

Y Pwyllgor Cyfrifon Cyhoeddus

Lleoliad:
Ystafell Bwyllgora 3 – y Senedd

Dyddiad:
Dydd Mawrth, 16 Hydref 2012

Amser:
09:00

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



I gael rhagor o wybodaeth, cysylltwch â:

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Agenda

- 1. Cyflwyniad, ymddiheuriadau a dirprwyon (09:00 – 09:05)**
- 2. Bil Archwilio Cyhoeddus (Cymru): Cyfnod 1 – Tystiolaeth gan yr Athro David Heald (09:05 – 09:55)** (Tudalennau 1 – 10)
- 3. Bil Archwilio Cyhoeddus (Cymru): Cyfnod 1 – Tystiolaeth gan Reolwr ac Archwilydd Cyffredinol y DU (09:55 – 10:45)** (Tudalennau 11 – 19)
Amyas Morse, Rheolwr ac Archwilydd Cyffredinol y DU
- 4. Cynnig o dan Reol Sefydlog 17.42 i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer y canlynol: (10:45)**
Eitem 5
- 5. Ystyried tystiolaeth ar Fil Archwilio Cyhoeddus (Cymru) (10:50 – 11:00)**
- 6. Papurau i'w nodi** (Tudalennau 20 – 22)

Bil Archwilio Cyhoeddus (Cymru): Cyfnod 1 – Llythyr gan Archwilydd Cyffredinol Cymru ynghylch trefniadau TUPE (Tudalennau 23 – 25)

Eitem 2

Public Accounts Committee
Public Audit (Wales) Bill
PA10 – Professor David Heald

THE PUBLIC AUDIT (WALES) BILL

Memorandum by Professor David Heald to the Public Accounts Committee

INTRODUCTION

1. I am grateful to the Committee for the opportunity to submit written evidence and then give oral evidence. Introducing myself, I am Professor of Accountancy at the University of Aberdeen Business School, with a longstanding research interest in public expenditure, public sector accounting and auditing. My practical engagement with these matters includes being:
 - specialist adviser on government accounting to the Treasury Committee of the House of Commons (1989-2010)
 - member of the Financial Issues Advisory Group which proposed the financial arrangements that were later enacted as the *Public Finance and Accountability (Scotland) Act 2000* (1998)
 - specialist adviser to The Public Accounts Commission of the House of Commons (TPAC) (2002-08)
 - member of the Audit Commission’s Technical Advisory Group (2003-2010)
 - independent member of the Financial Reporting Advisory Board to HM Treasury, on the nomination of the UK Government’s Chief Economic Adviser (2004-09)
2. It is relevant to the present matter that I resigned as specialist adviser to TPAC in July 2008, so that I could publicly oppose the corporate model for the National Audit Office (NAO) that had resulted from the Tiner Report (2008). My criticisms of the audit governance arrangements that were later enacted by the *Budget Responsibility and National Audit Act 2011* are expounded in Heald (2008, 2009). I later gave written and oral evidence to the Communities and Local Government Committee of the House of Commons, opposing the abolition of the Audit Commission and the complete outsourcing of local government and National Health Service (NHS) audits in England (Heald, 2011).
3. I lack personal knowledge of Welsh public affairs and of the difficulties that have led to the provisions in the *Public Audit (Wales) Bill*. I am therefore heavily dependent on my

reading of publicly available material. However, there are generic issues about public audit arrangements that deserve consideration by the Committee. My concern is that the Bill proposes a permanent structural solution to a temporary conduct problem, for which there are proportionate remedies. ‘Something has to be done’ often leads to policy and institutional design mistakes.

THE CHALLENGES OF PUBLIC AUDIT

4. Public audit constitutes a difficult arena because it extends much further than the financial certification audit also undertaken in the private sector. Judgements about ‘regularity and propriety’ and Value for Money (VfM) are central to the substance of modern public audit. VfM audit inevitably touches sensitive nerves in the triangular relationship between Legislature, Government and Audit Office. While VfM does not question policy, the line between what is policy and what is implementation is inevitably blurred. The issue of *cost effectiveness* (does the policy achieve declared objectives?) sits alongside that of *worth-whileness* (which is of fundamental interest to legislators and their electors but which Audit Offices address with difficulty). VfM audit comes behind policy implementation, so there is always the danger of wisdom derived from hindsight. Moreover, media and political attention will inevitably focus on criticisms, disregarding successes, thus creating an aura of negativity. Public audit is a delicate plant which has to be carefully nurtured.
5. In this difficult context, the actual and perceived independence of an Auditor General are fundamental safeguards. In his/her work, an Auditor General must have independence not only from the Government but also from the Legislature because reports may include criticism of expenditure programmes and organisations that have strong support in the Legislature. There should be an open appointments procedure, a fixed term of between seven and ten years, restrictions on subsequent employment to the extent that the law allows, and a well-defined procedure for removal from office.
6. Auditors General are ‘Officers of Parliament’, constitutional watchdogs of fundamental importance to democratic government (Gay and Winetrobe, 2008; Gay, 2011). The need to protect independence makes this role an isolating experience, thereby emphasising the importance of support arrangements that do not impinge on professional judgement.

7. In governance terms, the accountability of the Auditor General for Wales (AGW) should be to the Assembly as a whole, not to the Government or the governing majority. My reading of documentation in relation to the *Public Audit (Wales) Bill* is that the Government is in the driving seat, not the Assembly (Welsh Government, 2012, para 40). This is dangerous because Governments, at both ministerial and civil service levels, have incentives to constrain the operations of public audit.

