

To: Business Committee

From: Sue Essex AM
Minister for Finance, Local Government and Public Services

EXPLANATORY MEMORANDUM

PUBLIC AUDIT, ENGLAND AND WALES

The Public Audit (Wales) Act 2004 (Transfer of Property, Rights and Liabilities of the Audit Commission for Local Authorities and the National Health Service in England and Wales) Order 2005 [Audit Commission Transfer Order]

The Public Audit (Wales) Act 2004 (Transfer of Property, Rights and Liabilities of the Comptroller and Auditor General) Order 2005 [the C & AG Transfer Order]

Summary

The intended effect of the Orders is to enable the property, rights and liabilities appropriate to the Auditor General for Wales assuming his extended functions from 1 April 2005 to be vested in him by that date.

1. This Memorandum is submitted to the Assembly's Business Committee in relation to the Public Audit (Wales) Act 2004 (Transfer of Property, Rights and Liabilities of the Audit Commission for Local Authorities and the National Health Service in England and Wales) Order 2005 and the Public Audit (Wales) Act 2004 (Transfer of Property, Rights and Liabilities of the Comptroller and Auditor General) Order 2005, in accordance with Standing Order 26.
2. A copy of the Instruments is submitted with this Memorandum. A more detailed summary of the provisions included in the Orders is at annex 1 and annex 2 to this Memorandum.

Enabling Power

3. The powers enabling these orders to be made are contained in section 68 and Schedule 3 of the Public Audit (Wales) Act 2004. Paragraph 1 to Schedule 3 requires the Secretary of State for Wales to obtain the approval of the National Assembly before making the orders.

Target Implementation

4. It is intended that the proposed Orders proceed to plenary on 1 March 2005, for the Assembly to confirm, approve or give its consent to the Orders and for the proposed Orders to be laid before Parliament before 11 March 2005 at the latest, in order to come into force by 31 March 2005. If the intended date is not met then the objective of implementing the new unitary public audit arrangements for Wales for which the Act provides will not be met.

Effect

5. The draft Instruments are to be made by the Secretary of State for Wales. They transfer to the Auditor General for Wales defined property, rights and liabilities of the Audit Commission and the Comptroller and Auditor General from 1 April 2005. The key property, rights and liabilities transferring to the Auditor General for Wales under the provisions of both Orders are:-

- the premises currently occupied by both organisations in Wales and identified in the Orders, including fixtures and fittings and rights and liabilities under related facilities maintenance contracts (e.g. cleaning) where relevant;
- personal and other moveable property (such as office furniture and IT hardware) in or on premises;
- personal and other moveable property for the use of staff in their employment in Wales, and not on the premises immediately before the transfer date (i.e. property held by staff at home or a location other than the premises to transfer e.g. laptop computers and lease hire vehicles);
- a legal right in respect of all documents relating to staff and property transferring;
- the contracts of employment for all staff transferring to the employ of Auditor General for Wales from the Audit Commission and the Comptroller and Auditor General;
- any sum by way of bonus entitlements earned under performance related pay arrangements of the Audit Commission and the National Audit Office, not paid by 1 April 2005; and
- an interest in intellectual property in place at 1 April 2005. This will enable the Wales Audit Office to benefit from intellectual property where transferring staff have contributed to its development. The parties are to enter into a separate agreement by means of a side letter outside of the Transfer Scheme Orders in respect of joint intellectual property development that has not been completed by the transfer date of 1 April 2005.

6. The Audit Commission Transfer Order incorporates the following provisions that are not relevant to the C & AG Transfer Order. These are as follows:-

- provision for the transfer from the Audit Commission to the Auditor General for Wales of fees and charges paid to the former before the transfer date of 1 April 2005 in respect of audit and inspection services that still have to be completed on 1 April 2005. From 1 April 2005 the Auditor General will become responsible for the arrangements for completing such audit and inspection work and the relevant remuneration will need to transfer. Fees and charges are already paid direct to the Auditor General for Wales in respect of the statutory functions he performs and, unlike the Audit Commission the majority of work undertaken by the Auditor General for Wales and the Comptroller and Auditor General is funded by the Exchequer.
- the transfer of a proportion of the cash reserves held by the Audit Commission immediately before the transfer date and which in part derives from income received from Welsh Local Government and NHS bodies. The transfer sum of £758,000 has been agreed between the Commission and the Auditor General; and,
- provision for the Auditor General for Wales to repay the Audit Commission any outgoings it has incurred before the transfer date in respect of property to transfer and relating to a period after the transfer date.

