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The Public Audit (Wales) *Bill* [HL]

[Bill 108 of 2003-04]

The *Public Audit (Wales) Bill* [HL] is due to have its second reading in the House of Commons on 17 June 2004. It was introduced into the House of Lords on 27 November 2003 and completed its passage through the Lords on 11 May 2004.

The Bill creates a single public audit body for Wales – the Wales Audit Office or y Swyddfa Archwilio Cymru – by conferring a number of new functions on the Auditor General for Wales. The Bill is the third piece of Wales-only primary legislation to be introduced into Parliament since the creation of the National Assembly for Wales in 1999.

The Bill was published in draft in April 2003 and was subject to considerable pre-legislative scrutiny in both the House of Commons and the National Assembly.

Chris Sear

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Summary of main points

The Bill confers a number of new functions on the Auditor General for Wales (AGW), which will have the effect of transferring most of the functions currently exercised in Wales by the Audit Commission in respect of local authorities and the National Health Service in Wales to the AGW. This will create a single public audit body for Wales, to be known as the Wales Audit Office or, in Welsh, y Swyddfa Archwilio Cymru, under the AGW. The new office will cover local government and NHS bodies as well as the National Assembly for Wales and its sponsored public bodies. It is the third piece of Wales-only primary legislation to be introduced into the UK Parliament since the creation of the National Assembly for Wales, which does not have the power to introduce primary legislation. The others became the *Children's Commissioner for Wales Act 2001* and the *Health (Wales) Act 2003*.

The Bill was published in draft as Cm 5796 by the Wales Office in April 2003 and was the subject of considerable pre-legislative scrutiny. The Welsh Affairs Committee in the House of Commons took evidence and reported on 2 July 2003. The Bill was also the subject of a debate in the Welsh Grand Committee on 15 July 2003. The National Assembly for Wales (NAW) set up an ad hoc committee to review the draft Bill as the subject of the Bill had an impact on several of the Assembly's Subject Committees' areas. The NAW Committee took evidence from a number of organisations in Wales, and published its report on 18 July 2003. The NAW debated the Bill on 24 September 2003, and a second NAW ad hoc committee further considered the Bill after it was introduced into the House of Lords on 27 November 2003. Each body was in favour of the proposed legislation.

The Bill completed its passage through the House of Lords on 11 May 2004 and is due to receive its second reading in the House of Commons on 17 June 2004. As the Bill has been generally well-received, debate and interest in the Lords centred on two particular aspects of the Bill – freedom of information and cost. In particular, pressure was put on the Government by the opposition parties during its passage through the Lords to amend provisions relating to freedom of information, and specifically to delete clause 54 which restricts disclosure of information by local government auditors. However, although the Government agreed an amendment to clause 54, they declined to delete it. A number of other amendments were made to the Bill during its passage through the Lords.

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I The Auditor General for Wales

The Auditor General for Wales (AGW) is a statutory appointment under section 90 of the *Government of Wales Act 1998*. The AGW is appointed by the Queen and paid for by the National Assembly for Wales. The AGW is independent of the Assembly and its Audit Committee, although he (the current AGW is Sir John Bourn, also the Comptroller and Auditor General (C&AG)) is obliged to ‘take into account the views of the Audit Committee.’

Key aspects of the model are:

- Parliament votes monies to the Secretary of State for Wales
- The Assembly receives a block grant from the Secretary of State for Wales and also receives advances from the National Loans Fund and specific grants from several Departments
- The Assembly then spends these funds, or grants them to Assembly sponsored public bodies to spend
- In 2004-05 the Welsh block budget is £11.8 billion
- The AGW audits the accounts of the Assembly, and its sponsored bodies, to check that funds have been spent on the purposes intended. He is also empowered to investigate whether value for money has been achieved
- In carrying out his audits, the AGW has the right to obtain documents, information and explanations as he reasonably thinks necessary for his purposes
- The AGW reports his audit findings to the Assembly¹

Unlike for the UK and Scotland, there is no Assembly involvement in the appointment or dismissal of the AGW. One major factor is that the Assembly is legally a body corporate, encompassing both executive and legislature. The Richard Commission has made recommendations to make a separation of the two roles,² but statutorily at least, it would not seem appropriate to give the Assembly (encompassing the Welsh Executive) a role in appointing the auditor for government bodies in Wales. Other models, such as a role for the Audit Committee of the Assembly, might be more appropriate. Within Wales, the Audit Commission continues to audit local authority and health expenditure. The Bill will integrate audit in Wales.

II Public audit in the UK

Different models of auditing apply across the UK. This section looks at the main features.

¹ Taken from <http://www.agw.wales.gov.uk/about.htm>

² See Library Standard Note SN/PC/3018, *Report on the Commission on the Powers and Electoral Arrangements for the National Assembly for Wales*

A. The Comptroller and Auditor General for the UK

The *National Audit Act 1983* was designed to ensure that the Comptroller and Auditor General (C&AG) is both independent and accountable to Parliament. This legislation established the office as an Officer of the House of Commons, to be appointed by the Crown but in consultation with the Chairman of the Public Accounts Committee (PAC). The C&AG holds office during good behaviour and can only be dismissed following resolutions of both Houses.³ The Act also created an independent National Audit Office, with staff employed directly by the C&AG and gave the C&AG complete discretion over discharge of functions although, in determining to carry out an audit examination, he must take into account any proposals made by the PAC. Finally it created a statutory Public Accounts Commission to oversee the budget of the NAO and appoint its auditor. It consists of the Chairman of the PAC, the Leader of the House (a Cabinet Minister) and seven other MPs, none of whom can be ministers.

This relationship with Parliament is often used as a benchmark of independence and accountability to be applied to the creation of new constitutional watchdogs. The key characteristics of this model can be summarised as:

- parliamentary involvement in appointment and dismissal
- a statutory committee which is responsible for budget approval and oversight
- a specific select committee to which the Officer is bound to report
- staffing independent of the civil service.

Further detail is contained in Research Paper 03/77, *Officers of Parliament - a Comparative Perspective*, which describes models for Auditor Generals found in Canada, Australia, New Zealand and Ireland.⁴

The NAO describes its work in financial audit on its website as follows:

Financial Audit

Under the law, the C&AG and the NAO are responsible for auditing the accounts of all Government departments and agencies and to report the results to Parliament. Individual accounts can range from the Department for Work and Pensions, to the Passport Agency. The C&AG also audits over half of the 'arms-length' public bodies (known as non-Departmental public bodies), examples of which include the Legal Services Commission and the Regional Development Agencies. We are also responsible for auditing all National Loans Fund accounts. We have several international clients, such as the International Labour Organisation and the European Agricultural Guidance and Guarantee Fund,

³ The term 'good behaviour' is used as a shorthand for undertaking the duties of the office. See the *Exchequer and Audits Department Act 1866*.

⁴ Available at <http://www.parliament.uk/commons/lib/research/rp2003/rp03-077.pdf>

which are won in open competition against other auditors. In total, we audit over 550 accounts per year, and total expenditure and revenue of over £650 billion.

As with other auditors, the C&AG is required to form an opinion on the accounts, as to whether they are free from material misstatements. The C&AG is also required to confirm that the transactions in the accounts have appropriate Parliamentary authority. If the NAO identify material misstatements, the C&AG will issue a qualified opinion. Where there are no material errors or irregularities in the accounts, the C&AG may nonetheless prepare a report to Parliament on other significant matters. Such reports may be considered by the Committee of Public Accounts of the House of Commons. Even if no report is made, the NAO will still, where appropriate, write a letter to the management of a body outlining where improvements in their systems could be made. Such ‘management letters’ often lead to significant changes.

Value for Money Audit

Around 50 reports to Parliament are presented each year by the Comptroller and Auditor General on the value for money with which Government departments and other public bodies have spent their resources. Under the 1983 National Audit Act, the National Audit Office can examine and report on the economy, efficiency and effectiveness of public spending. We use the following definitions for the ‘three Es’:

Economy: minimising the cost of resources used or required – **spending less**

Efficiency: the relationship between the output from goods or services and the resources to produce them – **spending well**; and

Effectiveness: the relationship between the intended and actual results of public spending – **spending wisely**.

Our value for money work covers a wide range of issues. Our reports range from examining the entire operation of the criminal justice system to the major procurement projects of the Ministry of Defence and the administration of European Union schemes by the Department for Environment, Food and Rural Affairs. We identify topics for examination from careful monitoring and analysis of the risks to value for money across the full range of our responsibilities. And we use staff with a wide range of professional expertise, bringing in outside consultants where necessary.⁵

The Commons PAC receives the reports of the NAO and takes evidence from Accounting Officers, senior governmental officials who have been specially designated by the Treasury and have a personal responsibility to ensure the prudent stewardship of public funds. The C&AG, or his deputy, and a senior official from the Treasury attend all the Committee’s hearings.

The PAC will then issue their own report. By convention, the Government must reply to their recommendations within two months. The C&AG and/or the PAC can decide to conduct a follow up investigation into the issues raised.⁶ The Commonwealth

⁵ <http://www.nao.org.uk/about/role.htm>

⁶ The website of the PAC gives further details at http://www.parliament.uk/parliamentary_committees/committee_of_public_accounts.cfm

Parliamentary Association has produced a guide to the work of a PAC, which looks at practice across the Commonwealth.⁷ The work of the UK PAC in comparison to other Public Accounts Committees in a number of Parliaments is assessed in a study from the Constitution Unit of University College London in 2003.⁸ The C&AG retains responsibility for expenditure in reserved areas under the devolution settlement.

The NAO website explains the relationship between its work and other audit bodies within the UK:

As the auditor of central government expenditure, the NAO is the principal state audit body in the United Kingdom. Other bodies are responsible for other aspects of public spending in the UK. The Audit Commission is responsible for appointing the auditors for local authorities and health service bodies in England and Wales and for promoting value for money in these sectors. The Auditor General for Scotland, supported by Audit Scotland, is responsible for auditing the expenditure of the Scottish Parliament and Executive and reporting to that Parliament. Staff at Audit Scotland are also responsible for local authority audit in Scotland. The Auditor General for Wales, who is supported by staff from the National Audit Office in Cardiff, reports to the National Assembly on the accounts and value for money of public bodies in Wales. The Comptroller and Auditor General for Northern Ireland and the Northern Ireland Audit Office do a similar job in respect of the Northern Ireland Assembly (and report to the Westminster Parliament if the Assembly is not in operation).

