

# CONSTITUTIONAL REFORM AND GOVERNANCE BILL

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

### Introduction

1. This memorandum sets out the background and context relevant to the proposed Government amendment to the Constitutional Reform and Governance Bill conferring legislative competence on the National Assembly for Wales (“the NAW”) in relation to governance arrangements for the Auditor General for Wales (“the AGW”) and the Wales Audit Office (“the WAO”).

### Background

2. Part 3 of the Government of Wales Act 2006 (c.32) (“the 2006 Act”) gives the NAW the power to pass legislation known as Assembly Measures. Assembly Measures can make any provision that can be made by an Act of Parliament in relation to those Matters, subject to the restrictions contained in the 2006 Act.

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

4. The proposed amendment to the Bill would grant the NAW law-making powers by inserting a new Matter (i.e. Matter 14.1) in Field 14 (Public Administration). The purpose of Matter 14.1 is to enable the NAW to put in place new governance arrangements for the AGW and WAO (which may be similar to those that the Bill proposes for the Comptroller and Auditor General and the National Audit Office) whilst fully respecting the operational independence of the AGW. The amendment would also insert a new paragraph 6A into Part 2 of Schedule 5 (which sets out general restrictions on the NAW’s legislative competence) to enable the NAW to modify the provisions of the 2006 Act relating to the AGW.

### Context

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

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as granting approvals to draw from the Welsh Consolidated Fund and auditing the accounts of the NAW Commission.

6. Detailed provisions about the appointment and status of the AGW, the AGW's staff, financial affairs and general powers of the AGW are set out in Schedule 8 to and, in relation to financial matters, Part 5 of the 2006 Act. The office of the AGW is a corporation sole whereas the WAO has no legal personality of its own being a collective term to describe the AGW and the AGW's staff.

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

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

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

10. The AGW is empowered in some cases and required in others, to charge fees for auditing accounts and carrying out inspections and examinations, for example, into economy, efficiency and effectiveness. In addition to any funds made available in a NAW budget resolution by virtue of section 120(1) and (2) of the 2006 Act, certain provisions of enactments may authorise the AGW in some circumstances to retain receipts, for example, from fees charged for specified purposes. The AGW also has power to borrow to meet a temporary excess of expenditure over income.

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

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12. The AGW has appointed an Audit and Risk Management Committee, made up of independent members who are external to the WAO, which advises on audit, risk and governance in the WAO.

13. There is a need to put in place enhanced governance and accountability arrangements for the operation of the AGW and the WAO. To this end, the Audit Committee of the NAW, which has an oversight role, is considering undertaking a review of the governance of the AGW/WAO. The Committee has yet to establish formal terms of reference for such a review and will be considering the outcome of the International Peer Review of the WAO (commissioned by the AGW at the start of 2009 and published on 8 October) before making a final decision. The Peer Review expressed the view that “there is scope to enhance and strengthen the governance of the Wales Audit Office without restricting the AGW’s crucial independence to examine whatever subjects he chooses, and to make independent audit judgments on them free from political interference” (Recommendations, paragraph 8).

14. The legislative competence conferred by the proposed amendment would allow the Assembly to take forward any legislation that would be required as a result of the Audit Committee’s review. However, the competence will not allow the Assembly to legislate in any way that would infringe the principle of auditor independence or that would alter the statutory role, or audit functions, of the AGW and WAO. In that connection, the provisions would enable the NAW to place functions relating to the AGW and the WAO on NAW committees but not on the NAW itself or the Welsh Ministers, given the protection afforded to the AGW’s independence by paragraph 3 of Schedule 8 to the 2006 Act. Furthermore, such functions could only be conferred on the NAW Audit Committee or another committee which is independent from the Welsh Assembly Government.

