Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
8 October 2012

Meeting time:
14:30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

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Agenda

1. Introduction, apologies, substitutions and declarations of interest

2. Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

None

Affirmative Resolution Instruments

None

3. Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA178 - The Bluetongue (Wales) (Amendment) Regulations 2012 (Pages 1 - 10)
Negative Procedure. Date made 15 September 2012. Date laid 19 September 2012. Coming into force date 10 October 2012

CLA179 – Radioactive Contaminated Land Statutory Guidance for Wales 2012
(Pages 11 – 87)
Negative Procedure. Date made not stated. Date laid 24 September 2012. Coming into force date not stated

Affirmative Resolution Instruments

None

4. Scrutiny of Legislative Competence: Implications of the Byelaws Bill

5. Public Audit Wales (Pages 88 – 199)

Papers:
CLA(4)-20-12(p1) – Public Audit (Wales) Bill
CLA(4)-20-12(p2) – Explanatory Memorandum
CLA(4)-20-12(p3) – Legal Advisers Report

6. Committee Correspondence

The Natural Resources Body for Wales (Functions) Order 2012 (Pages 200 – 201)
Paper:
CLA(4)-20-12(p4) – Letter from the Minister to the Chair of the Environment and Sustainability Committee

7. Date of next meeting

15 October 2012

Paper(s) to note
CLA(4)-19-12 – Report of the Meeting 24 September 2012

Constitutional and Legislative Affairs Committee

CLA(4)-20-12

CLA178

Constitutional and Legislative Affairs Committee Report

Title: The Bluetongue (Wales) (Amendment) Regulations 2012

Procedure: Negative

These regulations amend the Bluetongue (Wales) Regulations 2008 by transposing Directive 2012/5/EU (the Directive) as regards vaccination against bluetongue and will allow animal keepers to vaccinate their animals against bluetongue using inactivated vaccines.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument at the present time.

Article 1 of the Directive amends Directive 2000/75/EC (the 2000 Directive). Article 1(2) of the Directive, which amends Article 5 of the 2000 Directive, includes the following –

“2. Whenever live attenuated vaccines are used, Member States shall ensure that the competent authority demarcates:

(a) a protection zone, consisting of at least the vaccination area;

(b) a surveillance zone, consisting of a part of the Union territory with a depth of at least 50 kilometres extending beyond the limits of the protection zone.”

Article 1(4) of the Directive replaces Article 8(2)(b) of the 2000 Directive with the following –

"(b) The surveillance zone shall consist of a part of the Union territory with a depth of at least 50 kilometres extending beyond the limits of the protection zone and in which no vaccination against bluetongue with live attenuated vaccines has been carried out during the previous 12 months.";

The Regulations do amend the Bluetongue (Wales) Regulations 2008 in relation to surveillance zones, but no reference is made to the required depth of at least 50 kilometres.

The National Assembly is therefore invited to pay special attention to these Regulations because they inappropriately implement European Union legislation. [Standing Order 21.3(iv)]

Legal Advisers
Constitutional and Legislative Affairs committee

1 October 2012

The Government has responded as follows:

WELSH STATUTORY INSTRUMENTS

2012 No. 2403 (W. 257)

ANIMALS, WALES

ANIMAL HEALTH

The Bluetongue (Wales) (Amendment) Regulations 2012

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Bluetongue (Wales) Regulations 2008 (S.I. 2008/1090 (W.116)) ("the 2008 Regulations") by transposing Directive 2012/5/EU amending Council Directive 2000/75/EC as regards vaccination against bluetongue (OJ No L 81, 21.3.2012, p1).

Regulation 2(4) adds two new paragraphs to regulation 13 (restrictions in protection and surveillance zones) regarding requirements for surveillance zones.

Regulation 2(5) substitutes a new Part 3 (vaccination). Regulation 17 identifies the restrictions relating to obtaining vaccines. Regulation 18 provides a general prohibition on vaccination. Regulation 19 sets out the circumstances and conditions in which compulsory and voluntary vaccination against bluetongue can take place.

A regulatory impact assessment has not been produced for this instrument as no new impact on the private, voluntary or public sector is foreseen.

WELSH STATUTORY INSTRUMENTS

2012 No. 2403 (W. 257)

ANIMALS, WALES

ANIMAL HEALTH

The Bluetongue (Wales) (Amendment) Regulations 2012

Made	*15 September 2012*
Laid before the National Assembly for Wales	*19 September 2012*
Coming into force	*10 October 2012*

The Welsh Ministers are designated for the purposes of section 2(2) of the European Communities Act 1972(**1**) in relation to measures in the veterinary and phytosanitary fields for the protection of public health(**2**).

The Welsh Ministers make the following Regulations in exercise of the powers conferred on them by section 2(2) of the European Communities Act 1972.

Title, application and commencement

1.—(1) The title of these Regulations is the Bluetongue (Wales) (Amendment) Regulations 2012.

(2) These Regulations apply in relation to Wales.

(3) They come into force on 10 October 2012.

Amendment of the Bluetongue (Wales) Regulations 2008

2.—(1) The Bluetongue (Wales) Regulations 2008(**3**) are amended as follows.

(**1**) 1972 c.68. Section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1)(a), and the European Union (Amendment) Act 2008 (c.7), Part 1 of the Schedule.
(**2**) S.I. 2008/1792.
(**3**) S.I. 2008/1090 (W.116).

(2) In regulation 2 (interpretation) in the appropriate place in alphabetical order insert—

""inactivated vaccines" ("*brechlynnau anweithredol*") means vaccines that are not live attenuated vaccines;";

""live attenuated vaccines" ("*brechlynnau byw a wanhawyd*") means vaccines which are produced by adapting bluetongue virus field isolates through serial passages in tissue culture or in embryonated hens' eggs; ".

(3) For regulation 3 (exemptions) substitute—

"**3.** These Regulations do not apply to—

(a) anything a person is authorised to do by licence granted under the Specified Animal Pathogens (Wales) Order 2008(**1**);

(b) administration of a vaccine for research purposes in accordance with an animal test certificate granted under the Veterinary Medicines Regulations 2011(**2**)."

(4) In regulation 13 (restrictions in protection and surveillance zones), after paragraph (1) insert—

"(1A) A surveillance zone declared by the Welsh Ministers must not contain any land where animals have been vaccinated with live attenuated vaccines against bluetongue within the last 12 months.

(1B) No person may vaccinate against bluetongue using live attenuated vaccine in a surveillance zone declared under this regulation."

(5) For Part 3 (vaccination), substitute—

"PART 3

Vaccination

Obtaining vaccine

17. No person other than the holder of a marketing authorisation, a manufacturing authorisation or a wholesale dealer's authorisation granted by the Secretary of State under the Veterinary Medicines Regulations 2011 may obtain vaccine except for the purpose of enabling the use of vaccines under regulation 19.

(**1**) S.I. 2008/1270 (W.129), to which there are amendments not relevant to these Regulations.

(**2**) S.I. 2011/2159.

Prohibition on vaccination

18. No person may vaccinate an animal against bluetongue except in accordance with regulation 19.

Use of vaccines

19.—(1) The Welsh Ministers may grant a specific or general licence permitting the use of inactivated or live attenuated vaccines against bluetongue in accordance with this regulation.

(2) The Welsh Ministers may declare a vaccination zone in which any occupier of premises or keeper of animals must ensure the vaccination of their animals with inactivated or live attenuated vaccines and comply with any other measures related to either vaccination or vaccine specified in that declaration.

(3) Where a zone is declared under paragraph (2), a veterinary inspector may serve a notice on the occupier of premises or the keeper of animals on premises requiring that occupier or keeper to ensure the vaccination with inactivated or live attenuated vaccines of animals at the premises.

(4) The Welsh Ministers may only grant a licence under paragraph (1) or declare a zone under paragraph (2) if—

(a) the decision to use the vaccine is based on the result of a specific risk assessment carried out by the Welsh Ministers; and

(b) the EU Commission is informed of that decision before such vaccination is carried out.

(5) Whenever live attenuated vaccines are to be used, the Welsh Ministers must declare—

(a) a protection zone consisting of at least the vaccination area; and

(b) a surveillance zone extending beyond the limits of the protection zone in which no animals have been vaccinated with live attenuated vaccines against bluetongue within the last 12 months.

(6) No person may vaccinate against bluetongue using live attenuated vaccine in a surveillance zone declared under this regulation.
”

John Griffiths
Minister for Environment and Sustainable Development, one of the Welsh Ministers

15 September 2012

Explanatory Memorandum to The Bluetongue (Wales) (Amendment) Regulations 2012

1. This Explanatory Memorandum has been prepared by the Department for Environment and Sustainable Development and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

2. In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Bluetongue (Wales) (Amendment) Regulations 2012.

John Griffiths AM
Minister for Environment & Sustainable Development, one of the Welsh Ministers

15 September 2012

Description

3. The Bluetongue (Wales) (Amendment) Regulations 2012 amend the Bluetongue (Wales) Regulations 2008 (S.I. 2008/1090 (W.116)) ("the 2008 Regulations") to implement European legislation concerning vaccination against bluetongue. Bluetongue is an exotic (not normally found in Wales) notifiable animal disease affecting all ruminant animals including sheep, cattle, deer, goats and camelids.

4. On the basis of a Veterinary Risk Assessment carried out by the Welsh Ministers, these Regulations will allow animal keepers the option to vaccinate their animals against bluetongue using inactivated (killed) vaccines. The risk assessment will be published on the Welsh Government website with the legislation. Since the UK was declared disease-free on 5 July 2011, vaccination against bluetongue has been prohibited.

Matters of special interest to the Constitutional and Legislative Affairs Committee

5. Section 3 of this Memorandum explains that these Regulations are made in reliance on section 2(2) of the European Communities Act 1972. By virtue of section 59(3) of the Government of Wales Act 2006, the Welsh Ministers are to determine whether an instrument made in exercise of the section 2(2) powers is to be subject to the negative or affirmative procedure.

6. These Regulations do not amend an Assembly Act or Measure, or an Act of Parliament, nor do they create offences, impose civil penalties or involve government expenditure.

7. Accordingly, the Welsh Ministers have determined that these Regulations are to be subject to the negative resolution procedure.

Legislative background

8. These Regulations amend the Bluetongue (Wales) Regulations 2008 (S.I. 2008/1090 (W.116)) ("the 2008 Regulations") by transposing Directive 2012/5/EU amending Council Directive 2000/75/EC as regards vaccination against bluetongue.

9. The Welsh Ministers are able to make these Regulations by exercising the powers conferred on them by section 2(2) of the European Communities Act 1972. The Welsh Ministers are designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures in the veterinary and phytosanitary fields for the protection of public health.

10. The Regulations are made under negative resolution procedure.

Purpose & intended effect of the legislation

11. Member States are obliged to control and eradicate bluetongue virus. Council Directive 2000/75/EC requires measures to prevent the spread and eradication of the disease. The amendments to the 2000 Directive introduced by Directive 2012/5/EU enable Member States in disease-free areas to decide, following a risk assessment and notification to the Commission, to allow animal keepers to vaccinate their animals on a precautionary basis with approved vaccines. A Veterinary Risk Assessment has been carried out in Wales and recommends that vaccination with inactivated (killed) vaccines should be allowed.

12. The last outbreak of bluetongue in the UK occurred in 2007-2008, and the whole of the UK was declared disease-free on 5 July 2011. As we want to maintain this status, current policies and objectives are aimed primarily at reducing the risk of bluetongue outbreaks, and avoiding the consequential burden of animal movement controls and economic losses following export trade restrictions.

13. Amendment to the 2008 Regulations is required to transpose the Directive 2012/5/EU and thereby allow animal keepers in disease-free areas to vaccinate livestock with inactivated vaccines for the range of bluetongue virus serotypes. The Directive also sets out that where compulsory vaccination is required following an outbreak of the disease, or if live attenuated vaccine is used, then a protection zone and surrounding surveillance zone must be declared.

14. Directive 2012/5/EU is being implemented across the UK, however in Northern Ireland, vaccination will not be allowed. In England, the Bluetongue (Amendment) Regulations 2012 came into force on 24 August 2012. The Bluetongue (Scotland) Order 2012 will come into force on 24 September 2012.

15. These Regulations do not impose any requirements, but allow animal keepers and agricultural businesses the option to vaccinate animals against bluetongue. They will have to determine if the economic costs of vaccination are worthwhile.

Consultation

16. The Welsh Government consulted informally with stakeholders with an interest in bluetongue vaccination between 23 April and 4 May 2012. All respondents supported the proposal to allow vaccination.

6. Regulatory Impact Assessment (RIA)

17. No RIA has been prepared as these Regulations allow farmers the option to vaccinate animals against bluetongue but do not impose any requirements.

Constitutional and Legislative Affairs Committee Report

CLA(4)-20-12

CLA179

Radioactive Contaminated Land Statutory Guidance

1. "The Guidance is intended to explain how local authorities should implement the radioactive contaminated land regime, including how they should go about deciding whether land is "contaminated land" in the legal sense of the term"

2. On 24th September 2012, the Statutory Guidance was laid before the National Assembly together with a brief Explanatory Memorandum. Statutory guidance may (or may not) constitute subordinate legislation. The usual test is whether or not the guidance is legislative in character. The persons (including public bodies) to whom the guidance is directed are required to have regard to such guidance. In practice this means that they must have a very good reason for not following that guidance. The reason must be capable of justifying the course of action adopted in any judicial review procedure.

3. The procedure applicable to the guidance is legislative in character, and therefore it has been agreed that the Committee will consider the guidance.

Enabling Power

4. The Welsh Ministers have various powers to issue guidance under Part IIA of the Environmental Protection Act 1990. The Explanatory Memorandum states that the guidance is legally binding on local authorities and the Environment Agency.

Procedure

5. The procedure for approval is set out in Section 78YA as follows:-

Section 78YA

(1) Any power of the Minister for the Environment and Sustainable Development to issue guidance under this Part shall only be exercisable after consultation with the appropriate Agency and such other bodies or persons as he may consider it appropriate to consult in relation to the guidance in question.

(2) A draft of any guidance proposed to be issued under section 78A(2) or (5), 78B(2) or 78F(6) or (7) above shall be laid before the National Assembly for Wales and the guidance shall not be issued until after the period of 40 days beginning with the day on which the draft was so laid or, if the draft is laid on different days, the later of the two days.

(3) If, within the period mentioned in subsection (2) above, the National Assembly for Wales resolves that the guidance, the draft of which was laid before it, should not be issued, the Minister for the Environment and Sustainable Development shall not issue that guidance.

(4) In reckoning any period of 40 days for the purposes of subsection (2) or (3) above, no account shall be taken of any time during which the National Assembly for Wales is dissolved or prorogued or during which the National Assembly for Wales is adjourned for more than four days.

(5) The Minister for the Environment and Sustainable Development shall arrange for any guidance issued by him under this Part to be published in such a manner as he considers appropriate.

6. The guidance is subject to a variation on the negative procedure. As in negative procedure cases, the guidance can be made and come into force unless the Assembly resolves to the contrary within a specified period. However, in the case of statutory instruments made under a negative procedure, the instruments are normally made before they are laid. In this case, the guidance is laid in draft, and may not be made until the end of a specified period. The procedure therefore provides a greater measure of scrutiny than a standard negative procedure.

Scrutiny

7. The Committee has agreed to scrutinise guidance which is subject to an Assembly procedure. If the guidance is regarded as subordinate legislation not made by statutory instrument, the Constitutional and Legislative Affairs Committee may report on it under Standing Order 21.7 (i). Even if it is not so regarded, the Committee may still report on it as being a legislative matter of a general nature under Standing Order 21.7 (v).

Technical Scrutiny

8. If this had been a statutory instrument, the matter would have been drawn to the attention of the Assembly under Standing Order 21.2 (ix) – *that it is not made or to be made in Welsh*

9. The Minister for the Environment and Sustainable Development has discretion to publish the guidance in such a manner he considers appropriate. (Section 78YA (5)).

10. There appears to be a typographical error in paragraph 3 of the Explanatory Memorandum which states that *"This Statutory Guidance has been scored in accordance with the Welsh Government's Welsh*

*Language Scheme and **does** require translation due to the length, the technical nature and limited target audience of the document."*

Merits Scrutiny

11. No merits points are identified that would have been reported under Standing Order 21.3 if this had been a statutory instrument.

12. This matter is drawn to the attention of the Assembly under Standing Orders 21.7 because it raises legislative and procedural issues likely to be of interest to the Assembly.

Legal Advisers
Constitutional and Legislative Affairs Committee

October 2012

The Government has responded as follows:

Radioactive Contaminated Land Statutory Guidance – Draft 2012 version

Applicable National Assembly for Wales Procedure

This statutory guidance is issued in accordance section 78YA of the Environmental Protection Act 1990 (as it applies to harm attributable to radioactivity), which states:

Section 78YA

(1) Any power of the Minister for the Environment and Sustainable Development to issue guidance under this Part shall only be exercisable after consultation with the appropriate Agency and such other bodies or persons as he may consider it appropriate to consult in relation to the guidance in question.

(2) A draft of any guidance proposed to be issued under section 78A(2) or (5), 78B(2) or 78F(6) or (7) above shall be laid before the National Assembly for Wales and the guidance shall not be issued until after the period of 40 days beginning with the day on which the draft was so laid or, if the draft is laid on different days, the later of the two days.

(3) If, within the period mentioned in subsection (2) above, the National Assembly for Wales resolves that the guidance, the draft of which was laid before it, should not be issued, the Minister for the Environment and Sustainable Development shall not issue that guidance.

(4) In reckoning any period of 40 days for the purposes of subsection (2) or (3) above, no account shall be taken of any time during which the National Assembly for Wales is dissolved or prorogued or during which the National Assembly for Wales is adjourned for more than four days.

(5) The Minister for the Environment and Sustainable Development shall arrange for any guidance issued by him under this Part to be published in such a manner as he considers appropriate.

Radioactive Contaminated Land Statutory Guidance – Draft 2012 version

Contents

Introduction

1. This statutory guidance ("this Guidance") is issued by the Welsh Ministers in accordance with section 78YA of the Environmental Protection Act 1990 ("the 1990 Act") as it applies to harm attributable to radioactivity. It applies only to radioactive contamination of land and it applies only in Wales.

2. Section 57 of the Environment Act 1995 created Part 2A of the Environmental Protection Act 1990 which establishes a legal framework for dealing with non-radioactive contaminated land in Wales. Section 78YC gives powers to the Welsh Ministers applying the Part 2A regime, with any necessary modifications, for the purpose of dealing with harm attributable to radioactivity. These powers have been exercised in the Radioactive Contaminated Land (Enabling Powers) (Wales) Regulations 2005 and the Radioactive Contaminated Land (Modification of Enactments) (Wales) Regulations 2006[1] to establish a legal framework for dealing with radioactive contaminated land in Wales.

