

# **BUDGET RESPONSIBILITY AND NATIONAL AUDIT BILL**

## **WELSH ASSEMBLY GOVERNMENT MEMORANDUM ON POWERS CONFERRING LEGISLATIVE COMPETENCE ON THE NATIONAL ASSEMBLY FOR WALES**

### **Introduction**

1. This memorandum sets out the background and context relevant to clause 27 of, and Schedule 6 to, the Budget Responsibility and National Audit Bill, conferring legislative competence on the National Assembly for Wales (“the NAW”) in relation to the governance arrangements for the Auditor General for Wales (“the AGW”). The AGW and the AGW’s staff are known as the Wales Audit Office (WAO).

### **Background**

2. Part 3 of the Government of Wales Act 2006 (c.32) (“the 2006 Act”) gives the NAW the power to pass legislation known as Assembly Measures.

3. The NAW may pass Measures in relation to the “Matters” which are listed in 20 “Fields” in Part 1 of Schedule 5 to the 2006 Act. Additions to the Assembly’s legislative competence are made by adding new Matters to the Fields in Part 1 of Schedule 5. The 2006 Act includes a power to add new matters by Order in Council, and matters may also be added by provisions in Acts of Parliament, which are referred to as “framework powers”. Assembly Measures can make any provision that can be made by an Act of Parliament in relation to those Matters, subject to certain restrictions contained in the 2006 Act.

4. Schedule 6 to the Bill grants the NAW law-making powers by inserting a new Matter (Matter 14.1) in Field 14 (Public Administration) of Schedule 5. The purpose of Matter 14.1 is to enable the NAW to put in place new governance arrangements for the AGW (which may be similar to those that the Bill proposes for the Comptroller and Auditor General and the National Audit Office) whilst respecting the operational independence of the AGW. Schedule 6 would also amend paragraphs 3 and 6 in Part 2 of Schedule 5 (which sets out general restrictions on the NAW’s legislative competence) to enable the NAW to modify certain provisions of the Government of Wales Act 1998 (“the 1998 Act”) and provisions of the 2006 Act relating to the AGW.

5. Part 4 of the 2006 Act includes provision which would enable the NAW to pass legislation known as Acts of the Assembly (the “Assembly Act provisions”) if the majority of those voting in a referendum in Wales vote in favour (and the Welsh Ministers make an order commencing the provisions). Schedule 7 to the 2006 Act sets out the subjects in relation to which the NAW may pass Acts, and the exceptions from those subjects. Schedule 6 amends paragraph 14 in Part 1 of Schedule 7 to insert “the Auditor General for Wales” as a new subject, and amends the restrictions in paragraphs 2 and 5 in Part 2 of Schedule 7 to enable the NAW to modify the 1998 and 2006 Acts. That will

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add to the competence already stated there – i.e. “Audit, examination, regulation and inspection of auditable public authorities”.

## Context

6. The Public Audit (Wales) Act 2004 created a single public audit body for Wales, covering the Assembly Government, its sponsored bodies, local government and the NHS in Wales. As a result, the AGW performs a role equivalent to that of both the Comptroller and Auditor General and the Audit Commission in England but with some important differences. There is no direct ‘devolved’ equivalent to the Public Accounts Commission in Wales, although the NAW is required by the 2006 Act to have an Audit Committee (now known as the Public Accounts Committee). The 2006 Act continued the office of the AGW with minor modifications including new functions reflecting changes in the devolution settlement, such as granting approvals to draw from the Welsh Consolidated Fund and auditing the accounts of the NAW Commission.

7. Detailed provisions about the appointment and status of the AGW, the AGW’s staff, financial affairs and general powers of the AGW are set out in Schedule 8 to and, in relation to financial matters, Part 5 of the 2006 Act. The office of the AGW is a corporation sole. The “Wales Audit Office” has no legal personality of its own, but is a collective term used to describe the AGW and the AGW’s staff.

8. The AGW is appointed by Her Majesty on the nomination of the NAW. The tenure of the AGW is governed by paragraph 2 of Schedule 8 to the 2006 Act. There is no express statutory provision that governs either the length of the appointment or the number of times that a person may hold that office but such provision is made in the terms and conditions of the AGW’s appointment.

9. In the exercise of his functions, the AGW is not subject to the direction or control of the NAW or the Assembly Government. The AGW is not an officer of the NAW in the way that the Comptroller and Auditor General is an officer of the House of Commons.

10. The AGW appoints staff, sets their terms and conditions and has power to secure provision of services for assisting in the exercise of the AGW’s functions. Sums required for these purposes and other expenses are paid from the AGW’s budget, the estimate for which is considered (and possibly modified by) the NAW’s Public Accounts Committee in accordance with paragraph 12 of Schedule 8 to the 2006 Act and which forms part of the overall budget motion moved annually in the NAW (as required by section 125 of the 2006 Act).

11. The AGW is empowered in some cases, and required in others, to charge fees for auditing accounts and carrying out inspections and examinations, for example, into economy, efficiency and effectiveness. In addition to any funds made available in a NAW budget resolution by virtue of

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section 120(1) and (2) of the 2006 Act, certain provisions of enactments may authorise the AGW in some circumstances to retain receipts, for example, from fees charged for specified purposes. The AGW also has power to borrow to meet a temporary excess of expenditure over income.