The various public audit bodies work as closely as possible together to share good practice. To this end, they have established a Public Audit Forum⁹ to act as a focus for developmental thinking on public audit.¹⁰

B. The Audit Commission in England

The Commission was established in the *Local Government Finance Act 1982*. It carries out a number of different functions relating to the inspection and audit of different functions relating to the inspection and audit of local authority and health services in England and Wales. It encompasses the District Audit Service, which audits local authority accounts. The legislation is now consolidated into the *Audit Commission Act 1998*. Its most recent initiative has been the Comprehensive Performance Assessment process. The concept was developed by ministers, but the Commission has developed the

⁷ *The Overseers: Public Accounts Committees and Public Spending*, David McGee, Pluto, 2002

⁸ *Parliamentary audit scrutiny*, Constitution Unit, 2003

⁹ The Public Audit Forum⁹ is chaired by Sir John Bourn, the C&AG. It is made up of public audit agencies, the National Audit Office, the Northern Ireland Audit Office, the Audit Commission for Local Authorities and the National Health Service in England and Wales and Audit Scotland and the Accounts Commission for Scotland. It is a consultative and advisory body and cannot direct the national audit agencies and other bodies involved in public audit. See <http://www.public-audit-forum.gov.uk/about.htm>

¹⁰ <http://www.nao.org.uk/about/role.htm>

necessary detailed arrangements for implementation, using powers conferred on it as part of the Best Value initiative in 2000.

Schedule 1 of the 1998 Act gives ministers broad powers to direct the discharge of functions of the Commission. Section 8 of the 1998 Act gives auditors discretion to issue reports in the public interest, as that term is defined by the auditor. Section 33 allows the Commission general powers to undertake studies designed to improve ‘efficiency, economy and effectiveness’ (mirrored in the current Bill at clause 3), and section 34 enables study of areas where statutory provisions or ministerial directions have affected the ‘three Es’ of local authorities. There is provision for such a study to be presented to the Comptroller and Auditor General, who has discretion to draw the House’s attention to the study. This provision resulted from an amendment in the Lords to the 1982 legislation and represents the only legislative attempt to link the role of the NAO with the Audit Commission. The relationship between the two bodies is not close.

The Chairman is appointed by three Secretaries of State (ODPM, Health and Wales), though there are statutory requirements for consultation with local government interests.

Section 1 and the Schedule of the 1998 Act allows the appointment of between 15 and 20 Commissioners by the Secretary of State for three terms, which may be renewable. The lead is normally taken by ODPM. These appointments are paid, and are staggered to provide corporate continuity. He was seen as too closely connected with Government. There is no formal role for Parliament to be consulted or to express opinions on the suitability of either the Chair or the Commissioners. The Commission’s staff are not civil servants, but appointed directly by the Commission. The head is described in the schedule to the 1998 Act as the Controller and is appointed by the Secretary of State for a three-year renewable term.

The Audit Commission budget comes from a departmental vote. The Commission accounts are laid before Parliament, but not debated. Schedule 1 of the 1998 Act requires the annual report to be presented to the Secretary of State who then presents it to Parliament and the National Assembly for Wales. There is a statutory duty for the Commission to ensure that its fee income balances its expenditure plans, with specified exceptions for certain inspection and audit functions. Partly for constitutional reasons, as the Commission deals primarily with local government, it has no structural links with Parliament, although it is frequently called to give evidence on particular enquiries to select committees. The C&AG audits the Accounts of the Commission, which are then presented to Parliament.

C. The Scottish model

The Auditor General for Scotland is a statutory position under the *Scotland Act 1998*:

69. - (1) There shall be an Auditor General for Scotland who shall be an individual appointed by Her Majesty on the nomination of the Parliament.

(2) A recommendation shall not be made to Her Majesty for the removal from office of the Auditor General for Scotland unless the Parliament so resolves and, if the resolution is passed on a division, the number of members voting in favour is not less than two-thirds of the total number of seats for members of the Parliament.

This therefore provides for parliamentary involvement in the appointment and dismissal of the Auditor General for Scotland. Audit in Scotland is undertaken by Audit Scotland, set up in 2000 following the passing of the *Public Finance and Accountability (Scotland) Act 2000*. Under the terms of section 10 of the Act, Audit Scotland was set up to be a body corporate whose functions are to provide the administrative support and services that the Auditor General for Scotland and the Accounts Commission for Scotland require for the carrying out of their own (statutory) functions. The Accounts Commission's scope is to examine the expenditure of local authorities in Scotland.

Audit Scotland audits more than 200 bodies including:

- 19 Scottish Executive departments and agencies
- 52 NHS boards and trusts
- 32 councils
- 35 police, fire and other boards
- 42 further education colleges
- 23 non-departmental public bodies (NDPBs)
- Scottish Water.¹¹

The Auditor General for Scotland is responsible for auditing the Scottish Parliament and Executive, and health bodies and non-departmental public bodies. The Accounts Commission reports to Scottish ministers, not Parliament. The C&AG continues to audit matters in Scotland that remain 'reserved' to the UK Government, including defence, foreign affairs, central government taxation and social security. He also retains the power to report on any cross-border public authority. The Scottish model is therefore more complex than that proposed for Wales, in that the Accounts Commission continues to report separately to the Executive, and the Auditor General to the Parliament.

D. Audit in Northern Ireland

The *Northern Ireland Act 1998* makes provision for a Comptroller and Auditor General for Northern Ireland:

65. - (1) The Comptroller and Auditor General for Northern Ireland shall be appointed by Her Majesty on the nomination of the Assembly.

¹¹ Source: Audit Scotland, *Corporate plan 2004/7*, available at <http://www.audit-scotland.gov.uk/publications/pdf/2004/04cp03as.pdf>

(2) A recommendation shall not be made to Her Majesty for the removal from office of the Comptroller and Auditor General for Northern Ireland unless-

- (a) the Assembly so resolves; and
- (b) the resolution is passed with the support of a number of members of the Assembly which equals or exceeds two thirds of the total number of seats in the Assembly.

The Northern Ireland Assembly, when sitting, therefore has a role in the appointment and dismissal of the C&AG for Northern Ireland, in a similar way to that exercised by the Scottish Parliament over the AG for Scotland.

The C&AG for Northern Ireland is responsible for:

- authorising the issue of money from the Northern Ireland Consolidated Fund to enable Northern Ireland Departments to meet their necessary expenditure, and for ensuring that there are adequate arrangements for the collection of revenue; and
- the external audit of central government bodies in Northern Ireland, including Northern Ireland Departments and their Executive Agencies and a wide range of other public sector bodies, including Executive Non-Departmental Public Bodies and health and personal social service bodies. He undertakes financial audit and value for money audit and the results of his work are reported to the Northern Ireland Assembly, or to Parliament during the suspension of devolution.¹²

The C&AG for Northern Ireland is supported by the Northern Ireland Audit Office. While devolution is suspended, the powers of the Assembly are exercised by the Secretary of State and the C&AG for Northern Ireland reports to the Public Accounts Committee in the UK Parliament rather than the Assembly's Public Accounts Committee.

III The *Public Audit (Wales) Bill*

The Bill was introduced into the House of Lords as HL Bill 1, 2003-04. It completed its passage through the House of Lords on 11 May 2004 and was given its first reading in the Commons on 12 May 2004. Second reading is due on 17 June 2004. The Bill, now Bill 108 of 2003-04, consists of 73 clauses and 4 schedules.¹³ An explanatory note is available.¹⁴ The *Regulatory Impact Assessment* provides a useful summary of the Bill's background:

4 The National Assembly is of the view that a continuation of the current split in responsibilities between the Auditor General and the Audit Commission in Wales is unnecessary and potentially counter-productive for the purposes of building a

¹² See the Northern Ireland Audit Office website at <http://www.niauditoffice.gov.uk/about/role.asp>

¹³ Available at <http://www.publications.parliament.uk/pa/cm200304/cmbills/108/2004108.htm>

¹⁴ Available at <http://www.publications.parliament.uk/pa/ld200304/ldbills/001/en/04001x--.htm>

more cohesive public scrutiny framework which best suits the needs of the people of Wales. A single public audit body would be consistent with and complement the National Assembly's emphasis on cross-cutting themes in the development of policy and a cross-sector partnership approach to delivery, which can produce complex accountability arrangements. The reduction in organisational boundaries that would result from the Bill would also foster a more holistic approach to value for money work in the Welsh public sector.

5. The legislation will also end confusion over the respective audit responsibilities of the Audit Commission and the Auditor General in respect of the health sector, a consolidated audit service would be in line with the progress being made by the Assembly in consolidating public sector body accounts into a "Whole of Government of Wales" Account (as required by the *Government Resources and Accounts Act 2000*) which by 2005 should incorporate local government as well as health sector accounts.¹⁵

During the second reading debate in the House of Lords, Lord Evans of Temple Guiting, Government spokesperson for the Office of the Deputy Prime Minister, explained the purpose of the Bill:

The purpose of this Bill is to create a unitary public audit structure for Wales. Its provisions have been subject to pre-legislative scrutiny and public consultation. Both exercises demonstrated that the Bill has widespread support. The Welsh Affairs Select Committee gave consideration to it as did an ad hoc National Assembly scrutiny committee. The Welsh Grand Committee and the National Assembly in plenary have debated it. The Government want the Bill to be as robust as possible and I can assure noble Lords that very careful consideration will be given to their views and concerns expressed in this debate and in further stages of the Bill in this House.

The Bill seeks to achieve a unitary audit framework by extending the functions conferred on the Auditor General for Wales. Most importantly, the Auditor General will take on the majority of the functions in Wales of the Audit Commission for local government and the NHS in England and Wales. The Auditor General and his staff will be known as the Wales Audit Office in English or Y Swyddfa Archwilio Cymru in Welsh.

