

Ms Christine Chapman AC
Cadeirydd y Pwyllgor Cymunedau,
Cydraddoldeb a Llywodraeth Leol
Cynulliad Cenedlaethol Cymru
Bae Caerdydd
CF99 1NA

Dyddiad: 14 Mawrth 2016
Ein cyf: HVT2519/fgb
Tudalen: 1 o 1

Annwyl Christine

BIL LLYWODRAETH LEOL (CYMRU) DRAFFT

Yn ei llythyr atoch dyddiedig 17 Chwefror 2016, soniodd Anthony Barrett ein bod yn y broses o gael cyngor allanol mewn perthynas â'n pryderon ynghylch agweddau ar ddrafft Bil Llywodraeth Leol (Cymru) ac y byddem yn parhau i roi'r diweddaraf i chi. Rwyf bellach wedi cael cyngor gan Rhodri Williams CF, ac amgaeaf gopi o hyn.

Fel y mae'r Cwnsler yn nodi yn ei gasgliad (gweler paragraff 53 ymlaen), ceir anawsterau cymhwysedd deddfwriaethol sylweddol gyda'r drafftio presennol o adrannau 124, 127, 132 a 143 o'r Bil drafft. Rwy'n credu bod y casgliad hwnnw'n fuddiol o ran ategu adroddiad eich Pwyllgor.

O ystyried perthnasedd y materion a drafodir yn y cyngor, rwy'n copïo'r llythyr hwn, ynghyd â'r atodiad, i'r Llywydd, y Gweinidog Gwasanaethau Cyhoeddus, Cadeirydd y Pwyllgor Cyllid a Chadeirydd y Pwyllgor Cyfrifon Cyhoeddus.

Byddwn yn fwy na pharod i ddarparu esboniad pellach.

Yn Gywir

HUW VAUGHAN THOMAS
ARCHWILYDD CYFFREDINOL CYMRU

Amg Cyngor gan Rhodri Williams CF

cc Y Fonesig Rosemary Butler DBE AC, y Llywydd
Mr Leighton Andrews AC, y Gweinidog Gwasanaethau Cyhoeddus
Ms Jocelyn Davies AC, Cadeirydd y Pwyllgor Cyllid
Mr Darren Millar AC, Cadeirydd, y Pwyllgor Cyfrifon Cyhoeddus

**IN THE MATTER OF THE WALES AUDIT OFFICE
AND IN THE MATTER OF THE LOCAL GOVERNMENT (WALES) BILL 2015
AND IN THE MATTER OF THE COMPETENCE OF THE NATIONAL ASSEMBLY
FOR WALES UNDER THE GOVERNMENT OF WALES ACT 2006**

ADVICE

1. I am asked to advise the Wales Audit Office in relation to the draft Local Government (Wales) Bill (“the draft Bill”) and on certain provisions which may conflict with the independence of the Auditor General for Wales, as set out in section 8(1) of the Public Audit (Wales) Act 2013 (“the PA(W)A 2013”) and as prohibited by section 108(6) and paragraph 2 of Part 2 of Schedule 7 to the Government of Wales Act 2006 (“GOWA 2006”), which set out restrictions on the competence of the National Assembly for Wales to legislate in the areas of law devolved to it.
2. In particular, I am asked (i) whether section 143 of the draft Bill (which provides for co-ordination of relevant functions between relevant regulators) lies outside the competence of the National Assembly and whether any regulations made under section 143(2) and (3) that purported to have an effect that compromised the Auditor General’s discretion would be invalid; I am also asked (ii) whether section 132 (which requires the Auditor General to provide facilities, assistance and Information to Welsh Government appointed reviewers) and (iii) section 144 (which requires the Auditor General to have regard to Welsh Government guidance) are also beyond competence.
3. Finally, following consultation held in Chambers, I am also asked the same question in relation (iv) to sections 124 and 127 (which deal with the duty to carry out combined assessments of governance arrangements of county councils). This Advice is provided further to advice given in consultation on 1st March 2016.

Background

4. On 24th November 2015, the Welsh Government published the draft Bill and opened a consultation exercise seeking views on it with a closing date for responses of 15th February 2016. The Consultation Document states that "*[t]he objective of the Draft Bill is to complete the programme of Local Authority mergers and set out a new and reformed legislative framework for Local Authority democracy, accountability, performance and elements of finance*". Part 5 of the Draft Bill sets out arrangements which, according to the Welsh Government's Consultation Document, are intended to provide for a new improvement regime: The Consultation Document explains at page 38 that Chapter 5 of Part 5 aims specifically to allow for better co-ordination between the "regulators".

