.

<sup>110</sup> *ibid* 19

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

<sup>113</sup> *ibid*

The operation of the Corporation was also amended because of new legislative powers and the adoption of new regulatory techniques. Under the Housing Act 1980 it was now compulsory for every housing association to transfer copies of their audited accounts to the Corporation within six months.<sup>114</sup> The Housing Corporation had already had the power to request that housing associations transferred these accounts to them,<sup>115</sup> but only 81% of associations submitted their reports within the requisite time period.<sup>116</sup> Under their new powers under the 1980 Act, the Corporation began legal proceedings against eight associations during the 1985/86 financial year.<sup>117</sup> Aware of the fact that it could not monitor every housing association; in 1978/79 the Corporation introduced spot audits.<sup>118</sup> These were designed to supplement the monitoring visits that were already being undertaken by the Corporation.<sup>119</sup> This was to feed into a new regulatory approach under which each housing association in receipt of public funds would be visited over the course of a two year cycle.<sup>120</sup> These visits were to focus on serious weakness both in the control of an association by its committee, and in its behaviour.<sup>121</sup> An approach not dissimilar to the risk based approach to regulation in force today.

#### 4.3.3 Becoming similar but growing apart?

All these changes to the Housing Corporation had the effect of further centralising social housing regulation across Britain, but by the late 1980s a decision was taken that would significantly increase the scope for divergence between Wales and England. In 1988, Tai Cymru was established as a separate Housing Corporation for Wales. This was a development that was to mean that whilst the social housing sector as a whole was becoming increasingly similar, Wales and England were continuing to drift apart with regards to social housing regulation.

This divergence in social housing regulation between Wales and England might never have happened. By the mid-1980s suggestions were being made that the Corporation's Welsh Office should be scrapped, with its functions in north Wales being operated from Liverpool, and in south Wales from Bristol.<sup>122</sup> With regulation across Wales and England now being

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<sup>114</sup> Housing Act 1980, s 124(3)

<sup>115</sup> Housing Act 1974

<sup>116</sup> Housing Corporation (n84) Page 17

<sup>117</sup> Housing Corporation, *Report 1985/6* Amongst the other functions that were transferred to the Corporation under the Housing Act 1980 were functions relating to consent, the recovery of certain sums and the extension of some of its pre-existing powers under the Housing Acts 1974. See Housing Act 1980 Part VIII

<sup>118</sup> Housing Corporation (n70) Page 21

<sup>119</sup> *ibid*

<sup>120</sup> Housing Corporation, *Report 1981/2*

<sup>121</sup> *ibid*

<sup>122</sup> Murie (n4), s 142

controlled from the Housing Corporation's headquarters, the opportunity for regional variation seemed to have further decreased, with each region converging to follow one central approach. Any move to disband the Corporation's Welsh office would have accelerated convergence between Wales and England. This idea was rejected, and it was only a few years later that Tai Cymru was established.

The Housing Association Act 1985 updated the statutory basis upon which the Housing Corporation operated, but only three years later a separate Housing Corporation for Wales was established. Discussions regarding the establishment of a separate Welsh Housing Corporation had started back in the autumn of 1987. Concerns were raised about how certain provisions contained in a new Housing Bill would be implemented in Wales without the establishment of a separate Housing Corporation.<sup>123</sup> In the minutes of a meeting held between the Welsh Office and the Department of the Environment on 3 September 1987, it was noted that both were agreed that it was now necessary to establish a separate Welsh Housing Corporation.<sup>124</sup>

A week later the Secretary of State for Wales was on the offensive in his efforts to establish a separate Welsh Corporation. In a letter to the Cabinet Office, the Welsh Office sets out that the Secretary of State viewed the Welsh Office of the Housing Corporation as the *'odd man out amongst Welsh quangos'* that came within his responsibility for public expenditure, as it was a Welsh arm of a body, as opposed to being a *'distinct and independent Welsh entity'*.<sup>125</sup> Furthermore, it was noted that *'this singularity'* was to be further emphasized when Scottish Homes was to come into being as a separate Housing Corporation for Scotland.<sup>126</sup> The proposals seemed to gain support in Whitehall during the autumn of 1987 but support was still not forthcoming from the Cabinet Office. In a letter to the Secretary of State for Wales, the Minister for the Civil Office, Richard Luce, set out his concerns with the proposal.<sup>127</sup> The Minister outlined that the Government's policy on the establishment of non-departmental public bodies was that they were only to be established if the new body would *'carry out its functions more economically and effectively than would other options'*.<sup>128</sup> The Minister felt that whilst the proposal to establish a Welsh Housing Corporation would lead to some efficiency savings, this would be a side effect, with the primary motivation for its

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<sup>123</sup> Letter from J D Shortridge, Parliamentary Undersecretary to Mr E A Peat (4 September 1987) - National Archives File BD 107/ 66

<sup>124</sup> *ibid*

<sup>125</sup> Letter from Welsh Office to Dr J P Spencer at the Cabinet Office (9 September 1987) National Archives File BD 107/ 66

<sup>126</sup> *ibid*

<sup>127</sup> Letter from Richard Luce, the Minister for the Civil Office to the Right Honourable Peter Walker, the Secretary of State for Wales (27 November 1987) National Archives File BD 107/ 66

<sup>128</sup> *ibid*

establishment being political in nature.<sup>129</sup> Despite these concerns, by December the proposal had been approved in principle by the Secretary of State for the Environment<sup>130</sup> and the Prime Minister.<sup>131</sup> Once again this important step did not develop as a result of a process of thinking about how housing powers should be devolved to Wales. In this instance, it would seem that the primary motivation for devolution was the Secretary of State for Wales' desire to ensure his powers were consistent with those of the Secretary of State for Scotland.

On 16 December, a meeting was held between the Secretary of State for Wales and Sir Hugh Cubitt, the Chairman of the Housing Corporation. At the meeting the Secretary of State informed Sir Hugh of his intention to establish a separate Housing Corporation for Wales.<sup>132</sup> The idea was supported in principle by Sir Hugh and attention turned towards some of the issues that would arise during the establishment of a Welsh Corporation.<sup>133</sup> Amongst the issues discussed were the timescale for the establishment of the Corporation, its name, and the need to ensure that the Corporation's Board was of sufficient quality.<sup>134</sup> The following week the Government launched its consultation on the establishment of a separate Housing Corporation for Wales.<sup>135</sup>

The proposal received widespread support from those involved in Welsh housing.<sup>136</sup> The sector's enthusiasm for the idea is highlighted by the fact that by early January 1988 the Welsh Office had already received a letter from a Colwyn Bay Chartered Surveyor offering his services to any newly established body.<sup>137</sup> Despite this positivity there were concerns raised by housing associations that operated on both sides of the border that housing associations in Wales wanted to establish a closed shop.<sup>138</sup> In their response to the consultation, Hanover Housing Association set out that if a separate Housing Corporation was established in Wales it would have to consider reorganising its administration, though

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<sup>129</sup> *ibid*

<sup>130</sup> Letter from A C Elmer at the Welsh Office to Mr M Betenson at the Treasury (11 December 1987) National Archives File BD 107/ 66

<sup>131</sup> Letter David Norgrove, Private Secretary to the Prime Minister, to Jon Shortridge at the Welsh Office (11 December 1987) National Archives File BD 107/ 66

<sup>132</sup> Minutes of a meeting held between the Secretary of State, the Chairman of the Housing Corporation and the Chief Executive of the Housing Corporation (16 December 1987) National Archives File BD 107/ 66

<sup>133</sup> *Ibid*. No reason was given by Sir Hugh for his support.

<sup>134</sup> *ibid*. Particular concerns were raised about the quality of the Housing Corporation's Welsh board member, Lloyd Williams.

<sup>135</sup> Welsh Office, *Consultation Paper on the Proposal to Establish a Separate Housing Corporation for Wales*

<sup>136</sup> The proposals were welcomed by organisations ranging from local authorities, to housing associations, to other third sector bodies. The responses are held by the National Archives in file BD 107/66

<sup>137</sup> Letter from John Kelly to Peter Walker, the Secretary of State for Wales (24 December 1987) National Archives File BD 107/ 66

<sup>138</sup> Response to the Consultation Paper by Hanover Housing Association – Available in file BD 107/66

they did make it clear that they saw no reason to question their continued operation in Wales.<sup>139</sup> Their response suggests that some housing associations were aware of the potential impact the establishment of a Welsh Housing Corporation would have on the social housing sector in Wales, and the divergence that was likely to follow between the sector in Wales and England.

With ‘*almost unanimous support*’ for the idea to establish a Welsh Housing Corporation attention soon turned to its establishment.<sup>140</sup> Civil servants and politicians focused on two areas in particular during this process; the structure of the Welsh Corporation and its name. There had been some debate within Whitehall on how a separate Welsh Housing Corporation could be most effectively created through legislation. They eventually concluded that this would be through introducing amendments to the Housing Bill. By February 1988 revised instructions had been sent to the Parliamentary Counsel for the amendments that needed to be made to the Housing Bill.<sup>141</sup> What is immediately obvious from the instructions is that despite the fact that the formation of Scottish Homes was one of the factors that had made some in Westminster believe that the formation a separate Housing Corporation for Wales was necessary, these two bodies were to be very different.<sup>142</sup> The Welsh Corporation was to be far more closely associated with its counterpart in England. The instructions state:

the Secretary of State for Wales is not seeking a Welsh equivalent of the Scottish body “Scottish Homes”. He wishes to establish the Housing Corporation for Wales which will have exactly the same, and no more, powers than those exercised at present by the Housing Corporation.<sup>143</sup>

Given that the new Welsh body was to have the same powers as the existing Corporation, this limited some of the structural issues that may have arisen. In many areas, the Housing Bill could be simply amended so that the statutory provisions that gave the Housing Corporation its powers also applied to the new Welsh body.<sup>144</sup> This approach would also have an impact on the name that was to be chosen for the Welsh Housing Corporation. Four names were initially suggested in February 1988.<sup>145</sup> These were Welsh Homes, Homes for

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<sup>139</sup> *ibid*. It should be noted that Hanover Housing is registered as a registered provider of social housing in England today, but not as a registered social landlord in Wales.

<sup>140</sup> Letter from A E Peat to the Permanent Secretary of the Parliamentary Clerk (3 February 1988) - National Archives File BD 107/66

<sup>141</sup> Instructions to the Parliamentary Counsel for Amendments to be made to the Housing Bill to create a separate Housing Corporation for Wales – National Archives File BD 107/66

<sup>142</sup> *ibid*

<sup>143</sup> *ibid*

<sup>144</sup> *ibid*

<sup>145</sup> Letter from A E Peat to J W Lloyd (4 February 1988) - National Archives File BD 107/ 66

Wales/ Housing for Wales, Tai Cymru and the Welsh Housing Agency.<sup>146</sup> The Housing Corporation was eager that the new Welsh Corporation adopted a different name to avoid confusion between the two organisations.<sup>147</sup> It was felt, however, that Welsh Homes would be too similar to the new Scottish Homes in Scotland. This was felt to be undesirable given the different structure and functions of Scottish Homes.<sup>148</sup> Within the month the decision was taken that the body should be referred to as Housing for Wales in English and as Tai Cymru in Welsh.<sup>149</sup>

The decision that Tai Cymru was to operate under the same powers as the Housing Corporation in England certainly curtailed the extent to which regulation in Wales and England could diverge from each other. In addition to this, both bodies were answerable to ministers within the same Government and would be subjected to similar policy directives. This does not lessen the significance of the moment. For the first time, housing associations were being regulated by two different bodies across either side of Offa's Dyke. Given the extent to which other administrative functions over housing had already been devolved to the Welsh Office, the establishment of Tai Cymru meant that there was now very little crossover between Wales and England with regards to housing. Even though social housing regulation in Wales and England remained similar, there is no doubting that the establishment of Tai Cymru meant that both nations continued to grow apart. This was a process that was to continue even more significantly only a decade later with the establishment of the National Assembly.

#### 4.4 The run up to the National Assembly

Only a few years after its foundation, Tai Cymru found itself severely tested. In 1990, a Welsh housing association, Corlan, collapsed. The incident sparked significant reaction in Wales. In Westminster, the Secretary of State for Wales was questioned on numerous occasions on how the situation had arisen, and about what his and Tai Cymru's proposals were for dealing with it.<sup>150</sup> On 25 May 1990, Tai Cymru commissioned a report by the Housing Association Consultancy and Advisory Service (HACAS) into the affairs of Corlan.<sup>151</sup> In March 1991 the Parliamentary Undersecretary to the Welsh Office laid out the Report's findings to the Commons.<sup>152</sup> The Undersecretary made it clear that he believed that

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<sup>146</sup> *ibid*

<sup>147</sup> *ibid*

<sup>148</sup> *ibid*

<sup>149</sup> Letter from E K Davies to Mr J W Lloyd (11 January 1988) - National Archives File BD 107/ 66

<sup>150</sup> HC Deb, 16 July 1990, vol 176, cols 673; HC Deb, 28 January 1991, vol 184, cols 407-8; and HC Deb, 7 March 1991, vol 187, cols 235-6

<sup>151</sup> HC Deb, 7 March, 1991, vol 187, cols 235-6

<sup>152</sup> *Ibid* The Undersecretary set out that there were four primary reasons for Corlan's collapse, namely; that Corlan had overvalued site works and had made premature applications for grants, that Corlan's internal



Tai Cymru had learned lessons from the incident and cited the fact that they now required associations to submit management accounts in addition to their audit financial reports.<sup>153</sup>

#### 4.5 Conclusion

Tai Cymru survived the Corlan incident and in 1996 the statutory basis for social housing regulation was updated once more, with the Housing Act 1996 now replacing the Housing Act 1988. The Act was to serve as the legal basis for both the Housing Corporation and Tai Cymru and makes almost identical provisions for both. Only three years later, Tai Cymru was disbanded, following the establishment of the National Assembly, with all its functions being transferred to the Welsh Ministers.<sup>154</sup> The Act was subsequently amended to reflect this, though the statutory basis for the powers of the Welsh Ministers remained largely unchanged from those of Tai Cymru. As this chapter has shown, a clear line can therefore be drawn from the developments in housing devolution in the 1960s and the establishment of the Housing Corporation, to the powers devolved to the National Assembly in 1999 in relation to social housing regulation.

Through this exploration of the historic development of divergence this chapter has also drawn further attention to two of the thesis's main themes. First, the chapter has demonstrated how a number of factors contribute to development of divergence. In this period, two factors appear to have had a particularly significant impact on the process, politics and the structural differences that exist between Wales and England. This chapter has also highlighted how divergence can develop at a number of level. It has shown how, even in the era of administrative devolution when there was limited divergence in primary legislation, important differences could develop between Wales and England. It has also highlighted how the devolution settlement in Wales continued to be shaped by ad-hoc decisions as opposed to a more rounded consideration as to the benefits of devolution and what shape any settlement should take.

Despite the significant changes in Wales' devolution settlement and the legislation introduced by the National Assembly since 1999, the Housing Act 1996 remains the statutory basis for social housing regulation in Wales. In England on the other hand, this is not the case. The Housing Act 1996 was therefore the last piece of legislation enacted that provided a common statutory basis for social housing regulation both sides of Offa's Dyke. It

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administrative and other arrangements were insufficiently robust for the size of their development programme, deficiencies in Corlan's management of programmes and of its financial control, and that Corlan had allowed uncertainties to arise as to the delegation of control.

<sup>153</sup> *ibid*

<sup>154</sup> Government of Wales Act 1998, s 140, s 141, s 142, s 143

is from this point that Chapter 5 will chart the development of contemporary divergence in social housing regulation.

## 5. Housing Divergence: 1996 to the Present Day

18 September 1997 is a landmark date in Welsh history. By a majority of just 6,721, the people of Wales voted in favour of establishing a National Assembly.<sup>1</sup> The opening of the National Assembly in 1999 was not the final step in Wales's devolutionary journey. Over the last decade and a half, the National Assembly has operated under three different devolutionary settlements; the Government of Wales Act 1998, Schedule 5 of the Government of Wales Act 2006 and Schedule 7 of the Government of Wales Act 2006. This chapter sets out the significance of each of these developments. It looks at both primary and secondary sources in order to get an understanding of how these constitutional changes impacted upon social housing regulation in Wales and England, and examines whether they promoted or restricted divergence.

A study of modern day devolution in Wales, might be expected to start with the opening of the National Assembly in 1999, but this chapter begins its examination in 1996. In 1996, the UK Government enacted the Housing Act 1996. Even though regulation had been undertaken separately in Wales and England since the enactment of the Housing Act 1988,<sup>2</sup> the Housing Act 1996 updated the statutory basis for regulation in both nations. The Act operated as the statutory basis for regulation on both sides of the border until 2008, when the Westminster Government enacted a further piece of housing legislation, the Housing and Regeneration Act 2008. The Housing and Regeneration Act 2008 became the new statutory basis for regulation in England only, with the Housing Act 1996 continuing as the statutory basis for regulation in Wales. Both the Housing Act 1996 and the Housing and Regeneration Act 2008 have been amended further in recent years, by legislation such as the Housing (Wales) Measure 2011, the Localism Act 2011 and the Housing and Planning Act 2016. Despite this, the Housing Act 1996 and the Housing and Regeneration Act 2008 both continue to provide the statutory basis for social housing regulation in Wales and England respectively. This chapter therefore charts the extent of the differences that developed between regulation in Wales and England during the early years of the Assembly, and explores the factors that contributed to the process. In doing so, this chapter provides a link between the historic and contemporary aspects of this thesis.

The chapter examines these developments in three sections. The first section charts the development of devolution more generally over the period between 1996 and 2011, drawing

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<sup>1</sup> Richard Wyn Jones and Roger Scully, *Wales Says Yes, Devolution and the 2011 Welsh Referendum*, (University of Wales Press 2012) 18

<sup>2</sup>Tai Cymru in Wales and the Housing Corporation in England.

on both primary and secondary materials to note how these developments may have constrained or enhanced divergence. The second section examines how legislative divergence developed over this time, noting the effect of differing policy objectives across Offa's Dyke and potential external factors. Finally, the chapter examines the differences that developed between the regulatory frameworks in Wales and England. In adopting this approach this chapter is setting the scene for a more detailed analysis of the dissimilarities that have developed between Wales and England, and of the factors that have contributed to divergence process. This chapter also demonstrates how divergence can develop as a result of the actions of both the UK and Welsh Governments, a theme that becomes increasingly important throughout the remainder of the thesis.

## 5.1 From the referendum to the present day

### 5.1.1 The establishment of the National Assembly

Between 1999 and 2007 the powers of the National Assembly were set out in the Government of Wales Act 1998. This period is often referred to as the era of executive devolution, as the Act, in effect, transferred the Secretary of State for Wales's powers to the National Assembly.<sup>3</sup> This period has been discussed by a number of leading academics on Welsh devolution, including Richard Rawlings, in his book, *Delineating Wales*.<sup>4</sup> Rawlings notes that the Assembly had powers over policy, a number of significant administrative functions and secondary legislation, but crucially, no primary legislative powers.<sup>5</sup> The devolution settlement therefore limited the ability of the Welsh Government to enact divergent housing legislation. This may go some way towards explaining the limited extent of divergence in social housing regulation over this period.

Given the extensive administrative devolution that had taken place within the housing sector before 1999,<sup>6</sup> it is not surprising that powers over housing were devolved to the National Assembly. As discussed in Chapter 4, social housing regulation had been undertaken by different bodies in Wales and England for a decade by this time, Tai Cymru in Wales and the Housing Corporation in England. The rise of quangos in Wales, including Tai Cymru as well as such organisations as the Welsh Development Agency has been cited as a driver towards

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<sup>3</sup> Richard Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (first published 2003, reprinted 2007, University of Wales Press Cardiff 2003) 5

<sup>4</sup> Ibid Described by Alan Trench as '*best book about Welsh devolution*' Alan Trench, 'Books and Information Sources' (*Devolution Matters*) <<https://devolutionmatters.wordpress.com/devolution-the-basics/information-sources/>> accessed 1 April 2016

<sup>5</sup> Rawlings (n3) 5

<sup>6</sup> As discussed in Chapters 3 and 4.

the formation of the Assembly.<sup>7</sup> On the one hand they contributed towards the development of a Welsh identity and led to greater differences between administration in Wales and England.<sup>8</sup> On the other, there was a perception that these quangos lacked accountability and operated in an unfair manner.<sup>9</sup> This led to calls for the greater democratisation of devolution. In this context, it is not surprising that many quangos, including Tai Cymru, were disbanded upon the establishment of the National Assembly.

The Government of Wales Act 1998 abolished Tai Cymru.<sup>10</sup> Interestingly, Tai Cymru's powers were not directly transferred to the National Assembly. Tai Cymru's functions were initially transferred to the Secretary of State for Wales.<sup>11</sup> These functions were then transferred from the Secretary of State, to the National Assembly under the National Assembly for Wales (Transfer of Functions) Order 1999.<sup>12</sup> Tai Cymru was, therefore, not disbanded by the National Assembly, but was in fact disbanded by the UK Government before the Assembly had even been established. One of the key developments of the early years of Welsh devolution in the social housing context was not a result of a newly established Assembly finding its feet, but was in fact a continuation of a process that had been ongoing for decades previously with Westminster, through the Secretary of State for Wales, making decisions on how Wales was run.

This finding seems to lend support to the views noted by Rawlings and others about limited nature of devolution in Wales at this time.<sup>13</sup> It should also be emphasized that, despite its limits, the establishment of the National Assembly did create the possibility that greater differences could develop between social housing regulation in Wales and England. A Secretary of State for Wales was unlikely to use his or her powers to introduce secondary legislation, or issue guidance to Tai Cymru that differed considerably from the overall objectives of the Westminster Government. Indeed, as discussed in Chapters 3 and 4, when powers had been devolved to Wales prior to 1999, concentrated attempts had been made to minimise the possibility of policy differences emerging. The purpose of administrative devolution was to allow the relevant devolved body to administer Westminster policy in a distinct manner in Wales, not to pursue its own policy agenda. The move towards executive

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<sup>7</sup> Including Richard Rawlings, Kevin Morgan and Geoff Mungham. Rawlings (n3) 30; and Kevin Morgan and Geoff Mungham, *Redesigning Democracy, The Making of the Welsh Assembly* (Poetry Wales Press Ltd, 2000) 45

<sup>8</sup> Rawlings (n3) 31

<sup>9</sup> In their book, Morgan and Mungham title a chapter Quangoland: The Unelected State. Morgan and Mungham (n7) 45

<sup>10</sup> Government of Wales Act 1998, s 140, s 141, s 142 and s 143

<sup>11</sup> *ibid*

<sup>12</sup> The National Assembly for Wales (Transfer of Functions) Order 1999 No. 672 Schedule 1

<sup>13</sup> Rawlings (n3)

devolution was to signal a change in approach.<sup>14</sup> The National Assembly was free to pursue a distinctive policy approach to housing, within certain constraints.<sup>15</sup> A democratically elected Assembly would also not be tied by the same political bonds as the Secretary of State for Wales. This analysis seems to be supported by events that took place over the eight years that the National Assembly operated under this model of devolution. For example, the National Assembly implemented a new inspection regime and set out new regulatory requirements for housing associations in 2006.<sup>16</sup> The fact that powers over primary legislation were not devolved did mean that if the National Assembly wanted to pursue a radically different approach to social housing regulation, its ability to do so remained limited.

These developments provide further emphasis for two of the thesis's main themes. First, they demonstrate how divergence can develop at a number of different levels. In 2006, there was very limited divergence in primary legislation between Wales and England. On a regulatory level, however, there were separate inspections regimes. Secondly, these developments provide further evidence that politics is a factor that can lead to the development of divergence. The impact of politics on divergence extends beyond party politics. During this period, the Labour Party were in power in both Cardiff Bay and Westminster, yet despite this, distinctive Welsh approaches were beginning to emerge. This is discussed in greater depth in sub-section 7.1.

Even with the gradual emergence of distinctive Welsh policy approaches, the limitations of the Government of Wales Act 1998 were quickly recognised. Rawlings notes that as early as 2000, the Labour Party had promised their coalition partners at the National Assembly, the Liberal Democrats, an Independent Commission on the Powers and Electoral Arrangements of the Assembly.<sup>17</sup> By 2002 the Richard Commission had been established and by 2004 its report was published.<sup>18</sup> The Commission proposed numerous changes to the devolution settlement. Amongst these were the transfer of primary law-making powers to the Assembly and changes to the electoral system.<sup>19</sup> The Commission's Report, and the Labour Party's reaction to it in particular, had a major impact on the development of Welsh devolution.

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<sup>14</sup> As set out in; Welsh Office, *A Voice for Wales; The Governments Proposals for a Welsh Assembly*, (White Paper, Cm 3718, 1997) p5. The Assembly was to be established to provide the people of Wales with an opportunity to choose their own policy priorities.

<sup>15</sup> As noted, the Assembly was not able to enact its own primary legislation, limiting the extent by which divergence could develop.

<sup>16</sup> Affordable Housing Task and Finish Group, *Report to the Deputy Minister for Housing* (June 2008) 34

<sup>17</sup> Rawlings (n3) 503

<sup>18</sup> *ibid*

<sup>19</sup> Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, *Report of the Richard Commission* (Spring 2004) 253

### 5.1.2 The LCO years

The Labour Party did not wholeheartedly welcome the Richard Commission report.<sup>20</sup> In a White Paper published in August 2004, the party issued a response to the Commission's suggestions. Of particular interest to the thesis is the Labour Party's response to the proposal that primary law making powers should be devolved. The party's response highlights, once more how political expediency rather than a process of thinking drove the development of Wales's devolution settlement.

The White Paper sets out that if a Labour Government was re-elected for a third term they would bring forward another White Paper discussing the options for '*further enhancement of the powers of the Assembly*'.<sup>21</sup> Following these discussions they would then lay a Bill before Parliament to enact these changes.<sup>22</sup> The 2004 White Paper set out two options for enhancing the power of the Assembly. The first option was to give the Assembly '*enhanced Order-making powers*'.<sup>23</sup> Under this system the UK Government would give the National Assembly '*maximum discretion*' to make secondary legislation,<sup>24</sup> but the Parliament at Westminster would continue to be the only body capable of making '*Wales only*' primary legislation.<sup>25</sup> The second option was the devolution of primary law making powers to the National Assembly in those areas that were already devolved.<sup>26</sup> Housing would be one such area.

On 5 May 2005, the Labour Party won their third term in office. A few months later they published the promised White Paper, *Better Governance for Wales*. Given their not entirely enthusiastic support for further devolution a few months earlier, the content of the White Paper has been described as '*radical*', '*far-reaching*' and a '*major surprise*'.<sup>27</sup> The White Paper set out proposals for devolution of primary legislative powers to the National Assembly.<sup>28</sup> These would initially be transferred on an issue-by-issue basis through an Order in Council.<sup>29</sup> In the long term, it was envisaged that the National Assembly would be granted full legislative powers in those areas that were already devolved, following a post legislative referendum.<sup>30</sup> Some analysts have argued that this compromise was a victory for the pro-

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<sup>20</sup> Jones and Scully (n1) 46

<sup>21</sup> Labour Party, *Better Governance for Wales*, (A Welsh Labour Party Policy Document, August 2004) 8

<sup>22</sup> *ibid*

<sup>23</sup> *ibid*

<sup>24</sup> *ibid* 7

<sup>25</sup> *ibid* 8

<sup>26</sup> *ibid*

<sup>27</sup> Jones and Scully (n1) 45

<sup>28</sup> Wales Office, *Better Governance for Wales* (White Paper, Cm 6582, 2005) 8

<sup>29</sup> *ibid* 9

<sup>30</sup> *ibid*

devolution wing of the Labour Party.<sup>31</sup> This seems a strong argument given the negative reaction to the Richard Commission within certain parts of the Party in 2004.<sup>32</sup> This victory came at a price. When the White Paper's proposals were put into law by the Government of Wales Act 2006 (GOWA 2006) it soon became apparent that the legislative process that was adopted was extremely cumbersome, time consuming and complicated.

The system of legislating introduced by GOWA 2006 became known as the Legislative Competence Order (LCO) system, and was set out in Part 3 and Schedule 5 of the Act. Part 3 gave the National Assembly the power to enact primary legislation, known as Assembly Measures.<sup>33</sup> In order for the Assembly to be able to make a Measure it had to be within its legislative competence.<sup>34</sup> What was within or outside the Assembly's competence was set out in Schedule 5 of the Act.<sup>35</sup> Upon GOWA's enactment the Assembly's competence did not extend beyond a few limited functions (known as matters) relating to the Assembly's day-to-day running.<sup>36</sup> Schedule 5 contained 20 fields under which primary legislative functions could be transferred to the National Assembly.<sup>37</sup> These fields included areas such as education, health and housing.<sup>38</sup> Matters could be added to Schedule 5 either by an Act of the Westminster Parliament or as a result of an Order in Council that had been approved by the National Assembly and both Houses of Parliament.<sup>39</sup>

3 May 2007 saw the people of Wales go to the polls for the third time to elect members for the National Assembly. Those elected would be the first Assembly Members (AMs) to be tasked with operating the LCO system. It was in Westminster and not Cardiff Bay that the failures of system became apparent, in particular, the approach adopted by the UK Parliament when considering whether an LCO should be approved or not. In an article for *Parliamentary Affairs*, Sue Griffiths and Paul Evans argue that when deciding on whether to approve a prospective LCO or not, Westminster's main focus was on policy concerns not procedural matters.<sup>40</sup> They argue that:

In negotiation, individual Whitehall departments required certain policy areas to be exempt from the Assembly's competence, not on the grounds of constitutional

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<sup>31</sup> Jones and Scully (n1) 49

<sup>32</sup> *ibid* 46

<sup>33</sup> Government of Wales Act 2006, s 93

<sup>34</sup> *ibid* 94

<sup>35</sup> *ibid*

<sup>36</sup> *ibid* Schedule 5 as enacted

<sup>37</sup> *ibid*

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*, s 95

<sup>40</sup> Sue Griffiths and Paul Evans, 'Constitution by Committee? Legislative Competence Orders under the Government of Wales Act (2007-2011)' (2013) *Parl.Aff.* 491



principle, but because the Government wished to forestall any moves in Wales to adopt divergent policies.<sup>41</sup>

This approach was to severely handicap the LCO system and limit the National Assembly's legislative powers. The LCOs granted tended to transfer very specific matters to Schedule 5, ensuring that the Assembly's legislative competence remained restricted. Examination of LCOs granted at the time can illustrate these restrictions. For example, one LCO granted the Assembly the power to legislate over the red meat industry but not the white meat industry.<sup>42</sup> The policy driven approach to scrutiny also meant that some LCOs took a long time to transfer Matters to the National Assembly, with one LCO taking over two years.<sup>43</sup> This restricted approach to devolution was not what many pro-devolutionists had expected when GOWA 2006 had been enacted.<sup>44</sup> It would appear that some civil servants and MPs at Westminster did not appreciate how the establishment of the National Assembly had changed the nature of Welsh devolution. The National Assembly was not a Westminster outpost in Wales, established to administer common UK policies in the Welsh context, but a separate institution that could pursue distinctive Welsh policies, if it so wished. Once more, political factors seemed to be affecting the development of devolution in Wales as opposed to long term constitutional thinking.

The system's limitations were to have a real impact on the development of divergence between Welsh and English housing legislation. In 2008 the National Assembly proposed an LCO, the National Assembly for Wales (Legislative Competence) (No.5) Order 2008 (Affordable Housing).<sup>45</sup> The LCO was to give the Assembly the legislative competence to enact primary legislation that would permit the Welsh Ministers to suspend the right to buy in particular local authorities.<sup>46</sup> Griffiths and Evans highlight how the Welsh Affairs Committee at Westminster had significant reservations about the LCO.<sup>47</sup> They note that the transfer of the powers set out in the LCO would, in effect, allow for the abolition of the right to buy in Wales.<sup>48</sup> The Committee argued that the abolition of the right to buy was not the Welsh Government's policy objective and, as such, it was not appropriate for the LCO to be approved as it stood at the time. The Committee proposed that the LCO should be amended

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<sup>41</sup> *ibid*

<sup>42</sup> National Assembly for Wales (Legislative Competence) (Agriculture and Rural Development) Order 2009/1758

<sup>43</sup> National Assembly for Wales (Legislative Competence) (Environment) Order 2010/248. Griffiths and Evans (n39) 491

<sup>44</sup> Jones and Scully (n1) 82 and 83

<sup>45</sup> National Assembly for Wales (Legislative Competence) (No.5) Order 2008 (Affordable Housing)

<sup>46</sup> *ibid*

<sup>47</sup> Griffiths and Evans (n40) 496

<sup>48</sup> *ibid*

so that the Secretary of State would also have to give his or her consent before the suspension of the right to buy could be approved in a particular local authority.<sup>49</sup>

This was to prove to be a contentious suggestion, so much so that Griffiths and Evans argue that it was the treatment of this LCO that brought the issues with the system more broadly to a head.<sup>50</sup> They note how the Joint Committee on Statutory Instruments strongly criticised the Welsh Affairs' Committee's suggestions.<sup>51</sup> The Joint Committee set out that the National Assembly's competence should be defined by law, not by the Secretary of State's decision.<sup>52</sup> As such, the progress of the LCO was stalled for a further year.

It was not just the Joint Affairs Committee that criticised the Welsh Affairs Committee's treatment of the housing LCO. Evans and Griffiths note how the Welsh Affairs Committee's decision had drawn criticism from a broad range of sources, including the Assembly's Presiding Officer and the Welsh press.<sup>53</sup> They argue in their article that this decision signalled a shift in approach at Westminster with more focus being given to process when subsequent LCOs were scrutinised at Committee Stage.<sup>54</sup> It was not just Westminster that was changing. Frustrated with the devolution settlement, the Labour, Plaid Cymru coalition Government in Cardiff Bay had set about establishing the All Wales Convention in order to ascertain whether there was sufficient support in Wales to vote in favour of the devolution of full legislative powers to the National Assembly, should a referendum be held.<sup>55</sup> The Commission reported back to the Government in 2009, publishing a report suggesting that a yes vote would be attainable.<sup>56</sup> The referendum was held on 3 March 2011, with 'yes' receiving 63.5% of the vote.<sup>57</sup> This was to signal the end for the LCO system.

Whilst the limitations of the LCO system reduced the rate at which regulation in Wales diverged from regulation in England, it did not halt the process completely. At Westminster, the UK Government enacted the Housing and Regeneration Act 2008. The Act updated the statutory basis for regulation in England, increasing divergence between Wales and England. In 2011, the UK Government enacted a further piece of legislation, the Localism Act 2011, which made further amendments to the statutory basis for regulation in England, demonstrating how divergence can develop as a result of the actions of both the UK and Welsh Governments. It was not just at Westminster that primary legislation was being

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<sup>49</sup> Ibid 496 and 497

<sup>50</sup> Ibid 497

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Griffiths and Evans (n40) 497

<sup>54</sup> Ibid

<sup>55</sup> The All Wales Convention, *Report* (2009) 9

<sup>56</sup> Ibid

<sup>57</sup> Jones and Scully (n1) 110

introduced that amended the existing statutory basis for social housing regulation. By 2010, the 2008 LCO had been superseded. The National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010 gave the National Assembly the power to make primary legislation relating to social housing providers, disposals of social housing and homelessness.<sup>58</sup> The significance of this Order for the housing sector was immediately acknowledged. Writing for the *Journal of Housing Law* in 2010, Simon Hoffman notes how there was: *'a possibility that housing law in Wales will differ substantially from England.'*<sup>59</sup>

In 2011, the National Assembly was to use these new powers to enact the Housing (Wales) Measure 2011. The Measure contained provisions that gave the Welsh Ministers the power to suspend the right to buy within individual local authorities.<sup>60</sup> It also contained provisions that amended Part 1 of the Housing Act 1996, the statutory basis for social housing regulation in Wales.<sup>61</sup> The establishment of the National Assembly, and the devolution of legislative powers to it in particular, increased the possibility of different policy being pursued in Wales and England. The fact that there was now a greater space within which policy divergence could develop did not mean that both Governments were bound to adopt differing policy approaches. As will be demonstrated in section 5.2, whilst different legislative and policy approaches may have been adopted in Wales and England since the establishment of the National Assembly, there have also been examples of both nations implementing similar approaches. Divergence is therefore not a linear process.

### 5.1.3 The present day

A mere two months on from the referendum the people of Wales returned to the ballot box to vote in the National Assembly election. Following the election, the result of the referendum was put into effect. The legislative competence of the National Assembly was now set out in Part 4 and Schedule 7 of the GOWA 2006, provisions that remain in force to this day.<sup>62</sup> Under these provisions the National Assembly can introduce primary legislation that relates to one of the 21 fields listed in Schedule 7, subject to certain exceptions.<sup>63</sup> Given that the fields set out in Schedule 7 have already been filled, it is no longer necessary for the

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<sup>58</sup> The National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010

<sup>59</sup> Simon Hoffman, 'Legislative competence in housing for Wales: and assessment of likely impacts' [2010] J.H.L. 41

<sup>60</sup> Housing (Wales) Measure 2011, Part 1

<sup>61</sup> *Ibid* Part 2

<sup>62</sup> Government of Wales Act 2006 Pat 4 and Schedule 7. This is set to change in the near future following the enactment of the Wales Act 2017. The Wales Act 2017 will change the model of devolution in place in Wales from the conferred to the reserved powers model.

<sup>63</sup> *ibid*. At the time of the Act's enactment there were only 20 fields within Schedule 7. The Wales Act 2014 introduced taxation as a further field.

Assembly to submit an LCO to Westminster in order to seek permission to introduce primary legislation.

Wales's devolution settlement is set for further change in the near future. The conferred powers model of devolution, in place in Wales, has been heavily criticised for lacking clarity. On three occasions the Supreme Court has been asked to decide whether legislation enacted by the National Assembly is within its legislative competence, under Schedule 7 of GOWA 2006.<sup>64</sup> The UK Government has therefore recently enacted legislation that will change the model of devolution in place in Wales to the reserved powers model.<sup>65</sup> Under this model, the Assembly will be permitted to enact primary legislation on any subject that is not expressly reserved to Westminster.<sup>66</sup> Whilst the advantages of the reserved powers model of devolution have been well documented,<sup>67</sup> there has been some concern that the provisions contained within the Wales Act 2017 will see the Assembly lose powers.<sup>68</sup> Despite these concerns the Wales Act 2017 has made it onto the statute book, with the reserved powers model of devolution set to be put in place in the near future.<sup>69</sup> Whilst not expressly discussing the significance of this constitutional change, the thesis will, in the remaining chapters, highlight the potential impact of policy and legislative variation on future discussion regarding Wales's devolution settlement.

## 5.2 Legislative divergence

### 5.2.1 A unified statutory basis for regulation

The Housing Act 1996 was the latest in a long line of housing acts enacted since the 1960s. Chapter 4 explored how each new enactment saw the statutory basis for regulation evolve, focusing in particular on the Housing Act 1988. The Housing Act 1988 established Tai Cymru as separate social housing regulator in Wales.<sup>70</sup> In 1996 the decision was taken to

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<sup>64</sup> *Local Government Byelaws (Wales) Bill 2012 – reference by the Attorney General for England and Wales* [2012] UKSC 53; [2013] 1 AC 792; *Agricultural Sector (Wales) Bill - Reference by the Attorney General for England and Wales* [2014] UKSC 43; *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill - Reference by the Counsel General for Wales* [2015] UKSC 3

<sup>65</sup> Wales Act 2017

<sup>66</sup> See Scotland Act 1998, Schedule 5; and Northern Ireland Act 1998, Schedule 3.

<sup>67</sup> Wales Governance Centre and the Constitution Unit, *Delivering a Reserved Powers Model of Devolution for Wales*, (Wales Governance Centre at Cardiff University, September 2015)

<sup>68</sup> The Wales Act 2017 has been criticised by both academics and politicians in Wales; Wales Governance Centre and the Constitution Unit, *Challenge and Opportunity: The Draft Wales Bill 2015*, (Wales Governance Centre at Cardiff University, February 2016); Wales Politics 'Carwyn Jones 'not yet ready to back Wales Bill'' (BBC News, 28 October 2016) < <http://www.bbc.co.uk/news/uk-wales-politics-37789638> > accessed 14 November 2016; National Assembly Constitutional and Legislative Affairs Committee, *Report on the UK Government's Wales Bill*, (National Assembly for Wales, October 2016)

<sup>69</sup> Wales Act 2017, s 3

<sup>70</sup> Housing Act 1988, s 46

further update the statutory basis for regulation in Wales and England.<sup>71</sup> As with the Housing Act 1988 the statutory powers of Tai Cymru and the Housing Corporation were extremely similar under the Housing Act 1996, ensuring that the ability of both regulators to adopt differing approaches to regulation was kept to a minimum. As discussed in 5.1, with the establishment of the National Assembly in 1999 and the subsequent growth in its powers, there is now a greater possibility of divergence developing.

As discussed in section 5.1.1, the Government of Wales Act 1998 disbanded Tai Cymru as the regulator of housing associations in Wales. The constitutional significance of this development has been discussed above, but the decision was also to have an impact on the development of divergence in social housing regulation between Wales and England. During the process of transferring regulatory powers from Tai Cymru to the Secretary of State for Wales, and then from the Secretary of State to the National Assembly, amendments were made to the Housing Act 1996. These amendments were not substantial and were mainly linguistic in nature.<sup>72</sup> Nevertheless one significant dissimilarity did develop between the nations. Regulation was now being undertaken directly by the state in Wales, whereas in England, regulation was still being carried out at arm's length by the Housing Corporation. To this day, the Welsh Government remains the regulator of social housing in Wales, whilst in England, the regulator has been changed on two occasions.<sup>73</sup> This chapter will explore the development of this difference and will consider its significance.

### 5.2.2 The Housing and Regeneration Act 2008 – the start of real divergence?

As discussed in section 5.1.2, the LCO system constrained the ability of the Welsh Government to develop and implement its own legislative programme. Not limited by such difficulties the UK Government carried on with business as usual. In 2008, the UK Labour Government enacted the Housing and Regeneration Act 2008. Part 2 of the Act updated the statutory basis for regulation in England.<sup>74</sup> Importantly, these provisions did not apply in Wales. Part 1 of the Housing Act 1996 remained the statutory basis for regulation in Wales.<sup>75</sup> For the first time, the statutory basis for regulation in Wales and England was to be found in different statutes.