The Audit Commission will, however, retain its powers to undertake cross-border economy, efficiency, and effectiveness studies relating to local government on an England and Wales basis. In bringing forward this Bill the Government are supporting the National Assembly in establishing a transparent public audit framework in Wales with a single thread of accountability. It is a framework that can be readily understood by the people of Wales and that can best protect their interests in terms of the effective stewardship of public money.¹⁶

¹⁵ *Public Audit (Wales) Bill* regulatory impact assessment, available at <http://www.walesoffice.gov.uk/2004/RIAMay2004.htm>

¹⁶ HL Deb 9 December 2003 c708

Lord Roberts of Conwy, responding to Lord Evans on behalf of the Conservatives, said that they “welcome the Bill's Second Reading in the firm belief that it will benefit the people of Wales and, indeed, the United Kingdom”.¹⁷ However, he raised the ‘controversial’ issue of clause 54, which restricts public disclosure, and the issue of cost. Both subjects are discussed in more detail below.

The Liberal Democrats broadly welcomed the Bill, with Lord Thomas QC saying “We give the Bill a broad welcome. In particular, we welcome the powers in Clause 11 to extend the Auditor General's right of access to documents and the benefit of assistance, information and explanation in respect of any of these transactions.”¹⁸ Lord Thomas also commented that the pre-legislative scrutiny had had the result of extending the Bill to local government.

During a debate on the draft Bill in the National Assembly for Wales, Plaid Cymru Shadow Minister for Assembly Business Jocelyn Davies AM said that the Bill “will lead to improved scrutiny, transparency and accountability in public finance in Wales.”¹⁹

The Bill has been welcomed by a number of organisations. The Auditor General for Wales said on publication of the draft Bill that:

These changes will signal a new period in the history of public audit in Wales and will create fresh opportunities to deliver the best possible service for the National Assembly, local authorities and the people of Wales. I look forward greatly to this opportunity to contribute to the work of the Assembly and the wider public sector.²⁰

CIPFA commented:

We welcome the bringing together in one body of the functions of the National Audit Office and the Audit Commission in Wales. In the context of the modernising agenda for public services this joining up of services across organisational and sectoral boundaries is a positive and forward-looking step. The closer ties proposed between the various auditors and inspectors, some through the formation of the Wales Audit Office and others through the proposals in the draft Bill, will have a beneficial impact on public sector bodies in Wales through efficiencies and through the impact of joined up planning in reducing the regulatory burden.

We welcome the proposal in the draft Bill for the continuance, in all material respects, of the existing regime for the audit of local government in Wales. In CIPFA's view, it remains important to be able to make meaningful comparisons

¹⁷ Ibid c716

¹⁸ Ibid c720

¹⁹ National Assembly for Wales debates 24 September 2003

²⁰ http://www.agw.wales.gov.uk/notices/2003/agw2003_9pn.htm

between local government in England and Wales. This will facilitate the effective dissemination of best practice. Maintaining the current regime for appointing auditors, as is the case elsewhere in the UK, will assist in this. The Whole of Government Accounts programme and the separate Wales Whole of Government Accounts programme are also reasons for supporting the maintenance of existing arrangements.²¹

(...)

By bringing audit, examination review and inspection of greater numbers of public sector bodies within the Wales Audit Office it should be possible to increase the efficiency of planning and undertaking this work, and to plan in a way that reduces the overall regulatory burden on public sector bodies in Wales.

The Welsh Local Government Association was also in favour of the Bill, although they had some concerns. Commenting on the draft Bill, the WLGA said:

In theory the new structures will provide a more coherent approach to the audit process, which is to be welcomed. However some of the economies of scale from being part of a larger England and Wales body ie the NAO and the AC may be lost. As such there is the possibility that the cost of the new body will be greater per head than at present, which would be a concern to a local government family already carrying a significant cost burden associated with the audit and inspection regime.

The benefits of the proposals would appear to be in the ability to take a pan public sector view of issues such as standards and management practices. Whilst this approach is in principle welcomed, concerns remain that the temptation will be to develop a "one size fits all" methodology which ignores the very real different operational environments facing public sector organisations in the various spheres of activity.²²

A. Part I: the Auditor General for Wales

1. Role and accountability of the Auditor General for Wales

Part 1 of the Bill, clauses 1-11 deals with the new functions which will be given to the AGW as a result of the Bill. The *Government of Wales Act 1998* (GOWA) established the office of AGW.²³ This Bill enlarges his responsibilities, so that he becomes responsible for the functions currently exercised in Wales by the Audit Commission. The first Auditor General to be appointed in June 1999 was Sir John Bourn, the current

²¹ http://www.cipfa.org.uk/pt/pt_details_r.cfm?news_id=16769

²² Memorandum to the Welsh Affairs Committee, Draft *Public Audit (Wales) Bill*, Fifth report of session 2002-03, HC 763, 2002-03, available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmwelaf/763/3060902.htm>

²³ See s90-103 and s145-146

Comptroller and Auditor General for the United Kingdom. However, there is no statutory requirement for the office to be held by the C&AG.²⁴

The appointments process for the AGW was set out in s90 of the Act. The AGW was appointed by the Crown for a term fixed at the time of appointment and the statute was silent about any Assembly involvement. The only requirement was for the Secretary of State to consult the Assembly before recommending dismissal on grounds of misbehaviour.²⁵ However, the Audit Committee of the Assembly was given a role: under s145(3) the AGW is required to take into account the views of the Audit Committee when deciding which examinations to undertake; under s93(6) he must face the examination of his estimates by the Committee.²⁶

The National Assembly for Wales report on the draft Bill recommended that, “in the spirit of devolution and modern government practice”,²⁷ the National Assembly should be consulted before the appointment of the AGW by means of an amendment to s90 of the *Government of Wales Act 1998*. The report also noted that “the House of Commons had a role in vetting the Prime Minister’s nomination for the post of Comptroller and Auditor General.”²⁸ The current Bill does not however insert such an amendment in the 1998 Act.

During the Lords second reading debate, Baroness Finlay of Llandaff noted:

The Auditor General will report to the Assembly. I hope that the report will be debated in the Assembly in plenary, prior to approval by resolution. It is important that the Auditor General is a Crown appointment to ensure independence. The Institute of Welsh Affairs has pointed out that the House of Commons has a role in vetting the Prime Minister's nomination for the post of Comptroller and Auditor General. Will the Minister clarify whether the Assembly will have the opportunity to debate the suitability of the Government's appointee, so that the Assembly may have ownership of the process from the beginning?²⁹

Responding for the Government, Lord Evans of Temple Guiting responded “The Auditor General will be appointed by Her Majesty. In practice the National Assembly is asked for its view on the appointment of the Auditor General. It will be open to the Assembly to debate the appointment in plenary session on a Motion”.³⁰

²⁴ The role of Sir John Bourn in holding both posts was discussed in a memorandum he submitted to the Welsh Affairs Committee during pre-legislative scrutiny of the draft Bill (HC 763, 2002-03), available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmwelaf/763/3061102.htm>

²⁵ s90(6)

²⁶ s92(4)

²⁷ *Public Audit (Wales) Bill* Committee report to the National Assembly for Wales, para 5.1, available at <http://www.wales.gov.uk/keypubassempubauditbill/content/reports-e.htm>

²⁸ Para 5

²⁹ HL Deb 9 December 2003 c719

³⁰ Ibid c729

Part I of the Bill adds to the functions of the AGW. Clause 1 allows the National Assembly for Wales to:

Transfer any of its supervisory functions in respect of a public body or a registered social landlord in Wales to the Auditor General or to provide that such a function is to be exercised on the Assembly's behalf by the Auditor General. "Supervisory functions" are defined as examining, inspecting, reviewing or studying the financial or other management of the body or the way in which it discharges any of its functions."³¹

The Bill will do this by inserting a new section 146A in the GOWA. The clause allows the Assembly to direct the AGW to prepare a report on his exercise of these functions.

Clause 2 inserts a new s96C into the GOWA which allows the AGW to exercise the functions of a relevant authority (ie government departments, public and local authorities. Clauses 3 to 5 enable the AGW to undertake or promote studies designed to enable him to make recommendations for improving economy, efficiency, and effectiveness of relevant bodies, including educational bodies and registered social landlords. Clause 6 relates to the funding of the AGW, to borrow money to cover expenditure over available income. Clause 6(3) amends s93 of the GOWA to allow the AGW to borrow to cover a temporary excess of expenditure over available income. The *Explanatory Notes* cite precedents for this power from the Audit Commission and the Auditor General of Scotland.³² Clause 7 allows him to charge fees for various services. Clause 8 to 11 deal with administrative matters, including the use by the AGW of an official seal (clause 8), and staffing matters (clause 9). Clause 9(2) removes the prohibition on the Assembly and the AGW entering into an arrangement to exercise each others' functions. The *Explanatory Notes* state "It is the intention that the Wales Audit Office will develop protocols to ensure that no conflict of interest may arise".³³ The Government response to the Welsh Affairs Select Committee scrutiny also noted:

The original purpose of Section 92(3) of the *Government of Wales Act 1998* was to ensure no conflict of interest or perceived reduction in the Auditor General's independence. It is no longer considered necessary either by the Auditor General or the National Assembly as these issues can be dealt with by formal protocols. NAO staff are formally seconded to other public sector organisations, including the Assembly. These secondments strengthen mutual understanding and enable the sharing of expertise (such as in the preparation of accruals accounting). By way of example, under existing conventions a member of NAO staff will not assume audit duties in respect of the body to which he or she has been seconded until at least 3 years have elapsed.³⁴

³¹ Explanatory notes para 7

³² See para 20. The statutory references are para 9 of Schedule 1 of the *Audit Commission Act 1998* and Schedule 2 of the *Public Finance and Accountability (Scotland) Act 2000*

³³ para 32

³⁴ HC 87 2003-4

During the Lords second reading debate, Baroness Noakes, for the Opposition, complained that these developments were ‘potentially dangerous’:

There is a basic principle which should apply to all auditors, whether in the public or private sectors—that auditor independence must not be impaired. Auditor independence can be impaired by the provision of non-audit services, but that is what this Bill will allow. Independence can be impaired if the auditor has to judge his own work, which the Bill will also permit. So the Bill is potentially deficient because it does not limit the powers created by Clauses 2 and 9 to those situations that do not compromise auditor independence. The Explanatory Notes indicate in relation to Clause 9, and working with the Assembly, that there will be protocols that will counteract the provisions of the Bill. However, we would take some convincing that protocols would be sufficient to counteract the Bill, which potentially drives a coach and horses through auditor independence.³⁵