5. Section 143 of the draft Bill on the "*co-ordination of relevant functions of relevant regulators*" provides in particular that:
 - (1) *The relevant regulators must have regard to the need for co-ordination in the exercise of relevant functions.*
 - (2) *The Welsh Ministers may by regulations make further provision for and in connection with the co-ordination of the exercise by relevant regulators of relevant functions.*
 - (3) *Regulations made under subsection (2) may, among other things, make provision for-*
 - (a) *a timetable for the exercise of relevant functions to be prepared and published;*
 - (b) *relevant regulators to be required to adhere to the timetable;*
 - (c) *information to be shared between relevant regulators in connection with the exercise of relevant functions;*
 - (d) *relevant regulators to consult one another in relation to the exercise of relevant functions.*

6. Section 123 of the draft Bill defines the Auditor General as a "*relevant regulator*" and the Auditor General's local government functions as "*relevant functions*". The other "relevant regulators" defined by the section are Her Majesty's Chief Inspector of Education & Training in Wales ("Estyn") and the Welsh Ministers exercising social services inspection functions ("CSSIW").

7. While the Consultation Document provides further explanatory notes and poses more detailed questions in respect of other Chapters of Part 5, no further explanation is given on the intention behind Chapter 5 of Part 5 in the Consultation Document. One is left with general question 5.1 posed in the Consultation Document which simply asks whether consultees have any comments on any of the provisions in Part 5 of the Draft Bill.
8. By his response to the Consultation dated 15th February 2016, the Auditor General stated:

"Conflict with audit independence"

Several aspects of Part 5 are not compatible with audit independence, which is a fundamental audit principle and essential for overall credibility of reporting on the stewardship of public resources, both at the local government level and the Welsh Government level. The greatest problem is in section 143, which sets out to empower the Welsh Ministers to make regulations for co-ordinating work of the Auditor General with work of Her Majesty's Chief Inspector of Education and Training in Wales (Estyn) and work of the Welsh Ministers in terms of their social services inspection functions (CSSIW). Using these powers, the Welsh Ministers would apparently be able to set timetables for when audit work is done and require the sharing of information.

These regulation-making provisions are at odds with section 8(1) of the Public Audit (Wales) Act 2013, which says:

"The Auditor General has complete discretion as to the manner in which the functions of that office are exercised and is not subject to the discretion or control of the National Assembly or the Welsh Government."

The regulation-making provision therefore appears to provide the Welsh Ministers with the means in effect to amend section 8(1) of the 2013 Act. As we understand it, section 8(1) of the 2013 Act is protected from amendment by the Assembly by virtue of paragraphs 2 to 4 of Part II of Schedule 7 to the Government of Wales Act 2006. In particular, it appears to me that regulation-making provisions ought to be limited to the oversight or supervision of the Auditor General of his functions, which are properly matters for the Wales Audit Office and the National Assembly, rather than the Welsh Ministers, and any regulations that purported to have an effect that compromised the Auditor General's discretion would be invalid. (I am in the process of obtaining independent advice on this point.) Even if that analysis is not correct (and in any event there is scope for considerable confusion and expense), and such regulations were valid, then audit independence would be compromised."

9. The prohibition on making modifications of, or conferring power by subordinate legislation to make modifications of, section 8(1) PA(W)A 2013 applies "*in so far as that section relates to the Auditor General's exercise of functions free from the direction or control of the Assembly or Welsh Government*". The first question I am asked therefore is whether by the draft legislation the Assembly is seeking to confer power by subordinate legislation to make modifications of section 8(1) of the 2013 Act and whether making "modifications" (which might be said to relate only to actual legislative amendments) may include provisions in secondary legislation which interfere with the freedom enshrined in section 8(1) PA(W)A 2013. In addition, the question arises whether the Welsh Ministers' power to make regulations in relation to the Auditor General's exercise of audit functions amounts to "direction or control".

10. I am asked whether the section of the draft Bill that confers the regulation making power might be invalid given the wording of paragraph 2(2B) of Schedule 7 which states that "*a provision to which sub-paragraph (4) applies cannot...confer power to modify section 8(1) of the Public Audit (Wales) Act 2013.*" The further question is whether this could make the whole provision invalid as it purports to confer power to modify 8(1), or, alternatively, whether it might still be valid insofar as it confers power to make regulations in respect of Estyn and CSSIW.

11. There is then also the question of whether the draft legislation would fall within the exceptions in subparagraphs (2A) and (4).

12. I am reminded that, when appearing before the Communities, Equality and Local Government Committee on 10th February 2016, the Welsh Minister described the Wales Audit Office's concerns about audit independence as "absurd". His explanation for this comment was that the Auditor General's independence was protected in statute, but he omitted to mention that the draft Bill's provisions would provide for regulations potentially at odds with those existing protections. In the same televised Committee session the Minister also said that he was "*surprised that the auditor general or his officers don't think that there is a role for them working, for example, with inspectorates to develop collection assessments of local authorities and I am surprised that they see this clause as a breach of their independence. I think their independence is guaranteed in statute.*"

13. Since the consultation held on 1st March 2016, I have been provided with a copy of the Report of the Communities, Equality and Local Government Committee on the Draft Bill dated March 2016. In respect of Part 5 of the Draft Bill ("County Councils: improvement of governance"), the report states, at paragraphs 49 – 50 that the Auditor General for Wales suggested that "combined assessments" provided for in section 124 were "likely to prove unnecessarily complicated" given the distinct roles and independence of the bodies involved and that the Auditor General for Wales raised concerns that "several aspects of Part 5 are not compatible with audit independence, which is a fundamental audit principle", in particular the powers in section 143 for the Welsh Ministers to make regulations for co-ordinating work of the Auditor General, Estyn and CSSIW and to set timetables for audit work.