### **Scope of Proposed Powers**

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

16. The powers being sought would create a new “Matter 14.1” enabling the Assembly to pass legislation on :

- the AGW’s terms and conditions of employment relating to tenure and remuneration, and the number of times that an individual may be appointed to the office of the AGW;
- restrictions on the other offices and positions that may be held by an AGW or the activities of a previous AGW;
- requiring the AGW to aim to carry out AGW functions in an efficient and cost effective manner and to have regard to the standards and principles expected of an expert accountant or auditor;

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- the authorisation of persons to exercise the functions of the AGW or on the AGW's behalf;
- the oversight or supervision of the AGW or the AGW's functions;
- the provision or use of resources in support of the AGW's functions including the employment and use of staff; procurement and use of services; the holding of documents or information; and the keeping of records;
- the charging of fees and other amounts relating to the AGW's functions or to auditors appointed by the AGW (such as auditors which the AGW appoints under section 13(2) of the Public Audit (Wales) Act 2004 to audit the accounts of local government bodies in Wales); and
- the restatement of any law relating to the AGW.

17. Matter 14.1 would enable the NAW to make changes in the governance arrangements for the AGW and WAO, which could be similar to those which are set out in Part 7 of the Bill in relation to the Comptroller and Auditor General and the National Audit Office. For example, the provision which might be made by a Measure relating to matter 14. could include establishing the WAO as a body corporate with functions relating to the oversight or support of the AGW, and specifying the number of members, and the terms of appointment of a Chair, members and Chief Executive. However, the nature of any changes would be for the NAW to determine.

18. The proposed amendment would also add a new paragraph 6A to Part 2 of Schedule 5 to the 2006 Act ("General Restrictions"). Part 2 of the Schedule lists restrictions on the provision which can be made in an Assembly Measure. If a provision of a Measure breaches any of them, it is outside of the NAW's legislative competence and is not law. The restrictions are subject to exceptions set out in Part 3 of Schedule 5.

19. New paragraph 6A would apply to any provision that may flow from new Matter 14.1. In relation to such a provision, paragraph 6A disapplies paragraph 6(1) of Part 2 (which provides that an Assembly Measure cannot modify provisions in the 2006 Act) and paragraph 6(3) (which protects certain other enactments against amendment) insofar as it relates to certain provisions of the Government of Wales Act 1998. The effect is that a provision to which paragraph 6A applies may amend the 2006 Act and the specified provisions of the 1998 Act.

20. However, paragraph 6A goes on to provide that such a provision may not amend paragraph 3 of Schedule 8 to the 2006 Act, which protects the independence and status of the AGW. It also provides that a provision to which paragraph 6A applies may only give a role to a NAW committee which excludes from its membership the First Minister, the Welsh Ministers, their Deputies and the Counsel General (or anyone acting as such); and which is

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not chaired by an Assembly Member who is a member of a political group with an executive role. In other words, a Measure may only give a role relating to the AGW or WAO to the NAW Audit Committee or another committee which is independent of the Assembly Government.

### **Geographical limits**

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

22. The limitation relating to functions other than in relation to Wales means that the NAW would not be able by Measure to generally confer functions which did not relate to Wales. The functions of the AGW relate to Wales and to Welsh public bodies.

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

23. By virtue of paragraph 1 of Part 2 of Schedule 5 to the 2006 Act, and paragraph 7 of Part 3 of that Schedule, the NAW may not by Measure alter or remove functions of a Minister of the Crown without the consent of the relevant Secretary of State (and may not create new Minister of the Crown functions at all). The proposed provisions themselves do not modify or remove any functions of a Minister of the Crown. In relation to any future proposals for Assembly Measures that may impact on Minister of the Crown functions, the appropriate UK Government Departments would first be consulted and agreement sought before any change to, or modification of, those functions could be made.

24. By virtue of paragraph 5 of Part 2 of Schedule 5, and paragraph 8 of Part 3 of that Schedule, a provision of an Assembly Measure cannot modify functions of the Comptroller and Auditor General unless the Secretary of State consents. Another proposed amendment will insert a new paragraph 22A into Schedule 9 to the Bill, which will extend these provisions of the 2006 Act to functions of the new National Audit Office. This consequential amendment reflects the fact that, if Part 7 of the Bill is enacted, certain functions currently carried out by the Comptroller and Auditor General will in future be carried out by the National Audit Office. The NAW will not be able to modify those functions without the agreement of the Secretary of State.

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