3. This Guidance is intended to explain how local authorities should implement the radioactive contaminated land regime, including how they should go about deciding whether land is "contaminated land" in the legal sense of the term. It also elaborates on the remediation provisions of Part 2A, such as the goals of remediation, and how the Environment Agency (as the enforcing authority for radioactive contaminated land in Wales up to April 2013). The Natural Resources Body for Wales shall become the enforcing authority for radioactive contaminated land upon the commencement of the Natural Resources Body for Wales (Functions) order 2012. The enforcing body should ensure that remediation requirements are reasonable. This Guidance also explains specific aspects of the Part 2A liability arrangements, and the process by which the Agency may recover the costs of remediation from liable parties in certain circumstances.

4. This Guidance is legally binding on local authorities and the Agency and relevant sections of Part 2A which form the basis of this Guidance are mentioned in specific sections of this Guidance below. This Guidance has been subject to National Assembly for Wales scrutiny under the negative resolution procedure, in accordance with section 78YA of the 1990 Act. The Agency have been consulted in relation to this Guidance, as required by section 78YA(1) of the 1990 Act[2], and the full public

[1] SI 2006/2988. These Regulations have been amended by the Radioactive Contaminated Land (Modification of Enactments) (Wales) (Amendment) Regulations 2007 (SI 2007/3250); the Radioactive Contaminated Land (Modification of Enactments) (Wales) (Amendment) Regulations 2008 (SI 2008/520 and the Radioactive Contaminated Land (Enabling Powers and Modification of Enactments) (Wales) (Amendment) Regulations 2010 (SI 2010/2146)

[2] The views of other relevant bodies in the land contamination sector have been taken into account through their consultation by the Department of Environment, Food and Rural Affairs and the Welsh Government in relation to the Statutory Guidance for non-radioactive contaminated land.

consultation on changes to the contaminated land regime held by the Department for Environment, Food and Rural Affairs ("Defra") between December 2010 and March 2011 covered the radioactive contaminated land regime. This Guidance should be read in accordance with Part 2A.

5. This Guidance replaces the previous statutory guidance as it applies to harm attributable to radioactivity which was published as Annex 3 of Defra Circular 01/2006, and was issued in accordance with section 78YA of the 1990 Act. As they relate to radioactive contaminated land, the previous statutory guidance and the Circular of which it was a part are obsolete from the date that this Guidance is issued.

6. Non-radioactive contamination of land is covered by separate statutory guidance issued by the Minister for the Environment and Sustainable Development. In the event that land is affected by both radioactive and non-radioactive contaminants, both sets of statutory guidance will apply, and local authorities and the Agency should decide what is a reasonable course of action having due regard for the primary relevant legislation and, in the case of local authorities, advice from the Agency.

Limits of the radioactive contaminated land regime

7. The radioactive contaminated land regime and therefore this Guidance only covers contamination which has resulted from the after-effects of a radiological emergency or a past practice or past work activity[3]. It does not apply to current practices and natural background radiation. In addition, the regime and therefore this Guidance does not apply in relation to land within a nuclear site or an MOD nuclear site or where remediation is to be undertaken by a local authority in implementation of an emergency plan under regulation 13(2) of the Radiation (Emergency Preparedness and Public Information) Regulations 2001[4].

Terminology

8. Most of the specific terms used in this Guidance are defined within the text. Some general aspects of terminology are:

   - "harm attributable to radioactivity" means harm so far as attributable to any radioactivity possessed by any substances (as referred to in section 78YC of the 1990 Act).
   - "Part 2A" means Part 2A of the 1990 Act as extended and modified for the purpose of dealing with harm attributable to radioactivity (as described in paragraph 2 above), unless otherwise stated. References to sections of the

[3] This limit arises by virtue of the definition of "substance" in section 78A(9) of the 1990 Act.

[4] (SI 2001/2975). These limits are laid down in section 78YB of the 1990 Act.

1990 Act are references to those sections as similarly extended and modified, unless otherwise stated.

- "radioactive contaminated land" is used to mean land which meets the definition of "contaminated land" in Part 2A. Other terms, such as "land affected by contaminants" "land affected by contamination" or "land contamination", are used to describe the much broader categories of land where radioactive contaminants are present but usually not at a sufficient level of risk to qualify as radioactive contaminated land.
- "the 1990 Act" means the Environmental Protection Act 1990 as amended.
- "the radioactive contaminated land regime" is used to mean the regime established by Part 2A.
- The terms "contaminant", "pollutant" and "substance" as used in this Guidance have the same meaning – i.e. they all mean a substance relevant to the Part 2A regime which is in, on or under the land and which has the potential to cause harm to a receptor. This Guidance mainly uses the term "contaminant" and associated terms such as "contaminant linkage". However, it recognises that some non-statutory technical guidance relevant to land contamination uses alternative terms such as "pollutant", "substance" and associated terms in effect mean the same thing. Further, as explained in Section 3, in this Guidance the terms "contaminant", "pollutant" and "substance" cover only substances containing radionuclides which have resulted from the after-effects of a radiological emergency or have been processed as part of a past practice or past work activity[5]. Associated terms such as "contaminant linkage" are similarly limited. Where the intention is to refer to non-radioactive contaminants and associated terms, this is expressly stated.
- The term "Basic Safety Standards Directive" means the Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation.
- "unacceptable risk" means a risk of such a nature that it would give grounds for land to be considered radioactive contaminated land under Part 2A.

9. Some terms have specific technical meanings in the context of radiological protection which are not necessarily the same as the ordinary meaning that can be found in the Oxford English Dictionary. Examples are 'intervention' and 'practice'. Definitions of these terms, as understood and employed by the radiological protection community (and appearing in legislation) can be found in the Glossary at the end of this Guidance.

[5] Section 78A(9) of the 1990 Act.

Section 1: Objectives of the Part 2A Regime

1.1 This Guidance should be read and applied with Part 2A and the following points in mind.

1.2 Historical contamination of land by radionuclides from anthropogenic activity has in many cases occurred due to a lack of understanding of the hazards posed by radioactive materials at the time. Radioactive substances have been used for a wide variety of purposes since the start of the twentieth century, but most have only been subject to regulation since 1963, the year in which the 1960 Radioactive Substances Act came into force. Industrial activities have involved the use of materials containing radioactivity in a variety of different contexts: (a) where radioactive materials have been employed for their radioactive properties (for example, luminising works); (b) where radioactive properties are incidental in materials that are used for their non-radioactive properties (for example, gas mantle production); and (c) where radioactive materials have been inadvertently handled, or escaped accidentally (for example, lead mining).

1.3 Little information is available on the scale of radioactive contamination outside of nuclear sites. What information is available is subject to large uncertainties. A study undertaken on behalf of Defra, the Agency and the Welsh Assembly Government indicated that the likely number of sites in England and Wales where activities took place capable of giving rise to radioactive contamination, if a contaminant linkage was in place, was in the range 100 – 1000 and most likely to be in the range 150 – 250.[6]

1.4 The objectives of the radioactive contaminated land regime under Part 2A are broadly the same as those of the non-radioactive contaminated land regime, namely to provide a system for the identification and remediation of land where contamination is causing unacceptable risks. However, while the non-radioactive contaminated land regime deals with the unacceptable risks posed by land contamination to human health and the environment, the radioactive contaminated land regime only takes into account unacceptable risks to human health. In addition, the radioactive contaminated land regime implements a part of the Basic Safety Standards Directive.

[6] Environment Agency "Indicators for Land Contamination" – Science report SC030039/SR Appendix A. 2005

1.5 Under Part 2A the starting point should be that land is not radioactive contaminated land unless there is reason to consider otherwise. Only land where unacceptable risks are clearly identified, after a risk assessment has been undertaken in accordance with this Guidance, should be considered as meeting the Part 2A definition of "contaminated land".

1.6 The overarching objectives of the Government's policy on radioactive contaminated land and the Part 2A regime are:

(a) To identify and remove unacceptable risks to human health.
(b) To seek to ensure that radioactive contaminated land is made suitable for its current use.
(c) To ensure that the burdens faced by individuals, companies and society as a whole are proportionate, manageable and compatible with the principles of sustainable development.
(d) To implement Articles 48 and 53 of the Basic Safety Standards Directive which impose certain requirements when dealing with land affected by radioactive contaminants as a result of the after-effects of a radiological emergency or a past practice or past work activity.

1.7 Local authorities and the Agency should seek to use Part 2A only where no alternative solution exists. The Part 2A regime is one of several ways in which land contamination can be addressed. For example, land contamination can be addressed when land is developed (or redeveloped) under the planning system, during the building control process, or where action is taken independently by landowners. Other legislative regimes may provide a means of dealing with land contamination issues, such as building regulations and environmental permitting.

1.8 Under Part 2A, local authorities and the Agency may need to decide whether and how to act in situations where such decisions are not straightforward, and where there may be unavoidable uncertainty underlying some of the facts of each case. In so doing, the local authorities and the Agency should use their judgement to strike a reasonable balance between: (a) dealing with risks raised by radioactive contaminants in land and the benefits of remediating land to remove or reduce those risks; and (b) the potential impacts of taking action including financial costs to whoever will pay for remediation (including the taxpayer where relevant), health and environmental impacts of intervention, property blight, and burdens on affected people. Local authorities and the Agency should take a precautionary approach to the risks raised by radioactive contamination, whilst avoiding a disproportionate approach given the circumstances of each case. The aim should be to consider the various benefits and costs of taking action with a view to ensuring that the regime produces net benefits[7], taking account of local circumstances.

[7] In the case of "interventions" as defined in the Basic Safety Standards Directive, the obligation is to maximise the net benefit (see paragraph 6 below).

Section 2: Local authority inspection duties

2.1 Part 2A requires that local authorities cause their areas to be inspected with a view to identifying radioactive contaminated land, and to do this in accordance with this Guidance. Relevant sections of the 1990 Act include:

(a) Section 78B(1): Where a local authority considers that there are reasonable grounds for believing that any land may be contaminated, it shall cause the land to be inspected for the purpose of - (a) identifying whether it is contaminated land; and (b) enabling the authority to decide whether the land is land which is required to be designated as a special site.

(b) Section 78B(1A): The fact that substances have been or are present on the land shall not of itself be taken to be reasonable grounds for the purposes of subsection (1).

(c) Section 78B(2): In performing [these] functions a local authority shall act in accordance with any guidance issued for the purpose by the Minister for the Environment and Sustainable Development.

Reasonable grounds approach to inspection

2.2 The trigger for a local authority to cause land to be inspected is where it considers that there are *reasonable grounds* for believing that land may be radioactive contaminated land. This is a more limited inspection duty than that which applies under the non-radioactive contaminated land regime. A local authority will have such reasonable grounds where it has knowledge of relevant information relating to (a) a former historical land use, past practice, past work activity or radiological emergency, capable of causing lasting exposure giving rise to the radiation doses set out in paragraph 4.4 below; or (b) levels of contamination present on the land arising from a past practice, past work activity or radiological emergency, capable of causing lasting exposure giving rise to the radiation doses set out in paragraph 4.4 below.

2.3 The “relevant information” referred to above means information that is appropriate and authoritative and may, for example, include information held by the local authority, including information already gathered as part of its strategic approach to Part 2A as it applies to non-radioactive contamination or as part of the town and country planning process; or information received from a regulatory body such as the Agency or the Health and Safety Executive.

Detailed Inspection of particular areas of land

2.4 If the local authority considers that there are reasonable grounds for believing land may be radioactive contaminated land it should inspect the land to obtain sufficient

information to decide whether it is radioactive contaminated land, having regard to section 3 of this Guidance.

2.5 The local authority should consult the landowner before inspecting the land unless there is a particular reason why this is not possible, for example because it has not been possible to identify or locate the landowner. Where the owner refuses access, or the landowner cannot be found, the authority should consider using statutory powers of entry.

2.6 If the local authority intends to carry out an inspection using statutory powers of entry under section 108 of the Environment Act 1995 (as modified by the Radioactive Contaminated Land (Modification of Enactments) (Wales) Regulations 2006) it should first be satisfied that there is a reasonable possibility that a significant contaminant linkage may exist on the land. The authority should not use statutory powers of entry to undertake intrusive investigations, including the taking of sub-surface samples, if:

(a) It has already been provided with appropriate, detailed information on the condition of the land (e.g. by the Agency or some other person such as the owner of the land) which provides sufficient information for the authority to decide whether or not the land is radioactive contaminated land; or

(b) a relevant person (e.g. the owner of the land, or a person who may be liable for the contamination) offers to provide such information within a reasonable and specified time, and then provides such information within that time.

2.7 The local authority should carry out any intrusive investigation in accordance with appropriate good practice technical procedures for such investigation.

2.8 If at any stage the local authority considers, on the basis of information obtained from inspection activities, that there is no longer a reasonable possibility that a significant contaminant linkage exists on the land, the authority should not carry out any further inspection in relation to that linkage.

2.9 If land is radioactive contaminated land it will fall within the definition of a special site prescribed in regulation 2 of the Contaminated Land (Wales) Regulations 2006 and the Agency will be the enforcing authority in respect of that land. Therefore, if the local authority considers that there are reasonable grounds for believing land may be radioactive contaminated land on the basis set out in paragraph 2.2, it should consult the Agency, and, subject to the Agency's advice and agreement, the local authority should arrange for the Agency to carry out any intrusive inspection of the land on behalf of the local authority. If the Agency is to carry out such an inspection, the local authority should where necessary authorise a person nominated by the Agency to exercise the powers of entry conferred by section 108 of the Environment Act 1995 as modified.

2.10 Where the Agency carries out an inspection on behalf of a local authority, the authority's regulatory functions under section 78B and 78C of the 1990 Act (including the inspection duty and the decision as to whether land is radioactive contaminated land) and the need to comply with the related provisions of this Guidance remain the sole responsibility of the local authority. The Agency should advise the local authority of its findings in order to enable the authority to carry out these functions. The Agency should carry out any intrusive investigations in accordance with appropriate good practice technical procedures for such investigations.

Section 3: Risk assessment

3.1 Part 2A takes a risk based approach to defining radioactive contaminated land. For the purposes of this Guidance “risk” means the combination of: (a) the likelihood that harm will occur as a result of contaminants in, on or under the land; and (b) the scale and seriousness of such harm if it did occur.

3.2 As land which is radioactive contaminated land would qualify as a special site for which the Agency would be the enforcing authority, the local authority should consult the Agency about the risk assessment and, subject to the Agency’s advice and agreement, should arrange for the Agency to carry out the risk assessment on its behalf. However, as already stated in paragraph 2.10 where the Agency acts on behalf of a local authority, the authority’s regulatory functions under sections 78B and 78C of the 1990 Act and compliance with the related provisions of this Guidance remain the sole responsibility of the local authority.

3.3 Local authorities and the Agency should have regard to good practice guidance on risk assessment and they should ensure they undertake risk assessment in a way which delivers the results needed to make robust decisions in line Part 2A and this Guidance.

3.4 Risk assessments should be based on information which is: (a) scientifically-based; (b) authoritative; (c) relevant to the assessment of risks arising from the presence of contaminants in soil; and (d) appropriate to inform regulatory decisions in accordance with Part 2A and this Guidance.

Current use

3.5 Under Part 2A, risks should be considered only in relation to the current use of the land. For the purposes of this Guidance, the "current use" means:

(a) The use which is currently being made of the land.

(b) Reasonably likely future uses of the land that would not require a new or amended grant of planning permission.

(c) Any temporary use to which the land is put, or is likely to be put, from time to time within the bounds of current planning permission.

(d) Likely informal use of the land, for example children playing on the land, whether authorised by the owners or occupiers or not.

(e) In the case of agricultural land, the current agricultural use should not be taken to extend beyond the growing or rearing of the crops or animals which are habitually grown or reared on the land.

3.6 In assessing risks the local authority should disregard receptors which are not likely to be present given the current use of the land or other land which might be affected. In considering the timescale over which a risk should be assessed the authority should take into account any evidence that the current use of the land will cease in the relevant foreseeable future (e.g. within the period of exposure assumed for the receptors in a contaminant linkage).

3.7 When considering risks in relation to any future use or development which falls within the description of a "current use", the local authority should assume that the future use or development would be carried out in accordance with any existing planning permission. In particular, the local authority should assume:

(a) That any remediation which is the subject of a condition attached to that planning permission, or is the subject of any planning obligation, will be carried out in accordance with that permission or obligation.

(b) Where a planning permission has been given subject to conditions which require steps to be taken to prevent problems which might be caused by contamination, and those steps are to be approved by the local planning authority, that the local planning authority will ensure that those steps include adequate remediation.

Contaminant linkages

3.8 Under Part 2A, for a relevant risk to exist there needs to be one or more contaminant-pathway-receptor linkage(s) - “contaminant linkage” by which a receptor might be affected by the contaminants in question. In other words, for a risk to exist there must be contaminants present in, on or under the ground in a form and quantity that poses a hazard, and one or more pathways by which they might harm people. For the purposes of this Guidance:

(a) A “contaminant” is a substance which is in, on or under the land and which has the potential to cause harm to a receptor. Further, in this Guidance a “contaminant” is limited to any substance containing radionuclides which have resulted from the after-effects of a radiological emergency or have been processed as part of a past practice or past work activity. This reflects the limitation in the definition of “substance” in the radioactive contaminated land regime[8]. Where the intention is to refer to non-radioactive contaminants or substances, this is expressly stated.

[8] See the definition of “substance” in section 78A of the 1990 Act set out at paragraph 4.2 below. This definition was amended by the Radioactive Contaminated Land (Enabling Powers and Modification of Enactments) (Wales) (Amendment) Regulations 2010. The effect of the amendment was to remove the previous exclusion of radon gas and certain radionuclides form the definition of “substance”. However, even though the exclusion has been removed, these substances are only covered to the extent that they have resulted from the after-effects of a

(b) A “receptor” is something that could be adversely affected by a contaminant. Under the radioactive contaminated land regime this is limited to human beings only.

(c) A “pathway” is a means by which a receptor is or might be affected by a contaminant.

3.9 The term “contaminant linkage” means the relationship between a contaminant, a pathway and a receptor. All three elements of a contaminant linkage must exist in relation to particular land before the land can be considered potentially to be radioactive contaminated land under Part 2A, including evidence of the actual presence of contaminants. The term “significant contaminant linkage”, as used in this Guidance, means a contaminant linkage which gives rise to a level of risk sufficient to justify a piece of land being determined as radioactive contaminated land. The term “significant contaminant” means the contaminant which forms part of a significant contaminant linkage.