The process that led to the development of this difference began a few years earlier. June 2007 saw the publication of the Cave Report. The Report was the conclusion of a Review

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<sup>71</sup> Housing Act 1996

<sup>72</sup> With 'relevant authority' replacing 'Corporation' when referring to the regulator of Registered Social Landlords. Housing Act 1996, s 1 – as enacted and as amended by the Government of Wales Act 1998

<sup>73</sup> By the Housing and Regeneration Act 2008; and the Localism Act 2011

<sup>74</sup> Housing and Regeneration Act 2008, Part 2

<sup>75</sup> Housing and Regeneration Act 2008, s 61

undertaken by Professor Martin Cave into social housing regulation in England.<sup>76</sup> Whilst the content of the Cave Review's Report, and the UK Government's reaction to it has been criticised by some,<sup>77</sup> others have described the legislation enacted based upon its recommendations as the greatest shake up to the way that social housing regulation was undertaken in England for thirty years.<sup>78</sup> Whilst there is some debate as to whether the Cave Review and the Housing and Regeneration Act 2008 considerably changed the way that social housing regulation was undertaken in England, this thesis will demonstrate that the significance of the enactment of the Housing and Regeneration Act 2008 for the development of divergence between Wales and England is beyond question.

One difference that developed between social housing regulation in Wales and England in the wake of the Cave Review can be found when examining the bodies subjected to regulation. Under the Housing Act 1996, the powers of Tai Cymru and the Housing Corporation only extended to housing associations. The Cave Review examined the role that regulation could play over the broader social housing sector in England including both local authority housing and housing associations homes. It recommended that there was a need to rationalise the approach to regulation.<sup>79</sup> The Housing and Regeneration Act 2008 therefore set out one regulatory regime for the entire sector.<sup>80</sup> The Act still recognised that there were differences between the way that social housing regulation could be most efficiently undertaken with regard to housing associations and local authority housing, but these difference would now be recognised within a united system.<sup>81</sup> In Wales, no such changes have been introduced and whilst the Welsh Government is the regulator of both types of bodies, this regulation is carried out separately.<sup>82</sup> Whilst this is a very clear and important divergence, the primary focus of this thesis will be on the regulation of housing associations.

With this in mind, a number of the Cave Report's recommendations are of particular interest. The Report highlights numerous shortcomings within the regulatory regime that was in place at the time. Amongst these were; that regulation was inadequate in the way it dealt with tenant concerns, that there was insufficient separation between policy and regulation, and

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<sup>76</sup> The Cave Review of Social Housing Regulation, *Every Tenant Matters: A Review of Social Housing Regulation* (June 2007)

<sup>77</sup> Dave Cowan 'A review of reviews' 11(3) [2008] J.H.L. 51. Cowan stated that the approach taken by the Westminster Government to the Review's Report had produced '*an enormous amount of hot air and navel-gazing.*'

<sup>78</sup> Alan Murie, *Moving Homes, The Housing Corporation 1964-2008* (Politico's Publishing 2008) 264

<sup>79</sup> Cave Review (n76)

<sup>80</sup> Housing and Regeneration Act 2008

<sup>81</sup> *ibid* for example sections, 112, 113 and 114

<sup>82</sup> Housing Act 1996; the Housing and Regeneration Act 2008, s 61 restricts the RSL system to Wales

that certain providers were being over-regulated.<sup>83</sup> The Report made many recommendations on how social housing regulation could be improved. Amongst these were the establishment of a regulator that was, by law, independent from the Government, and the development of a more co-regulatory approach to regulation.<sup>84</sup>

Following the publication of the Cave Review the UK Government set about enacting the Housing and Regeneration Act 2008. The Act was to change the way in which regulation was undertaken in England. The Housing Corporation, after being in existence for more than forty years was disbanded.<sup>85</sup> In its place, two new bodies were established; the Homes and Communities Agency (HCA) and the Tenants Services Authority (TSA), the operating name of the Office for Tenants and Social Landlords.<sup>86</sup> The HCA was established with four objects in mind: (1) improving the supply and quality of housing, (2) regenerating or developing land or infrastructure, (3) supporting the creation, regeneration or development of communities and (4) to contribute to sustainable development and good design.<sup>87</sup> Meanwhile, the TSA was established to regulate social housing.<sup>88</sup> This meant that the funding and the regulation of housing associations were carried out by two different bodies, a shift from the position in Wales where not only was regulation being undertaken by one body, but that body was the Welsh Government.<sup>89</sup>

The significance of this difference might not be as great as it first appears. In October 2015 the Office for National Statistics (ONS) reclassified private registered providers of social housing in England as part of the public sector.<sup>90</sup> The reason given by the ONS for their decision was the degree of public sector control exercised by the UK Government over registered providers of social housing.<sup>91</sup> The ONS's reclassification originally applied from 22 July 2008, the date of enforcement of the Housing and Regeneration Act 2008.<sup>92</sup> This would suggest that, despite the attempts of the Westminster Government to set up an arm's length

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<sup>83</sup> The Cave Review (n76) 24

<sup>84</sup> *ibid*

<sup>85</sup> Housing and Regeneration Act 2008, s 64

<sup>86</sup> *ibid*, s 1, s 81

<sup>87</sup> *ibid*, s 2

<sup>88</sup> *ibid*, s 86

<sup>89</sup> Whilst the Welsh Government was responsible for regulation in Wales, it had entered into an agreement with the Wales Audit Office. The Wales Audit Office had been contracted to inspect Welsh RSLs. Their findings would then support the work of Welsh Government's Housing Directorate. Essex (n16) 34

<sup>90</sup> Office for National Statistics, *Classification announcement: 'Private registered providers' of social housing in England*, (30 October 2015)

<sup>91</sup> *ibid* 2

<sup>92</sup> *ibid* 1. This was subsequently changed to 24 July 1996 - Luke Cross 'Housing associations in Scotland, Wales and Northern Ireland reclassified to public sector' (*Social Housing*, 29 September 2016)

<http://www.socialhousing.co.uk/news/housing-associations-in-scotland-wales-and-northern-ireland-reclassified-to-public-sector/7017005.article#> accessed 1 March 2017

regulator of social housing in England, this was not achieved and that in reality, the Government still exercised very real controls over the sector. It would therefore appear that the regulators in Wales and England still had a great deal in common, even after the enactment of the Housing and Regeneration Act 2008. The ONS's decision and its implications will be discussed in greater depth in Chapters 6 and 7.

The Housing and Regeneration Act 2008 introduced further changes to the way that regulation was undertaken in England. Under the Act, profit-making bodies would, for the first time, be permitted to register with the regulator as providers of social housing in England.<sup>93</sup> In Wales, all RSLs still had to be non-profit bodies.<sup>94</sup> The Act also created, two categories of regulatory standards in England. The regulator would be permitted to set standards concerning the provision of social housing, and standards that concerned the management of social housing.<sup>95</sup> In Wales, no such division had taken place.<sup>96</sup> These changes, and others, led to the development of divergence between Wales and England, but within three years, the extent of these differences was to change again with further legislation enacted in Wales and England.

### 5.2.3 Divergence and convergence - legislation from both sides

The Housing and Regeneration Act 2008 saw the development of differences between social housing regulation in Wales and England. In 2011, the statutory basis for regulation in Wales and England underwent further change. This time, change was driven by the enactment of legislation at both the Westminster Parliament and the National Assembly for Wales. The effect that the enactment of this new legislation had on the development of divergence in social housing regulation between Wales and England is more complicated to assess than the impact of the Housing and Regeneration Act 2008.

Following the election of the Coalition Government at Westminster in 2010, the Department of Communities and Local Government (DCLG) decided to undertake a review of the way that social housing regulation was undertaken in England. In October 2010, the DCLG published its report. The introduction to the Report sets out that the review was to take place in the context of certain published Government objectives.<sup>97</sup> The introduction names out seven such objectives, the first three of these were to sound the death knell for the TSA. These objectives were; reducing the number of quangos, reducing administration cost, and

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<sup>93</sup> Housing and Regeneration Act 2008 s 112

<sup>94</sup> Housing Act 1996, s 2

<sup>95</sup> Housing and Regeneration Act 2008, s 193, s 194

<sup>96</sup> Housing Act 1996, s 34

<sup>97</sup> Department for Communities and Local Government, *Review of Social Housing Regulation*, (October 2010) 3



ensuring value for money and cutting unnecessary regulation.<sup>98</sup> Interestingly '*supporting a supply of affordable housing*' and '*ensuring that social housing tenants are adequately protected and empowered*' were the last two objectives noted in the introduction.<sup>99</sup>

Given the Government's stated desire to reduce the number of quangos it is no surprise that DCLG recommended that the TSA should be disbanded.<sup>100</sup> What might be considered as surprising, is the fact the DCLG expressly cites this objective as its reason for making the recommendation to abolish the TSA.<sup>101</sup> In addition to recommending the abolition of the TSA, the DCLG Report recommended that the TSA regulatory functions should be transferred to HCA.<sup>102</sup> Such a recommendation might be expected to lead to a moment of convergence between regulation in Wales and England. There would no longer be any divide between the body that funded and regulated housing associations in England, making the position more similar to the position in Wales. Crucially, the DCLG's Report recommended that regulation in England should now be exercised by a regulatory committee that was legally separated from the remainder of the HCA.<sup>103</sup> By adopting this recommendation, the UK Government ensured that a degree of separation would continue between the regulator and the funder of social housing in England, a degree of separation not present in Wales. As discussed above, the decision of the ONS to reclassify registered providers of social housing in England does raise a question as to the significance of this separation in reality.

The recommendations of the HCA Report were taken forward by the UK Government and put into law through the enactment of the Localism Act 2011. The Localism Act 2011 did not replace the Housing and Regeneration Act 2008 as the statutory basis for regulation, rather it made significant amendments to it. Beyond the scrapping of the TSA, the most significant changes made by the Localism Act 2011 included the '*refocussing*' of consumer regulation.<sup>104</sup> This '*refocussing*' would see a two-tiered approach to regulation introduced in England. The Localism Act 2011 introduced sections 198A and 198B to the Housing and Regeneration Act 2008.<sup>105</sup> Under section 198B the regulator would be permitted to take action against a provider that had, or was at risk of breaching a standard set out under section 194 of the Housing and Regeneration Act 2008, a standard relating to an economic

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<sup>98</sup> *ibid*

<sup>99</sup> *ibid*

<sup>100</sup> *ibid* 2

<sup>101</sup> *ibid*

<sup>102</sup> *ibid*

<sup>103</sup> *ibid*

<sup>104</sup> *ibid*

<sup>105</sup> Housing and Regeneration Act 2008, s 198A, s 198B

matter.<sup>106</sup> Under section 198A, however, the regulator would only be permitted to take action against a provider that had, or may breach a standard set under section 193, standards concerning consumer matters, if this failure had or could cause a serious detriment to the provider's tenants.<sup>107</sup> It would appear that, following the enactment of the Localism Act 2011 that the regulator in England could enforce standards relating to economic matters, more rigorously, than it could enforce standards relating to consumer matters. No such distinction was in place in Wales under the Housing Act 1996. The significance of this will be discussed in greater depth in Chapter 6.<sup>108</sup>

Whilst legislation enacted at Westminster continued to push divergence between Wales and England, the National Assembly was about to enact a piece of legislation that would see the regimes in Wales and England converge to a certain extent. In October 2007, the Affordable Housing Task and Finish Group, was commissioned by the Deputy Minister for Housing to:

explore the barriers and opportunities presented by the Assembly Government's priority to deliver significantly more affordable homes in Wales by 2011.<sup>109</sup>

The Group reported back to the Deputy Minister in June 2008. The Group's report, better known as the Essex Report, after its author Sue Essex, examined both the statutory basis for regulation in Wales and the regulatory framework. The Report drew attention to the statutory changes introduced in England through the Housing and Regeneration Act 2008.<sup>110</sup> Interestingly Essex noted that the Welsh Government had:

given no indication as to how it might choose to respond to these changes beyond saying it is content with the 1996 Act.<sup>111</sup>

It went on to state:

This leaves unresolved how or whether the Welsh Assembly Government might take a stronger role around tenants' issues and what it might do to strengthen its intervention powers.<sup>112</sup>

The Welsh Government's response to the Essex Report came in the form of the Housing (Wales) Measure 2011. Much like the Localism Act 2011 amended the Housing and Regeneration Act 2008, the Housing (Wales) Measure 2011 did not replace the Housing Act

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<sup>106</sup> *ibid*, s 194, s 198B

<sup>107</sup> *ibid*, s 193, s 198A

<sup>108</sup> See 6.2.2

<sup>109</sup> Essex Review (n16) 1

<sup>110</sup> *ibid* 41

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

1996 as the statutory basis for regulation in Wales, but made many amendments to it. These amendments both simultaneously drove divergence and convergence. On the one hand the Measure brought the Welsh Ministers powers to intervene in failing associations much closer to those of the Secretary of State in England.<sup>113</sup> On the other hand, the Measure updated the regulator's ability to set performance standards,<sup>114</sup> powers that, as discussed, differed to those of the regulator in England.<sup>115</sup> This ensured that the two-tiered approach to regulation adopted in England was not put in place in Wales. The Measure also left a number of the provisions within the Housing Act 1996 unchanged. These included provisions relating to the requirement for all RSLs in Wales to be non-profit bodies, ensuring that some of the differences already in place between Wales and England continued.<sup>116</sup>

This examination of the legislation enacted in Wales and England between 2008 and 2011 highlights the complicated way in which divergence develops. It demonstrates how divergence and convergence can develop as a result of the actions of both the UK and Welsh Governments, and as a result of a number of factors working with and against each other. The contents of these three Acts, as well as other legislation that has been enacted in the period since 2011 will be explored in greater depth in Chapter 6 of this thesis. The chapter will build upon the work set out in this chapter to provide a snapshot of the differences that exist between Wales and England today. Chapters 7 and 8 will then move on to discuss some of the factors that have contributed to the divergence process in more depth.

### 5.3 Divergence between the regulatory frameworks

Whilst statutory differences between Wales and England concerning social housing regulation have primarily developed as a result of Westminster legislation, this is not the only level at which divergence develops. Divergence is a process that appears at a number of levels; primary legislation, secondary legislation and between the regulatory frameworks. This latter category has also undergone great deal of change over recent years, with changes being made to the regulatory frameworks in Wales and England. These must also be placed onto the already complicated map of divergence.

As discussed in 5.2.2, and 5.2.3, the way in which social housing regulation was undertaken in Wales and England was reviewed at the turn of the last decade. The Essex Review in Wales and the Cave and DCLG Reviews in England did not only review the statutory basis

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<sup>113</sup> Housing (Wales) Measure 2011, Chapter 4

<sup>114</sup> Housing (Wales) Measure 2011, s 35

<sup>115</sup> Housing and Regeneration Act 2008

<sup>116</sup> Housing Act 1996, s 2

for regulation in both nations, it also examined the regulatory frameworks that were in place, and the approaches taken to regulation. This section will provide a brief overview of the contents of the Reports and the changes that developed in light of them, so that they can be examined in more detail in subsequent chapters.

The Cave Review was to signal a shift in the way social housing regulation was undertaken in England. Many of the Review's major recommendations have been set out in 5.2.2. The impact of the Review extended beyond the enactment of the Housing and Regeneration Act 2008. Following the enactment of the Housing and Regeneration Act 2008, the Westminster Government set about introducing a new regulatory framework in England. This was put into force in 2010, and heralded the beginning of a new approach to regulation, 'co regulation' with the boards of social housing providers expected to play a much greater self-regulatory role.<sup>117</sup> In addition to moving towards a co-regulatory approach to regulation, the framework introduced several new standards that registered providers would have to comply with, in particular standards concerning service delivery and tenant involvement.<sup>118</sup>

Only one month after the framework was put into force, it became apparent that it was only destined to regulate the activities of the providers of social housing in England in the short term. With the election of the coalition Government, the DCLG was tasked with reviewing the way that social housing regulation was undertaken in England. Within two years, the Localism Act 2011 had been enacted, scrapping the TSA. A new regulatory framework was published in March 2012.<sup>119</sup> The Framework was to maintain the co-regulatory approach developed by the TSA but also reflected changes made to statutory basis for regulation. For the first time, consumer and economic standards were set out separately within the framework, with more emphasis being placed on the economic standards, an important change from the position two years previously.<sup>120</sup>

Whilst all these changes were introduced in England, the regulatory framework in Wales was also undergoing change. In response to the Essex Report, the One Wales Coalition Government set about developing a new regulatory framework in Wales. This followed closely on the heels of the enactment of the Housing (Wales) Measure 2011. The new regulatory framework in Wales was published in December 2011.<sup>121</sup> As when examining the

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<sup>117</sup> Tenants Services Authority, *The regulatory framework for social housing in England from April 2010*, (March 2010) 9

<sup>118</sup> *ibid* 5

<sup>119</sup> Homes and Communities Agency, *The Regulatory Framework for social housing in England from April 2012* (March 2012)

<sup>120</sup> *ibid*

<sup>121</sup> Welsh Government, *The Regulatory Framework for Housing Associations Registered in Wales* (2 December 2011)

development of divergence between legislation in both nations, measuring the extent of the differences that developed between the regulatory frameworks in place in Wales and England is a difficult task. The new Welsh regulatory framework adopted some measures that saw regulation in Wales and England converge, in particular the focus on co-regulation.<sup>122</sup> On the other hand the Welsh Government, did, at times, develop a distinctly Welsh approach to regulation within the Framework.

The Regulatory Framework in Wales set out the standards that RSLs in Wales had to comply with by using the outcomes based objectives model of regulation.<sup>123</sup> This meant that Welsh RSLs had to demonstrate that they had complied with a number of regulatory objectives in their day to day operation. For example, an RSL in Wales had to demonstrate that:

We provide an efficient and effective responsive repairs service which meets the requirements of our tenants.<sup>124</sup>

By contrast the English Framework required that

Registered providers shall:

provide a cost-effective repairs and maintenance service to homes and communal areas that responds to the needs of, and offers choices to, tenants, and has the objective of completing repairs and improvements right first time.<sup>125</sup>

This distinction continues to be in place today, though the Welsh Government is about to open consultation to review the way it publishes its regulatory standards.<sup>126</sup> The significance of this distinction in practice is questionable. All five housing associations interviewed in Wales as part of the research undertaken for this thesis stated that they viewed the outcomes based objectives approach, to some extent or another, as a tick boxing exercise.<sup>127</sup> Even if the impact of this variation is limited in practice, it remains of academic

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<sup>122</sup> *ibid*

<sup>123</sup> *ibid*, 18, Appendix 3

<sup>124</sup> *ibid* 21

<sup>125</sup> HCA (n119) 20

<sup>126</sup> Carol Kay and Sarah Laing Gibbens 'Regulatory Reform- Sharpening our approach to delivering regulation' (Community Housing Cymru, Creating the Narrative, Annual Conference 2016, Cardiff, December 2016); and Welsh Government, 'A revised and improved approach to delivery of housing regulation', (*Welsh Government*) < <http://gov.wales/docs/desh/publications/161215-regulatory-judgement-framework-en.pdf> > accessed 10 January 2017

<sup>127</sup> Interview with Chief Executive of Welsh RSL 1, (Cardiff, 19 January, 2015); Interview with Chief Executive of Welsh RSL 2, (West Wales, 25 March, 2015); Interview with Chief Executive of Welsh RSL 3, (Cardiff, 1 May, 2015); Interview with Chief Executive of Welsh RSL 4, (West Wales, 14 May, 2015); and Interview with Chief Executive of Welsh RSL 5, (South Wales, 21, October, 2015)

interest. Regulatory divergence up until 2011 had, on the whole, been driven by Westminster. In adopting the outcomes based objective approach to regulation the Welsh Government was attempting to develop a distinctive Welsh approach to regulation. A historically rare example of divergence been pushed from Cardiff Bay.

In 2013 regulation in Wales underwent a further change. This was not a change made to the regulatory framework but a change in approach by the Welsh Government to regulation.<sup>128</sup> The new approach further emphasised the importance of co-regulation and boosted the importance of risk based approach to regulation.<sup>129</sup> Further change was to come in England as well. As of 31 March 2015, regulation in England has operated under a new regulatory framework. The content of this framework will be examined in detail in the following chapters as the thesis examines present day divergence. In addition to exploring the variation that developed as a result of the changes that were made to the regulatory frameworks in Wales and England, the remaining chapters of this thesis will also consider the impact of new legislation enacted at Westminster, in the shape of the Housing and Planning Act 2016, and potential new legislation in Wales, on the development of regulation and divergence.

## 5.4 Conclusion

There is no doubting that there are now significant differences in place between the way that social housing regulation is undertaken in Wales and in England. This chapter has demonstrated that the process that has led us to our current position has taken decades. From the early days of the Welsh Board of Health, to the Welsh Office in 1965, to opening of the National Assembly in 1999, there have been many key steps along the journey. These chapters have demonstrated how the devolution settlement in Wales developed as a result of a series of ad hoc decisions, not through a processes of thinking. As shown in this chapter, however, it is in the last 10 years that the differences between the way that social housing regulation is undertaken in Wales and England has significantly increased. It is by keeping this history in mind, remembering what factors encouraged or constrained divergence, that divergence can develop at a number of levels, and that divergence can develop as a result of the actions of the UK and Welsh Governments, will we be able to best assess the extent by which regulation is likely to diverge or converge in future.

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<sup>128</sup> Welsh Government, *Improving the implementation of the Regulatory Framework: a risk based approach to regulation* (December 2013) As noted above, the Welsh Government have set out that they are reviewing the way that regulatory standards in Wales are set out, and have indicated that they may publish a new regulatory framework in Wales in early 2017. Kay and Gibbends (n126)

<sup>129</sup> *ibid*

## 6. Divergence Today: What's Different?

Having explored the divergence process in its historical context in the previous three chapters, the focus of the thesis now turns towards its development in the present day. Chapters 3 to 5 highlighted a number of themes that impact upon the divergence process in the social housing context. These themes include the fact that divergence can develop at a number of different levels, that divergence can develop as a result of the actions of both the Welsh and UK Governments, and that a number of factors contribute towards the development of divergence and convergence. These themes continue to feature prominently in this chapter, and the two chapters that follow it. This chapter sets out to provide a snapshot of the variations that exists between social housing regulation in Wales and England in the present day. Chapters 7 and 8 will then examine the factors that have contributed to the development of these differences, exploring their role in process of divergence.

In providing its snapshot of the differences that exists between social housing regulation in Wales and England today, this chapter will focus on three specific aspects of regulation. These are: (1) registration, (2) tenant protection, and (3) the regulatory controls cited by the Office for National Statistics (ONS) as their reason for reclassifying housing associations in Wales and England as part of the public sector. This chapter focuses on these three aspects of regulation so that it can examine the differences that have developed within them in detail, as opposed to providing a broad-brush analysis.<sup>1</sup> In so doing, the chapter examines what the extent of the differences that have developed in these three areas of regulation tells us about the impact of divergence in practice, the impact of divergence on housing and devolution policy, and for the development of future divergence.

### 6.1 Registration

The chapter's discussion on the differences that exist between Wales and England with regard to registration are set out in three parts. 6.1.1, considers why housing associations choose to register with the regulators. 6.1.2, sets out the differences that have developed with regards to who can register with the regulators in both nations. Whilst 6.1.3, considers the implications of a regulatory gap that has developed as a result of divergence.

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<sup>1</sup> More information on the reasons for this can be found in Chapter 1, sections 1.2 and 1.3

### 6.1.1 Why register?

Since the enactment of the Housing Act 1974 a register has been kept of housing associations operating in Wales and England.<sup>2</sup> Registration has changed significantly over the intervening four decades. Changes have been made as to who can register, and as to who maintains the register. The impact of such changes on divergence will be examined later in the chapter.

One aspect of registration that does not appear to have undergone such significant change is the incentives for housing associations to register with the regulator. This demonstrates that whilst divergence may develop with regard to certain aspects of social housing regulation, it has not diverged across the board. Registration was introduced by the Housing Act 1974; it limited access to public finance to registered associations only, giving them greater access to finance than an association which chose not to register.<sup>3</sup> Despite changes over the subsequent years to social housing development funding structures, registration is still required for any association seeking to gain full access to public money in Wales and England. In Wales, the Welsh Government awards its social housing grants to RSLs,<sup>4</sup> whilst in England only registered providers are eligible for funding under the Affordable Homes Programme.<sup>5</sup> In recent years the significance of gaining access to public money as a reason for registration seems to have decreased. One participant noted during interview that:

there was a time when grants we got from central government was a really big deal because it basically covered 100% of the costs of running the housing association.<sup>6</sup>

Over recent years the amount of public funding available has decreased on both sides of the border. One RSL in Wales revealed how social housing grants now only cover 30% of the costs of developing some of its schemes, following a deal that it had struck with Welsh Government.<sup>7</sup> As a consequence, the importance of private lending has increased markedly.

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<sup>2</sup> As discussed in 4.2.1

<sup>3</sup> *ibid*

<sup>4</sup> Welsh Government, 'Social Housing Grant' (8 April 2015) <http://gov.wales/topics/housing-and-regeneration/grants-and-funding/socialhousinggrant/?lang=en> accessed 14 June 2016

<sup>5</sup> Homes and Communities Agency, *Affordable Homes Programme 2015-18, Investment Partner Qualification Application Form Guidance*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/394964/AHP\\_2015-18\\_Investment\\_Partner\\_Qualification\\_Application\\_form\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394964/AHP_2015-18_Investment_Partner_Qualification_Application_form_guidance.pdf) accessed 14 June 2016

<sup>6</sup> Interview with Chief Executive of Welsh RSL 2, (West Wales, 25 March, 2015)

<sup>7</sup> Interview with Chief Executive of Welsh RSL 4, (West Wales, 14 May, 2015)



Despite the decline in public funding, regulation has continued to play an important role in determining access to finance for the sector. During interview, Kerry Mac Hale, the policy lead for the Regulation of the Social Housing sector in England at the Department for Communities and Local Government, revealed that lenders had informed the UK Government's Ministers that they wished to see a '*robust regulatory regime*' in place in England.<sup>8</sup> By being subject to such a regime, housing associations in Wales and England are viewed as a low risk investment opportunities for private lenders, meaning that they can receive preferential terms when entering into lending agreements.<sup>9</sup>

Furthermore, bodies such as the Housing Finance Corporation only make loans available to regulated housing associations in the UK.<sup>10</sup> It would seem that despite the fact that there is less public money available for housing associations in Wales and England, being regulated does provide housing associations with greater access to finance. Given that there are still incentives for housing associations to register with the regulators, the registration requirements of the Welsh Government and the HCA's Regulatory Committee remain important.

As discussed in Chapters 4 and 5, the regulators of RSLs in Wales and registered providers in England have changed several times over the past fifty years. The Welsh Government is the regulator of RSLs in Wales and is tasked with maintaining the register.<sup>11</sup> In England, the Homes and Communities Agency is the regulator of registered providers and maintains the register.<sup>12</sup> The register is maintained directly by the state in Wales and at arm's length in England - in itself, a difference between the nations. Reports have emerged within the housing press recently that suggest that the UK Government may establish a new regulatory body in England, separate from the HCA, so as to strengthen the division between the financing and regulation of housing associations.<sup>13</sup> As discussed in 5.2.2 the significance of this difference is questionable,

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<sup>8</sup> Interview with Kerry Mac Hale, Policy lead on social housing regulation, UK Government (Telephone interview, 17 May 2016)

<sup>9</sup> Andrew Haywood, 'Investing in Social Housing, A Guide to the Development of the Affordable Housing Sector' (*The Housing Finance Corporation*, 2 March 2013) <http://www.thfcorp.com/investing/investing-in-social-housing.pdf> accessed 14 June 2016

<sup>10</sup> This can be seen by logging onto the Housing Finance Corporation's website <http://www.thfcorp.com/> accessed 14 June 2016 and was also noted during interview with Chief Executive 4 (n14)

<sup>11</sup> Housing Act 1996, s 1

<sup>12</sup> Housing and Regeneration Act 2008, s 111

<sup>13</sup> Carl Brown 'New regulator likely following HCA review' (*Inside Housing*, 27 October 2016) < <http://www.insidehousing.co.uk/business/regulation/new-regulator-likely-following-hca-review/7017397.article?adfesuccess=1>> accessed 16 November 2016

even if a new separate regulatory body is established in England.<sup>14</sup> In addition to this proposed change, the HCA has recently opened consultation on another connected proposal that would see the way that regulation is undertaken in Wales and England diverge. The HCA is seeking the opinion of registered providers on proposals to introduce fees for social housing regulation.<sup>15</sup> Given that neither proposal had been put into effect at the date of submission for this thesis, their significance for the divergence process will not be considered. One aspect of regulation within which the approaches of both Governments have clearly parted, however, is who can register with the regulator. The impact of this variation is considered below.

### 6.1.2 Who can register?

In Wales, a 'Welsh body' is eligible for registration as a RSL if it is a registered charity that is a housing association, or if it is a registered society or company that complies with the conditions set out in section 2(2) of the Housing Act 1996.<sup>16</sup> The conditions set out in section 2(2) are that the body is principally concerned with Welsh housing, is non-profit and is established to provide, construct, improve or manage houses for letting, for occupation by members of the body or hostels.<sup>17</sup> In addition to this, any additional purposes or objects of the body must comply with a list set out in the Act.<sup>18</sup> These permitted additional purposes include constructing homes for shared ownership and, acquiring, repairing, improving, or converting a houses or other property, so that it can be disposed of on sale, lease or on shared ownership terms.<sup>19</sup>

By contrast, the requirements for registration in England appear simpler. An English body must satisfy only two conditions in order to be permitted to register. First, it must either be a provider of social housing in England or a body that intends to become a provider of social housing in England.<sup>20</sup> Secondly, the body must satisfy any criteria set by the regulator with regard to its financial situation, its constitution and other arrangements for its management.<sup>21</sup> The significance of these differing registration

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<sup>14</sup> The ONS's reclassification of English registered providers originally applied from 22 July 2008, the date of enforcement of the Housing and Reservation Act 2008 (this was subsequently changed to the date of enforcement of the Housing Act 1996). Under the provisions contained within the Act at the date of enforcement, housing associations were regulated and funded separately, by the TSA and the HCA. More detail in 5.2.2

<sup>15</sup> Homes and Communities Agency, *Consultation on introducing fees for social housing regulation*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/572462/Statutory\\_consultation\\_on\\_fees.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/572462/Statutory_consultation_on_fees.pdf), accessed 25 November 2016

<sup>16</sup> Housing Act 1996, s 2(2)

<sup>17</sup> *ibid*

<sup>18</sup> *ibid*, s 2(4). These are only allowed in addition to the purposes set out in section 2(2), not as alternatives.

<sup>19</sup> *ibid*

<sup>20</sup> Housing and Regeneration Act 2008, s 112

<sup>21</sup> *ibid*

requirements for the social housing sector in Wales and in England are discussed below.

Perhaps the most significant difference between the eligibility criteria for registration in Wales and England is that, in Wales, a body must be non-profit, whereas no such requirement exists in England. The Housing and Regeneration Act 2008 sets out what constitutes a 'profit-making' and 'non-profit-making' organisation. A non-profit organisation is a charity, or a body that satisfies three conditions: namely that (1) it does not trade for profit or issue capital with interest or dividend beyond a rate set out by the Housing Association Act 1985, (2) the purpose of the body is the provision or management of housing, and (3) any other purpose of the body is connected or incidental to the provision of housing.<sup>22</sup> Any body that does not satisfy these conditions will be deemed a profit-making organisation.<sup>23</sup>

Even before the enactment of the Housing and Regeneration Act 2008, profit-making organisations played a role in the provision of social housing in England. Since 2004, for-profit bodies were permitted to apply for grant money, and were permitted to undertake certain management functions in social housing.<sup>24</sup> The Cave Review recommended that this should be taken further and that 'for-profit' organisations should be permitted to register with the regulator.<sup>25</sup> It was argued that this would encourage competition within the sector and would provide tenants with greater choice.<sup>26</sup> This recommendation was taken forward and put into practice by the Housing and Regeneration Act 2008.<sup>27</sup>

This process contrasts starkly with the situation in Wales. Only two years after the publication of the Cave Review Report, the Essex Review reported back on the social housing regulatory regime in Wales.<sup>28</sup> The word 'profit' appears in the Report on nine occasions, each time in the context of 'non-profit' organisations.<sup>29</sup> It would appear that the possibility of allowing profit-making organisations to register as RSLs in Wales was

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<sup>22</sup> *ibid*, s 115

<sup>23</sup> *ibid*

<sup>24</sup> The Cave Review of Social Housing Regulation, *Every Tenant Matters: A Review of Social Housing Regulation* (June 2007) page 11

<sup>25</sup> *ibid* 25

<sup>26</sup> *ibid* 91

<sup>27</sup> Housing and Regeneration Act 2008 112

<sup>28</sup> Affordable Housing Task and Finish Group, *Report to the Deputy Minister for Housing* (June 2008)

<sup>29</sup> *ibid*

not even considered. The implications of this finding will be examined in more detail in Chapter 6, which considers the factors that have driven divergence.<sup>30</sup>

It is clear that a noteworthy legal variation has developed between the way that social housing regulation is undertaken in Wales and England. The impact that this difference has had in practice appears limited, at least so far. As of 2 November 2016, only 1.92% of registered providers in England were registered as profit-making bodies.<sup>31</sup> By contrast, 11.18% of registered providers were local authorities, whilst 86.89% of registered providers were not-for-profit bodies.<sup>32</sup> With not-for-profit registered providers continuing to dominate the sector in England, the statutory changes introduced by the Housing and Regeneration Act 2008 have clearly failed to increase the choice available to social housing tenants in the way envisaged by the Cave Report.<sup>33</sup>

The relative slow growth in profit-making providers registering with the regulator in England further supports two of the key themes of this thesis. First, that in order to understand the extent by which divergence develops, it is important to examine it at a number of different levels. On paper a significant legal variation has developed between Wales and England as to the role of profit making organisations. A closer inspection of how the sector operates however, has cast doubt over its significance in practice. This, supports a second theme of this thesis, namely that a number of factors impact upon the development of divergence and convergence between Wales and England. At first glance, it would appear that a difference in political view and ideology between the respective governments has led to the development of divergence.<sup>34</sup> A more detailed exploration, however, indicates that the impact of this variation is limited in practice, suggesting that there are other economic, legislative and structural factors that have an impact on the divergence process.

The significance of these other factors could lessen in the near future, leading to the development of greater variation in practice between Wales and England. The Housing and Planning Act 2016 decreases the regulatory powers of the regulator and the UK Government over the social housing sector in England.<sup>35</sup> This may tempt some

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<sup>30</sup> In particular, 6.1.1 and 6.1.2.

<sup>31</sup> This was a total of 34 register providers. The full register is accessible at; Homes and Communities Agency 'Current Registered Providers of Social Housing' (*GOV.UK*, 2 November 2016) <https://www.gov.uk/government/publications/current-registered-providers-of-social-housing> accessed 14 January 2017

<sup>32</sup> *ibid.* In total there were 1,762 registered providers, 1,531 non-profit private registered providers, 197 Local Authorities and 34 profit-making private registered providers.

<sup>33</sup> Cave Review (n24)

<sup>34</sup> This difference in ideology is discussed in greater depth in section 7.1.2.

<sup>35</sup> Housing and Planning Act 2016, discussed in more detail below.

previously unregistered profit-making organisations to register with the regulator, if they feel that the positives of registration now outweigh the negatives. The Act makes a further amendment to the Housing and Regeneration Act 2008 that could lead to an increase in the number of profit-making bodies registered with the regulator in England. Section 115 of the Housing and Regeneration Act 2008, as enacted, stipulated that if the regulator believed that a profit-making organisation had in fact become a non-profit organisation then the regulator was to change the register accordingly.<sup>36</sup> No provision was in place that would permit the regulator to re-designate a non-profit organisation as a profit-making provider.<sup>37</sup> The Housing and Planning Act 2016 has changed this. The regulator will now have to amend the register if it feels that a profit-making organisation has become a non-profit organisation or vice versa, paving the way for non-profit providers to become profit-making providers for the first time.<sup>38</sup> It remains to be seen what impact this new legislative difference will have on the sector.

The fact that bodies may register as either profit-making or non-profit providers is not the only dissimilarity to have developed with regard to registration between Wales and England. In England a body must satisfy two conditions before it can register, but in Wales the requirements are far more prescriptive.<sup>39</sup> An English body is eligible for registration as long as it provides social housing and complies with regulatory criteria concerning its financial, constitutional and management arrangements.<sup>40</sup> In Wales, a body may only register as a RSL if it has amongst its objects or powers; the provision, construction, improvement or management of houses to be kept available for letting, houses for occupation by members of the body, or hostels.<sup>41</sup> In addition to this, any additional objects of Welsh RSLs must comply with a list set out in section 2(4) of the Act.<sup>42</sup> These differing provisions mean that the law in Wales and England has diverged with regard to the type work a housing association is permitted to undertake.

In Wales, the Housing Act 1996 limits the work that an RSL is permitted to undertake to what many laypersons would understand the term 'social housing' to mean. The meaning given to '*provider of social housing*' in England differs slightly from this. Under the Housing and Regeneration Act 2008 a '*provider of social housing*' includes the

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<sup>36</sup> Housing and Regeneration Act 2008, s 115(9) as enacted

<sup>37</sup> This was in line with the recommendations of the Cave Review.

<sup>38</sup> Housing and Planning Act 2016, Schedule 4, Part 2, Para 23

<sup>39</sup> See above

<sup>40</sup> Housing and Regeneration Act 2008, s 112

<sup>41</sup> Housing Act 1996, s 2

<sup>42</sup> *ibid*

provision of *'low cost rental accommodation'* but it also includes the provision of *'low cost home ownership accommodation'*, be that through shared ownership, equity percentage or shared ownership trust.<sup>43</sup> This is an important difference between the relevant laws of Wales and England. It would appear that a body that provides homes for low cost ownership through shared ownership but that does not provide homes for low cost rent, would be permitted to register with the regulator in England. This would not be the case in Wales.

The potential impact of this difference can be illustrated by events that took place in the summer of 2015. Genesis Housing Association announced that it would stop building properties for affordable and social rent in July of that year.<sup>44</sup> It announced that it would, however, continue to construct homes for shared ownership, market rent and outright sale.<sup>45</sup> It seems that Genesis was permitted to do this whilst continuing to operate as a provider of social housing for two reasons. First, Genesis was still providing homes for low cost rental through the homes that it had already constructed or purchased as part of its portfolio. This seems analogous to what would happen if Genesis were a Welsh RSL, as long as the provision, improvement or management of such rental properties continued to be one of its objects or powers.<sup>46</sup> Secondly and more interestingly, under the definition of *'provider of social housing'* as set out in section 80 of the Housing and Regeneration Act 2008, Genesis would still be constructing social housing by building homes for shared ownership. It seems that this second reason would not apply in Wales. The differences that have developed in the registration requirements in Wales and England can impact upon the work that housing associations can undertake in these nations.

This finding suggests that the sectors in Wales and England could diverge further over the coming years. Not only are registered providers in England permitted to operate for a profit, they also do not need to construct or provide any properties for low market rent in order to be eligible for registration with regulator.<sup>47</sup> If an increasing number of registered providers were to follow Genesis's example by stopping the construction

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<sup>43</sup> Housing and Regeneration Act 2008, s 80

<sup>44</sup> Pete Apps, 'Large association stops building cheap rented homes' (*Inside Housing*, 30 July 2015) <http://www.insidehousing.co.uk/business/development/land-and-construction/large-association-stops-building-cheap-rented-homes/7011045.article> accessed 14 June 2016

<sup>45</sup> *ibid*

<sup>46</sup> Housing Act 1996, s 2

<sup>47</sup> This interpretation of the statute is supported by guidance published by the HCA on registration. Homes and Communities Agency, *Guidance on Applying for Registration as a Provider of Social Housing* (April 2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/420591/Reg\\_Guidance\\_full.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420591/Reg_Guidance_full.pdf) accessed 14 June 2016

homes for low cost rent in order to focus on low cost home ownership properties, then the sectors in Wales and England could become very different indeed. Already there is evidence that this is taking place. Sanctuary Housing Association, the UK'S largest social housing provider announced its eight-year development plan in May 2016.<sup>48</sup> It announced that it intended to construct 24,000 homes over the period. While stating that it would construct 1,000 properties for social rent in Scotland, the provider revealed that it would not build any in England.<sup>49</sup> As in Wales, a housing association is only permitted to register with the regulator in Scotland if it has amongst its objects or powers; the provision, construction, improvement or management of houses to be kept available for letting, houses for occupation by members of the body, or hostels.<sup>50</sup> This difference between the law in Scotland and England may help to explain Sanctuary's different approach. If so, this development suggests that the variation of housing law and regulation between Wales and England potentially has practical consequences.

Under the present devolution settlement, the National Assembly has significant legislative and policy powers over housing issues. One policy area where the powers of the National Assembly is more limited, however, is over the payment of welfare benefits. Powers over housing benefit, for example, have not been devolved to Wales, with the UK Government retaining responsibility for developing a united policy across both nations. Work undertaken by the Auditor General for Wales has already discovered that common policies can affect Wales and England differently.<sup>51</sup> If, over time, variation in housing law sees the sectors in Wales and England become more distinct, with social rented housing becoming less prevalent in England than in Wales, then the probability of common welfare policies applying equally on both sides of Offa's Dyke, diminishes. This issue is further discussed in section 7.1.2 and 8.2.2.

### 6.1.3 Where's the border?

As well as the differences that have developed between Wales and England over who can register with the regulators in each nation, another area within which a variation has developed in recent years relates to where a body is permitted to register. In Wales, only

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<sup>48</sup> Pete Apps, 'Sanctuary to bring all developments in house' (*Inside Housing*, 27 May 2016) <http://www.insidehousing.co.uk/business/development/land-and-construction/sanctuary-to-bring-all-development-in-house/7015370.article> accessed 14 June 2016

<sup>49</sup> *ibid.* It does intend to construct 2,000 homes for affordable rent.

<sup>50</sup> Housing (Scotland) Act 2010, s 24

<sup>51</sup> The Auditor General for Wales found that the bedroom tax disproportionately affected Wales. This is discussed in more detail in section 7.2.2. Auditor General for Wales, *Managing the Impact of Welfare Reform Changes on Social Housing Tenants in Wales* (Wales Audit Office, 8 January 2015)

'Welsh bodies' are eligible to register with the regulator,<sup>52</sup> whilst in England, only 'English bodies' are permitted to register.<sup>53</sup> The fact that the Housing Act 1996 and the Housing and Regeneration Act 2008 contain these different provisions is not surprising. Given that the regulatory regimes in place in both nations are undertaken independently from each other, with the Welsh Government responsible for regulating the social housing sector in Wales,<sup>54</sup> and that the HCA responsible for regulating the sector in England,<sup>55</sup> it is perhaps not surprising that both regulators have limited the bodies eligible for registration to those that operate within their respective nations. But this development has produced some unexpected results and raises a number of questions about the impact of legislative divergence.