14. The Report states at paragraph 50 that the Minister told the Committee that "*the Audit Office and the role of the auditor general are clearly laid down in statute*" and that as such the Auditor General for Wales' independence was "guaranteed". The Report ends with the words: "*While we acknowledge this view, we refer to the AGW's detailed comments and seek assurance that the provisions will not in any way compromise this independence.*"

Analysis

The relevant legislation

15. Section 108 GOWA 2006 provides:

“108 Legislative competence

(1) Subject to the provisions of this Part, an Act of the Assembly may make any provision that could be made by an Act of Parliament.

(2) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.

(3) A provision of an Act of the Assembly is within the Assembly's legislative competence only if it falls within subsection (4) or (5).

(4) A provision of an Act of the Assembly falls within this subsection if–

(a) it relates to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and, subject to subsection (4A), does not fall within any of the exceptions specified in that Part of that Schedule (whether or not under that heading or any of those headings), and

(b) it neither applies otherwise than in relation to Wales nor confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales.

(4A) Provision relating to a devolved tax (as listed under the heading “Taxation” in Part 1 of Schedule 7) is not outside the Assembly's legislative competence by reason only of the fact that it falls within an exception specified under another heading in that Part of that Schedule.

(5) A provision of an Act of the Assembly falls within this subsection if–

(a) it provides for the enforcement of a provision (of that or any other Act of the Assembly) which falls within subsection (4) or a provision of an Assembly Measure or it is otherwise appropriate for making such a provision effective, or

(b) it is otherwise incidental to, or consequential on, such a provision.

(6) But a provision which falls within subsection (4) or (5) is outside the Assembly's legislative competence if–

(a) it breaches any of the restrictions in Part 2 of Schedule 7, having regard to any exception in Part 3 of that Schedule from those restrictions,

(b) it extends otherwise than only to England and Wales, or

(c) it is incompatible with the Convention rights or with EU law.

(7) For the purposes of this section the question whether a provision of an Act of the Assembly relates to one or more of the subjects listed in Part 1 of Schedule 7 (or falls within any of the exceptions specified in that Part of that Schedule) is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.”

16. The relevant provisions of paragraph 2 of Part II of Schedule 7 to the Government of Wales Act 2006 then provide:

"(1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any of the provisions listed in the Table below-

Table

<i>Enactment</i>	<i>Provisions protected from modification</i>
<i>[...]</i>	<i>[...]</i>
<i>The Public Audit (Wales) Act 2013 (anaw 3)</i>	<i>Sections 2(1) to (3), 3(2) to (4), '6(2)" to (3) and section 8(1) in so far as that section relates to the Auditor General's exercise of functions free from the direction or control of the Assembly or Welsh Government."</i>

[...]

(2A) Subparagraph (1), so far as it applies in relation to sections 2(1) to 1(3), 3(2) to (4), 6(2) to (3) and 8(1) of the Public Audit (Wales) Act 2013 does not apply in relation to any provision to which sub-paragraph (4) applies.

(2B) But, subject to sub-paragraph (2C), a provision to which sub-paragraph (4) applies cannot modify or confer power by subordinate legislation to modify section 8(1) of the Public Audit (Wales) Act 2013.

(2C) Sub-paragraph (28) does not prevent the conferral of functions on a committee of the Assembly that-

(a) does not consist of or include any of the following persons-

- (i) the First Minister or any person designated to exercise the functions of the First Minister,*
- (ii) a Welsh Minister appointed under section 48,*
- (iii) the Counsel General or any person designated to exercise the functions of the Counsel General, or*
- (iv) a Deputy Welsh Minister, and*

(b) is not chaired by an Assembly member who is a member of a political group with an executive role.

[...]

(4) This sub-paragraph applies to a provision of an Act of the Assembly which-

(a) *is a provision relating to the oversight or supervision of the Auditor General or of the exercise of the Auditor General's functions,*

(b) *provides for the enforcement of a provision falling within paragraph (a) or is otherwise appropriate for making such a provision effective, or*

(c) *is otherwise incidental to, or consequential on, such a provision."*

17. There is no question but that the draft Bill falls within section 108(4)(a) GOWA 2006, as its subject matter clearly comes within paragraph 14 of Part 1 to Schedule 7¹. The question is therefore whether it nevertheless falls outside the competence of the National Assembly for Wales because it falls within the prohibition contained in section 108(6)(a) having regard to the restrictions in Part 2 of Schedule 7.