3.10 In considering contaminant linkages, the local authority should consider whether:

(a) The existence of several different potential pathways linking one or more potential contaminants to a particular receptor may result in a significant contaminant linkage.

(b) There is more than one significant contaminant linkage on any land. If there are, the authority should consider whether each should be dealt with separately, since different people may be responsible for the remediation of individual contaminant linkages.

The process of risk assessment

3.11 The process of risk assessment involves understanding the risks presented by land, and the associated uncertainties. In practice, this understanding is usually developed and communicated in the form of a “conceptual model”. The understanding of the risks is developed through a staged approach to risk assessment, often involving a preliminary risk assessment informed by desk-based study; a site visit and walkover; a generic quantitative risk assessment; and various stages of more detailed quantitative risk assessment. The process should normally continue until it is possible for the local authority to decide: (a) that there is insufficient evidence that the land might be radioactive contaminated land to justify further inspection and assessment; and/or (b) whether or not the land is radioactive contaminated land.

3.12 As a general rule, inspections should be conducted as quickly, and with as little disruption, as reasonably possible whilst ensuring that a sufficiently robust assessment

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radiological emergency or have been processed as part of a past practice or work activity – naturally occurring substances (such as naturally occurring radon) are not covered.

is carried out. The local authority should seek to avoid or minimise the impacts of long inspections on affected persons, in particular significant disruption and stress to directly affected members of the public in the case of inspections involving residential land.

3.13 In undertaking risk assessments, local authorities should ensure that the time and resource put into assessment is sufficient to provide a robust basis for regulatory decisions. In some cases, there may be a need for detailed and lengthy assessments, particularly in complex cases where regulatory decisions are not straightforward. However, in other cases a less detailed and shorter assessment may be appropriate. For example, if it becomes evident early in risk assessment that there is clearly a high or low risk (to the extent that the decision on whether or not land is radioactive contaminated land is straightforward) the authority should normally take the decision on the basis of this evidence alone.

Recognising and dealing with uncertainty

3.14 All risk assessments of potentially contaminated land sites will involve uncertainty, for example due to scientific uncertainty over the effects of substances, and the assumptions that lie behind predicting what might happen in the future. When building an understanding of the risks relating to land, the local authority should recognise that uncertainty exists. The authority should seek to minimise uncertainty as far as it considers to be relevant, reasonable and practical; and it should recognise remaining uncertainty, which is likely to exist in almost all cases. It should be aware of the assumptions and estimates that underlie the risk assessment, and the effect of these on its conclusions.

3.15 The uncertainty underlying risk assessments means there is unlikely to be any single "correct" conclusion on precisely what is the level of risk posed by the land, and it is possible that different suitably qualified people could come to different conclusions when presented with the same information. It is for the local authority to use its judgement to form a reasonable view of what it considers the risks to be on the basis of a robust assessment of available evidence in line with this Guidance.

Risk summaries

3.16 Once the local authority has completed its detailed inspection and assessment of particular land it should be satisfied it has sufficient understanding of the risks to take relevant regulatory decisions.

3.17 The local authority should produce a risk summary for any land where, on the basis of the risk assessment, the authority considers it is likely that the land in question may be determined as radioactive contaminated land. The risk summary should explain the local authority's understanding of the risks and other factors the authority considers to be relevant. The authority should seek to ensure that the risk summary is

understandable to the layperson, including the owners of the land and members of the public who may be affected by the decision. The authority should not proceed to formal determination of land as radioactive contaminated land unless a risk summary has been prepared.

3.18 Risk summaries should as a minimum include:

(a) A summary of the local authority's understanding of the risks, including a description of: the contaminants involved; the identified contaminant linkage(s), or a summary of such linkages; the potential impact(s); the estimated possibility that the impact(s) may occur; and the timescale over which the risk may become manifest.
(b) A description of the local authority's understanding of the uncertainties behind the assessment.
(c) A description of the possible remediation. This need not be a detailed appraisal, but it should include a description of broadly what remediation might entail; how long it might take; likely effects of remediation works on local people and businesses; how much difference it might be expected to make to the risks posed by the land; and the authority's initial assessment of whether remediation would be likely to produce a net benefit, having regard to the broad objectives of the regime set out in Section 1. The authority should seek the views of the Agency, and take any views provided into account, in producing this description.

3.19 Local authorities are not required to produce risk summaries:
(a) For land which will not be determined as radioactive contaminated land. In such cases the authority should have regard to paragraph 5.2 of this Guidance.
(b) For land determined as radioactive contaminated land before this Guidance came into force.

Section 4: The definition of radioactive contaminated land

4.1 Part 2A of the 1990 Act defines "contaminated land" (referred to as radioactive contaminated land in this Guidance), and provides for the Welsh Ministers to issue guidance (i.e. this Guidance) on how local authorities should determine which land is radioactive contaminated land and which is not.

4.2 Relevant sections of the Act include:

- Section 78A(2): "contaminated land" is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land that – (a) harm is being caused or (b) there is a significant possibility of harm being caused.
- Section 78A(4): "harm" means lasting exposure to any person resulting from the after-effects of a radiological emergency, past practice or past work activity.
- Section 78A(5): the questions – (a) whether harm is being caused, and (b) whether the possibility of harm being caused is "significant", shall be determined in accordance with guidance issued for the purpose by the Minister for Environment and Sustainable Development in accordance with section 78YA below.
- Section 78A(6): without prejudice to the guidance that may be issued under subsection (5) above, guidance under paragraph (a) of that subsection may make provision for different degrees and descriptions of harm; and guidance under paragraph (b) of that subsection may make provision for different degrees of possibility to be regarded as "significant" (or as not being "significant") in relation to different descriptions of harm.
- Section 78A(9): "substance" means, whether in solid or liquid form or in the form of a gas vapour, any substance containing radionuclides which have resulted from the after-effects of a radiological emergency or have been processed as part of a past practice or past work activity.

Section 4a: Harm

4.3 This section of the Guidance sets out the basis on which a local authority should determine that harm is being caused and therefore the land is radioactive contaminated land. In particular, it sets out the dose criteria that should be used to determine whether harm is being caused. In assessing harm, the local authority should act in accordance with the advice on risk assessment in section 3 and the guidance in this section.

4.4 The local authority should regard harm as being caused where lasting exposure gives rise to doses that exceed one or more of the following: (a) an effective dose of 3 millisieverts per annum; (b) an equivalent dose to the lens of the eye of 15 millisieverts per annum; or (c) an equivalent dose to the skin of 50 millisieverts per annum. The skin limit shall apply to the dose averaged over any area of $1cm^2$, regardless of the area exposed.

4.5 The estimation of an effective dose and an equivalent dose should be undertaken in accordance with Articles 15 and 16 of the Basic Safety Standards Directive. The estimation of an effective or equivalent annual dose should not include the local background level of radiation from the natural environment.

4.6 The local authority should determine that land is radioactive contaminated land on the basis that such harm is being caused where: (a) it has carried out a scientific and technical assessment of the dose arising from the pollutant linkage, according to relevant, appropriate, authoritative and scientifically based guidance on such assessments, having regard to any advice provided by the Agency; (b) that assessment shows that such harm is being caused; and (c) there are no suitable and sufficient risk management arrangements currently in place to prevent such harm.

4.7 In following guidance on the assessment of dose, the local authority should be satisfied that it is relevant to the circumstances of the contaminant linkage and land in question, and that any appropriate allowances have been made for particular circumstances.

4.8 To simplify such an assessment of dose, the local authority may use authoritative and scientifically based guideline values for concentrations of the potential contaminants in, on or under the land in contaminant linkages of the type concerned. If it does so, the local authority should be satisfied that: (a) an adequate scientific and technical assessment of the information on the potential contaminant, using the appropriate, authoritative and scientifically based guideline values, shows that harm is being caused; and (b) there are no suitable and sufficient risk management arrangements currently in place to prevent such harm.

4.9 In using any guideline values, the local authority should be satisfied that: (a) the guideline values are relevant to the judgement of whether the effects of the contaminant linkage in question constitute harm; (b) the assumptions underlying the derivation of any numerical values in the guideline values (e.g. assumptions regarding soil conditions, the behaviour of contaminants, the existence of pathways, the land-use patterns and the presence of human beings) are relevant to the circumstances of the contaminant linkage in question; (c) any other conditions relevant to the use of the guideline values have been observed (e.g. the number of samples taken or the methods of preparation and analysis of those samples or radiation surveys); (d) appropriate adjustments have been made to allow for the differences between the

circumstances of the land in question and any assumptions or other factors relating to the guideline values; and (e) the basis of derivation of the guideline values has taken into account the requirements to comply with the Basic Safety Standards Directive in paragraph 4.5 above.

4.10 The local authority should be prepared to reconsider any determination based on the use of guideline values if it is demonstrated to the authority's satisfaction that under some other more appropriate method of assessing the risks the local authority would not have determined that the land appeared to be radioactive contaminated land.

Section 4b: Significant possibility of harm

4.11 In assessing the significant possibility of harm, the local authority should act in accordance with the advice on risk assessment in section 3 and the guidance in this section.

4.12 This section of the Guidance sets out the basis on which a local authority should determine that there is a significant possibility of harm being caused and therefore the land is radioactive contaminated land. In particular, it sets out the degree of possibility of the harm being caused which will amount to a significant possibility.

4.13 In deciding whether or not a significant possibility of harm exists, the local authority should first understand the possibility of harm and the levels of certainty/uncertainty attached to that understanding before it goes on to decide whether or not the possibility of harm is significant.

4.14 The term "possibility of harm" should be taken as referring to a measure of the probability, or frequency, of the occurrence of circumstances which would lead to lasting exposure being caused where (a) the potential annual effective dose is below or equal to 50 millisieverts per annum; and (b) the potential annual equivalent dose to the lens of the eye and to the skin are below or equal to 15 millisieverts and 50 millisieverts respectively, the local authority should regard the possibility of harm as significant if, having regard to any uncertainties, the potential annual effective dose from any lasting exposure multiplied by the probability of the dose being received is greater than 3 millisieverts. References to "potential annual effective dose" and "potential annual equivalent dose", refer to doses that are not certain to occur.

4.15 Where the conditions in paragraph 4.4 are not met, the local authority should consider whether the possibility of harm being caused is significant on a case by case basis. In deciding whether the possibility of harm being caused is significant, the local authority should take into account relevant information concerning: (a) the potential annual effective dose; (b) any non-linearity in the dose-effect relationship for stochastic effects; (c) the potential annual equivalent dose to the skin and to the lens of the eye; (d) the nature and degree of any deterministic effects associated with the potential

annual dose; (e) the probability of the dose being received; (f) the duration of the exposure and timescale within which the harm might occur; and (g) any uncertainties associated with (a) to (f) above. "Relevant information" means information which is appropriate, scientifically-based and authoritative.

4.16 The local authority should consider that conditions for determining that land is radioactive contaminated land on the basis that a significant possibility of harm would exist where: (a) the local authority has carried out an appropriate, scientific and technical assessment of the potential dose arising from the contaminant linkage, having regard to any advice provided by the Agency, and taking into account the requirements of paragraph 4.5; (b) that assessment shows that there is a significant possibility of such harm being caused; and (c) there are no suitable and sufficient risk management arrangements currently in place to prevent such harm.

4.17 In following guidance on assessment of the potential dose, the local authority should be satisfied that it is relevant to the circumstances of the contaminant linkage and land in question, and that any appropriate allowances have been made for particular circumstances.

Section 5: Determination of radioactive contaminated land

5.1 Section 78A(2) of the 1990 Act says that in determining whether any land appears to be contaminated land, a local authority shall, *"...act in accordance with guidance issued by the Secretary of State...with respect to the manner in which that determination is to be made."* This section provides such Guidance.

Deciding that land is not radioactive contaminated land

5.2 In implementing the Part 2A regime, the local authority may inspect land that it then considers is not radioactive contaminated land. In such cases, the authority should issue a written statement to that effect (rather than coming to no formal conclusion) to minimise unwarranted blight. The statement should make clear that on the basis of its assessment, the local authority has concluded that the land does not meet the definition of "contaminated land" under Part 2A. The local authority may choose to qualify its statement (e.g. given that its Part 2A risk assessment may only be relevant to the current use of the land).

5.3 The local authority should keep a record of its reasons for deciding that land is not radioactive contaminated land. The authority should inform the owners of the land of its conclusion and give them a copy of the written statement referred to in paragraph 5.2. The local authority should also consider informing other interested parties (for example occupiers of the land and owners and occupiers of neighbouring land) and whether to publish the statement. The statement should be issued within a timescale that the authority considers to be reasonable, having regard to the need to minimise unwarranted burdens to persons likely to be directly affected, in particular the landowner, and occupiers or users of the land where relevant.

Determining that land is radioactive contaminated land

5.4 The local authority has the sole responsibility for determining whether any land appears to be radioactive contaminated land. It cannot delegate this responsibility (except in accordance with section 101 of the Local Government Act 1972). However, in making such decisions the authority may rely on information or advice provided by another body such as the Agency, or a suitably qualified experienced practitioner appointed for that purpose. This applies even where the Agency has carried out the inspection of land on behalf of the local authority.

5.5 There are two possible grounds for the determination of land as radioactive contaminated land :

(a) Harm is being caused to a human being.

(b) There is a significant possibility of harm being caused to a human being.

5.6 Before making any determination, the local authority should have identified one or more significant contaminant linkage(s), and carried out a robust, appropriate, scientific and technical assessment of all the relevant and available evidence. If the authority considers that conditions for considering land to be radioactive contaminated land do not exist it should not decide that the land is radioactive contaminated land.

5.7 If land is determined to be radioactive contaminated land, it would qualify as a "special site" under the Contaminated Land (Wales) Regulations 2006, for which the Agency would be the enforcing authority. Therefore the local authority should consult the Agency before deciding whether or not to determine the land, providing the Agency with a draft of the record of the determination that the authority is required to prepare in accordance with paragraphs 5.16 – 5.18 below. The local authority should take the Agency's views into full consideration and it should strive to ensure it has the Agency's agreement to its decision (although the decision is for the local authority to make subject to the provisions of Part 2A and this Guidance).

Physical extent of land to be determined

5.8 It is for the local authority to decide the physical extent of land that should be determined. The authority should strive to ensure that there are grounds to consider that all the land in question can reasonably be considered to be radioactive contaminated land. In practice, often it is likely that contamination will not be uniformly spread across a site, and it may not be clear precisely where the boundaries of the contamination lie. In such cases the authority should use its judgement on the extent of land it might reasonably consider to be radioactive contaminated land.

5.9 The local authority should review its decision on the physical extent of the land to be determined (or that has been determined) if at a later date it becomes aware of relevant further information. For example, this may be the case if, during remediation, it becomes clear that the extent of contamination is significantly greater or less than was thought when the determination was made.

Sub-division of land for the purposes of determination

5.10 The local authority may sub-divide the relevant land for the purposes of determination by issuing separate determinations for smaller areas of land which form part of a larger area of radioactive contaminated land. In deciding whether (and if so how) to do this, the authority should take into account: (i) the nature of the contamination; (ii) the degree of risk posed, and whether the degree of risk varies across the land; (iii) the nature of the remediation which might be required; (iv) the ownership of the land; (v) the likely identity of those who may bear responsibility for the remediation and (vi) the

views of the Agency concerning the desirability of a separate determination of part of the land.

Making determinations in urgent cases

5.11 If the local authority considers there is an urgent need to determine particular land, it should make the determination in a timescale it considers appropriate to the urgency of the situation.

Informing interested parties

5.12 Before making a determination, the local authority should inform the owners and occupiers of the land and any other person who appears to the authority to be liable to pay for remediation of its intention to determine the land (to the extent that the authority is aware of these parties at the time) unless the authority considers there is an overriding reason for not doing so. The authority should also consider:

(a) Whether to give such persons time to make representations (for example to seek clarification of the grounds for determination, or to propose a solution that might avoid the need for formal determination) taking into account: the broad aims of regime; the urgency of the situation; any need to avoid unwarranted delay; and any other factor the authority considers to be appropriate.

(b) Whether to inform other interested parties as it considers necessary, for example owners and occupiers of neighbouring land.

5.13 If the local authority determines land as radioactive contaminated land, it shall give notice of that fact to (a) the Agency; (b) the owner of the land; (c) any person who appears to the authority to be in occupation of the whole or any part of the land; and (d) each person who appears to the authority to be an appropriate person; in accordance with section 78B(3) of Part 2A. In respect of point (d) this Guidance recognises that in some cases the authority may not have identified the appropriate person(s) at the time the determination is made, in which case the requirement to give notice to such persons would not apply.

Postponing determination

5.14 The local authority may postpone determination of radioactive contaminated land if the land owner or some other person undertakes to deal with the problem without determination, and the local authority is satisfied in consultation with the Agency that the remediation will happen to an appropriate standard and timescale. If the local authority chooses to do this, any agreement it enters into should not affect its ability to determine the land in future (e.g. if the person fails to carry out the remediation as agreed).

5.15 The local authority may postpone determination of radioactive contaminated land if a significant contaminant linkage would only exist if the circumstances of the land were to change in the future within the bounds of the current use of the land as described in paragraph 3.6 of this Guidance (e.g. if a temporarily interrupted pathway were to be reactivated). If the authority chooses to do this, it should keep the status of the land under review and take reasonable measures to ensure that the postponement does not create conditions under which significant risks could go unaddressed in future. Alternatively, the authority may decide to determine the land but postpone remediation.

Record of the determination of radioactive contaminated land

5.16 The local authority should prepare a written record of any determination that land is radioactive contaminated land. The record should clearly and accurately identify the location, boundaries and area of the land in question, making appropriate reference to Ordnance Survey grid references and/or Global Positioning coordinates. The record should be made publicly available by means to be decided by the authority.

5.17 The record should explain why the determination has been made, including:

(a) The risk summary required by section 3 of this Guidance, and where not already covered in the risk summary: (i) a relevant conceptual model comprising text, plans, cross sections, photographs and tables as necessary in the interests of making the description understandable to the layperson; and (ii) a summary of the relevant assessment of this evidence.
(b) A summary of why the local authority considers that the requirements of relevant sections of this Guidance have been satisfied.

5.18 The local authority should seek to ensure (as far as reasonable) that all aspects of the record of determination are understandable to non-specialists, including affected members of the public.