12. The AGW is the Accounting Officer for the Wales Audit Office. The NAW appoints the auditor of the accounts of the AGW and sets the terms and conditions of that appointment. The AGW is required to pay that auditor such remuneration as is provided for in the terms of appointment. The auditor of the AGW certifies the AGW's accounts and lays them with the auditor's report before the NAW. That auditor may also carry out examinations into the economy, efficiency and effectiveness with which the AGW has used resources in the exercise of his functions and the auditor may lay any report on such an examination before the NAW.

13. The AGW has appointed an Audit and Risk Management Committee, comprising independent members, which advises the AGW on the management of risk, control and governance.

14. There is a need to put in place enhanced governance and accountability arrangements for the operation of the AGW. To this end, the Public Accounts Committee of the NAW, which has an oversight role, has agreed to undertake a review of the governance of the AGW. The Committee has established formal terms of reference for such a review and is currently considering the best way to take this work forward. The review will include consideration of the International Peer Review of the WAO (commissioned by the AGW at the start of 2009, published on 8 October 2009 and an update on progress published on 7 October 2010). The Peer Review expressed the view that "there is scope to enhance and strengthen the governance of the Wales Audit Office without restricting the AGW's crucial independence to examine whatever subjects he chooses, and to make independent audit judgments on them free from political interference" (Recommendations, paragraph 8).

15. The legislative competence conferred by the proposed amendments would enable the NAW to pass legislation modernising the governance and accountability arrangements of the AGW. It would not allow the NAW to make the AGW subject to the direction or control of the NAW or the Assembly Government. However, that restriction would not prevent the NAW conferring functions relating to the AGW on a NAW committee (new or existing) independent of the Welsh Assembly Government and not chaired by an Assembly Member who is a member of a political group with an executive role.

### **Scope of Proposed Powers**

16. The proposed competence would provide the NAW with law-making powers to modernise the governance and accountability arrangements for the AGW, subject to certain restrictions to ensure that the AGW continues to have operational independence in the carrying out of his functions.

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17. The powers being sought would create a new Matter 14.1, in the public administration field in Schedule 5, enabling the NAW to pass legislation in relation to:

- the AGW's terms and conditions of employment relating to tenure and remuneration
- the number of times that an individual may be appointed to the office of the AGW;
- restrictions on the other offices and positions that may be held by an AGW
- the activities of a former AGW;
- requiring the AGW to aim to carry out AGW functions in an efficient and cost effective manner and to have regard to the standards and principles expected of an expert accountant or auditor;
- the authorisation of persons to exercise the functions of the AGW or on the AGW's behalf;
- the oversight or supervision of the AGW or the AGW's functions;
- the provision or use of resources in support of the AGW's functions including the employment and use of staff; procurement and use of services; the holding of documents or information; and the keeping of records;
- the charging of fees and other amounts relating to the AGW's functions or to auditors appointed by the AGW (such as auditors which the AGW appoints under section 13(2) of the Public Audit (Wales) Act 2004 to audit the accounts of local government bodies in Wales); and
- the restatement of any law relating to the AGW.

18. Matter 14.1 would enable the NAW to make changes in the governance arrangements for the AGW, which could be similar to those which are set out in Part 2 of the Bill in relation to the Comptroller and Auditor General and the National Audit Office. For example, the provision which might be made by a Measure relating to matter 14.1 could include establishing the Wales Audit Office with functions relating to the oversight or support of the AGW, and specifying the number of members, their roles and terms of appointment. However, the nature of any changes would be for the NAW to determine.

19. Paragraph 4 of Schedule 6 to the Bill also amends paragraphs 3 and 6 in Part 2 of Schedule 5 to the 2006 Act ("Exceptions to Matters and General Restrictions"). Part 2 of Schedule 5 includes restrictions on the provision which can be made in an Assembly Measure. If a provision of a Measure

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breaches any of them, it is outside of the NAW's legislative competence and is not law. The restrictions are subject to exceptions set out in Part 3 of Schedule 5.

20. Paragraph 4 makes changes to paragraphs 3 and 6 of Part 2 of Schedule 5 to the 2006 Act which would apply to any provision that may flow from new Matter 14.1 (as described in new paragraph 3(3) of Part 2 of Schedule 5). In relation to such a provision, paragraph 4(2) disapplies paragraph 3 of Part 2 of Schedule 5 (which protects certain other enactments against amendment) insofar as it relates to certain provisions of the Government of Wales Act 1998, and paragraph 4(3) disapplies paragraph 6(1) of Part 2 (which provides that an Assembly Measure cannot modify provisions in the 2006 Act). The effect is that such a provision may amend the 2006 Act and the specified provisions of the 1998 Act provided that the purpose of the provision relates to the things listed in Matter 14.1 (or, for example, is consequential on or incidental to such provision).