Under section 1A of the Housing Act 1996, a Welsh body is a registered charity, registered society or a company, that has its registered offices in Wales.<sup>56</sup> Furthermore, to be eligible for registration such a body must also be '*principally concerned with Welsh housing*'.<sup>57</sup> As such, a Welsh body must own housing only in, or mainly in, Wales, or demonstrate that its activities are principally undertaken in Wales.<sup>58</sup> An English body, on the other hand, is defined in the Housing and Regeneration Act 2008 as a registered charity, a registered society, a registered company or a community land trust that has its registered offices in England.<sup>59</sup> There is one further type of body, however, that can register with the regulator in England, namely any body which is neither a Welsh body nor a Welsh Local Authority that provides accommodation in England.<sup>60</sup>

These provisions clearly limit the ability of bodies in Wales and England to register across the Welsh-English border. There is not one body that is registered in both nations at present.<sup>61</sup> The legislation in both nations does not prohibit registered organisations from providing homes in the other country. The Housing Act 1996 is very clear in only requiring Welsh RSLs to be principally concerned with Welsh housing,<sup>62</sup> whilst the Housing and Regeneration Act 2008 in England places no constraints upon where a registered provider

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<sup>52</sup> Housing Act 1996, s 2

<sup>53</sup> Housing and Regeneration Act 2008, s 112

<sup>54</sup> Housing Act 1996, s 1

<sup>55</sup> Housing and Regeneration 2008, s 59

<sup>56</sup> Housing Act 1996, s 1A

<sup>57</sup> *ibid*, s 2(2)

<sup>58</sup> *ibid*, s 2(2A)

<sup>59</sup> Housing and Regeneration Act 2008, s 79

<sup>60</sup> Housing and Regeneration Act 2008, s 79(1)(e)

<sup>61</sup> This can be seen when comparing the social housing registers as referenced above (n31) and Welsh Government 'Registered Social Landlords' (2 December 2016) <http://gov.wales/topics/housing-and-regeneration/publications/registered-social-landlords-in-wales/?lang=en> accessed 9 January 2017

<sup>62</sup> Housing Act 1996, s 2(2)



can undertake their activity.<sup>63</sup> This means that an English provider can provide social housing in Wales but is regulated from England, with the same being true for Welsh RSLs. As a result, social housing tenants that live within the same town could be renting property from landlords that are subject to different regulatory regimes. The rights of such tenants would differ, depending on which side of the border their landlord is based.

Neither the HCA in England nor the Welsh Government holds data on how many properties are owned by registered providers nor RSLs on the other side of the border from where they are registered, or even on how many registered providers or RSLs operate in both nations.<sup>64</sup> This lack of data is, perhaps, surprising. The HCA revealed, following a freedom of information request that, as they are the '*Social Housing Regulator for England*', they '*do not collect data on social housing outside of England*'.<sup>65</sup> The rationale for this decision is clear and understandable. It does give rise to the prospect that tenants of such housing associations are trapped in a kind of regulatory no man's land with their individual concerns falling within the purview of neither the English nor the Welsh regulator.

If the regulators lack data on cross-border social housing activity, this information is available via the housing database Housingnet. The data held by Housingnet reveals that the number of social homes owned by Welsh RSLs in England is extremely small. As of 2 June 2016, only 11 properties were owned by Welsh RSLs in England.<sup>66</sup> Six of these were owned by First Choice Housing Association and a further five were owned by Mid Wales Housing.<sup>67</sup> 19 English housing associations had property in Wales,<sup>68</sup> between them these associations owned 1,160 properties. The majority – 774 – were owned by Place for People Homes Ltd.<sup>69</sup> Whilst the number of tenants affected by this issue does appear small, it does not reduce its significance for 1,000 plus households impacted by the regulatory gap.

The system seems to lack clarity and certainty for those in these households. If a tenant was to encounter a problem with their housing association, the support networks in place for a tenant of an English provider living in Wales are likely to be oriented towards making a complaint to the Welsh Government and not the HCA. Organisations such as the Tenants Participation Advisory Scheme (TPAS) and Shelter now have separate TPAS Cymru and Shelter Cymru branches for their work in Wales. A local Assembly Member or a local

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<sup>63</sup> Housing and Regeneration Act 2008, s 59

<sup>64</sup> This is particularly surprising given that Housing Act 1996, s 35(1) gives the Welsh Ministers the power to collect information on such bodies.

<sup>65</sup> E-mail from Laura Townsend of the Homes and Communities Agency to Steffan Evans (25 May 2016)

<sup>66</sup> Information provided by Housingnet. E-mail from Gaz Summer of Housingnet. to author (2 June 2016)

<sup>67</sup> *ibid*

<sup>68</sup> *ibid*

<sup>69</sup> *ibid*

Member of Parliament may also be more experienced on providing advice within a Welsh context.

It is important not to overstate the gravity of this problem. The relatively small number of tenants affected by the regulatory gap means that it is unlikely that significant problems will often materialise. TPAS Cymru and Shelter Cymru are also likely to be able to contact their colleagues in England in order to ensure that the advice that a tenant receives is correct. Given that neither the Welsh Government nor the HCA holds information on how many housing associations operate on both sides of the border, however, neither regulator would seem to be in a position to be certain that this is the case. Such a lack of information could also limit the effectiveness of any new policy pursued by the regulators or the governments in both nations. If the regulators do not hold such information, how can they confidently develop regulatory policies that will apply consistently across their jurisdiction?

This finding also re-emphasises a theme that appears consistently throughout this thesis. In order to fully understand the extent of the differences that have developed between Wales and England with regards to social housing regulation, there is a need to examine the divergence process at a number of levels. In this instance, the primary legislation in Wales and England has clearly diverged. This particular variation means that, by law, a housing association is not permitted to register with the regulator in both Wales and England. Yet the regulatory gap identified above did not develop solely as a result of this divergence. It was also a consequence of the regulators in both nations taking the same approach to this aspect of registration. Whilst the statute does not permit a body to register with both regulators, it does not prohibit the regulators from collecting information on whether an RSL or a provider holds property outside their nation. Neither regulator has done so. It is this common approach to registration that ensured that the statutory difference led to the development of a regulatory gap. The gap was not an inevitable consequence of the legislative difference. One or both of the regulators could have decided to collect information on housing associations operating within their territory but which had not registered with them. It is therefore through a combination of legislative divergence and procedural convergence that this regulatory gap developed, highlighting the complicated way in which regulatory divergence has developed.

## 6.2 Tenant protection

Section 6.1, primarily focused on how the divergence that has developed between Wales and England has impacted on housing associations, examining how the law in both nations is now different as to who can register. The second section of this chapter will focus on how

divergence has impacted upon tenants. Again, the fact that the statutory basis for regulation in Wales and England has been updated on more than one occasion over the last decade is relevant here.<sup>70</sup> These statutory changes, combined with changes in the way the regulators interpret their regulatory powers, have led the law to diverge. One area where the statutory basis for regulation in Wales and England has most clearly diverged concerns the regulators' powers to set standards. This divergence developed gradually but is now so extensive that it can be argued that tenants in Wales are offered greater regulatory protection than their counterparts in England.

### 6.2.1 Gradual divergence

As set out in Chapter 5, before the enactment of the Housing and Regeneration Act 2008 Wales and England shared a common statutory basis for regulation.<sup>71</sup> It was section 34 of the Housing Act 1996, as originally enacted, that granted the regulators in both nations with the power to set standards with which housing associations had to comply with.<sup>72</sup> Under the 1996 Act, the Housing Corporation in England and the regulator in Wales<sup>73</sup> were permitted, following consultation, to set performance standards in connection with the provision of housing.<sup>74</sup> These powers were fairly broad with no examples placed in the Act of the sorts of standards that the regulator may have wished to set.<sup>75</sup> The powers of the regulators to monitor compliance were also relatively broad. The Act gave the regulators the power to monitor compliance with any standards set under section 34 *'from time to time'*, and also allowed them to require bodies to submit information to them in relation to the standards by a given date, every year.<sup>76</sup> These performance standards were to be published in a manner that the regulators considered *'appropriate'*,<sup>77</sup> and a body that failed to comply with any standard would be committing an offence.<sup>78</sup> The only additional requirement placed on the regulators in both nations was that they annually published any information that they had gathered as a result of exercising these powers.<sup>79</sup> Only a decade later these powers were to be reformed.

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<sup>70</sup> This can be seen from Chapters 4 and 5.

<sup>71</sup> Even after the establishment of the National Assembly in 1999.

<sup>72</sup> Housing Act 1996, s 34 as originally enacted.

<sup>73</sup> The regulator in Wales was to change in 1999 following the establishment of the National Assembly. When the Act was originally enacted in 1996 the regulator had been Tai Cymru but this was changed to the Welsh Ministers in 1999. More information at 4.1.1.

<sup>74</sup> Housing Act 1996, s 34 as originally enacted.

<sup>75</sup> *ibid*

<sup>76</sup> *ibid*, s 35 as originally enacted.

<sup>77</sup> *ibid*

<sup>78</sup> *ibid*

<sup>79</sup> *ibid*

The enactment of the Housing and Regeneration Act 2008 created a new statutory basis on which the regulator in England would be permitted to set standards. Under the Housing Act 1996 the standard-setting powers of the regulators in both Wales and England were fairly broad and appeared in one statutory provision. The Housing and Regeneration Act 2008 divided the regulator's powers into two categories. Section 193 of the Housing and Regeneration Act 2008, as enacted, gave the regulator the power to set standards that concerned the provision of social housing, whilst section 194, as enacted, granted the regulator with the power to set standards that concerned the management of a respective provider.<sup>80</sup> Not only did the Act create two categories of standards, but it also contained more detail on the sorts of standards that the regulator would be permitted to set. With regard to the provision of social housing, the regulator was permitted to set standards:

as to the nature, extent and quality of accommodation, facilities or services provided by them in connection with social housing.<sup>81</sup>

Section 193 also contained a list of ten further specific standards with which registered providers of social housing in England might have been required to comply. These included standards that related to maintenance, levels of rent and methods of consulting and informing tenants.<sup>82</sup> In addition to this, section 193 also set out that the regulator was *'to have regard to the desirability of registered providers being free to choose how to provide services and conduct business.'*<sup>83</sup> Compared to the broad powers of the regulator under the Housing Act 1996, the Housing and Regeneration Act 2008 gave the Westminster Government greater control over the standards that the regulator could set for the sector in England. By providing examples of the sorts of standards that English providers might be expected to comply with, the 2008 legislation gave the regulator a very clear indication of the type of standards that it was expected to set for the sector. The Act also provided the Secretary of State with the power to direct the regulator to set a standard under section 193, a further control over the work of the regulator.<sup>84</sup>

Interestingly, the powers of the Secretary of State over management standards were not as extensive.<sup>85</sup> The Secretary of State did not have the power under the Housing and Regeneration Act 2008, as originally enacted, to direct the regulator to set a management

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<sup>80</sup> Housing and Regeneration Act 2008, s 193, s 194 as originally enacted.

<sup>81</sup> *ibid*, s 193 as originally enacted.

<sup>82</sup> *ibid*

<sup>83</sup> *ibid*

<sup>84</sup> *ibid*, s 197 as originally enacted.

<sup>85</sup> *ibid*, s 194 as originally enacted. This section provided the regulator in England with the power to set standards relating to the management, finances and other affairs of the provider.

standard.<sup>86</sup> Section 194 also did not contain a list of examples of the sorts of standards that the regulator may have wished to set.<sup>87</sup> There were similarities between the sections. Section 194 did also contain a requirement that any standard set under the section did not limit a provider's ability to be free to choose how it operated.<sup>88</sup> To this end the regulator's powers to set management standards were curtailed further. Any standards that were set with regard to a profit-making provider, only extended to their operations as a provider of social housing,<sup>89</sup> meaning that they were free to continue to manage their financial affairs as they wished beyond their social housing activities.

Despite the fact that the Housing and Regeneration Act 2008 created two separate categories of regulatory standards, it did not establish a different approach to monitoring the two categories. The decision to establish two such categories did pave the way, however, for a significant shift in approach upon the enactment of the Localism Act in 2011. This shift will be examined in 6.2.2.

While these statutory changes were being made in England, the Welsh Government did not amend the statutory basis for regulation in Wales. The changes in England therefore immediately led to divergence in the undertaking of regulation in Wales and England. This result lends support to the argument made in Chapter 5 that the initial driver for the development of significant divergence from Wales was the enactment of Westminster legislation that applied only in England. The changes brought about by the Housing and Regeneration Act 2008 essentially meant that section 34 of the Housing Act 1996 became part of the body of distinct Welsh law. Indeed, the Housing and Regeneration Act 2008 explicitly set out that Part 1 of the Housing Act 1996 was to be restricted to Wales.<sup>90</sup> The 2008 Act amended the wording of section 34 of the Housing Act 1996 so that it only applied to 'Welsh Minister' marking a clear difference between the law in Wales and the law in England.<sup>91</sup> This episode highlights the complicated way in which the 'body of Welsh law' has developed and diverged from the law applicable in England. The significance of this finding for our understanding of "Welsh law" will be discussed in greater detail in Chapter 8.

### 6.2.2 Going in a different direction

In 2011, the National Assembly and the UK Parliament both enacted legislation that amended the statutory basis for the setting of regulatory standard by the regulators in Wales

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<sup>86</sup> *ibid*

<sup>87</sup> *ibid*

<sup>88</sup> *ibid*, this requirement also appeared in s 193.

<sup>89</sup> *ibid*

<sup>90</sup> Housing and Regeneration Act 2008, s 61

<sup>91</sup> Housing Act 1996, s 34 as amended by the Housing and Regeneration Act 2008.

and England. In Wales, the Housing (Wales) Measure 2011 introduced three new sections to the Housing Act 1996.<sup>92</sup> It is these provisions that, to this day, provide the regulator with powers to set regulatory standards for RSLs. In England, some provisions of the Localism Act 2011, amended the Housing and Regeneration Act 2008.<sup>93</sup> These legislative changes were to have an important, yet at times unexpected, impact on divergence between Wales and England.

Against a general trend towards divergence, on the whole, the provisions contained within the Housing (Wales) Measure 2011 lead to convergence in the regulators' standard-setting powers. Under the Housing Act 1996, the Welsh Government was permitted to set standards that were concerned with the '*provision of housing*'.<sup>94</sup> This was in contrast to the position in England where the regulator was permitted to set standards based on two grounds, one concerning services and housing provision, and the other concerning the management of the provider.<sup>95</sup> The Housing (Wales) Measure 2011 led to the system in Wales became more in line with that of England. Following the amendments made by the Measure, the Welsh Government are now also permitted to set standards for RSLs based on two grounds. These grounds are similar to the ones that were in place in England under the Housing and Regeneration Act 2008, as originally enacted. The Welsh Government is now permitted to set standards that are in connection to functions relating to the provision of housing, and in connection to functions that relate to the governance and financial management of their organisations.<sup>96</sup> Whilst the Measure does not set out these two grounds in separate legislative sections, as was the case in England in 2008, this is a clear example of the law in Wales converging with English law. Another provision inserted into the Housing Act 1996 makes this process even more apparent. Under section 33A the Welsh Ministers are required to '*have regard to the desirability of registered providers being free to choose how to provide services and conduct business*' when setting standards.<sup>97</sup> This is an identical provision to one placed in the Housing and Regeneration Act 2008 in England.

It is these statutory provisions that, to this day, provide the Welsh Government with the power to set performance standards for Welsh RSLs in its capacity as the social housing regulator. These powers were subject to some amendments three years later by the Housing (Wales) Act 2014. It appears that these amendments were inserted to correct legislative

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<sup>92</sup> Housing (Wales) Measure 2011 introduced sections 33A, 33B and 33C to the Housing Act 1996.

<sup>93</sup> Localism Act 2011, s 178, s 179

<sup>94</sup> Housing Act 1996, s 34 as amended by the Housing and Regeneration Act 2008.

<sup>95</sup> Housing and Regeneration Act 2008, s 193, s 194 as originally enacted.

<sup>96</sup> Housing Act 1996, s 33A

<sup>97</sup> *ibid*

oversights, made when the Housing (Wales) Measure 2011 was enacted, not to significantly amend the powers of the regulator.<sup>98</sup>

Whilst the legislative basis for setting regulatory standards in Wales and England converged following the enactment of the Housing (Wales) Measure 2011, the law in both nations did not converge absolutely. The amended Housing Act 1996 does not contain examples of the sorts of standards that RSLs could be expected to face.<sup>99</sup> The Housing Act 1996 now also contains an additional statutory provision that did not appear in the Housing and Regeneration Act 2008. The newly amended section 34 of the Housing Act 1996 provides the Welsh Government with the power to set standards of performance that are '*in connection with the provision of housing in England*' by a Welsh RSL.<sup>100</sup> Given that the Welsh regulators are not aware of how many RSLs provide properties in England, it seems very unlikely that they would be in a position to set such standards.<sup>101</sup> The fact that the Welsh Government has retained the ability to set standards for the provision of housing by RSLs in England, whilst the Westminster Government has not retained the same power for its regulator, remains an interesting distinction.

Whilst the National Assembly for Wales was enacting legislation that would bring the statutory powers of the regulators in both nations to set performance standards closer together, the Westminster Parliament was simultaneously enacting legislation that would see these powers diverge significantly. Amendments made to the Housing and Regeneration Act 2008, brought about by the Localism Act 2011, resulted in a shift in the standard-setting powers of the regulator in England and, perhaps more importantly, in their enforcement powers.

The Localism Act 2011 introduced amendments to both sections 193 and 194 of the Housing and Regeneration Act 2008, the statutory basis by which the English regulator was allowed to set standards for registered providers. As a result of these changes the regulator is now permitted to set standards that relate to '*consumer matters*' and to '*economic matters*'.<sup>102</sup> In addition to changing the names of the categories by which the regulator is permitted to set standards, the Localism Act 2011 also made minor amendments to the list of standards that registered providers might be subject to under section 193, and introduced a list of such standards for the first time in section 194.<sup>103</sup> The Act also amended section 194 to give the

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<sup>98</sup> *ibid.* Section 33A as originally enacted permitted the Welsh Government to set a standard but not to amend or withdraw a standard. The Housing (Wales) Act 2014 amended s 33A to permit this.

<sup>99</sup> *ibid*

<sup>100</sup> *ibid*, s 34

<sup>101</sup> See 5.1.3

<sup>102</sup> Housing and Regeneration Act 2008, s 193, s 194

<sup>103</sup> *ibid*

regulator the power to set standards that require a provider to comply with rules set in relation to their levels of rent.<sup>104</sup> These changes, whilst important, did not greatly increase divergence between Wales and England. The Localism Act 2011 also introduced two new sections into the Housing and Regeneration Act 2008. It is these new sections that has seen the law in Wales and England radically diverge.

The Housing and Regeneration Act 2008 grants the English regulator a number of enforcement powers that it can use, if it feels that a provider has breached a standard set under either section 193 or section 194 of the Act.<sup>105</sup> The Act, as originally enacted, did not differentiate between how those powers were to be exercised. If a provider breached a standard set under section 193, the process by which the regulator could enforce the standard were the same as if it had breached a standard set under section 194. This has changed following the enactment of Localism Act 2011.

The Localism Act 2011 introduced sections 198A and 198B to the Housing and Regeneration Act 2008.<sup>106</sup> The regulator, under section 198B is permitted to take action against a provider that has breached, or is at risk of breaching, a standard set under section 194, a standard relating to an economic matter.<sup>107</sup> Under section 198A, however, the regulator is only permitted to take action against a provider that has, or may, breach a standard set under section 193, a standard that concerns consumer matters, if this failure has, or could cause a serious detriment to the provider's tenants.<sup>108</sup> The Localism Act 2011 has therefore effectively created a two tier system of regulatory standards in England: (1) economic standards, which need only be breached to lead to regulatory action; and (2) consumer standards, a breach of which must satisfy a two stage test before regulatory action is taken.

In Wales, no such distinction exists. Whilst the Welsh Government, in its capacity as regulator, is permitted to set regulatory standards based on two grounds, no distinction has been made as to how it can exercise its regulatory powers if a RSL breaches a standard.<sup>109</sup> This is a highly important variation that has developed in the primary law of these nations. The introduction of a two-tier system of standards in England would seem to place tenants in England at a disadvantage compared their Welsh counterparts. Whilst tenants in England must demonstrate that they have suffered or could suffer serious detriment as a result of

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<sup>104</sup> *ibid*

<sup>105</sup> *ibid*. Set out in Chapter 7 of the Act.

<sup>106</sup> *ibid*, s 198A, s 198B

<sup>107</sup> *ibid*, s 198B

<sup>108</sup> *ibid*, s 198A

<sup>109</sup> As can be seen when looking at Housing Act 1996, s 15B, s 50C, s 50F, s 50H, s 50O



their provider breaching a standard, in Wales a tenant must only demonstrate that their landlord has breached a standard, set in connection with the provision of housing. The practical consequences of these different approaches are highlighted further when examining the way that the regulators have decided to set their regulatory standards. This is done in section 5.2.3 below.

Before examining the regulatory standards set in Wales and England in detail, it is worth looking back at the divergence process in this instance. Despite the establishment of the National Assembly in 1999, there was no substantial statutory divergence between Wales and England in this area until the enactment of the Housing and Regeneration Act 2008, a piece of legislation that was enacted at Westminster to change the statutory basis for regulation in England only. Only three years later, the National Assembly was to enact legislation which would see the way that the Welsh regulator was able to set regulatory standards converge with England. The Westminster Parliament then enacted a further piece of legislation, generating even greater divergence in the statutory basis for social housing regulation than had existed previously. This example illustrates a key theme of this thesis, namely that divergence develops as result of the actions of the UK and Welsh Governments.

### 6.2.3 The regulatory frameworks

To understand the significance of statutory divergence between Wales and England, it is important to examine how the regulators have exercised their powers to set standards. In both nations, the regulators have drafted regulatory frameworks with which RSLs and registered providers must comply. The approach taken when drafting these has been very different. These differing approaches has reinforced the variation that has developed between both nations at statutory level, leading to important differences developing between the rights of tenants in Wales and England.

In England, the regulatory framework for the registered providers of social housing comprises three elements; regulatory requirements, codes of practice, and regulatory guidance.<sup>110</sup> They have different roles. There are nine categories of regulatory requirements with all of which registered providers must comply.<sup>111</sup> These include requirements relating to registration, information submission and of most interest for this chapter, regulatory standards.<sup>112</sup> A code of practice, meanwhile, acts as amplifier to a regulatory requirement, supplementing its content, and assisting a provider in understanding how compliance may

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<sup>110</sup> Homes and Communities Agency, 'What is the Regulatory Framework' (April 2015) Page 2 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/420120/What\\_is\\_the\\_regulatory\\_framework.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420120/What_is_the_regulatory_framework.pdf) accessed 14 June 2016

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

be achieved.<sup>113</sup> Finally, regulatory guidance is issued to provide registered providers with further information on the regulatory requirements and with information on how the regulator will carry out its role.<sup>114</sup> Ten such documents have been published.<sup>115</sup>

In contrast to the holistic approach taken by the HCA in England, the Welsh Government's regulatory framework focuses almost exclusively on the regulatory standards with which RSLs must comply.<sup>116</sup> The other factors contained within the English regulatory framework such as information submission requirements are set out in other documents in Wales. These elements do not form part of the regulatory framework itself.<sup>117</sup> Although this is an interesting difference in approach, this section will not examine its impact. Instead, the primary focus here will be on the performance standards set out by the two nation's regulators. By examining the extent of the divergence between the performance standards, this thesis will be able to explore whether the dissimilarities that exist in legislation regarding performance standards have been replicated in the regulatory frameworks.

In England, the economic and consumer standards set by the regulator form two separate regulatory requirements. The economic standards imposed on registered providers form the first regulatory requirement of the English social housing regulatory framework. These standards are set out in three separate documents; the Governance and Financial Viability Standard, the Value for Money Standard and the Rent Standard.<sup>118</sup> The consumer standards form the basis of the second regulatory requirement within the regulatory framework. These have been set out in four separate documents; the Tenant Involvement and Empowerment Standard, the Home Standard, the Tenancy Standard and the Neighbourhood and Community Standard.<sup>119</sup> In Wales, every standard directed at RSLs appear in a single document: the Regulatory Framework for Housing Associations Registered in Wales.<sup>120</sup> To demonstrate the impact of this distinction, this chapter will now turn to examine one English regulatory standard in particular, the Tenant Involvement and Empowerment Standard. This will highlight how the difference in approach taken affords Welsh tenants greater protection than their English equivalents.

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<sup>113</sup> *ibid.* A Code of Practice can be set in reference to the Economic standards.

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.* page 3

<sup>116</sup> Welsh Government, *The Regulatory Framework for Housing Associations Registered in Wales* (2 December 2011) It should be noted, however, that this framework is currently under review. For a more detailed discussion see section 7.1

<sup>117</sup> These include documents such as circulars, published by the Welsh Government.

<sup>118</sup> What is the Regulatory Framework (n110)

<sup>119</sup> *ibid.*

<sup>120</sup> The Welsh Regulatory Framework (n116)

### 6.2.3.1 Tenant Involvement and Empowerment

The Tenant Involvement and Empowerment Standard document was published in England in April 2012. It contains three required outcomes for registered providers. The first of these concerns ‘*customer service, choice and complaints*’, the second concerns ‘*involvement and empowerment*’ whilst the final outcome concerns ‘*understanding and responding to the diverse needs of tenants*’.<sup>121</sup> The regulatory document expands on what these outcomes entail. For example, under the second heading ‘*involvement and empowered*’, registered providers must ensure that:

tenants are given a wide range of opportunities to influence and be involved in ... the formulation of their landlord’s housing related policies and strategic priorities.<sup>122</sup>

In addition to these required outcomes, the Tenant Involvement and Empowerment Standard contains ‘*specific expectations*’ that registered providers must comply with. These are in keeping with the regulatory outcomes set out in the document and include:

the provision of timely and relevant performance information to support effective scrutiny by tenants of their landlord’s performance in a form which registered providers seek to agree with their tenants.<sup>123</sup>

These standards are broadly similar to the ones contained within the Welsh regulatory framework but they differ in the way they have been set out. As stated above, in Wales, all regulatory standards that RSLs must comply with appear on one document, the Regulatory Framework for Housing Associations Registered in Wales.<sup>124</sup> Appendix 3 of the Framework contains ten main outcomes split between two categories, ‘*governance and financial management*’ and ‘*landlord services*’.<sup>125</sup> Each of these ten outcomes contains a number of sub-outcomes; these are numerous and RSLs must demonstrate compliance with all of these standards in addition to the main outcomes.<sup>126</sup> The standards that appear as part of

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<sup>121</sup> Homes and Communities Agency, ‘*Tenant Involvement and Empowerment Standard*’ (April 2012) Page 1 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/422709/Tenant\\_I\\_and\\_E\\_Standard\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/422709/Tenant_I_and_E_Standard_2015.pdf) accessed 14 June 2016

<sup>122</sup> *ibid*

<sup>123</sup> *ibid* Page 2

<sup>124</sup> The Welsh Regulatory Framework (n116)

<sup>125</sup> *ibid* Annex 3. Proposed Welsh Government changes will reduce the number of standards that Welsh RSLs have to comply with. It is not envisaged that the new approach will significantly change the requirements that are placed on Welsh RSLs as the new standards will be closely based on those already in place. Carol Kay and Sarah Laing Gibbens ‘Regulatory Reform- Sharpening our approach to delivering regulation’ (Community Housing Cymru, Creating the Narrative, Annual Conference 2016, Cardiff, December 2016) and Welsh Government, ‘A revised and improved approach to delivery of housing regulation’, (*Welsh Government*) < <http://gov.wales/docs/desh/publications/161215-regulatory-judgement-framework-en.pdf>>

<sup>126</sup> *ibid*

the Tenant Involvement and Empowerment Standard in England appear on more than one occasion in the Welsh regulatory framework, both as *'governance and financial management'* outcomes and as *'landlord services'* outcomes. For example, the first outcome that an RSL must comply with, within Appendix 3 is: *'We place the people who want to use our services at the heart of our work - putting the citizen first.'*<sup>127</sup> This outcome contains nine sub outcomes, each of which are comparable to the standards that appear within the English Framework.<sup>128</sup> Welsh RSLs are also required to demonstrate that they are: *'open about what we do, and publish balanced information about our activities'*,<sup>129</sup> a sub-outcome that appears under the *'We live public sector values, by conducting our affairs with honesty and integrity, and demonstrate good governance through our behaviour'* outcome.<sup>130</sup> The standards set out under the Tenant, Involvement and Empowerment document in England, therefore appear throughout the Welsh Regulatory Framework, as opposed to appearing in a separate document. The impact of this on tenants is potentially significant, as will be demonstrated below.

The Tenant Involvement and Empowerment Standard is an aspect of consumer regulation in England. For enforcement action to be taken against a provider in breach of a consumer standard the regulator must be satisfied that the breach has resulted in, or creates a significant risk of, serious detriment to the tenant.<sup>131</sup> The HCA sets out its role in monitoring such standards as follows:

Our approach to consumer regulation is set out in legislation and is reactive only. We do not have a role in monitoring providers' performance on consumer standards. We only use our regulatory and enforcement powers where we judge that there has been a breach of a consumer standard which has or could cause serious detriment.<sup>132</sup>

In order to determine whether regulatory action is required, the HCA has introduced a serious detriment test in England which examines the *'degree of harm'* caused by any breach.<sup>133</sup> Under the test there are four questions that the regulator must initially consider before coming to a conclusion on whether a breach constitutes serious detriment. First, the

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<sup>127</sup> *ibid*

<sup>128</sup> *ibid.* For example; 'We value and are responsive to the views of the people who want to use our services.'

<sup>129</sup> *ibid*

<sup>130</sup> *ibid*

<sup>131</sup> Housing and Regeneration Act 2008, s 198A

<sup>132</sup> Home and Communities Agency *'Regulating the Standards'* (June 2015) Page 13

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/463693/20150925\\_Regulating\\_The\\_Standards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/463693/20150925_Regulating_The_Standards.pdf) accessed 14 June 2016

<sup>133</sup> *ibid* page 22

regulator will consider whether the concern raised appears within its remit.<sup>134</sup> Secondly, the regulator will examine whether, if the issue raised were true, there would be a breach of a consumer standard.<sup>135</sup> If there would be a breach, the HCA will consider whether it would cause harm to the tenant.<sup>136</sup> Finally, the regulator will consider whether such harm would be serious.<sup>137</sup> If the regulator has concluded that the concerns raised could potentially cause harm, it will then gather and examine the evidence of the specific case to determine whether there has, in fact, been a breach resulting in serious detriment.<sup>138</sup> The HCA, asserts that in order to reach such a decision that it will need evidence of harm in relation to, but not exclusively in relation to: *'health and safety, loss of home, unlawful discrimination, loss of legal rights, financial loss.'*<sup>139</sup> The bar appears to have been set at a high level for the regulator to be able to take enforcement action against a provider that is in breach of a consumer standard. This analysis seems to be supported when looking at how the regulator has implemented the test.

Since November 2013, the English regulator has published an Annual Consumer Regulation Review, looking back at how the consumer regulation standards have been enforced over the previous year. In 2014/15 the regulator received 589 referrals for breaches of consumer standards.<sup>140</sup> Of these, 238 were deemed to have sufficient potential to lead to findings of a breach or serious detriment, with the regulator seeking more information in 89 of these cases.<sup>141</sup> The regulator found that there had been a breach that had or could cause serious detriment in six of these cases.<sup>142</sup> All six concerned breaches of the Home Standard, standards that concern the quality of accommodation and repairs work.<sup>143</sup> This followed the example set over the previous two years.<sup>144</sup>

The Annual Reviews contain case studies of where the regulator had considered whether there had been a breach of the Tenant Involvement and Empowerment Standard.<sup>145</sup> This

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<sup>134</sup> *ibid*

<sup>135</sup> *ibid*

<sup>136</sup> *ibid*

<sup>137</sup> *ibid*

<sup>138</sup> *ibid*

<sup>139</sup> *ibid*

<sup>140</sup> Homes and Communities Agency, *'Consumer Regulation Review (2014/15)'* (September 2015) page 7 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/459119/CRR\\_2015\\_full.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/459119/CRR_2015_full.pdf) accessed 14 June 2016

<sup>141</sup> *ibid*

<sup>142</sup> *ibid*

<sup>143</sup> Homes and Communities Agency, *'Home Standard'* (April 2012) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/419208/Home\\_Standard\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419208/Home_Standard_2015.pdf) accessed 17 November 2016

<sup>144</sup> Consumer Regulation Review (n140) The reports for 2013/14 and 2012/13 are available at <https://www.gov.uk/government/collections/consumer-regulation-review> accessed 14 June 2016

<sup>145</sup> *ibid* 18

gives some indication of the circumstances where the regulator may be prepared to find that a breach is of a sufficient magnitude to lead to a finding of serious detriment. In one instance, the regulator has considered whether the decision of a provider to cease to recognise a tenant association as being the tenant's representative body, had breached the regulatory standard.<sup>146</sup> The regulator concluded that the provider had not breached the standard given that, in its place, it had organised a monthly tenant's forum for all tenants.<sup>147</sup> If the provider had stopped carrying out any consultation with its tenants, it is possible that the HCA would have concluded that the provider had breached the regulatory standard and that this breach would have been of sufficient seriousness to constitute a serious detriment.

The fact that a breach of a consumer standard has to be seriously detrimental in England when, in Wales, a mere breach is sufficient to lead to regulatory action is an important difference. The significance of this difference is further emphasized by the fact that the regulator in England takes a reactive approach to consumer regulation in contrast to the more proactive approach of the Welsh regulator. The regulators in both Wales and England take a co-regulatory approach, meaning that the onus for ensuring co-operation with the regulatory requirements rests with the board of a respective provider or RSL, working in conjunction with their respective tenants.<sup>148</sup> In Wales, the regulator also undertakes periodic reviews of RSLs, assessing their compliance with each performance standard.<sup>149</sup> Following the completion of such a review, the regulator then publishes a regulatory opinion on the RSL, scoring each RSL for their compliance with the standards. Concerns were raised by some interviewees that this process did limit the co-operative nature of regulation.<sup>150</sup> Such an approach does mean, however, that an RSL's compliance with the regulatory standards is assessed on a semi-regular basis,<sup>151</sup> meaning that failures to comply with what would in England be dubbed as '*consumer regulation*' does have an impact on a RSL's regulatory score.

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<sup>146</sup> *ibid*

<sup>147</sup> *ibid*

<sup>148</sup> Regulating the Standards (n132) page 5 and Welsh Government '*Improving the implementation of the Regulatory Framework: a risk based approach to regulation*' (December 2013) <http://gov.wales/docs/desh/publications/131220improving-regulatory-framework-en.pdf> accessed 14 June 2016

<sup>149</sup> *ibid*

<sup>150</sup> Two participants in particular felt that the system in place in Wales was not fully co-regulatory in nature with one comparing the approach to 'audit and inspection'. Interview with Chief Executive of Welsh RSL 1, (Cardiff, 19 January, 2015); and Interview with Chief Executive of Welsh RSL 3, (Cardiff, 1 May, 2015)

<sup>151</sup> One participant stated that they had, had very limited contact with Welsh Government. Interview with Chief Executive of Welsh RSL 1, (Cardiff, 19 January, 2015). The Welsh Government has indicated that it will be seeking to meet with RSLs on a quarterly basis from early 2017 and will be publishing regulatory scores at least annually. Kay and Gibbens (n125)

This is highlighted when examining one recent regulatory opinion published by the Welsh Government. In June 2016, the Welsh Government published its regulatory judgment for Pennaf Housing Group. The Welsh Government sets out that it wishes to receive greater regulatory assurance from the RSL that it understands *‘the issues underpinning dissatisfaction with the quality of workmanship on some of the Group’s development schemes.’*<sup>152</sup> It seems unlikely that such assurance would ever be sought by the regulator in England. The Welsh regulator made this recommendation to Pennaf as part of formal regulatory assessment, following a proactive examination of whether Pennaf complied with (what would be considered in England as) a consumer standard. In England, it appears likely that a provider that was deemed to be failing to understand tenant dissatisfaction with repairs, would be acting in breach of the Tenant Involvement and Empowerment Standard. Such a breach would then have to be brought to the attention of the regulator by the Housing Ombudsman.<sup>153</sup> The regulator would then need to conclude that not only was a provider in breach of such a standard but that this breach also constituted a serious detriment to the tenants. The wording of the Welsh Government’s regulatory judgment makes it appear unlikely that, if Pennaf were an English provider, this would be the case. The Welsh Government requires Pennaf to develop more of an understanding of *‘the issues underpinning dissatisfaction with the quality of workmanship’*.<sup>154</sup> This would suggest that whilst Pennaf’s understanding of tenants’ concerns are not satisfactory, the RSL does have some understanding of their tenants’ concerns. From the case studies published by the HCA, discussed above, it appears probable that an English provider that had understood some of their tenants’ concerns, even if this understanding was not satisfactory, would not be committing a breach of sufficient gravity to warrant regulatory enforcement action to be taken.

The implications of this for tenant protection are immediately apparent. The proactive approach taken by Welsh Government means that the views of tenants can influence the regulatory judgments they provide to individual RSLs. Given that these judgments are publicly available, this provides Welsh RSLs, such as Pennaf, with a clear incentive to gain a better understanding of, and to address their tenants’ concerns, so as such critiques are not made in the next regulatory judgment they receive from the Welsh Government. Given that the regulator would not take action in England until a breach of sufficient gravity has taken place, the regulatory regime in England does not appear to provide tenants with protection against such ‘non-serious’ breaches of consumer regulation. The fact that the regulator in

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<sup>152</sup> Welsh Government, Housing Policy – Regulation, *‘Regulatory Opinion, Pennaf Group’* (June 2016) <http://gov.wales/docs/desh/publications/160601-hara-pennaf-group-en.pdf> accessed 14 June 2016

<sup>153</sup> Regulating the Standards (n132)

<sup>154</sup> Pennaf decision (n152)

Wales is willing to take action in such circumstances therefore suggests that tenants in Wales are afforded greater protection under regulation than their English counterparts. This view was supported by one interview participant who had some experience of working on both sides of the Offa's Dyke:

I feel like I will be held to account by the Welsh regulator, in terms of what I'm doing with our involved tenants and how, I'm involved, you know? How we are involving tenants in our service, well in our organisation full stop. What I think that's happened in England is there's been increasing emphasis just on the financial stuff, the governance stuff, value for money and to be honest, really the regulator isn't actually that bothered about what happens with what they call the tenant facing standards...<sup>155</sup>

Whilst this was the view of one particular participant, the analysis in this section does lend some support to it. Tenants in Wales seem to be better protected by the regulator. The fact the regulator in England will only reactively examine compliance with consumer standards does lead to the possibility of tenants having to suffer harm before the regulator becomes willing to take action. The proactive approach of the Welsh Government to regulating such standards means that any issues encountered by tenants are tackled before matters worsen. The absence of the serious detriment test in Wales seems to provide Welsh tenants with greater protection than their English counterparts. The potential drivers for this regulatory difference will be examined in more detail in Chapters 7 and 8. This section, however, has highlighted the potential real world implications of divergence for tenants, and has shown that, in order to fully understand them, it is important to explore the development of divergence at both legislative and regulatory levels.

### 6.3 The problematic powers

On 30 October 2015, the Office for National Statistics (ONS) published a classification announcement that was to have a great impact on the way in which social housing regulation is undertaken. The ONS announced that they had decided to reclassify providers in England as Public Non-Financial Corporations for accounting purposes.<sup>156</sup> The significance of this decision was immediately apparent. The ONS had, in effect, reclassified English registered providers as part of the public sector, meaning that their borrowing,

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<sup>155</sup> Interview with Chief Executive of Welsh RSL 5, (South Wales, 21, October, 2015)

<sup>156</sup> Office for National Statistics 'Classification announcement: 'Private registered providers' of social housing in England' (30 October 2015)



amounting to some £60 billion, was transferred onto the public balance sheet.<sup>157</sup>

Unsurprisingly the Westminster Government has been eager to reverse this decision. In an oral statement to the Communities and Local Government Committee, the then Housing Minister, Brandon Lewis revealed that the Government was keen to get registered providers 'off the Government books, which is what they want, as quickly as possible'.<sup>158</sup> The Minister also revealed to the Committee how the Government intended to do so. He set out that the Government would make a number of amendments to the Housing and Planning Bill that was progressing through the Houses of Parliament at the time, which would deregulate the social housing sector, tackling some of the concerns highlighted by the ONS.<sup>159</sup>

On 29 September 2016, the ONS published a further classification announcement. The ONS announced that RSLs in Wales, as well as housing associations in Scotland and Northern Ireland would also be reclassified as part of the public sector.<sup>160</sup> The decision to reclassify Welsh RSLs would add a further £2.3 billion of debt to the public balance sheet, and would subject Welsh RSLs to public sector borrowing rules, set by the Treasury at Westminster.<sup>161</sup> The Welsh Government have indicated that, like the UK Government, they will also enact legislation in an attempt to reverse the ONS's decision.<sup>162</sup>

The remainder of this chapter will examine the extent by which the law in Wales and England had diverged with regard to the areas highlighted by the ONS at three points in time: (1) prior to the ONS's reclassification announcement in England, (2) following the enactment of the Housing and Planning Act 2016, (3) the extent of possible future differences, following the enactment of legislation by Welsh Government that seeks to reverse the ONS's decision in Wales. Chapter 8 will then examine what these events tell us

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<sup>157</sup> Housing association change adds £59 billion to UK debt (*Business Reporter*, 20 November 2015) <http://business-reporter.co.uk/2015/11/20/housing-association-change-adds-59-billion-to-uk-debt/> accessed 15 June 2016

<sup>158</sup> Communities and Local Government Committee, *Housing Associations and the Right to Buy*, (Oral Evidence by Brandon Lewis MP, HC 370, 15 December 2015) question 321

<sup>159</sup> *ibid*

<sup>160</sup> Office for National Statistics 'Statistical classification of registered providers of social housing in Scotland, Wales and Northern Ireland: September 2016' (29 September 2016)

<sup>161</sup> Steffan Evans 'Adding £2.3bn of debt to the accounts – social housing deregulation as an early test for the minority Welsh Government' (LSE British Politics and Policy Blog, 10 May 2016) <<http://blogs.lse.ac.uk/politicsandpolicy/adding-2-3bn-of-debt-to-the-national-accounts-social-housing-deregulation-as-an-early-test-for-the-minority-welsh-government/>> accessed 23 July 2016

<sup>162</sup> Heather Spurr 'Governments pledge to reverse ONS reclassification' (*Inside Housing*, 30 September 2016) <<http://www.insidehousing.co.uk/governments-pledge-to-reverse-ons-reclassification/7017032.article>> accessed 2 November 2016; Kay and Laing (n125); and Carl Sargent, Cabinet Secretary for Communities and Children 'Keynote address' (Community Housing Cymru, Creating the Narrative, Annual Conference 2016, Cardiff, December 2016)

about the way that divergence develops, questioning whether it is democracy or international accountancy standards that drives it.