18. I consider that section 8(1) PA(W)A 2013 contains an important principle in enshrining the complete discretion which the Auditor General for Wales has as to the manner in which the functions of his office are exercised and that he should not be subject to the direction or control of the National Assembly or the Welsh Government. This discretion is, by virtue of section 8(2), subject to only three exceptions, which are then set out in section 8(3), namely that he must aim to carry out his functions efficiently and cost-effectively (section 8(3)(a)); have regard, as he considers appropriate, to the standards and principles that an expert professional provider of accounting or auditing services would expect to follow (section 8(3)(b)); and have regard to advice given to him by the Wales Audit Office, notably under section 17(3) (section 8(3)(c)).

19. The prohibition found in paragraph 2(1) of Part 2 to Schedule 7 GOWA 2006 only applies to section 8(1) PA(W)A 2013 "*in so far as that section relates to the Auditor General's exercise of functions free from the direction or control of the Assembly or Welsh Government*". However, I should point out straightaway that this apparent restriction goes to the very heart of the principle set out in section 8(1) and that it is difficult to envisage a breach of the protection provided by paragraph 2(1) of Part 2 to Schedule 7 in respect of section 8(1) which did not relate to the Auditor General's exercise of functions free from direction or control. The same may not be true of sections 2(1) – (3), 3(2) – (4) and 6 (2) – (3) which are not subject to such a restriction.

¹ As amended by the Budget Responsibility and National Audit Act 2011

20. I consider that the protection of the principle in section 8(1) that the Auditor General “*is not subject to the direction or control of the National Assembly or the Welsh Government*” is closely linked to the protection that the Auditor General “*has complete discretion as to the manner in which the functions of that office are exercised*” in the sense that it is difficult to conceive of a breach of the protection against direction and control which does not impinge upon the protection against complete discretion. However, as a strict matter of statutory interpretation, the prohibition in the Table in paragraph 2(1) of Part 2 to Schedule 7, only extends to the protection from “**direction and control...**”.

21. Paragraph 2(2A) of Part 2 to Schedule 7 then provides, among other things, that the prohibition found in paragraph 2(1) does not apply, in respect of section 8(1), to any provision to which paragraph 2(4) applies. Paragraph 2(4) provides for an exception to the prohibition in respect of an Act of the National Assembly which (a) provides for the oversight or supervision of the Auditor General or of the exercise of his functions, or (b) provides for the enforcement of such a provision or is otherwise appropriate for making such a provision effective, or (c) is otherwise incidental to, or consequential on, such a provision.

22. However, by virtue of paragraphs 2(2B) & (2C), the exception in paragraph 2(4) does not apply to the modification of section 8(1) PA(W)A 2013, unless it is by way of the conferral of a function on a committee of the Assembly which is so constituted so as not to include any Minister, Deputy Minister or Counsel General and is not chaired by any Assembly member who is a member of a political group with an executive role. I do not consider that the provisions which I am asked to consider in the draft Bill do confer any such function on a Committee of the Assembly, however, constituted. I do not therefore

consider that the exception to the prohibition found in paragraph 2(4) of Schedule 7 has any relevance to the provisions found in the draft Bill, for present purposes.

23. I do bear in mind, nevertheless, the provisions of section 154 GOWA 2006². This section, which by section 154(1)(b) applies to any provision of an Act of the Assembly or a Bill for such an Act, which could be read in such a way as to be outside the Assembly's legislative competence, provides at section 154(2):

“The provision is to be read as narrowly as is required for it to be within competence or within the powers, if such a reading is possible, and is to have effect accordingly.”

Section 143 of the draft Bill

24. I consider that section 143(1) (set out above), which provides that the Auditor General for Wales, as one of the “relevant regulators” (defined in section 123(1)(a)) must have regard to the need for co-ordination (with the other relevant regulators) in the exercise of relevant functions (defined in section 123(1)(b) & (2)(c)³ to include auditing the accounts of a county council under Part 2 Chapter 1 of the Public Audit (Wales) Act 2004, the undertaking of studies under Part 2 Chapter 2 of the same Act and the carrying out of examinations of a county council under section 15 of the Well-being of Future Generations (Wales) Act 2015), amounts to a modification by way of an implied amendment to the provision of section 8(1) PA(W)A 2013. It does so by implying a further exception to the general principle set out in section 8(1) by adding to the current exceptions which apply by virtue of section 8(2) & (3). It is thus inconsistent with section 8(1) as currently drafted.

² For its application, see *Attorney General v National Assembly for Wales Commission & Others* [2012] UKSC 53; [2013] 1 AC 792

³ It is worth noting that the previous definition of “relevant regulator” and “relevant functions” found in section 16 of the Local Government (Wales) Measure 2009, excluded the Auditor General for Wales, though the Auditor General was otherwise given various functions under the 2009 Measure

25. Such an implied amendment occurs when a later enactment such as the draft Bill does not expressly amend (whether textually or indirectly) an earlier enactment such as the PA(W)A 2013, but when the provisions of the later enactment are inconsistent with those of the earlier. The later enactment by implication thus amends the earlier, so far as is necessary to remove the inconsistency between them⁴.