PROBLEMS AT THE WALES AUDIT OFFICE

8. The reputation of the Wales Audit Office (WAO) was damaged by the events of 2010 and 2011 (Public Accounts Committee, 2011). My reading persuades me that it would be wrong to attribute all the responsibility for this damage to the criminal conduct and managerial style of Mr Jeremy Colman, AGW from April 2005 to February 2010.
9. Among the points that emerge from the publicly available documentation are the following:
 - (a) Mr Colman's term of office was extended in May 2009 so that he would serve an eight-year term, an indication of Assembly confidence in his record-to-date as the first full-time AGW
 - (b) The International Peer Review (Gardner et al, 2009) gave a generally positive appraisal of the professional work of the WAO in October 2009, four and a half years after its creation. However, in both explicit and coded language, it noted dysfunctional relationships among senior management and an unsatisfactory human resources and industrial relations climate. While highlighting multiple challenges ahead, it rejected adoption of the corporate model then newly adopted by the NAO ahead of legislation. It recorded strong stakeholder support for the WAO, in marked contrast to stakeholder responses to the announced demise of the Audit Commission
 - (c) The Internal Audit report (Wales Audit Office, 2011) on the conduct in office of Mr Colman is written in a hostile tone, criticising many aspects of his managerial style but making no reference to the context within which he was operating. In light of the signals about conflict among senior management contained in the International Peer Review (Gardner et al, 2009), it is regrettable that this report was not externally commissioned

(d) The National Audit Office (2010) report on the WAO accounts from 2005-06 to 2009-10 makes dismal reading. This led to restatements in the 2010-11 accounts and a report to the Assembly by the Auditor General for Scotland (AGS) (Black, 2011). While in no way excusing the egregious accounting and disclosure deficiencies at the WAO, the audit fees to a private firm in those years were minimal: £8,000 (2005-06); £9,000 (2006-07); £9,000 (2007-08); £10,000 (2008-09); and £13,000 (2009-10). Not only are there exaggerated expectations of what financial certification audit can achieve but also top-tier audit firms do not bid for such work because they have, or may bid for, contracts with Audit Offices as outsourced audit suppliers. There are dangers in audits of Audit Offices being undertaken by audit firms without extensive experience of the specific requirements of HM Treasury's Financial Reporting Manual. Audits of each other by Auditors General might be seen as a round robin. Robust internal review, including the technical department of an Audit Office, is therefore imperative: material errors once made will later lead to reputation-shredding restatements of accounts.

10. On the basis of my reading, I conclude that:

- (a) the integration of NAO in Wales and Audit Commission in Wales was problematic; to what extent difficulties were ones of managerial and employee culture, professional judgement or incompatible personalities is something on which others might advise the Committee. The legacy of entitlements from previous employment will have complicated changes in senior management, not least in that departures would be expensive and controversial. Whereas Audit Scotland and the AGS were established in 1999,¹ when there was a halo around devolution, the WAO and full-time AGW were not created until 2005; this may have been a complicating factor. Hopefully, the present AGW will be able to resolve legacy issues
- (b) the impression is given of a large amount of time being spent on the internal machinery of public audit, possibly to the detriment of the delivery of public audit

¹ The AGS is an office holder of the Scottish Parliament, appointed by Her Majesty, but not a corporation sole. Audit Scotland is a corporate body, whose statutorily defined membership is: the AGS; the Chairman of the Accounts Commission; and three other members appointed jointly by the AGS and the Chairman of the Accounts Commission (*Public Finance and Accountability (Scotland) Act*, Section 10(2)).

- (c) proportionate internal governance mechanisms for the WAO are available, rendering the corporate model unnecessary as well as inappropriate
- (d) Assembly oversight of the AGW and WAO should be strengthened.

PROPORTIONATE REMEDIES

11. The independence of the AGW, in fact and in appearance, from the Government and the Assembly, is vital. The incumbent has three roles: corporation sole as AGW; Chief Executive of the WAO; and Accounting Officer. There are tensions between these roles which the incumbent must manage. In his written and oral evidence, the AGW has documented the ambiguities, tensions and inflexibilities that would arise from the proposed corporate board structure (Thomas, 2012). The arrangement confuses governance with executive functions, and oversight with advice. I could understand a proposal to abolish the corporation sole status of the AGW (though I would oppose it), but putting a corporate board on top is not strengthening governance but weakening it. In this case, two mechanisms are not better than one but risk the dilution of accountability.² Boards can be oversight, executive or advisory. If the WAO is to have a board, this should be advisory, with executive authority in the hands of the AGW and oversight exercised by the Assembly (see paragraph 14 below). Advice should be given careful consideration, but the decision-making authority, together with accountability for decisions, should rest unambiguously with the AGW.
12. I support what is labelled as Option 2 (Allow AGW to strengthen internal control arrangements) in the *Explanatory Memorandum* (Welsh Government, 2012). Although events make this a difficult point to sustain in public debate, the internal management of the WAO should be his/her responsibility. An Audit Office in a parliamentary democracy is not like a normal public sector service delivery organisation because of the paramount importance of protecting audit independence in relation to financial certification, regularity and propriety, and VfM. The roles of monitoring and advising do not mix. In my view, the proposals which the AGW put to the Committee on 7 October 2010 largely address the identified deficiencies (Wales Audit Office, 2010a,b).

² In the case of the corporate NAO, Schedule 3 of the *Budget Responsibility and National Audit Act 2011* governs the relationship between the NAO and the Comptroller and Auditor General. This requires a Code of Practice (National Audit Office, 2012).

There is an update in the 2011-12 Wales Audit Office (2012, pp. 64-65) Report and Accounts.

13. The AGW should have a fixed, non-renewable term and there should be a clearly specified mechanism for removal from office for misconduct or under-performance. This power must be exercised by the Assembly as a whole and be subject to a strong super-majority requirement that protects the incumbent from removal by the Government of the day. In the bi-cameral UK Parliament, the requirement is a resolution of both Houses and in the unicameral Scottish Parliament, elected on proportional representation, a two-thirds majority of all members. Given that conflicts between the Government of the day and the AGW can be predicted, such protection is essential. Within the assurances provided by the statutory framework and oversight arrangements, the Assembly should trust or remove the AGW.