### 6.3.1 The ONS decision

Before examining the actual decision of the ONS with regard to registered providers in England and RSLs in Wales, it is important to understand how the ONS conducts its reviews. All EU member states must produce their national accounts statistics in accordance with the European System of Accounts 2010 (ESA 2010).<sup>163</sup> As part of this process, the ONS must classify each institutional unit in the UK.<sup>164</sup> As such, the ONS's review into the status of registered providers in England, and RSLs in Wales was a review to see whether their classification, as institutional units, was the correct one. The ONS decided that it was not. In their classification announcement in England, the ONS pinpointed five reasons for this. The ONS decided that the UK Government's powers in each of these instances meant that English housing associations should be classified as Public Non-Financial Corporations under the ESA 2010. These were:

1. HM Government consent powers over, and power to set conditions on, disposals of social housing assets (exercised through the HCA under section 172-178 of the HRA [Housing and Regeneration Act] 2008)
2. HM Government powers to direct the use of disposal proceeds (exercised through the HCA under sections 177-178 of the HRA [Housing and Regeneration Act] 2008)
3. HM Government consent powers over disposals of housing stock following a registered provider's de-registration with the HCA (exercised through the HCA under section 186 of the HRA [Housing and Regeneration Act] 2008)
4. HM Government consent powers over the voluntary winding-up, dissolution, and restructuring of a registered provider (exercised through the HCA under section 160-166 of the HRA [Housing and Regeneration Act] 2008)
5. HM Government powers over the management of a registered provider, in particular the power of the HCA to appoint managers and officers to the provider (exercised through the HCA under sections 151-157, 246-252, 261(3) and 269 of the HRA [Housing and Regeneration Act] 2008).<sup>165</sup>

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<sup>163</sup> Office for National Statistics 'UK economic statistics sector and transaction classifications: the classification process' <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/guide-method/classifications/na-classifications/the-ONS-classification-process/index.html> accessed 15 June 2016, para 6

<sup>164</sup> *ibid*

<sup>165</sup> Classification Announcement England (n156)

During an interview the ONS revealed that it was these, and no other reasons, that had led them to reach their decision:

Interviewer: Ok, great, thanks for clarifying that, so, moving on to your announcement, you know? You list five, well you outline five reasons for your reclassification, can you sort of set those out, kind of, was there anything beyond what was written down on paper then?

Interviewee (ONS): So, was there, of course there was analysis beyond this written on paper because we haven't published all the information that we've gathered, but, you know? Firstly, it would be remiss of us to have a load of other factors that we didn't publish, so no there nothing beyond this that was an influence, and also if there was I wouldn't be able to tell you because I'm not allowed to give you privileged information without then publishing that online for everyone basically.

Interviewer: Ok so it's those five reasons then are the things that predominantly....

Interviewee (ONS): Yeah, they are the reasons.<sup>166</sup>

The deregulatory legislation enacted in England has focused very closely on these five powers. It appears probable that, if the UK Government reduce their controls over the sector in relation to these five powers, the ONS would be willing to reverse their decision to reclassify registered providers as part of the public sector, given that, according to the ONS interviewee, these were the powers that led them to reclassify English providers. Removing those powers would therefore remove the need to classify registered providers as part of the public sector.

The reasons behind the ONS's decision to reclassify Welsh RSLs as part of the public are almost identical to their reasons for reclassifying registered providers in England.<sup>167</sup> As a result, this chapter will discuss each of these powers cited by the ONS in their reclassification announcement in England, in turn, examining how the powers of the HCA and the UK Government will change with the enactment of the Housing and Planning Act 2016. The chapter will then compare these powers to the ones presently in place in Wales,

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<sup>166</sup> Interview with a member of the Office for National Statistics Classifications Team, (Newport, 8 April 2016)

<sup>167</sup> Classification Announcement Wales (n160). The ONS cite the Welsh Ministers' powers over the management of an RSL, Welsh Ministers' consent powers over the disposal of land and the disposal of housing assets, and Welsh Ministers' powers over constitutional changes of an RSL.

examining the impact of these changes on divergence, and questioning what impact the ONS decision might have in future.

### 6.3.2 Disposal consent

The first group of statutory provisions noted by the ONS as a reason for its decision to reclassify registered providers in England were sections 172 to 178 of the Housing and Regeneration Act 2008.<sup>168</sup> These sections, prior to their amendment by the Housing and Planning Act 2016, required a provider to get the regulator's consent before they could dispose of social housing dwellings.<sup>169</sup> The rationale for introducing such controls seems clear. Given the, at times significant, public funds invested in social housing dwellings, the Government wished to control how such dwellings could be used. This interpretation is supported by the exceptions contained within the Act to these requirements. A disposal that was an assured or a secure tenancy for example, did not require the regulator's consent.<sup>170</sup> Given that providing homes for low cost rent is one of the grounds upon which a body can register as a provider of social housing, it is not surprising that the consent of the regulator was not required to undertake such activities. Another form of disposal that did not require the regulator's consent was a disposal made as a result of a sale under the right to buy or right to acquire.<sup>171</sup> Again this exception came as a result of an alternative Government policy, the promotion of home ownership, taking precedence.

If a disposal did not fit within one of the exceptions noted within the Act, then any failure to get the regulator's consent would lead to the disposal being void, unless it was a disposal of a single dwelling and the provider reasonably believed that the buyer intended to use the dwelling as their principle residence.<sup>172</sup> Such consent could be granted either generally or specifically (to particular providers or particular types of property, for example).<sup>173</sup> It is also worth noting that a non-profit providers had to notify the regulator when a disposal of land other than a social housing dwelling was made.<sup>174</sup>

The system clearly placed constraints on how registered providers could operate in England. These constraints were felt by the ONS to constitute such control as to necessitate a reclassification under ESA 2010 rules. The Westminster Government's reaction to this finding has been to significantly reduce the HCA's disposals consent powers. Registered

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<sup>168</sup> Classification Announcement (n156)

<sup>169</sup> Housing and Regeneration Act 2008, s 172

<sup>170</sup> *ibid*, s 173(2)(1)

<sup>171</sup> *ibid*, s 173(4)(5)

<sup>172</sup> *ibid*, s 175

<sup>173</sup> *ibid*, s 174

<sup>174</sup> *ibid*, s 176

providers in England will no longer be required to gain the consent of the regulator before they dispose of any property.<sup>175</sup> Instead, registered providers will only be required to notify the regulator that a disposal has taken place.<sup>176</sup> For-profit registered providers will only be required to notify the regulator if the disposal is of a social housing dwelling, whilst a non-profit provider will be required to notify the regulator after the disposal of any land.<sup>177</sup>

It remains to be seen whether these steps are sufficient for the Minister to succeed in meeting his objective of getting providers 'off Government books'.<sup>178</sup> Registered providers are now certainly subjected to far less Government control than was the case under the old regime. In order to understand the impact of these changes on divergence, it is necessary to examine the law in Wales, and how this compares to both the old, and current system in England.

The powers of the Welsh Government, under the Housing Act 1996 with regard to disposals, are very similar to, if not slightly greater than, the ones enjoyed by the UK Government under the Housing and Regeneration Act 2008 before it was amended. Whilst in England, consent was only required for the disposal of a social housing dwelling, in Wales, RSLs must get the consent of the regulator before disposing of any land.<sup>179</sup> As was the case in England, there are exceptions to this requirement. A letting made as an assured tenancy or a secured tenancy, for example, does not require consent in Wales,<sup>180</sup> and neither do disposals made under the right to buy or right to acquire.<sup>181</sup> The process by which consent can be granted in Wales is also extremely similar to the old process in England. The consent can be granted generally to all RSLs, or to types of land generally.<sup>182</sup> Furthermore, legislation in Wales is very similar to the old regime in England when it comes to what happens if a disposal has been made without consent. As was the case in England, the disposal is void unless the disposal was of a single house, to an individual for whom; the RSLs reasonably believed that the house would be their principal dwelling.<sup>183</sup> It would seem that the law with regard to disposal consent in Wales and England had already diverged, all be it slightly, before the enactment of the Housing and Planning Act 2016. It is therefore not surprising that one of the reasons behind the ONS's decision to reclassify Welsh RSLs as part of the public sector

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<sup>175</sup> Housing and Planning Act 2016, schedule 4, para 15

<sup>176</sup> *ibid*, para 16

<sup>177</sup> *ibid*

<sup>178</sup> Communities and Local Government Committee, *Housing Associations and the Right to Buy*, (2015-16 HC 370) oral evidence by Brandon Lewis the Minister of State for Housing and Planning

<sup>179</sup> Housing Act 1996, s 9

<sup>180</sup> *ibid*, s 10

<sup>181</sup> *ibid*

<sup>182</sup> *ibid*, s 9

<sup>183</sup> *ibid*

were the *'Welsh Ministers' consent powers over the disposal of land and the disposal of housing assets'*.<sup>184</sup>

The finding that the law in Wales and England only varied slightly prior to the enactment of the Housing and Planning 2016 has important implications. Given the limited dissimilarities that had developed prior to the enactment of the Housing and Planning Act 2016, it was the deregulatory steps taken in England that significantly increased divergence between both nations. This raises a question about what really drives divergence. As noted, this question will be addressed in Chapter 8, but the fact that the Welsh Ministers retain their disposals consent powers, whilst their counterparts in England do not, is undoubtedly an important difference in the law of the two nations. It would seem that this variation does have its roots in the ONS's decision to reclassify PRPs in England. It remains to be seen whether the Welsh Government will adopt the same deregulatory measures as their Westminster counterparts as they react to the ONS's decision in Wales. If, as appears likely, that the Welsh Government does decide to do so, then the significance of the ONS's decision would be unquestionable in light of the finding set out above. The law in Wales and England would converge, not only removing the differences that had developed as a result of the Housing and Planning Act 2016 but also, potentially removing the differences that had developed before its enactment, raising questions about the capacity of the Assembly to develop an alternative approach to housing policy and to social housing regulation, in particular.

### 6.3.3 Disposals Proceeds Fund

The second set of powers that led the ONS to reach its conclusion, concerned the Disposals Proceeds Fund. Under the old regime, not only did registered providers have to obtain the regulator's consent before disposing of social housing dwellings, but the Government also exerted control over the way in which they could spend the money raised from such disposals. Under section 177 of the Housing and Regeneration Act 2008, the net proceeds of any disposal had to be shown in a separate *'disposals proceeds fund'*.<sup>185</sup> Section 177 set out ten forms of disposals that were to be considered *'net disposal proceeds'* for the purposes of the fund.<sup>186</sup> These included the net proceeds of sale made as a result of the right to acquire, and the net proceeds of sale of property in respect of which a grant had been made.<sup>187</sup> This fund could then only be used in accordance with directions issued by the regulator, following approval by the Secretary of State.<sup>188</sup> If the fund remained unused at the

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<sup>184</sup> Classification Announcement Wales (n160)

<sup>185</sup> Housing and Regeneration Act 2008, s 177

<sup>186</sup> *ibid*

<sup>187</sup> *ibid*

<sup>188</sup> *ibid*, s 178

end of a period specified by the regulator, the regulator could require the provider to pay the funds to the HCA or the Greater London Authority, where applicable.<sup>189</sup> The Housing and Planning Act 2016 abolishes the Disposals Proceeds Fund.<sup>190</sup>

This is another important deregulatory move by the UK Government. Under the directions set by the regulator, registered providers in England could, on the whole, only use the Disposals Proceeds Fund for the provision of dwellings at social or affordable rent.<sup>191</sup> Such restrictions will not be present in future. Between 2009 and 26 January 2016, 17 registered providers had been ordered to repay sums to the Homes and Communities Agency from the Disposal Proceeds Fund.<sup>192</sup> These repayments totalled £3,703,745.<sup>193</sup> The HCA will not have access to these funds in future. These deregulatory changes introduced by the Government at Westminster could reduce the amount of money invested into social housing in England, given that registered providers will not be under a regulatory obligation to reinvest the proceeds of their disposals in social housing.

The powers of the Welsh Government with regard to disposals proceeds are almost identical to the ones that the HCA and the Westminster Government exercised under the old regime in England. As was the case in England, an RSL in Wales is required to show the net disposals of a sale in a separate disposal proceeds fund.<sup>194</sup> The types of disposals to be considered 'net disposal proceeds' in Wales, are again very similar to England<sup>195</sup> as are the powers of the regulator to intervene if the funds are not used appropriately.<sup>196</sup> It would therefore seem that the legislation on disposals proceeds in Wales and England had not diverged at all before the enactment of the Housing and Planning Act 2016. Given this similarity, the ONS's decision to reclassify RSLs in Wales as part of the public sector due to the Welsh Government's '*consent powers over the disposal of land and the disposal of housing assets*' is not surprising.<sup>197</sup> Furthermore, it would seem, once again, that it was the decision of the ONS to reclassify registered providers in England, and the Westminster

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<sup>189</sup> *ibid*

<sup>190</sup> Housing and Planning Act 2016, Schedule 4, Part 3, Para 32 and Para 33. The Act does permit the Secretary of State to make interim provisions in relation to sums that were already in the Fund at the time that the Act came into force.

<sup>191</sup> Homes and Communities Agency, 'Disposals Proceeds Fund Requirements of the Social Housing Regulator' (April 2015)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/419213/DPF\\_Requirements\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419213/DPF_Requirements_2015.pdf) Registered providers were also permitted to use the funds to construct homes for shared ownership.

<sup>192</sup> E-mail from Carole Harrison of the Homes and Communities Agency to Steffan Evans (1 February 2016)

<sup>193</sup> *ibid*. It is worth noting that this sum does not include the amount repaid to the Greater London Authority.

<sup>194</sup> Housing Act 1996, s 24

<sup>195</sup> *ibid*

<sup>196</sup> *ibid*, s 25

<sup>197</sup> Classification Announcement Wales (n160)

Government's subsequent reaction to it, that led to the development of divergence. Whether this newly created divergence is removed by the enactment of future legislation in Wales remains to be seen. Whilst any such legislation would remove divergence it would also signify a shift in the law, with the Welsh Government losing another control over the sector in Wales.

#### 6.3.4 Disposal consent after deregistration

The third control cited by the ONS was the powers of the Government under section 186 of the Housing and Regeneration Act 2008. Section 186 ensured that the Government's consent to disposals powers continued even after deregistration.<sup>198</sup> This meant that a person, who owned a social housing dwelling whilst registered, would continue to need the consent of the regulator before they could dispose of that dwelling, even after deregistration.<sup>199</sup> Given that the Housing and Planning Act 2016 removed the requirement for registered providers to get the consent of the regulator before they disposed of such dwellings, it is no surprise that this requirement has also been removed post-deregistration.<sup>200</sup> Those disposing of such property will now only be required to notify the regulator of such a disposal, not seek their consent.<sup>201</sup>

The system in Wales is extremely similar to the one that was in place in England before the Housing and Planning Act 2016 made amendments to the Housing and Regeneration Act 2008.<sup>202</sup> These are not the only controls that the Welsh Government exercises over social housing disposals post deregistration. The Housing Act 1996 also places restrictions on how a property can be used by a purchaser after the initial disposal. If the disposal was made, subject to a discount, then the Act inserts a number of covenants into the relevant conveyance, grant or assignment.<sup>203</sup> One such covenant requires the purchaser to pay a sum to the RSL if he or she disposes of the property within 5 years of the original disposal.<sup>204</sup> The liability under the covenant appears as a charge against the house,<sup>205</sup> and takes priority immediately after any charge left outstanding by the purchaser or any charge by a lender that allowed the purchaser to secure the first disposal.<sup>206</sup> A second such covenant gives an RSL the right of first refusal on a property, for ten years, under conditions

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<sup>198</sup> Housing and Regeneration 2008, s 186

<sup>199</sup> *ibid*

<sup>200</sup> Housing and Planning Act 2016, Schedule 4, para 18

<sup>201</sup> *ibid*

<sup>202</sup> Housing Act 1996, s 9(6)

<sup>203</sup> *ibid*, s 11

<sup>204</sup> *ibid*

<sup>205</sup> *ibid*

<sup>206</sup> *ibid*, s 12



prescribed by the Welsh Ministers through regulations.<sup>207</sup> In this light it is not surprising that the Welsh Government's control powers over disposals led the ONS to reclassify Welsh RSLs as part of the public sector. If, as seems likely, the Welsh Government reacts to the ONS's decision by reducing its controls over RSLs in Wales, the law in Wales and England will converge, eroding the dissimilarities that had developed before the enactment of the Housing and Planning Act 2016.

### 6.3.5 Consent powers over voluntary winding-up, dissolution, and restructuring

The fourth reason given by the ONS for its reclassification of registered providers in England is slightly detached from the first three. It concerned the Government's control over voluntary winding-up, dissolution, and restructuring of non-profit providers.<sup>208</sup> These powers could be split in two. The first concerned the powers of the regulator over registered providers that were companies. The second, the powers of the regulator over registered providers that were registered societies. The powers of the regulator with regard to both types of providers were extremely similar. A non-profit provider that was a company needed the consent of the regulator before winding-up,<sup>209</sup> converting into a society<sup>210</sup> and restructuring, amongst other activities.<sup>211</sup> A non-profit provider that was a registered society, needed the consent of the regulator before restructuring,<sup>212</sup> winding up<sup>213</sup> or its dissolution.<sup>214</sup>

Not only did these statutory provisions mean that registered providers needed the consent of the regulator before making structural changes, the Housing and Regeneration Act 2008 also gave the regulator powers to petition for the winding up of a registered society or a company.<sup>215</sup> The regulator could exercise these powers in three circumstances; when the provider failed to carry out its objectives, when the provider was unable to pay its debts, and when the regulator ordered the provider to transfer all its land to another person.<sup>216</sup>

These powers provided the HCA and the Government with a significant degree of control over registered providers. The regulator's right to petition for the winding up of a company or a registered society was clearly a substantial power but the Government's consent powers were arguably more significant. It was these powers that meant that any registered providers

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<sup>207</sup> *ibid*, s 12A

<sup>208</sup> Classification Announcement (n156)

<sup>209</sup> Housing and Regeneration Act 2008, s 162

<sup>210</sup> *ibid*, s 161

<sup>211</sup> *ibid*, s 160

<sup>212</sup> *ibid*, s 163

<sup>213</sup> *ibid*, s 164

<sup>214</sup> *ibid*, s 165

<sup>215</sup> *ibid*, s 166

<sup>216</sup> *ibid*

that were seeking to merge in England needed the consent of the Government, acting through the HCA, before doing so. As a result, the Government had control over how registered providers developed. The amendments introduced by the Housing and Planning Act 2016 reduce these controls and give registered providers greater freedoms to develop as they please.

For example, the regulator is no longer able to petition for the winding up of a provider.<sup>217</sup> More importantly, the Act has also reduced the regulator's consent powers. Non-profit registered providers that are companies are now only required to notify the regulator if they convert into a society or if they restructure.<sup>218</sup> Non-profit registered providers that are societies on the other hand are only required to notify the regulator before restructuring or their dissolution.<sup>219</sup> Yet the Housing and Planning Act 2016 does not completely strip the regulator and the Government of its powers. Registered providers are still required to obtain the consent of the regulator before petitioning to be wound-up, whether the provider is a company or a registered society.<sup>220</sup> Furthermore, whilst a provider no longer requires the consent of the regulator before restructuring, the statute still provides the regulator with a degree of control. If the changes made by a provider mean that it would no longer satisfy the registration requirements of the regulator, then the regulator is permitted to notify the provider of that fact.<sup>221</sup>

Whilst the HCA still retains a degree of statutory control over the structure of registered providers in England, it would appear that in practice, their powers will be decreased further. The HCA are about to open consultation over the registration requirements for merged providers.<sup>222</sup> The HCA is proposing to remove the requirement for registered providers to undergo the full registration process if they merge with another registered provider.<sup>223</sup> The new regime would, according to Inside Housing, provide merged providers with '*near to automatic approval for registration*'<sup>224</sup> thereby decreasing the regulator's control over the way that the sector develops in England further. This process further emphasises the validity of the thesis's main themes. The enactment of the Housing and Planning Act 2016 clearly changed and decreased the regulator's power over the social housing sector in England. If

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<sup>217</sup> Housing and Planning Act 2016, Schedule 4, Part 2, Para 29

<sup>218</sup> *ibid*, Schedule 4, Part 2, Para 24, 25, 26, 27, 28

<sup>219</sup> *ibid*

<sup>220</sup> *ibid*

<sup>221</sup> *ibid*

<sup>222</sup> Heather Spurr 'HCA to relax registration rules' (*Inside Housing*, 9 May 2016)

<http://www.insidehousing.co.uk/business/regulation/risk-and-judgements/hca-to-relax-registration-rules/7015135.article?adfesuccess=1> accessed 15 June 2016

<sup>223</sup> *ibid*

<sup>224</sup> *ibid*

the HCA were to decide, however, to apply their regulatory powers over the registration of housing associations in a rigorous manner, the regulator would still enjoy a degree of control over the structural make up of social housing providers in England. As such, the significance of the divergence that has developed between Wales and England with regard to the regulator's primary legislative powers, in this instance, only becomes fully apparent after examining the way in which the regulator has interpreted their powers, highlighting the need to explore divergence at a number of levels.

As with the other powers of the regulator discussed to date, the old regime that was in place in England was extremely similar to the one that is still in place in Wales. The powers of the regulator in Wales are set out in Schedule 1 of the Housing Act 1996. An RSL that is a registered society must only give notice to the regulator if it changes its name or location.<sup>225</sup> For all other changes, the consent of the regulator is required.<sup>226</sup> The same is also true for RSLs that are registered companies,<sup>227</sup> whilst an RSL that is a registered charity, but not a registered company must get the consent of the Charity Commission before changing its objects.<sup>228</sup> The Charity Commission is not permitted to grant such consent without first consulting the regulator.<sup>229</sup> In addition to this, a registered society must obtain the consent of the regulator before they can register an amalgamation, a transfer of engagements, convert into a company, dissolve or applying to be wound up.<sup>230</sup> Similar provisions are also in place for RSLs which are companies.<sup>231</sup> As was the case in England, the Welsh Government also has the power to petition for the winding-up of an RSL that is a company or a registered society if it is failing to properly carry out its objects or if it is in financial difficulty.<sup>232</sup>

The similarity between the old system that was in place in England and the one still in place in Wales is evident and emphasizes the significance of the differences that have appeared between Wales and England as a result of the deregulatory changes enacted through the Housing and Planning Act 2016. Registered providers in England now have far greater freedoms to organise their corporate affairs than their counterparts in Wales. Such freedoms will increase further if the HCA decides to go ahead with their proposals to decrease the registration requirements for merged providers. This greater freedom could lead to the sector in England developing in ways that at present might be unexpected. For example, in

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<sup>225</sup> Housing Act 1996, Schedule 1, Para 9

<sup>226</sup> *ibid*

<sup>227</sup> *ibid* Schedule 1, Para 11

<sup>228</sup> *ibid* Schedule 1, Para 10

<sup>229</sup> *ibid*

<sup>230</sup> *ibid* Schedule 1, Para 12

<sup>231</sup> *ibid* Schedule 1, Para 13

<sup>232</sup> *ibid* Schedule 1, Para 14

December 2015 the National Housing Federation published a voluntary merger code for housing associations in England.<sup>233</sup> The code has been criticised by a number of associations. Some associations in England have argued that the code is too burdensome and favours predatory takeovers.<sup>234</sup> Others have argued that the code does not adequately protect the interest of tenants and have developed their own code.<sup>235</sup> Given that the code is voluntary and that the deregulatory measures contained in the Housing and Planning Act 2016 means that there are now limited Government controls over the sector in England, it is possible that the social housing sector in England could fragment, with registered providers having differing policy priorities when it comes to their corporate development. The more extensive Government control in Wales means that such an eventuality is less likely on the western side of Offa's Dyke. Whether this continues to be the case appears uncertain given that the ONS cites the Welsh Government's '*powers over constitutional changes of an RSL*' as one of the reasons that led it to reclassify Welsh RSLs as part of the public sector.<sup>236</sup> It seems likely that any legislation enacted by Welsh Government to reverse the ONS's decision would see its controls over the constitution of RSLs reduced.

### 6.3.6 Management powers

The final set of powers cited by the ONS concerned the UK Government's powers over the management of private registered providers. The ONS cited the powers of the HCA to appoint managers and officers in particular, as controls that led them to reclassify the status of registered providers. These powers are numerous but, in contrast to the other regulatory powers discussed above, the UK Government has been reluctant to introduce deregulatory moves with regard to these powers, on the ground that these are key for any regulator.<sup>237</sup> As such, the Government has only been prepared to tighten, not remove, these regulatory powers. This suggests that whilst the Government is prepared to be influenced by the ONS, there are some regulatory powers that the Government believes are too important to be removed, and as such they are willing to challenge the ONS.

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<sup>233</sup> National Housing Federation, 'Mergers, Group Structures and Partnerships, A voluntary code for housing associations' (November 2015) [http://s3-eu-west-1.amazonaws.com/pub.housing.org.uk/Mergers\\_Group\\_Structures\\_and\\_Partnerships\\_Code.pdf](http://s3-eu-west-1.amazonaws.com/pub.housing.org.uk/Mergers_Group_Structures_and_Partnerships_Code.pdf) accessed 15 June 2016

<sup>234</sup> Heather Spurr 'Concern over 'burdensome' merger code' (*Inside Housing*, 27 January 2016) <http://www.insidehousing.co.uk/business/regulation/value-for-money/concern-over-burdensome-merger-code/7013690.article> accessed 15 June 2016

<sup>235</sup> Carl Brown 'Associations to develop 'alternative' merger code' (*Inside Housing*, 3 May 2016) <http://www.insidehousing.co.uk/business/regulation/associations-to-develop-alternative-merger-code/7015023.article?adfesuccess=1> accessed 15 June 2016

<sup>236</sup> Classification Announcement Wales (n160)

<sup>237</sup> Interview with Kerry Mac Hale, Policy lead on social housing regulation, UK Government (Telephone interview, 17 May 2016)

The first set of management powers cited by the ONS concern the HCA's powers of appointment in the event of insolvency. The Housing and Regeneration Act 2008 gives the regulator the right to appoint an interim manager, which has a number of powers over the provider, during a moratorium.<sup>238</sup> Under the Act the regulator is also permitted to develop proposals for the future of a provider during a moratorium, and to then appoint a manager to implement them.<sup>239</sup> The powers of such managers are numerous and can be substantial. For example, a manager appointed under a moratorium to implement a proposal is permitted to make and execute an instrument providing for the amalgamation of a registered society or for transferring its engagements.<sup>240</sup> No amendments were made to these powers with the enactment of the Housing and Planning Act 2016.

The second set of powers cited by the ONS within this category directly concerns the regulator's management powers.<sup>241</sup> If the regulator is satisfied that a provider has failed to meet a standard, mismanaged its social housing or failed to comply with a number of statutory provisions, then the regulator may require the provider to tender for the appointment of a new manager, or the regulator may directly appoint an individual to act as manager of the provider.<sup>242</sup> In addition to these powers the regulator enjoys further controls over the management of registered providers. The regulator may, under certain conditions, order that the management functions of a provider should be transferred to a specified person.<sup>243</sup> Again the UK Government has made no attempts to remove these controls over the sector through the Housing and Planning Act 2016, despite the ONS's decision.

The ONS pinpoints two further powers of the regulator within this final category. These are the regulator's powers to appoint someone to carry out the functions of a suspended person,<sup>244</sup> and the regulator's powers to appoint new officers to a provider.<sup>245</sup> It is only with regard to this last power that the UK Government has introduced deregulatory provisions through the enactment of the Housing and Planning Act 2016. The 2016 Act replaced one of the grounds upon which the regulator could appoint new officers. Whilst the Housing and Regeneration Act 2008 had permitted the regulator to appoint an additional officer if it felt that it was '*necessary for the proper management of the body's affairs*'<sup>246</sup> the Housing and Planning Act 2016 removed this ground. In its place the 2016 Act inserted a new ground.

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<sup>238</sup> Housing and Regeneration Act 2008, s 151

<sup>239</sup> *ibid*, s 152

<sup>240</sup> *ibid*, s 157

<sup>241</sup> *ibid*, s 246

<sup>242</sup> *ibid*, s 247, s 251

<sup>243</sup> *ibid*, s 249

<sup>244</sup> *ibid*, s 261(3)

<sup>245</sup> *ibid*, s 269

<sup>246</sup> *ibid*, s 269 (1)(c)

The regulator will now be permitted to appoint an additional officer if it is necessary to ensure that a *'registered provider's affairs are managed in accordance with legal requirements'*.<sup>247</sup>

In comparison with the significant deregulatory measures taken by the UK Government in response to the ONS's reclassification announcement, the steps taken by the Government with regard to its powers of appointment have been minimal. It remains to be seen whether their reluctance to relinquish these controls will impact on any future ONS review of English registered providers. One consequence of the UK Government's reluctance to deregulate in this area has been to limit the development of divergence between the powers of appointment of the regulators in Wales and England. As such, there is very minimal variation between both nations with regard to these powers.

As in England, the regulator in Wales has powers to appoint a manager in the event of insolvency and to develop provisions for the future of an RSL during a moratorium.<sup>248</sup> The Welsh Government also has the power to require an RSL to tender for appointment of a new manager, to order the transfer of management, or to appoint a new manager, if the RSL has failed to meet its statutory standards, or where there has been misconduct or mismanagement in the affairs of the housing association.<sup>249</sup> In addition to this, the Welsh Government has powers to appoint new officers to RSLs in Wales.<sup>250</sup> These powers have diverged slightly from the position in England, where the powers of the regulator were tightened by the enactment of the Housing and Planning Act 2016. In Wales, the Welsh Government does retain the power to appoint a new officer if it believes that *'it is necessary for the proper management of the charity/ company/ society's affairs...'*<sup>251</sup> With this one exception the law in Wales and England has barely diverged.

Given that Westminster's Government's belief that these powers are crucial if regulation is to be effectively undertaken,<sup>252</sup> it is interesting to note that the ONS stated that the Welsh Government's *'powers over the management of an RSL'* was also one of the reasons that led to its decision to reclassify Welsh RSLs as part of the public sector.<sup>253</sup> During interview the ONS revealed that their reclassification decision had been taken on the sum of all evidence.<sup>254</sup> It was made clear, however, that if there is sufficient evidence against one of

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<sup>247</sup> Housing and Planning Act 2016, Schedule 4 part 4, para 37

<sup>248</sup> Housing 1996 Act schedule 1, Part 2, Paras 43A, 44, 44, 45, 46, 48

<sup>249</sup> *ibid* schedule 1, Part 2, Paras 15B, 15D, 15F

<sup>250</sup> *ibid* schedule 1, Part 2, Paras 6, 7, 8

<sup>251</sup> *ibid* schedule 1, Part 2, Paras 6, 7, 8

<sup>252</sup> Interview with Kerry Mac Hale, Policy lead on social housing regulation, UK Government (Telephone interview, 17 May 2016)

<sup>253</sup> Classification Announcement Wales (n160)

<sup>254</sup> Interview with a member of the Office for National Statistics Classifications Team, (Newport, 8 April 2016)

the indicators then this can be enough to indicate control.<sup>255</sup> Despite the UK Government's protestations, it would appear that the ONS still considers appointment powers as grounds for classifying housing associations as part of the public sector. What is unclear is whether these powers, by themselves, amount to sufficient evidence of control to necessitate the classification of housing associations as part of the public sector. If the ONS were to decide that such powers were sufficient to require this, then the Welsh and UK Governments will have to choose between maintaining their desired degree of regulatory control, and ensuring that housing associations are returned to the private sector.

#### 6.4. Conclusion

This chapter has demonstrated a number of interesting ways in which social housing regulation in Wales and England has diverged over recent years. The impact of this divergence upon the sector has been significant. These differences mean that different types of housing associations are permitted to register with the regulators in Wales and England. The work these bodies are permitted to undertake has also diverged, with English registered providers no longer having to construct homes for social rent to be eligible for registration, in contrast to their Welsh colleagues. The chapter has demonstrated that the way by which regulation protects tenants has also diverged. It has highlighted how tenants in Wales are granted greater protection by regulation than their English counterparts due to a differing approach to setting and monitoring performance standards, showing how divergence could have a real impact on the ground. Finally, the chapter examined how the decision of the ONS to reclassify English registered providers has led the UK Government to relinquish a substantial degree of control over the sector. The chapter has demonstrated how this has increased variation in the short term but how this could diminish in future.

In addition to examining the extent by which divergence has developed over recent years the chapter has also further highlighted three key themes that have appeared in this thesis. The chapter has demonstrated the complicated way in which divergence develops. Divergence has not developed in a straightforward and linear manner; rather, it developed at a number of levels and as a result of legislation in both Cardiff Bay and Westminster. This theme has appeared throughout the chapter but perhaps in particular with regard to sections 6.1 and 6.2, which set out how differences between the registration requirements faced by RSLs and registered providers, and the variation that has developed between the way that tenants are protected in Wales and England, have developed. This chapter has also shown how a number of different factors can impact upon divergence process, including politics, as

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<sup>255</sup> *ibid*

discussed in 6.1 and 6.2, and international accountancy standards, as discussed in 6.3. These three themes will continue to appear throughout the remainder of this thesis.



## 7 The Drivers of Divergence and Convergence – Constitutional Factors

Having examined the differences that have developed between Wales and England in Chapter 6, the thesis now turns to examine the factors that have driven the divergence process. The thesis discusses these factors over two chapters, setting out how these compete with, and work with each other, leading to the development of both regulatory divergence and convergence. Chapter 7 focuses on two such factors: policy and politics, and the limits of devolution.

This chapter first looks at the impact of policy and politics on the development of variation in social housing regulation between Wales and England. It examines policy documents and legislation to see whether there is evidence of any ideological and policy differences leading to divergence. Having undertaken this examination, the focus of the chapter turns to the impact of non-devolved areas on the Assembly's ability to pursue its own direction regarding housing policy. The thesis has already highlighted how such limitations have constrained the Assembly in the past, exploring the difficulties the Assembly faced enacting the Housing (Wales) Measure 2011.<sup>1</sup> Whilst the barriers that delayed the enactment of the 2011 Measure have been removed, other constraints remain on the Assembly. This chapter explores these constraints, setting out their impact on the process of divergence.

In inspecting the impact of these two factors on the development of divergence and convergence the thesis refers back to Chapter 6. Chapter 6 provided a snapshot of the differences that have developed between Wales and England with regard to three aspects of the regulatory framework, labelled 'registration', 'tenant protection' and 'the problematic powers'. These three aspects of regulation are now used to illustrate how both policy and politics, and the limits of devolution, have driven and constrained divergence. Having examined the impact of constitutional factors on the divergence process in this chapter, Chapter 8 will move on to focus on the impact of sector specific factors on the development of divergence and convergence.

### 7.1 Politics and policy

In the foreword to *A Voice for Wales; The Government's Proposals for a Welsh Assembly* the then Secretary of State for Wales, Ron Davies stated:

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<sup>1</sup> See 5.1.2

The Assembly will let the people express their own priorities – for better schools and health services, for bringing the quangos under control and into the open; for directing the £7,000 million of Welsh Office spending where it is most needed.

The environment, housing, transport and business would all benefit from a strategic view based on the needs of the whole of Wales.<sup>2</sup>

It would seem that allowing for the development of policy divergence was one of the primary reasons given by the backers of devolution for establishing the National Assembly in 1999. As has been demonstrated in Chapters 3, 4 and 5, devolution is not a new phenomenon in Wales. Housing has been devolved to Wales to some extent or another since 1 May 1940.<sup>3</sup> The Welsh Board of Health and subsequently the Welsh Office had, however, been established to administer the UK Government's policy in Wales, not to develop their own distinctive policies. The establishment of the National Assembly in 1999, therefore, significantly increased the possibility that distinctive Welsh policies would be implemented.<sup>4</sup>

Politicians in Wales seem to have grasped the opportunity that devolution presented them early into the life of the National Assembly. On 11 December 2002 Rhodri Morgan, the then-First Minister, delivered his landmark 'clear red water' speech.<sup>5</sup> In the speech, Morgan sets out the different approach taken by his Government on health and education to the approach taken by Tony Blair's New Labour Government at Westminster.<sup>6</sup> He emphasises the importance of social universalism to his Government in an attempt to draw a contrast with the approach taken at Westminster.<sup>7</sup> Only a few years later this 'clear red water' began to be seen in the context of social housing regulation.

Between June 2007 and October 2010, three influential reports were published that were to lead to important changes in the way that regulation was undertaken in Wales and England. Each report would lead to legislative changes. Professor Robert Cave published the first of the reports in June 2007. *Every Tenant Matters: A Review of social housing regulation* (otherwise referred to as the Cave Review). The Report contained recommendations on how

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<sup>2</sup> Welsh Office, *A Voice for Wales; The Governments Proposals for a Welsh Assembly*, (White Paper, Cm 3718, 1997) p5

<sup>3</sup> On May 1 1940 housing functions were first devolved to the Welsh Board of Health. See 2.3

<sup>4</sup> This potential was increased in 2006 with the enactment of the Government of Wales Act 2006. The Act transferred primary law making powers to the Assembly for the first time. These powers were expanded further following a referendum in 2011. Following a yes vote the statutory basis for devolution in Wales was changed, moving from Part 3, Schedule 5 of the Government of Wales Act 2006, to Part 4 Schedule 7 of the Act.

<sup>5</sup> Rhodri Morgan, 'Clear Red Water Speech' (the National Centre for Public Policy, 11 December 2002)

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

social housing regulation in England should be changed.<sup>8</sup> Several of the recommendations were taken forward by the UK Government and were put into force through the enactment of the Housing and Regeneration Act 2008.<sup>9</sup> The second report was commissioned only four months later. A Task and Finish Group, led by Sue Essex was commissioned by the Welsh Government's Deputy Minister for Housing, Jocelyn Davies. The group was established to review the way that social housing regulation was being undertaken in Wales.<sup>10</sup> By June 2008 the Group had published its report, *Affordable Housing Task and Finish Group, Report to the Deputy Minister for Housing*.<sup>11</sup> The Report was to have an influence on the development of the regulatory framework in Wales, and would also have a legislative impact with the Housing (Wales) Measure 2011 enacted three years after its publication.<sup>12</sup> The last of the reports was published in October 2010 by the Department for Communities and Local Government. The *Review of social housing regulation* (known as the DCLG Review) made further recommendations on how social housing regulation in England should be changed.<sup>13</sup> Some of the Report's recommendations were put into legislation the following year through the enactment of the Localism Act 2011.<sup>14</sup> These three Reports and the reaction to them fundamentally changed how social housing regulation was undertaken in Wales and England, leading to divergence. This chapter will examine the three Reports in detail looking to see whether the incidences of divergence and convergence seen in their wake can be attributed to them. The chapter will also explore why these Reports developed differing or similar approaches, looking at the context within which these Reports were developed.

### 7.1.1 The political context

The three Reviews into social housing regulation in Wales and England were undertaken under unique political pressures. The impact that this pressure had on the Reports' authors seem to vary, but the distinctive environment within which each of the Reports were developed, does seem to have influenced their approaches and recommendations.

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<sup>8</sup> The Cave Review of Social Housing Regulation, *Every Tenant Matters: A Review of Social Housing Regulation* (June 2007)

<sup>9</sup> For example, Housing and Regeneration Act 2008, s 112 which allowed profit-making organisations to register as providers of social housing in England.

<sup>10</sup> *Affordable Housing Task and Finish Group, Report to the Deputy Minister for Housing* (June 2008)

<sup>11</sup> *ibid*

<sup>12</sup> For example, Housing (Wales) Measure 2011 Chapter 4 amends the Housing Act 1996 and increase the enforcement powers of the regulator as recommended by Essex and her team.

<sup>13</sup> Department for Communities and Local Government, *Review of Social Housing Regulation*, (October 2010)

<sup>14</sup> For example, Localism Act 2011, s 178 abolished the TSA and transferred its functions to the HCA Regulatory Committee.