In response, the Government spokesman, Lord Evans of Temple Guiting said:

The ancillary powers conferred on the Auditor General under Clause 2 of the Bill will enable the Wales audit office and a wide range of other bodies to collaborate and assist each other in joint working and the development of work in respect of corporate governance, better risk management and work on the consolidation of accounts. They will also enable the Auditor General to provide or receive professional, administrative and technical support; for example, payroll or personnel services or more specialist professional services such as database interrogation.³⁶

The powers of the Audit Committee to examine the AGW’s estimates are restricted with respect to that part of the budget which deals with local government bodies in Wales. This aspect of the Bill has created some controversy. Evidence from local government interests to the Welsh Affairs Select Committee recommended an advisory board for the AGW to ensure that he considered the views of his stakeholders. The Committee concluded that there should be a wide statutory duty on the AGW to have “regard to the views of all appropriate professionals and relevant stakeholders on his forward programme for local government economy, efficiency and effectiveness audits and indeed on wider issues on local audit”.³⁷ The Government response was as follows:

The Government accepts this recommendation in part. Clause 39 already imposes a duty on the Auditor General [for Wales] to consult associations of local government bodies and associations of employees on value for money studies. The draft Bill will also be amended to impose a mutual duty of consultation and co-operation on the Auditor General for Wales and the Audit Commission in

³⁵ HL Deb 9 December 2003 c724

³⁶ Ibid c728

³⁷ HC 763 2002-3, para 20-26

respect of the discharge of their local government functions. The Government considers that a wider statutory duty to consult would lack focus and some clarity. The National Assembly for Wales is giving consideration to establishing a non-statutory advisory mechanism that would be beneficial, particularly in advising on policy aspects in the formulation of value for money studies. The Government endorses this approach.³⁸

However, during the second reading debate, Lord Thomas of Gresford, for the Liberal Democrats, argued against putting a “clamp on the Auditor General with a committee of interested parties”.³⁹ The Bill does not contain a general provision on stakeholder groups, but Clause 41(5) does require the AGW to consult local government bodies and employees before undertaking studies to improve economy, efficiency and effectiveness in local government.

A key change from the draft Bill was made following pre-legislative scrutiny. The government aligned the provisions of clauses 11, 18 and 52 to ensure that auditors in both the local government and the non-local government sectors have common power of access to documents and information, in line with recommendations made by Lord Sharman in his report, *Holding to account: the review of audit and accountability for central government*.⁴⁰

The Welsh Affairs Select Committee had commented:

We recommend that the Bill is amended so that the Clause 11 access rights apply across central and local government in Wales, making Welsh audit a beacon of good audit practice. (Paragraph 37)

To which the Government responded:

The Government accepts this recommendation. The Government proposes to bring the provisions of Clause 11 more in line with section 6 of the *Audit Commission Act 1998* (which are somewhat wider in scope), whilst at the same time maintaining clearly, on the face of the draft Bill, that the Auditor General's access powers enables him or her to trace public money down the chain to the end user. The Government also proposes to amend Clause 18 of the draft Bill to ensure that the Auditor General has common access powers in relation to local government bodies in Wales. Equivalent rights of access will apply across both the central and local government sectors.

³⁸ HC 87 2003-4

³⁹ HL Deb 9 December 2003 c722

⁴⁰ The report and the Government's response are available at http://www.hm-treasury.gov.uk/Documents/Public_Spending_and_Services/Audit_and_Accounting/pss_aud_sharman.cfm

B. Part II: Local government bodies in Wales

Part 2 of the Bill, clauses 12-58, relates to the arrangements for auditing the accounts of local government bodies in Wales. It is the longest part of the Bill as it largely replicates provisions relating to local government in the *Audit Commission Act 1998*. Schedule 1 is also introduced. This Schedule amends, in relation to Wales, the Best Value regime set out in the *Local Government Act 1999*. Clause 12 defines “local government bodies in Wales”, which are listed in Schedule 2 of the *Audit Commission Act*. Clauses 13-21 relate to the audit of accounts, including the requirement for local government bodies to make their accounts by 31 March each year (or such other date as the Assembly may direct) (clause 13) and to issue and revise from time to time a code of practice embodying best practice.

1. Code of audit practice

Clause 16 of the Bill enables the AGW to issue and revise a code of practice:

embodying the best professional standards with respect to standards, procedures and techniques to be adopted by auditors appointed by him when they are auditing the accounts of local government bodies in Wales. Any code...must be ratified by the Assembly in the first instance, and is subject to annulment by either House of the UK Parliament.⁴¹

In pursuance of this requirement, the AGW has issued a consultation paper, *Developing a Code of Audit and Inspection Practice for Wales: Issues for Stakeholders: Consultation document*.⁴² This says:

5. The Bill provides for the AGW to draw up a Code of Practice with which appointed auditors of local government bodies in Wales will be required to comply. The production of such a Code will be a statutory requirement but the Auditor General wishes to extend the scope and coverage of the Code on a non-statutory basis so that its principles can be applied to audit and inspection work on all public bodies that fall within his remit.

6. In the light of these proposals, the NAO and the Audit Commission have been working closely together on behalf of the AGW to draw up proposals for a Code of Audit and Inspection Practice for Wales. The purpose of this consultation document is to seek views on the key issues and principles which might shape that Code.

7. The Audit Commission (the Commission) is currently revising its Code of Audit Practice because the current version is due to be renewed in March 2005. Therefore, the Commission has been consulting on proposals for updating its Code and the Commission’s proposals, and the responses to the consultation, have informed the work on a Code for Wales. The Commission’s existing Code,

⁴¹ Explanatory notes p14

⁴² http://www.agw.wales.gov.uk/WelshCode_consultation_E.pdf

which applies to both England and Wales, will be re-adopted, through transitional arrangements to be included in the Commission's proposed new Code, so that its provisions will continue to apply in Wales up to 31 December 2005, to allow 2004/05 audits to be completed on an orderly basis. The new Welsh Code will apply to all 2005/06 audits.

8. The principle of having a Code to support a public audit regime is a well established one. When Audit Scotland came into being, by bringing together the NAO and the Accounts Commission, the opportunity was taken to develop a Code covering the range of audit functions under the new Auditor General for Scotland. In England and Wales the audits of local government bodies and local NHS bodies are already subject to a Code of Audit Practice which the Audit Commission is required to prepare and maintain. The proposals for Wales will mean that the AGW will have a range of audit functions and certain inspection functions, and the creation of the WAO provides an opportunity to support a more integrated approach to audit and inspection by developing a Code of Audit and Inspection Practice covering the full range of AGW responsibilities.⁴³

Responses are requested by 18 June 2004.

2. Disclosure of information

One of the main areas of contention has been over Clause 54, which deals with disclosure of information. The Welsh Affairs Committee recommended that this clause should be deleted following scrutiny of the draft Bill (when it formed clause 50):

d) We recommend that Clause 50 should be deleted from the Draft Bill. The Auditor General for Wales must ensure that a suitable protocol is developed for the clearance of the factual content of local audit reports, in consultation with the bodies or individuals concerned. (Paragraph 35)

The Committee had received a recommendation to this effect from the AGW, who said in his evidence to the Committee:

33. The clause is similar in nature to Section 49 of the *Audit Commission Act 1998* and could have the effect of preventing the Auditor General for Wales or appointed auditors from publishing information gained in the course of local authority audit work except in certain limited circumstances. This clause only applies in respect of information obtained from local government bodies. No such restriction applies to the Auditor General's current remit. Its inclusion would therefore cause a significant inconsistency in the way in which audit findings can be reported in various parts of the Welsh public sector.

34. My practice to date has been to report on any matter where I consider that it is in the public interest to do so. For example, I have reported on an irregular departure settlement given to a senior official of the National Museums and Galleries of Wales. More recently I reported on unacceptable confidentiality

⁴³ Ibid, pp3-4

clauses included in departure settlements made by the National Council for Education and Training for Wales. Both of these matters were subsequently considered by the Assembly's Audit Committee. Prior to devolution, the National Audit Office had reported on similar matters in respect of the Welsh Development Agency and the former Development Board for Rural Wales. In the UK context, the National Audit Office has often reported on such matters—particularly in the NHS and the further and higher education sectors.

35. The inclusion of Clause 50 would prevent or restrict the scope of such reporting in the case of local government organisations. Therefore for consistency and in the interests of accountability and openness I would argue strongly for its removal.⁴⁴

Pursuing a similar argument, Hywel Williams, speaking on behalf of Plaid Cymru, said in the debate on the draft Bill in the Welsh Grand Committee:

The Welsh Affairs Committee scrutinised the Bill and made at least two key recommendations. We strongly support both, and have said as much in the National Assembly. The first is the deletion of clause 50 [*sic*], which restricts disclosure of information by local government auditors. The Welsh Local Government Association has argued that the clause protects the integrity of the audit process, and that without it, information could be made public before it had been checked for factual accuracy with the person or organisation concerned. It argues that the clause would also preserve the separate institutional mandate of local government. However, no such exemption currently exists for other parts of the public sector, and I cannot see why local government should be a special case. The Auditor General has asked for the clause to be removed, and we agree.⁴⁵

The AGW repeated his recommendation to the National Assembly for Wales's ad-hoc committee on the draft Bill, which in turn recommended:

The Committee accepted the argument that the protection offered to local government under clause 50 would inhibit transparency and be out of line with that given to other public sector bodies. The Committee agreed that it should be deleted from the Bill.⁴⁶

However, the Government, in its response to the Welsh Affairs Committee, refused to delete the clause:

The Government has given very careful consideration to this recommendation. Clause 50 makes provision for restrictions on the disclosure of information held by the Auditor General or an appointed auditor in respect of local government, except in specified circumstances. It is consistent with the existing provisions of

⁴⁴ Welsh Affairs Committee, Memorandum submitted by the Auditor General for Wales, 28 May 2003, available at <http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmwelaf/763/3061102.htm>

⁴⁵ <http://www.publications.parliament.uk/pa/cm200203/cmstand/welshg/st030715/am/30715s01.htm>

⁴⁶ NAW *Public Audit (Wales) Bill* Committee

section 49 of the *Audit Commission Act 1998*. Both Clause 50 and section 49 include provision for criminal sanctions against a person who may disclose information in contravention of the legislation. If Clause 50 were to be deleted and the *Public Audit (Wales) Bill* enacted, section 49 of the *Audit Commission Act* would remain in force in respect of England. As a consequence there would be potential for the disclosure of the same information being treated inconsistently for the purposes of the criminal law in Wales and England. The Government is of the view that such a situation would be inappropriate and that any future consideration of the disclosure issue should be on an England and Wales basis. For this reason it does not propose to delete the provision from the draft Bill.