Financial Implications

7. There are no financial implications for the Assembly arising from the implementation of these Orders.

Regulatory Appraisal

8. A Regulatory Appraisal has not been prepared for this instrument by the Secretary of State for Wales as it has no impact on business, charities or voluntary bodies.

Consultation

9. Paragraph 2 to Schedule 3 of the Act places a duty on the Secretary of State to consult the Audit Commission, the Comptroller and Auditor General, and the Auditor General for Wales on the provisions of the draft orders. Formal consultation has taken place for the period from 18 January to 4 February 2005. The period of formal consultation was preceded by informal discussion with officials of both the Audit Commission and the National Audit Office based on initial drafts circulated to them at the end of November and early December on a without prejudice basis. The consultation exercise did not raise any fundamental issues and the final draft orders reflect the majority of responses. These were:-

- that 80 per cent of the fees quantum to be transferred to the Auditor General for Wales under Article 5 should be paid on 19 April 2005 with the balance of the sum due (after audit) being paid on or before 30 June 2005;
- that the cash reserves quantum for the purposes of Article 6 should be £758,000;

- that the rights and liabilities to transfer extend under Article 7(2) to agreement made by the Commission to lend or advance monies to a third party on behalf of a member of staff in line with existing Commission flexible benefit arrangements. (The pre-consultation orders already allowed for agreements made by the Commission to lend money to staff for items such as the purchase of travel season tickets);
- the creation of intellectual property for the Auditor General should extend only to the transfer date of 1 April 2005, with jointly developed intellectual property coming on stream after 1 April 2005 being covered by a side letter; and
- intellectual property created for the Auditor General should be non-assignable by him to third parties.

10. All these proposals are mutually acceptable to the consultees.

11. Only the following responses have not been reflected in amendments to the Order:-

- the Audit Commission asked for an inclusion in the Audit Commission Transfer Order of an indemnity by the AGW in respect of any claims relating to transferring Commission staff that pertain to after the transfer date. Assembly and Wales Office legal advice is that such an indemnity is not relevant as staff transferring will become the responsibility of the AGW from 1 April 2005 and he would be automatically be responsible for any such liabilities pertaining to after that date. An indemnity by the Audit Commission in favour of the AGW (which the existing order does include) is relevant because claims relating to actions prior to the transfer date and which are the legitimate responsibility of the Audit Commission may not materialise until after the 1 April 2005 transfer date; and
- the Audit Commission also asked for an insertion in Article 8 of the Audit Commission Transfer Order (which deals with the payment of performance-related bonuses due to transferring staff but not paid by 1 April 2005) to make clear that transfer of the bonus quantum is conditional on the sum actually paid by the AGW not exceeding a cash limit determined by the Audit Commission for transferring staff. The issue is best dealt with through an agreement between the parties outside of the scope of the Order. The quantum of the bonus to be payable to each individual will be clearly determined under Audit Commission rules and in practice is very unlikely to be second guessed by the AGW. The Audit Commission proposal would also create a conditional element to the transfer of the bonus quantum, which is not appropriate to a statutory instrument.

12. Both the Commission and the C&AG have made a number of comparatively minor drafting suggestions that do not impact on either the legal interpretation or substance of the Order. These have not been incorporated due to the ultimate responsibility of the Secretary of State for the Orders.

