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Dear John

Consultation on the Local Government & Elections (Wales) Bill

1. Thank you for your letter of 22 November 2019 in which you invite views on the Local Government and Elections (Wales) Bill. I understand that you would like comments particularly in relation to the provisions of the Bill that concern the role of the Auditor General. In the time available, I can only provide preliminary views, but I hope that they are helpful. My colleagues will provide further views and clarification at your session on 11 December 2019, and we will provide a further submission by 3 January 2020.

Performance assessment arrangements: performance requirements

2. I welcome the Bill's intended improvement of performance assessment arrangements. The duty to keep performance under review, provided by section 88, appears to me to be a more realistic and coherent approach than the improvement principles and duties set out in the Local Government (Wales) Measure 2009.
3. My predecessor and colleagues at the Wales Audit Office have long had concerns at the onerous complexity of the 2009 Measure. The numerous functions and principles imposed by the 2009 Measure have led to performance improvement work being seen as burdensome and bureaucratic by some authorities. At the same time, it is not clear that the performance improvement requirements of the Measure have actually led to improvement in authorities' performance, though it is difficult to identify particular effects given the complex environment that local government operates in, especially with reductions in funding. It is clear that legislation is needed to repeal the requirements of the 2009 Measure and to replace them with more realistic and coherent requirements.

4. I would also note that the current Bill is much more realistic and proportionate in this respect than the November 2015 draft local government bill.

Self-assessments

5. While acknowledging the benefits of encouraging greater self-awareness, I am somewhat sceptical about whether the requirements of section 90 in themselves will improve the quality of self-assessment. The experience of the “Best Value Reviews”, which authorities were required to do under the Local Government Act 1999, and more recently of the 2009 Measure, demonstrates the potential weaknesses in the approach. These were a lack of consistent objectivity and rigour; a reluctance to be critical and a tendency to be superficial in gathering and assessing evidence of performance; and shortages of the necessary skills and capacity to undertake comprehensive assessments. I have no reason to believe that the appetite and capacity for objective self-appraisal have increased in the past decade, and I am also not convinced that new requirements in themselves will lead to an improved situation.
6. The new provisions for self-assessment are, however, more streamlined than the requirements under the 1999 Act and the orders and guidance made under that Act and are more coherent and comprehensive than the requirements of the 2009 Measure. This should be helpful in connecting performance assessment with the audit consideration of arrangements for securing economy, efficiency and effectiveness (required by section 17(2)(d) of the Public Audit (Wales) Act 2004).
7. Finally, it would be helpful if there were a deadline for producing self-assessments in respect of each financial year: perhaps four months after the end of the year. Without a deadline, it would seem that a self-assessment for a financial year could be undertaken at some indefinite time in the future.

Panel assessments

8. I also have some reservations about whether panel assessments (section 91) will achieve Welsh Ministers’ intended objectives. As panel members are to be appointed by the councils that they are to assess, there is a risk of self-interest undermining the objectivity of the panel members. I am also concerned that the supply and availability of appropriately skilled panel members may be rather limited given the number and timing of panel assessments required in any given year. I note that section 93 provides for the Welsh Ministers to make regulations concerning the appointment of panels. Such regulations could be used to set appropriate requirements in terms of skills, knowledge and experience of panel members. I am nonetheless sceptical that a sufficient pool of suitably qualified and capable potential panel members will be available.

Special inspections

9. The Bill's provisions for special inspections by the Auditor General (sections 94 to 99) appear appropriate in themselves. While these new provisions seem generally similar to the special inspection provisions of the 2009 Measure, as the focus of the inspections is to be assessing whether councils are meeting the performance requirements of section 88, rather than the various requirements of Part 1 of the 2009 Measure, these new provisions are necessary. And the clearer focus of the new provisions should be helpful in scoping and delivering inspections.
10. I am, however, concerned at how, under section 128 of the Bill, the receipt of a report of a special inspection is to be the first condition (along with the alternative of an abolition request) for Welsh Ministers making restructuring regulations. I realise this is not a simple trigger, as the fourth condition is that the Welsh Ministers must be satisfied that, unless they make restructuring regulations, effective and convenient local government is not likely to be achieved in the area. Nevertheless, with such a link to restructuring regulations, I think that there is a real danger of the arrangements compromising the Auditor General's independence and so undermining wider audit effectiveness and public trust and confidence in the management of public money.
11. This is particularly likely in a case where the Welsh Ministers request an inspection in relation to a council about which there has been speculation as to the possibility of restructuring. Having a received a request, the Auditor General may be put in an invidious position: be seen as the agent of Welsh Ministers in facilitating change against local opposition or side with local interests against the wishes of Welsh Ministers.
12. I also do not think that the conditions set out in section 128 are sufficient or helpful in providing a sound basis for deciding on restructuring regulations. Aside from special inspection reports (or abolition requests), there is only consultation, notice and the Welsh Ministers' judgement. Focus on these conditions seems likely to lead to neglect of consideration of broader relevant matters, such as the views of the population of the area.
13. With the inclusion of special inspections as a condition for making restructuring regulations, undertaking a special inspection may become a rather difficult process. There is the possibility of reduced co-operation and extensive challenge of the inspection process, which may extend to judicial review. This would cause the Wales Audit Office to incur significant costs.
14. I am also concerned that the fee provisions in section 100 of the Bill include a strict prohibition on fees exceeding the full cost of the activities to which they relate. This adds to the existing problems caused by the Public Audit (Wales) Act 2013 prohibiting fees from exceeding the full cost of each function at each body to which they relate. As the work of the Auditor General involves many different statutory functions—more than a dozen in the case of a single local government audit—this leads to a large administrative burden in terms of time recording and invoicing. The

Committee will be aware of the Finance Committee's separate consideration of the "no more than full cost" rule, which currently governs the charging of audit fees, and whether it should be replaced with a more practical requirement for fees and expenditure to broadly match over time in aggregate so as to reduce the complexity of fees and their administration.