26. I therefore consider that section 143(1) therefore falls foul of the prohibition found in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006 in that it seeks to make modifications of a provision listed in Table A, namely the provision in section 8(1) PA(W)A 2013, that the Auditor General is not subject to the direction of control of the National Assembly or the Welsh Government.

27. Likewise, I consider that section 143(2) and (3), which provides for a power for the Welsh Ministers to make further provisions by regulations for the co-ordination of the exercise by relevant regulators of relevant functions, which regulations, may include provision for a timetable for the exercise of such relevant functions, or require relevant regulators to adhere to such a timetable, or for information to be shared between relevant regulators and for them to consult one another in relation to the exercise of relevant functions, also falls foul of the prohibition in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006 in that it seeks to confer power by subordinate legislation to make modifications of a provision listed in Table A, namely section 8(1) PA(W)A 2013.

⁴ See Halsbury's Laws of England (5th Edition) Volume 96 at paragraph 690

28. An issue was raised, in respect of section 143(2), as to whether it would be sufficient for the legislator to argue that there was no modification until the Regulations postulated under the subsection were actually made⁵. I do not think that this argument has any force. The prohibition in paragraph 2(1) of Part 2 to Schedule 7 GOWA 2006 is not simply on the making of modifications but also on the conferring of “**power to by subordinate legislation to make modifications**”. Section 143(3)(a) – (d) (regulations about imposed timetables, sharing of information and consultation between relevant regulators) does just this.

29. I am instructed that in practice, Regulations made under section 143 which might provide for a timetable for the exercise of “*relevant functions*” and for adherence to that timetable could lead to situations where the Auditor General’s audit work at local authorities was curtailed. This, in turn, would lead to the following problems. It would prevent necessary testing of controls and transactions being completed so preventing full information being provided for the Auditor General’s audit opinion (section 23 of PA(W)A 2004). In such circumstances, the Auditor General would have to provide qualified opinions on the grounds of uncertainty, and this would significantly impair the reliability of financial reporting by local authorities and undermine accountability.

30. Moreover, I am told that it would tend to prevent the Auditor General producing immediate reports in the public interest under section 22 of PA(W)A 2004 regarding matters coming to his notice in the course of audit, such as unlawful expenditure. A typical scenario would entail a matter becoming apparent towards the end of the timetabled period for the audit. As reports cannot be produced instantly, the publication of a report in the public interest would be prevented by the passing of the end date of the timetabled audit period. As public interest matters are usually fairly complex and sensitive, and so require some time to deal with, this effect is quite likely. Again, this

⁵ The same point could be made in respect of section 127 of the draft Bill (see further below)

effect of the timetable would significantly undermine the accountability of local authorities, particularly in relation to unlawful expenditure and significant failures of governance.

31. Furthermore, it could prevent the Auditor General compiling sufficient evidence for his studies for making recommendations for improving economy, efficiency and effectiveness in the provision of services and financial management. The quality of analysis would therefore be likely to suffer, and appropriate recommendations might be omitted. Such a situation could also be exploited by persons wishing to confound the Auditor General's studies. For example, a study considering whether contractors were meeting their obligations could be confounded by unscrupulous contractors delaying the provision of information required by the Auditor General until the end of the allotted period for the exercise of study functions. Finally, a timetable could also prevent the Auditor General from undertaking studies at appropriate times. Timely examination of a time-specific issue, such as examination of arrangements for securing value for money in major construction projects, could therefore be undermined.

32. I am also instructed that any Regulations made under section 143 that provided for information to be shared between "relevant regulators" could lead to the Auditor General being under an obligation to share information that is not appropriate. Unlike section 132(4) (see further below), there is no exception in section 143 to allow for prohibitions on disclosure. The likely practical problem that would arise from this would be in relation to information that gives early indications of performance problems. This could lead to early uncorroborated indications of problems being shared between the review bodies leading to an expansion of work by those bodies before, for example, relevant individuals in authorities can be given the opportunity to comment. In other words, this could lead to premature actions on the basis of hearsay. This in turn would be likely to lead to wider reticence and even obstruction in the provision of information by authority staff, so hindering the efficient exercise of all the Auditor General's local authority functions.