13. During pre-legislative scrutiny and public consultation on the Public Audit (Wales) Bill respondents sought assurances that members of staff of the Audit Commission and the National Audit Office should not be disadvantaged in their terms and conditions of employment resulting from the transfer. This was particularly the case in respect of the pension rights of transferring staff. The Assembly Public Audit (Wales) Bill Committee, in its pre-legislative scrutiny report of July 2003, recommended that Schedule 3 be strengthened to protect the pension rights of the staff of both organisations. Paragraph 3(3) to Schedule 3 of the Act requires that in transferring to the employ of the Auditor General for Wales the terms and conditions of staff must (taken as a whole) not be less favourable to the individual than the terms and conditions on which he or she was employed immediately before the transfer. This provides a guarantee to staff in respect of the value of any contractual terms relating to pensions.
14. Existing staff of the National Audit Office are already in the Principal Civil Service Pension Scheme (PCSPS). Staff of the Audit Commission transferring become eligible to join the PCSPS if they to wish, or to make alternative arrangements. Under the terms of the Commission's pension scheme, staff transferring to the employ of the Auditor General for Wales cannot stay within the Commission's scheme, although they can, in joining the PCSPS opt to transfer their rights accrued under the Audit Commission Scheme or have rights accrued under it frozen. For this reason rights and liabilities in respect of the Commission Scheme do not transfer to the Auditor General for Wales except those that do not relate to benefits for old age; invalidity or survivors (for example, rights in respect of redundancy or industrial injury compensation that may be written into an occupational pension scheme will transfer). The Government Actuary has certified that the PCSPS and the Audit Commission pension scheme are broadly comparable.

Recommended Procedure

15. In accordance with Standing Order 26.2, I propose that the National Assembly approves the draft Transfer Scheme Orders.

Compliance

16. I confirm that the proposed Orders will (as far as is applicable):-
 - have due regard to the principle of equality of opportunity for all people (Government of Wales Act 1998, section 120);
 - be compatible with the Assembly's scheme for sustainable development (section 121);
 - be compatible with Community law (section 106);
 - be compatible with the Assembly's human rights legislation (section 107); and

- be compatible with any international obligations binding the UK Government and the Assembly (section 108).

17. I confirm that this Memorandum has been cleared with the Office of the Counsel General and the Assembly Compliance Officer.

18. Drafting Lawyer: Ms Elizabeth Jones, ext 6816

19. Policy Contact: David Powell, ext 1223

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FEBRUARY 2005

MINISTER FOR FINANCE, LOCAL GOVERNMENT AND PUBLIC SERVICES

Annex 1

A summary of Audit Commission Transfer Scheme Order to be made under Section 68 and Paragraphs 1 and 2 of Schedule 3 to the Public Audit (Wales) Act 2004 [the Act]

Article 1: provides for the citation of the Order as the “Public Audit (Wales) Act 2004 (Transfer of Property, Rights and Liabilities of the Audit Commission for Local Authorities and the National Health Service in England and Wales) Order 2005”. It also specifies the transfer date as 1 April 2005.

Article 2: makes provision for the transfer of all property, rights and liabilities (save for the exceptions identified in paragraphs [1] and [2] to Article 4) in relation to premises identified in Schedule 1 to the Order to which the Audit Commission was entitled or subject immediately before the transfer date – i.e. its premises in Wales. This includes rights and liabilities under facilities maintenance contracts in respect of the premises, where relevant.

Article 3: makes provision for the transfer (save for the exceptions again identified in (1) and (2) to Article 4) of:-

- the property in and all rights and liabilities in respect of personal or other moveable property (such as information technology hardware and office furniture) in or on the premises to be transferred [Article 3(a)];
- the property in, and all rights and liabilities in respect of personal and moveable property not in or on the premises to be transferred but for the use of Audit Commission staff in the pursuance of their employment within Wales. This covers property, including lease hire vehicles, in the possession of staff (including staff designated as home workers whose work essentially contributed to Audit Commission operations in Wales) held at home or at a location other than their principal place of employment [Article 3(b)];

Article 4:

Article 4(1) excludes the transfer of rights and liabilities mentioned in Articles 2 or 3 in respect of contracts for the supply, use or maintenance of information technology programmes. Such contracts are for negotiation, through licensing or other appropriate procedures outside the ambit of the draft Order [Article 4(1)];

Article 4(2) provides that liabilities mentioned in Article 2 or 3 do not include any liability (including the liability to pay a sum of money or do anything) that relates to a period before the transfer date of 1 April 2005;

Article 4(3) requires the Auditor General for Wales to reimburse the Audit Commission for any amounts it has expended before the transfer date in respect of a liability mentioned in Article 2 and 3 which relates to a period including or after the transfer date;

Article 4(4) ensures that no existing contractual provision can be used to frustrate or prevent the transfer of property, rights and liabilities that would otherwise not be capable of transfer (for instance, a non-transferrable lease). Paragraph 1(2)(a) to Schedule 3 of the Act provides that property, rights and liabilities which may be the subject of a scheme include any that would otherwise be incapable of being transferred or assigned. Paragraph 1(5) also enables the Secretary of State to make incidental provision as to the interests, rights and liabilities of persons other than the transferor and the Auditor General for Wales in respect of the transfer scheme.