### 7.1.1.1 The Cave Review

The Cave Review was announced by the Secretary of State for Communities and Local Government on 14 December 2006.<sup>15</sup> The Review contains a foreword by the Secretary of State, Ruth Kelly which sets out the challenges she believed needed to be confronted in relation to housing.<sup>16</sup> One of these challenges identified by Kelly was the *'need to think about how social housing can continue to meet its goals in the twenty-first century'*.<sup>17</sup> To this end, Kelly wished to ensure that the sector could deliver both *'security and opportunity'* to the 4 million social housing tenants.<sup>18</sup> Kelly set out in her foreword that she believed that the principles underpinning social housing remained sound, but she believed that it could become a more effective *'platform for social mobility'*.<sup>19</sup> To this end Kelly believed that:

In the twenty-first century we need a regulatory system that enables social housing to respond more effectively to people's changing needs. That gives tenants more opportunity to have their say, and demand action on the issues that matter to them. And that ensures Government gets the most out of its investment.<sup>20</sup>

The Cave Review was therefore undertaken within an environment where there was an overarching political wish to increase transparency and flexibility within the social housing sector, whilst also ensuring a return on Government investment. In addition to these broader goals, Cave's team undertook their review subject to more specific expectations. The Report on the Review clearly sets out what the Review team had considered to be the purpose of their work, as shown by the following extract:

The purpose of the Review is to establish a regulatory system for social housing which is clearer and more effective than the present set of arrangements in ensuring that social housing providers are regulated according to a clear set of objectives and accords with established principles of good regulation.<sup>21</sup>

This was to be done whilst also finding a clear view:

- about the scope of social housing which is subject to regulation, whether defined in terms of organisational type or activity

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<sup>15</sup> Cave Review (n8) 29

<sup>16</sup> *ibid* 5

<sup>17</sup> *ibid*

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

<sup>20</sup> *ibid* 6

<sup>21</sup> *ibid* 29

- of the rationale for regulating social housing
- about the extent to which the current regulatory arrangements have been effective
- of the necessary attributes of the future regulatory system that best address the features of social housing which require it to be regulated.<sup>22</sup>

In other words, the Westminster Government had, in effect, requested that Cave and his team undertake a root and branch review of the way in which social housing regulation was undertaken in England, to be developed in line with its other housing policy objectives. With such a remit, it is perhaps not surprising that the Cave Review was to make recommendations that were to change the way that regulation was undertaken in England.<sup>23</sup>

#### 7.1.1.2 *The Essex Review*

Only a few months later the Task and Finish Group was established to review social housing regulation in Wales. The group was set up shortly after the formation of the One Wales Government, a coalition between Labour and Plaid Cymru.<sup>24</sup> Essex sets out in her Report how the group had been established with the objects of the *One Wales Document* (the coalition agreement that underpinned the Government) in mind.<sup>25</sup> The *One Wales Document* contained a commitment to deliver 6,500 affordable homes over the course of the Assembly.<sup>26</sup> In order to achieve this objective and others concerning the provision of affordable housing, the Government proposed to increase funding support for social housing and improve the supply of public land amongst other pledges.<sup>27</sup> Essex sets out that her group had therefore adopted an approach that had a clear focus on '*identifying ways forward on affordable housing*' within the Welsh Government's overall objectives on '*sustainability, regeneration, social justice and wellbeing*'.<sup>28</sup>

The initial impetus for the Essex Review had been concerns about:

whether the current regulatory framework for Welsh housing associations (HAs) was appropriate for the commitment to deliver more affordable housing.<sup>29</sup>

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<sup>22</sup> *ibid* 31

<sup>23</sup> *ibid* 21. For example, the recommendation that a regulator should be set up independent from Government.

<sup>24</sup> Essex Review (n9) October 2007

<sup>25</sup> *ibid* 7

<sup>26</sup> *ibid*

<sup>27</sup> *ibid*

<sup>28</sup> *ibid* 8

<sup>29</sup> *ibid*

The Task and Finish Group had, however, been asked to consider a number of other issues through its terms of reference. These were:

- Constraints on Registered Social Landlords (RSLs) ability to deliver broader social products necessary for sustainable communities, including tackling homelessness;
- Opportunities for attracting/releasing more investment or funding in the sector to meet the One Wales goals;
- Incentivising higher environmental standards in line with the One Wales aspirations;
- Opportunities for using the Making the Connections agenda to good effect in the housing area;
- Looking at alternative models of operation, such as partial stock transfer; and
- Considering potential opportunities from moving to a more flexible and integrated approach to tenure.<sup>30</sup>

The focus of the Essex Review therefore differed slightly from the focus of the Cave Review. Whilst Cave and his team had been tasked with carrying out a review on social housing regulation, the focus of the Essex Review seemed broader, looking at regulation within the context of issues concerning social housing. There appears to be one underlying reason for this. The UK Government had already decided that Communities England was to be responsible for ensuring the expansion of supply.<sup>31</sup> Whilst Professor Cave acknowledged the important role that regulation played in the process of supplying social housing,<sup>32</sup> this was not the primary focus of his Report. This was in contrast to the position in Wales where the initial impetus for the commissioning of the Essex Review was to ensure that the regulatory regime was appropriate to deliver more social housing.<sup>33</sup>

#### *7.1.1.3 The DCLG Review*

Only two years later, and only three years after the publication of the Cave Report, Grant Shapps, the Minister for Housing and Local Government under the Coalition Government in Westminster, announced that he would commission a review into the role of the Tenants Service Authority (TSA), the recently established social housing regulator in England, and

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<sup>30</sup> *ibid*

<sup>31</sup> Cave Review (n8) 62

<sup>32</sup> *ibid*

<sup>33</sup> Essex Review (n13) 8

the social housing regulatory framework more generally.<sup>34</sup> The TSA and the regulatory framework had only been put into law two years previously with the enactment of the Housing and Regeneration Act 2008, but Shapps felt that the effectiveness of the regime needed to be reviewed further. The political context within which this Review was undertaken differed significantly from the previous two Reports.

In the introduction to their Report the DCLG team set out the Government's objectives in light of which the Report had been drafted. These are interesting not just for their content but also for the order in which these objectives were listed. These were:

- reducing the number and cost of quangos
- reducing administration costs and ensuring value for money of public investment
- cutting unnecessary regulation and inspection
- ensuring there is a robust, transparent and independent framework of economic regulation for social housing
- ensuring there is a regulatory environment that ensures housing associations continue to command the confidence of lenders and can continue to attract investment at competitive rates
- supporting a supply of affordable housing
- ensuring social housing tenants are adequately protected and empowered.<sup>35</sup>

Of the seven Government objectives, the first five concern economic matters. This focus on economic factors seemed to signal an ideological shift from the previous two Reports. The way in which the Review was developed was also very different. The Review was not undertaken by independent experts as had been the case with the previous two Reviews. It was the work of the DCLG, a department within the UK Government, and a department within which Grant Shapps was a minister. This might have limited the freedom of the Review team. Indeed, nowhere in the review team's Report does the name of any of its authors appear. This can therefore be viewed as a report drafted by the civil service to put Government policy into force, an important distinction, the impact of which can be seen clearly from the Report's content. Nowhere is the impact of this differing approach more

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<sup>34</sup> DCLG (n13) 3

<sup>35</sup> *ibid*

apparent than in the DCLG's first finding. The first finding set out in the Report's summary of findings is:

In line with the Government's commitment to reduce the number of quangos, the Tenant Services Authority (TSA) should be abolished and its economic regulation and backstop consumer regulation functions transferred to the Homes and Communities Agency (HCA), generating efficiency savings in back-office functions and exploiting synergies across investment and regulation.<sup>36</sup>

It would seem that the UK Government's political objective of minimising quangos and reducing costs had influenced the team undertaking the review at the DCLG. The fact that no other reasons beyond the '*Government's commitment to reduce the number of quangos*' and the potential for '*efficiency savings*' were cited by the DCLG when making this recommendation highlights the importance that the review team had placed on the Government's objectives. Despite this recommendation, the DCLG Report also recommended that there was a need to ensure that the regulation of social housing providers and their financing remained separate.<sup>37</sup> The TSA had been established following recommendations made by the Cave Review.<sup>38</sup> It was the Cave Review that had, for the first time, recommended that regulation should be undertaken separately from the Government.<sup>39</sup> The fact that the DCLG wanted to see this separation continue, even after dissolution of the TSA, seems to further suggest that it was the aims of the Government to reduce the number of quangos that had led the DCLG Review team to their conclusions. Whether or not this was the case, it seems correct to conclude that the political context in which these Reports developed had an impact upon their content. The impact of this on divergence will be examined by looking at two areas of the law in particular, who can register with the regulator, and the differing approaches taken to consumer and economic regulation.

### 7.1.2 Where's the profit?

As discussed in Chapter 6, one of the major differences that exists between social housing regulation in Wales and England is that profit-making bodies are permitted to register as providers in England, but not as RSLs in Wales.<sup>40</sup> The basis upon which this dissimilarity developed can be found in the content of the Cave and Essex Reviews.

At the time of the Cave Report's publication the position of the law in Wales and England had not diverged with regard to the role of profit-making bodies and the provision of social

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<sup>36</sup> *ibid* 2

<sup>37</sup> DCLG Review (n13) 2

<sup>38</sup> Cave Review (n8) see recommendation S1, p21

<sup>39</sup> Cave Review (n8) 72

<sup>40</sup> More detail on the legislative differences that exist between both nations can be found in Chapter 5.



housing. In both Wales and England, only non-profit bodies were permitted to register with the regulator.<sup>41</sup> The position of the law in both nations had begun to shift slightly with the enactment of the Housing Act 2004. The Act inserted a new section into the Housing Act 1996 that permitted both the Housing Corporation in England and the Welsh Ministers in Wales to make grants to bodies other than registered social landlords.<sup>42</sup> These grants could be given on one of six grounds including constructing homes that were to be disposed of on shared ownership terms and for providing, constructing or improving houses that were to be kept for letting.<sup>43</sup> The number of organisations that had taken advantage of these opportunities were limited. At the time of the Cave Report's writing there was not one profit-making body that was providing social housing in England.<sup>44</sup> One body, however, was managing general needs housing.<sup>45</sup> The Cave Review was to signal a shift in the approach taken by the UK Government.

One of the key themes of the Cave Review was broadening tenant choice. The word '*choice*' and its derivatives appeared in the Review on 120 occasions, with the word and the narrow context surrounding it accounting for 1.47% of the entire document.<sup>46</sup> The word appeared most prominently, although not exclusively, in the context of tenant or consumer choice. The reason for this focus on consumer choice can be found in an extract contained within the Report from evidence given by the Audit Commission. The Audit Commission believed that:

...residents who make conscious choices about where they live and whose services they receive are more likely to put down roots and give support to the future of their locality. . . Where tenants can exercise choice over their provider, this will encourage providers to ensure tenant satisfaction. The need for regulation will diminish as tenants are increasingly able to use market choice to spur providers to better provision.<sup>47</sup>

Not only did the Cave's team receive evidence emphasising the importance of tenant choice to the development of social housing, they also received evidence that tenants wished to be given more choice in how services were provided to them.<sup>48</sup> The sort of 'choice' that tenants wanted to be granted was varied, ranging from choice over where they lived, to choice over contractors, to choice about internal decoration.<sup>49</sup> The Report noted that there was a lack of

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<sup>41</sup> Housing Act 1996, s 2 as originally enacted.

<sup>42</sup> Housing Act 1996, s 27A

<sup>43</sup> *ibid*

<sup>44</sup> Cave Review (n8) 32

<sup>45</sup> *ibid* 34

<sup>46</sup> *ibid*

<sup>47</sup> Cave Review (n8) 51

<sup>48</sup> *ibid*

<sup>49</sup> *ibid* 92/93

incentives for the sector to provide tenants with such a choice and that it was necessary to stimulate it by '*encouraging providers, empowering consumers and removing the institutional barriers to choice*'.<sup>50</sup> The Report contained a number of recommendations as to how this could be better achieved. Amongst the Review's recommendations were strengthening the role of tenants in regulation<sup>51</sup> and providing them with greater freedom to choose how their properties were managed.<sup>52</sup> Perhaps the most interesting of all the Review's recommendations on boosting tenant choice for the purposes of this thesis, however, was the recommendation that there should be an expansion in '*the availability of choice of provider at all levels in the supply of social housing*'.<sup>53</sup>

The Cave Review concluded that tenants could be granted greater choice when selecting a provider in more than one way. The Review team's Report argued in favour of separating the development, ownership and management roles in the provision of social housing.<sup>54</sup> It was argued that this would stimulate competition, giving tenants greater choice.<sup>55</sup> The Cave Report also suggested that tenant choice could be expanded by allowing profit-making providers to register with the regulator, both as independent organisations and as subsidiaries to non-profit providers.<sup>56</sup> This would increase the type of bodies that tenants could choose to rent their property from. The Report did make it clear that it was vital that regulation acted as a safeguard ensuring that there was no leakage between non-profit providers and their profit-making subsidiaries. The Cave team also concluded that there were no reasons why non-profit providers should be permitted to become profit-making bodies.<sup>57</sup>

The promotion of tenant choice was not the only reason that led the team undertaking the Cave Review to recommend that profit-making providers should be permitted to register with the regulator. The Cave Review was also viewed as an opportunity to rationalise the complicated regulatory process that was in place at the time, with local authority providers, profit-making providers, non-profit providers and Arms' Length Management Organisations (ALMOs) all being subject to different forms and degrees of regulation.<sup>58</sup> The Review set out that this ad-hoc approach meant that both non-profit providers and profit-making providers

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<sup>50</sup> *ibid* 92

<sup>51</sup> *ibid* 93

<sup>52</sup> *ibid*

<sup>53</sup> *ibid* 100

<sup>54</sup> *ibid* 101

<sup>55</sup> *ibid* 103

<sup>56</sup> *ibid* 91

<sup>57</sup> *ibid*

<sup>58</sup> *ibid* 58

felt that the playing field had been tilted unfairly in the favour of the other.<sup>59</sup> It was felt that creating a unified regulatory regime would deal with many of these complications and would encourage profit-making bodies to develop more social housing.<sup>60</sup>

It is in these recommendations that we see the roots of an important legal variation that has developed between Wales and England. By the following year, the UK Government had enacted the Housing and Regeneration Act 2008, based on the Cave's Review recommendations. The Act, for the first time, permitted profit-making providers to register with the regulator.<sup>61</sup> Over the same period Sue Essex's team were reviewing how social housing regulation was undertaken in Wales. Her team took a very different approach to the profit-making question. It is in this difference of approach that we see the impact of policy and political differences on regulatory divergence.

The Essex Report contains a section entirely dedicated to regulatory developments that were taking place in both England and Scotland.<sup>62</sup> Indeed the Essex Report states that:

Discussions about the future framework for HAs in Wales have an obvious synergy with parallel debates in England and Scotland.<sup>63</sup>

Her Report was therefore not developed in isolation of the work that was going on elsewhere in the UK. In this light, it is perhaps a little surprising that all references to the word 'profit' in the Essex Review appear in the context of 'not for profit' or 'non-profit' organisations.<sup>64</sup> It would appear from the content of the Report that the Essex team had not even considered the possibility of expanding registration criteria so as to allow profit-making organisations in Wales to register with the regulator. As has been discussed, profit-making providers continue to be prohibited from registering with the regulator in Wales.<sup>65</sup> This finding highlights how devolution had permitted both Wales and England to develop different policy approaches to similar issues.

This finding is of further academic interest. At the time that Wales and England adopted divergent approaches to registration, Labour was the party of government at Westminster and Cardiff Bay.<sup>66</sup> This demonstrates that when examining the factors that have contributed to the divergence process, it is necessary to explore ideological differences within individual

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<sup>59</sup> *ibid* 62

<sup>60</sup> *ibid* 85

<sup>61</sup> Housing and Regeneration Act 2008, s 112

<sup>62</sup> Essex Review (n10) 40

<sup>63</sup> *ibid*

<sup>64</sup> *ibid*

<sup>65</sup> See 6.1.2

<sup>66</sup> Although the party was in a coalition with Plaid Cymru at the National Assembly.

political parties, in addition to exploring differences between competing parties, in order to fully understand the impact of politics and policy on the process. It seems that the statutory difference that has developed between Wales and England with regard to the registration of profit-making providers can be directly attributed to governments of the same colour, but in two different nations developing distinctive policy approaches. This is not the only variation that has developed between the two nations because of such factors.

### 7.1.3 Setting and monitoring the standards

As noted in Chapter 6, the powers of the social housing regulators in Wales and England to set regulatory standards and to monitor compliance with them has diverged significantly over the past decade.<sup>67</sup> The law has diverged in such a way so that it is now arguable that social housing tenants in Wales are better protected by regulation than their counterparts in England. As with the divergence that has developed with regard to the role of profit-making providers, its roots can be found in ideological and policy differences between both nations - differences that become apparent when examining the three Reviews into social housing regulation in both Wales and England.

The Housing and Regeneration Act 2008 created, for the first time, two categories of regulatory standards. The regulator would be permitted to set standards concerning the provision of social housing and standards that concerned the management of social housing.<sup>68</sup> The reasons for this change can be found in the recommendations of the Cave Review. The Cave team believed that the decision to locate responsibility for supply issues at Communities England provided the Government with an opportunity to redesign regulation, so that it focused on the '*benefit of consumers, current and future*'.<sup>69</sup> The Review recommended that a regulator should be founded, independently from Government, and have three principal duties:

- To ensure the continuing provision of high quality social housing
- To empower and protect tenants
- To expand the availability of choice of provider at all levels of the provision of social housing.<sup>70</sup>

The UK Government took this recommendation on board. The Housing and Regeneration Act 2008 established the TSA as an independent regulator of social housing.<sup>71</sup> The Act set

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<sup>67</sup> See 6.2

<sup>68</sup> Housing and Regeneration Act 2008, s 193, s 194

<sup>69</sup> Cave Review (n8) 72

<sup>70</sup> *ibid*

<sup>71</sup> Housing and Regeneration Act 2008, s 81 as enacted.

out ten objectives that were to underpin the activities of the TSA.<sup>72</sup> These ten objectives were closely linked to the Cave Report's recommended three principal duties for an independent regulator, further demonstrating the Report's influence on regulatory developments in England. The impact of the Review, on the regulator's power to set standards is even more apparent in some of its subsequent recommendations.

Recommendation S4 set out that the:

Government should be entitled to issue directions to the regulator in relation to rents and the standards of housing provision. It should be for the regulator to transpose these into the regulatory framework. Therefore it is recommended that the regulator be given the statutory power to set rent levels across the domain.<sup>73</sup>

It was thought that such a system would increase certainty within the sector, thus attracting new providers and minimising regulatory creep that could develop if there was ambiguity with regards to regulatory standards.<sup>74</sup> This recommendation forms the basis of sections 193 and 197 of the Housing and Regeneration Act 2008. As was discussed in Chapter 6, section 193 gave the regulator the power to set standards in relation to the provision of social housing.<sup>75</sup> Section 193 set out ten standards that registered providers might be required to comply with, amongst these were standards relating to maintenance and levels of rent.<sup>76</sup> Section 197, meanwhile, gave the Secretary of State the power issue direction in relation to these standards.<sup>77</sup> The power of the regulator under section 194 of the Housing and Regeneration Act 2008 to set standards in relation to the management of registered providers also has its roots in the Cave Review. The Review recommended that:

The regulator should monitor organisational viability (which will encompass both financial viability and governance) and intervene appropriately to protect the interests of tenants and taxpayers.<sup>78</sup>

This provides a further clear link between the recommendations of the Cave Review and the legislative provisions of the Housing and Regeneration Act 2008. The powers of the regulator and the Secretary of State under these sections effectively mirror the regime envisaged by Professor Cave. Given that the statutory basis for the regulator's power to set standards in Wales remained unchanged, it was the enactment of the Housing and

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<sup>72</sup> *ibid*, s 86 as enacted.

<sup>73</sup> Cave Review (n8) 75

<sup>74</sup> *ibid*

<sup>75</sup> Housing and Regeneration Act 2008, s 193

<sup>76</sup> *ibid*

<sup>77</sup> *ibid* 197

<sup>78</sup> Cave Review (n8) 85

Regeneration Act 2008 that led to divergence between Wales and England. It would therefore seem correct to argue that the dissimilarities that developed between the statutory basis for regulatory standard setting in 2008, between Wales and England, developed directly because of England pursuing an alternative policy to Wales.

As has already been established, the development of differences between the powers of the regulators to set standards in Wales and England was not linear in nature.<sup>79</sup> In 2011, the Welsh Government enacted the Housing (Wales) Measure 2011, three years after the publication of the Essex Report. The delay between the publication of the Essex Report and the enactment of the Housing (Wales) Measure can be partly attributed to the legislative difficulties that the National Assembly faced operating under Part 3, Schedule 5 of the Government of Wales Act 2006.<sup>80</sup> Another reason for this delay becomes apparent when examining the Essex Report. In it, the authors set out that the Welsh Government had given no indication as to how it intended to respond to legislative changes in England beyond saying that it was content with the Housing Act 1996 continuing as the statutory basis for regulation in Wales.<sup>81</sup> As was highlighted by Essex Report, this left unanswered how Welsh Government would strengthen its regulatory powers, if it were to do so at all.<sup>82</sup> This further emphasizes the role that politics and policy played in the development of divergence. By making the political choice in 2008 that it did not seek a new legislative framework for regulation in Wales, the Welsh Government in effect contributed to the development of divergence. Yet by 2011 the Government had changed its position. When the Measure was eventually enacted it led to the law in Wales and England converging in relation to the powers of the regulator to set regulatory standards. This will be explored next.

The Housing (Wales) Measure 2011 introduced section 34A to the Housing Act 1996. This section updated the grounds upon which the Welsh Government, in its capacity as social housing regulator, would be able to set performance standards for RSLs, bringing the system in Wales more into line with the system in England.<sup>83</sup> Perhaps due to the Welsh Government's stated desire in 2008 to keep the Housing Act 1996 as the statutory basis for regulation in Wales, the Essex Report did not contain wide ranging recommendations on how the law on regulation should be amended. The Review focused in more detail on the

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<sup>79</sup> See Chapter 6, specifically 6.2

<sup>80</sup> As discussed in more detail at 5.1.2 and in the following article - Sue Griffiths and Paul Evans, 'Constitution by Committee? Legislative Competence Orders under the Government of Wales Act (2007-2011)' (2013) Parl.Aff. 491

<sup>81</sup> Essex Review (n10) 41

<sup>82</sup> *ibid*

<sup>83</sup> Housing Act 1996 34A

regulatory framework itself instead. Amongst the Essex Report's recommendations, however, was that:

the current regime needs upgrading to reflect new realities, ensuring that housing associations are well governed, financially viable, delivering high quality services to their residents and are striving to continuously improve.<sup>84</sup>

The Essex Report argued that, for this aim to be achieved, there had to be a '*decisive move towards a new set of arrangements*', which were also '*more customer facing*'.<sup>85</sup> In the Report, the Essex team set out their vision for these new arrangements. This included a move towards self-regulation, the continued use of inspection as part of the regulatory regime, and assessment of associations' performance against key indicators.<sup>86</sup> The impact of the Essex Review on the regulatory framework that is in place in Wales is clear to see. Many of the key features of the regulatory regime can be directly attributed to the Review's recommendations. For example, the regulator in Wales continues to pro-actively assess compliance with all aspects of the regulatory framework in Wales.<sup>87</sup> As was discussed in the Chapter 6, this is not the case in England, with consumer regulation now only being undertaken on a reactive basis.<sup>88</sup> Given the clear imprint that the Essex Review has left on the regulatory framework in Wales, the work of Sue Essex certainly contributed to divergence. This episode, emphasises once more the effect of policy differences on the development of divergence.

As the Essex team made very few legislative recommendations, beyond recommending that the Welsh Government should increase its intervention powers,<sup>89</sup> the impact of the Review on legislation in relation to regulatory standards is more questionable. The Review's reference to governance, financial viability and quality of service, may partly explain why the Welsh Government decided to introduce section 34A into the Housing Act 1996, but this is not clear. The fact that the Review did not propose wholesale legislative changes in Wales, however, can be said to be a factor in the development of divergence. The lack of such a recommendation coupled with the Welsh Government's satisfaction with the Housing Act 1996 meant that there was no impetus in Wales to enact significant new legislation. This meant that legislative changes introduced in England were not replicated in Wales, to any

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<sup>84</sup> Essex Review (n10) 44

<sup>85</sup> *ibid*

<sup>86</sup> *ibid* 46

<sup>87</sup> See 5.2

<sup>88</sup> In particular, 6.2

<sup>89</sup> Essex Review (n10) 90

extent until 2011, increasing variation between both nations. The political choice taken in 2008 therefore contributed to the development of divergence.

The Housing (Wales) Measure 2011 was not the only piece of legislation enacted in 2011 that was relevant to the development of divergence between Wales and England. It was also the year that saw the enactment of the Localism Act 2011 at Westminster. The enactment of the Localism Act 2011 was to significantly change the way in which social housing regulation was undertaken in England, leading to the development of further differences. The Localism Act 2011, for the first time, created a two-tier approach to regulation in England, with consumer regulation now being undertaken on a reactive basis only.<sup>90</sup> The reasons for this change can be found in the *Review of social housing regulation* by the Department of Communities and Local Government (DCLG).

The DCLG Review recommended that many aspects of regulation that were in place in England in 2010 should continue unchanged. One such aspect was the power of the regulator to set standards.<sup>91</sup> The effect of this recommendation can be seen in legislation, with minimal changes made to the regulator's standard setting powers.<sup>92</sup> The Review team did not feel that this was the case with regard to all the aspects of the regulatory framework. One area where the team felt that there was need for a change in the law was the power of the regulator to monitor compliance with regulatory standards. The team's Report stated that:

The Review concludes that consumer and economic issues require substantially different levels of regulatory activity in order to achieve the desired outcomes outlined above. We recommend that this distinction should be reflected in legal framework for regulation.<sup>93</sup>

The Report went on to set out in more detail why it thought that this was the case and how this was to be achieved. The Review team concluded that the interests of tenants could be adequately protected through an Ombudsman, and, as a result, that *'there should be no automatic role for the regulator'* in dealing with consumer matters.<sup>94</sup> The Review team asserted that the tools available to the regulator to assess compliance with performance standards were 'blunt', and that this task could be best carried out through tenant led

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<sup>90</sup> *ibid*

<sup>91</sup> DCLG Review (n13) 6

<sup>92</sup> See Chapter 6.

<sup>93</sup> DCLG Review (n13) 8

<sup>94</sup> *ibid* 9. Registered providers in England are not alone in being subjected to the work of an ombudsman. In Wales, RSLs are subject to the jurisdiction of the Public Services Ombudsman for Wales. In England, registered providers are subject to the jurisdiction of the Housing Ombudsman.



scrutiny.<sup>95</sup> It was argued, therefore, that the role of the regulator should be limited to setting out clear standards, and to dealing with cases of serious failure against those standards in consumer matters.<sup>96</sup> This is extremely analogous to the ‘reactive’ approach to regulation adopted by the UK Government when enacting the Localism Act 2011.<sup>97</sup>

Having considered the approach taken towards consumer standards, the Report goes on to examine the approach taken with regard to economic standards. The team concluded that the approach of the regulator to economic regulation should continue and be subject to minimal legislative change.<sup>98</sup> They felt that there was a ‘*clear rationale for the continuation of the regulator’s proactive stance*’ in relation to economic regulation.<sup>99</sup> It was felt that this approach prevented operational failure and supported lender confidence.<sup>100</sup> Again the impact of this recommendation on the Localism Act 2011 is clear, with the Act making minimal changes to the power of the regulator in relation to economic standards.

This analysis would suggest that the origins of the two-tier approach to regulation in England can be traced back to the DCLG Review on social housing regulation. Given that no such approach has been adopted in Wales, it can be argued that these recommendations made by the DCLG have directly led to the development of a significant variation between regulation in Wales and England. This finding once again emphasises the role of policy and politics in the development of divergence. The significance of political and policy differences has grown in prominence as a result of deepening devolution. But policy and politics are not the only factors that have contributed to the development of divergence and convergence between Wales and England. We will now turn to explore the impact of the devolution settlement on divergence.

## 7.2 The limits of devolution

The history of housing devolution in Wales has been explored in detail for the first time in Chapters 3, 4 and 5. The historical analysis demonstrated that the process leading to the present devolution settlement was long and complicated. One constant theme throughout this journey has been how the nature of the devolution settlement that was in place at any given time, has had an impact on the distinctiveness of policies developed and implemented in Wales. Having provided a brief recap of the impact Wales’s historic devolution settlements have had on the divergence process, this section will explore how Wales’s present-day

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<sup>95</sup> *ibid* 11

<sup>96</sup> *ibid* 13

<sup>97</sup> The Localism Act inserted s 198A into the Housing and Regeneration Act 2008.

<sup>98</sup> DCLG Review (n12) 18

<sup>99</sup> *ibid*

<sup>100</sup> *ibid*

devolution settlement limits the ability of the Welsh Government to pursue its own distinctive policy, if it so wishes. It will do so by looking at two specific limitations placed on the Assembly's powers; (1) the limit of the Assembly's legislative competence, and (2) the impact of UK Government policy in non-devolved areas, on devolved policy.

The transfer of housing functions to the Welsh Board of Health in May 1940 did not lead to significant policy divergence.<sup>101</sup> The Welsh Board of Health had not been established to adopt new and distinctive health policies in Wales but to administer the Ministry of Health's policy on the western side of Offa's Dyke.<sup>102</sup> The purpose of devolving housing functions to the Welsh Board of Health, as a result of Clement Davies's Report on TB in Wales, was therefore, to allow UK housing policy to be administered in a distinct manner in Wales, not for divergent Welsh housing policy to be developed.<sup>103</sup> The establishment of the Welsh Office in 1964 and the subsequent establishment of Tai Cymru in 1988 saw greater autonomy granted to Wales, and thus created the scope for more divergence.<sup>104</sup> As discussed in 4.1, steps were taken when establishing the Welsh Office to minimise the development of policy divergence.<sup>105</sup> Over time, however, the way that the social housing sector operated in Wales began to differ from the sector in England. The Secretary of State for Wales ensured that more money was available for housing associations in Wales, and pushed for the creation of a separate social housing regulator.<sup>106</sup> Despite these differences, it should be remembered that the Secretary of State, the Welsh Office and Tai Cymru were either directly or indirectly answerable to Westminster.<sup>107</sup> They were therefore unlikely to wish to adopt radically different policy choices.

The establishment of the National Assembly in 1999 and the transfer of primary law-making powers to it under the Government of Wales Act 2006, would see the scope for the development of divergence increase significantly. The National Assembly was established to let the people of Wales '*express their own priorities*'.<sup>108</sup> Allowing for the development of a distinctive Welsh policy approach was, therefore, an explicit reason behind the decision to establish the National Assembly. Despite this, the ability of the Assembly to adopt differing policy has been limited. The Legislative Competence Order (LCO) system in place between 2007 and 2011 and the approach taken to it by those at Westminster meant that, in practice,

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<sup>101</sup> See 3.3.2

<sup>102</sup> *ibid*

<sup>103</sup> *ibid*

<sup>104</sup> See 4.1 and 4.3

<sup>105</sup> *ibid*

<sup>106</sup> *ibid*

<sup>107</sup> *ibid*

<sup>108</sup> Welsh Office, *A Voice for Wales; The Governments Proposals for a Welsh Assembly*, (White Paper, Cm 3718, 1997) p5

the Assembly had to seek the consent of the UK Parliament before enacting legislation.<sup>109</sup> The impact of this on divergence and housing has been demonstrated. Members of Parliament, reluctant to see any significant divergence develop with regard to the 'right to buy', stalled the progress of an LCO that would have permitted the Assembly to enact legislation on housing for three years.<sup>110</sup> The reluctance to grant this legislative consent led to the development of divergence in social housing regulation. As has been set out in Chapter 5, the Housing (Wales) Measure 2011 moved the legislative basis for regulation in Wales closer to the legislative basis for regulation in England when it was eventually enacted.<sup>111</sup> For the period between 2008 and 2011 the variation between both nations was greater than what it might have been had the Assembly enjoyed greater legislative competence.<sup>112</sup> At any given moment in time the form of devolution dispensed to Wales has had peculiar, even idiosyncratic, characteristics. These features are more the product of the specific historical path taken by devolution than of any rational plan or design. In turn, they have had consequences for character of the legislative, regulatory and policy outputs of the Welsh institutions.

Such limitations are not a thing of the past. Under the Government of Wales Act 2006 the National Assembly has legislative competence over housing.<sup>113</sup> This competence is reasonably wide ranging, extending to:

Housing. Housing finance except schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits. Encouragement of home energy efficiency and conservation, otherwise than by prohibition or regulation. Regulation of rent. Homelessness. Residential caravans and mobile homes.<sup>114</sup>

The Assembly is also about to be granted, for the first time, taxation powers that concern housing. From 2018, powers over Stamp Duty will be devolved to Wales, giving the Assembly control of a tax that is linked to housing.<sup>115</sup> These broad ranging powers have permitted the Assembly to develop and pursue its own distinctive policies on social housing regulation, leading to the development of dissimilarity between Wales and England on matters ranging from the role of profit-making providers, to how tenants are protected under regulation. As noted, the Welsh Government's ability to develop distinctive policies on social

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<sup>109</sup> See 5.1.2

<sup>110</sup> *ibid*

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

<sup>113</sup> Government of Wales Act 2006, Schedule 7, Para 11

<sup>114</sup> *ibid*

<sup>115</sup> Wales Act 2014, s 15

housing regulation remains limited. The devolution settlement currently in place in Wales, impacts on the development of divergence in two different ways. First, Wales's devolution settlement places limits on the ability of the National Assembly to enact legislation. The Assembly is only able to enact legislation if the policy area concerned is within its legislative competence, placing limits on the Welsh Government's ability to develop distinctive policy.<sup>116</sup> Second, the UK Government is free to enact legislation and to develop policy in those areas that have not been devolved to Wales. The UK Government therefore retains an ability to change the social housing sector in Wales. Nowhere is this ability more clearly demonstrated than in the context of welfare spending. This chapter will examine both factors, in terms of what they have meant, and what they could mean for the development of differences between social housing regulation in Wales and England in future.

### 7.2.1 Beyond the limits

At present the National Assembly operates under the conferred powers model of devolution. This means that the National Assembly has got the power to enact primary legislation if the legal competence to do so has been expressly conferred to it. The Government of Wales Act 2006 has done so in relation to 21 subject areas, one of which is housing.<sup>117</sup> This is subject to certain restrictions. The Assembly is not permitted to enact legislation that breaches the European Convention of Human Rights, or the law of the European Union.<sup>118</sup> The Assembly is also not permitted to amend the powers of Ministers of the Crown,<sup>119</sup> nor is it permitted to enact legislation that concerns an exception to one of the 21 fields listed under Schedule 7.<sup>120</sup> These restrictions are important and do play a role in limiting divergence. This is illustrated when examining the decision of the Supreme Court in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*.<sup>121</sup>

The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill was developed during the fourth Assembly.<sup>122</sup> The Bill, if enacted, would have allowed the Welsh Government to recover certain costs for the treatment of people suffering from asbestos related diseases in Wales.<sup>123</sup> Under the Government of Wales Act 2006 both the Counsel General for Wales and the UK Attorney General have the power to refer a Bill, or a provision within a Bill, to the Supreme Court, in order to question whether the Bill is within the Assembly's legislative

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<sup>116</sup> Government of Wales Act 2006, s 108

<sup>117</sup> *ibid* Schedule 7

<sup>118</sup> *ibid*, s 108(6)(c)

<sup>119</sup> *ibid* Schedule 7 Part 2

<sup>120</sup> These are set out in Schedule 7

<sup>121</sup> *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, Re* [2015] UKSC 3

<sup>122</sup> Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

<sup>123</sup> *ibid*

competence.<sup>124</sup> The Counsel General and the Attorney General have exercised this power a total of three times, with the Asbestos Bill being the third time that this was done.<sup>125</sup> One of the grounds upon which the Bill was referred to the Supreme Court was to examine whether the Bill breached Article 1 Protocol 1 (A1P1) of the European Convention of Human Rights.<sup>126</sup> It was held unanimously by the Supreme Court that the Bill did indeed breach A1P1 and as a result of this, and a finding that the Bill contained provisions that were outside the powers transferred to the Assembly, the Bill never received royal assent.<sup>127</sup> The Court's decision that the Bill breached the European Convention of Human Rights therefore contributed to minimising divergence between Wales and England in the context of health. Such constraints would also be apparent if the Welsh Government attempted to legislate a piece of housing legislation that breached Convention rights.<sup>128</sup> This is an important limitation on the power of the Welsh Government to develop its own policy approach.

The Supreme Court decision also highlights a further constraint that the conferred powers model of devolution places on the Welsh Government's ability to implement divergent policy. Under the conferred powers model of devolution, the Welsh Government is only permitted to enact legislation that has been directly devolved to it. This differs from the reserved powers model of devolution in place in Scotland and Northern Ireland. The reserved powers model devolves all power to the sub-state institution except for the powers explicitly reserved to Westminster. It has been argued that the reserved powers model of devolution provides a clearer and more stable settlement that would see the number of cases referred to the Supreme Court reduce.<sup>129</sup> The lack of clarity provided by the current conferred powers model may constrain divergence with both the Welsh Government and the National Assembly forced to commit resources to ensuring that legislation passed by the Assembly is within its legislative competence.

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<sup>124</sup> Government of Wales Act 2006, s 112

<sup>125</sup> Asbestos (n121); the other two occasions were *Agricultural Sector (Wales) Bill, Re* [2014] UKSC 43; and *Local Government Byelaws (Wales) Bill 2012, Re* [2012] UKSC 53

<sup>126</sup> Asbestos (n121) [9]

<sup>127</sup> *ibid*

<sup>128</sup> This seems to be in contrast with the position in England. Whilst the Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law, section 4(6) of the Act makes it clear that a declaration of incompatibility under the Act does not affect the 'validity, continuing operation or enforcement of the provision'. Given that the additional controls placed on the Assembly's legislative powers under the Government of Wales Act 2006, s 108(6)(c) are not in place at Westminster, it would appear that the ECHR applies in greater force in Wales than it does in Westminster. This was discussed in more detail here – Steffan Evans, 'Human rights: the forgotten dimension of the English Votes for English Laws debate' (*LSE, British Policy and Politics Blog*, 21 August 2015) < <http://blogs.lse.ac.uk/politicsandpolicy/human-rights-the-forgotten-dimension-of-the-english-votes-for-english-laws-debate/>> accessed 9 August 2016

<sup>129</sup> The Wales Governance Centre and the Constitution Unit, *Delivering a reserved powers model of devolution for Wales*, (Wales Governance Centre at Cardiff University, September 2015) Page 7

Following the enactment of the Wales Act 2017 the model of devolution in place in Wales is set to change with the reserved powers model replacing the conferred powers model of devolution.<sup>130</sup> There are concerns, however, that, rather than clarifying the basis by which the Assembly is permitted to enact legislation, the model introduced by the Wales Act 2017 could in fact increase uncertainty.<sup>131</sup> It has also been argued that the Act may also claw back some of the Assembly's powers, particularly in light of the number of reserved areas set out within the Act.<sup>132</sup> It remains to be seen whether this will be the case; but as this thesis has demonstrated, the history of devolution suggests that, whichever system of devolution is adopted, there will remain constraints on the Welsh Government's ability to develop its own distinctive policy approach. This could impact upon the development of future divergence between social housing regulation in Wales and England.

This is not the only impact that Wales's devolution settlement has had on the divergence process. Policy developed by the UK Government in areas of overlapping competence can also have an impact on divergence. This will be explored more closely in the next section.

### 7.2.2 Westminster remains in charge

The merits of the conferred and reserved powers model have been much discussed in Wales over recent years.<sup>133</sup> This chapter has briefly outlined the impact that the current and future devolution settlements have had, and may have, on divergence. The chapter will now examine an element of Wales's devolution settlement that has received less attention: the impact of the Westminster Government's policy in non-devolved areas, on the development of divergence. Drawing on evidence gathered through interviews with Welsh RSLs, the chapter will demonstrate how the UK Government's welfare policy, the 'bedroom tax' in particular, has influenced and shaped the way that the social housing sector operates in Wales. The chapter will set out the significance of this finding for our understanding of the way that divergence develops.

Paragraph 11 of Schedule 7 of the Government of Wales Act 2006 gives the National Assembly for Wales legislative competence over housing.<sup>134</sup> The provision sets out a

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<sup>130</sup> Wales Act 2017

<sup>131</sup> The Wales Governance Centre and the Constitution Unit, *Opportunity and Challenge, the draft Wales Bill* (Wales Governance Centre at Cardiff University, February 2016)

<sup>132</sup> Professor Richard Wyn Jones, 'Professor Richard Wyn Jones' excoriating verdict on the Wales Bill plans for devolution' (Walesonline, 28 October 2016) < <http://www.walesonline.co.uk/news/politics/richard-wyn-jones-wales-bill-12091891> > accessed 14 November 2016

<sup>133</sup> For example, Delivering a reserved powers model of devolution for Wales (n129); and Opportunity and Challenge, the draft Wales Bill (n131)

<sup>134</sup> Government of Wales Act 2006 Schedule 7, Para 11

number of different areas that are deemed to constitute 'housing', including 'homelessness' and 'regulation of rent'.<sup>135</sup> Another aspect of 'housing' under the act is 'housing finance'.<sup>136</sup> The devolution of housing finance to the Assembly is made subject to a specific exception, however:

except schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits.<sup>137</sup>

This exception, in effect ensures that Westminster retains control over social security spending in Wales in the housing context. The fact that the UK Government retains control over social security is not surprising given the import role that the welfare state plays in maintaining the UK's social union. However, this retention of power to Westminster has a very substantial impact on the ability of the National Assembly to develop the social housing sector in Wales as it would prefer. This argument will be demonstrated below.

The 'under occupancy penalty', or the 'bedroom tax' as it is commonly known, was introduced by the UK Coalition Government in 2012.<sup>138</sup> The policy meant that individuals that were in receipt of housing benefit would see their payments reduced if it were deemed that their property contained a spare bedroom.<sup>139</sup> The policy was highly controversial and was met with fierce opposition and legal challenge.<sup>140</sup> The changes were to apply across Wales, Scotland and England and meant that thousands of people were faced with the choice of moving home or seeing a reduction in the housing benefit that they received.<sup>141</sup> It would seem that the policy has had a significant impact on Welsh housing associations.

During interviews, the chief executives of five Welsh Registered Social Landlords (RSLs) stated that they had seen a change in the type of property that was in demand within their social housing stock. Each RSL had seen an increase in demand for one bedroom homes. Each chief executive also cited the introduction of the 'bedroom tax' as the reason for this. Their view is best summarised by the following extract:

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<sup>135</sup> *ibid*

<sup>136</sup> *ibid*

<sup>137</sup> *ibid*

<sup>138</sup> Welfare Reform Act 2012, s 69

<sup>139</sup> *ibid*

<sup>140</sup> Amongst these were the case of *R. (on the application of Rutherford) v Secretary of State for Work and Pensions* [2016] EWCA Civ 29

<sup>141</sup> The Northern Irish Executive agreed to implement the policy in Northern Ireland after months of political argument. Steps have been taken to mitigate the policy for 4 years, however. Pete Apps, 'Stormont deal will nullify bedroom tax' (*Inside Housing*, 18 November 2015) < <http://www.insidehousing.co.uk/stormont-deal-will-nullify-bedroom-tax/7012821.article> > accessed 28 November 2016

Interviewer: Ok, great, sort of, looking at other factors that, you know? Might influence how you work, one of them obviously is housing need, what your tenants want. Is there a particular type of property in your social housing portfolio that's more in demand than another?