Reconsideration, revocation and variation of determinations

5.19 The local authority should reconsider any determination that land is radioactive contaminated land if it becomes aware of further information which it considers significantly alters the basis for its original decision. In such cases the authority should decide whether to retain, vary or revoke the determination having sought and taken into account the advice of the Agency.

5.20 The local authority should reconsider any determination of radioactive contaminated land if remediation action has been taken which, in the view of the authority, stops the land being radioactive contaminated land. In such cases the authority should issue a statement to this effect, having regard to paragraph 5.2 and 5.3 above.

5.21 If the local authority varies or revokes a determination, or issues a statement in accordance with paragraph 5.20 it should record its reasons for doing so alongside the initial record of determination in a way that ensures the changed status of the land is made clear. If the reconsideration results in relevant documentation, such as a revised determination notice or a statement in accordance with paragraph 5.20 copies of this documentation should also be recorded. The authority should ensure that interested parties are informed of the decisions and the reasons for it, including the owner of the land; any person who appears to the authority to be in occupation of the whole or any part of the land; any person who was previously identified by the authority to be an appropriate person; and the Agency.

Section 6: Remediation of Radioactive Contaminated Land

6.1 Once land has been determined as radioactive contaminated land, the enforcing authority must consider how it should be remediated and, where appropriate, it must issue a remediation notice to require such remediation. As explained in paragraph 2.9 above, the enforcing authority for the purposes of remediation of radioactive contaminated land is the Agency, which takes on responsibility once the land has been determined as a "special site". The rules on the issuing of remediation notices are set out in the Contaminated Land (Wales) Regulations 2006.

6.2 Relevant provisions of Part 2A include:

- Section 78A(7): Defines "remediation" as: "(a) the doing of anything for the purpose of assessing the condition of – (i) the contaminated land in question; or (ii) any land adjoining or adjacent to that land; (b) the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land for the purpose – (i) of preventing or minimising, or remedying or mitigating the effects of, any harm by reason of which the contaminated land is such land; or (ii) of restoring the land to its former state; or (c) the making of subsequent inspections from time to time for the purpose of keeping under review the condition of the land".

- Section 78A(7A): For the purpose of paragraph (b) of subsection (7) above, "the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land" shall include ensuring that- (a) any such area is demarcated; (b) arrangements for the monitoring of the harm are made; (c) any appropriate intervention is implemented; and (d) access to or use of land or buildings situated in the demarcated area is regulated."

- Section 78E(1): "In any case where [the local authority has identified contaminated land]...the enforcing authority shall... serve on each person who is an appropriate person a..."remediation notice"...specifying what that person is to do by way of remediation and the periods within which he is required to do each of the things so specified."

- Section 78E(4): "Subject to subsection (4A), the only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of this Part are things which it considers reasonable, having regard to – (a) the cost which is likely to be involved; and (b) the seriousness of the harm in question.

- Section 78E(4A): "Where remediation includes an intervention, that part of the remediation which consists of an intervention may only be considered reasonable – (a) where the reduction in detriment due to radiation is sufficient to justify any

adverse effects and costs, including social costs, of the intervention; and (b) where the form, scale and duration of the intervention is optimised."

- Section 78E(4B): "For the purpose of subsection (4A), the form, scale and duration of the intervention shall be taken to be optimised if the benefit of the reduction in health detriment less the detriment associated with the intervention is maximised."

- Section 78E(5): "In determining for any purpose of this Part – (a) what is to be done (whether by an appropriate person, the enforcing authority, or any other person) by way of remediation in any particular case, (b) the standard to which any land is to be remediated pursuant to [a remediation] notice, or (c) what is, or is not, to be regarded as reasonable for the purposes of subsection (4) above, the enforcing authority shall have regard to any guidance issued for the purpose by the Welsh Ministers and the Secretary of State."

6.3 The Agency as the enforcing authority should have regard to this Guidance when it is: (a) deciding what remediation action it should specify in a remediation notice as being required to be carried out; (b) satisfying itself that appropriate remediation is being, or will be, carried out without the service of a notice; or (c) deciding what remediation action it should carry out itself.

6.4 The guidance in this Section does not attempt to set out detailed technical procedures or working methods. In considering such matters, the Agency may consult relevant technical documents (e.g. those produced by other professional and technical organisations). It may also act on the advice of a suitably qualified experienced practitioner.

Section 6(a): Remediation techniques

6.5 The broad aim of remediation should be: (a) to remove identified significant contaminant linkages, or permanently to disrupt them to ensure they are no longer significant and that risks are reduced to below an unacceptable level; and/or (b) to take reasonable measures to remedy harm that has been caused by a significant contaminant linkage.

6.6 Remediation may involve a range of treatment, assessment and monitoring actions, sometimes with different remediation actions being used in combination or sequentially to secure the overall remediation of the land.

6.7 In the case of radioactive contaminated land, it is necessary to ensure compliance with Article 53 of the Basic Safety Standards Directive which is given effect by, in particular, section 78A(7A). This means that remediation must, if necessary, and to the extent of the lasting exposure risk involved, include ensuring that: (a) any area of land is demarcated; (b) arrangements for monitoring of exposure are made; (c) any appropriate intervention is implemented; and (d) access to or use of land or buildings situated in the demarcated area is regulated.

6.8 In cases where the aim of remediation is to remove or permanently disrupt significant contaminant linkages, remediation treatment should involve demonstrable disruption or removal of the significant contaminant linkage(s) that led to land being determined as radioactive contaminated land, in order to reduce or remove unacceptable risks to receptors. This might involve one or more of the following:

(a) Reducing or treating the contaminant part of the linkage (e.g. by physically removing contaminants or contaminated soil, or by treating the soil to reduce levels of contaminants).

(b) Breaking, removing or disrupting the pathway parts of the linkage (e.g. a pathway could be disrupted by removing or reducing the chance that receptors might be exposed to contaminants, for example by sealing a site with a material such as clay or concrete).

(c) Protecting or removing the receptor. For example, by changing the land use or restricting access to a site it may be possible to reduce risks to below an unacceptable level.

6.9 Assessment, monitoring or demarcation actions may also be required as part of remediation. For example, assessment actions may be needed to characterise the nature of significant contaminant linkage(s) to help the Agency decide what remediation should involve. Assessment may also be needed whilst other remediation actions are being carried out, or after other actions have been carried out (e.g. to assess the effectiveness of the other measures, or to inform the need for possible further remediation actions). Monitoring actions may be needed after remediation has taken place (e.g. to check whether remedial action has been successful, or whether there is a need for further assessment or action). Demarcation may be appropriate to limit access to a contaminated area.

6.10 Assessment and monitoring action should not be required for any purpose other than the remediation of the land in relation to the reason why it was determined as radioactive contaminated land.

Phased Remediation

6.11 Remediation may require a phased approach, with different remediation actions being carried out in sequence or in parallel.

6.12 In some cases, it may not be possible or reasonable for a single remediation notice to specify all the remediation actions which might eventually be needed. In such cases, the Agency should specify in the notice the remediation action(s) which it considers to be appropriate at the time, and further remediation notices may need to be issued later regarding further phases of action.

6.13 If a phased approach is taken to remediation, before serving a further remediation notice, the Agency should be satisfied that previous action has not already achieved the remediation of the land (i.e. to a standard to which remediation can reasonably be required, having regard to the advice below), and that further action is still necessary to achieve the remediation of the land in question.

Remediation of multiple significant pollutant linkages

6.14 Where more than one significant contaminant linkage has been identified on the land, the Agency should consider whether reasonable actions for addressing each linkage individually would result in the optimum approach for achieving the overall remediation of the land. If a more integrated approach would be more practicable and more cost effective whilst still delivering the same (or a better) overall standard of remediation the Agency should generally favour this approach. However, in cases where more than one party has been found responsible for linkages, the Agency should not impose an approach which is more costly for any responsible party than addressing the linkages separately. Where an intervention is involved, the Agency will need to ensure compliance with the tests of justification and optimisation (see paragraphs 6.36 – 6.42 below).

Section 6(b): Securing remediation without a remediation notice

6.15 Before serving a remediation notice, the Agency should consider section 78H(5) (a-d) of Part 2A. The Agency should not serve a remediation notice if it is satisfied that appropriate measures are being taken by way of remediation without the serving of a remediation notice. The Agency should assume that appropriate measures are being taken if: (a) it is satisfied that steps are being taken that are likely to achieve a standard of remediation equal to, or better than, what the Agency would otherwise have specified in a remediation notice; and (b) the Agency is satisfied that the timescale in which remediation is planned to take place is appropriate.

6.16 The Agency should actively consider the merits and likelihood of achieving remediation without recourse to a remediation notice before issuing a remediation notice.

Section 6(c): Standard of remediation

6.17 Part 2A states that the Agency as the enforcing authority may only require (or undertake itself in cases where direct enforcing authority activity is deemed necessary) actions in a remediation notice which are reasonable with regard to the cost and the seriousness of the harm. This requirement is in addition to the broader responsibility on the Agency, as a public regulator, to act in a reasonable manner.

6.18 In cases where the aim of remediation is to disrupt significant contaminant linkages, the Agency should aim to ensure that remediation achieves a standard sufficient to ensure the land no longer poses sufficient risk to qualify as radioactive contaminated land. In using powers under Part 2A, the Agency should not require a higher standard of remediation unless, in the case of a proposed intervention, this is required by the tests of justification and optimisation (see paragraphs 6.37 – 6.43 below). The appropriate person or some other person might choose to carry out remediation to a higher standard (e.g. to increase the value or utility of the land, or to prepare it for redevelopment) but it should not be required by the Agency

6.19 Where the Agency considers that it is not practicable or reasonable to remediate land to a degree where it stops being radioactive contaminated land, the authority should consider whether it would be reasonable to require remediation to a lesser standard.

6.20 In cases where the purpose of remediation is to remedy harm that has already been caused, the Agency should decide what is a suitable standard of remediation having regard to the guidance on reasonableness (including the tests of justification and optimisation below). In some cases it may be reasonable to require land to be restored to its former state. In other cases it may not be practicable and/ or reasonable to do this. In such cases the Agency should consider whether it would be reasonable to require remediation to a lesser standard.

Section 6(d): Reasonableness of remediation

6.21 The Agency may only require remediation action in a remediation notice if it is satisfied that those actions are reasonable. In deciding what is reasonable, the Agency should consider various factors, having particular regard to: (a) the practicability, effectiveness and durability of remediation; (b) the health and environmental impacts of the chosen remedial options; (c) the financial cost which is likely to be involved; (d) the benefits of remediation with regard to the seriousness of the harm in question and (e) where remediation of harm involves an intervention, whether it meets the tests of justification and optimisation.

6.22 The paragraphs below explain how the Agency should consider these factors in reaching a judgement on what is reasonable. The Agency should regard a remediation action as being reasonable if it is satisfied that the benefits of remediation are likely to outweigh the costs of remediation. Where the remediation of harm involves an intervention, the Agency is required to have regard to a broader set of potential adverse impacts under the test of justification and to ensure the net benefit of the intervention is maximised under the test of optimisation (see paragraphs 6.36 – 6.42 below).

6.23 In some cases, it might be that there is more than one potential approach to remediation that would be reasonable. In such cases the Agency should choose what it considers to be the “best practicable technique” having regard to the factors above. Unless there are strong grounds to consider otherwise, the best practicable technique

in such circumstances is likely to be the technique that achieves the required standard of remediation to the appropriate timescale, whilst imposing the least cost on the persons who will pay for the remediation. Where remediation of harm involves an intervention, the Agency is required to choose the option that maximises the net benefit of the intervention.

Practicability, effectiveness and durability of remediation

6.24 The Agency should ensure that any requirement it makes in regard to remediation is practicable and effective – i.e. it should be possible, within reasonable limits, for the person to undertake the required actions, and the actions should be effective in addressing the problem at hand. This applies both to the remediation scheme as a whole and the individual remediation actions of which it is comprised.

6.25 In assessing the practicability of any remediation, the Agency should consider, in particular: (i) technical constraints, such as whether the technical capacity and resources needed to undertake the work exist, and could reasonably be made available; (ii) site constraints, such as access to the relevant land, the presence of buildings or other structures in, on or under the land; (iii) time constraints, such as whether it would be possible to carry out the remediation within the required time period; and (iv) regulatory constraints, such as whether the remediation can be carried out within relevant statutory or similar controls, for example, the legal disposal of wastes arising.

6.26 The Agency should consider the durability of remediation. In some cases it will be reasonable to require (or otherwise ensure) a permanent solution to the problem. In other cases this may not be possible or reasonable, in which case the authority should consider how to ensure a reasonable standard of durability. The aim should be to ensure (as far as practical and reasonable) that the scheme as a whole would continue to be effective during the time over which the significant contaminant linkage would continue to exist or recur.

6.27 In considering durability, the Agency should consider whether it is likely that some other future action (such as redevelopment) will resolve or control the problem. If the Agency feels that such action is likely to occur within a reasonable timescale, the Agency may consider whether it would be appropriate to require remediation of limited durability, pending a more durable solution later.

6.28 Where a remediation scheme cannot reasonably and practicably continue to be effective during the whole of the expected duration of the problem, the Agency should require the remediation to be effective for as long as can reasonably and practicably be achieved. In such circumstances, additional monitoring actions may be required.

6.29 Where a remediation method requires on-going management and maintenance in order to continue to be effective (for example, the maintenance of gas venting or alarm systems), these on-going requirements should be specified in any remediation notice (or similar remediation agreement if remediation is being taken forward without such a

notice) as well as any monitoring actions necessary to keep the effectiveness of the remediation under review.

Financial cost of remediation

6.30 In considering the costs likely to be involved in carrying out any remediation action, the Agency should take into account the direct financial costs likely to be caused by remediation. This would include:

(a) The cost of preparing for remediation to take place (e.g. feasibility studies, design of remedial actions, management costs, and the cost of relevant assessment actions).

(b) The cost of undertaking the remediation actions and making good afterwards, including any tax payable.

(c) The cost of managing the land after the main remediation action has taken place (e.g. on-going requirements to manage or maintain the remediation action, and the cost of any monitoring or assessment action).

(d) Relevant disruption costs (e.g. depreciation in the value of land or other interests, or other loss or damage, which is likely to result from the carrying out of the remediation action in question).

(e) The above costs relative to any estimated increase in the financial value and utility of the land as a result of remediation, and whether such increase in value and utility would accrue to the person(s) bearing the cost of remediation.

(In the case of an intervention, other costs will also need to be weighed in the balance- see paragraphs 6.36 – 6.43 below).

6.31 The identity or financial standing of any person who may be required to pay for a remediation action are not relevant to the consideration of whether the costs of a remediation action are reasonable (although they may be relevant in deciding whether the cost of remediation can be imposed on such persons).

Benefits of remediation

6.32 In considering the benefits of remediation, the Agency should consider: (a) the seriousness of any harm and the various factors that led the land to be determined (e.g. the scale of harm that might already be occurring; or the likelihood of potential future harm and the likely impact if it were to occur); (b) the context in which the effects

are occurring or might occur; and (c) any estimated increase in the financial value and utility of the land as a result of remediation, and who would benefit from such an increase. In considering such benefits it is for the Agency to decide whether or not to describe such benefits (whether direct or indirect) in terms of monetary value or whether to make a qualitative consideration.

Health and environmental impacts of remediation

6.32 In considering the costs of remediation and the seriousness of harm, the Agency should also consider other costs and impacts that may, directly or indirectly, result from remediation. This should include consideration of: (a) potential health impacts of remediation; and (b) environmental impacts of remediation. In considering such impacts it is for the Agency to decide whether or not to describe such costs in terms of monetary value or whether to make a qualitative consideration.

6.33 The Agency's consideration of potential health impacts of remediation should include: (a) direct health effects (e.g. resulting from contaminants being mobilised during remediation, and worker safety); and (b) indirect health effects such as stress related effects that may be experienced by affected people, particularly local residents. In making this consideration the Agency should also be mindful of the health benefits of remediation and the potential health impacts of not remediating the land.

6.34 With regard to environmental impacts of remediation, the Agency should consider whether remediation can be carried out without disproportionate damage to the environment, and in particular: (a) without unacceptable risk to water, air, soil and plants and animals; (b) without causing a nuisance through noise or odours; (c) without adversely affecting the countryside or places of special interest; and (d) without adversely affecting a building of special architectural or historic interest.

6.35 The Agency should strive to minimise impacts of remediation on health and the environment (and comply with any relevant regimes that might require this, for example the planning and environmental permitting regimes). If the Agency considers that health or environmental impacts of a particular remediation approach are likely to outweigh the likely benefits of dealing with the risk posed by the contamination, it should consider whether an alternative approach to remediation is preferable, even if it may deliver a lower standard of remediation than other techniques.

Remediation of harm involving an intervention: tests of justification and optimisation

6.36 Where the proposed remediation involves an intervention, the Agency must apply the tests of justification and optimisation: it must ensure that any intervention that forms part of a remediation scheme or package is both justified and optimised. These tests are laid down in Article 48 of the Basic Safety Standards Directive and given effect in Part 2A (in particular section 78E(4A) and (4B)). The terms "intervention",

"justification" and "optimisation", as well as "detriment", are defined as follows and also appear in the Glossary at the end of this Guidance:

Intervention: is a type of remediation action and is defined in Article 1 of the Basic Safety Standards Directive as:

"a human activity that prevents or decreases the exposure of individuals to radiation from sources which are not part of a practice or which are out of control, by acting on sources, transmission pathways and individuals themselves."

Section 78A(9) of the 1990 Act says this meaning applies for the purposes of Part 2A of the 1990 Act.

Justification: means ensuring that the reduction in detriment due to radiation is sufficient to justify any adverse effects and costs, including social costs, of the intervention.

Optimisation: means ensuring that the form, scale and duration of the intervention maximises the benefit of the reduction in health detriment less the detriment associated with the intervention.

Detriment: principally means a health detriment, but may also include other detriments, for example, a detriment associated with blight.

6.37 The principle of justification recognises that an intervention may bring about reduction in doses and other harmful impacts but may incur costs and other adverse effects. Costs are not restricted to financial costs, but also include costs to society. To ensure optimisation, the Agency should choose the option that maximises the net benefit of the intervention, from the interventions that are justified.

6.38 For an intervention to be optimised on land affected by both radioactive and non-radioactive significant contaminant linkages, the optimisation should also have regard to the effect of any remedial actions addressing the non-radioactive significant contaminant linkage(s).