14. The accountability of the AGW should run directly to the Assembly. There is a distinction between the oversight role (exercised at Westminster by TPAC) and the client role (the Westminster Public Accounts Committee (PAC) is the principal client of the NAO). During my 2002-08 specialist advisership, I felt that TPAC, whose active members were often also PAC members, tended to blur its oversight role with the more familiar client role. However, I agreed with the procedure through which TPAC approved the Corporate Plan and Estimates, and then the Chairman of TPAC presented the NAO's Estimate to Parliament and answered Parliamentary Questions. The Scottish Parliament follows the Westminster arrangement, with oversight being by the statutory Scottish Commission for Public Audit consisting of Members of the Scottish Parliament. I understand that the small size of the Assembly at 60 Assembly Members (AMs) may have been a reason for not establishing a separate oversight body in Wales. However, the roles of client and oversight body that the Public Accounts Committee must presently fulfil can be incompatible. I therefore propose the establishment of a Welsh Commission for Public Audit, which might include a minority of external persons with relevant governance and financial knowledge and experience.³ There

³ The post of Comptroller and Auditor General of Northern Ireland was established by the *Government of Ireland Act 1920*. The present arrangements are described at <http://www.niauditoffice.gov.uk/index/about-niao/governance-of-niao.htm>. There is an Advisory Board whose role is 'providing objective and impartial advice to the C&AG to assist him in the discharge of his functions'. In the Northern Ireland Assembly, the client role is performed by the Public Accounts Committee and the oversight role is performed by the Audit Committee.

should be some overlap of membership with the Committee but those AMs should not dominate.

SPECIFIC POINTS ABOUT THE MODEL OF THE CORPORATE BOARD

15. The Government is placing too much confidence in reasonableness as a mechanism for resolving disagreements and conflicts between the AGW and the WAO. This is not something that could credibly be tested in the courts and, if it were, it would inflict reputational damage, provoke media mockery, and probably lead to resignations. Conflict might arise over:

- how much VfM audit and performance measurement to undertake (note the drastic curtailment for local authorities and the NHS in England)
- which areas of public expenditure should receive priority for VfM
- resource requirements
- the extent of reliance on outsourced audit providers, rather than the use of WAO employees (note the abolition of the Audit Commission and the outsourcing of its audit functions)

Instead of speaking his or her mind to the Committee, the AGW might have to defend unsatisfactory compromises. This would be done in the knowledge that disagreements might leak to the media or be disclosed through Freedom of Information (FOI) requests.

16. I have no knowledge of how the NAO arrangements are working. However, I would point to the proximity factor that affects public audit in the smaller polities of the Devolved Administrations, where there is more intense Legislature-Audit Office interaction than at Westminster. This intensifies the danger of compromising the AGW's independence, or of such perceptions arising. In a small country like Wales, suitable candidates for Non-Executive roles will be well-known and could become subject to media, governmental or political pressure.

17. Employee representation on an executive Board which exercises control over the AGW is entirely inappropriate. There are specific issues in the context of an Audit Office that do not apply to a normal public service delivery organisation. Such a Board member would also be seriously conflicted: for example, in relation to the industrial relations and human resources issues identified as problematic by the International Peer Review (Gardner et al, 2009), and to future reductions in workload and employment. If there

were leaks from the Board or ‘inspired’ FOI requests, suspicion might be pointed at the employee director.

18. In his written and oral evidence the AGW (Thomas, 2012) has raised a number of practical obstacles to the implementation of the corporate board proposal (eg HM Revenue & Customs treatment of travel and subsistence expenses and the legal basis on which staff transfers would take place from the AGW to the corporate WAO). The resolution of these issues would have significant impacts on transition costs. Indeed, even without legislative change, legacy entitlements of staff from predecessor organisations will constrain the managerial freedom of the AGW. This might cause future controversy because of ‘pay-offs’, the amounts of which would be beyond the control of the AGW and WAO.

CONCLUSION

19. The International Peer Review (Gardner et al, 2009, p. 7) wrote of the WAO being at a watershed, in part due to expected reductions in financial audit work as machinery of government changes reduced the number of audited bodies. The reality has proved much more difficult.
20. Media criticism of the expenses of the then UK Comptroller and Auditor General were the trigger for the corporate model being applied to the NAO. Rolling out a corporate model is a readily available option and the *Budget Responsibility and National Audit Act 2011* constitutes a precedent. In my view, this model is inappropriate for Wales.
21. Auditors should not expect to be popular, especially public sector auditors whose remit extends to VfM and organisational performance at a time when UK fiscal austerity is putting downward pressure on Welsh public expenditure. Public sector organisations are inevitably exposed to media and political attacks on, for example, salaries and expenses. Good housekeeping is desirable for its own sake and imperative for reputation because of easy media headlines about ‘public sector fat cats’. However, the point needs to be made that the full-year salary of the present AGW in 2011-12 was £150,000 (Wales Audit Office, 2012, pp. 56), about 20% of the mean salary of a Big 4 audit partner.

22. Rather than going ahead with this Bill, the Assembly should pass a limited measure which includes the establishment of a Welsh Commission for Public Audit. Legislation would not be required to establish an Advisory Board to advise the AGW in the discharge of his/her responsibilities, but it could be given a statutory basis. In the context of public audit arrangements, the AGW and WAO remain in the early years of their existence. The overriding need is to provide the AGW with the support he/she needs while being clear that this does not dilute either his/her independence of professional judgement or personal accountability to the Assembly for the performance of the WAO.

Aberdeen, 2 October 2012

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Submission to the Wales Public Accounts Committee from the C&AG

Public Audit (Wales) Bill

October 2012

Introduction

1 The session on 16 October provides the Committee with the opportunity to explore the practicalities of implementing the governance reforms proposed by the Public Audit (Wales) Bill, hereafter 'the Bill,' with me and to obtain my perspective on how these have worked in practice, based on my experience of implementing similar reforms under the Budget Responsibility and National Audit Act 2011.

2 This paper explains the way the arrangements implemented under the Budget Responsibility and National Audit Act (BRANA), with respect to the Comptroller and Auditor General and the National Audit Office work in practice, and provides a summary of the differences between the BRANA and the Bill.