Co-ordination between regulators

15. Having regard for the need for co-ordination is clearly desirable. However, the extensive requirements in section 118 of the Bill, particularly the requirement to produce timetables for each council for the exercise of functions, are over-prescriptive, largely impractical and unnecessary. For example, many inspections by CIW and Estyn are on short notice in order to be effective, and it is therefore not appropriate to explicitly timetable these. I already have a strategic agreement in place with CIW, Estyn and HIW in pursuit of cooperation and coordination through "Inspection Wales". This operates well at both a strategic and operational level, and I therefore view prescription of section 118 as unnecessary.
16. I am also concerned that section 118 may be outside the Assembly's legislative competence. This is because the section requires the Auditor General to have regard to the need for co-ordination in the exercise of functions, which amounts to a modification by way of an implied amendment to section 8(1) of the Public Audit (Wales) Act 2013. Section 8(1) of the 2013 Act says that the Auditor General has complete discretion in the exercise of his functions and is not subject to direction by the Welsh Ministers. Section 118 therefore seems to fall foul of the prohibition found in section 108(6)(a) and para 5 of Part 1 of Schedule 7B to GOWA 2006, which protects section 8(1) of the 2013 Act from amendment. I recognise that section 118 of the Bill is in part a restatement of section 23 of the 2009 Measure. However, the 2013 Act is subsequent to the 2009 Measure, so its provisions prevail—section 23 of the 2009 Measure was no longer valid following the commencement of the 2013 Act, so cannot be restated.

General power of competence

17. The provision for a local authority general power of competence is in principle, I think, appropriate. There has been confusion in both community councils and unitary authorities in Wales as to whether the general power of competence provided by the Localism Act 2010 applies. Welsh provision should help prevent such confusion in the future.
18. I do, however, think that expectations of the flexibility of the general power of competence should not be too high. It is not simply a power to do anything that individuals may do; it is subject to significant constraints, such as limitations on charges, pre-commencement power restrictions, pre- and post-commencement limitations, and the principles of public law. Authorities will need to spend expert time on checking limitations. That said, the general

power of competence does provide some additional freedom of action that can be useful in some circumstances.

19. I am, however, somewhat concerned that as community councils have limited affordable access to suitably qualified and expert advisers in public law there may be an increase in inappropriate projects undertaken by such councils. The committee may be aware that I have issued several public interest reports in 2019 regarding unlawful expenditure on projects.
20. I note that section 43 of the draft Bill requires community councils to have regard to guidance issued by Welsh Ministers in relation to the exercise of general power of competence. I think this is appropriate: such guidance will be very important, as many community councils are not familiar with the limits of competence set out in Chapter 1 of Part 2 of the Bill and by principles of public law.
21. In relation to the draft Bill's provision for the use of audit opinions in determining community council competence (section 37), I should note that while such opinions are of relevance to the abilities of bodies in terms of financial management and governance, audit work is not designed to provide assurance as to whether a council meets competency requirements. The audit provisions in section 17 of the Public Audit (Wales) Act 2004 do not require audits to address fitness for general competence.
22. If audit opinions are to be fully appropriate to determining whether a council has competence, it will be necessary to amend the scope of audit work. This will increase community council audit fees (or they will need to be funded by other means). Rather than making this a blanket requirement for all audits, it may be more cost-effective if provision were made to require community councils to obtain specific reports on fitness for competence. Such reports could be provided on an agreement basis under section 19 of the Public Audit (Wales) Act 2013.

Corporate Joint Committees

23. It seems to me that Corporate Joint Committees fall within the definition of joint committees set out in section 12 of the Public Audit (Wales) Act 2004. However, the Bill and the Explanatory Memorandum do not make this explicit. It would be helpful if this were clarified. In any event, and especially as they are to hold assets. Corporate Joint Committees will need to prepare accounts and be audited.
24. The Committee may want to note that I, and my predecessor, have frequently commented on the complexity of structures and governance in the public service landscape in Wales. I am not clear from the provisions of Part 5 of the Bill, or the explanatory memorandum, whether this will improve or worsen complexity. Careful consideration will need to be given through guidance and regulation to ensure that there is proper coherence, integration and efficiency in the exercise of these provisions.

25. The appropriateness of powers to make subordinate legislation, and the financial implications of the Bill
26. It not possible in the time available to provide properly considered comments on the appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation. Likewise, it is not possible in the time available to provide proper consideration of the financial implications of the Bill as set out in the Explanatory Memorandum. We will, however, endeavour to provide such comments by 3 January 2020.
27. Given the Public Accounts Committee's interest in issues such as community council competence and my comments on the proposed fee regime for special inspections, I am copying this letter to the Chairs of the PAC and Finance Committee.
28. My colleagues and I should be happy to support the Committee further, and I hope that this material is helpful to you.

Yours sincerely



Adrian Crompton
AUDITOR GENERAL FOR WALES

cc: Mr Llyr Gruffydd AM, Chair, Finance Committee
Mr Nick Ramsay AM, Chair Public Accounts Committee