33. Such Regulations would also present another issue, as section 54 of PA(W)A 2004 prohibits disclosure of information obtained in the course of audit, subject to certain exceptions. There is an exception for the provision of information for the purposes of Welsh Ministers' functions in relation to social services (section 54(2)(e)), but there is no equivalent for Estyn. If the Auditor General considered that disclosure to Estyn would prejudice his statutory functions, and if he could not get consent to disclose from the body to which the information relates, he would potentially be subject to conflicting statutory duties: one to disclose information under regulations made under section 143 of the draft Bill, and another not to disclose that same information under section 54 PA(W)A 2004, since no other exception to the section 54 prohibition would apply in this situation. It would appear that he could not avoid breach of statutory duty in such case. As well as being a legal problem in its own right, such cases would be problematic in terms of consuming resources in activities such as seeking consent for disclosure and consideration of the legal issues.

34. Nor do I consider that section 154(2) GOWA 2006 could operate to remove the Auditor General from the scope of section 143 of the draft Bill, since a combination of section 143(1) and the definition section in section 123(1)(2) means that such a reading is not possible. Given the clear principle set out in section 8(1) PA(W)A 2013, that the Auditor General is not subject to the direction or control of the National Assembly or the Welsh Government, I do not consider that it is possible to read section 143 as compatible with the prohibition found in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006. I therefore consider that in enacting section 143 of the Draft Bill, the National Assembly would be acting outside its competence under section 108.

35. If the definition of relevant regulators were modified, however, so as to exclude the Auditor General for Wales, whereupon section 8(1) PA(W)A 2013 would cease to be relevant, and the prohibition found in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006 would cease to apply, then the provision of section 143 could still apply to the other two relevant regulators, namely Estyn and the Welsh Ministers exercising CSSIW functions under the Social Services and Well-being (Wales) Act 2014. I am also conscious of the rule in *Attorney General-v-Lamplough*, whereby where an Act is amended, whether by repeal of part of its provisions or otherwise, and the question arises whether the amendment affects the legal meaning of the remainder of the Act, unless the contrary intention appears from the amending Act, the repeal or other amendment of part of the Act does not affect the construction of the remainder⁶.

Section 144 of the draft Bill

36. Section 144 of the draft Bill simply provides, under the heading Guidance, that “A *person exercising functions under this Part* (Part 5 County Councils: Improvement of Governance) *must have regard to any guidance issued by the Welsh Ministers.*” Since the obligation under the section is simply to have regard to the guidance issued by the Welsh Ministers and because it would be possible to interpret this provision, by virtue of the application of section 154(2) GOWA 2006, not to empower the Welsh Ministers to give guidance which would impinge upon the protection granted by section 8(1) PA(W)A 2013, I do not consider that this section falls foul of the prohibition found in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006.

⁶ See Halsbury’s Laws of England (5th Edition) Volume 96 at paragraph 691

Section 132 of the draft Bill

37. Section 132 provides as follows:

“132 Provision of information by other persons

(1) A reviewer carrying out a governance review in respect of a county council may require a person within subsection (3) to provide the reviewer with whatever facilities and assistance the reviewer may reasonably require for the purpose of carrying out the review, including among other things by providing documents, records and other information.

(2) That person must take all reasonable steps to comply with the requirement.

(3) The persons are—

(a) the public services board for the county council's area;

(b) the Local Health Board for an area any part of which is in the county council's area;

(c) a community council in the county council's area;

(d) Her Majesty's Chief Inspector of Education and Training in Wales;

(e) the Auditor General for Wales.

(4) A person is not required by this section to provide documents, records or other information if the person is prohibited from providing them by any enactment or other rule of law.

(5) The power in subsection (1) includes power to require documents or records to be produced in a form which is legible and portable.

(6) The Welsh Ministers may by regulations amend subsection (3) by—

(a) adding or removing a person, or

(b) varying the description of a person.”

38. Section 132(2) & (3)(e) together provide that the Auditor General for Wales may be obliged to take all reasonable steps to comply with a requirement laid down by a reviewer carrying out a governance review to provide not just documents, records and other information but also “*whatever facilities and assistance the reviewer may reasonably require for the purpose of carrying out the review*”. This could conceivably amount to a considerable burden on the administrative freedom which the Auditor General currently enjoys. The question is whether the duty to comply with this requirement impinges upon and thus impliedly amends the complete discretion as to the

manner in which the functions of the Auditor General's office are exercised, pursuant to section 8(1) PA(W)A 2013.

39. In practice, I am advised that a requirement to provide facilities and assistance in the form of audit staff could very well mean that staff are taken off the audit or study work for which they are provided. For example, staff who had worked on a study of some aspect of governance arrangements in authorities could be drawn back to assist the Welsh Minister appointed reviewer to use that work and this could prevent them undertaking potentially more pressing work on a new study. I am told that Wales Audit Office operational teams are quite small (for example studies are often undertaken by only 2 to 3 people) so any redeployment for Welsh Minister-appointed reviewer purposes could have significant consequences for the Auditor General for Wales' work programme.

40. In addition to the deflection of resources, referred to above, and the problems stemming from being required to share uncorroborated evidence, also mentioned above, there is scope for disproportionate resources to be taken up in determining what information must be shared. This is because section 132(4) includes an exception from the requirement to provide information where provision is prohibited by an enactment or other rule of law. I am told that whilst this exception is in itself appropriate, the overall effect could be very time consuming in that time would have to be spent considering whether an exception to the section 54 of PA(W)A 2004 prohibition on disclosure of information would apply.