Budget Responsibility & National Audit Act 2011

3 The Budget Responsibility and National Audit Act (BRANA), which received Royal Assent in March 2011, makes provision about the Comptroller and Auditor General (C&AG), establishes the National Audit Office (NAO) as a body corporate and sets out the relationship between the C&AG and NAO. The Act took full effect from 1 April 2012, setting the NAO's governance on a statutory basis.

4 The Act reflects the unique statutory position of the NAO, balancing the need for appropriate controls and oversight, while preserving the independence of the Comptroller and Auditor General.

5 The key requirements of the Act are:

- the C&AG to be appointed by letters patent for a fixed, non-renewable, term of 10 years;
- the NAO Chair to be appointed by letters patent for a term of up to three years, renewable once;

- the composition of the NAO Board, and the requirement for non-executive members to be appointed by The Public Accounts Commission (TPAC);
- creating the NAO as a corporate entity for the first time; and
- making provision for the role of the NAO Board.

The Role of the NAO Board

6 The Board's role is defined by the Act, and given practical application through the Code of Practice. Further information on the provisions of the Code of Practice can be found below.

7 The Board has five non-executive members and four executive members. Non-executive members are appointed for a fixed term, agreed by TPAC. The C&AG is a permanent member of the Board and the other Executive members are appointed for a fixed term by the non-executive members, upon the C&AG's recommendation.

8 There is a clear division of responsibility between the Chairman and the C&AG; the Chairman is responsible for the leadership and effective working of the Board and the C&AG is the Chief Executive of the NAO and is responsible for developing and implementing the NAO strategy.

9 The NAO Board agrees the strategy and resource estimate of the NAO, and submits them to TPAC for approval; it also provides support and independent advice to the C&AG in exercising his functions and overseeing the management of NAO resources.

10 In practical terms the Board:

- provides effective challenge in driving improvements in the NAO's operations, and brings increased rigour and discipline in decision making;
- provides support to the C&AG and other members of the Leadership Team; and
- brings insight from the wider experience of the non-executive members to inform the thinking of the NAO and support improvement.

11 The Board is supported by two committees, both of which consist solely of non-executive members:

12 ***Audit Committee*** - The Audit Committee, as part of its work on risk management and internal controls considers the governance of the NAO, informed by the Board's annual assessment of its own performance.

13 ***Remuneration Committee*** - The Remuneration Committee has a formal role in determining the executive Board members remuneration, except for that of the C&AG which is determined by the Prime Minister and Chair of the Committee of Public Accounts. It also advises on remuneration and reward issues for the wider NAO.

Provisions of BRANA & the Code of Practice

14 BRANA sets out at a high level the role of the Board and the relationship between the Board and the C&AG. The Act requires that the NAO prepare a Code of Practice, approved by TPAC, setting out in more detail the relationship between the C&AG and the NAO Board. The aim of both documents is to protect the audit independence of the C&AG while establishing the remit of the Board in the following areas:

- **The NAO Strategy:** the C&AG prepares the strategy, which the Board considers and approves, subject to any modifications it considers appropriate. The strategy is submitted to TPAC jointly by the C&AG and Board Chairman. The strategy contains a bid for the resources required.
- **The Work Programme:** The C&AG prepares a programme of statutory work (C&AG approved services) for each financial year. The Board considers this programme, and may offer advice on the balance of the programme, but decisions on the final programme will be taken by the C&AG. The NAO Board is not able to amend the budget set out by the C&AG for the services carried out by the C&AG under his statutory responsibilities.
- **The NAO approved services (previously the non-statutory work programme):** the Board has more authority regarding the programme of NAO approved services. The C&AG develops a programme of work which the Board then considers, making any additions or removing any items it deems appropriate, before approving the programme and resources required.
- **The Estimate:** for each financial year the C&AG will determine the budget required for the programme of statutory work as a prior claim on the overall resource envelope approved by TPAC as part of the strategy.
- The C&AG also makes proposals to resource the programme of NAO approved services, which the Board considers, making any amendments it deems appropriate. The C&AG has the discretion to decline to carry out a particular piece of work within the programme of NAO approved services when he considers the budget approved by the Board to be insufficient.
- **Monitoring the carrying out of the C&AG's functions:** the Board is responsible for monitoring the delivery of the approved work programme, and outturn against approved budgets. The Board may provide advice to the C&AG. To support it in this responsibility the Board receives regular management information from the NAO, and an annual report from the NAO's external auditor.

Key differences between the Bill and BRANA

15 Annex 1 below sets out a detailed comparison between the draft Bill under scrutiny by the Committee and provisions set out under BRANA.

16 The key differences identified are:

- **Tenure:** The tenure of the C&AG is 10 years, whereas the Bill proposes a maximum tenure for the Auditor General for Wales (AGW) of 8 years (both non-renewable).

- **AGW Code of Audit Practice:** The AGW must issue a *Code of Audit Practice* prescribing the way in which his functions are to be carried out. There is no equivalent requirement placed on the C&AG.
- **Regard to proposals made by the Public Accounts Committee:** Under Clause 18 of BRANA, in determining whether to carry out a Value for Money examination, the C&AG must *have regard to* proposals made by the Committee of Public Accounts. There is no equivalent clause in the draft Bill under scrutiny.
- **Audit of Local Government Bodies:** Clause 11 of the Bill provides that the AGW must audit the accounts of local government bodies in Wales. In respect of local public bodies in England, this is currently the remit of the Audit Commission. The current draft Local Audit Bill, published 6 July 2012, proposes that the audit of local public bodies in England will, going forward, be undertaken by private sector auditors in line with a Code of Audit Practice issued by the C&AG which shall *prescribe the way in which local auditors are to carry out their functions*.
- **Oversight:** under BRANA, the Public Accounts Commission performs key oversight functions such as the appointment and removal of non-executive Board members, approval of the scheme relating to the charging of fees, specifying what offices or positions a former Comptroller and Auditor General must consult with the Commission on prior to taking up, review and approval of the NAO's estimate of resources and approval of the NAO and C&AG's strategy. BRANA also specifies areas where the Chair of the Committee of Public Accounts has a role, for example his/her agreement is required in order to appoint the C&AG. Under the proposed Bill, the oversight of the WAO and AGW is performed by the National Assembly.
- **Code of Practice dealing with the relationship between the C&AG and NAO:** under Schedule 3 clause 10 of BRANA, the C&AG and NAO are required to jointly prepare a code of practice dealing with the relationship between the NAO and C&AG, a provision on which the draft Bill is silent.