6.39 The assessment of whether a potential intervention is justified and optimised should include the preparation of: (a) an estimate of the financial costs of the intervention (taking into account the guidance in paragraph 6.30; (b) a statement of the social costs and adverse effects (see paragraphs 6.41 below) associated with the intervention; and (c) a statement of the benefit (e.g. reduction in radiation exposure) likely to result from the intervention.

6.40 In making an assessment of whether the intervention is justified or optimised, the Agency should: (a) consult publications of international bodies, including the International Atomic Energy Agency; (b) if appropriate, apply the approaches of multi-attribute analysis in assessing the balance between the various factors that need to be taken into consideration and the weightings which may be appropriate to assign to the

various attributes; or alternatively, some other recognised options assessment approach; (c) consult with relevant stakeholder groups to understand their perceptions of the relative importance of different attributes; and (d) consider quantitative and qualitative methods as a decision-aid in helping to reveal the key issues and assumptions and allowing an analysis of the sensitivity to various assumptions.

6.41 The type of social costs and adverse effects to be considered as arising from an intervention may, for example, include: (a) social disruption such as vacating property, or limiting its use, or restricting access to it; (b) heavy traffic from vehicles, associated with the intervention; (c) the health impacts of the intervention (discussed in paragraph 6.33 above) including those arising from doses to remediation workers; (d) the environmental impacts of the intervention (discussed in paragraph 6.34 above) including risks: (i) to water, air, soil and plants and animals, (ii) of nuisance through noise or odours, (iii) to the countryside or places of special interest, and (iv) to a building of special architectural or historic interest or a site of archaeological interest; and (e) the generation of waste and, where relevant, the transport and disposal of such waste.

6.42 The Agency should consider both the seriousness of impacts of any social costs and also the likely duration of any impact.

Section 6(e): Revision of remediation notices

6.43 The Agency should consider revising a remediation notice if it considers it is reasonable to do so. In particular this would apply to cases where new information comes to light which calls into question the reasonableness of an existing remediation notice. For example, this might be the case where information that comes to light during remediation shows that some remediation actions are no longer necessary, or that additional or alternative actions are necessary.

6.44 If the Agency has issued a remediation notice but the person concerned later proposes an alternative remediation scheme, the Agency should consider whether to amend or revoke the remediation notice. It is for the Agency to decide the degree of consideration it gives to such a proposal. If the Agency decides to do this, it should be satisfied that the standard of remediation and the timescale in which it would take place are in line with the guidance in this section.

Section 6(f): Verification

6.45 Any remedial treatment action should include appropriate verification measures. In arranging for such measures, the Agency should ensure that the person responsible for verification is a suitably qualified experienced practitioner.

Section 7: Liability

7.1 The main provisions for the establishment of liability are set out in Part 2A, and the Agency (and anyone else interested in liability) should refer directly to Part 2A. This section (as with all of this Guidance) should be read in conjunction with the 1990 Act.

7.2 The statutory guidance in this section relates in particular to circumstances where two or more persons are liable to bear the responsibility for any particular thing by way of remediation. It deals with the questions of who should be excluded from liability, and how the cost of each remediation action should be apportioned between those who remain liable after any such exclusion. It is issued under section 78F(6) and (7) of the 1990 Act, which provides that:

- Section 78F(6): "Where two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing."

- Section 78F(7): "Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State."

7.3 In summary, this section sets out a process involving:

(a)Initial identification of liable persons: The Agency makes an initial identification of persons who may be responsible for paying for remediation actions. In doing this, each significant contaminant linkage is treated separately (unless it is reasonable to treat more than one linkage together because the same parties are liable). The Agency first looks for persons who caused or knowingly permitted each linkage in terms of section 78F(2) of Part 2A (who this Guidance refers to as "Class A" persons). If no Class A persons can be found, the Agency usually seeks to identify the owners or occupiers of the land in terms of section 78F(4) of Part 2A (who this Guidance refers to as "Class B" persons). The persons responsible for each linkage make up a "liability group" for that linkage. Liability groups may consist of one or more persons, and this Guidance sometimes uses the terms "Class A liability group" or a "Class B liability group" to reflect the nature of persons in the group. A special rule applies where the land is "land contaminated by a nuclear occurrence" as defined under Part 2A. In this case, the Secretary of State is deemed to be the liable person. Therefore, the Agency will need to consider whether a contaminant linkage arose by reason of the land being "land contaminated by a nuclear occurrence" (see paragraph 7.6(e) below).

(b)Orphan linkages: If no Class A or Class B persons can be found liable for a linkage and the Secretary of State is not liable, that linkage becomes known as an "orphan linkage" for which there are separate procedures set out at the end of this Section.

(c)Remediation actions: The Agency decides what remediation actions relate to which linkages. This Guidance uses the term "remediation action" to mean any individual thing which is being, or is to be, done by way of remediation. A "remediation package" is all the remediation actions which relate to a particular linkage. A "remediation scheme" is the complete set of remediation actions (relating to one or more linkages) to be carried out with respect to the relevant land or waters.

(d)Attribution of liability to liability groups: The Agency attributes responsibility between liability groups. This Guidance uses the term "attribution" to mean the process of apportionment between liability groups.

(e)Exclusions: The Agency considers (with regard to any liability group with two or more members) whether members of the group should be excluded, in accordance with the rules for exclusion set out in Section 7(c) with regard to Class A persons, and Section 7(e) with regard to Class B persons. This Guidance uses the term "exclusion" to mean any decision by the Agency that a person is to be treated as not being an appropriate person in accordance with section 78F(6) of Part 2A.

(f)Apportioning liability between members of liability groups: The Agency decides how to apportion liability between the members of each liability group who remain after any exclusions have been made. This Guidance uses the term "apportionment" to mean a decision by the Agency dividing the costs of carrying out any remediation action between two or more appropriate persons in accordance with section 78F(7) of Part 2A.

As this Guidance relates to radioactive contaminated land, the only contaminant linkages with which this section is concerned are those which involve contaminants that are substances containing radionuclides which have resulted from the after-effects of a radiological emergency or have been processed as part of a past practice or past work activity (as explained in Section 3).

Section 7(a): Procedure for determining liabilities

7.4 For some land, the process of determining liabilities will consist simply of identifying either a single person (either an individual or a corporation such as a limited company) who has caused or knowingly permitted the presence of a single significant contaminant, or the owner of the land. The history of other land may be more complex. A succession of different occupiers or of different industries, or a variety of substances may all have contributed to the problems which have made the land radioactive contaminated land. Numerous separate remediation actions may be required, which may not correlate neatly with those who are to bear responsibility for

the costs. The degree of responsibility for the state of the land may vary widely. Determining liability for the costs of each remediation action can be correspondingly complex.

Step 1: Identifying potential appropriate persons and liability groups

7.5 As part of the process of determining that the land is radioactive contaminated land (see Sections 4 and 5), the local authority will have identified at least one significant contaminant linkage (contaminant, pathway and receptor), resulting from the presence of at least one significant contaminant.

7.6 Where there is a single significant contaminant linkage:

(a) The Agency should identify all persons who would be appropriate persons to pay for any remediation action relevant to the contaminant which forms part of the significant contaminant linkage. These persons constitute the "liability group" for that significant contaminant linkage.

(b) To achieve this, the Agency should make reasonable enquiries to find all those who have caused or knowingly permitted the contaminant in question to be in, on or under the land. Any such persons constitute a "Class A liability group" for the significant contaminant linkage.

(c) If no such Class A persons can be found for a significant contaminant, the Agency should identify all of the current owners or occupiers of the radioactive contaminated land in question. These persons then constitute a "Class B liability group" for the significant contaminant linkage.

(d) If the Agency cannot find any Class A persons or any Class B persons in respect of a significant contaminant linkage and paragraph (e) below does not apply, there will be no liability group for that linkage and it should be treated as an “orphan linkage” (see paragraphs 7.92 – 7.98 below).

(e) Section 78F(1A) provides that “in relation to any land contaminated by a nuclear occurrence, the Secretary of State is deemed to be the appropriate person”. “Land contaminated by a nuclear occurrence” is given a specific meaning in section 78(2A). Primarily it covers radioactive contaminated land where civil liability for damage to the land is regulated by either the Nuclear Installations Act 1965, which implements the Paris Convention on third party nuclear liability, or any foreign law that implements the Paris Convention (although, in certain circumstances, it can also cover land contaminated by nuclear occurrences where these liability regimes do not apply). In particular, this means that where land is radioactive contaminated land as a result of an accident at a nuclear installation covered by the 1965 Act civil liability regime, then the land is likely to qualify as “land contaminated by a nuclear occurrence” in which case the Secretary of State will be the appropriate person.

7.7 Where there are two or more significant contaminant linkages, the Agency should consider each significant contaminant linkage in turn, carrying out the steps set out in paragraph 7.6 above, to identify the liability group (if one exists) for each of the linkages.

7.8 Having identified one or more liability groups, the Agency should consider whether any of the members of those groups are exempted from liability under the provisions in Part 2A. This could apply where:

(a) A Class B person is exempted from liability arising from the escape of a contaminant from one piece of land to other land (see section 78K of Part 2A).

(b) A person is exempted from liability by virtue of his being a person "acting in a relevant capacity" (such as acting as an insolvency practitioner) as defined in section78X(4)of Part 2A.

7.9 If all of the members of any liability group benefit from one or more of these exemptions, the Agency should treat the significant contaminant linkage in question as an orphan linkage (see paragraphs 7.92 – 7.98 below).

7.10 Persons may be members of more than one liability group (e.g. if they caused or knowingly permitted the presence of more than one significant contaminant).

7.11 Where the membership of all of the liability groups is the same, there may be opportunities for the Agency to abbreviate the remaining stages of this procedure. However, the tests for exclusion and apportionment may produce different results for different significant contaminant linkages, and so the Agency should exercise caution before trying to simplify the procedure in any case.

Step 2: Characterising remediation actions

7.12 Each remediation action will be carried out to achieve a particular purpose with respect to one or more defined significant contaminant linkages. Where there is a single significant contaminant linkage on the land in question, all the remediation actions will be referable to that linkage, and there is no need to consider how the different actions relate to different linkages. This step and Step 3 of the procedure therefore do not need to be carried out where there is only a single significant contaminant linkage. However, where there are two or more significant contaminant linkages on the land in question, the Agency should establish whether each remediation action is: (a) referable solely to the significant contaminant in a single significant contaminant linkage (a "single-linkage action"); or (b) referable to the significant contaminant in more than one significant contaminant linkage (a "shared action").

7.13 Where a remediation action is a shared action, there are two possible relationships between it and the significant contaminant linkages to which it is referable. The Agency should establish whether the shared action is:

(a) a "common action" – i.e. an action which addresses together all of the significant contaminant linkages to which it is referable, and which would have been part of the remediation package for each of those linkages if each of them had been addressed separately.

(b) a "collective action" – i.e. an action which addresses together all of the significant contaminant linkages to which it is referable, but which would not have been part of the remediation package for every one of those linkages if each of them had been addressed separately, because: (i) the action would not have been appropriate in that form for one or more of the linkages (since some different solution would have been more appropriate); (ii) the action would not have been needed to the same extent for one or more of the linkages (since a less far-reaching version of that type of action would have sufficed); or (iii) the action represents a more economic way of addressing the linkages together which would not be possible if they were addressed separately.

7.14 A collective action replaces actions that would have been appropriate for the individual significant contaminant linkages if they had been addressed separately, as it achieves the purposes which those other actions would have achieved.

Step 3: Attributing responsibility between liability groups

7.15 This stage of the procedure does not apply in simpler cases. Where there is only a single significant contaminant linkage, the liability group for that linkage bears the full cost of carrying out any remediation action. Where the linkage is an orphan linkage, the Agency is required to exercise its power to carry out the remediation action itself, at its own cost (although it may obtain a contribution to its costs from the Secretary of State in certain circumstances). Where the linkage arises from a nuclear occurrence, the Agency is also required to carry out the remediation itself, but the Secretary of State (as the appropriate person) will bear the cost.

7.16 Similarly, for any single-linkage action, the liability group (i.e. the group that remains after the exclusions in paragraph 7.8 have been applied) for the significant contaminant linkage in question bears the full cost of carrying out that action.

7.17 However, the Agency should apply the guidance in Section 7(g) below with respect to each shared action, in order to attribute to each of the different liability groups their share of responsibility for that action.

7.18 After the guidance in Section 7(g) has been applied to all shared actions, it may be the case that a Class B liability group which has been identified does not have to bear the costs for any remediation actions. Where this is the case, the Agency does not need to apply any of the rest of the guidance in this Chapter to that liability group.

Step 4: Excluding members of a liability group

7.19 The Agency should now consider, for each liability group which has two or more members, whether any of those members should be excluded from liability: (a) for each Class A liability group with two or more members, the Agency should apply the guidance on exclusion in Section 7(c); and (b) for each Class B liability group with two or more members, the Agency should apply the guidance on exclusion in Section 7(e).

Step 5: Apportioning liability between members of a liability group

7.20 The Agency should now determine how any costs attributed to each liability group should be apportioned between the members of that group who remain after any exclusions have been made.

7.21 For any liability group (after the exclusions in paragraph 7.8 have been applied) which has only a single remaining member, that person bears all of the costs falling to that liability group (i.e. both the cost of any single-linkage action referable to the significant contaminant linkage in question; and the share of the cost of any shared action attributed to the group as a result of the attribution process set out in Section 7(g)).

7.22 For any liability group which has two or more remaining members, the Agency should apply the relevant guidance on apportionment between those members. Each of the remaining members of the group will then bear the proportion determined under that guidance of the total costs falling to the group, that is both the cost of any single-linkage action referable to the significant contaminant linkage in question, and the share of the cost of any shared action attributed to the group as a result of the attribution process set out in Part 9. The relevant apportionment guidance is: (a) for any Class A liability group, the guidance set out in Section 7(d); and (b) for any Class B liability group, the guidance set out in Section 7(f).

Section 7(b): General considerations relating to exclusion, apportionment and attribution procedures

7.23 This sub-section sets out general guidance about the application of the exclusion, apportionment and attribution procedures set out in the rest of this section. It is issued under both section 78F(6) and section 78F(7).

7.24 The Agency should ensure that any person who might benefit from an exclusion, apportionment or attribution is aware of the guidance in this section, so that they may make appropriate representations to the Agency.

7.25 The Agency should apply the tests for exclusion (in Section 7(c) and (e)) with respect to the members of each liability group. If a person, who would otherwise be an appropriate person to bear responsibility for a particular remediation action, has been excluded from the liability groups for all of the significant contaminant linkages to which

that action is referable, he should be treated as not being an appropriate person in relation to that remediation action.

Financial circumstances

7.26 The financial circumstances of those concerned should have no bearing on the application of the procedures for exclusion, apportionment and attribution in this section, except where the circumstances in paragraph 7.74 below apply (the financial circumstances of those concerned are taken into account in the separate consideration under section 78P(2) on hardship and cost recovery). In particular, it should be irrelevant in the context of decisions on exclusion and apportionment: (a) whether those concerned would benefit from any limitation on the recovery of costs under the provisions on hardship and cost recovery in section 78P(2); or (b) whether those concerned would benefit from any insurance or other means of transferring their responsibilities to another person.

Information and Decisions

7.27 The Agency should make reasonable endeavours to consult those who may be affected by any exclusion, apportionment or attribution. In all cases, however, it should seek to obtain only such information as it is reasonable to seek, having regard to: (a) how the information might be obtained; (b) the cost of obtaining the information for all parties involved; and (c) the potential significance of the information for any decision.

7.28 The statutory guidance in this Section should be applied in the light of the circumstances as they appear to the Agency on the basis of the evidence available to it at that time. Where the Agency is presented with conflicting evidence, it should make decisions with regard to the balance of probabilities. The Agency should take into account the information that it has acquired in the light of the guidance in the previous paragraph, but the burden of providing the Agency with any further information needed to establish an exclusion or to influence an apportionment or attribution should rest on any person seeking such a benefit. The Agency should consider any relevant information which has been provided by those potentially liable under these provisions. Where any such person provides such information, any other person who may be affected by an exclusion, apportionment or attribution based on that information should be given a reasonable opportunity to comment on that information before the determination is made.

Agreements on Liabilities

7.29 In any case where:

(a) two or more persons are appropriate persons and thus responsible for all or part of the costs of a remediation action;
(b) they agree, or have agreed, the basis on which they wish to divide that responsibility; and
(c) a copy of the agreement is provided to the Agency and none of the parties to the agreement informs the Agency that it challenges the application of the agreement;

the Agency should generally make such determinations on exclusion, apportionment and attribution as are needed to give effect to this agreement, and should not apply the remainder of this guidance for exclusion, apportionment or attribution between the parties to the agreement. However, the Agency should apply the guidance to determine any exclusions, apportionments or attributions between any or all of those parties and any other appropriate persons who are not parties to the agreement.

7.30 However, where giving effect to such an agreement would increase the share of the costs theoretically to be borne by a person who would benefit from a limitation on recovery of remediation costs under the provision on hardship in section 78P(2)(a) or under the guidance on cost recovery issued under section 78P(2)(b), the Agency should disregard the agreement.

Section 7(c): Exclusion of Members of a Class A Liability Group

7.31 This sub-section of the Guidance sets out the tests for determining whether to exclude from liability a person who would otherwise be a Class A person. The tests are intended to establish whether, in relation to other members of the liability group, it is fair that relevant persons should bear any part of that responsibility.

7.32 The exclusion tests below are subject to the following overriding guidance:

(a) the exclusions that the Agency should make are solely in respect of the significant contaminant linkage giving rise to the liability of the liability group in question; an exclusion in respect of one significant contaminant linkage has no necessary implication in respect to any other such linkage, and a person who has been excluded with respect to one linkage may still be liable to meet all or part of the cost of carrying out a remediation action by reason of his membership of another liability group;

(b) the tests should be applied in the sequence in which they are set out; and

(c) if the result of applying a test would be to exclude all of the members of the liability group who remain after any exclusions resulting from previous tests, that further test should not be applied, and consequently the related exclusions should not be made.

7.33 The effect of any exclusion made under Test 1, or Tests 4 to 6 below should be to remove completely any liability that would otherwise have fallen on the person benefiting from the exclusion. Where the Agency makes any exclusion under one of these tests, it should therefore apply any subsequent exclusion tests, and make any apportionment within the liability group, in the same way as it would have done if the excluded person had never been a member of the liability group.