Article 5: makes provision for the transfer from the Audit Commission to the Auditor General for Wales of a proportion of the amount of fees and charges paid to the Audit Commission in respect of audit and inspection services provided by auditors appointed by the Commission under section 3 of the Audit Commission Act 1998. The fees and charges subject to transfer are those paid prior to the transfer date in respect of audit and inspection work still to be completed as at 1 April 2005. Sections 69 and 70 of the Act make provision for appointments of auditors made by the Audit Commission for local government and NHS bodies in Wales to continue for the whole of their term. From 1 April 2005 such auditors will be regarded as having been appointed by the Auditor General for Wales. Article 5(3) requires 80 per cent of the transfer sum to be paid on 19 April 2005 with the balance of the sum due (after audit) being paid on or before 30 June 2005.

Sections 69(5) - (6) and 70(3) - (4) of the Act makes provision for studies under sections 33 and 34 of the Audit Commission Act 1998 undertaken, or promoted by the Audit Commission before 1 April 2005 to be completed by the Commission. For this reason fees and charges that relate to the funding of these studies will not transfer.

Article 6: provides for the transfer of £758,000 of cash reserves held by the Audit Commission as at the transfer date. The sum, agreed between the Audit Commission and the Auditor General for Wales, represents balances held by the Commission that can be attributed to work undertaken in Wales. It is to be paid on or before 31 December 2005.

Article 7: provides for the transfer to the Auditor General for Wales of all rights and liabilities of the Audit Commission under or in connection with any contract of employment in force immediately before the transfer date, made between the Commission and members of its staff whose principal place of employment is at one of the premises specified in Schedule 1 of the draft Order, or the homeworker, working on Welsh operations but living in England, listed in Schedule 2.

Under Article 7(2) the rights and liabilities to transfer extend to agreements made by the Commission to lend money (for instance for the purchase of travel season tickets) and for the reimbursement of expenses. It also extends to agreements to lend or advance monies to a third party on behalf of a member of staff.

Article 7(3) requires the Audit Commission to indemnify the Auditor General for Wales against any liability arising from Article 7(1) and 7(2), if the liability relates to a period before the transfer date of 1 April 2005.

Articles 7(4) and (5) require the Auditor General to reimburse the Audit Commission the proportion of amounts lent or advanced under Article 7(2) not repaid under the terms of an agreement before the transfer date.

Under Article 7(6) and 7(7) the rights and liabilities to transfer do not extend to provisions within the person's contract of employment relating to an occupational pension scheme, unless they are provisions that do not relate to benefits for old age; invalidity or survivors (for example, rights in respect of redundancy or industrial injury compensation that may be written into a occupational pension scheme will transfer).

Paragraph 3(3) to Schedule 3 of the Act provides that the terms and conditions of a member of staff transferring to the employ of the Auditor General for Wales must not, taken as a whole, be less favourable to the individual than the terms and conditions on which he or she was employed immediately before the transfer. In practice members of Audit Commission staff transferring to the employ of the Auditor General for Wales will be eligible to join the Principal Civil Service Pension Scheme. In doing so, they can opt to transfer their rights accrued in the Audit Commission scheme, or freeze those rights under the terms of that scheme. They can also choose not to join the Principal Civil Service Pension Scheme and make alternative arrangements.

Article 8: makes provision for the payment by the Audit Commission to the Auditor General for Wales on or before 30 September 2005 the amount equal to all bonuses due to staff transferring under Audit Commission performance-related pay arrangements relating to the period 1 October 2004 to 31 March 2005. The level of bonuses is determined by the Audit Commission. Bonuses for the period 1 April to 30 September 2004 have already been paid. Paragraph 1(5) to Schedule 3 of the Act enables a transfer scheme to include supplementary, incidental, transitional or consequential provision.

Article 9: creates an interest for the Auditor General for Wales in intellectual property created by or for the Audit Commission before the 1 April 2005 transfer date. The Audit Commission and the Auditor General for Wales are to enter into a separate agreement outside of the Order for intellectual property development that has not been completed by the transfer date. The interest created cannot be assigned by the Auditor General to a third party.