Comparison between the reforms implemented in respect of the NAO and C&AG and those proposed for Wales

Figure 1 below provides a summary of the similarity and differences between the provisions as set out in the draft Bill, currently under scrutiny by the Committee, and those set out under BRANA which took full effect from the 1 April this year.

Overall, there is much in common between BRANA and the provisions of the draft Bill, however there are also some notable differences, as set out below.

Figure 1

Comparison between the provisions of the Public Audit (Wales) Bill and BRANA

Summary of the provision per Public Audit (Wales) Bill

Clause 2: the Auditor General for Wales (AGW) is appointed by Her Majesty on the nomination of the National Assembly. No nomination is to be made unless the National Assembly is satisfied that appropriate consultation has taken place with such bodies as represent the interests of local government in Wales.

Clause 2: the person appointed holds office for up to 8 years and may not be re-appointed.

Clause 3: A person appointed as AGW may be removed from office by Her Majesty at the AGW's request, on the grounds of medical incapacity, or on the grounds of misbehaviour if recommended by a vote of the National Assembly.

Clause 4: The AGW may not be a member of any legislature in the UK nor hold any office appointed by or on behalf of the Crown, National Assembly or National Assembly Commission.

Clause 5: A former AGW must consult with such person specified by the National Assembly before taking up a position of a description specified by the National Assembly.

For 2 years after ceasing to be AGW: the former AGW may not hold a position appointed by or on behalf of the Crown, National Assembly or National Assembly Commission; and they may also not provide services to the Crown, National Assembly, National Assembly Commission, or a statutory auditee of the AGW.

Clause 6: the AGW continues to be a corporation sole.

Summary of the provision per Budget Responsibility and National Audit Act 2011

Clause 11: the C&AG is appointed by Her Majesty on a motion made by the Prime Minister who must have the agreement of the Chair of the Committee of Public Accounts.

There is no reference to consultation with other parties.

Clause 11: the person appointed holds office for 10 years and may not be re-appointed.

Clause 14: the C&AG may resign from office or be removed by Her Majesty on an address of both Houses of Parliament.

Clause 12: The C&AG is an officer of the House of Commons, may not be a member of the House of Lords and may not hold any office appointed by or on behalf of the Crown

Clause 15: A former C&AG must consult with such person as specified by TPAC on taking up an appointment or position of a description as specified by TPAC.

For 2 years after ceasing to be C&AG, the C&AG may not hold an office appointed by or on behalf of the Crown, nor be a member/director, officer or employee of a body whose accounts are required under statute to be audited by the C&AG or open to inspection by the C&AG.

Clause 12: the C&AG continues to be a corporation sole.

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<p>Clause 7: the remuneration arrangements for the AGW are made by the National Assembly, who must first consult the First Minister. No element is to be performance based. The AGW's remuneration is to be charged on the Welsh Consolidated Fund.</p>	<p>Clause 13: Remuneration arrangements are made jointly between the Prime Minister and the Chair of the Committee of Public Accounts. No element is to be performance based. The C&AG's remuneration is to be charged on the Consolidated Fund.</p>
<p>Clause 8: the AGW has complete discretion as to the manner in which the functions of his/her office are exercised and is not subject to the direction or control of the National Assembly or the Welsh Government. However, the AGW must aim to carry out his duties efficiently and cost-effectively and with regard to the standards and principles that an expert provider of accounting or auditing services would be expected to follow.</p>	<p>Clause 17: the C&AG has complete discretion in the carrying out the functions of his/her office, including determining whether to carry out a value for money examination and the manner in which such examination is to be carried out. However, the C&AG must aim to carry out his duties efficiently and cost-effectively and with regard to the standards and principles that an expert provider of accounting or auditing services would be expected to follow.</p>
<p>Clause 9: the AGW may do anything conducive to, incidental to, or to facilitate the carrying out of any of his/her functions.</p>	<p>Clause 16: the C&AG may provide services to any person in any place within or outside of the UK under agreements or arrangements entered into by the C&AG. Schedule 3 (3) requires NAO approval for these.</p>
<p>However the AGW may not do anything which is, or could become, the responsibility of the WAO.</p>	<p>No equivalent requirement.</p>
<p>Clause 10: Code of audit practice – the AGW must issue a code of audit practice prescribing the way in which his/her functions are to be carried out.</p>	<p>No equivalent requirement.</p>
<p>No equivalent requirement.</p>	<p>Clause 18: In determining whether to carry out a vfm examination the C&AG must <i>have regard to</i> proposals made by the Committee of Public Accounts.</p>
<p>Clause 11: the AGW must audit the accounts of local government bodies in Wales.</p>	<p>No equivalent clause. In England this is currently the remit of the Audit Commission. The current draft Local Audit Bill proposes that the audit of local bodies in England is to be undertaken by private sector auditors in line with a Code of Audit Practice issued by the C&AG.</p>
<p>Part 2, relationship between the Wales Audit Office (WAO) and AGW - Clauses 13, 14 and 15: establishes the WAO as a body corporate, provides powers for the WAO to do anything to facilitate or which is incidental or conducive to the exercise of any of its functions, and states that the WAO must aim to carry out its functions efficiently and cost-effectively.</p>	<p>Part 2, National audit – clauses 20 to 23: establishes the National Audit Office as a body corporate, states that the NAO must aim to carry out its functions efficiently and cost effectively and sets out that the NAO's expenditure is to be funded from Parliament.</p>
<p>Clause 16 states that the AGW is to be the Chief Executive, but not an employee, of the WAO.</p>	<p>Schedule 2, Part 3 (11) states that the C&AG is to be the Chief Executive, but not an employee, of the NAO.</p>
<p>Clause 17 sets out the relationship between the AGW and WAO. It specifies that the WAO must monitor the exercise of the AGW's functions and may provide advice where appropriate, to which the AGW must have regard.</p>	<p>Schedule 3 (clauses 4 and 5) sets out the same in respect of the NAO and C&AG.</p>
<p>Clause 19 provides that arrangements may be made between the WAO and a public body for the</p>	<p>Whilst the C&AG may provide services to any person, in any place, by agreement (clause 16).</p>