7.34 The effect of any exclusion made under Test 2 (Payments made for remediation) or Test 3 (Sold with information), on the other hand, is intended to be that the person who received the payment or bought the land, as the case may be, (the "payee or buyer") should bear the liability of the person excluded (the "payer or seller") in addition to any liability which the person is to bear in respect of their own actions or omissions. To achieve this, the Agency should:

(a) complete the application of the other exclusion tests and then apportion liability between the members of the liability group, as if the payer or seller were not excluded as a result of Test 2 or Test 3; and

(b) then apportion any liability of the payer or seller, calculated on this hypothetical basis, to the payee or buyer, in addition to the liability (if any) that the payee or buyer has in respect of his own actions or omissions; this should be done even if the payee or buyer would otherwise have been excluded from the liability group by one of the other exclusion tests.

Related Companies

7.35 Before applying any of the exclusion tests, the Agency should establish whether two or more of the members of the liability group are "related companies".

7.36 Where the question to be considered in any exclusion test concerns the relationship between, or the relative positions of, two or more related companies, the Agency should not apply the test so as to exclude any of the related companies. For example, in Test 3 (Sold with information), if the "seller" and the "buyer" are related companies, the "seller" would not be excluded by virtue of that Test.

7.37 For these purposes, "related companies" are those which are, or were at the "relevant date", members of a group of companies consisting of a "holding company" and its "subsidiaries". The "relevant date" is that on which the enforcing Agency first served on anyone a notice under section 78B(3) identifying the land as radioactive contaminated land, and the terms "holding company" and "subsidiaries" have the same meaning as in Section 1159 of the Companies Act 2006.

Exclusion tests for Class A persons

Test 1: Excluded activities

7.38 The purpose of Test 1 is to exclude persons who have been identified as members of a Class A liability group solely on grounds of having carried out certain activities. The activities are ones which, in the Welsh Government's view, carry such limited responsibility (if any) that exclusion would be justified even where the activity is held to amount to "causing or knowingly permitting" under Part 2A. This is not intended to imply that the carrying out of such activities necessarily amounts to "causing or knowingly permitting".

7.39 In applying Test 1, the Agency should exclude any appropriate person who is a member of a liability group solely by reason of one or more of the activities listed in (a) to (k) below.

(a) Providing (or withholding) financial assistance to another person (whether or not that other person is a member of the liability group), in the form of any one or more of the following: (i) making a grant; (ii) making a loan or providing any other form of credit, including instalment credit, leasing arrangements and mortgages; (iii) guaranteeing the performance of a person's obligations; (iv) indemnifying a person in respect of any loss, liability or damage; (v) investing in the undertaking of a body corporate by acquiring share capital or loan capital of that body without thereby acquiring such control as a "holding company" has over a "subsidiary" as defined in section 736 of the Companies Act 1985; or (iv) providing a person with any other financial benefit (including the remission in whole or in part of any financial liability or obligation).

(b) Underwriting an insurance policy under which another person was insured in respect of any occurrence, condition or omission by reason of which that other person has been held to have caused or knowingly permitted the significant contaminant to be in, on or under the land in question. For the purposes of this sub-paragraph: (i) underwriting an insurance policy is to be taken to include imposing any conditions on the person insured, for example relating to the manner in which he carries out the insured activity; and (ii) it is irrelevant whether or not the insured person can now be found.

(c) As a provider of financial assistance or as an underwriter, carrying out any action for the purpose of deciding whether or not to provide such financial assistance or underwrite such an insurance policy as is mentioned above. This sub-paragraph does not apply to the carrying out of any intrusive investigation in respect of the land in question for the purpose of making that decision where: (i) the carrying out of that investigation is itself a cause of the existence, nature or continuance of the significant contaminant linkage in question; and (ii) the person who applied for the financial assistance or insurance is not a member of the liability group.

(d) Consigning, as waste, to another person the substance which is now a significant contaminant, under a contract under which that other person knowingly took over responsibility for its proper disposal or other management on a site not under the control of the person seeking to be excluded from liability.

For the purpose of this sub-paragraph, it is irrelevant whether or not the person to whom the waste was consigned can now be found.

(e) Creating at any time a tenancy over the land in question in favour of another person who has subsequently caused or knowingly permitted the presence of the significant contaminant linkage in question (whether or not the tenant can now be found).

(f) As owner of the land in question, licensing at any time its occupation by another person who has subsequently caused or knowingly permitted the presence of the significant contaminant in question (whether or not the licensee can now be found). This test does not apply in a case where the person granting the licence operated the land as a site for the disposal or storage of waste at the time of the grant of the licence.

(g) Issuing any statutory permission, licence or consent required for any action or omission by reason of which some other person appears to the Agency to have caused or knowingly permitted the presence of the significant contaminant in question (whether or not that other person can now be found). This test does not apply in the case of statutory undertakers granting permission for their contractors to carry out works.

(h) Taking, or not taking, any statutory enforcement action: (i) with respect to the land, or (ii) against some other person who appears to the Agency to have caused or knowingly permitted the presence of the significant contaminant in question, whether or not that other person can now be found.

(i) Providing legal, financial, engineering, scientific or technical advice to (or design, contract management or works management services for) another person (the "client"), whether or not that other person can now be found: (i) in relation to an action or omission (or a series of actions and/or omissions) by reason of which the client has been held to have caused or knowingly permitted the presence of the significant contaminant; (ii) for the purpose of assessing the condition of the land, for example whether it might be contaminated; or (iii) for the purpose of establishing what might be done to the land by way of remediation.

(j) As a person providing advice or services as described in sub-paragraph (i) above carrying out any intrusive investigation in respect of the land in question, except where: (i) the investigation is itself a cause of the existence, nature or continuance of the significant contaminant linkage in question; and (ii) the client is not a member of the liability group.

(k) Performing any contract by providing a service (whether the contract is a contract of service (employment), or a contract for services) or by supplying goods, where the contract is made with another person who is also a member of the liability group in question. For the purposes of this sub-paragraph the person

providing the service or supplying the goods is referred to as the "contractor" and the other party as the "employer". This sub-paragraph applies to subcontracts where either the ultimate employer or an intermediate contractor is a member of the liability group. This sub-paragraph does not apply where: (i) the activity under the contract is of a kind referred to in a previous sub-paragraph of this paragraph; (ii) the action or omission by the contractor by virtue of which he has been identified as an appropriate person was not in accordance with the terms of the contract; or (iii) where:

- the employer is a body corporate;
- the contractor was a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in any such capacity, at the time when the contract was performed; and
- the action or omissions by virtue of which the employer has been identified as an appropriate person were carried out or made with the consent or connivance of the contractor, or were attributable to any neglect on his part.

Test 2: Payments for remediation

7.40 The purpose of this test is to exclude from liability those who have already, in effect, met their responsibilities by making certain kinds of payment to some other member of the liability group, which would have been sufficient to pay for adequate remediation.

7.41 In applying this test, the Agency should consider whether all the following circumstances exist: (a) one of the members of the liability group has made a payment to another member of that liability group for the purpose of carrying out particular remediation on the land in question; only payments of the kinds set out in paragraph 7.42 immediately below are to be taken into account; (b) that payment would have been sufficient at the date when it was made to pay for the remediation in question; (c) if the remediation for which the payment was intended had been carried out effectively, the land in question would not now be in such a condition that it has been identified as radioactive contaminated land by reason of the significant contaminant linkage in question; and (d) the remediation in question was not carried out or was not carried out effectively.

7.42 Payments of the following kinds alone should be taken into account: (a) a payment made voluntarily, or to meet a contractual obligation, in response to a claim for the cost of the particular remediation; (b) a payment made in the course of a civil legal action, or arbitration, mediation or dispute resolution procedure, covering the cost of the particular remediation, whether paid as part of an out-of-court settlement, or paid under the terms of a court order; or (c) a payment as part of a contract (including a group of interlinked contracts) for the transfer of ownership of the land in question which is either specifically provided for in the contract to meet the cost of carrying out

the particular remediation or which consists of a reduction in the contract price explicitly stated in the contract to be for that purpose.

7.43 For the purposes of this test, payments include consideration of any form.

7.44 However, no payment should be taken into account where the person making the payment retained any control after the date of the payment over the condition of the land in question (that is, over whether or not the substances by reason of which the land is regarded as radioactive contaminated land were permitted to be in, on or under the land). For this purpose, neither of the following should be regarded as retaining control over the condition of the land: (a) holding contractual rights to ensure the proper carrying out of the remediation for which the payment was made; nor (b) holding an interest or right of any of the following kinds: (i) easements for the benefit of other land, where the radioactive contaminated land in question is the servient tenement, and statutory rights of an equivalent nature; (ii) rights of statutory undertakers to carry out works or install equipment; (iii) reversions upon expiry or termination of a long lease; or (iv) the benefit of restrictive covenants or equivalent statutory agreements.

7.45 If all of the circumstances set out in paragraph 7.41 above apply, the Agency should exclude the person who made the payment in respect of the remediation action in question. (See paragraph 7.34 above for guidance on how this exclusion should be made.)

Test 3: Sold with information

7.46 The purpose of this test is to exclude from liability those who, although they have caused or knowingly permitted the presence of a significant contaminant in, on or under some land, have disposed of that land in circumstances where it is reasonable that another member of the liability group, who has acquired the land from them, should bear the liability for remediation of the land.

7.47 In applying this test, the Agency should consider whether all the following circumstances exist:

(a) one of the members of the liability group (the "seller") has sold the land in question to a person who is also a member of the liability group (the "buyer");

(b) the sale took place at arms' length (that is, on terms which could be expected in a sale on the open market between a willing seller and a willing buyer);

(c) before the sale became binding, the buyer had information that would reasonably allow that particular person to be aware of the presence on the land of the contaminant identified in the significant contaminant linkage in question, and the

broad measure of that presence; and the seller did nothing material to misrepresent the implications of that presence; and

(d) after the date of the sale, the seller did not retain any interest in the land in question or any rights to occupy or use that land.

7.48 In determining whether these circumstances exist:

(a) a sale of land should be regarded as being either the transfer of the freehold or the grant or assignment of a long lease; for this purpose, a "long lease" means a lease (or sub-lease) granted for a period of more than 21 years under which the lessee satisfies the definition of "owner" set out in section 78A(9);

(b) the question of whether persons are members of a liability group should be decided on the circumstances as they exist at the time of the determination (and not as they might have been at the time of the sale of the land);

(c) where there is a group of transactions or a wider agreement (such as the sale of a company or business) including a sale of land, that sale of land should be taken to have been at arms' length where the person seeking to be excluded can show that the net effect of the group of transactions or the agreement as a whole was a sale at arms' length;

(d) in transactions since the beginning of 1990 where the buyer is a large commercial organisation or public body, permission from the seller for the buyer to carry out his own investigations of the condition of the land should normally be taken as sufficient indication that the buyer had the information referred to in paragraph 7.47(c) above; and

(e) for the purposes of paragraph 7.47(d) above, the following rights should be disregarded in deciding whether the seller has retained an interest in the radioactive contaminated land in question or rights to occupy or use it: (i) easements for the benefit of other land, where the radioactive contaminated land in question is the servient tenement, and statutory rights of an equivalent nature, (ii) rights of statutory undertakers to carry out works or install equipment, (iii) reversions upon expiry or termination of a long lease, and (iv) the benefit of restrictive covenants or equivalent statutory agreements.

7.49 If all of the circumstances in paragraph 7.47 above apply, the Agency should exclude the seller. (See paragraph 7.34 above for guidance on how this exclusion should be made.)

7.50 This test does not imply that the receipt by the buyer of the information referred to in paragraph 7.47(c) above necessarily means that the buyer has "caused or knowingly permitted" the presence of the significant contaminant in, on or under the land.

Test 4: Changes to substances

7.51 The purpose of this test is to exclude from liability those who are members of a liability group solely because they caused or knowingly permitted the presence in, on or under the land of a substance which has only led to the creation of a significant contaminant linkage because of its interaction with another substance which was later introduced to the land by another person.

7.52 In applying this test, the Agency should consider whether all the following circumstances exist:

(a) The substance forming part of the significant contaminant linkage in question is present, or has become a significant contaminant, only as the result of radioactive decay (the "intervening change") involving: (i) both a substance (the "earlier substance") which would not have formed part of the significant contaminant linkage if the intervening change had not occurred; and (ii) one or more other substances (the "later substances").

(b) The intervening change would not have occurred in the absence of the later substances;

(c) A person (the "first person") is a member of the liability group because he/she caused or knowingly permitted the presence in, on or under the land of the earlier substance, but he/she did not cause or knowingly permit the presence of any of the later substances.

(d) One or more other persons are members of the liability group because they caused or knowingly permitted the later substances to be in, on or under the land.

(e) Before the date when the later substances started to be introduced in, on or under the land, the first person: (i) could not reasonably have foreseen that the later substances would be introduced onto the land; (ii) could not reasonably have foreseen that, if they were, the intervening change would be likely to happen; or (iii) took what, at that date, were reasonable precautions to prevent the introduction of the later substances or the occurrence of the intervening change, even though those precautions have, in the event, proved to be inadequate.

(f) After that date, the first person did not: (i) cause or knowingly permit any more of the earlier substance to be in, on or under the land in question; (ii) do anything which has contributed to the conditions that brought about the intervening change; or (iii) fail to do something which he could reasonably have been expected to do to prevent the intervening change happening.

7.53 If all of the circumstances in paragraph 7.52 above apply, the Agency should exclude the first person (or persons, if more than one member of the liability group meets this description).

Test 5: Escaped substances

7.54 The purpose of this test is to exclude from liability those who would otherwise be liable for the remediation of radioactive contaminated land which has become contaminated as a result of the escape of substances from other land, where it can be shown that another member of the liability group was actually responsible for that escape.

7.55 In applying this test, the Agency should consider whether all the following circumstances exist:

(a) a significant contaminant is present in, on or under the radioactive contaminated land in question wholly or partly as a result of its escape from other land;

(b) a member of the liability group for the significant contaminant linkage of which that contaminant forms part: (i) caused or knowingly permitted the contaminant to be present in, on or under that other land (that is, the person is a member of that liability group by reason of section 78K(1)), and (ii) is a member of that liability group solely for that reason; and

(c) one or more other members of that liability group caused or knowingly permitted the significant contaminant to escape from that other land and its escape would not have happened but for their actions or omissions.

7.56 If all of the circumstances in paragraph 7.55 above apply, the Agency should exclude any person meeting the description in paragraph 7.55(b) above.

Test 6: Introduction of pathways or receptors

7.57 The purpose of this test is to exclude from liability those who would otherwise be liable solely because of the subsequent introduction by others of the relevant pathways or receptors (as defined in Section 3) in the significant contaminant linkage.

7.58 In applying this test, the Agency should consider whether all the following circumstances exist:

(a) One or more members of the liability group have carried out a relevant action, and/or made a relevant omission ("the later actions"), either: (i) as part of the series of actions and/or omissions which amount to their having caused or

knowingly permitted the presence of the contaminant in a significant contaminant linkage; or (ii) in addition to that series of actions and/or omissions.

(b) The effect of the later actions has been to introduce the pathway or the receptor which form part of the significant contaminant linkage in question.

(c) If those later actions had not been carried out or made, the significant contaminant linkage would either not have existed, or would not have been a significant contaminant linkage, because of the absence of a pathway or of a receptor.

(d) A person is a member of the liability group in question solely by reason of having carried out other actions or making other omissions ("the earlier actions") which were completed before any of the later actions were carried out or made.

7.59 For the purpose of this test:

(a) A "relevant action" means: (i) the carrying out at any time of building, engineering, mining or other operations in, on, over or under the land in question; and/or (ii) the making of any material change in the use of the land in question for which a specific application for planning permission was required to be made (as opposed to permission being granted, or deemed to be granted, by general legislation or by virtue of a development order, the adoption of a simplified planning zone or the designation of an enterprise zone) at the time when the change in use was made.

(b) A "relevant omission" means: (i) in the course of a relevant action, failing to take a step which would have ensured that a significant contaminant linkage was not brought into existence as a result of that action, and/or (ii) unreasonably failing to maintain or operate a system installed for the purpose of reducing or managing the risk associated with the presence on the land in question of the significant contaminant in the significant contaminant linkage in question.

7.60 This test applies only with respect to developments on, or changes in the use of, the radioactive contaminated land itself. It does not apply where the relevant acts or omissions take place on other land, even if they have the effect of introducing pathways or receptors.

7.61 If all of the circumstances in paragraph 7.58 above apply, the Agency should exclude any person meeting the description at paragraph 7.58(d) above.

Section 7(d): Apportionment between members of a single Class A liability group

7.62 The statutory guidance in this sub-section is issued under section 78F(7) and sets out the principles on which liability should be apportioned within each Class A liability group as it stands after any members have been excluded from liability with respect to the relevant significant contaminant linkage as a result of the application of the exclusion tests in Section 7(c).

7.63 The history and circumstances of different areas of radioactive contaminated land, and the nature of the responsibility of each of the members of any Class A liability group for a significant contaminant linkage, are likely to vary greatly. It is therefore not possible to prescribe detailed rules for the apportionment of liability between those members which would be fair and appropriate in all cases.

General Principles

7.64 In apportioning costs between the members of a Class A liability group who remain after any exclusions have been made, the Agency should follow the general principle that liability should be apportioned to reflect the relative responsibility of each of those members for creating or continuing the risk now being caused by the significant contaminant linkage in question. In applying this principle, the Agency should follow, where appropriate, the specific approaches set out in paragraphs 7.66-7.75 below.

7.65 If appropriate information is not available to enable the Agency to make such an assessment of relative responsibility (and, following the guidance at paragraph 7.27 above, such information cannot reasonably be obtained) the Agency should apportion liability in equal shares among the remaining members of the liability group for any significant contaminant linkage, subject to the specific guidance in paragraph 7.74 below.

Specific Approaches

Partial applicability of an exclusion test

7.66 If, for any member of the liability group, the circumstances set out in any of the exclusion tests in Section 7(c) above apply to some extent, but not sufficiently to mean that the an exclusion should be made, the Agency should assess that person's degree of responsibility as being reduced to the extent which is appropriate in the light of all the circumstances and the purpose of the test in question. For example, in considering Test 2, a payment may have been made which was sufficient to pay for only half of the necessary remediation at that time – the Agency could therefore reduce the payer's responsibility by half.

Entry of a substance vs. its continued presence

7.67 In assessing the relative responsibility of a person who has caused or knowingly permitted the entry of a significant contaminant into, onto or under land (the "first person") and another person who has knowingly permitted the continued presence of that same contaminant in, on or under that land (the "second person"), the Agency should consider the extent to which the second person had the means and a reasonable opportunity to deal with the presence of the contaminant in question or to reduce the seriousness of the implications of that presence. The Agency should then assess the relative responsibilities on the following basis: (a) if the second person had the necessary means and opportunity, they should bear the same responsibility as the first person; (b) if the second person did not have the means and opportunity, their responsibility relative to that of the first person should be substantially reduced; and (c) if the second person had some, but insufficient, means or opportunity, their responsibility relative to that of the first person should be reduced to an appropriate extent.