Interviewee, Chief Executive 1: Traditionally the larger properties have been in demand, and again if you looked at stuff that you would say are rare, would be things like bungalows, you know? So, older people love bungalows, yeah? They don't want to live necessarily in a flat, they want bungalows. So those are the ones if you like, are always in demand. The one beds increasingly so at the moment because of the bedroom tax. That's a political issue and if the bedroom tax goes the demand for one beds will go, because nobody wants a one bed generally. People want room for the kids to stay over, or as a study, or for the grandkids, or a carer, or whatever it might be. Once bedroom tax goes, if it goes, the demand for one beds will go.<sup>142</sup>

This is a highly significant finding. It suggests that the 'bedroom tax', a piece of UK Government welfare policy, has changed the demand for social housing in Wales, a change that has had an impact on the very nature of the Welsh social housing sector. The impact of this change on the sector in Wales has been striking. One chief executive outlined the challenge that faced their organisation:

when the bedroom tax first came in we had 460 tenants, 420 tenants affected by it, we have just about 3,000 properties, so quite a proportion, and of those I think 200 odd wanted to, were paid to downsize. I think at the moment we've got, we managed to move on about a 100 of those by the way, so we've got about a hundred, I haven't look most recently, we did a report to board, I think we've got about a 125 people now who are prepared to downsize, but we've got nothing for them.<sup>143</sup>

The change has clearly placed RSLs under pressure to ensure that they find suitable properties for those tenants wishing to downsize. The interview participants revealed that the change had placed them under pressure from two angles. First, RSLs are coming under pressure from their tenants, and in one instance, from their local authority to develop smaller properties.<sup>144</sup> This means that they are being placed under increasing pressure to develop property that in their view, will be in low demand if the bedroom tax policy was halted. This

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<sup>142</sup> Interview with Chief Executive of Welsh RSL 1, (Cardiff, 19 January, 2015)

<sup>143</sup> Interview with Chief Executive of Welsh RSL 3, (Cardiff, 1 May, 2015)

<sup>144</sup> Interview with Chief Executive of Welsh RSL 4, (West Wales, 14 May, 2015)



presented the RSLs with a secondary pressure: how to develop property that would satisfy the short-term need for smaller houses, against the risk of developing homes that are unwanted in the future, if the policy was ever withdrawn. One chief executive highlighted the pressured that Welsh RSLs faced by recounting their previous experiences of working in Welsh social housing in the 1980s:

when I worked in Swansea long time ago there'd been, and in Merthyr Tydfil, there'd been a lot of one bedroom flats which had become, because of the changing allocation policies in the 80s and early 90s had become almost ghettoised and the subsequently cleared and replaced with family homes, we've now got a situation where we have too few one bedroom properties and so there's a greater demand because of the Government policy too, that has been applied...<sup>145</sup>

In an attempt to counter this threat, one participant noted how their organisation was constructing its one bedroom flats with a slightly larger footprint so that they could divide a one bedroom flat into a two-bedroom property if this was required in future years.<sup>146</sup> This demonstrates once more how the 'bedroom tax' has directly changed the way that some within the Welsh social housing sector operate. This pressure constrains the ability of the Welsh Government to develop its own, fully distinctive social housing policy. The new Welsh Government has announced that it aims to construct 20,000 affordable homes over the course of the present Assembly.<sup>147</sup> Given that the 'bedroom tax' has, in effect, changed the nature of the demand within Wales for social housing, the Welsh Government may need to construct a higher number of one bedroom properties than what it might have desired. This would mean that, despite the fact that housing was devolved to the National Assembly, the Westminster Government could still steer the development of the Welsh social housing sector. This could have long-term consequences for the way in which social housing regulation develops and for the future of divergence between Wales and England.

Work by the Welsh Audit Office in January 2015 suggested that the introduction of the 'bedroom tax' in Wales affected a disproportionate number of Welsh social housing tenants.<sup>148</sup> A House of Commons, Welsh Affairs Committee Report, published in 2013 gives,

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<sup>145</sup> Interview with Chief Executive of Welsh RSL 2, (West Wales, 25 March, 2015)

<sup>146</sup> RSL 1 (n142)

<sup>147</sup> Community Housing Cymru, 'Welsh Government pledges a further 20,000 affordable homes' (*Community Housing Cymru*, 2 June 2016) < <http://chcymru.org.uk/en/view-news/welsh-government-pledges-a-further-20000-affordable-homes>> accessed 9 August 2016

<sup>148</sup> Auditor General for Wales, *Managing the Impact of Welfare Reform Changes on Social Housing Tenants in Wales* (Wales Audit Office, 8 January 2015) 22

some indication as to why this was the case.<sup>149</sup> Many housing association properties in Wales were developed in the 1940s, during the baby boomer years, with few one bedroom properties being constructed at this time.<sup>150</sup> In addition to this, housing associations operating in Wales's most rural areas had very limited access to one bedroom properties. Moreover, homes were spread across large areas, making it hard to move people to smaller properties.<sup>151</sup> These structural differences between the sectors in Wales and England meant that the UK Government's welfare policy affected Wales differently to Scotland and England, with important implications for social housing law, policy and provision. In effect, the Westminster Government's welfare policy disproportionately affected Wales because the nature of the Welsh social housing sector differed from that of England. The introduction of the 'bedroom tax' could, in time, be viewed as a point of convergence, leading Welsh RSLs to deliver more one bedroom properties and driving the nature of sector in Wales closer to that of the sector in England.

This result is significant for another reason. The differences that have developed between the nature of the social housing stock in Wales and England have their roots in a period when there was very limited devolution in Wales.<sup>152</sup> This would suggest that differences between Wales and England's social, economic and geographical make up, are, to a certain extent, responsible for the distinctive nature of Wales's social housing stock. Recent advances in devolution mean that there is now a new pressure that could see the nature of Wales's housing stock become distinct from England. With the devolution of primary law making powers to the National Assembly there is now a greater space for divergent policy to develop. This policy divergence could, in time, see the nature of Welsh and English housing become more distinct. Nowhere can this potential be more clearly demonstrated than with regard to regulation. Recent variations that have developed between Wales and England regarding the role of profit-making providers and the different approaches to consumer regulation have already, and will increasingly, lead to the social housing sectors in Wales and England becoming distinct.<sup>153</sup> This raises the possibility that the Westminster Government's welfare policy could have increasingly different effects on either side of Offa's Dyke. This phenomenon is already presenting the Welsh Government with difficult choices.

Whilst social security has not been devolved to the National Assembly, the Welsh Government could have pursued an alternative policy choice when reacting to the 'bedroom

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<sup>149</sup> House of Commons Welsh Affairs Committee, *The impact of changes to housing benefit in Wales*, (Second Report of Session 2013–14, 8 October 2013)

<sup>150</sup> *ibid* page 12

<sup>151</sup> *ibid*

<sup>152</sup> The limited extent of devolution to Wales during this period is discussed in Chapter 3.

<sup>153</sup> As discussed in Chapter 6, in particular 6.1.

tax'. The Scottish Government took steps to 'mitigate' the effects of the 'bedroom tax'.<sup>154</sup> They provided local authorities in Scotland with additional discretionary housing payment, money that local authorities could spend on supporting tenants who needed assistance to pay their rent.<sup>155</sup> The Welsh Government also faced calls to adopt such an approach.<sup>156</sup> Adopting it would not only have mitigated the impact of the 'bedroom tax' in Wales but would also have reduced the immediate pressure of developing one bedroom properties, maintaining the difference between the housing stocks in Wales and England. The Welsh Government decided against this. It argued that funding the shortfall could have potentially been a substantial and long term cost which would not '*plug all the gaps*'.<sup>157</sup> In opting for this approach, the Welsh Government, perhaps unintentionally, has increased the possibility that the nature of the social housing stock in Wales and England will converge.

The question that remains unanswered is whether this one decision indicates how the Welsh Government will react to such pressures in the long term. If the Welsh Government continues to adopt a distinctive Welsh approach to social housing regulation, then this increases the possibility that the social housing sectors in Wales and England will diverge. With the Westminster Government continuing its programme of welfare reform through the introduction of universal credit and direct payments, any divergence between the sectors in Wales and England could mean that these policies will have a different impact in Wales compared to the rest of the UK.<sup>158</sup> If this is the case, the Welsh Government could face a choice, between maintaining an approach to social housing regulation that has allowed the sector in Wales to diverge to England, and taking steps to minimise this divergence so as to mitigate the impact of any welfare policies that disproportionately hit Wales. Issues of this kind could become increasingly important in our understanding of what drives the process of divergence and convergence between social housing regulation in Wales and England over coming years, raising questions over whether there is a need to develop a mechanism for sharing powers within the UK.

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<sup>154</sup> Kate Berry, *SPICe Briefing The 'Bedroom Tax'*, (The Scottish Parliament, 6 October 2014)

<sup>155</sup> *ibid* 9

<sup>156</sup> Corin Williams, 'Welsh Government urged to act on bedroom tax' (*Inside Housing*, 30 July 2015) <http://www.insidehousing.co.uk/welsh-government-urged-to-act-on-bedroom-tax/7011051.article> accessed 9 August 2016

<sup>157</sup> Huw Silk, 'Call for Welsh Government to subsidise families hit by the bedroom tax' (*Walesonline*, 26 October 2015) < <http://www.walesonline.co.uk/news/politics/call-welsh-government-subsidise-families-10327375>> accessed 9 August 2015

<sup>158</sup> Community Housing Cymru has recently raised concerns that the Westminster Government's decision to cap housing benefit at Local Housing Allowance Rate may impact Welsh tenants. This has led to calls by RSLs for Welsh Government to take action. Community Housing Cymru 'UK Government to cap housing benefit at LHA rates' (*Community Housing Cymru*, 21 November 2016) <http://chcymru.org.uk/en/view-news/uk-government-to-cap-housing-benefit-at-lha-rates> accessed 22 November 2016

### 7.3 Conclusion

This chapter has demonstrated that legislative devolution has allowed for the development of divergence between Wales and England. It has provided a way for the Governments in both nations to pursue differing policy objectives, leading to both legislative and regulatory divergence. The chapter has demonstrated, however, that whilst the devolution settlement does allow for the development of a degree of divergence, it does place limitations as to how far such divergence can develop. It has also highlighted how policy developed by the UK Government in non-devolved areas can have an impact on social housing in Wales, leading to the development of convergence. These findings are crucial in shaping our understanding of how divergence has developed between both nations, and how this could develop in future. These are not the only two factors that have contributed to the development of divergence. The next chapter will examine three other issues that have limited or contributed to the development of divergence between Wales and England. These are international accountancy practices, private finance and the structure of the sector. By examining all these factors together, the complicated way in which divergence develops will become further apparent.

## 8. The Drivers of Divergence and Convergence – Sector Specific Factors

The thesis has exposed the complicated way in which the divergence in social housing regulation between Wales and England has developed. It has revealed how powers over housing were devolved to Wales, increasing gradually from the powers of Welsh Board of Health in 1940, to the full legislative powers enjoyed by the National Assembly today. The thesis has also set out the extent by which social housing regulation differs between Wales and England in the present day, and has questioned how divergence might develop in future, focusing in particular on three aspects of the regulatory regimes: registration, tenant protection, and the problematic powers. In Chapter 7 the focus was on the constitutional factors that have driven and constrained divergence. Chapter 7 examined two factors, the impact of policy and political differences, and the impact of the limits of devolution, on divergence. It highlighted how these two factors work against each other, and with each other, to drive the law in Wales and England further apart, and closer together.

This chapter continues the examination of this process by looking at three other factors that have had an impact on the development of divergence. These factors are: (1) international accountancy standards, (2) access to private finance and (3) the structure of the sector in both nations. The first of these factors relate to the impact of the ONS's decision to reclassify housing association in Wales and England as part of the public sector. The chapter examines whether there is evidence of the ONS's decision influencing government policy; evidence that would suggest that international accountancy standards do have an impact on the way that divergence develops. The second factor relates to the pressures exerted on the sector from the financial markets, in particular from money lenders. This chapter will look at areas of regulation where it would seem that lender concerns have had an impact on Government policy. Finally, the chapter looks at the structural differences that exist between the Wales and England. As was demonstrated in Chapters 3, 4 and 5, societal, economic and geographic differences can impact upon the divergence process. This chapter questions whether the significant differences that exist between the scales of the social housing sectors in both nations has had any impact on the development of divergence.

### 8.1 The impact of international accountancy standards

So far, one of the key themes of this thesis has been the complicated way in which divergence has developed. As was demonstrated in Chapter 6, the way that regulation is undertaken differs on a number of levels, and these differences have their roots in changes

made at both Westminster and Cardiff Bay. Chapter 6 also sets out how regulation has converged as well as diverged during this period. This thesis has already demonstrated how constitutional factors have contributed to the development of divergence in social housing regulation in Wales and England. The establishment of the National Assembly, and the devolution of primary law-making powers to it, has, for the first time, created the possibility that two different bodies can pursue two differing legislative programmes, leading to a growth in divergence. As demonstrated in 7.2, however, the ability of the Welsh Government to develop distinctive policies and legislation is constrained by the nature of the devolution settlement. It is not just the nature of the devolution settlement that constrains the ability of the Governments in Westminster and Cardiff Bay to develop their own distinctive policies on social housing regulation, it is also constrained by external pressures. This section of the chapter will focus on one such external factor: international accountancy standards. The chapter will argue that the decision of the ONS to reclassify housing associations in Wales and England as part of the public sector, demonstrates how such standards can shape regulatory approaches, constraining divergence. The chapter will examine what impact this process has had on regulatory

### 8.1.1 The ONS intervenes

Countries across the globe are required to adopt a rigorous, internationally consistent system for classifying what is happening within their national economies.<sup>1</sup> National Accounts developed in such a way allow for comparisons to be taken between nations globally, and underpins how large sums of money is divided between nations.<sup>2</sup> Within the European Union (EU) the requirement for ensuring consistency in approach between nations is made more pressing by the fact that such classifications underpins the decision making process for deciding on each member state's contribution to the EU.<sup>3</sup> It is perhaps not surprising that the EU has developed a harmonised methodological approach that must be used by each member state when undertaking such work, the European System of Accounts Framework 2010 (ESA 2010).<sup>4</sup> In the UK, it is the role of the ONS to apply this methodology, ensuring that each body/ sector in the UK is accurately classified under this methodological approach.<sup>5</sup>

Every month the ONS classification team publishes a forward workplan setting out which bodies will have their status reviewed in the upcoming period. On 19 September 2015, the

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<sup>1</sup> Office for National Statistics, *National Accounts sector and transaction classification: A summary of the classification process* (Office for National Statistics, January 2012) 3

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> Eurostat, European Commission, *European System of Accounts 2010* (European Union, 2013)

<sup>5</sup> National Accounts sector (n1)

ONS announced that the status of registered providers in England would come under review.<sup>6</sup> This news did not come as a surprise to the sector in light of new policies announced by the recently elected Conservative Government.<sup>7</sup> These included the expansion of the 'right to buy' so that it applied to the properties of registered providers in England. Indeed, the ONS revealed during interview that these changes acted as a catalyst in their decision to review the status of English registered providers.<sup>8</sup>

When the reclassification announcement was made on 30 October, however, the ONS made no reference to the new Government policy and focused instead on the provisions that were already in place through the Housing and Regeneration Act 2008.<sup>9</sup> The reason for this is to be found in the methodological approach set out in ESA 2010:

Interviewee ONS: ... In each period, we produce those statistics for, say, each quarter, we have to make sure that the units, as in statistical units, including Government departments, charities, whatever, businesses, and the transactions that they engage with are classified correctly based on their characteristics in accordance with the rules for that quarter. So, we wouldn't look at anything that was coming up because it hasn't happened and it's not real.

Given that the proposed policy changes in England did not make it onto the statute book until May 2016, these changes were 'not real' at the time of the review. The same could not be said of the legislative changes made through the enactment of the Housing and Regeneration Act 2008 and the Localism Act 2011, which had not been in place when the ONS had last undertaken a review into the status of English registered providers.<sup>10</sup> In addition to this, the framework by which the ONS made its classifications decisions had been updated since the last review of private registered providers. As noted above, the ONS is required to classify each unit in the UK in accordance with ESA 2010.<sup>11</sup> ESA 2010 was introduced in September 2014, replacing a previous methodological approach that had been

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<sup>6</sup> Office for National Statistics, 'National Accounts Sector Classification: Classification update and forward workplan, September 2015' (*Office for National Statistics*, 29 September 2015) < <http://www.ons.gov.uk/economy/nationalaccounts/uksectoraccounts/articles/nationalaccountssectorclassifications/2015-09-29>> accessed 22 July 2016

<sup>7</sup> Steffan Evans 'How extending the right to buy in England could change the relationship between the government and housing associations' (*LSE British Politics and Policy Blog*, 14 August 2015) <http://blogs.lse.ac.uk/politicsandpolicy/how-extending-the-right-to-buy-in-england-could-change-the-relationship-of-the-uk-government-with-housing-associations/> accessed 22 July 2016

<sup>8</sup> Interview with a member of the Office for National Statistics Classifications Team, (Newport, 8 April 2016) 'I would refer to it as the catalyst, you know, because it was something we were aware that was going to happen and we wanted to get our house in order, or make sure that our house was in order rather.'

<sup>9</sup> Office for National Statistics 'Classification announcement: 'Private registered providers' of social housing in England' (30 October 2015)

<sup>10</sup> *ibid*

<sup>11</sup> *ibid*

in place since the 1990s.<sup>12</sup> It was therefore on these two grounds that the ONS undertook its review of private registered providers in England. It is difficult to separate the two grounds to undertake an accurate analysis on the impact of each factor in leading the ONS to reclassify private registered providers,<sup>13</sup> but, Given that the ONS classification announcement originally applied from the 22 July 2008, the date of enactment of the Housing and Regeneration Act 2008, it had seemed that the provisions enacted within the Act also contributed to the ONS's decision.<sup>14</sup> In September 2016, however, the ONS announced that the date from which English housing associations were to be reclassified as part of the public sector was to be extended back to the date of enforcement of the Housing Act 1996, suggesting that the provisions enacted within the Housing and Regeneration Act 2008 had been a less significant factor for the ONS than had originally been understood.<sup>15</sup> Given this uncertainty the focus of this chapter is not on measuring the impact of any individual ground on classification, but is on examining what the ONS's decision, and the reaction to it, tells us about divergence.

As was set out in more detail in Chapter 6, the ONS highlighted five powers that had led them to reclassify private registered providers in England as Public Non-Financial Corporations. These were:

1. HM Government consent powers over, and power to set conditions on, disposals of social housing assets (exercised through the HCA under section 172-178 of the HRA [Housing and Regeneration Act] 2008)
2. HM Government powers to direct the use of disposal proceeds (exercised through the HCA under sections 177-178 of the HRA [Housing and Regeneration Act] 2008)
3. HM Government consent powers over disposals of housing stock following a registered provider's de-registration with the HCA (exercised through the HCA under section 186 of the HRA [Housing and Regeneration Act] 2008)

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<sup>12</sup> ESA (n4)

<sup>13</sup> Interview with ONS (n8) During interview with the ONS, the ONS employee stated that *'it is difficult to say because of course we didn't do the review twice, once under the old rules, once under the new rules, we have the new rules and we applied them.'*

<sup>14</sup> Classification announcement (n9).

<sup>15</sup> Luke Cross 'Housing associations in Scotland, Wales and Northern Ireland reclassified to public sector' (*Social Housing*, 29 September 2016) <http://www.socialhousing.co.uk/news/housing-associations-in-scotland-wales-and-northern-ireland-reclassified-to-public-sector/7017005.article#> accessed 1 March 2017



4. HM Government consent powers over the voluntary winding-up, dissolution, and restructuring of a registered provider (exercised through the HCA under section 160-166 of the HRA [Housing and Regeneration Act] 2008)

5. HM Government powers over the management of a registered provider, in particular the power of the HCA to appoint managers and officers to the provider (exercised through the HCA under sections 151-157, 246-252, 261(3) and 269 of the HRA [Housing and Regeneration Act] 2008).<sup>16</sup>

The ONS were clear that its reclassification decision had been *'taken on the sum of all evidence'*.<sup>17</sup> Yet it was revealed that *'sufficient evidence against one, or, even only one of the indicators set out in the rules can be enough to indicate control...'* so as to necessitate reclassification.<sup>18</sup> The approach taken by the ONS when assessing these controls differed to the approach taken by the UK Government. This is demonstrated by looking at a guide published on the ONS website that sets out how the classification team operates:

Although national accounts classification decisions have wide relevance within government, it should be made clear that ESA does not allow for consideration of political or commercial significance when making classification decisions and that as an independent statistics office, ONS ensures that classification decisions are robust and fully consistent with the rules of ESA10 and additional relevant statistical guidance.<sup>19</sup>

The ONS therefore makes decisions by assessing the Government's control over a body, against the rules contained in ESA10 without consideration of wider political or commercial context.<sup>20</sup> The UK Government took a different approach. During an interview, Kerry Mac Hale, the policy lead on social housing regulation at the Westminster Government, revealed that her team had undertaken their own internal assessment following the publication of the ONS's forward workplan. Mac Hale declared:

We obviously had our own internal assessment, we had been talking to them, we knew specific things they were asking us for information on, we also had looked at ESA 2010 against all the information we'd provided, with all of these things,

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<sup>16</sup> *ibid*

<sup>17</sup> ONS interview (n8)

<sup>18</sup> *ibid*

<sup>19</sup> Office for National Statistics 'UK economic statistics sector and transaction classifications: the classification process' (*Office for national Statistics*)

<http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/guide-method/classifications/na-classifications/the-ons-classification-process/index.html> Para 9

<sup>20</sup> The ONS made it clear during interview that its role was to make sure that it classified bodies correctly for every quarter *'based on their characteristics in accordance with the rules'*. ONS interview (n8)

they're independent, they're also looking at this from a statistical perspective where I'd be looking at the issues from a policy perspective which is quite different, so I'm looking at, really my natural inclination is to look at things and go, why have we got those powers in the first place? And evaluate whether they're, you know? Whether that's appropriate or not, they'll be looking at something slightly different, so I think we've always known that there were risks to classification for the sector...<sup>21</sup>

It would seem that the approach of those working at the UK Government was far more policy-focused than the rules based stance of the ONS. On occasions these different approaches can be fundamentally confrontational. As set out in Chapter 6, the UK Government has deregulated the social housing sector in England as a response to the ONS's decision, reducing or abolishing the regulator's power in all five areas cited by the ONS.<sup>22</sup> The Westminster Government was reluctant to introduce full-scale deregulatory changes in one area, however, the regulator's powers over the management of a provider.<sup>23</sup> The reason for this reluctance was made clear by Kerry Mac Hale during interview, as can be seen from the following extract:

so, the only thing we didn't remove is the appointment, the power, the regulator's power to appoint officers and managers, but we did tighten that and we have been quite clear why we haven't tightened that because we think it's a key power for any regulator to have, if there's a, you know? Significant risk to the sector, then they need to be able to take those kinds of actions but they need to be quite closely guarded so that, you know? I don't know, if the regulator decides to take a dislike to somebody they can't just remove them, but what we have done is tighten it so that if an organisation has broken the law they can decide to use their powers, it's not automatic, but they can decide to use them.<sup>24</sup>

The UK Government's policy driven view that such powers are crucial for regulation to be undertaken would not influence the ONS given that international accountancy practices require such decisions to be made without consideration for its political or commercial significance. It remains to be seen whether the UK Government's attempt at a compromise is sufficient to appease the ONS. The ONS does permit Government departments to

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<sup>21</sup> Interview with Kerry Mac Hale, Policy lead on social housing regulation, UK Government (Telephone interview, 17 May 2016)

<sup>22</sup> See 6.3

<sup>23</sup> Whilst the powers of the regulator to appoint managers and members to a body were tightened, these were not abolished. More detail can be found in 6.3.6

<sup>24</sup> Interview with Kerry Mac Hale (n23)

approach it to seek advice on how a policy change is likely to impact on classification.<sup>25</sup> During interview the ONS would not reveal if such conversations had taken place with regard to the UK Government's deregulatory proposals.<sup>26</sup> Kerry Mac Hale revealed, however, that the Government had, had '*informal conversations*' with the ONS but that they would not '*give an opinion on*' what the Government had done, '*until they make next ruling*'.<sup>27</sup>

Whilst the Westminster Government has been more prepared to deregulate with regard to the other powers cited by the ONS, Kerry Mac Hale made a very revealing comment during interview:

Interviewer: Ok, and with regard then to the changes you made to the, you know? Five points raised by the ONS, were any of those things that might have been on the cards anyway or did they become issues because of what the ONS did?

Interviewee Kerry Mac Hale: Well we're constantly renewing the regulatory framework. Would we have moved at that point to make those changes? Probably not. Would we have chosen to make some of those changes without an ONS ruling? Probably not. So, it was a catalyst for quite a lot of decisions.<sup>28</sup>

Mac Hale's answer makes it clear that the UK Government would not have enacted these changes were it not for the ONS's decision to reclassify English registered providers. This is a very important finding, which highlights the limitations placed on a government when it attempts to develop its policy programme. Whilst it would be correct to note that the UK Government were not legally bound to take deregulatory steps following the ONS's decision, the decision placed the Government in a position where it took steps that it would '*probably not*' have done otherwise. The reasons why the UK Government felt compelled to act following the ONS's decision suggests that international accountancy standards and their application are, in effect, regulating the Government's work.

Following the reclassification announcement, the Westminster Government came under pressure from a number of angles to reverse the ONS's decision. First, it is likely that the Treasury was eager to see the £60 billion of additional borrowing that had been transferred onto its books, transferred back to the social housing sector as quickly as possible. Secondly, the leaders of housing associations across England made it clear that they wished

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<sup>25</sup> Classification process (n21) para 44

<sup>26</sup> ONS interview (n14)

<sup>27</sup> Kerry Mac Hale interview (n23)

<sup>28</sup> *ibid*

to see the sector regain its independence as quickly as possible.<sup>29</sup> Finally there were concerns within Government and the sector over how the decision to reclassify registered providers might affected their ability to borrow money in the future from the private sector.<sup>30</sup> This would have a serious impact on the ability of registered providers to construct new housing, which would have a knock on impact on the Government's ability to meet its own house building targets. These three factors contributed to shape the UK Government's policy response to the decision. This response is best summarised by the following extract from evidence given by the then UK Government Minister for Housing and Planning, Brandon Lewis at the Communities and Local Government Committee in December 2015. Lewis stated that he wanted registered providers '*off the Government books, which is what they want, as quickly as possible.*'<sup>31</sup> Statutory deregulation therefore became the most attractive option for the Westminster Government.

This finding has important implications for our understanding of how legislation is developed in the UK. As a condition of its EU membership and in order to ensure that the British economy remains an attractive investment prospect, the UK Government must ensure that its accounts are governed in a way that is consistent with other nations. Responsibility for ensuring that the UK does act in compliance with such international accountancy standards has been placed with the ONS. Not only does the ONS have to ensure that the UK complies with such international standards, it must also ensure that it assesses compliance in a way that is methodologically consistent with the international community. This means that the ONS is not permitted to consider why controls have placed over bodies such as social housing providers, but, rather whether those controls mean that, according to international accountancy standards, such bodies should be classified as part of the public or private sector. This approach regulates the extent of control that a government can enjoy over certain bodies/ sectors, whilst at the same time ensuring that body remains part of the private sector.

This finding, that international accountancy practices drove Westminster Government's policy on social housing regulation has important implications for Wales and for our understanding of the divergence processes. In the short term, these practices can be said to have driven divergence between Wales and England, with the UK Government's

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<sup>29</sup> National Housing Federation, 'ONS Reclassification of Private Registered Providers' (*National Housing Federation*) < [http://s3-eu-west-1.amazonaws.com/pub.housing.org.uk/ONS\\_Reclassification\\_of\\_Private\\_Registered\\_Providers.pdf](http://s3-eu-west-1.amazonaws.com/pub.housing.org.uk/ONS_Reclassification_of_Private_Registered_Providers.pdf) > accessed 23 July 2016

<sup>30</sup> *ibid*

<sup>31</sup> Communities and Local Government Committee, *Housing Associations and the Right to Buy*, (2015-16 HC 370) oral evidence by Brandon Lewis the Minister of State for Housing and Planning, Q321

deregulatory legislation moving the regulatory regime in England away from the regime that is in place in Wales. In the long term, however, this may lead to regulatory convergence, as the Welsh Government attempts to deal with the ONS decision to reclassify Welsh RSLs.<sup>32</sup>

On 29 September 2016, the ONS announced that Welsh RSLs were also to be reclassified as part of the public sector.<sup>33</sup> As discussed in 6.3, the reasons given by the ONS for reclassifying Welsh RSLs were extremely similar to the reasons it provided for reclassifying registered providers in England. The ONS focused in particular on the Welsh Government's consent powers over disposals, the Government's powers over the management of RSLs and the Government's powers over constitutional changes at RSLs.<sup>34</sup> It would seem that the Welsh Government would have three options open to it when deciding on how to respond to the reclassification decision; do nothing, follow England's lead, develop a distinctive Welsh approach.

As was the case in England, the Welsh Government is not obliged to take action to seek to reverse the ONS's reclassification decision. With housing devolved to the Assembly, the Welsh Government, can, if it so wishes, decide to retain RSLs as part of the public sector in Wales. Given the political differences that exist between Wales and England, as evidenced in sub-section 7.1, this may prove to be an attractive option to some within the Welsh Government. Yet the obstacles that would have faced the UK Government had it chosen to adopt this approach in England are also apparent in Wales. Welsh RSLs have asserted their wish to remain independent of the Welsh Government, expressing concerns that remaining part of the public sector would have an impact on their ability to borrow money and to construct housing.<sup>35</sup> The Welsh Government would also face one further complication if it chose to adopt such an approach. The reclassification of Welsh RSLs will add an estimated £2.3 billion to the national debt.<sup>36</sup> This debt will be placed on the UK Government's balance sheet, not the National Assembly's.<sup>37</sup> The ONS revealed the reasons for this during interview:

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<sup>32</sup> Office for National Statistics 'Statistical classification of registered providers of social housing in Scotland, Wales and Northern Ireland: September 2016' (29 September 2016)

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> Community Housing Cymru 'CHC's response to the ONS reclassification of housing associations in England' (*Community Housing Cymru*, 30 October 2015) < <http://chcymru.org.uk/en/view-news/chcs-response-to-the-ons-reclassification-of-housing-associations-in-englan> > accessed 23 July 2016

<sup>36</sup> Steffan Evans 'Adding £2.3bn of debt to the accounts – social housing deregulation as an early test for the minority Welsh Government' (LSE British Politics and Policy Blog, 10 May 2016) < <http://blogs.lse.ac.uk/politicsandpolicy/adding-2-3bn-of-debt-to-the-national-accounts-social-housing-deregulation-as-an-early-test-for-the-minority-welsh-government/> > accessed 23 July 2016

<sup>37</sup> ONS interview (n14)

Interviewee ONS: so, the public sector is made up in technical terms of the general government sector, which includes all the government stuff, and even more technically, that includes stuff that is public and non-market, and in, sort of, very, very rough terms, non-market things are things that aren't behaving like business.

Interviewer: Yeah

Interviewee ONS: The public sector also include things that are public controlled and market producers, so they are public controlled business like I said. So, the Welsh Government itself fits into the general government part and more specifically within that it sits in the central government sub-sector. There is a state government sub-sector as well in the European System of Accounts, but we, last year concluded that the state government sub-sector does not exist in the UK, for very good technical reasons. That's not to say that Welsh Government or any of the other devolved admins don't look a bit like states, it's just to say in terms of the powers that they have, it's just to say that in terms of how state government is defined in ESA, that doesn't apply to the UK, and for that reason, you kind of have to make a call are the state, are the devolved administrations part of central government or local government? Well given the definitions they can't be part of local government, they are part of central government, they're effectively like having a government department but whereas it's responsibility is not over a certain competence like welfare, but over a certain geography like Wales.<sup>38</sup>

This passage suggests that international accountancy standards can place a further practical constraint on the ability of the Welsh Government to develop distinctive social housing policy on two grounds. First, with regard to future borrowing, the UK Government's debt is the responsibility of the Treasury, and as such all public-sector borrowing is subject to rules set by the Treasury. This would mean that in effect, Welsh RSL would be subjected to Westminster control. This is an eventuality that both the Welsh Government and the social housing sector in Wales would seem to be eager to avoid. Secondly, the Treasury may attempt to put pressure on the Welsh Government to deregulate the sector in Wales to ensure that any reclassification is reversed so as to remove the £2.3 billion extra debt from the national balance sheet. If the Assembly were to decide not to take steps to ensure that RSLs were transferred back to the public sector, such pressure could test the already fractious relationship between the Governments in Cardiff Bay and Westminster. Given all

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<sup>38</sup> *ibid*

these pressures, it is perhaps unsurprising that the Welsh Government has indicated that it will bring forward legislation to ensure RSLs return to the private sector.<sup>39</sup>

Shortly after the publication of the ONS's reclassification decision in England, a story appeared in the housing press, setting out that the Welsh Government were looking to take pre-emptive deregulatory measures in an attempt to prevent reclassification.<sup>40</sup> With the Assembly election and the EU referendum dominating the political landscape in the spring and summer of 2016, such pre-emptive legislation did not emerge prior to the ONS's reclassification announcement. Despite this, the Welsh Government has reiterated its commitment to enacting legislation to ensure that Welsh RSLs are returned to the private sector.<sup>41</sup>

The options available to the Welsh Government to reverse the reclassification decision appear limited. The first option for the Welsh Government would be to follow the lead of the UK Government in England, and to deregulate the sector in Wales. If the Welsh Government were to choose to follow this route the law in Wales and England would converge, with the powers of the regulators in both nations being more closely aligned than what they had been before the ONS's initial review. Such an approach may seem attractive to the Welsh Government. By enacting similar deregulatory provisions to the ones that were set out in the Housing and Planning Act 2016, the Welsh Government could draw upon the experience of the Westminster Government, meaning that legislation could be enacted quickly to minimise interference. On the other hand, this is not an easy option politically. As has been demonstrated, even a right wing Conservative Government in Westminster had difficulty in completely loosening the Government's control over the social housing sector in England in the five areas identified by the ONS. A left wing, Labour Government in Wales, dependent on the support of Plaid Cymru might find this even more difficult. This might lead the Welsh Government to adopt a distinctive Welsh approach.

Given that housing is devolved to the National Assembly the Welsh Government is free to develop its own regulatory approach in an attempt to reverse the ONS's reclassification. The Welsh Government's ability to do so is limited. As was noted by Kerry Mac Hale, the ONS were very clear in their classification decision in England about which powers they felt

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<sup>39</sup> Carl Sargent, Cabinet Secretary for Communities and Children 'Keynote address' (Community Housing Cymru, Creating the Narrative, Annual Conference 2016, Cardiff, December 2016)

<sup>40</sup> Pete Apps, 'Wales mulls deregulation to head off ONS', (*Inside Housing*, 28 January 2016) <<http://www.insidehousing.co.uk/wales-mulls-deregulation-to-head-off-ons/7013693.article>> accessed 23 July 2016

<sup>41</sup> Heather Spurr 'Governments pledge to reverse ONS reclassification' (*Inside Housing*, 30 September 2016) <<http://www.insidehousing.co.uk/governments-pledge-to-reverse-ons-reclassification/7017032.article>> accessed 2 November 2011.

necessitated reclassification, giving the Westminster Government very limited move to manoeuvre.<sup>42</sup> The ability of the Welsh Government to develop a distinctive approach with regard to primary legislation is equally limited. The Welsh Government may have greater room to manoeuvre, however, with regard to the regulatory framework. This room for manoeuvre is particularly pronounced when looking at the power of the Welsh Government over the constitutional changes made by RSLs. As was discussed in Chapter 6, under the new statutory basis for regulation in England, a provider will no longer need the consent of the regulator before making such changes.<sup>43</sup> The HCA could, however, refuse to register the provider in its new form, meaning that it did retain a degree of regulatory control over structural makeup of the sector. This control seems likely to be loosened further in England, with the HCA opening consultation over the prospect of granting near automatic registration to a new provider formed as a result of two registered providers merging.<sup>44</sup> An option for Welsh Government could be the removal of the requirement for RSLs to gain its consent before making such structural changes, but without taking the extra steps of removing its registration powers. This approach may satisfy the ONS sufficiently to lead it to reverse the expected decision to reclassify Welsh RSLs, whilst retaining a greater degree of control over the sector than their counterparts in England.

Comments made by Carol Kay and Sarah Laing Gibbens of the Welsh Government's regulatory team suggest that this will be the approach pursued by Welsh Government. At Community Housing Cymru's Annual Conference in December 2016, Kay and Laing set out proposed changes to the regulatory regime in place in Wales.<sup>45</sup> These changes would see the way that the regulator publishes its regulatory judgments change, and would see performance standards that RSLs must comply with simplified.<sup>46</sup> In addition to explaining what these proposed changes would mean for the sector, Kay and Laing set out why they were necessary. It was argued that these changes were necessary to ensure that the Welsh Government had a '*smooth path*' when bringing forward legislation to change the statutory

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<sup>42</sup> Kerry Mac Hale interview (n23)

<sup>43</sup> Housing and Planning Act 2016

<sup>44</sup> HCA Consultation

<sup>45</sup> Carol Kay and Sarah Laing Gibbens 'Regulatory Reform- Sharpening our approach to delivering regulation' (Community Housing Cymru, Creating the Narrative, Annual Conference 2016, Cardiff, December 2016) and Welsh Government, *Improving the implementation of the Regulatory Framework: a risk based approach to regulation* (December 2013)

<sup>46</sup> *ibid.* The Welsh Government will publish two regulatory scores in relation to the performance of each RSL. These will be known as a 'Co-regulation Status'. One will concern performance in relation to 'governance and service delivery' standards, the other will concern performance in relation to 'financial viability' standards. These statuses will be published annually at a minimum, and more regularly if required. The number of standards that Welsh RSLs have to comply with, would, under the changes be reduced, and the nature of standards simplified. These new standards will, however, be based on those already in place.



basis for regulation, in the wake of the ONS decision.<sup>47</sup> Kay and Gibbens argued that regulation needed to be robust, and seen to be robust to reassure lenders and politicians when legislation was brought forward.<sup>48</sup> Not only do Kay and Laing's comments emphasize, once more the impact international accountancy standards have on divergence, it also emphasizes the fact that differences in social housing regulation between Wales and England appear at a number of levels, one of the key themes of this thesis. If the Welsh Government does adopt this approach in reacting to the ONS's decision it would mean that the statutory basis for regulation in Wales and England, would converge, but with a degree of variation continuing in practice. It will be interesting to revisit this factor, during future research, to examine whether regulation has converged in the way that presently looks likely.

## 8.2 Private finance

The thesis has examined the impact of three factors on the development of divergence between Wales and England to date: the impact of politics and policy,<sup>49</sup> the limits of devolution,<sup>50</sup> and the impact of international accountancy standards.<sup>51</sup> It has demonstrated how each of these factors has had an impact on the way that social housing regulation is undertaken in both nations and has questioned what impact they may have in future. This chapter now turns to examine a fourth factor that has had a clear impact on the development of divergence between Wales and England in recent years: private finance. This section will consider the impact of this factor in two parts. 8.2.1, will explore how the concerns of lenders and the bond markets have shaped the way that regulation is undertaken in practice. Having completed this exploration 8.2.2 will consider whether concerns expressed by the financial sector have shaped legislation in England.

As discussed in 6.1.1 and in 2.1.1 in particular, gaining access to private finance has become increasingly important for housing associations. Such finance is accessed in a number of ways. In Wales bank loans remain by far the most prominent form of private finance used by RSLs.<sup>52</sup> In England, however, registered providers have increasingly turned to institutional investors as they seek access to more private finance at better prices.<sup>53</sup> Regardless of which source of finance is used, it is vital for housing associations that they can gain access to it if they are to be able to develop their social housing portfolios. This

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<sup>47</sup> *ibid*

<sup>48</sup> *ibid*

<sup>49</sup> See 7.1

<sup>50</sup> See 7.2

<sup>51</sup> See 8.1

<sup>52</sup> 'The 2016 Financial Statements of Welsh Housing Associations' (Community Housing Cymru, 2016)

<sup>53</sup> See 2.1.1 for a fuller discussion on this.

increasing reliance on private funds has had an impact on how the sector operates. The thesis has already highlighted that both Welsh RSLs and English registered providers are concerned that ONS reclassification could have an impact on the sector's ability to get access to private finance, and how this is shaping the way that the Governments in both nations are reacting to the decision.<sup>54</sup> This is not the only impact that the financial markets have had on the way that social housing regulation is undertaken in Wales and England. It has been argued by some that housing associations are increasingly becoming subjected to external forms of regulation, from lenders directly<sup>55</sup> and from ratings agencies,<sup>56</sup> as the amount of private finance that enters the sector increases and becomes more diverse. Whilst not directly examining how these new external regulatory practices might be impacting upon the way that RSLs and registered providers are operating on a day to day basis, this section of the chapter will highlight how such pressures have impacted upon the regulatory work of the Welsh Government and the HCA respectively.

### 8.2.1 Market regulation

The chief executives of five Welsh RSLs interviewed for the purposes of this thesis were in no doubt that the regulatory opinions that the Welsh Government published in relation to their organisations had an impact on their ability to borrow money. The chief executives of four RSLs stated that, whilst their organisations had received satisfactory financial viability judgments, they believed that any negative assessment would have an impact on their ability to borrow further funds. One chief executive noted that the lenders for their organisation would:

come into meetings and they'll quote sentences out of our financial viability judgment.<sup>57</sup>

Another set out why they felt that a poor regulatory assessment could have an impact on their ability to borrow money. The participant felt that it would:

make a lender more nervous and if a lender is nervous, they perceive the risk higher, then the price of funding goes up...<sup>58</sup>

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<sup>54</sup> See 6.1.1 and 8.2

<sup>55</sup> For example, see; Thomas Wainwright and Graham Manville, 'Financialization and the third sector: Innovation in social housing bond markets' (2016) *Environment and Planning A* 819; and; Connie P.Y. Tang, Michael Oxley and Daniel Mekic, 'Meeting commercial and social goals: institutional investment in the housing association sector' (2017) *Housing Studies* 411

<sup>56</sup> Tang et al (n60)

<sup>57</sup> Interview with Chief Executive of Welsh RSL 5, (South Wales, 21, October, 2015)

<sup>58</sup> Interview with Chief Executive of Welsh RSL 4, (West Wales, 14 May, 2015)

The evidence given by the Chief Executive of an RSL which had received a poorer regulatory score suggests that the other participants were correct in this view. The Chief Executive explicitly stated that their poor regulatory score had, had an impact on their ability to borrow further funds in future.

Interviewer: Yeah, from that then it would suggest that your regulatory score would have an impact then would it, on future lending?