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<p>exercise by the WAO, or by the AGW, of functions of the public body (including a Minister of the Crown or government department). This also includes the provision of administrative, technical or professional services to, or for the purposes of the functions of the relevant public body by the AGW.</p> <p>(Clause 26, mentioned below, sets out that the AGW must prepare and submit an Annual plan to the WAO of the AGW's (entire) work programme and resources estimate. The WAO may approve or reject it on the basis of unreasonableness)</p>	<p>There is no equivalent provision in BRANA for the NAO or C&AG to exercise any of the functions of another public body.</p> <p>However, work performed under this category must be approved by the NAO – Schedule 3 clause 3 (referred to as NAO-approved services)</p> <p>NAO approval applies to the non-statutory work of the C&AG as opposed to all of it.</p>
<p>Clause 20 specifies the preparation of an estimate of the income and expenses of the WAO and the submission to, and oversight by the National Assembly. Consultation with the AGW and WAO is required before modification of the Estimate by the Assembly.</p> <p>Clause 21 specifies that the WAO must provide resources to the AGW for the exercise of his/her functions. Clause 18 provides that the AGW has the power to delegate his/her functions but the scheme of delegation must be approved by the WAO.</p> <p>Clause 30 provides for the indemnification of the AGW and WAO against a liability in consequence of breach of duty.</p>	<p>Clause 23 specifies the submission to, and oversight by the Public Accounts Commission of the estimate of NAO's use of resources. No consultation is required under statute in respect of modifications the Commission sees appropriate to make. The Commission must have regard to any advice given to it by the Treasury or Committee of Public Accounts.</p> <p>Schedule 3, clause 2 specifies that the NAO must provide resources for the C&AG's functions.</p> <p>Powers to delegate the C&AG's functions are granted by sch 3, clause 6, subject to approval of the scheme of delegation by the Public Accounts Commission.</p> <p>Clause 24 indemnifies the C&AG and NAO against a liability in consequence of breach of duty.</p>
<p>Clause 24 Scheme for charging fees – fees received by the AGW must be paid to the WAO. The WAO may charge fees in accordance with a scheme approved by the National Assembly. The requirements set out in this clause are more prescriptive than those set out in BRANA, including for example a requirement to list the enactments under which the WAO may charge a fee.</p>	<p>Schedule 3 clause 8 allows the NAO to charge fees in accordance with a scheme approved by the Public Accounts Commission. Any fees received by the C&AG must be paid to the NAO.</p>
<p>Clauses 25-28, Annual Plan, requires that an annual plan be agreed between the AGW and WAO each financial year covering the planned work programme for the AGW and the WAO as well as the planned use of resources, including the maximum amount available for the AGW's programme. This must be laid before the National Assembly.</p> <p>Clause 26 of the Bill states that the AGW must submit an Annual Plan to the WAO setting out the AGW's (entire) work programme and an estimate of the maximum amount of resources required to undertake it. The WAO may reject the statement if all or part of it is considered <i>unreasonable</i>.</p>	<p>Schedule 3, clause 1 sets out the requirement for the NAO and C&AG to jointly prepare a strategy for the national audit functions, to be reviewed annually, that sets out the use of resources for the national audit functions and the maximum available for the exercise of the C&AG's functions. The strategy must be jointly submitted by the C&AG and NAO Chair to the Public Accounts Commission for approval.</p> <p>There is no equivalent provision under BRANA where the NAO could reject the C&AG's statutory work programme, or the maximum resources required, on the basis of unreasonableness.</p>
<p>Whilst the WAO and AGW are not bound by the plan, they must have regard to it.</p>	<p>The NAO and C&AG must each give effect to the strategy.</p>

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Schedule 1 of the Bill sets out the membership of the WAO: 7 members of whom 5 are non-executives (including the Chair), the AGW and one executive member.

The Chair and other non-executives are appointed by the National Assembly. The National Assembly must first consult the First Minister before appointing the Chair.

The National Assembly may make remuneration arrangements for the Chair and non-executives but no element of these arrangements may be performance based.

Non-executives are appointed for a maximum of 4 years, and cannot be re-appointed more than once. Restrictions may be imposed on the non-executives in terms of other offices or positions held, including for a maximum of two years after ceasing to be a non-executive member of WAO.

The National Assembly may terminate the appointment of a non-executive member if, for example, they have been absent for more than three months, are unfit or have failed to comply with the terms of their appointment. Before terminating the appointment of the Chair, the First Minister must be consulted. The National Assembly may terminate the appointment of the Chair if he/she has failed to comply with the terms of appointment, or is unwilling to carry out the functions of the Chair.

Executive members are appointed by the non-executives on the recommendation of the AGW, or if not, another person of the non-executives' choosing.

Schedule 2 of BRANA specifies that the NAO is to have 9 members of whom 5 are non-executives (including the Chair), the C&AG and three NAO employees.

The Chair is appointed by Her Majesty exercisable on an address of the House of Commons, the motion for which must be moved by the Prime Minister. To do so the Prime Minister must have the agreement of the Chair of the Committee of Public Accounts. Other non-executives are appointed by the Public Accounts Commission.

The Prime Minister and Chair of the Committee of Public Accounts may jointly make remuneration arrangements for the NAO's Chair. The Public Accounts Commission may make arrangements for the remuneration of other non-executive members.

Non executives are appointed for a maximum 3 year term, and cannot be re-appointed more than once. Restrictions may be imposed on non-executives whilst holding office and afterwards, with no maximum time limit imposed by the legislation.