The clause subsequently appeared in the Bill in the House of Lords as clause 54 (it is also clause 54 in the Commons version of the Bill). Re-iterating the Government's position in the House of Lords on 9 December 2003 during second reading, Lord Evans of Temple Guiting said:

At pre-legislative scrutiny stage there was significant discussion on whether Clause 54 of the Bill should be deleted. Clause 54 restricts the disclosure of information obtained by an auditor of a local government body except in specified circumstances. The clause mirrors Section 49 of the *Audit Commission Act 1998*. Both impose criminal sanctions on a person who releases information in contravention of the legislation.

The purpose of the clause is to prevent the premature release of information that is still subject to verification and potentially prejudicial in nature. There is no such restriction on the Auditor General for Wales in relation to information concerning the Assembly or any other public body in Wales, outside the local government sector. In these cases verification and release of information is subject to protocol arrangements. The accounting officer of the National Assembly or an Assembly-sponsored public body is given an opportunity to sign off draft reports prepared by the Auditor General, to indicate that he or she is content with the factual accuracy of the text prior to publication. The Assembly's audit committee can therefore be satisfied that in taking evidence on reports there is agreement on the factual content.

The Government's view is that Clause 54 should be retained. If it were deleted from the Bill, Section 49 of the *Audit Commission Act* would remain in force in England and there would be potential for inconsistency in the application of the criminal law between England and Wales. The Government consider that, for this reason, further consideration of disclosure matters should be on an England/Wales basis. The criminal law is not a field in which powers have been generally devolved in respect of Wales.

Against that background, the Government consider that it would be a nonsense to allow a situation in which the same conduct if committed in England would be regarded as so blameworthy as to be potentially punishable with two years' imprisonment, but if committed in Wales would not be a criminal offence.⁴⁷

⁴⁷ HL Debate 9 December 2003 cc710-1

Following the continuing pressure in the House of Lords, Don Touhig, Parliamentary Under-Secretary of State at the Wales Office, published a written ministerial statement which described an amendment to be brought forward by the Government:

Clause 54 was included in the *Public Audit (Wales) Bill* to ensure consistency in the criminal law across England and Wales. The Government have brought forward an amendment to Clause 54 to make clear the link with the present legislation that currently applies across England and Wales—section 49 of the *Audit Commission Act 1998*. It also ensures that any relaxation of the restrictions in the *Audit Commission Act* can be applied at the same time in England and Wales, following consultation with the National Assembly for Wales of course.

The Government acknowledges the concerns that have been raised about this clause. Indeed, section 49 of the *Audit Commission Act* is already being considered as part of a much wider review of statutory restrictions on disclosure that the Government is undertaking. This is the Department for Constitutional Affairs' review into existing statutory prohibitions on disclosure. Such restrictions can be removed by order under section 75 of the *Freedom of Information Act 2000* in the case of Acts passed before or in the same session as that Act. The DCA's "*Second Report to Parliament on the Review of Legislation Governing the Disclosure of Information*" published in November 2002 is available at <http://www.dca.gov.uk/foi/foidoirpt2.htm>. Section 49 of the *Audit Commission Act* is specifically referred to in Part II of that report, "*Listing by Lead Department*" under the Office of the Deputy Prime Minister heading.

Following preliminary consideration and consultation, the Government's preferred treatment for section 49 is to amend it so that it is consistent with the spirit of the *Freedom of Information Act*, which has an overall presumption in favour of disclosure. The Department for Constitutional Affairs currently plans to publish a final report on its review in the autumn. The Department for Constitutional Affairs is also intending to bring forward the first order to be made under the freedom of information legislation later this year, and the Government will include the proposed amendment to section 49 in that order. When section 49 is amended, the Government amendment to clause 54 will allow the relaxation of the restriction on disclosure to apply also in Wales. The Government are therefore following the proper process to address this issue, and is already well advanced in doing this.

The amendment was tabled as Amendment 28 during the Report stage of the Bill on 1 April 2004. This incorporated an order making power in the clause which would enable the Government to repeal or relax the restriction on the disclosure of information in the light of the review of the *Audit Commission Act*. The amendment – which was agreed – said:

Page 36, line 47, at end insert—

(6) The Secretary of State may by order made by statutory instrument amend or repeal the preceding provisions of this section.

(7) An order under subsection (6) may be made only if—
(a) section 49 of the *Audit Commission Act 1998* (c. 18) (restriction on disclosure

of information) has been amended or repealed in the same Session as that in which this Act is passed or in any later Session;

(b) the Secretary of State thinks that the amendments or repeals to be made by the order under subsection (6) will (subject to paragraph (c)) have the same effect as the amendments to or repeal of section 49 of that Act;

(c) the order would not have the effect of imposing any further restriction on the disclosure of information under this section.

(8) An order under subsection (6) may not be made unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament.⁴⁸

The amendment creates a Henry VIII power as it would allow the Secretary of State to repeal or amend the clause after enactment in order to mirror any abolition or relaxation of the prohibition on disclosure in s29 of the *Audit Commission Act 1998*. The House of Lords Select Committee on Delegated Powers and Regulatory Reform considered the amendment and commented:

Both clause 54 of the Bill and section 49 of the Audit Commission Act include provision for criminal sanctions against a person who discloses information in contravention of the legislation. If clause 54 were to be deleted and the *Public Audit (Wales) Bill* enacted, section 49 of the *Audit Commission Act* would remain in force in respect of England. As a consequence there would be potential for the disclosure of the same information being treated inconsistently for the purposes of the criminal law in Wales and England.

The Department for Constitutional Affairs is currently conducting a review under section 75 of the *Freedom of Information Act 2000* of statutory bars on disclosure. Section 49 of the *Audit Commission Act 1998* is included in the review. This could result in section 49 being repealed in whole or in part, or amended so as to relax the restriction on disclosure in a way compatible with the spirit of the Freedom of Information Act.⁴⁹

The House of Lords Select Committee on the Scrutiny of Delegated Powers defined a Henry VIII clause as “a provision which enables primary legislation to be amended or repealed by subordinate legislation with or without further Parliamentary scrutiny”. These provisions are often used for relatively minor amendments in schedules, but concerns have arisen where such provisions are or could be used to create or amend policy. The Donoughmore Committee of 1932 recommended:

The use of the so-called “Henry VIII clause” conferring power on a Minister to modify the provisions of Acts of Parliament...should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds...The “Henry VIII clause” should a) never be used except for the

⁴⁸ HL Deb 1 April 2004 c1477

⁴⁹ HL Paper 62 2003/04, available at

<http://www.publications.parliament.uk/pa/ld200304/ldselect/lddelreg/62/6201.htm>

purpose of bringing an Act into operation; b) be subject to a time limit of one year from the passing of the Act.⁵⁰

Lord Evans of Temple-Guiting on behalf of the Government was unable to say what exceptions to disclosure would be included in the amended section 49 of the *Audit Commission Act* as ‘the detailed work...has not yet started’. However, he considered that:

Section 49 has been used very rarely in the past and the Auditor General for Wales has no expectation that he would increase the frequency of its usage...Of course the Government cannot, and would not wish to, fetter the discretion of the Auditor General for Wales to act as he might consider appropriate and necessary, but we understand that he would take account of the changes being proposed to Section 49 of the *Audit Commission Act* and the consequent changes intended for Clause 54 of the Bill, as amended by government Amendment No. 28, in the extremely unlikely event that a situation arose in which he might have to consider prosecuting under the powers granted by the clause.

If the Auditor General for Wales or an appointed auditor considers that it is necessary to his or her functions for him or her to publish an audit report, they should have an unfettered ability to do so. It is not the intent, nor could it be the effect, that Clause 54, as amended, could be used in any way to prevent this from occurring. This is fully in line with the principles of public audit which the new Wales Audit Office being created by the Bill will seek to uphold. I should like to affirm that an auditor of a local government body will have the power to issue a public interest report under the Bill, and Clause 54 does not make the issue of such a report conditional on the consent of the local government body concerned.⁵¹

Baroness Noakes, Conservative Party spokesperson for Treasury and Work and Pensions, opposed the amendment. In doing so, she restated the Conservatives position:

We believe that applying criminal sanctions in the wide-ranging prohibitions on the disclosure of information in Clause 54 is wrong in principle. The Assembly committee which considered the draft Bill came to that conclusion, as did the Welsh Affairs Committee of another place, and the Auditor General has not requested these provisions.

She went on to say:

we are still being invited to take a great deal on trust. I accept that the Government intend to amend the *Audit Commission Act* and then what will become the *Wales Audit Act*, but we do not know in what ways these Acts will be amended. We are in the unfortunate position in relation to the Bill of being apparently dependant on the decisions of those who guard the interests of the

⁵⁰ Cmd 4060, 1932, p38

⁵¹ Ibid, c1476

Audit Commission...we have a real concern that we are being invited to leave an unacceptable clause in the Bill against a promise of unspecified amendments in the future.⁵²

She was supported by Lord Elis-Thomas, who said “all who have been involved in the scrutiny of the Bill have expressed concern about this clause, its impact and the powers within it”.⁵³ The amendment was however agreed.

The clause as revised is also numbered 54 in the Commons version of the Bill. The explanatory notes state:

117. This clause places restrictions on the disclosure of certain information relating to a particular body or person. The restrictions apply where information is acquired by the Auditor General, an appointed auditor (or by a person acting on behalf of the Auditor General or an appointed auditor) in the course of exercising their functions under:

- Part 2 of the Bill
- Part 1 of the *Local Government Act 1999* (functions in relation to the best value regime)
- The new section 145B of GOWA (inserted by clause 4 of the Bill), dealing with studies at the request of educational bodies in Wales
- The new section 145C of GOWA (inserted by clause 5 of the Bill), dealing with studies relating to registered social landlords in Wales.