Interviewee, Chief Executive 2: Yeah, yep, yep and has.<sup>59</sup>

It is not surprising that organisations with good regulatory scores find it easier to gain access to private finance, with research suggesting that the same is true for the sector in England.<sup>60</sup> Given the importance of private lending to the social housing sector the regulators in both nations are placed in a difficult position. Evidence gathered through interviews in Wales, and through the examination of evidence given by the head of the Regulation Committee at the Homes and Communities Agency (HCA), Julian Ashby, to the Communities and Local Government Committee in July 2013, suggests that pressure from the financial sector influences the way that the social housing regulators operate in both nations. This demonstrates that 'private finance' is another factor that impacts on the development of divergence in social housing regulation between Wales and England. The significance of this finding will be discussed below.

As set out in Chapter 6, the regulator in England has adopted a two-tier approach to regulation, with the regulator treating consumer regulation and economic regulation differently. Consumer regulation, within the social housing context, is undertaken on a reactive basis, and only in cases where a standard was breached to such an extent that the tenant suffered a serious detriment.<sup>61</sup> Economic regulation on the other hand is undertaken on a proactive basis.<sup>62</sup> There are two strands to the way that economic regulation is undertaken. First a provider must meet regulatory outcomes that concern their governance as an organisation.<sup>63</sup> A provider must:

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<sup>59</sup> Interview with Chief Executive of Welsh RSL 2, (West Wales, 25 March, 2015)

<sup>60</sup> For example Tang et al (n60)

<sup>61</sup> Home and Communities Agency *'Regulating the Standards'* (June 2015)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/463693/20150925\\_Regulating\\_The\\_Standards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/463693/20150925_Regulating_The_Standards.pdf) accessed 9 August 2016

<sup>62</sup> *ibid*

<sup>63</sup> Homes and Communities Agency, *'Governance and Financial Viability Standard'* (April 2015)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/419368/Governance\\_and\\_Financial\\_Viability\\_Standard\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419368/Governance_and_Financial_Viability_Standard_2015.pdf) accessed 9 August 2016

ensure effective governance arrangements that deliver their aims, objectives and intended outcomes for tenants and potential tenants in an effective, transparent and accountable manner.<sup>64</sup>

A provider must also comply with six specific outcomes concerning their governance. These concern matters such as adhering to all relevant law, complying with regulatory requirements and having an effective risk management controls in place.<sup>65</sup> Secondly, registered providers must meet regulatory outcomes that concern their financial viability. Registered providers must:

manage their resources effectively to ensure their viability is maintained while ensuring that social housing assets are not put at undue risk.<sup>66</sup>

Registered providers are assessed for their compliance with these two aspects of economic regulation separately, with the regulator publishing two separate judgements. Compliance is graded between one and four, with one being the highest score and four being the lowest.<sup>67</sup> Despite the clear overlap that exists between both requirements, it seems that the two were designed to play different roles as part of the regulatory framework. A provider's governance score had been introduced to measure how well it was being managed, whilst a provider's financial viability score had been introduced to measure its financial health.<sup>68</sup> In practice, the HCA Regulatory Committee has blurred the line between the two. This fact and the reason for it were revealed by the Chair of the HCA Regulatory Committee, Julian Ashby in rather extraordinary evidence to the Communities and Local Government Committee in July 2013.<sup>69</sup> In his evidence, Ashby revealed that a 'handful' of registered providers, no more than five, were non-compliant with financial viability standards.<sup>70</sup> He revealed the reason for this:

It would be a small number primarily because non-compliance with the viability standard would almost certainly trigger a potential breach in covenant. We are very wary of making a situation worse by doing something that would trigger a covenant breach.<sup>71</sup>

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<sup>64</sup> *ibid* 1

<sup>65</sup> *ibid*

<sup>66</sup> *ibid*

<sup>67</sup> Regulating the standards (n66) 20,21

<sup>68</sup> *ibid*

<sup>69</sup> Communities and Local Government Committee, *Minutes of Evidence*, (2013-14 HC 310) oral evidence by Julian Ashby, Chair, Regulation Committee, Homes and Communities Agency.

<sup>70</sup> *ibid* question 11

<sup>71</sup> *ibid* q13

This is a rather startling statement. Ashby seems to reveal that the HCA Regulatory Committee consciously avoided downgrading registered providers' financial viability rating to avoid triggering a reaction from lenders and the financial markets. This statement becomes even more surprising when read in conjunction with further information that came to light during Ashby's evidence. It became apparent that, despite his view that a 'handful' of registered providers were non-compliant with financial viability standards, only one, Cosmopolitan Housing, which was in well documented financial difficulty at the time, was awarded the bottom two grades.<sup>72</sup> This provoked a reaction from the members of the committee.

Q23 Chair: Why do you have a financial viability rating if you do not use it in those circumstances, then?

Julian Ashby: We do use it, but the circumstances-

Q24 Chair: It is not used for anybody here. Apart from Cosmopolitan, which is obviously in the bottom section, there is not a single organisation rated in V3. Everyone else is basically good or very good.

Julian Ashby: I see the point you are making.

Q25 Chair: It is quite an important point, isn't it?

Julian Ashby: It is. A conclusion, though, that an association is not viable is a very serious conclusion to come to, because it is not simply saying that there are issues to address.

Q26 Chair: The wording is not "not viable". It says, "Financial viability is of concern". Not a single association in the country concerns you with regard to their financial viability.

Julian Ashby: The issue that highlights is the difficulty of giving a grading that could trigger a re-pricing.

Q27 Chair: So is it not worth the paper it is written on.<sup>73</sup>

Again, Ashby seemed to suggest that he, as the Chair of the regulatory committee at the HCA, was reluctant to use his own regulatory powers. His concern was that this could worsen the situation by raising the costs of borrowing from the private sector. Ashby's evidence suggests that he would have given a 'handful' of registered providers a lower

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<sup>72</sup> *ibid* q22

<sup>73</sup> *ibid* q23, 24, 25, 26, 27

financial viability score, were it not for these pressures.<sup>74</sup> Ashby became even more explicit during the course of his evidence that the HCA Regulatory Committee consciously chose not to use some their regulatory powers:

Q41 Andy Sawford: Your submission suggests your powers are not fit for purpose in the current economic climate, and you have repeatedly talked about the risk of repricing. The fear of causing providers to breach loan covenants is something you have raised. This clearly ties your hands, and it has come out in the questioning. Exactly which of your powers are not now available to you?

Julian Ashby: All the powers are there and are available to us. The issue is whether it would be prudent to use them.<sup>75</sup>

Whilst Ashby was open about the fact that the regulator was reluctant to use some of its regulatory powers, he also revealed that the HCA Regulatory Committee had found different ways of noting its concerns regarding the operation of certain registered providers:

We do find ways of signalling our concerns and we have particularly used the governance rating for that purpose because that does not have the same repricing trigger impact that a V3 or V4 would have. That is understood, and the messages that we have put out through that, if you have read some of them, are pretty strong.<sup>76</sup>

Ashby revealed that this approach ensured that lenders were aware of the HCA's concerns, but, at the same time, avoided the financial effects of lowering a provider's financial viability score. This evidence drew damning comments from members of the Select Committee, with one stating that he did not believe that the HCA Regulatory Committee could be called an 'independent regulator'.<sup>77</sup> Whether or not these concerns were merited, it is apparent from Ashby's evidence that the approach of the regulator in England is driven and influenced by the financial sector. Evidence gathered during the interviews in Wales would appear to suggest that similar practices are undertaken on the western side of Offa's Dyke as well.

One interviewee set out the financial difficulties that their organisation had recently faced. The participant was eager to safeguard sensitive information concerning their organisation but was willing to reveal some of the steps that had been taken by the regulator, their lenders and themselves over the proceeding months.<sup>78</sup> The participant revealed that their

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<sup>74</sup> *ibid* q31

<sup>75</sup> *ibid* q41

<sup>76</sup> *ibid* q47

<sup>77</sup> *ibid* q51

<sup>78</sup> RSL 2 (n64)

organisation had '*had higher levels of regulatory engagement*'.<sup>79</sup> Shortly after the appointment of the participant, they were invited to meet a Welsh Government Minister and his team.<sup>80</sup> The Minister was said to have been:

explicit about his requirements of the board and the people who were here at the time, I mean, I wasn't due to start for another three and a half months but he offered his support and his officers support for what needed to be done...<sup>81</sup>

The participant noted that they believed that their lenders had viewed this process and the involvement of the regulator as a positive step.<sup>82</sup> This had not been the only involvement of the regulator. The participant revealed that not only had their organisation had been '*working very closely*' with their lenders, but that one of their lenders had met independently with the regulator.<sup>83</sup> The participant stated:

in reaching the conclusion that we have, or just about getting there with our lender, they have said; and this is subject to the regulator not taking any further action. So, the regulator and the lender have met separately, so we've met with the lender, we've met with the regulator and then they've met together and understood the perspectives of each other, but in order to address the situation that this organisation is in, they've all come together to help resolve the situation...<sup>84</sup>

This statement is highly significant. It demonstrates the proximity of the relationship between the regulator and the lenders of this RSL. This proximity would seem to create a scope for this RSL's lender's concerns to influence the work of the regulator, particularly given that the participant stated that their agreement with their lender is '*subject to the regulator not taking any further action*'.<sup>85</sup> Such an understanding provides the Welsh Government, in its capacity as social housing regulator, with an incentive to avoid taking further regulatory steps against the RSL in question. It is not possible to conclude whether this has had an impact on the way that the regulator has approached its dealing with this RSL or any others; however, it does suggest that lender concerns could also shape the way that regulation is undertaken in Wales, as well as England.

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<sup>79</sup> *ibid*

<sup>80</sup> *ibid*

<sup>81</sup> *ibid*

<sup>82</sup> *ibid*

<sup>83</sup> *ibid*

<sup>84</sup> *ibid*

<sup>85</sup> *ibid*

It appears that many providers of private finance are happy to continue to provide money to housing associations, on the basis that the regulator can provide an indication as to the performance of housing associations in some way. A further explanation for the continued willingness of private financiers to invest in, and to borrow money to the social housing sector may be found in the literature that has developed on the social housing sector in England as summarised in 2.1. With banks and institutional investors increasingly playing a regulatory role over the social housing sector, their awareness of the risk profile of individual housing association has increased greatly.<sup>86</sup> Furthermore, a number of the larger providers in England who regularly seek funds from institutional investors via the bond markets are registered with ratings agencies, providing investors with a clear picture of their credit profile.<sup>87</sup>

The finding that the regulators in both nations do not seem to use their regulatory powers as envisaged has clear implications for our understanding of how divergence develops. First, it highlights the need for further research to examine the extent by which social housing regulation between Wales and England has diverged in practice. My thesis has demonstrated how regulation has diverged between Wales and England with regard to legislation and the regulatory framework. However, Julian Ashby's evidence suggests that the way that regulation operates in practice differs from what has been set out by respective governments and regulators. Second, this evidence further emphasizes that the development of divergence runs beyond the control of both Welsh and UK Governments. The concerns of the providers of private finance impact on the work of the regulators, at least to a certain extent. The influence of the financial sector on regulation becomes even clearer when looking at the development of the Housing and Planning Act 2016.

### 8.2.2 The special administrative regime

The Housing and Planning Act 2016 contains many provisions that concern the social housing sector in England. This thesis has already examined how the Act deregulates the sector in England, in wake of the ONS's decision to reclassify registered providers as part of the public sector.<sup>88</sup> The Act made other changes to the sector. The most high profile of these changes was the voluntary expansion of the right to buy to tenants of housing associations.<sup>89</sup> The Act also contained a series of provisions that introduced a new special administration regime for failing housing associations in England.<sup>90</sup> The Act sets out the process that is to

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<sup>86</sup> Tang et al (n60)

<sup>87</sup> *ibid*

<sup>88</sup> See 6.3

<sup>89</sup> Housing and Planning Act 2016 Part 4, Chapter 1

<sup>90</sup> *ibid*, Part 4, Chapter 5



be followed if an association enters into significant financial difficulty.<sup>91</sup> The content of these provisions was changed during the course of the Act's progress through the Houses of Parliament. This section will briefly examine the process that led to these changes being made. This analysis will further underscore the influence of the providers of private finance over elected governments. It will reinforce the finding set out earlier in this chapter that private finance shapes the development of divergence between Wales and England.

The special administrative regime was developed by the UK Government following a review into the near insolvency of Cosmopolitan Housing in 2012.<sup>92</sup> The policy lead on social housing regulation in England, Kerry Mac Hale revealed during interview that following this review, a subsequent review was undertaken into the powers of the regulator in light of the Cosmopolitan Housing experience.<sup>93</sup> The review concluded that if a large or complex association became insolvent in future, the powers of the regulator at that time would have been insufficient to cope.<sup>94</sup> At the time the regulator had the power to introduce a 28 day moratorium in the case of a provider entering insolvency.<sup>95</sup> Mac Hale stated that these powers had become outdated:

Some of these housing associations have a turnover of over a billion pounds, you can't just sort through that in 28 days and get agreements from secured lenders, so those powers have been in place for well over ten years. In that ten years housing associations in England have taken on much more private finance and therefore are exposed to much greater risk, have more secured lenders, sometimes these secured lenders will be somewhat obscure bond holders so actually for the regulator to get in contact with them in 28 days might prove difficult let alone to get them to agree to some kind of rescue plan, so for the large developing housing associations the existing moratorium powers were probably not going to help...<sup>96</sup>

Mac Hale's statement suggests that it was the changing nature of the social housing sector in England, in particular the increasing prominence of private finance within the sector, which led the Government to introduce the new regime. These changes were introduced after the near collapse of Cosmopolitan Housing, so an outside catalyst seems to have prompted this

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<sup>91</sup> *ibid*

<sup>92</sup> Interview with Kerry Mac Hale, (n23) Cosmopolitan Housing Group was a large housing association that faced significant financial problems in 2012. For more information see Inside Housing 'Cosmopolitan: The true story' *Inside Housing*, 22 November 2013) <http://www.insidehousing.co.uk/cosmopolitan-the-true-story/6529628.article> accessed 22 November 2016

<sup>93</sup> *ibid*

<sup>94</sup> *ibid*

<sup>95</sup> Housing and Regeneration Act 2008, s 145

<sup>96</sup> Mac Hale (n23)

action, rather than any other desire within Government to develop a new regime for regulation. There are similarities, this analysis suggests, between the influence of private lenders concerns on the development of government policy and the impact of international accountancy standards. The UK Government was not bound to change its approach to dealing with near insolvent registered providers in England. A similar situation as to what the Government was in, with regards to the ONS's decision to reclassify registered providers in England. If the UK Government had not taken any steps, however, this may have weakened the credibility of the regulator, leading to concerns within the financial sector that would ultimately impact on registered providers' ability to borrow money. This further demonstrates the impact of external factors on the development of divergence between Wales and England.

The introduction of the special administrative regime is significant for our understanding of divergence between Wales and England for a further reason. The development of the regime demonstrates how the concerns of private lenders have directly influenced the shape and content of legislation concerning social housing regulation. Indeed, this influence seems to have been exerted in such a way that it has had an impact on the language used by policy makers at Westminster. During interview, Kerry Mac Hale noted what she felt were the Government's aims when they developed the special administration regime:

we wanted to make sure that we were protecting both secured lenders and as far as we could tenants in an insolvency...<sup>97</sup>

Whilst Mac Hale states that the special administrative regime was designed to protect both secured lenders and tenants, her comment would seem to suggest that there was a difference between the two, with tenants only being protected '*as far as we could*'. This would suggest that the UK Government placed greater importance on protecting private lenders than they did on protecting social housing tenants during the formation of the Housing and Planning Act 2016. It would seem that this was not always the case.

When the Housing and Planning Bill was first laid before Parliament on 13 October 2015, there was no reference in the Bill to the special administrative regime.<sup>98</sup> Yet by the time that the Bill reached the Lords on 13 January 2016, the special administration regime had been introduced.<sup>99</sup> The clauses contained in the Bill set out that, in the case of an insolvency, a person would be appointed as a 'housing administrator'.<sup>100</sup> The administrator would be

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<sup>97</sup> *ibid*

<sup>98</sup> Housing and Planning HC Bill (2015-16) [75]

<sup>99</sup> Housing and Planning HL Bill (2015-16) [87]

<sup>100</sup> *ibid* clause 92

appointed with two primary objectives, ensuring that the provider's social housing remained a part of the regulated housing sector, and to ensure that it became unnecessary for them to remain in post, either due to the rescue of the provider or following the completion of relevant transfers of the provider's undertakings.<sup>101</sup> By early April 2016, reports started to emerge in *Inside Housing* that the regime was to be changed due to lender concerns.<sup>102</sup> One article suggested that lenders had warned the Government that the regime's focus on ensuring that social housing remained part of the regulated housing stock, would undermine a methodology used to value properties when lending money to social housing providers.<sup>103</sup> This would have reduced the value of registered providers' properties as securities and would have led to lenders asking for more security from registered providers.<sup>104</sup> A few weeks later the Housing and Planning Bill was changed.

The original two objectives of the administrator appointed under the Bill were amended.<sup>105</sup> Under first objective, the administrator was challenged to save the provider as a going concern.<sup>106</sup> If, however, the provider was to be wound up, the administrator was tasked with achieving a better result for the provider's creditors as whole, than what they would have been likely to receive if the administrator was not in place.<sup>107</sup> To achieve this the administrator would be permitted to realise property in order to make distribution to creditors.<sup>108</sup> The second objective set out in the Bill was to ensure that the provider's social housing remained part of the regulated housing sector.<sup>109</sup> The Bill explicitly stated, therefore, that lenders would be permitted to sell social housing homes into the private sector to cover the loans they had made, and, that this took precedence over the protection of social housing stock.<sup>110</sup> It was this version of the special administration regime that was to make it into the statute book.<sup>111</sup>

The interview undertaken with Kerry Mac Hale seems to lend support to the article that appeared in *Inside Housing* that it was lender concerns that had led to changes made to the special administration regime.

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<sup>101</sup> *ibid* clause 93

<sup>102</sup> Heather Spurr 'Lender concerns prompt Housing Bill change' (*Inside Housing*, 4 April 2016) <http://www.insidehousing.co.uk/lender-concerns-prompt-housing-bill-change/7014634.article> accessed 10 August 2016

<sup>103</sup> *ibid*

<sup>104</sup> *ibid*

<sup>105</sup> Housing and Planning HL Bill (2015-16) [117] clause 95

<sup>106</sup> *ibid* clause 96

<sup>107</sup> *ibid*

<sup>108</sup> *ibid*

<sup>109</sup> *ibid* clause 97

<sup>110</sup> *ibid* clause 95

<sup>111</sup> Housing and Planning Act 2016, s 95, s 96, s 97

...so we've been working really closely with the lenders on the framing of that legislation, so we put a load of amendments down at the report stage of the Housing and Planning Bill largely to address concerns they had and to tweak some of the ways that the administration regime would operate, we always said that we'd talk to the lenders in that period to make sure that it was right and they were comfortable and they had confidence in investing in the sector, I guess we worked very closely with them through that period in terms of helping them consider the reality of what the existing insolvency provisions did against what we were proposing, so the idea of being able to get your hands on the security after 28 days might be appealing but the reality of that is, is that you would then end up with X thousand properties with X families living in them with rent that you would have to collect and when you think about the reality of some of that, it's not something necessary that some of the banks and some of the bond holders are really set up to deal with.<sup>112</sup>

Mac Hale's response fully highlights the extent of the influence that lenders exert over the Government. Not only does her response lend support to *Inside Housing's* story that the special administration regime was changed following lender concerns; it also suggests that the Government felt the need to justify its proposed changes to lenders before enacting the legislation. Whilst Mac Hale viewed the amendments made to the Housing and Planning Bill as 'tweaks', in reality it would appear that the concessions made to the financial sector were more significant. The changes had, in effect, changed the entire focus of the role of the special administrator if the provider could not be saved as a going concern. Under the original proposal, the primary objective for the administrator had been to ensure that the provider's social housing remained part of the regulated sector. The amendments made to the Bill to 'address' lender 'concerns' meant that this objective had been relegated to secondary significance and would only have any influence in cases where there were sufficient funds to both pay off creditors and to protect social housing assets. Given that the regime was established to deal with insolvent registered providers, the likelihood of the administrator being tasked with achieving the second objective seems remote. It appears that private lenders had exerted sufficient influence to make a significant change to the content of the Housing and Planning Act 2016.

No such regime has been put in place in Wales. The regulator in Wales continue to operate under a system that is analogous to the old regime in England.<sup>113</sup> The introduction of the

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<sup>112</sup> Mac Hale (n23)

<sup>113</sup> Housing Act 1996, s 39

special administration regime through the Housing and Planning Act 2016 in England can therefore be said to be a point of divergence between Wales and England. The way in which this difference developed emphasises, once more, how more than one factor contributes to the process. The special administration regime emerged as result of both the UK Government and lender concerns following the review carried out into the collapse of Cosmopolitan Housing. The Westminster Government's policy response to the problems presented by the Cosmopolitan Housing crisis, have clearly been shaped by the influence exerted by private lenders. Both factors combined to shape the legislative changes made through the Housing and Planning Act 2016, leading to the development of divergence between Wales and England.

With no indication that private sector finance will decrease in importance over the coming years, the impact of the financial sector on social housing regulation seems set to remain. It has been shown that this influence has an impact on divergence. It would seem that the regulators in both nations are reluctant to use their powers in practice in a way that risks provoking a negative reaction from lenders. This reluctance might open a difference between the written rules and policy practice – apparent divergence on paper might be more limited or constrained in practice. Further research is necessary before we are able to draw definite conclusions here. What seems beyond doubt, however, is that private lenders have directly shaped the way that social housing regulation is undertaken in England, and as a result also on patterns of divergence between Wales and England. This is a finding that further supports three of the key themes of this thesis; first that divergence develops as a result of the actions of both the Westminster and Welsh Governments, second, that divergence can develop at a number of different levels, and third, that it appears as a result of a number of factors working against and with each other.

### 8.3 The Structure of the Sector

Turning to the structure of the sector, when examining the social housing sectors in Wales and England a clear difference is that in scale. As set out in Chapter 2, in Wales, 93 housing associations are registered with the Welsh Government,<sup>114</sup> by comparison 1,769 are registered with the HCA in England.<sup>115</sup> It is not just in the sheer number of registered bodies that we see this difference. In Wales, as of 31 March 2015 the total social rented stock provided by RSLs amounted to 139,104, with a further 10,000 properties being provided by

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<sup>114</sup> Welsh Government, Registered Social Landlord (*Welsh Government*, 26 May 2016) 10 May 2016 <http://gov.wales/topics/housing-and-regeneration/publications/registered-social-landlords-in-wales/?lang=en> accessed 10 August 2016

<sup>115</sup> Homes and Communities Agency, 'Current Providers of Social Housing', (*Gov.uk*, 1 August 2016) <https://www.gov.uk/government/publications/current-registered-providers-of-social-housing> accessed 10 August 2016

RSLs at non-social rates.<sup>116</sup> By contrast, the G15, a group of London's largest 15 registered providers, manage 410,000 homes.<sup>117</sup> In total, registered providers in England provided 2,708,611 social and non-social homes in 2015.<sup>118</sup> This difference in scale reflects the relative population of Wales – (3 million) and England (53 million) and has significant implications for this analysis. The difference of scale presents the regulators in Wales and England with very different challenges, potentially leading to divergence in regulation. This section will briefly examine the impact of this structural difference, suggesting avenues for future research.

### 8.3.1 Structuring the regulatory approach?

In December 2013, the Welsh Government made a decision to change the way that they approached social housing regulation. The Welsh Government announced that it intended to move to a risk based approach to social housing regulation.<sup>119</sup> This was not a decision to change the content of the regulatory framework but rather a decision to change the way that the framework was being implemented.<sup>120</sup> Indeed, the Welsh Government argued that such a change would mean that the regulatory process would be '*more closely aligned with the original principles of the Regulatory Framework*'.<sup>121</sup>

The Welsh Government's decision to change their approach to regulation followed an interim evaluation of regulatory practice.<sup>122</sup> This evaluation had concluded that while its underpinning principles were correct, in practice, the regulatory regime was not being consistently delivered.<sup>123</sup> RSLs believed that there had been a move away from the co-regulatory regime with focus returning to an inspection based approach to regulation.<sup>124</sup> RSLs also believed that the regulatory regime needed to better reflect the risks that the

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<sup>116</sup> National Statistics for Wales 'Social housing stock and rents, as at 31 March 2015', (*Welsh Government*, 6 August 2015) <http://gov.wales/docs/statistics/2015/150806-social-housing-stock-and-rents-31-march-2015-en.pdf> accessed 10 August 2016

<sup>117</sup> G15, 'About us' (*G15*) <http://g15london.org.uk/about-us/> accessed 10 August 2016

<sup>118</sup> Homes and Communities Agency 'Private Registered Provider Social Housing Stock in England' (*Gov.uk*, 29 September 2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/464349/SDR\\_2014-15\\_full.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/464349/SDR_2014-15_full.pdf) accessed 10 August 2016

<sup>119</sup> Welsh Government 'Improving the implementation of the Regulatory Framework: a risk based approach to regulation' (*Welsh Government*, December 2013) <http://gov.wales/docs/desh/publications/131220improving-regulatory-framework-en.pdf> accessed 10 August 2016

<sup>120</sup> *ibid*

<sup>121</sup> *ibid*, subheading 2

<sup>122</sup> Welsh Government Social Research, *Interim Evaluation of the Regulatory Framework for Housing Associations in Wales. A report commissioned by the Welsh Government on behalf of the Regulatory Board for Wales*, (Social Research No: 33/2013)

<sup>123</sup> *ibid* page 18

<sup>124</sup> *ibid*

sector faced and for greater emphasis to be placed on learning from regulation.<sup>125</sup> The Report concluded that the limited resources available to the Welsh Government's regulatory team had contributed to these failures.<sup>126</sup> It was felt that these resources could be better targeted at the RSLs most in need of regulation by moving to a risk based approach.<sup>127</sup> These recommendations were accepted and implemented by the Welsh Government.<sup>128</sup>

The change to the method of implementation of this regulatory framework is of interest as it seems to be attributable, at least in part, to the structure of the sector in Wales. With limited resources, the Welsh Government were struggling to effectively regulate all of Wales's RSLs, whilst at the same time maintaining a co-regulatory approach to regulation. Moving to a risk based approach to regulation would allow the Welsh Government to target their resources more effectively, reflecting the different risk profile of different parts of the sector.

The decision of the Welsh Government to adopt a risk based approach to regulation can be viewed as a point of convergence between regulation in Wales and England. Despite the gulf in size and scale between the social housing sectors, the HCA Regulatory Committee had also identified the risk based approach to regulation as the most effective approach.<sup>129</sup> This finding highlights the importance of the structure of the social housing sector on the work of the regulators. Tasked with implementing their respective regulatory regimes, and with only limited resources, the regulators in both nations have had to devise a regulatory approach that ensures that regulation is undertaken in a way that minimises the risk of failure within the social housing sector. Both have decided that this is best achieved by targeting its resources at the part of the sector that they view as highest risk, leading to the approaches to regulation in both nations to converge.

The way that the social housing sector is structured may have also contributed to the development of divergence. The thesis discussed at length in Chapter 6 how the regulator in England adopted a two-tier approach to regulation – economic regulation and consumer regulation - with consumer regulation only being undertaken on a reactive basis. This was in contrast to the position in Wales where there was no differentiation between the two. Chapter 7 highlighted how this divergence developed as a result of the UK Government adopting differing policy to the Welsh Government, in particular following the publication of the Department for Communities and Local Government's (DCLG) Review into social

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<sup>125</sup> *ibid*

<sup>126</sup> *ibid* 19

<sup>127</sup> *ibid*

<sup>128</sup> Improving implementation (n124)

<sup>129</sup> Homes and Communities Agency, 'A guide to regulation of registered providers' (*Gov.uk*, 14 May 2015) <https://www.gov.uk/government/publications/a-guide-to-regulation-of-registered-providers/a-guide-to-regulation-of-registered-providers> accessed 10 August 2016

housing regulation. However, whilst this divergence does seem to have been primarily driven by a difference in political ideology between the Coalition Government in Westminster and the Labour Government in Wales, structural differences may have also contributed to that process.

Not only are there far more English registered providers than Welsh RSLs but many English registered providers are also larger than their Welsh counterparts. With a number of high profile mergers taking place within the social housing sector in England over the past decade, the nature of the sector has changed greatly.<sup>130</sup> Mergers have not only led to larger registered providers, but they have also led to the development of increasingly complicated group structures.<sup>131</sup> Given the concerns that have been raised in some quarters that such structures can expose registered providers to greater risk,<sup>132</sup> such activities are likely to have attracted a great deal of the HCA's resources.<sup>133</sup> Given that 'reducing administrative costs'<sup>134</sup> was one of the objectives of the DCLG Review, and that making 'significant financial savings across government'<sup>135</sup> was named as one of the drivers for change in social housing regulation, the UK Government's decision to adopt a two tier approach to regulation may have been a partly pragmatic response to such pressure, with the Government deciding that it wanted to channel its limited resources to the aspects of social housing it viewed as providing the greatest risk.

Differences in the structure of the social housing sector between Wales and England influences, drives and constrains divergence. These pressures are not new. As discussed in Chapters 3, 4 and 5, geographical, economic and societal differences have had an impact upon the way that the housing sector has developed for decades.<sup>136</sup> The influence of this factor is unlikely to wane in future. As was noted in Chapter 6, the divergence that has developed between Wales and England with regard to profit-making providers, and with regard to what constitutes 'social housing' means that there is scope for the two sectors to develop quite distinctively. If the sectors do develop in such a way, it would mean that the regulators in Wales and England will face increasingly different challenges. This could, in

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<sup>130</sup> For example; David Mullins, 'Competing Institutional Logics? Local Accountability and Scale and Efficiency in an Expanding Non-Profit Housing Sector' (2006) *Public Policy and Administration* 6

<sup>131</sup> *ibid* and Jacob Veenstra, Hendrik M. Koolma, Maarten A. Allers, 'Scale, mergers and efficiency: the case of Dutch housing corporations' (2017) *Journal of Housing and the Built Environment* 313

<sup>132</sup> Tony Manzi and Nicola Morrison, 'Risk, commercialism and social purpose: Repositioning the English housing association sector' (2017) *Urban Studies* 1

<sup>133</sup> Kerry Mac Hale noted the increasing difficulties that the regulator faced when dealing with larger registered providers as one of the reasons that the special administrative regime was introduced. Mac Hale (n100)

<sup>134</sup> Department for Communities and Local Government, *Review of Social Housing Regulation*, (October 2010) page 3

<sup>135</sup> *ibid*, 5

<sup>136</sup> See discussion in section 3.1 for example on the higher rates of home ownership in the south Wales valleys.



time, lead to the development of further regulatory divergence as the regulators in both nations attempt to combat challenges that are unique to its social housing sector.

#### 8.4 Conclusion

This chapter has examined three factors that have contributed to way that divergence has developed between Wales and England since the advent of devolution. These three factors combined with the two noted in Chapter 7 (policy and politics, and the limits of devolution) have unquestionably shaped the way that social housing regulation is undertaken in both nations. The two chapters have highlighted the complicated way that these factors work with and against each other as part of this process. The importance of looking beyond government policy documents is evident if a full understanding of divergence between Wales and England in practice is to be developed. The chapters have also highlighted the importance of looking at the work going on in both legislatures, if the process is to be fully understood. The final chapter, Chapter 9 will reflect on this work and will consider its implications for our broader understanding of the divergence processes and devolution.

## 9. Conclusion

This thesis opened by reflecting on Michael Keating's words in his introduction to *'Devolution in Practice: Public Policy Differences within the UK'*.<sup>1</sup> Keating argued that relatively *'little systematic attention has been given to...'* divergence or to its implications.<sup>2</sup> Chapter 1 drew attention to other academic work that supported Keating's view that the development of legislative and policy divergence is an aspect of devolution that has been overlooked by academia.<sup>3</sup> The thesis therefore set out to address this under-explored aspect of devolution. In order to explore the divergence process in depth, the thesis has concentrated on its development in one particular policy area, social housing regulation.<sup>4</sup> In exploring the process, my thesis has considered how divergence and devolution have developed over time. Through this exploration, a number of key themes have consistently reappeared. These include the fact that divergence can develop at a number of different levels, that it can develop as a result of the actions of both the Welsh and UK Government, and that it can be influenced by a number of different factors.

It is not just the literature on divergence to which this thesis has made a contribution. By exploring the development of social housing regulation in Wales and England, the thesis has also made a contribution to the literature on housing law and policy, and to the literature on devolution, developing our understanding of how devolution works in practice, in particular. Through this work, the thesis has considered what is the relationship between devolution and divergence. This conclusion will reflect on the findings of this examination and will argue that whilst divergence was not, the aim of devolution, as argued by Keating, the development of a degree of policy and legislative variation is an inevitable consequence of it. Having made this argument, the Conclusion will look back at some of my findings as to how divergence has developed within the social housing context. The section will note how the housing sector is currently in a state of flux. It will argue further changes to social housing regulation are inevitable. The chapter will close by considering what the findings of the thesis mean for our understanding of the divergence process more generally and will question what impact this may have on Wales's devolution settlement in future.

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<sup>1</sup> Michael Keating 'Devolution and public policy in the United Kingdom: divergence or convergence?' in John Adams and Peter Robinson (eds) *Devolution in Practice: Public Policy Differences within the UK* (ippr 2002) 3

<sup>2</sup> *ibid*

<sup>3</sup> Including Pete Alcock, 'New Policy Spaces: The Impact of Devolution on Third Sector Policy in the UK' [2012] 46 (2) *Soc Policy Admin* 219, 220

<sup>4</sup> The reasons for adopting this approach are set out in full in section 1.4

## 9.1 Devolution and divergence, inevitably linked?

Ron Davies, the then Secretary of State for Wales, wrote in 1997, that the establishment of the Assembly '*will let the people express their own priorities*' over policy in Wales.<sup>5</sup> It is clear that Davies, one of leading architects of the devolution settlement in 1999, intended the National Assembly to be a body that would be free to develop its own distinctive policy. This decision meant that when the Assembly was subsequently established, a space had been created within which divergence could develop between Wales and the remainder of the UK. The fact that the establishment of the National Assembly for Wales, the reconvening of the Scottish Parliament, and the reopening of the Northern Irish Assembly created the space within which policy variation could develop, does not mean that development of such divergence was the purpose of devolution. As noted by Davies, the establishment of the National Assembly allowed the people of Wales to express their own policy priorities. Whilst these priorities may have differed from the priorities of the people of England in certain areas, in others, they remained the same.

Empirical research undertaken since 1999 suggests that the popular perception of public attitudes in Wales and Scotland being to the left of those in England is not, in fact, accurate. The work of leading analysts such as Charlie Jeffrey,<sup>6</sup> Guy Lodge,<sup>7</sup> Katie Schmuecker,<sup>8</sup> and John Curtice,<sup>9</sup> suggests that the citizens of the four nations of the UK broadly share the same opinion on a number of key issues. Not only does their work suggest that UK citizens broadly share the same opinion on policy matters, it also suggests that the people of the UK wish to see a degree of policy uniformity across all four nations.<sup>10</sup> This phenomenon has been labelled as the 'devolution paradox', with the people of Wales, Scotland and Northern Ireland eager to see more powers devolved to the devolved legislatures on the one hand, but wishing to see a degree of uniformity continuing, on the other.<sup>11</sup> The impact of this paradox on policy development can be seen clearly when examining health policy in Wales in the mid-2000s, with the Welsh Government adopting a policy that was more line with

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<sup>5</sup> Welsh Office, *A Voice for Wales; The Governments Proposals for a Welsh Assembly*, (White Paper, Cm 3718, 1997) p5

<sup>6</sup> Charlie Jeffery 'Devolution and divergence: public attitudes and instructional logics in John Adam and Katie Schmuecker *Devolution in Practice 2006, Public policy differences within the UK* (ippr 2005); and Charlie Jeffrey, Guy Lodge and Katie Schmuecker, 'The devolution paradox' in Guy Lodge and Katie Schmuecker (eds) *Devolution in Practice 2010* (ippr 2010)

<sup>7</sup> Jeffrey, Lodge and Schmuecker, (n6)

<sup>8</sup> *ibid*

<sup>9</sup> John Curtice, 'Policy divergence: recognising difference or generating resentment' in Guy Lodge and Katie Schmuecker (eds) *Devolution in Practice 2010* (ippr 2010).

<sup>10</sup> *ibid*; Jeffrey, Lodge and Schmuecker (n6); and Jeffrey (n6).

<sup>11</sup> Jeffrey (n6)

England with regard to NHS waiting times following public pressure.<sup>12</sup> It seems clear that the establishment of the National Assembly did not lead to a significant public desire for the development of divergent policy in all areas. Indeed, Charlie Jeffrey argues that:

it will be a sign of maturity of devolved politics when divergence is not regarded as a necessarily good thing in itself...<sup>13</sup>

Not only is there evidence from public attitudes research of support for policy uniformity across the UK, the devolution settlements in Wales, Scotland and Northern Ireland ensures that the UK's four nations remain interdependent. Whilst the National Assembly for Wales is permitted to peruse distinctive policy and to enact distinctive legislation in the policy areas devolved to Wales,<sup>14</sup> in other areas such as defence and foreign policy, the UK Government retains responsibility for developing policy and legislation. In a system of shared legislative and policy competence, the decisions of one government can have a direct impact on the policy of another. The thesis has demonstrated that this interdependency can have an impact on the development of divergence. It has shown how the UK Government's social security policy shapes the social housing sector in Wales. Chapter 7 drew attention to findings made during interview with the Chief Executives of five Welsh Registered Social Landlords (RSLs).<sup>15</sup> Each Chief Executive revealed how, following the implementation of the 'bedroom tax', each had seen an increase in demand for smaller homes.<sup>16</sup> The interview participants indicated that they had either developed plans, or were coming under pressure to develop plans to construct one bedroom properties.<sup>17</sup> This policy spill-over therefore limits the ability of the National Assembly to shape the nature of the social housing sector in Wales in a divergent manner.

It is clear that, whilst the advent of political devolution created the scope within which policy and legislative divergence could develop, neither the Welsh nor UK Governments are compelled to develop distinctive policy. The unique, cultural, geographic and demographic

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<sup>12</sup> Jeffrey (n6) 47; Stephen Peckham, Nicholas Mays, David Hughes, Marie Sanderson, Pauline Allen, Lindsay Prior, Vikki Entwistle, Andrew Thompson and Huw Davies 'Devolution and Patient Choice: Policy Rhetoric versus Experience in Practice' 46(2) [2012] Soc Policy Admin 199; and Katherine Smith and Mark Hellowell, 'Beyond Rhetorical Differences: A Cohesive Account of Post-devolution Developments in UK Health Policy' 46(2) Soc Policy Admin 178

<sup>13</sup> Jeffrey (n6) 48,49

<sup>14</sup> The Assembly has got legislative competence to enact legislation in 21 devolved areas. These are set out in the Government of Wales Act 2006, Part 5, Schedule 7.

<sup>15</sup> See 7.2.2 in particular

<sup>16</sup> Interview with Chief Executive of Welsh RSL 1, (Cardiff, 19 January, 2015); Interview with Chief Executive of Welsh RSL 2, (West Wales, 25 March, 2015); Interview with Chief Executive of Welsh RSL 3, (Cardiff, 1 May, 2015); Interview with Chief Executive of Welsh RSL 4, (West Wales, 14 May, 2015); and Interview with Chief Executive of Welsh RSL 5, (South Wales, 21, October, 2015)

<sup>17</sup> *ibid*

features of the UK's four nations, however, places different pressures on each government. Such pressures make it seemingly inevitable that a degree of divergence will develop between them. Some of these pressures are not new. My thesis has demonstrated how, even during the era of administrative devolution, special provisions were made for Wales by the UK Government. The purpose of administrative devolution was to allow devolved bodies to administer Westminster policy, in Wales, in a distinct manner.<sup>18</sup> These bodies were not permitted to develop their own distinctive policies, with explicit attempts made to ensure that divergence was kept to a minimum. The following extract comes from instructions given to the Parliamentary Counsel in preparation for the transfer of powers to the Welsh Office in 1965:

Certain operations, however, such as the making of general regulations and the giving of general directions are to be reserved to the Minister with the object of securing uniformity of enactments.<sup>19</sup>

Despite this, archival research undertaken for the purposes of this thesis has uncovered a number of instances where a distinctive Welsh approach was taken during the era of administrative devolution. For example, when seeking a replacement for Megan Lloyd George on the Central Housing Administrative Committee in 1956, the UK Government explicitly sought a Welsh replacement.<sup>20</sup> No such provision was made for a region of England, suggesting that Wales's sense of national identity was a factor that influenced the operation of the UK Government.<sup>21</sup> In the late 1970s, the Secretary of State for Wales safeguarded and ensured extra funding for the work of the Housing Corporation in Wales, a period when the Corporation's budget was being cut in England.<sup>22</sup> The distinctive needs, and the unique political environment in Wales contributed to the development of a degree of policy variation even in an era of very limited administrative devolution.

Given that the cultural, geographic and demographic differences between Wales and England led to the development of a degree of divergence in an era when explicit attempts were made to control its development, it is not surprising that the establishment of the Assembly has seen these factors contribute to the development of further differences. As

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<sup>18</sup> See Chapter 3 and 4 for a more detailed exploration of the administrative devolution era.

<sup>19</sup> Ministry of Housing and Local Government, *Transfer of Functions to Secretary of State for Wales - Instructions to Parliamentary Counsel to prepare an Order in Council under the Ministries of the Crown (Transfer of Functions) Act 1946* – National Archives File HLG 124/171

<sup>20</sup> More detail on this in 3.4.2

<sup>21</sup> This interpretation is further supported when considering the concerns that were expressed in Whitehall about the potential negative reaction in Wales about appointing Blaise Gillie, a Scot, to the post of Undersecretary of the Welsh Office of the Ministry of Housing and Local Government. This is also discussed further in 3.4.2

<sup>22</sup> More detail on this in 4.2.2

was discussed in Section 8.3, for example, the differences in size and scale between the social housing sectors in Wales and England present the Welsh and UK Governments with very different challenges when devising regulatory approaches. Political devolution has allowed such distinctions in culture, geography and society to be manifested in policy. Section 9.2, below, will further emphasize this by looking back at the findings of the thesis as to some of the factors that have directly led to the development of divergence in the social housing regulatory context.