Persons who have caused or knowingly permitted the entry of a significant contaminant

7.68 Where the Agency is determining the relative responsibilities of members of the liability group who have caused or knowingly permitted the entry of the significant contaminant into, onto or under the land, it should follow the approach set out in paragraphs 7.69 to 7.72 below.

7.69 If the nature of the remediation action points clearly too different members of the liability group being responsible for particular circumstances at which the action is aimed, the Agency should apportion responsibility in accordance with that indication. In particular, where different persons were in control of different areas of the land in question, and there is no interrelationship between those areas, the Environment Agency should regard the persons in control of the different areas as being separately responsible for the events which make necessary the remediation actions or parts of actions referable to those areas of land.

7.70 If the circumstances in paragraph 7.69 above do not apply, but the quantity of the significant contaminant present is a major influence on the cost of remediation, the Agency should regard the relative amounts of that contaminant which are referable to the different persons as an appropriate basis for apportioning responsibility.

7.71 If it is deciding the relative quantities of contaminant which are referable to different persons, the Agency should consider first whether there is direct evidence of the relative quantities referable to each person. If there is such evidence, it should be used. In the absence of direct evidence, the Agency should see whether an appropriate surrogate measure is available. Such surrogate measures can include: (a) the relative periods during which the different persons carried out broadly equivalent

operations on the land; (b) the relative scale of such operations carried out on the land by the different persons (a measure of such scale may be the quantities of a product that were produced); (c) the relative areas of land on which different persons carried out their operations; and (d) combinations of the foregoing measures.

7.72 In cases where the circumstances in neither paragraph 7.69 nor 7.70 above apply, the Agency should consider the nature of the activities carried out by the appropriate persons concerned from which the significant contaminant arose. Where these activities were broadly equivalent, the Agency should apportion responsibility in proportion to the periods of time over which the different persons were in control of those activities. It would be appropriate to adjust this apportionment to reflect circumstances where the persons concerned carried out activities which were not broadly equivalent, for example where they were on a different scale.

Persons who have knowingly permitted the continued presence of a contaminant

7.73 Where the Agency is determining the relative responsibilities of members of the liability group who have knowingly permitted the continued presence, over a period of time, of a significant contaminant in, on or under land, it should apportion that responsibility in proportion to: (a) the length of time during which each person controlled the land; (b) the area of land which each person controlled; (c) the extent to which each person had the means and a reasonable opportunity to deal with the presence of the contaminant in question or to reduce the seriousness of the implications of that presence; or (d) a combination of the foregoing factors.

Companies and officers

7.74 If, following the application of the exclusion tests (and in particular the specific guidance at paragraph 7.39(k)(iii)) both a company and one or more of its relevant officers remain as members of the liability group, the Agency should apportion liability on the following bases:

(a) the Agency should treat the company and its relevant officers as a single unit for the purposes of: (i) applying the general principle in paragraph 7.64 above (i.e. it should consider the responsibilities of the company and its relevant officers as a whole, in comparison with the responsibilities of other members of the liability group), and (ii) making any apportionment required by paragraph 7.65 above; and

(b) having determined the share of liability falling to the company and its relevant officers together, the Agency should apportion responsibility between the company and its relevant officers on a basis which takes into account the degree of personal responsibility of those officers, and the relative levels of resources which may be available to them and to the company to meet the liability.

7.75 For the purposes of paragraph 7.74 immediately above, the "relevant officers" of a company are any director, manager, secretary or other similar officer of the company, or any other person purporting to act in any such capacity.

Section 7(e): Exclusion of members of a Class B liability group

7.76 The guidance in this sub-section is issued under section 78F(6) and sets out the test which should be applied in determining whether to exclude from liability a person who would otherwise be a Class B person (that is, a person liable to meet remediation costs solely by reason of ownership or occupation of the land in question). The purpose of the test is to exclude from liability those who do not have an interest in the capital value of the land in question.

7.77 The test applies where two or more persons have been identified as Class B persons for a significant contaminant linkage.

7.78 In such circumstances, the Agency should exclude any Class B person who either:

(a) occupies the land under a licence, or other agreement, of a kind which has no marketable value or which he is not legally able to assign or transfer to another person (for these purposes the actual marketable value, or the fact that a particular licence or agreement may not actually attract a buyer in the market, are irrelevant); or

(b) is liable to pay a rent which is equivalent to the rack rent for such of the land in question as he occupies and holds no beneficial interest in that land other than any tenancy to which such rent relates; where the rent is subject to periodic review, the rent should be considered to be equivalent to the rack rent if, at the latest review, it was set at the full market rent at that date.

7.79 However, the test should not be applied, and consequently no exclusion should be made, if it would result in the exclusion of all of the members of the liability group.

Section 7(f): Apportionment Between the Members of a Single Class B Liability Group

7.80 The statutory guidance in this sub-section is issued under section 78F(7) and sets out the principles on which liability should be apportioned within each Class B liability group as it stands after any members have been excluded from liability with respect to the relevant significant contaminant linkage as a result of the application of the exclusion test in Section 7(e) above.

7.81 Where the whole or part of a remediation action for which a Class B liability group is responsible clearly relates to a particular area within the land to which the significant contaminant linkage as a whole relates, liability for the whole, or the relevant part, of that action should be apportioned among those members of the liability group who own or occupy that particular area of land.

7.82 Where those circumstances do not apply, the Agency should apportion liability for the remediation actions necessary for the significant contaminant linkage in question amongst all of the members of the liability group.

7.83 Where the Agency is apportioning liability amongst some or all of the members of a Class B liability group, it should do so in proportion to the capital values of the interests in the land in question, which include those of any buildings or structures on the land:

(a) where different members of the liability group own or occupy different areas of land, each such member should bear responsibility in the proportion that the capital value of their area of land bears to the aggregate of the capital values of all the areas of land; and

(b) where different members of the liability group have an interest in the same area of land, each such member should bear responsibility in the proportion which the capital value of their interest bears to the aggregate of the capital values of all those interests; and

(c) where both the ownership or occupation of different areas of land and the holding of different interests come into the question, the overall liability should first be apportioned between the different areas of land and then between the interests within each of those areas of land, in each case in accordance with the last two sub-paragraphs.

7.84 The capital value used for these purposes should be that estimated by the Agency, on the basis of the available information, disregarding the existence of any contamination. The value should be estimated in relation to the date immediately before the Agency first served a notice under section 78B(3) in relation to that land. Where the land in question is reasonably uniform in nature and amenity and is divided among a number of owner-occupiers, it can be an acceptable approximation of this basis of apportionment to make the apportionment on the basis of the area occupied by each.

7.85 Where part of the land in question is land for which no owner or occupier can be found, the Agency should deduct the share of costs attributable to that land on the basis of the respective capital values of that land and the other land in question before making a determination of liability.

7.86 If appropriate information is not available to enable the Agency to make an assessment of relative capital values (and, following the guidance at paragraph 7.27

above, such information cannot reasonably be obtained), the Agency should apportion liability in equal shares among all the members of the liability group.

Section 7(g): Attribution of responsibility between liability groups

7.87 The statutory guidance in this sub-section is issued under section 78F(7) and applies where one remediation action is referable to two or more significant contaminant linkages (i.e. it is a "shared action"). This can occur either where both linkages require the same action (that is, it is a "common action") or where a particular action is part of the best combined remediation scheme for two or more linkages (that is, it is a "collective action"). This sub-section provides statutory guidance on the attribution of responsibility for the costs of any shared action between the liability groups for the linkages to which it is referable.

Attributing Responsibility for the Cost of Shared Actions between Liability Groups

7.88 The Agency should attribute responsibility for the costs of any common action among the liability groups for the significant contaminant linkages to which it is referable on the following basis:

(a) If there is a single Class A liability group, then the full cost of carrying out the common action should be attributed to that group, and no cost should be attributed to any Class B liability group).

(b) If there are two or more Class A liability groups, then an equal share of the cost of carrying out the common action should be attributed to each of those groups, and no cost should be attributed to any Class B liability group).

(c) If there is no Class A liability group and there are two or more Class B liability groups, then the Agency should treat those liability groups as if they formed a single liability group, attributing the cost of carrying out the common action to that combined group, and applying the guidance on exclusion and apportionment set out in sub-sections 7(e) and 7(f) above as between all of the members of that combined group.

7.89 The Agency should attribute responsibility for the cost of any collective action among the liability groups for the significant contaminant linkages to which it is referable on the same basis as for the costs of a common action, except that where the costs fall to be divided among several Class A liability groups, instead of being divided equally, they should be attributed on the following basis:

(a) Having estimated the costs of the collective action, the Agency should also estimate the hypothetical cost for each of the liability groups of carrying out the actions which are subsumed by the collective action and which would be necessary if the significant contaminant linkage for which that liability group is

responsible were to be addressed separately; these estimates are the "hypothetical estimates" of each of the liability groups.

(b) The Agency should then attribute responsibility for the cost of the collective action between the liability groups in the proportions which the hypothetical estimates of each liability group bear to the aggregate of the hypothetical estimates of all the groups.

Confirming the attribution of responsibility

7.90 If any appropriate person demonstrates, before the service of a remediation notice, to the satisfaction of the Agency that the result of an attribution made on the basis set out in paragraphs 7.88 and 7.89 above would have the effect of the liability group of which they are a member having to bear a liability which is so disproportionate (taking into account the overall relative responsibilities of the persons or groups concerned for the condition of the land) as to make the attribution of responsibility between all the liability groups concerned unjust when considered as a whole, the Agency should reconsider the attribution. In doing so, the Agency should consult the other appropriate persons concerned.

7.91 If the Agency then agrees that the original attribution would be unjust it should adjust the attribution between the liability groups so that it is just and fair in the light of all the circumstances. An adjustment under this paragraph should be necessary only in very exceptional cases.

Orphan Linkages

7.92 As explained above (e.g. in paragraphs 7.6 and 7.9), an “orphan linkage” may arise where: (a) no Class A or Class B persons can be found and the Secretary of State is not the appropriate person; or (b) those who would otherwise be liable are exempted by one of the relevant statutory provisions (i.e. sections 78J(3), 78K or 78X(3)).

7.93 In any case where only one significant contaminant linkage has been identified, and that is an orphan linkage, the Agency should itself bear the cost of any remediation which is carried out (although there is a possibility that it may receive a contribution).

7.94 In more complicated cases, there may be two or more significant contaminant linkages, of which some are orphan linkages. Where this applies, the Agency will need to consider each remediation action separately.

7.95 For any remediation action which is referable to an orphan linkage, and is not referable to any other linkage for which there is a liability group, the Agency should itself bear the cost of carrying out that action.

7.96 For any shared action which is referable to an orphan linkage and also to a single significant pollutant linkage for which there is a Class A liability group, the Agency should attribute all of the cost of carrying out that action to that Class A liability group.

7.97 For any shared action which is referable to an orphan linkage and also to two or more significant contaminant linkages for which there are Class A liability groups, the Agency should attribute the costs of carrying out that action between those liability groups in the same way as it would do if the orphan linkage did not exist.

7.98 For any shared action which is referable to an orphan linkage and also to a significant contaminant linkage for which there is a Class B liability group (and not to any significant contaminant linkage for which there is a Class A liability group) the Agency should adopt the following approach:

(a) where the remediation action is a common action the Agency should attribute all of the cost of carrying out that action to the Class B liability group; and

(b) where the remediation action is a collective action, the Agency should estimate the hypothetical cost of the action which would be needed to remediate separately the effects of the linkage for which that group is liable. The Agency should then attribute the costs of carrying out the collective action between itself and the Class B liability group so that the expected liability of that group does not exceed that hypothetical cost.

Section 8: The Recovery of the Costs of Remediation

8.1 The statutory guidance in this section is issued under section 78P(2) of the 1990 Act. It provides guidance on the extent to which the Agency must seek to recover the costs of remediation which it has carried out and which it is entitled to recover.

8.2 The main relevant sections of the 1990 Act are:

- Section 78P(1): *"Where, by virtue of section 78N(3)(a), (c), (e) or (f) … the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to section78K(6)… , to recover the reasonable cost incurred in doing it from the appropriate person or, if there are two or more appropriate persons in relation to the thing in question, from those persons in proportions determined pursuant to section 78F(7)…."*

- Section 78P(2): *"In deciding whether to recover the cost, and, if so, how much of the cost, which it is entitled to recover under subsection (1) above, the enforcing authority shall have regard - (a) to any hardship which the recovery may cause to the person from whom the cost is recoverable; and (b) to any guidance issued by the Secretary of State for the purposes of this subsection."*

8.3 This section also explains when the Agency is prevented from serving a remediation notice. Under section 78H(5), the Agency may not serve a remediation notice if the Agency has the power to carry out remediation itself, by virtue of section 78N. Under that latter section, the Agency asks the hypothetical question of whether it would seek to recover all of the reasonable costs it would incur if it carried out the remediation itself. The Agency then has the power to carry out that remediation itself if it concludes that, having regard to hardship and the guidance in this chapter, it would either not seek to recover its costs, or seek to recover only a part of its costs. The relevant sections of the 1990 Act are:

- Section 78H(5): *"The enforcing authority shall not serve a remediation notice on a person if and so long as … (d) the authority is satisfied that the powers conferred on it by section 78 below to do what is appropriate by way of remediation are exercisable..."*

- Section 78N(3) provides that the enforcing authority has the power to carry out remediation: *"(e) where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P … or any guidance issued under that subsection, - (i) not to seek to recover under subsection (1) of that section any of the reasonable cost incurred by it in doing that thing; or (ii) to seek so to recover only a portion of that cost;...."*

Section 8(a): Cost Recovery Decisions

8.4 This sub-section sets out considerations to which the Agency should have regard when making any cost recovery decision. In view of the wide variation in situations which are likely to arise (e.g. due to variations in the history and ownership of land, and liability for its remediation) the guidance in this section sets out principles and approaches, rather than detailed rules. The Agency should have regard to the circumstances of each individual case.

8.5 In making any cost recovery decision, the Agency should have regard to the following general principles:

(a) The Agency should aim for an overall result which is as fair and equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers.

(b) The "polluter pays" principle should be applied with a view that, where possible, the costs of remediating pollution should be borne by the polluter. The Agency should therefore consider the degree and nature of responsibility of the relevant appropriate person(s) for the creation, or continued existence, of the circumstances which lead to the land in question being identified as radioactive contaminated land.

8.6 In general the Agency should seek to recover all of its reasonable costs. However, the Agency should waive or reduce the recovery of costs to the extent that it considers this appropriate and reasonable, either: (i) to avoid any undue hardship which the recovery may cause to the appropriate person; or (ii) to reflect one or more of the specific considerations set out in the statutory guidance in subsections 8(b), 8(c) and 8(d) below. In making such decisions, the Agency should bear in mind that recovery is not necessarily an “all or nothing” matter (i.e. where reasonable, appropriate persons can be made to pay part of the Agency’s costs even if they cannot reasonably be made to pay all of the costs).

8.7 In deciding how much of its costs it should recover, the Agency should consider whether it could recover more of the costs by deferring recovery and securing them by a charge on the land in question under section 78P. Such deferral may lead to payment from the appropriate person either in instalments (see section 78P(12)) or when the land is next sold.

Information for Making Decisions

8.8 In general, the Agency should expect anyone who is seeking a waiver or reduction in the recovery of remediation costs to present any information needed to support such a request.

8.9 In making any cost recovery decision, the Agency should consider any relevant information provided by the appropriate person(s). The Agency should also seek to obtain such information as is reasonable, having regard to: (i) accessibility of the information; (ii) the cost, for any of the parties involved, of obtaining the information; and (iii) the likely significance of the information for any decision.

8.10 The Agency should, in all cases, inform the appropriate person of any cost recovery decisions taken, explaining the reasons for those decisions.

Cost Recovery Policies

8.11 The Agency may choose to adopt and make available a policy statement about the general approach it intends to take in making cost recovery decisions.

Section 8(b): Considerations Applying both to Class A & Class B Persons

8.12 Paragraphs 8.13 – 8.22 below set out considerations to which the Agency should have regard when making any cost recovery decisions, irrespective of whether the appropriate person is a Class A person or a Class B person. They apply in addition to the general issue of the "hardship" which the cost recovery may cause to the appropriate person.

Commercial Enterprises

8.13 Subject to the specific circumstances set out below, the Agency should adopt the same approach to all types of commercial or industrial enterprises which are identified as appropriate persons. This applies whether the appropriate person is a public corporation, a limited company (whether public or private), a partnership (whether limited or not) or an individual operating as a sole trader.

Threat of business closure or insolvency

8.14 In cases where a small or medium-sized enterprise is the appropriate person, or is run by the appropriate person, the Agency should consider: (i) whether recovery of the full cost attributable to that person would mean that the enterprise is likely to become insolvent and thus cease to exist; and (ii) if so, the cost to the local economy of such a closure.

8.15 Where the cost of that closure to the local economy appears to be greater than the costs of remediation which the Agency would have to bear itself, the Agency should consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent.

8.16 However, the Agency should not waive or reduce its costs recovery where: (a) it is satisfied that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation; (b) it appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or (c) it appears that the enterprise could be kept in, or returned to, business even if it does become insolvent under its current ownership.

8.17 For these purposes, a "small or medium-sized enterprise" should be taken to mean an independent enterprise which matches the definition of a “micro, small and medium-sized enterprise” as established by the European Commission Recommendation of 6 May 2003, and any updates of that definition as may happen in future. (Under the 2003 definition this would cover any such enterprise with fewer than 250 employees, and either an annual turnover less than or equal to €50 million, or an annual balance sheet total less than or equal to €43 million.

8.18 The Agency should seek to be consistent with any relevant policy on assisting enterprise or promoting economic development of the local authority in whose area the radioactive contaminated land is situated (if such a policy exists). The Agency should consult the local authority and take its views into consideration in making its cost recovery decisions.

Trusts

8.19 Where the appropriate persons include persons acting as trustees, the Agency should assume that such trustees will exercise all the powers which they have, or may reasonably obtain, to make funds available from the trust, or from borrowing that can be made on behalf of the trust, for the purpose of paying for remediation. The Agency should, nevertheless, consider waiving or reducing its costs recovery to the extent that the costs of remediation to be recovered from the trustees would otherwise exceed the amount that can be made available from the trust to cover those costs.