The information must not be disclosed unless in accordance with the exceptions listed in clause 54(2). One of the exceptions is that the disclosure is made for the purposes of any functions of the Auditor General for Wales, or of an auditor, under Part 2 of the Bill or Part 1 of the *Local Government Act 1999*. Thus clause 54 does not obstruct the Auditor General or an auditor from putting into the public domain any information which should be put there for the proper exercise of that person's functions.

118. Disclosing the information in contravention of clause 54(2) constitutes an offence under clause 54(3).

119. Clause 54 mirrors the provisions of section 49 of the ACA. At the time of the passage of the Bill, section 49 of the ACA is under review by the Department of Constitutional Affairs with a view to its amendment or repeal by order under section 75 of the *Freedom of Information Act 2000*. This is because section 49 is a provision capable of preventing the disclosure of information under section 1 of the Freedom of Information Act. In order to ensure that clause 54 remains consistent with section 49 after (and assuming that) the Bill is enacted, clause 54(6) gives the Secretary of State (in practice, the Secretary of State for Wales) an order-making power to amend or repeal clause 54 in such a way as to reflect amendments to or repeal of section 49 of the ACA. The order-making power cannot be used so as to make clause 54 more restrictive of the disclosure of information than it currently is. Any order made under clause 54(6) would be

⁵² Ibid, c1479

⁵³ Ibid, c1480

subject to approval by both Houses of Parliament, in the same way as an order under section 75 of the *Freedom of Information Act*, amending or repealing section 49 of the ACA, would be.⁵⁴

C. Part III: Welsh NHS Bodies

Part III, clauses 59-62, deals with Welsh NHS bodies. Clause 59 defines “Welsh NHS body”, and clause 60 makes the AGW responsible for the financial audit of the accounts of Welsh NHS bodies. The relevant bodies must submit their accounts to the AGW no later than five months after the end of a financial year, and the AGW must examine the accounts and lay a copy of them as certified by him before the Assembly, within four months after receiving them. The AGW must be satisfied that the expenditure shown in such accounts is lawful and that the body has made proper arrangements for securing economy, efficiency and effectiveness in the use of its resources. Clause 61 ensures the AGW must co-operate with the National Assembly, the Audit Commission to the Commission for Healthcare Audit and Inspection (CHAI), where it seems appropriate for him to do so.

In its response to the Welsh Affairs Select Committee’s report on the draft Bill, the Government discussed these provisions:

Health sector value for money studies within Wales would be undertaken by the Auditor General and his staff. The Auditor General already has value for money powers in respect of the Health sector under the *Government of Wales Act 1998*. The function of conducting reviews of, and investigations into, the provision of health care by Welsh NHS bodies will be undertaken by the Assembly, through Healthcare Inspectorate Wales (HIW). HIW is a new internal unit to be set up by the Assembly under Section 63 of the *Government of Wales Act 1998*, and through which the Assembly will exercise its new health inspection powers in the Health and Social Care (Community Health and Standards) Act 2003.

The Commission for Healthcare Audit and Inspection (CHAI), will have responsibility, amongst other matters, for conducting reviews of the overall provision of particular kinds of healthcare by and for NHS bodies across England and Wales. CHAI, in carrying out its reviews and investigations, must be particularly concerned (amongst other matters) with the economy and efficiency of the provision of health care. CHAI would be able to commission other public authorities, including the Audit Commission to undertake its work, or may co-operate with such authorities. The draft Bill establishes a mutual duty of consultation and co-operation on the Auditor General for Wales, CHAI and the Healthcare Inspectorate Wales in order to secure the efficient and effective discharge of their functions.

The Government proposes that the funding of value for money studies in the health sector will be brought into line with those for the Assembly and its ASPBs. It would be covered in the annual estimate of income and expenditure the Auditor

⁵⁴ Op cit paras 117-9

General is required to submit to the Audit Committee and the amount of money that the Assembly votes to the AGW to undertake his/her value for money programme. In this way the AGW's ability to undertake work as he sees fit is not fettered by questions of affordability.

The Auditor General for Wales will have the power to charge for statutory financial audit and value for money studies specifically requested by bodies. In the light of consultation the Government proposes to amend the Bill to facilitate the conduct of integrated local audits (combined financial and value for money audits) in respect of individual health organisations. Integrated local audits are currently undertaken by the Audit Commission. The Bill would enable the Auditor General to charge a fee for such audits.⁵⁵

D. Other provisions of the Bill

1. Best Value

Schedule 1 gives the new position responsibility for Best Value in Wales, and amends the 1999 *Local Government Act* to include other bodies within this remit. During Grand Committee in the House of Lords a probing amendment by Baroness Noakes led to a discussion of the Bill's effect on Best Value:

I shall be extremely brief. Paragraph 3 of Schedule 1 inserts a new Section 2A into the *Local Government Act 1999* to deal with the Welsh dimension of best value audit. Our Amendment No. 63 proposes the deletion of subsection (4) of new Section 2A.

This is a probing amendment to find out exactly what the Government have in mind. Clearly, they intend to disapply or exempt from a functional duty certain best value authorities. The probing amendment is designed to ask the Minister to give us an example of how that might work in practice in Wales. I beg to move.

Lord Davies of Oldham: As the noble Baroness said, the measure would limit the powers of the Assembly in a certain way. She will not be surprised if I therefore resist the amendment. Its effect would be to take away a power which the Assembly already has under the *Local Government Act 1999*. This is not, as I understand it, an exemption in the context of a relaxation of the best value authority's responsibilities. The power would be exercised if the Assembly had fundamental doubts about the exercise of a function by a best value authority and was contemplating making alternative arrangements. The Assembly has not used the power but that does not detract from its validity. We want to retain the power and we do not think that we should remove a power which the Assembly already has.

Baroness Noakes: I thank the Minister for that reply. I had understood that subsection (4) would have the effect of taking a body outside the ambit of best value. My probing amendment is to find out why that would happen in relation to a particular function or functions. I am not sure I understood what the Minister said in response to.

⁵⁵ <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmwelaf/87/8702.htm>

Lord Davies of Oldham: I was indicating that the power which would be taken away by the amendment would be exercised only if the Assembly had fundamental doubts about the exercise of the functions by a best value authority. The power has not been used, so I cannot quote an example to her. However, we want to preserve that power—it is one which the Assembly already enjoys under the *Local Government Act*. That "reserve" power has validity and might be used in exceptional circumstances in respect of a best value authority when the Assembly has fundamental doubts about what is happening.

Baroness Noakes: I will need to consider carefully the Minister's comments. It seems that having doubts about performance would be more likely to leave an authority within the best value framework, so that all that could be exposed and explored through the best value process. Having doubts about performance would seem more likely to leave a body within that process. So, I am unsure about the Minister's response, which I will carefully consider between now and Report. I beg leave to withdraw the amendment.⁵⁶

2. Pension rights

As the 50 National Audit Office staff currently seconded to the AGW and the approximately 180 Audit Commission staff currently based in Wales are to be merged, common terms and conditions will be required. Schedule 3 sets out provisions in relation to transfer schemes to be made by the Secretary of State, with the consent of the Assembly, for the transfer to the AGW of property, rights and liabilities of the Comptroller and Auditor General and of the Audit Commission, including the transfer of staff. Transfers of staff may be governed by the *Transfer of Undertakings (Protection of Employment) Regulations 1981* (SI 1981/1794), as amended but if not Schedule 3 ensures that the transfers will comply with the principles underlying those Regulations, and that staff will be treated no less favourably than they would have been had the Regulations applied. Pension rights, which would not be covered by the *Transfer of Undertakings (Protection of Employment) Regulations 1981* (as amended), even if they apply, will be dealt with in the transfer schemes.

3. Cost

Concerns about the cost of establishing the Wales Audit Office were raised during pre-legislative scrutiny of the Bill. The Welsh Affairs Select Committee expressed “concern that there is as yet no realistic published estimate of set-up costs, or of recurrent costs or savings, arising from the proposed establishment of the Wales Audit Office.”⁵⁷ The National Assembly Committee on the draft Bill commented ‘the Committee had some concerns that the figure of £500,000 for transitional costs was still a broad estimate’ and recommended “that the running costs of the new organisation should be monitored closely and steps taken to ensure that there were not significant, consequential costs to

⁵⁶ HL Deb 25 February 2004 ccGC137-8

⁵⁷ Welsh Affairs Select Committee, op cit, para 42

local government.”⁵⁸ During debate in the Welsh Grand Committee, Hywel Williams on behalf of Plaid Cymru, asked:

What guarantees will the Government offer to fund the office adequately, so as to enable it to do its job to a high standard? The fact that no round figure has been set for the establishment of the audit office is, of course, ironic. It lends further support to the creation of just such an office, if only to ensure that no other body follows such a practice in future.⁵⁹

In its response to the Welsh Affairs Select Committee, the Government said:

Assembly Government officials, together with the NAO and Audit Commission, are working to refine the estimated figure of £500,000 for the transitional and set-up costs. Key elements of such costs will be in the areas of the provision of central services, such as personnel and finance; essential IT compatibility; and essential retraining to get the body up and running. The regulatory impact assessment for the Bill will be updated to reflect work in progress.⁶⁰

The initial explanatory memorandum, issued with the Bill as introduced into the House of Lords, cited the National Assembly’s estimate of £500,000 set up costs. During second reading of the Bill a number of peers raised this issue, in answer to which the Government minister Lord Evans of Temple Guiting said “That is still the estimated cost that is being worked to. The National Audit Office, the Audit Commission and the National Assembly are at this moment working on costings. In October the AGW submitted a paper to the National Assembly audit committees estimating, on a provisional basis, transitional costs of £400,000, not £500,000, for the financial year 2004-05.”⁶¹ As a result, when the Explanatory Notes were published for the Bill in the Commons, the cost figure had been revised:

160. There will be initial set up costs in respect of the Wales Audit Office that will be borne from funding provided by the Assembly. The set up costs will relate to the establishment of central administrative functions such as personnel, management services and finance, currently provided centrally by the National Audit Office and the Audit Commission. There are also initial costs relating to the compatibility of information and communication technology and project management. A detailed analysis conducted since introduction of the Bill has identified costs of £985,000, inclusive of VAT. Over the longer term there will be opportunities for offsetting cost savings through, for instance, rationalisation of accommodation needs and working practices.