Article 10: creates a right, under paragraph 1(3)(c) of Schedule 3 of the Act, for the Auditor General for Wales in all documents in possession or control of the Audit Commission and relating wholly to property, rights and liabilities transferring to him under Articles 2, 3 or 7 of the Order or any person who is a party to a contract of employment for which the Auditor General for Wales assumes all rights and liabilities under Article 7, paragraph 1. The Article also creates a right of access for the Auditor General for Wales to all documents in possession or control of the Commission relating partly to such property, rights and liabilities and contracts of employment.

Annex 2

A summary of the Comptroller and Auditor General Transfer Scheme to be made under section 68 and paragraphs 1 and 2 of Schedule 3 to the Public Audit (Wales) Act 2004 [the Act]

Article 1: provides for the citation of the Order as “The Public Audit (Wales) Act 2004 (Transfer of Property, Rights and Liabilities of the Comptroller and Auditor General) Order 2005”. It also specifies the transfer date as 1 April 2005.

Article 2: makes provision for the transfer of:-

- all property, rights and liabilities in relation to premises specified in Article 2(1)(a); this includes rights and liabilities under the related facilities maintenance contract;
- the property in and all rights and liabilities in respect of personal or other moveable property (such as information technology hardware owned by the Comptroller and Auditor General and office furniture) in or on the premises specified in Article 2(1)(a) (Article 2(1)(b));
- the property in, and all rights and liabilities in respect of personal and moveable property not in or on the premises referred to above but for the use of National Audit Office staff in the pursuance of their employment within Wales. This takes account of property in the possession of staff held at home or at a location other than the premises specified in Article 2(1)(a) (Article 2(1)(c));

Under Article 2(2) rights and liabilities of the Comptroller and Auditor General in respect of contracts for the supply, use or maintenance of information technology programmes do not transfer. Such contracts are for negotiation, through licensing or other appropriate procedures outside the scope of the draft Order.

Article 2(3) ensures that no existing contractual provision can be used to frustrate or prevent the transfer of property, rights and liabilities that would, otherwise, not be capable of transfer (for instance, a non-assignable lease). Paragraph 1(2)(a) to Schedule 3 of the Act provides that property, rights and liabilities which may be the subject of a scheme include any that would otherwise be incapable of being transferred or assigned.

Article 3: provides for the transfer of all rights and liabilities of the Comptroller and Auditor General to the Auditor General for Wales under or in connection with any contract of employment made between him and members of his staff whose principal place of employment immediately before the transfer date was the premises specified in Article 2(1)(a). Under article 3(2) the rights and liabilities to transfer extend to agreements made by the Comptroller and Auditor General to lend money (for instance for the purchase of travel season tickets) and for the reimbursement of expenses.

Article 4: makes provision for the payment by the Comptroller and Auditor General to the Auditor General for Wales as soon as practicable on or before 30 September 2005 the amount equal to all bonuses due to staff transferring under National Audit Office performance-related pay arrangements relating to the period 1 April 2004 to 31 March 2005. Paragraph 1(3)(c) of Schedule 3 to the Act provides that a transfer scheme may create new rights and liabilities as between the Auditor General and a transferor, such as the Comptroller and Auditor General, and paragraph 1(5) enables a transfer scheme to include supplementary, incidental, transitional and consequential provision.

Article 5: creates an interest for the Auditor General for Wales in intellectual property created by or for the Comptroller and Auditor General before the 1 April 2005 transfer date. The Comptroller and Auditor General and the Auditor General for Wales are to enter into a separate agreement outside of the Order for intellectual property development that has not been completed by the transfer date. The interest created cannot be assigned by the Auditor General to a third party.

Article 6: creates a right, under paragraph 1(3)(c) of Schedule 3 of the Act, for the Auditor General for Wales in all documents in possession or control of the Comptroller and Auditor General relating wholly to property, rights and liabilities transferring to the former under Articles 2 or 3 of the Order or any person who is a party to a contract of employment for which the Auditor General for Wales assumes all rights and liabilities under paragraph 1 of Article 3. The Article also creates a right of access for the Auditor General for Wales to all documents in possession or control of the Commission relating partly to such property, rights and liabilities and contracts of employment.