21. However, paragraph 4(3) of Schedule 6 to the Bill goes on to provide that such a provision may not amend paragraph 3 of Schedule 8 to the 2006 Act, which protects the independence and status of the AGW. It also provides that a provision to which new paragraph 3(3) applies (i.e. a provision flowing from Matter 14.1) may only give a role to a NAW committee which excludes from its membership the First Minister, the Welsh Ministers, their Deputies and the Counsel General (or anyone acting as such); and which is not chaired by an Assembly Member who is a member of a political group with an executive role. In other words, a Measure may only give a role relating to the AGW and which affects the independence of the AGW to the NAW Public Accounts Committee or another committee which is independent of the Assembly Government.

22. Paragraph 6 of Schedule 6 to the Bill would amend Part 1 of Schedule 7 to the 2006 Act, which sets out the subjects to which provisions of Assembly Acts may relate, to insert a new subject "Auditor General for Wales" in paragraph 14 (public administration). Paragraph 14 already includes the subject "Audit, examination, regulation and inspection of auditable public authorities", which would cover parts of the subject-matter of matter 14.1 in Schedule 5. The new subject would ensure that an Assembly Act could make similar types of provision in relation to the AGW as matter 14.1 in Schedule 5. However, it is worded differently in view of the subjects already included in Schedule 7 and the more general drafting style of that Schedule.

23. Paragraph 7 of Schedule 6 to the Bill also amends Part 2 of Schedule 7 to the 2006 Act, which sets out restrictions on the NAW's competence to pass Assembly Acts. The amendments provide for exceptions to the prohibitions on Assembly Acts being able to modify certain provisions of the 1998 and 2006 Acts, set out in paragraphs 2 and 5 of Part 2<sup>1</sup>. These exceptions will enable

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<sup>1</sup> The amendments in paragraph 7(2) and (3)(a) of Schedule 6 to the Bill have been drafted to take account of other amendments to paragraphs 2 and 5 in Schedule 7 to the 2006 Act which would be made by articles 10 and 11 of the draft National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010.

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an Assembly Act to modify Schedule 8 to the 2006 Act, which deals with the office of the AGW, and will enable an Assembly Act to modify other provisions of the 1998 and 2006 Acts if the purpose of the amendment relates to the oversight or supervision of the AGW. Like the amendments to Schedule 5, these amendments include provisions to protect the AGW's independence from the NAW and Welsh Assembly Government (see paragraph 21 above).

24. The purpose of the amendments to Schedule 7 to the 2006 Act is to ensure that, if the Assembly Act provisions were to come into force, the NAW would not lose any of the legislative competence conferred by matter 14.1 in Schedule 5.

### **Geographical limits**

25. Section 94 of the 2006 Act provides that a provision of an Assembly Measure is outside the NAW's legislative competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). Section 108 makes equivalent provision in relation to Assembly Acts. There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure or Act effective, provision enabling the provisions of the Measure or Act to be enforced and to make consequential amendments to other legislation.

26. The limitations relating to functions other than in relation to Wales mean that the NAW would generally not be able by Measure or Act to confer functions which did not relate to Wales. The functions of the AGW relate to Wales and to Welsh public bodies.

### **Restrictions on modifying and conferring functions**

27. By virtue of paragraph 1 of Part 2 of Schedule 5 to the 2006 Act, and paragraph 7 of Part 3 of that Schedule, the NAW may not by Measure alter or remove functions of a Minister of the Crown without the consent of the relevant Secretary of State (and may not create new Minister of the Crown functions at all). Similarly, by virtue of paragraphs 1 and 6 in Parts 2 and 3 of Schedule 7, an Assembly Act may not modify or remove pre-commencement functions<sup>2</sup> of a Minister of the Crown without the Secretary of State's consent unless the provision is incidental to or consequential on another provision contained in the Assembly Act; and an Assembly Act cannot confer or impose a function on a Minister of the Crown without the Secretary of State's consent. The proposed provisions themselves do not modify or remove any functions of a Minister of the Crown. In relation to any future proposals for Assembly Measures or Acts that may impact on Minister of the Crown functions, the appropriate UK Government Departments would first be consulted and agreement sought before any change to, or modification of, those functions could be made.

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<sup>2</sup> Pre-commencement function" means a function which is exercisable by a Minister of the Crown before the day on which the Assembly Act provisions come into force – see paragraph 1(3) of part 2 of Schedule 7 to GOWA 2006.

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28 By virtue of paragraph 5 of Part 2 of Schedule 5, and paragraph 8 of Part 3 of that Schedule, a provision of an Assembly Measure cannot modify functions of the Comptroller and Auditor General unless the Secretary of State consents. Paragraphs 4 and 7 in Parts 2 and 3 of Schedule 7 impose the same restriction on Assembly Acts. Paragraphs 26-28 of Schedule 5 to the Bill will extend these provisions of the 2006 Act to functions of the new National Audit Office. This consequential amendment reflects the fact that, if Part 2 of the Bill is enacted, certain functions currently carried out by the Comptroller and Auditor General will in future be carried out by the National Audit Office. The NAW will not be able to modify those functions without the agreement of the Secretary of State.

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