⁵⁸ *ibid*, para 9

⁵⁹ Available at

<http://www.publications.parliament.uk/pa/cm200203/cmstand/welshg/st030715/am/30715s01.htm>

⁶⁰ Welsh Affairs Committee, *op cit*, para n

⁶¹ HL Deb 9 December 2003 c729.

161. It is envisaged that the majority of annual budgetary costs will be met through fees and charges. Where overall estimated costs outweigh income, the balance will be met by the Assembly under existing arrangements provided for in the GOWA.

162. The Assembly estimates that the manpower effects of the Bill will be marginal and will primarily relate to recruitment in respect of the central administrative functions referred to above. The Bill makes provision for statutory transfer schemes that will incorporate the transfer of existing staff employed by the Audit Commission and the National Audit Office to the Wales Audit Office.⁶²

The *Regulatory Impact Assessment* noted that “the cost analysis was considered and accepted by the National Assembly Audit Committee on 6 May 2004” as well as being subject to consideration by the National Assembly for Wales Minister for Finance, Local Government and Public Services (Sue Essex).⁶³

4. Commencement

The Bill will come into force in accordance with provision made by the Assembly by order. However, the *Regulatory Impact Assessment* says “the policy aim is for the Auditor General’s new functions under the Bill to come into effect on 1 April 2005.”⁶⁴

IV Pre-legislative scrutiny of the *Public Audit (Wales) Bill*

A. Procedure

The procedure for pre-legislative scrutiny of a draft bill is the same as for any other select committee inquiry – no specific Standing Order applies.⁶⁵ In practice, decisions on how and where to refer a particular draft bill for parliamentary scrutiny are taken by the ‘usual channels’, that is, the informal means of communication between the government and opposition business managers and whips.

Once the draft bill has been referred to a committee, it is for that committee to decide its procedures, within the rules of the House and the motion that established it. Committees can choose whether to take written and/or oral evidence from appropriate organisations. Griffith and Ryle (a standard text on parliamentary procedure) provide a short summary on how draft bills have been scrutinised:

Select committees looking at draft bills seem to have steered a middle way between challenging the whole principle of the bill and minutely scrutinising the

⁶² <http://www.publications.parliament.uk/pa/cm200304/cmbills/108/en/04108x-c.htm>

⁶³ *Public Audit (Wales) Bill regulatory impact assessment*, available at <http://www.walesoffice.gov.uk/2004/RIAMay2004.htm>

⁶⁴ Ibid

⁶⁵ see Library standard note SN/PC/2822, *Pre-legislative scrutiny*, for a more detailed summary of the issues

text of each clause. Substantive reports have been published, commenting on the policy of the bill and suggesting improvements. The relevant government departments have been able subsequently to point to a committee's support for particular measures. At the same time they have had to justify quite fully any decisions not to accept changes recommended by the committee. Since committee scrutiny has often been conducted in tandem with public consultation on the bill, the whole process has subjected draft bills to more thorough public examination at an earlier stage than would normally occur. Arguably, at this stage, it is easier for ministers to agree to make changes than when the government's prestige is engaged as the bill goes through the formal legislative process.⁶⁶

After a Committee has examined the draft bill, the Government responds to the Committee's report. If it decides to pursue the measures set out in the draft bill, a bill is published and goes through its normal stages in the House of Commons and House of Lords before it is enacted.

The draft *Public Audit (Wales) Bill*, one of eight draft bills in the 2002-03 session, was published in draft on 3 April 2003⁶⁷ and was referred to the Welsh Affairs Committee. Speaking in the House of Lords on Second Reading on 9 December 2003, Lord Evans of Temple Guiting commented on the pre-legislative scrutiny to which the Bill had been subjected:

The Bill was first published in draft form on 3rd April this year and has been subject to both pre-legislative scrutiny by the House of Commons and the National Assembly. It has also been subject to a 12-week period of public consultation. The Parliamentary Under-Secretary of State for Wales and I have met with noble Lords to discuss and brief them on its provisions.

As I have mentioned, neither the pre-legislative scrutiny process nor public consultation revealed any significant concerns over the policy of the Bill. More than 200 organisations were consulted on the draft Bill and 15 responses were received. In all, 41 recommendations for change or clarification were made. Of these, 19 have been accepted. They improve consistency of practice between non-local government and local government audit arrangements; strengthen the ability of audit and regulatory bodies to co-operate; and clarify certain existing powers. I can search later documents showing the 22 points not accepted if that would be of interest to your Lordships.⁶⁸

The draft Bill was considered in a number of forums, including in both the House of Commons (by the Welsh Affairs Select Committee) and by the National Assembly for Wales. The need for both bodies to consider the draft Bill led to the suggestion that

⁶⁶ Robert Blackburn and Andrew Kennon, *Griffith & Ryle on Parliament: functions, practice and procedures*, Sweet & Maxwell, 2nd ed, 2003, p624

⁶⁷ Cm 5796

⁶⁸ HL Deb 9 December 2003 cc709-10

unnecessary dual scrutiny had taken place and that it would have been more effective to jointly consider the Bill. This problem was considered by the Welsh Affairs Select Committee in their report on *The Primary Legislative Process as it affects Wales* in 2002/03,⁶⁹ which recommended that powers for joint formal meetings between it and committees of the National Assembly for Wales should be granted. The Government noted in its reply to the Report that “joint pre-legislative scrutiny by the Welsh Affairs Committee and the appropriate Committee of the National Assembly for Wales would be helpful” and hoped that the House authorities would examine whether the procedural obstacles could be overcome.⁷⁰

The suggestion was accordingly taken up by the Commons Procedure Committee,⁷¹ which recommended:

- a) Until the end of the current Parliament, the Welsh Affairs Committee should be authorised to invite members of any specified committee of the National Assembly for Wales to attend and participate in its proceedings (but not to vote), subject to a quorum of both committees being present;
- b) During such proceedings, use of the Welsh language should be allowed in all circumstances, with the National Assembly providing interpreters and transcription of Welsh language contributions.⁷²

A motion to approve the Committee’s report was debated in the House on 7 June 2004. During the course of the debate, Phil Woolas, Deputy Leader of the House of Commons, said:

The Welsh Affairs Committee found that in pre-legislative scrutiny of the draft *National Health Service (Wales) Bill* - and, more recently, the draft *Public Audit (Wales) Bill* - there was considerable overlap between its work and that of the relevant National Assembly Committee. Joint hearings would remove that overlap and be of benefit both to Committees and to witnesses. The Welsh Affairs Committee therefore recommended the granting of powers for joint formal meetings between it and Committees of the National Assembly for Wales.⁷³

⁶⁹ HC 79 2002-03, available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmwelaf/79/7902.htm>

⁷⁰ HC 989, 2002-03, available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmwelaf/989/98902.htm>

⁷¹ *Joint activities with the National Assembly for Wales*, Third Report of Session 2003–04, HC 582 2003/04, available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmproced/582/58202.htm>

⁷² Ibid, para 12

⁷³ HC Deb 7 June 2004 422 c73

The motion, that the House approves the report and that “the Welsh Affairs Committee may invite members of any specified committee of the National Assembly for Wales to attend and participate in its proceedings (but not to vote)”, was agreed to on question.

1. Welsh Affairs Select Committee

The draft Bill was considered by the Welsh Affairs Select Committee in June and July 2003; the Committee reported on 2 July 2003.⁷⁴

The Committee supported the draft Bill’s main aims and took evidence from a number of interested parties, including the Welsh Local Government Association, the Welsh Assembly Government, the Audit Commission and the AGW. Each of the organisations welcomed the draft Bill, whilst recognising that there were some areas that needed further consideration. The Welsh Local Government Association was keen to ensure that while “the new structures will provide a more coherent approach to the audit process”, the costs might be greater because the body would lose the economies of scale from being part of a larger England and Wales body which would in turn bring a “significant cost burden” to local government in Wales.⁷⁵ The AGW fully supported the Bill, and commented that ‘one of the priorities will be to establish a realistic estimate for the cost of the Wales Audit Office, including any costs associated with acquiring and maintaining the necessary central infrastructure’. The Audit Commission commented that “we have supported the proposals as a unique opportunity to create a regulatory body that can be an integral part of the agenda for change and improvement for public services in Wales”.⁷⁶

The Committee made a number of specific recommendations to which the Government responded on 3 December 2003.⁷⁷ Their main recommendations (with the Government’s response in italics) included:

Consideration of a wide statutory duty to be placed on the Auditor General to have regard to the views of all appropriate professionals and relevant stakeholders on his forward programme for local government value for money audit (para 26)

The Government accepts this recommendation in part. Clause 39 already imposes a duty on the Auditor General to consult associations of local government bodies and associations of employees on value for money studies. The draft Bill will also be amended to impose a mutual duty of consultation and co-operation on the Auditor General for Wales and the Audit Commission in respect of the discharge of their local government functions. The Government considers that a wider statutory duty to consult would lack focus and some clarity. The National

⁷⁴ HC 763 2002-03,
<http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmwelaf/763/76302.htm>

⁷⁵ HC 763 ev 1, 9 June 2003

⁷⁶ Ibid, ev 33

⁷⁷ HC 87 2003-04, available at
<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmwelaf/87/8702.htm>

Assembly for Wales is giving consideration to establishing a non-statutory advisory mechanism that would be beneficial, particularly in advising on policy aspects in the formulation of value for money studies. The Government endorses this approach.

Deletion of Clause 50 which unduly restricts disclosure of information by local government auditors (para 35)

The Government has given very careful consideration to this recommendation. Clause 50 makes provision for restrictions on the disclosure of information held by the Auditor General or an appointed auditor in respect of local government, except in specified circumstances. It is consistent with the existing provisions of section 49 of the Audit Commission Act 1998. Both Clause 50 and section 49 include provision for criminal sanctions against a person who may disclose information in contravention of the legislation. If Clause 50 was to be deleted and the Public Audit (Wales) Bill enacted, section 49 of the Audit Commission Act would remain in force in respect of England. As a consequence there would be potential for the disclosure of the same information being treated inconsistently for the purposes of the criminal law in Wales and England. The Government is of the view that such a situation would be inappropriate and that any future consideration of the disclosure issue should be on an England and Wales basis. For this reason it does not propose to delete the provision from the draft Bill.