As the development of a degree of divergence seems to be an almost inevitable result of political devolution, Keating's observation that there has been limited academic study of the process would appear to be a weakness within the literature on devolution. Whilst it is important to acknowledge that devolution had not been established with the primary aim of generating '*substantive differences in public policy across the component parts of the United Kingdom*',<sup>23</sup> it is clear that political devolution has led to the development of substantive policy and legislative differences between the UK's nations. It would therefore appear imperative that further research is undertaken into the area, to ensure that our understanding of divergence and devolution is improved.

An example of how our understanding of both divergence and devolution can be improved through research can be seen when reflecting on one of the findings of this thesis. This thesis has demonstrated that differences between the law in Wales and England do not only emanate from the enactment of distinct Welsh legislation, it can also develop as a result of the UK Government enacting legislation that only applies in England. Evidence for this can be found when examining the statutory basis for regulation in Wales and England. The Housing Act 1996 provided the statutory basis for social housing regulation in both nations upon its enactment and continued to do so even after the establishment of the National Assembly in 1999.<sup>24</sup> In 2008, however, following the enactment of the Housing and Regeneration Act 2008, the Housing Act 1996 ceased to be the statutory basis for regulation in England and became the legal basis for regulation in Wales only.<sup>25</sup> It was the UK Government's decision to enact a new statutory basis for regulation in England that, in effect, created a distinct English, and a distinct Welsh, statutory basis for regulation, driving

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<sup>23</sup> Keating (n1)

<sup>24</sup> The Housing Act 1996 was amended on two occasions over this period. First by the Government of Wales Act 1998, s 140, s 141, s 142, s 143, which abolished *Tai Cymru*; and secondly by The National Assembly for Wales (Transfer of Functions) Order 1999 No. 672 Schedule 1, which devolved responsibility for social housing regulation to the Welsh Ministers.

<sup>25</sup> The Housing and Regeneration Act 2008 became the statutory basis for social housing regulation in England.

divergence. The significance of this finding for our understanding of Wales's devolution settlement will be set out in section 9.3 below.

## 9.2 Divergence and housing

The findings of this thesis suggest that at least five different factors have contributed to the development of both differences and similarities in social housing regulation between Wales and England. These were discussed at length in Chapters 7 and 8. The five factors noted were: (1) politics and policy, (2) the limits of devolution, (3) international accountancy standards, (4) private finance and (5) the structure of the sector. This section will revisit each of these five factors, providing a brief recap of how each has had an impact on the divergence process. This section will then move on to consider some of the changes that the sector will be facing in the near future, noting how the housing sector is currently in a state of legislative, regulatory and policy flux.

### 9.2.1 The factors driving divergence and convergence

In exploring the impact of politics and policy on the development of divergence, Chapter 7 focused in particular on the process that led to the enactment of the Housing and Regeneration Act 2008, the Housing (Wales) Measure 2011 and the Localism Act 2011.<sup>26</sup> These three pieces of legislation, enacted since the establishment of the Assembly, have seen the way that social housing regulation is undertaken in Wales and England develop in different ways, with variations developing between the way that tenants are protected through regulation,<sup>27</sup> and in the role that profit-making organisations play in the provision of social housing.<sup>28</sup> All three Acts were enacted following the completion of separate reviews into social housing regulation. The Cave Review,<sup>29</sup> the Essex Review,<sup>30</sup> and the DCLG Review<sup>31</sup> developed within their unique political context. Section 7.1 argued that the different pressures that each review team faced when undertaking their respective reviews influenced the nature of their recommendations. Given that a direct line can be drawn from some of these recommendations to the legislation enacted in their wake, it would appear that

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<sup>26</sup> See section 7.1 in particular

<sup>27</sup> Section 6.2 discussed the two-tiered approach to regulation adopted in England. This approach means that the regulator takes a reactive approach to consumer regulation, meaning that a provider has had to have breached, or is at risk of breaching a consumer standard before the HCA takes action. The analysis set out in section 6.2 suggested that tenants in England are at a greater risk of suffering harm than their counterparts in Wales, who are protected by the more proactive approach of the Welsh Government.

<sup>28</sup> As discussed in detail in Section 5.1, profit-making bodies are now permitted to register with the HCA in England as providers of social housing. This is not the case in Wales.

<sup>29</sup> The Cave Review of Social Housing Regulation, *Every Tenant Matters: A Review of Social Housing Regulation* (June 2007)

<sup>30</sup> Affordable Housing Task and Finish Group, *Report to the Deputy Minister for Housing* (June 2008)

<sup>31</sup> Department for Communities and Local Government, *Review of Social Housing Regulation*, (October 2010)

differences between the political and policy environments in Wales and England contribute towards the development of legislative and policy variation.

The second factor identified in the thesis as having an impact on the divergence process was the limits of devolution. As discussed briefly in 9.1 above, and in more detail in Chapter 7,<sup>32</sup> this thesis has demonstrated that Wales's devolution settlement has an impact on the divergence process. The thesis highlights how the nature of Wales's devolution settlement ensures that a degree of interdependency remains between the work of the Welsh and UK Governments. Chapter 7 focused in particular on how the UK Government's welfare policy can have a direct impact on the social housing sector in Wales.<sup>33</sup> As discussed above, evidence gathered through interview with the Chief Executives of five Welsh RSLs, highlight the impact that the 'bedroom tax', has had on Wales.<sup>34</sup> In light of this finding, the chapter questioned the degree by which the Welsh Government has the ability to develop a distinctive social housing policy in Wales, given the impact of policy overspill on divergence.<sup>35</sup> This further emphasises the complicated way in which divergence develops, and the role that both the Welsh and UK Governments play in the process.

The third factor discussed in the thesis for its role in the divergence process was international accountancy standards. Section 8.1 focused in particular on the Office for National Statistics's (ONS) decision to reclassify housing associations as part of the public sector.<sup>36</sup> The ONS reached their decision based on the degree of control exercised by both the Welsh and UK Governments over the social housing sectors in their respective nations, through regulation. Drawing on evidence gathered through interview with Kerry Mac Hale, the policy lead on social housing regulation at the UK Government, the thesis reveals that the UK Government would '*probably not*' have introduced the legislative changes made to social housing regulation in England under the Housing and Planning Act 2016, were it not for the ONS's decision.<sup>37</sup> Given that these legislative changes, have, in the short term led to the development of regulatory differences between Wales and England, this thesis has demonstrated that international accountancy standards are another factor that can drive divergence. In the long term, however, the ONS's decision may drive convergence. The

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<sup>32</sup> Specifically, 7.2

<sup>33</sup> *ibid*

<sup>34</sup> See Auditor General for Wales, *Managing the Impact of Welfare Reform Changes on Social Housing Tenants in Wales* (Wales Audit Office, 8 January 2015). This is discussed in more detail in section 7.2.2.

<sup>35</sup> See 7.2.2

<sup>36</sup> Office for National Statistics, *Classification announcement: "Private registered providers" of social housing in England*, (30 October 2015) and Office for National Statistics 'Statistical classification of registered providers of social housing in Scotland, Wales and Northern Ireland: September 2016' (29 September 2016)

<sup>37</sup> Interview with Kerry Mac Hale, Policy lead on social housing regulation, UK Government (Telephone interview, 17 May 2016)



Welsh Government has indicated that it will take any necessary steps to reverse the ONS's decision.<sup>38</sup> Such steps are likely to include the enactment of legislation that would amend the statutory basis for regulation in Wales to become more in line with the system now in place in England. This could see the statutory basis for regulation in Wales and England becoming more alike than had been the case prior to the ONS's decisions.<sup>39</sup> International accountancy standards is therefore a factor that has a complicated impact on the development of divergence. Future research, following the completion of the Welsh and UK Government's legislative and regulatory reaction to the ONS decision, may develop and deepen our understanding of its impact.

A fourth factor identified as impacting on the development of policy variation is private finance. Information gathered through interview, and from secondary materials, in particular, information revealed by Julian Ashby, the head of the Homes and Communities Agency (HCA) Regulatory Committee, before the Communities and Local Government Committee at Westminster, suggests that the requirement for housing associations to gain access to private finance influences the way that divergence develops in two key ways. First, it would appear to impact upon the way that regulation is undertaken in practice. Ashby revealed before the Communities and Local Government in 2013 that the way that the HCA undertakes its regulation in practice, differs from the regime set out on paper.<sup>40</sup> He revealed that the regulator had, in a '*handful*' of cases, decided against downgrading a provider's financial viability judgment so as to avoid triggering a reaction from lenders and the financial markets.<sup>41</sup> This suggests that private finance has a direct impact on regulation in practice. Secondly, an interview with Kerry Mac Hale<sup>42</sup> revealed that the UK Government changed certain provisions within the Housing and Planning Act 2016 in response to the concerns of lenders and bond holders.<sup>43</sup> It would appear that private finance is a factor that influences both policy development and policy implementation, impacting upon the development of divergence between Wales and England.

The final factor discussed within the thesis as having an impact on the development of divergence is the structural differences between the social housing sector in Wales and England. There are significantly fewer Welsh RSLs than their English counterparts. Welsh

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<sup>38</sup> Heather Spurr 'Governments pledge to reverse ONS reclassification' (*Inside Housing*, 30 September 2016) <<http://www.insidehousing.co.uk/governments-pledge-to-reverse-ons-reclassification/7017032.article>> accessed 2 November 2011.

<sup>39</sup> See 7.1.1 for a more detailed analysis.

<sup>40</sup> Communities and Local Government Committee, *Minutes of Evidence*, (2013-14 HC 310) oral evidence by Julian Ashby, Chair, Regulation Committee, Homes and Communities Agency

<sup>41</sup> *ibid* question 11

<sup>42</sup> Kerry Mac Hale (n37)

<sup>43</sup> *ibid*

RSLs are also, on the whole, smaller than English registered providers.<sup>44</sup> This may explain why the Welsh Government have adopted a more hands-on approach to regulation than the UK Government. The smaller number of RSLs provide the Welsh Government with a greater opportunity to develop both informal and formal regulatory contact than their English counterparts, where a hands-on approach may be more resource intensive. The thesis also notes that the approach taken by Welsh Government to regulation has been amended over recent years, becoming more risk based in nature, more in line with the English approach. A possible reason for this change in approach is the difficulties that the Welsh Government encountered when undertaking regulation without such a focus.<sup>45</sup> Chapters 3, 4 and 5 also highlighted how such structural differences led to the development of divergence, even in an era prior to political devolution. Indeed, Chapter 3 highlighted how societal, economic and geographical factors had an impact on the nature of Welsh housing, even in an era prior to administrative devolution, with higher rates of owner occupation in the south Wales coalfield than in the rest of the nation, in the early 20<sup>th</sup> century. Whilst further research is required to draw definite conclusions on the impact of this final factor on the development of divergence, it seems certain that the structural differences between both nations, is a factor that has an impact on the divergence process.

### 9.2.2 Social housing, a sector in flux

This thesis has demonstrated that divergence is a complex process. Legislative and policy differences develop as a result of the actions of both the Welsh and UK Governments. These variations appear at a number of different levels including in primary and secondary legislation, and in the regulatory frameworks published in both nations. These differences have developed as a result of a number of factors, working together to both push and to constrain divergence. This thesis has provided a snapshot of some of the differences that have appeared between social housing regulation as a result of this process.<sup>46</sup> The extent of the variation that has developed between Wales and England, as set out within this thesis, is correct as of 31 December 2016. With the social housing sector in Wales and England facing a number of challenges, however, it seems certain that the extent of this variation will change further.

Perhaps the most pressing challenge facing the social housing sectors in Wales and England is the ONS's decision to reclassify housing associations as part of the public sector.

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<sup>44</sup> See discussion in section 8.3

<sup>45</sup> These difficulties were revealed during interview with the five Chief Executives of Welsh RSLs. During this process, two chief executives said that they had, had minimal contact with the Welsh Government under the old approach to regulation. This is discussed in detail at 8.3

<sup>46</sup> These are discussed in Chapter 6 in particular.

As was discussed in sections 6.3 and 8.1 both the Welsh and Westminster Government are eager to reverse the ONS's decision and to return housing associations to the private sector.<sup>47</sup> There are three reasons for this. First the ONS's decision moves the debt of housing associations onto the public balance sheet.<sup>48</sup> Second, it subjects housing associations to public sector borrowing rules, reducing their ability to borrow from the private sector.<sup>49</sup> This in turn has an impact on the ability of housing associations to construct new homes, making it unlikely that either government would meet their housebuilding targets. Third, housing associations themselves are eager to see their organisations returned to the private sector.<sup>50</sup> These pressures are also apparent in Scotland and Northern Ireland.<sup>51</sup> A further, consideration is likely to be driving the Welsh Government's response to the ONS's decision. Community Housing Cymru have expressed concerns that the ONS's reclassification could result in the UK Treasury placing limits on the amount of money that Welsh RSLs could borrow.<sup>52</sup> This would limit the ability of the Welsh Government's to develop distinctive housing policy, further demonstrating the impact of Wales's devolution settlement on the divergence process.

The ONS's decision was discussed in detail in Chapter 6 which set out the UK Government's legislative reaction and looked at the options available for Welsh Government following their

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<sup>47</sup> In evidence to the Communities and Local Government Committee, Brandon Lewis, the former Minister of State for Housing and Planning stated that he wanted registered providers '*off the Government books, which is what they want, as quickly as possible.*' Communities and Local Government Committee, *Housing Associations and the Right to Buy*, (2015-16 HC 370) oral evidence by Brandon Lewis the Minister of State for Housing and Planning, Q321;

The Welsh Government has also been clear in its desire to see RSLs return to the private sector. Cemlyn Davies 'Welsh Government pledge to oppose housing associations status' (*BBC Wales News*, 29 December 2016) < <http://www.bbc.co.uk/news/uk-wales-politics-38451242>> accessed 12 January 2017

<sup>48</sup> In England, this is a figure in the region of £60 billion 'Housing association change adds £59 billion to UK debt' (*Business Reporter*, 20 November 2015) <http://business-reporter.co.uk/2015/11/20/housing-association-change-adds-59-billion-to-uk-debt/> accessed 15 June 2016;

In Wales the figure is around £2.3 billion Steffan Evans 'Adding £2.3bn of debt to the accounts – social housing deregulation as an early test for the minority Welsh Government' (*LSE British Politics and Policy Blog*, 10 May 2016) < <http://blogs.lse.ac.uk/politicsandpolicy/adding-2-3bn-of-debt-to-the-national-accounts-social-housing-deregulation-as-an-early-test-for-the-minority-welsh-government/>> accessed 23 July 2016

<sup>49</sup> National Housing Federation, 'ONS Reclassification of Private Registered Providers' (*National Housing Federation*) < [http://s3-eu-west-1.amazonaws.com/pub.housing.org.uk/ONS\\_Reclassification\\_of\\_Private\\_Registered\\_Providers.pdf](http://s3-eu-west-1.amazonaws.com/pub.housing.org.uk/ONS_Reclassification_of_Private_Registered_Providers.pdf)> accessed 23 July 2016;

Community Housing Cymru 'CHC's response to the ONS reclassification of housing associations in England' (*Community Housing Cymru*, 30 October 2015) < <http://chcymru.org.uk/en/view-news/chcs-response-to-the-ons-reclassification-of-housing-associations-in-englan>> accessed 23 July 2016

<sup>50</sup> *ibid*

<sup>51</sup> Heather Spurr (n38); The Scottish Government has already set out proposals for a Housing (Amendment) Bill to reverse the ONS's decision as part of its 2016-17 programme for government. Scottish Government, *A plan for Scotland. The Government's programme for Scotland 2016-17* (Scottish Government, 6 September 2016)

<sup>52</sup> Community Housing Cymru (n49)

public commitment to ensuring that RSLs are returned to the private sector.<sup>53</sup> As was discussed in Chapter 8, it is not yet possible to fully measure the impact of the ONS's decision on divergence and social housing regulation. At Westminster, the UK Government is yet to enact all the secondary legislation that it intends to have in place.<sup>54</sup> In Wales on the other hand, the Welsh Government had not taken the required legislative steps to reverse the ONS's decision, at time of submission for this thesis, despite making it clear that it was their intention to do so.<sup>55</sup>

In the period between the submission of this thesis and the viva voce examination the Welsh Government has tabled legislation before the National Assembly that seeks to reverse the ONS's reclassification decision.<sup>56</sup> As was anticipated by the analysis set out in sections 6.3 and 8.1 of this thesis, the legislative provisions, set out in the Regulation of Registered Social Landlords (Wales) Bill are extremely similar to the ones put in place in England through the enactment of the Housing and Planning Act 2016. The Bill, if enacted, will mean that RSLs in Wales will no longer require the consent of the Welsh Government before disposing of land,<sup>57</sup> or changing their constitution.<sup>58</sup> The power of the Welsh Government over the management of RSLs will also been reduced along the lines taken in England.<sup>59</sup> All these changes will see the statutory basis for regulation in Wales converge with the regime in place in England.

The Bill has now started on its legislative journey through the National Assembly. In evidence given to the National Assembly's External Affairs and Additional Legislation Committee, the then Cabinet Secretary for Communities and Children, Carl Sargent, made it clear that the Welsh Government had held conversations with the ONS whilst developing its legislative response.<sup>60</sup> In his evidence, Sargent cautioned the committee against making significant amendments to the Bill, stating that the ONS would not be willing to '*give a running commentary on the Bill*' any that amendments could jeopardise what he argued was a purely '*technical process*'.<sup>61</sup> This approach drew criticism from one committee member who argued that the ONS should respect the '*sovereign rights*' of the Assembly as a

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<sup>53</sup> Specifically, in 8.1

<sup>54</sup> Mac Hale (n37) revealed during interview that the UK Government does intend to put secondary legislation in place, in particular with regard to local authority control over housing associations.

<sup>55</sup> Heather Spurr (n38)

<sup>56</sup> Regulation of Social Landlords (Wales) Bill

<sup>57</sup> *ibid* clauses, 13, 14 and 15

<sup>58</sup> *ibid* clauses 3, 4 and 5

<sup>59</sup> *ibid* clauses 6, 7, 8, 9

<sup>60</sup> Sub-committee on the Regulation of Registered Social Landlords (Wales) Bill (National Assembly for Wales) 24 October 2017 para 109. Sargent stated '*Unusually, we've had several discussions with ONS, and ONS, on the Bill as it's currently drafted, have given us clearance and said it is acceptable for them to move forward.*'

<sup>61</sup> *ibid*

legislature to make amendments to the Bill.<sup>62</sup> These concerns suggest that the impact of international accountancy standards could extend beyond influencing how governments develop policy to influencing how democratic institutions operate and scrutinise legislation.

Despite the concerns of some committee members, the broad support that has been given to the Bill in consultation responses,<sup>63</sup> and the political desire in Wales to build more affordable homes does make it appear likely that the Bill will become part of Welsh law in 2018. Given that the Welsh Government were in contact with the ONS whilst drafting the Bill, it appears likely that its enactment will be sufficient to return Welsh RSLs into the private sector.

Whilst the ability of the Welsh Government to develop a distinctive approach when enacting primary legislation in response to the ONS's decision was limited, the same was not true with regards to the regulatory framework. In December 2016 the Welsh Government announced plans to '*revise*' and '*improve*' the delivery of social housing regulation in Wales.<sup>64</sup> From 1 January 2017 the Welsh Government will no longer publish regulatory opinions on housing associations in Wales.<sup>65</sup> In its place the Welsh Government will provide each RSL with a '*co-regulation status*'.<sup>66</sup> Each RSL will be given two such statuses, one in relation to its performance against '*governance and service delivery*' standards, the other in relation to its performance against '*financial viability*' standards.<sup>67</sup> There are four categories of status that a RSLs could receive, ranging from '*standard*', the status afforded to those RSLs that the regulator is satisfied with their performance, to '*statutory action*'.<sup>68</sup> In addition to this the Welsh Government are also intending to revise the current delivery outcomes set out in the Welsh regulatory framework, with the Government indicating that they wish to see the outcomes bearing a closer alignment to the way that RSLs operate in practice in Wales.<sup>69</sup>

Speaking at Community Housing Cymru's Annual Conference, Carol Kay and Sarah Laing Gibbens of the Welsh Government's social housing regulation team were clear that one of

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<sup>62</sup> *ibid* para 176

<sup>63</sup> Welsh Government 'Regulation of Social Landlords, Consultation – summary of responses' (*Welsh Government*, September 2017) [https://consultations.gov.wales/sites/default/files/consultation\\_doc\\_files/170914-responses-regulatory-reform-registered-social-landlords-en.pdf](https://consultations.gov.wales/sites/default/files/consultation_doc_files/170914-responses-regulatory-reform-registered-social-landlords-en.pdf) (accessed 28 December 2017)

<sup>64</sup> Welsh Government, 'A revised and improved approach to delivery of housing regulation', (*Welsh Government*) < <http://gov.wales/docs/desh/publications/161215-regulatory-judgement-framework-en.pdf>> (accessed 6 January 2017)

<sup>65</sup> *ibid*. For more information on regulatory opinions see 6.2.3

<sup>66</sup> *ibid*

<sup>67</sup> *ibid*

<sup>68</sup> *ibid*

<sup>69</sup> *ibid*. As discussed in section 5.3 all five housing association Chief Executives interviewed for this project felt that the outcomes based objectives approach were, to some extent or another, a tick boxing exercise.

the drivers behind these regulatory changes was the ONS's decision to reclassify Welsh housing associations.<sup>70</sup> It was argued that these proposed changes to regulation would allow the Welsh Government to maintain a robust regulatory regime as the Government lost some control over the sector through subsequent legislation.<sup>71</sup> Kay and Gibbens's comments further emphasize the significance of the ONS's decision for social housing regulation. It would appear that both the Welsh and UK Governments have been compelled to take measures that they would not otherwise have taken.

At first glance the introduction of the '*co-regulation status*' would seem to move the regulatory regime in Wales in line with England. Housing associations in both nations will now be categorised according to their compliance with '*governance*'<sup>72</sup> and '*financial viability*' standards.<sup>73</sup> The Welsh Government have made it clear, however, that tenants will '*remain at the heart of regulation*' in Wales. This would seem to indicate that the two tiered approach to regulation, in place in England, will not be implemented in Wales.<sup>74</sup> Under the two tiered approach to regulation in England, the regulator only reactively assess compliance with '*consumer standards*'.<sup>75</sup> As discussed in 6.2 this means that the regulator only assess compliance with standards relating to matters such as '*tenant involvement and empowerment*' if there has been a breach, or if the regulator suspects that there could be a breach of such a standard, that has or could cause serious detriment to a tenant.<sup>76</sup> This differs from the approach taken in Wales where compliance with such standards is assessed on a proactive basis. It would appear that the Welsh Government will continue to pursue a proactive approach when assessing compliance with the standards set out in the regulatory framework. This demonstrates that whilst the ONS's decision may lead to certain elements of the regulatory regimes in Wales and England converging, other elements will remain different. As the full legislative and regulatory responses of the UK and Welsh Governments become clear over the next two to three years, this would appear to be a fertile area for research, providing opportunity to gain a greater understanding of the way that international accountancy standards impact upon the divergence process.

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<sup>70</sup> Carol Kay and Sarah Laing Gibbens 'Regulatory Reform- Sharpening our approach to delivering regulation' (Community Housing Cymru, Creating the Narrative, Annual Conference 2016, Cardiff, December 2016)

<sup>71</sup> *ibid*

<sup>72</sup> In Wales '*Governance and service delivery*'.

<sup>73</sup> It will be interesting to see whether the Welsh Government shares the HCA's Regulatory Committee's reluctance to downgrade a '*financial viability*' status, for fear of provoking a reaction within the market, as discussed in 8.2.1

<sup>74</sup> A revised and improved approach (n56)

<sup>75</sup> Home and Communities Agency '*Regulating the Standards*' (June 2015) Page 13

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/463693/20150925\\_Regulating\\_The\\_Standards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/463693/20150925_Regulating_The_Standards.pdf) accessed 14 June 2016

<sup>76</sup> *ibid*

Both the Welsh and UK Governments must respond to the ONS's decision at a difficult time for the UK's housing sector. Housing is a policy area that has significantly increased in political salience over recent years. In May 2010, when David Cameron became Prime Minister, housing was viewed as an important issue by just 5% of the UK's population.<sup>77</sup> Over the following six years, housing has increased sharply as an area of concern for the UK's population, peaking at 22% in August 2016, housing's highest score since October 1974.<sup>78</sup> Whilst the importance of housing has dropped slightly in recent months, housing remained an important issue for 18% of the UK population in November 2016, higher than education, unemployment, defence, and law and order.<sup>79</sup> The increased importance of housing as a policy area is demonstrated further by the fact that the Economic and Social Research Council have identified housing as one of their priority research areas from 2016 to 2020.<sup>80</sup> In this light it is not surprising that both the Welsh and UK Governments have taken steps to address the 'housing crisis'.

The Governments at Cardiff Bay and Westminster have announced plans to increase house building. The Welsh Government has pledged to construct 20,000 affordable homes during the course of the current Assembly, a two-fold increase on the target that was in place between 2011 and 2016.<sup>81</sup> The UK Government on the other hand, has set a target of 1 million homes to be built, in England, between 2015 and 2020, across all tenures.<sup>82</sup> It is not just with regard to house building that the 'housing crisis' is having an impact on Government policy. In Wales, the Welsh Government is set to introduce legislation to abolish the 'right to buy'.<sup>83</sup> The UK Government, by contrast, has recently enacted legislation to expand the

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<sup>77</sup> Ipsos Mori, 'November 2016, Economist/ IPSOS Mori Issues Index' (Ipsos Mori, 2 December 2016) <http://www.slideshare.net/IpsosMORI/ipsos-mori-issues-index-november-2016?ref=https://www.ipsos-mori.com/researchpublications/researcharchive/3813/The-EU-and-Brexit-is-seen-as-the-most-important-issue-facing-Britain.aspx> (accessed 6 January 2017).

<sup>78</sup> Ipsos Mori, 'August 2016, Economist/ IPSOS Mori Issues Index' (Ipsos Mori, 26 August 2016) <http://www.slideshare.net/IpsosMORI/ipsos-mori-issues-index-august-2016?ref=https://www.ipsos-mori.com/researchpublications/researcharchive/3778/Concern-about-Europe-falls-in-the-second-month-following-Brexit-vote.aspx>

<sup>79</sup> Ipsos Mori November (n71)

<sup>80</sup> Economic and Social Research Council, 'ESRC Delivery Plan 2016-2020' (Economic and Social Research Council) <http://www.esrc.ac.uk/files/news-events-and-publications/publications/corporate-publications/delivery-plan/esrc-delivery-plan-2016-2020/> (accessed 6 January 2017).

<sup>81</sup> Welsh Government, '£30 million and new housing supply pact to deliver 20,000 homes' (Welsh Government, 1 December 2016) <http://gov.wales/newsroom/housing-and-regeneration/2016/30-million-and-new-housing-supply-pact-to-deliver-20000-homes/?lang=en> (accessed 6 January 2017).

<sup>82</sup> Department for Communities and Local Government, 'Single departmental plan: 2015 to 2020' (Department for Communities and Local Government, 2 September 2016) <https://www.gov.uk/government/publications/dclg-single-departmental-plan-2015-to-2020/single-departmental-plan-2015-to-2020> (accessed 6 January 2017).

<sup>83</sup> Carl Sargent, 'We're scrapping right to buy in Wales to protect vulnerable families' (The Guardian, 6 July 2016) <https://www.theguardian.com/housing-network/2016/jul/06/wales-government-right-to-buy-policy-social-housing> (accessed 6 January 2017).

policy to housing association properties in England.<sup>84</sup> This divergent response to a common issue, a lack of affordable housing, highlights, once more how devolution has created a scope for policy variation to develop between Wales and England. Not for the first time, ideological differences between the more left wing administration in Cardiff Bay, and the right wing administration at Westminster, have seen directly conflicting policies developed, almost simultaneously.<sup>85</sup>

In addition to addressing problems with the social housing sector, the Welsh Government has enacted two pieces of legislation that have made significant changes to the private rental sector in Wales. The first piece of legislation enacted was the Housing (Wales) Act 2014. The Act introduced a number of changes for the housing sector in Wales, but perhaps the most interesting of these was the introduction of landlord registration and landlord licencing.<sup>86</sup> Under the Act, all landlords in Wales must have registered with Rent Smart Wales, the designated licencing authority, by 23 November 2016.<sup>87</sup> In addition to this, landlords are only permitted to undertake lettings and management tasks if they have received a licence from Rent Smart Wales to do so.<sup>88</sup> Early indications suggest that a high number of landlords are not complying with these new requirements, raising a question as to the effectiveness of the Welsh Government's attempts to improve the private rental sector.<sup>89</sup>

The second piece of housing legislation enacted by the Welsh Government was the Renting Homes (Wales) Act 2016.<sup>90</sup> The Act significantly changes landlord and tenant law in Wales. Perhaps the most important change introduced by the Act is the replacement of all current tenancies and licences with two types of occupation contract.<sup>91</sup> Given that these changes will only apply in Wales, and with no indication that the UK Government is minded to introduce a similar regime in England, landlord and tenant law in Wales and England has diverged significantly. The importance of this change extends beyond housing law, with the Lord Chief Justice suggesting that the joint jurisdiction of England and Wales could come under pressure in 2017, as the Renting Homes (Wales) Act 2016 comes into force.<sup>92</sup> Thomas LCJ

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<sup>84</sup> Housing and Planning Act 2016, Part 4, Chapter 1.

<sup>85</sup> See sub-section 7.1.2 for a discussion on how such ideological differences has previously led to the development of divergence with regards to the role that profit-making organisations play within the social housing sector.

<sup>86</sup> Housing (Wales) Act 2014, s 14, s 18

<sup>87</sup> Rent Smart Wales, 'Landlord Registration', (*Rent Smart Wales*) <<https://www.rentsmart.gov.wales/en/landlord/landlord-registration/>> (accessed 6 January 2017)

<sup>88</sup> Housing (Wales) Act 2014, s 18

<sup>89</sup> Steffan Evans 'Landlord registration facing major challenges' (*Welsh Housing Quarterly*, 7 November 2016)

<sup>90</sup> Renting Homes (Wales) Act 2016

<sup>91</sup> Secure contracts and standard contracts, as set out in Renting Homes (Wales) Act 2016, s 1

<sup>92</sup> Justice Committee, The Lord Chief Justice's Annual Report 2016, (Oral Evidence by Rt Hon Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, HC 801, 22 November 2016) question 25



was particularly concerned about whether there was sufficient awareness in England that landlord and tenant law in Wales will be different to the law in England.<sup>93</sup> He stated:

we are slightly worried about whether people in a court in one of the English cities will realise that, if you have a dispute about a rented property in Wales, the law will not be what is English law—it will be Welsh law.<sup>94</sup>

Thomas LCJ revealed that the judiciary was yet to find a solution to this problem.<sup>95</sup> Whilst this thesis has focused on the development of divergence in social housing regulation, there is a pressing need for research to examine its impact in the private rental sector. This research would appear necessary not only to explore the extent of the differences that have developed between landlord and tenant law in Wales and England, and why they have developed, but also to examine whether these differences are placing a strain on the joint jurisdiction of England and Wales.

The impact of the challenges presented by the ‘housing crisis’ have extended beyond housing policy. Nowhere has the effects of the ‘crisis’ been more clearly felt than with regard to welfare policy. The UK’s housing benefit bill had increased from just under £23 billion in 2009/10 to over £26 billion by 2014/15.<sup>96</sup> With reducing the deficit having been one of George Osborne’s primary objectives during his spell as Chancellor, it is not surprising that the UK Government has taken steps to try and reduce housing benefit. One way in which the UK Government has sought to do this has already been discussed in this thesis, in particular in Chapter 7.<sup>97</sup> In 2012, the UK Coalition Government introduced the ‘under occupancy penalty’, or the ‘bedroom tax’ as it is commonly known.<sup>98</sup> Under the policy, individuals that were in receipt of housing benefit would see their payments reduced if it were deemed that their property contained a spare bedroom.<sup>99</sup> Whilst the policy was introduced by the UK Government, it became clear through interviews with the Chief Executives of five Welsh RSLs that the policy had, had an impact on the social housing sector in Wales. All five participants revealed that they had seen a change in the sorts of property that were in demand within their portfolios, with a greater demand for smaller homes as a result of the policy.

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<sup>93</sup> *ibid*

<sup>94</sup> *ibid*

<sup>95</sup> *ibid*

<sup>96</sup> ONS digital, ‘*How is the welfare budget spent?*’ (ONS digital, 16 March 2016)

<http://visual.ons.gov.uk/welfare-spending/> accessed 6 January 2017

<sup>97</sup> Specifically, 7.1.2

<sup>98</sup> Welfare Reform Act 2012, s 69

<sup>99</sup> *ibid*

This finding is perhaps not surprising given the suggestion in a Wales Audit Office publication in January 2015 that the introduction of the 'bedroom tax' in Wales would affect a disproportionate number of Welsh social housing tenants.<sup>100</sup> An indication as to why this is the case can be found in a Welsh Affairs Committee Report, published in 2013.<sup>101</sup> The Committee found that the housing stock of Welsh housing associations was older and more rural in nature than the stock in England.<sup>102</sup> This meant that there were proportionally fewer small homes in Wales, and that these were more isolated, making it harder to move people if they wished to downsize as a result of the reform.<sup>103</sup> With further welfare reform in the pipeline, in particular the introduction of the Universal Credit and the cap on Local Housing Allowance payments, the impact of UK Government welfare policy seems set to considerably impact upon the social housing sector in Wales and England. It would therefore appear that there is a pressing need for further academic research to examine the relationship between the UK Government's welfare policy and the Welsh Government's housing policy. In time, this research may lead to a debate as to how devolution should operate in policy areas where powers overlap, leading to questions about whether greater powers should be devolved to Wales, or whether there is a need to develop a mechanism for sharing powers.

Housing is a policy area that is clearly in a state of flux in the UK. The combination of the 'housing crisis', the UK Government's austerity programme, and the ONS's decision to reclassify housing associations as part of the public sector, has seen both legislation and policy in Wales and England change in ways that would have been unexpected only a few years ago. Historical cultural and geographical differences have seen these changes affect Wales and England differently. On the one hand, the UK Government's changes to housing benefit have disproportionately affected Wales, as a result of the nation's older, more rural housing stock. This has placed Welsh housing associations under pressure to develop smaller homes. This pressure could reduce some of the historical differences that exist between both nations. On the other, devolution has afforded both the Welsh and UK Governments the opportunity to develop distinctive responses to common problems. A clear example of this can be found when looking at the opposing approaches of both governments to the 'right to buy'. It therefore seems inevitable that the extent of the differences that exist between social housing regulation in Wales and England will change further in future. The legislative and regulatory variation set out in this thesis should consequently be viewed as

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<sup>100</sup> Auditor General for Wales, (n34)

<sup>101</sup> House of Commons Welsh Affairs Committee, *The impact of changes to housing benefit in Wales*, (Second Report of Session 2013–14, 8 October 2013)

<sup>102</sup> *ibid*

<sup>103</sup> *ibid*

correct as of 31<sup>st</sup> of December 2016. The findings of this thesis as to the factors that combine to drive legislative and policy differentiation do have important, longer term implications for our understanding of the divergence process. The thesis's final section will reflect on these lessons and will consider how they should shape our understanding of Welsh devolution.

### 9.3 Divergence, a complicated process

There has been a tendency within the UK to consider divergence to be a process that is primarily driven by the devolved nations.<sup>104</sup> Indeed, it would appear that the UK Government, maintains this view. The Wales Act 2017, which recently received royal assent, amends the Government of Wales Act 2006, and in doing so, changes the devolution settlement in Wales. Amongst the Act's provisions that has attracted the greatest public reaction have been those that moves the devolution model in place in Wales from the conferred to the reserved powers form of devolution,<sup>105</sup> and those provisions that devolve certain powers over income tax to the National Assembly.<sup>106</sup> The Wales Act 2017 also contains a provision that provides '*recognition of Welsh law*'.<sup>107</sup> The Act states:

There is a body of Welsh law made by the Assembly and the Welsh Ministers.<sup>108</sup>

No reference is made in the Act, however, to the fact a body of Welsh law also exists having been made by the UK Parliament and by UK Ministers. This thesis has demonstrated that such a body of Welsh law does exist. An example of Welsh law of this kind can be found in Part 1 of the Housing Act 1996, the statutory basis for social housing regulation in Wales. Whilst the Housing Act 1996, is a UK Parliament piece of legislation, Part 1 of the Act only applies in Wales.<sup>109</sup> In only recognising law made by the Assembly as Welsh law, the UK Government is not only inaccurate, it also reinforces the misconception that divergence is a process driven by changes made in Wales.

It appears that the Welsh Government is aware of the importance of this misconception. On 13 December 2016, the Welsh Government announced a new programme to '*make Welsh Law easier to find and understand*'.<sup>110</sup> It proposes to do this by codifying the law in Wales.

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<sup>104</sup> For example, see Lord Crickhowell's comments during the Wales Bill's second reading. Lord Crickhowell talks of '*diverging Welsh laws*' as a result of '*emerging body of law made by the Welsh Government*'. He makes no reference to diverging English laws. HL Deb, 10 October 2016, vol 774, col 1684

<sup>105</sup> Wales Act 2017, s 3

<sup>106</sup> *ibid* s 17

<sup>107</sup> *ibid* s 1(1)

<sup>108</sup> *ibid*

<sup>109</sup> Housing Act 1996, Part 1

<sup>110</sup> Welsh Government '*New programme to make Welsh Law easier to find and understand*' (Welsh Government, 13 December 2016) <http://gov.wales/newsroom/firstminister/2016/58795099/?lang=en> (accessed 6 January 2017)

Under the proposals, existing laws in areas devolved to Wales, will be consolidated and placed into a Welsh legal code.<sup>111</sup> The Welsh Government will apply this approach to both the legislation of the Assembly and the legislation of the UK Parliament, even if the provisions that apply to Wales also apply to other parts of the UK.<sup>112</sup> The findings of my thesis as to the way that the statutory basis for social housing regulation has evolved in Wales suggests that the Welsh Government is correct in taking this approach to its codification programme. Whilst a number of UK Parliament's statutes in devolved policy areas may apply in Wales and other parts of the UK, their provisions are still part of Welsh law. In reaching the decision to codify all legislation enacted at Westminster that apply in the devolved areas, in Wales, the Welsh Government demonstrates that it recognises that divergence can develop as a result of legislation enacted at Westminster. If the Welsh Government did not codify all such legislation at the outset, there would be a need to consistently review legislation enacted at Westminster, to see whether more Wales only law had been formed.

In recognising the fact that divergence develops as a result of legislation enacted in Cardiff Bay and at Westminster, the Welsh Government is likely to face a number of challenges when attempting to codify the law. Identifying all the component parts of Welsh law and then enacting legislation that codifies it is a mammoth task. Whilst the Welsh Government may be able to draw on the Law Commission for some assistance during this process,<sup>113</sup> it seems certain that it will take the Welsh Government a number of years to get legislation in place to fully codify the law. Identifying what constitutes Welsh law may be difficult for a further reason. Not only will the Welsh Government have to identify the legislation that applies in Wales, it will also have to decide whether it constitutes a devolved area. Given the number of high profile issues the Welsh Government has had in identifying what is devolved to Wales, this may prove a further stumbling block for the programme.<sup>114</sup>

My thesis has identified further complexities that impact on the divergence process. The thesis has highlighted how, in order to fully understand the process, there is a need to look beyond primary legislation at secondary legislation and documents such as regulatory framework. In Chapter 6,<sup>115</sup> the thesis demonstrated how neither the Welsh nor English

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<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

<sup>113</sup> The Law Commission has recommended that codifying the law in Wales could improve its form and accessibility. Law Commission, *Form and Accessibility of the Law Applicable in Wales*, (Law Com No 366, 2016)

<sup>114</sup> The Supreme Court has had to decide on three occasions whether proposed legislation is within the Assembly's legislative competence. *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, *Re* [2015] UKSC 3; *Agricultural Sector (Wales) Bill*, *Re* [2014] UKSC 43; and *Local Government Byelaws (Wales) Bill 2012*, *Re* [2012] UKSC 53

<sup>115</sup> Specifically, 6.1.3

regulators were aware of the number of housing associations that were registered with them, but that held property on the other side of the border. This regulatory oversight had developed, not as a result of statutory divergence but as a result of decisions taken by both regulators as to whether they wished to collect such data. Whilst the number of tenants affected by this regulatory oversight would appear small in this instance,<sup>116</sup> further research in other devolved areas may discover that this is a common problem. If this were to be the case, this would raise questions as to how the Welsh and UK Governments could work together to minimise the problem.

The analysis has highlighted the fact that the divergence process is influenced by a number of factors. These factors include external pressures such as the ONS's decision, the need for private finance and the cultural, geographic, demographic pressures that have shaped the sectors in Wales and England. This thesis has demonstrated with regard to the ONS's decision in particular, how an external force, beyond the control of government, can fundamentally change government policy. My thesis has demonstrated how these pressures can lead to the development of both divergence and convergence. The thesis has also demonstrated, however, that the divergence process can be influenced by the political environment in Wales and England, and policy choices made by both governments. It is clear then, that the establishment of the National Assembly in 1999 did create the space within which policy and legislative variation could, and has developed.

Despite the fact that the establishment of the National Assembly created the scope within which divergence could develop, the findings of this thesis have highlighted some of the potential difficulties that divergence may present the current devolution settlement in Wales. If the law in Wales and England becomes increasingly distinct, this is likely to place greater pressures on the united England and Wales legal jurisdiction. As noted in 9.2.2, the Lord Chief Justice has indicated that he believes that 2017 could be a challenging year for the jurisdiction as the Renting Homes (Wales) Act 2016 comes into force.<sup>117</sup> Perhaps the area where the development of policy variation could become most difficult to deal with, however, is welfare policy. As demonstrated in Chapter 7,<sup>118</sup> the UK Government's welfare policy has a direct impact on the housing sector in Wales. If the regulatory differences that now exist between Wales and England lead to the social housing sectors in Wales and England becoming more distinct, this is likely to make it increasingly difficult for the UK Government to develop its welfare policy in a way that impacts on Wales and England consistently. It would appear imperative that further research is undertaken on this issue, to ensure that

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<sup>116</sup> According to data provided by housingnet.co.uk. 1,171 homes were affected.

<sup>117</sup> Lord Chief Justice (n84)

<sup>118</sup> Specifically, 7.2.2

neither Welsh RSLs and tenants are at a disadvantage compared to their counterparts in England.

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