41. There is an exception in section 54 for persons who are, or who act on behalf of, public authorities for the purposes of FOIA (this covers the Auditor General and staff of the Wales Audit Office), where disclosure would not prejudice statutory functions. Staff of the Wales Audit Office would therefore need to consider all information to be disclosed to the Welsh Minister-appointed reviewer in terms of whether it falls within the available exceptions, which, in the majority of cases, would involve considering

whether provision of information would lead to prejudice to statutory functions. In effect, meeting the requirements of Welsh Minister-appointed reviewers would be akin to the handling of very large and ongoing FOIA requests.

42. On balance, therefore, and despite the provision of the exception found in section 132(4), I consider that section 132(1) – (3) contains a modification by way of an implied amendment to the provision of section 8(1) PA(W)A 2013. Again, it does so by implying a further exception to the general principle set out in section 8(1) that the Auditor General is not subject to the direction of control of the National Assembly or the Welsh Government, by adding to the current exceptions which apply by virtue of section 8(2) & (3). It is thus inconsistent with section 8(1) as currently drafted.

43. I therefore consider that section 132(1) – (3) falls foul of the prohibition found in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006 in that it seeks to make modifications of a provision listed in Table A, namely section 8(1) PA(W)A 2013. Again, given the clear principle set out in section 8(1) PA(W)A 2013, I do not consider that it is possible to read section 132 as compatible with the prohibition found in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006, by virtue of the application of section 154(2) GOWA 2016.

Section 124 and section 127 of the draft Bill

44. Section 124 provides:

“Duty to carry out combined assessment of governance arrangements of county council

(1) The relevant regulators must, at such intervals as they think fit, carry out a combined assessment in relation to each county council.

(2) A combined assessment is an assessment of a county council’s compliance with its duties under section 111 carried out jointly by the relevant regulators, based on a review by the relevant regulators of—

(a) reports relating to the council made by each of the relevant regulators in the exercise of their relevant functions,

(b) information available to the relevant regulators as a result of exercising their relevant functions in relation to the council, and

(c) documents published in relation to the council under this Part.

(3) A relevant regulator may share reports and information within subsection (2)(a) and (b) with the other relevant regulators for the purposes of a combined assessment.

(4) In carrying out a combined assessment, the relevant regulators may consult any other person who exercises functions of a public nature in relation to the council.”

And section 127 provides:

“Further provision about combined assessments

The Welsh Ministers may by regulations make provision about—

(a) when a combined assessment must be carried out;

(b) the form and content of a combined assessment report and response;

(c) when and how the report and response must be published.

45. I consider that section 124(1), for the same reason as section 143(1), in imposing an obligation on relevant regulators, at regular intervals, to carry out a combined assessment jointly with the other relevant regulators in relation to each county council, amounts to a modification by way of an implied amendment to the provision of section 8(1) PA(W)A 2013. It does so by implying a further exception to the general principle set out in section 8(1) that the Auditor General is not subject to the direction of control of the National Assembly or the Welsh Government, by adding to the current exceptions which apply by virtue of section 8(2) & (3). It is thus inconsistent with section 8(1) as currently drafted.

46. Whilst it is true that the frequency of such assessments is a matter for the discretion of each relevant regulator, it must be done regularly and, more importantly, it must be carried out jointly with the other relevant regulators. This must impinge on the otherwise complete discretion enjoyed by the Auditor General for Wales, under section 8(1) PA(W)A 2013.

47. In practice, I am told that section 124 would require the Auditor General to carry out assessments based on reports and information available from exercise of “relevant functions” (as defined by section 123). However, the relevant functions do not specifically address all the matters required to be addressed by section 124 (i.e. compliance with section 111). In particular, compliance with the requirements set out in regulations made under section 111(3) and (4), would not necessarily be addressed by the audit of accounts or studies under PA(W)A 2004. This would mean either complete assessments could not be provided, or the Auditor General for Wales would effectively be yielding to pressure created by the Welsh Ministers’ regulations under section 111(3) and (4) to undertake studies of the requirements set out in those regulations (to the extent that such matters lend themselves to study). This would tend to act as a fettering of the Auditor General for Wales’ choice of studies and would displace resources.

48. Furthermore, section 124(2) requires joint assessments by the Auditor General and the other “relevant regulators”, and section 125 requires them to try to reach agreement about the matters to be set out in combined assessment reports. Apart from these requirements appearing to be at odds with the Auditor General’s “complete discretion” under section 8(1) of PA(W)A 2013, in practice, discussions to reach agreement on assessments and reporting would take up time that could be applied to other functions. There is also scope for disagreement in relation to the “intervals” at which joint assessments should be undertaken under section 124, which will also take up time to discuss and resolve. I note, however, that sections 124(3) & (4) dealing with the sharing of reports and information and consulting with other persons, impose no additional obligations on the Auditor General for Wales.