Extension to local government auditors of the rights given by Clause 11 of the Bill to the Auditor General to follow public money to the end user, "making Welsh audit a beacon of good audit practice" (para 37)

The Government accepts this recommendation. The Government proposes to bring the provisions of Clause 11 more in line with section 6 of the Audit Commission Act 1998 (which are somewhat wider in scope), whilst at the same time maintaining clearly, on the face of the draft Bill, that the Auditor General's access powers enables him or her to trace public money down the chain to the end user. The Government also proposes to amend Clause 18 of the draft Bill to ensure that the Auditor General has common access powers in relation to local government bodies in Wales. Equivalent rights of access will apply across both the central and local government sectors.

The Committee expresses disappointment that the opportunity has not been taken to make the new arrangements for Welsh local government and NHS audit better than elsewhere in the United Kingdom rather than no worse (para 38): and some concern at the vagueness of the costs of the proposed establishment of the Wales Audit Office (para 42).

The Government and the National Assembly for Wales are of the view that the provisions in the draft Bill relating to joint working and closer strategic collaboration will facilitate a major improvement in the audit system in Wales. In the light of the recommendations arising from pre-legislative scrutiny and public consultation, the Government has sought legal advice and is satisfied that the

Auditor General's power to access documents and information extend to documents and/or information held in electronic/digital form.

It will also provide for greater democratic accountability in the introduction of a revised Code of Audit Practice for Wales by requiring it to be approved by the National Assembly for Wales in the first instance, followed by negative resolution procedures in the UK Parliament. The Bill will also take account of other technical amendments proposed during consultation. It will be open to the Auditor General for Wales to agree protocols with local government in Wales for the clearance of draft reports, along the lines of those already in place for central government organisations in Wales. The existing power for an appointed auditor to publish a report without full agreement if he considered it to be in the public interest to do so would remain.

The provision in Clause 20 of the draft Bill that enables the National Assembly to prescribe a scale or scales of fees in respect of local government bodies is a power already available to the Assembly under the Audit Commission Act 1998. It is very much a fail-safe provision in the event of the Auditor General (and currently the Audit Commission) failing to agree. The Government considers it prudent for the power to remain.

These are all issues to which the Committee refers in reaching its conclusion in paragraph 38 of its Report.

The Committee also calls for a duty on the Auditor General to promote cross-border studies, and their publication as joint reports (paras 29-31) and seeks clarification of several issues, including NHS performance audit arrangements, (para 40), arrangements between the Auditor General and the Assembly (para 44), and the proposed extension of the Auditor General's powers (para 16).

The Government accepts this recommendation in part. The draft Bill will impose a mutual duty of consultation and co-operation between the Auditor General for Wales and the Audit Commission; Commission for HealthCare Audit and Inspection; and the National Assembly with regard to their respective functions. The Government of Wales Act 1998 provides for consultation and co-operation between the Auditor General and the Comptroller and Auditor General. The Government's view is that a general statutory duty particularly in relation to joint working and joint reporting could have a restrictive rather than a facilitative effect. For instance, the flexibility to adjust forward programmes to meet unforeseen circumstance could be diminished and a study may not be able to proceed until both or all parties were in a position to proceed. A key aim of the Bill is to facilitate and promote greater cross-border co-operation. The provisions in Clauses 1, 2 and 3 will encourage collaborative working. The Government is confident that the Bill would facilitate further the good practice already in place.

It would be best if bodies have discretion to organise their priorities but the Government would expect that, in drawing up their respective programmes, they consult and identify all opportunities for working together and benefiting from each other's work. Joint reviews are already an established feature of audit and inspection work in Wales, particularly with respect to social services. Secondment of staff between bodies to facilitate co-operation is also a growing practice.

2. Other scrutiny forums

The Welsh Grand Committee considered the draft Bill on 15 July 2003.⁷⁸ The Bill was broadly supported by all speakers although the issue of whether to keep clause 50 (54 in the current Bill) was considered by a number of Members, as were the provisions of clause 11 (also 11 in the current Bill) relating to access to information. Hywel Williams, Plaid Cymru spokesman, said “The measures are generally welcome. After all, Scotland and Northern Ireland have separate single audit bodies...all the key political parties have accepted the Bill in principle” although he went on to question the validity of clause 50.

The draft Bill was also considered by a National Assembly Scrutiny Committee. The Committee, like the Welsh Affairs Select Committee, took evidence from a number of organisations, including the Welsh Local Government Association, Don Touhig, the Wales Office Minister, and the AGW. The duplication between the National Assembly Committee and the Welsh Affairs Select committee is considered in section IV.A. above.

The Committee’s report was debated in plenary in the Assembly on 24 September 2003. A second Committee was set up to consider the Bill as introduced into the House of Lords; this was established on 13 January 2004 and published its report, which considered the Government’s amendments to the Bill in the light of pre-legislative scrutiny, on 5 February 2004. The Committee listed the seven amendments to the Bill recommended by the Committee and the Government’s response. Those accepted included the recommendation that clause 11 should be extended to enable the AGW to track public money, made by the National Assembly Committee. Clause 16 was changed to require the code of practice under clause 16(1) to be debated by the Assembly, as recommended by the National Assembly Committee. Those rejected included the recommendation that clause 50 (now 54) on disclosure of information should be deleted and that schedule 3 paragraph 3 relating to pension rights should be strengthened.

V House of Lords debates on the *Public Audit (Wales) Bill*

1. Second reading

The Bill was introduced into the House of Lords on 27 November 2003 and had its second reading on 9 December 2003. A number of peers commented on the process by which the National Assembly secures primary legislation. Lord Morris of Aberavon commented that “although Parliament is presently solely entrusted with enacting primary legislation for Wales, I believe that our role is severely limited...if the Assembly wants it,

⁷⁸ Available at <http://www.publications.parliament.uk/pa/cm200203/cmstand/welshg/st030715/am/30715s01.htm>

and the Government, as sponsors of a Bill, agree with it, the Assembly should have it”.⁷⁹ Lord Thomas of Gresford said the process is:

slow, cumbersome, inefficient and not particularly effective. Therefore, it is no surprise that Wales has trailed behind Scotland and Northern Ireland in unifying its audit functions...how much simpler it would be if a Welsh bill were presented to the Assembly and then, after its preliminary stages, were referred to a Joint Committee of both Houses of Parliament here in Westminster...then returned to the Assembly for enactment.⁸⁰

2. House of Lords Select Committee on Delegated Powers and Regulatory Reform

The Select Committee’s report into the Bill was published on 11 December 2003.⁸¹ The Committee’s orders of reference include “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate level of parliamentary scrutiny”. The Committee concluded that, in respect of each delegation power by the bill, the delegation is “both appropriate and... subject to an appropriate level of scrutiny”. However, the Committee considered that in one respect there was an inappropriate level of scrutiny, commenting that:

Clause 16(1) enables the Auditor General for Wales to issue a code of audit practice. The bill provides both for affirmative resolution by the Assembly (clause 16(4)) and negative resolution procedure at Westminster (clause 16(7)). New section 8A(1) and (2) of the *Local Government Act 1999* ("the 1999 Act"), inserted by paragraph 7 of Schedule 1 to the Bill, provides for a code of practice about the way in which auditors appointed by the Auditor General for Wales carry out their functions under section 7 of the 1999 Act. In the delegated powers memorandum, it is explained that the same scrutiny procedures are intended to apply to this provision as to the code under clause 16. We agree that those procedures should apply. But it seemed to the Committee that a small amendment to the Bill (applying clause 16(4) to (9)) would be needed to ensure that the appropriate procedure applied also to codes under the new provisions of the 1999 Act.⁸²

Although an amendment was made to the orders and regulations provisions of section 57 (now 58) during Grand Committee stage, this issue was not addressed during the passage of the Bill through the Lords.

⁷⁹ HL Deb 9 Dec 2003 c716

⁸⁰ Ibid, c719

⁸¹ House of Lords Select Committee on Delegated Powers and Regulatory Reform, 2nd report of session 2003-04, HL paper 10, 2003-04, available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddelreg/10/1002.htm>

3. Grand Committee

The Bill was committed to a Grand Committee following second reading in the House of Lords, and under Lords procedure there are no divisions in Grand Committee.⁸³ A number of probing amendments were put down by Baroness Noakes, Opposition Spokesperson for Treasury and for Work and Pensions, designed to clarify some of the main issues, but all of these amendments were withdrawn. A number of Government amendments were however agreed. These included an amendment to Schedule 1, described by Lord Davies of Oldham as being designed to:

correct the fact that the draft Bill inadvertently resulted in the full provisions for consultation, approval and revision set out in Clause 16 not being applied to the code of practice in respect of best value audit. I can see from the amendments that have been tabled that our weaknesses were about to be exposed by Opposition amendments, and the Government amendments have been tabled to recognise our weakness. The amendment reflects the fact that approval of, and consultation on, a draft code are dealt with in the full provisions of Clause 16.⁸⁴

Further amendments were made to clause 57 (orders and regulations) to clarify that no order or regulation-making power on the Secretary of State are conferred in part 2, comprising provisions relating to local government in Wales.⁸⁵

The other main debate was on clause 54, discussed above (Section III.B.2 above)

4. Report

Report took place on 1 April 2004. The Government tabled 19 amendments as a result of discussions in Grand Committee. These included amendments to ensure that the National Council for Education and Training for Wales and the Higher Education Funding Council for Wales will not be able under clause 4 to ask the AGW to undertake an economy, efficiency and effectiveness study into themselves as the Auditor General has statutory responsibility for them and is therefore already able to undertake such studies, and an amendment to clause 54 (see section III.B.2 above).

5. Third Reading

The main debate on third reading on 11 May 2004 was also on clause 54 (see above). Other new clauses were inserted by the Government, including one to incorporate into the Bill a mutual duty on the AGW, the Audit Commission and the Commission for Healthcare Audit and Inspection (CHAI) to provide information for comparative purposes. This became clause 57 in the current Bill.

⁸² Ibid, para 6

⁸³ This took place over two days, 23 and 25 February 2004.

⁸⁴ HL Deb 25 February 2004, cGC138

⁸⁵ Ibid, cGC144