Her Majesty may terminate the Chair's appointment on an address of both Houses of Parliament. The Public Accounts Commission may terminate the appointment of other non-executives if, for example, they have been absent for more than three months, are unfit or failed to comply with the terms of their appointment.

Part 3: the WAO may pay the AGW additional payments of allowances or other benefits to cover expenses properly and necessarily incurred in his/her capacity as a member and Chief Executive of WAO.

Not specifically mentioned in the legislation.

Part 5 covers employees of WAO and sets out that an individual may not be an employee if disqualified from appointment under Part 6. The Part includes requirements for recruitment and specifies that appointment procedures and the terms of employment should be broadly in line with members of staff of the Welsh Government and that employees of WAO may not hold any office or position appointed by, or on behalf of the Crown, National Assembly or National Assembly Commission.

Part 5 to Schedule 2 simply states that the NAO may employ staff, that terms of appointment should be broadly in line with those applying to civil servants and that employees may not hold any office or position appointed by, or on behalf of the Crown.

Part 7, Procedural rules, sets out that WAO must make rules for the purpose of regulating the WAO's procedure, quorum for meetings and that

Part 6, Procedural rules, is very similar to Part 7 of the Public Audit (Wales) Bill. The only difference is that there is no explicit mention of the power for the

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the rules may include provision for the setting up of committees. There is also the power to apply different quorums for different circumstances.	rules to provide for different quorums for different situations.
Schedule 2, Part 1, requires the WAO and AGW to jointly prepare two interim and one annual report on the exercise of the functions of the AGW and WAO. These must be laid before the National Assembly.	Schedule 3: the C&AG and NAO must jointly prepare and review an annual strategy on the national audit functions for approval by the Public Accounts Commission. There is no specific requirement for interim reports.
Part 2 of Schedule makes provision for the WAO to designate, with the agreement of the National Assembly, an individual to temporarily exercise the functions of the AGW if the situation is vacant, the AGW is unwilling or unable to discharge the functions of his/her office, or on the grounds of misbehaviour. The individual temporarily designated must be an employee of WAO and the designation may not exceed six months, but could be extended for a further six months.	Under schedule 3 clause 7, if the Speaker of the House of Commons certifies to that House that, in the view of the Speaker, the C&AG is seriously impaired from carrying out the functions of his office due to ill-health, then, the NAO, with the agreement of the Public Accounts Commission, may authorise an employee of NAO to carry out the C&AG's functions for not more than six months.
No equivalent requirement.	Schedule 3, clause 10, requires the NAO and C&AG to jointly prepare a code of practice dealing with the relationship between NAO and the C&AG.

Y Pwyllgor Cyfrifon Cyhoeddus

Lleoliad: **Ystafell Bwyllgora 3 - y Senedd**

Dyddiad: **Dydd Llun, 8 Hydref 2012**

Amser: **13:00 - 16:20**

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Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



Cofnodion Cryno:

Aelodau'r Cynulliad:

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Aled Roberts
Lindsay Whittle

Tystion:

Gillian Body, Assistant Auditor General, Wales Audit Office
Paul Dimblebee, Group Director - Performance Audit, WAO
Pol Wong, Powys Fadog
Amanda Brewer
Gareth Hall

Staff y Pwyllgor:

Tom Jackson (Clerc)
Daniel Collier (Dirprwy Clerc)

1. Cyflwyniad, ymddiheuriadau a dirprwyon

1.1 Croesawodd y Cadeirydd yr Aelodau a'r cyhoedd i'r cyfarfod, gan bwysleisio mor falch ydoedd fod y Cyfarfod yn cael ei gynnal yn Llangollen.

1.2 Cafwyd ymddiheuriadau gan Julie Morgan.

2. Proses gaffael Llywodraeth Cymru a'r camau a gymerwyd ganddi i waredu hen westy River Lodge, Llangollen – Tystiolaeth gan Powys Fadog

2.1 Croesawodd y Cadeirydd Pol Wong, Prif Weithredwr a Chadeirydd Powys Fadog.

2.2 Holodd y Pwyllgor y tystion.

Cam i'w gymryd:

Cytunodd Powys Fadog i ddarparu:

- rhagor o wybodaeth am pryd y daeth dosbarthiadau crefft ymladd i ben ar hen safle gwesty'r River Lodge;

3. Proses gaffael Llywodraeth Cymru a'r camau a gymerwyd ganddi i waredu hen westy River Lodge, Llangollen – Tystiolaeth gan Amanda Brewer

3.1 Croesawodd y Cadeirydd Amanda Brewer i'r cyfarfod.

3.2 Holodd y Pwyllgor y tyst.

4. Proses gaffael Llywodraeth Cymru a'r camau a gymerwyd ganddi i waredu hen westy River Lodge, Llangollen – Tystiolaeth gan gyn Swyddog Cyfrifo

4.1 Croesawodd y Cadeirydd Gareth Hall i'r cyfarfod.

4.2 Holodd y Pwyllgor y tyst.

Cam i'w gymryd:

Cytunodd Gareth Hall i ddarparu:

- rhagor o wybodaeth am waith briffio gyda'r Gweinidog perthnasol o ran cynigion Cymdeithas Tai Clwyd Alyn i ddefnyddio safle gwesty'r River Lodge.
- Eglurder ar a gafwyd unrhyw esiamplau eraill o Awdurdod Datblygu Cymru / Llywodraeth Cymru yn methu â chynnal gwerthusiad annibynnol ar gaffael tir.
- Eglurder ar ba bryd y comisiynwyd yr adolygiad cydymffurfio.
- E-bost a gafwyd gan reolwr llinell Amanda Brewer yn amlinellu natur ei rôl ar fwrdd Powys Fadog a sicrwydd bod yr achos o wrthdaro buddiannau yn cael ei reoli'n effeithiol.

5. Papurau i'w nodi

5.1 Nododd y Pwyllgor gofnodion y cyfarfod blaenorol.

6. Cynnig o dan Reol Sefydlog 17.42 i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer y canlynol:

Eitem 7.