49. Likewise, and for the same reason as section 143(2), I consider that section 127, in providing for a power for the Welsh Ministers to make further provisions by regulations about when a combined assessment may be carried out, the form and content of a combined assessment report and response and as to how and when the report and response must be published, also falls foul of the prohibition in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006 in that it seeks to confer power by subordinate legislation to make modifications of a provision listed in Table A, namely section 8(1) PA(W)A 2013. As with section 143(2), it does not avail the National Assembly to argue that there is no modification until the Regulations postulated by section 127 are actually made, since the prohibition in paragraph 2(1) of Part 2 to Schedule 7 GOWA 2006 covers the conferring of a power by subordinate legislation to make modifications, and section 127(a) – (c) (governing regulations prescribing the timing, form and content of combined assessments and reports and responses to these) does just this.

50. Again, I do not consider that it is possible to read sections 124 or 127 as compatible with the prohibition found in section 108(6)(a) of and paragraph 2(1) of Part 2 of Schedule 7 to GOWA 2006, by virtue of the application of section 154(2) GOWA 2016. I therefore consider that in enacting sections 124 and 127 of the Draft Bill, the National Assembly would be acting outside its competence under section 108.

Section 181 of the draft Bill

51. Finally, and for the sake of completeness, mention was made in consultation of section 181 of the Draft Bill, which provides:

"181 Power to make consequential and transitional provision etc.

(1) If the Welsh Ministers consider it necessary or expedient for the purpose of giving full effect to any provision of Parts 2 to 7 (other than Chapter 1, of Part 6) (of this Act, or in consequence of any such provision, they may by regulations make -

(a) any supplemental, incidental, or consequential provision;

(b) any transitory, transitional or saving provision.

(2) Regulations under subsection (1) may amend, modify, repeal or revoke any enactment."

52. This is a general provision, frequently found in primary legislation and it expressly applies to Parts 2 to 7 of the Bill and not just to the relevant parts of Part 5. I consider therefore that this is precisely the type of provisions to which section 154(2) would apply with the result that, however, one might be able to interpret this section, it should be read narrowly so as to not to apply to provisions dealing with the Auditor General for Wales, with the result that the section will be within the competence of the National Assembly for the purposes of section 108 of and Schedule 7 to GOWA 2006.

Conclusion

53. In conclusion, I consider that there are significant legislative competence difficulties with the current drafting of sections 124, 127, 132 and 143 of the draft Bill, which would mean that the National Assembly would either not have competence to pass the Act in the first place, pursuant to section 108(6) of and paragraph 2(1) of Schedule 7 to GOWA 2006, or would not have the power thereafter to make provision by way of secondary legislation in the form of Regulations dealing with the matters set out in sections 143(2)(3) and 127 of the draft Bill.

54. What the Minister appears to have been referring to in his comments on the concerns raised by the Wales Audit Office in the Auditor General for Wales' response to the consultation process, in his letter to the Chair of the Communities, Equality and Local Government Committee and in the evidence given by the Wales Audit Office officials before the Committee, is the general principle that it is a good idea for the Wales Audit Office to work collaboratively with other inspectorates to develop collective assessments of local authorities when that is considered appropriate by the parties concerned. No one, of course, is questioning this. Nor is the Minister questioning the independence of the Auditor General for Wales, as protected by Statute.

55. What the Minister does not appear to have addressed directly, however, is whether pursuit of the former principle has impinged on the latter with the result that there does arise a serious issue with the competence of the National Assembly for Wales to pass the draft Bill in its current form. Given that the Minister expressly acknowledges the statutory importance of the independence of the office of the Auditor General for Wales and given that National Assembly for Wales' Communities, Equality and Local Government Committee recognises in its March 2016 Report on the draft Bill the importance of the concerns raised by the Auditor General for Wales and seeks assurances from the Minister that the draft Bill's provisions will in no way compromise the Auditor General's independence, it is to be hoped that the draft Bill can be suitably amended before it is placed before the National Assembly for consideration as part of the legislative process.

Rhodri Williams QC

14.iii.16

Thirty Park Place Chambers
Cardiff

**IN THE MATTER OF THE WALES
AUDIT OFFICE
AND IN THE MATTER OF THE LOCAL
GOVERNMENT (WALES) BILL 2015
AND IN THE MATTER OF THE
COMPETENCE OF THE NATIONAL
ASSEMBLY FOR WALES UNDER THE
GOVERNMENT OF WALES ACT 2006**

ADVICE

Bates Wells Braithwaite

10 Queen Street Place

London

EC4R 1BE

Tel: (020) 7551 7610/7551 7605

Email: m.carter@bwblp.com

c.whittle@bwblp.com

Ref. CLW/TS/214495/0010/MC

F.a.o Melanie Carter/Claire Whittle