7. Ystyried y dystiolaeth ar broses gaffael Llywodraeth Cymru a'r camau a gymerwyd ganddi i waredu hen westy River Lodge, Llangollen

7.1 Trafododd y Pwyllgor y dystiolaeth a gafwyd ar weithredoedd Llywodraeth Cymru wrth gaffael a gwaredu hen westy'r River Lodge, Llangollen.

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Date: 9 October 2012

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Page: 1 of 3

Mr Darren Millar AM

Chair

Public Accounts Committee

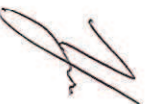
National Assembly for Wales

Cardiff Bay CF99 1NA



**PAC INQUIRY INTO THE GENERAL PRINCIPLES OF THE PUBLIC AUDIT (WALES) BILL:
NOTE ON TUPE**

1. At the Committee's session on 24 September 2012, I undertook to provide a supplementary note regarding the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in relation to the transfer of staff to the new Wales Audit Office that would established by the Bill. Please find such a note attached.
2. In drawing up the note, I have noticed on reviewing the transcript of the session that we did not give sufficiently full details of our attempts to engage with the Welsh Government on this issue. I have therefore included such details in the note and would draw particular attention to its paragraphs 6 and 7.
3. At the 24 September session, I also undertook to provide a supplementary note regarding my concerns at the financial implications of the Bill, and I shall be sending that note separately.
4. I should be happy to provide further information to the Committee to support its inquiry so as to help ensure that the Bill develops into legislation that is fit for purpose.



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Tudalen 23

FURTHER INFORMATION ON THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 (TUPE) IN RELATION TO ARRANGEMENTS FOR TRANSFERRING STAFF TO THE NEW WALES AUDIT OFFICE

1. As set out in my submission of 5 September 2012 and reiterated in oral evidence on 24 September 2012, I consider that the Bill does not provide adequate TUPE-equivalent safeguards for staff transferring to the new WAO. This is not just an awkward technical legal issue, but is also a rather serious concern for my staff. I therefore think it is somewhat pressing that the Welsh Government engages with my officials so as to address these concerns.
2. During the evidence session on 24 September, the Committee asked for a paper on the reasons why I did not think that TUPE would apply to the proposed transfer, and I therefore have set out these reasons below.
3. It may helpful to first make clear that "TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 2006. The TUPE Regulations implement the European Council Directive 2001/23/EC, which is also known as the Acquired Rights Directive¹. In short, the TUPE Regulations protect the terms and conditions of employees who are subject to transfers of employment between employers. There are, however, legal exceptions to the application of the protection of the TUPE Regulations.
4. It is my view that the transfer proposed in the Bill falls within the exception to the protective operation of the TUPE Regulations established by the 1996 European Court of Justice case of *Henke*². *Henke* concerned the application of the Acquired Rights Directive where there was no outsourcing from a public sector body to a private sector body but rather just an "administrative reorganisation" between two public sector bodies. The basic principle of *Henke* is that the Directive (and hence TUPE) does not apply where there is no "business" transferred and all that is transferred is administrative functions. As the effect of the Bill is the transfer of administrative functions, rather than business, so the attendant transfer of staff will not be a TUPE Regulations-protected transfer.
5. In addition to the *Henke* exemption, there is a further exemption contained within Regulation 3(5) of TUPE. Like *Henke*, this is an exemption that applies where there is "an administrative reorganisation of public administrative authorities or

¹ Directive 2001/23/EC consolidates the Acquired Rights Directive, Council Directive 77/187 amended by Directive 98/50

² *Henke v Gemeinde Schlerke and Verwaltungsgemeinschaft 'Brocken'*

the transfer of administrative functions between public administrative authorities.”
The proposed creation under the Bill of a corporate body WAO is an administrative reorganisation of public administrative authorities and so falls within this exception. In other words, the TUPE Regulations do not operate to provide protection of employment terms in the case of the transfer proposed under the Bill.

6. It appears very likely that whoever drafted the Bill for the Welsh Government was also of the view that the TUPE Regulations do not operate to provide protection of employment terms in the case of the transfer proposed under the Bill. This is because the Welsh Government appears to have drafted the Bill so that, in paragraph 5 of Schedule 3, certain selected parts of the TUPE Regulations are replicated so that there is a customised and cut-down version of the TUPE Regulations. This would provide members of staff of the AGW who are transferred to the employment of WAO with a degree of protection, but not the level of protection they would receive under the TUPE Regulations themselves. The provisions in paragraph 5 of Sch 3 would not be needed to provide employment protection if the full protection provided by the TUPE Regulations applied. It therefore appears that either the Welsh Government (or at least the persons that drafted the Bill) are of the view that the full protection provided by the TUPE Regulations does not apply, or some strangely selective yet accidental and unnecessary drafting has been included in the Bill.

7. Unfortunately, we can only guess at what the Welsh Government had in mind in drafting paragraph 5 of Schedule 3 of the Bill, as the Welsh Government has not shared its instructions with us. However, it is clear that paragraph 5 does not meet the commitment made by the Welsh Government in paragraph 242 of its consultation document of 15 March 2012 that, “provision will be made so that the transfer of employment will be on no less favourable terms than would be the case if TUPE applied.”

8. We have raised these issues with the Welsh Government several times. In my response of 11 May 2012 to the Welsh Government’s consultation on its draft Bill, I pointed out that while the consultation document said that there would be a transfer of staff, the draft Bill did not include any transfer provisions. I also suggested that the Welsh Government should provide draft transfer provisions in good time for adequate consultation in advance of the introduction of the Bill. Regrettably, that has not happened. Having considered the Bill as introduced, my staff wrote to the Welsh Government on 21 August 2012 asking for clarification of the transfer provisions in the Bill, and again on 17 September 2012. Officials have spoken on the phone, but the latest situation, as I understand it, is that while the Welsh Government has been working on a response to our email of 21 August it is also continuing to check the situation with its lawyers.