8.20 However, the Agency should not waive or reduce its costs recovery: (a) where it is satisfied that the trust was formed for the purpose of avoiding paying the costs of remediation; or (b) to the extent that trustees have personally benefited, or will personally benefit, from the trust.

Charities

8.21 Since charities are intended to operate for the benefit of the community, the Agency should consider the extent to which any recovery of costs from a charity would detrimentally impact that charity's activities. Where this is the case, the Agency should consider waiving or reducing its costs recovery to the extent needed to avoid such a consequence. This approach applies equally to charitable trusts and to charitable companies.

Social Housing Landlords

8.22 The Agency should consider waiving or reducing its costs recovery if: (a) the appropriate person is a body eligible for registration as a social housing landlord under section 2 of the Housing Act 1996 (for example, a housing association); (b) its liability relates to land used for social housing; and (c) full recovery would lead to significant financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised significantly. The extent of the waiver or reduction should be sufficient to avoid any such financial difficulties.

Section 8(c): Specific Considerations Applying to Class A Persons

8.23 This sub-section sets out specific considerations to which the Agency should have regard in cost recovery decisions where the appropriate person is a Class A person.

8.24 In applying the approach in this sub-section, the Agency should consider whether or not the Class A person is likely to have profited financially from the activity which led to the land being determined to be radioactive contaminated land (e.g. as might be the case if the contamination resulted from a business activity). If the person did profit, the Agency should generally be less willing to waive or reduce costs recovery than if no such profits were made.

Where other potentially appropriate persons have not been found

8.25 In some cases where a Class A person has been found, it may be possible to identify another person who caused or knowingly permitted the presence of the significant contaminant in question, but who cannot now be found for the purposes of treating that person as an appropriate person (as might be the case if a company has been dissolved). In such cases, the Agency should consider waiving or reducing its costs recovery from a Class A person if that person demonstrates that:

(a) another identified person, who cannot now be found, also caused or knowingly permitted the significant contaminant to be in, on or under the land; and

(b) if that other person could be found, the Class A person seeking the waiver or reduction of the Agency's costs recovery would either: (i) be excluded from liability by virtue of one or more of the exclusion tests set out in the Section 7 of this Guidance; or (ii) the proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Section 7.

8.26 Where an appropriate person is making a case for the Agency's costs recovery to be waived or reduced by virtue of paragraph 8.25 above, that person should provide

evidence to the Agency that a particular person, who cannot now be found, caused or knowingly permitted the significant contaminant to be in, on or under the land. The Agency should not regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

Section 8(d): Specific Considerations Applying to Class B Persons

8.27 This sub-section sets out specific considerations relating to cost recovery decisions where the appropriate person is a Class B person.

Costs in Relation to Land Values

8.28 In some cases, the costs of remediation may exceed the likely value of the land in its current use (as defined in Section 3 of this Guidance) after the required remediation has been carried out. In such cases, the Agency should consider waiving or reducing its costs recovery from a Class B person if that person demonstrates that the costs of remediation are likely to exceed the value of the land. In this context, the "value" should be taken to be the value that the remediated land would have on the open market, at the time the cost recovery decision is made, disregarding any possible blight arising from the contamination.

8.29 In general, the extent of the waiver or reduction in costs recovery should be sufficient to ensure that the costs of remediation borne by the Class B person do not exceed the value of the land. However, the Agency should seek to recover more of its costs to the extent that the remediation would result in an increase in the value of any other land from which the Class B person would benefit.

Precautions taken before acquiring a freehold or a leasehold interest

8.30 In some cases, the Class B person may have been unaware that the land in question may be radioactive contaminated land when they acquired it. Alternatively, the person may have taken a risk that the land was not contaminated, or they may have taken some precautions to reduce the risk of acquiring land which is contaminated.

8.31 The Agency should consider reducing its costs recovery where a Class B person who is the owner of the land demonstrates that:

(a) the person took such steps (prior to acquiring the freehold or accepting the grant of assignment of a leasehold) as would have been reasonable at that time to establish the presence of any contaminants;

(b) when the person acquired the land (or accepted the grant of assignment of the leasehold) they were nonetheless unaware of the presence of the significant

contaminant now identified, and could not reasonably have been expected to have been aware of its presence; and

(c) the Agency considers it would be reasonable, taking into account the interests of national and local taxpayers, that the person should not bear the whole cost of remediation.

8.32 The Agency should bear in mind that the safeguards which might reasonably be expected to be taken will be different in different types of transaction (for example, acquisition of recreational land as compared with commercial land transactions) and as between buyers of different types (for example, private individuals as compared with major commercial undertakings).

Owner-occupiers of Dwellings

8.33 Where a Class B person owns and occupies a dwelling on the radioactive contaminated land in question, the Agency should consider waiving or reducing its costs recovery if the person satisfies the Agency that, at the time the person purchased the dwelling, the person did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of the contaminant(s) in question. Any such waiver or reduction should be to the extent needed to ensure that the Class B person in question bears no more of the cost of remediation than it appears reasonable to impose, having regard to the person's income, capital and outgoings. Where the person has inherited the dwelling or received it as a gift, the Agency should consider the situation at the time when the person received the property.

8.34 Where the radioactive contaminated land in question extends beyond the dwelling and its curtilage, and is owned or occupied by the same appropriate person, the approach in paragraph 8.33 above should be applied only to the dwelling and its curtilage.

GLOSSARY

Deterministic effect: type of health effect (such as a radiation-induced cataract of the eye) which occurs following a dose of radiation above a certain level (a 'threshold' level) with the severity of the health effect dependent on the level of the dose.

Detriment: principally means a health detriment, but may also include other detriments, for example, a detriment associated with blight.

Enforcing Authority: defined in section 78A(9) in relation to a special site, as the Environment Agency.

Effective dose: an energy measure which applies a weighting factor to the equivalent dose to account for the different effectiveness of the dose in causing damage to different human tissues (e.g. skin, eyes). It is measured in Sieverts.

Equivalent dose: an energy measure which applies a weighting factor to the absorbed dose to account for the different effectiveness of various types of radiation (alpha, beta, gamma, neutron) in damaging human tissue. It is measured in Sieverts.

Health detriment: is defined in Article 1 of the Basic Safety Standards Directive as:
"an estimate of the risk in reduction in length and quality of life occurring in a population following exposure to ionising radiations. This includes loss arising from somatic effects, cancers and severe genetic disorder." Section 78A(9) of the 1990 Act says this meaning applies for the purposes of Part 2A of the 1990 Act.

Intervention: is a type of remedial action and is defined in Article 1 of the Basic Safety Standards Directive as:
"a human activity that prevents or decreases the exposure of individuals to radiation from sources which are not part of a practice or which are out of control, by acting on sources, transmission pathways and individuals themselves."
Section 78A(9) of the 1990 Act says this meaning applies for the purposes of Part 2A of the 1990 Act.

The term 'intervention' is in common use in the radiological protection community, and retains the above meaning in both the legislation and this Guidance. However, the International Commission for Radiation Protection (ICRP) has recommended that this term be replaced by the term 'unplanned exposure'. It is possible that this new term will eventually become a feature of European and national legislation, but at present it has no statutory effect.

Justification: a radiological protection principle. In the specific case of an intervention, justification means ensuring that the reduction in detriment due to radiation is sufficient to justify any adverse effects and costs, including social costs, of the intervention (see Section 6. of this Guidance).

Optimisation: a radiological protection principle which ensures that the form, scale and duration of the intervention maximises the benefit of the reduction in health detriment less the detriment associated with the intervention (See Section 6 of this Guidance).

Practice: is defined in Article 1 of the Basic Safety Standards Directive as:
"a human activity that can increase the exposure of individuals to radiation from an artificial source, or from a natural radiation source where natural radionuclides are processed for their radioactive, fissile or fertile properties, except in the case of an emergency exposure." Section 78A(9) of the 1990 Act says this meaning applies for the purposes of Part 2A of the 1990 Act.

The term 'practice' is in common use in the radiological protection community, and retains the above meaning in both the legislation and this Guidance. However, the International Commission for Radiation Protection (ICRP) has recommended that this term be replaced by the term 'planned exposure'. It is possible that this new term will eventually become a feature of European and national legislation, but at present it has no statutory effect.

Stochastic effect: the likelihood of a radiation-induced health effect (the principal one being radiation-induced cancer) which may be assumed to be linearly proportional to the radiation dose over a wide range of doses and where the severity of the health effect is not dependent on the level of the dose.

EXPLANATORY MEMORANDUM TO

The Part 2A Statutory Guidance on Radioactive Contaminated Land (Wales)

This Explanatory Memorandum has been prepared by the Department for Environment and Sustainable Development and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and accordance with Standing Order 27.14

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Statutory Guidance on Radioactive Contaminated Land (Wales) 2012.

Name of Minister: J Griffiths

Date: September 2012

Description

1. Part 2A of the Environmental Protection Act 1990 (as it applies to harm attributable to radioactivity) requires Local Authorities to find "contaminated land" (referred to as radioactive contaminated land in this Memorandum and the Statutory Guidance) and ensures that "reasonable" remediation is undertaken where such land is found. The purpose of the Statutory Guidance is to explain key parts of the 1990 Act, and to set legally binding rules on how they should be applied by the regulator. Its main purpose is to:

    - Explain how local authorities should decide whether land is radioactive contaminated land
    - Explain how local authorities should go about implementing the Regime
    - Explain how the regulator (always the Environment Agency in the case of radioactive contaminated land) should ensure that remediation requirements are "reasonable"
    - Elaborate on specific aspects of the liability arrangements where more than one party is liable.

2. This Statutory Guidance applies only to radioactive contamination of land. Non-radioactive contamination of land is covered by separate Statutory Guidance issued by the Minister for the Environment and Sustainable Development.

Matters of special interest to the Constitutional and Legislative Affairs Committee

3. This Statutory Guidance has been scored in accordance the Welsh Government's Welsh Language Scheme and does require translation due to the length, the technical nature and limited target audience of the document.

4. Section 78YA of the Environmental Protection Act 1990, as amended by Section 57 of the Environment Act 1995, requires that before the Statutory Guidance may be issued a draft of the Guidance must be laid before the Assembly and the Guidance may not be issued until after the period of 40 days beginning with the day on which draft is laid. In the reckoning of this period, no account may be taken of any time during which the Assembly is dissolved or prorogued or during which it is adjourned for more than four days

Legislative Background

5. Part 2A of the Environmental Protection Act 1990 ("Part 2A") provides the legislative framework for the non-radioactive contaminated land regime in England, Wales and Scotland. Section 78YC of the

Environmental Protection Act 1990 gives powers to the Secretary of State to make regulations applying the Part 2A regime, with any necessary modifications, for the purpose of dealing with harm attributable to radioactivity. These powers have been exercised in the Radioactive Contaminated Land (Modification of Enactments) (Wales) Regulations 2006[1] to establish a legal framework for dealing with radioactive contaminated land in Wales

6. Both contaminated land regimes provide for contaminated land to be identified and dealt with in a risk-based manner. Under the non-radioactive contaminated land regime local authorities are the primary enforcing authorities under Part 2A and are required to identify contaminated land in their areas and deal with land where the risks of contamination to human health and the environment are unacceptable. The Environment Agency is the secondary regulator for land designated as "special sites". Land that is radioactive contaminated land qualifies as a "special site". This means that, although local authorities are required to identify radioactive contaminated land in their areas, the Environment Agency rather than local authorities will be responsible for dealing with the land.

7. The requirement for the Statutory Guidance is specified in Section 78YA of the Environmental Protection Act 1990, as amended by Section 57 of the Environment Act 1995 (as it applies to harm attributable to radioactivity).

Territorial Extent and Application

8. This Statutory Guidance applies to Wales only. Similar guidance has been made by the Secretary for State for Energy and Climate Change in relation to England.

Policy background

9. The Statutory Guidance on both radioactive contaminated land and non-radioactive contaminated land is currently contained in a single document issued by the Department for Environment, Food and Rural Affairs (Defra). It has been decided by Defra to revise the Statutory Guidance on non-radioactive contaminated land in order to remove "regulatory creep" and increase regulatory certainty. In addition, to make both guidances simpler and easier to understand, it has been decided to separate them and to have two stand-alone documents.

10. This Statutory Guidance follows the new format of the revised Statutory Guidance for non-radioactive contaminated land. However, the difficulties with regard to "regulatory creep" and uncertainty that were

[1] SI 2006/12988 These Regulations have been amended by the Radioactive Contaminated Land (Modification of Enactments) (Wales) (Amendment) Regulations 2007 (SI 2007/3250); the Radioactive Contaminated Land (Modification of Enactments) (Wales)) (Amendment) Regulations 2008 (SI 2008/521 and the Radioactive Contaminated Land (Modification of Enactments) (Wales) (Amendment) Regulations 2010 (SI 2010/2146)

considered to apply to the non-radioactive contaminated land regime do not apply in the case of the radioactive contaminated land regime. Therefore this Statutory Guidance does not alter the substance of the current Statutory Guidance on radioactive contaminated land, for example, the tests for determining whether land is radioactively contaminated in the legal sense remain the same, but purely separates the guidance from that of non radioactive contaminated land.

Consultation

11. A 12 week consultation was launched by Defra and the Welsh Government on 21 December 2010 on proposals to update the contaminated land regimes in England and Wales. There were 112 responses to the consultation from interested parties including local authorities, consultants/contractors, industry, lawyers and academics. Supplementary meetings also took place with interested parties during and after the consultation period. There was general support overall for the proposals including the proposal to issue separate Statutory Guidance on radioactive contaminated land. The consultation document stated that there was no plan to have a separate consultation on this guidance and the Welsh Government decided not to hold a separate formal public consultation on the new statutory RCL guidance because:

- The specific rules on radioactive land were subject to full public consultation in 2006.
- No substantive changes are planned for the rules on radioactivity, other than some of the wider changes already consulted on; and,
- The proposed amendments to the Contaminated Land (Wales) Regulations 2006 which were consulted on are of a minor nature.

Guidance

12. Information on how the existing Statutory Guidance is being changed will be made available on the Welsh Government website at http://wales.gov.uk

Regulatory Impact Assessment

13. A Regulatory Impact Assessment has not been prepared as the Regulations will impose no significant costs on the public or private sectors, charities, the voluntary sector and the business sector.

Impact

14. The impact on businesses, charities, the public sector and the voluntary sector is expected to be negligible because this document replaces the existing Statutory Guidance with no material changes to the substance of the radioactive contaminated land regime. No land has been designated as radioactively contaminated in Wales.

Monitoring & review

15. Review of this Statutory Guidance will be considered in parallel with DECC's and Defra's overall review of policy on the contaminated land regime in October 2016.

ACCOMPANYING DOCUMENTS
Explanatory Notes and an Explanatory Memorandum are printed separately.

Public Audit (Wales) Bill

[AS INTRODUCED]

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Public Audit (Wales) Bill

[AS INTRODUCED]

An Act of the National Assembly for Wales to make provision reforming audit arrangements in Wales; continuing the office of Auditor General for Wales and creating a new body to be known as the Wales Audit Office; providing for the Auditor General for Wales to audit local government bodies in Wales; and for connected purposes.

Having been passed by the National Assembly for Wales and having received the assent of Her Majesty, it is enacted as follows:

Introduction

1 Overview

The main provisions of this Act—

(a) prescribe that the office of Auditor General for Wales is to continue upon the terms set out in Part 1, Chapter 1;

(b) create a new corporate body called the Wales Audit Office (the "WAO") and confer functions upon it (Part 2 and Schedules 1 and 2);

(c) prescribe governance arrangements for the Auditor General for Wales and the WAO, including arrangements for oversight of the Auditor General by the WAO, and provisions regarding the relationship between the two (Part 2, Chapter 2 and Schedules 1 and 2);

(d) prescribe how the functions of the Auditor General for Wales are to be exercised, and make provision for the Auditor General to audit the accounts of local government bodies in Wales (Part 1, Chapter 2).

PART 1

AUDITOR GENERAL FOR WALES

CHAPTER 1

THE OFFICE OF AUDITOR GENERAL FOR WALES

2 Office of Auditor General for Wales

(1) The office of Auditor General for Wales (the "Auditor General") is to continue.

(2) It is for Her Majesty to appoint a person to be Auditor General on the nomination of the National Assembly.

(3) No nomination is to be made until the National Assembly is satisfied that reasonable consultation has been undertaken with such bodies as appear to the Assembly to represent the interests of local government bodies in Wales.

(4) The person appointed holds office for up to 8 years.

(5) The person may not be appointed again.

(6) The validity of any act or omission of a person appointed as Auditor General is not affected by any defect in the person's nomination or appointment.

3 Resignation or removal

(1) A person appointed as Auditor General holds office until the end of the period for which the person was appointed (subject to subsections (2) and (3)).

(2) Her Majesty may relieve a person from office as Auditor General before the end of the period for which the person was appointed—

(a) at the person's request, or

(b) on Her Majesty being satisfied that the person is incapable for medical reasons of performing the duties of the office and of requesting to be relieved of it.

(3) Her Majesty may remove a person from office as Auditor General before the end of the period for which the person was appointed on the making of a recommendation, on the ground of the person's misbehaviour, that Her Majesty should do so.

(4) A recommendation for the removal of a person from office as Auditor General may not be made unless—

(a) the National Assembly has resolved that the recommendation should be made, and

(b) the resolution of the Assembly is passed on a vote in which the number of Assembly members voting in favour is not less than two-thirds of the total number of Assembly seats.

4 Disqualification

(1) A person cannot be appointed as Auditor General if the person is disqualified on any of the grounds specified in subsection (3).

(2) A person ceases to be Auditor General if the person is disqualified on any of the grounds specified in subsection (3).

(3) A person is disqualified from being Auditor General if the person is—

(a) a Member of the National Assembly;

(b) the holder of any other office or position to which a person may be appointed, or recommended or nominated for appointment, by or on behalf of—

(i) the Crown,

(ii) the National Assembly, or

(iii) the National Assembly Commission;

(c) a Member of the House of Commons or House of Lords;

(d) a Member of the Scottish Parliament;

(e) a Member of the Northern Ireland Assembly;

(f) an employee of the Wales Audit Office.

5 Employment etc of former Auditor General

(1) This section applies to a person who was appointed as Auditor General under this Part but who no longer holds that office.

(2) Before—

(a) taking up an office or position of a description specified by the National Assembly, or

(b) entering into an agreement or other arrangement of a description so specified,

the person must consult any person specified by the National Assembly.

(3) The National Assembly must publish a list of—

(a) the offices and positions specified for the purposes of subsection (2)(a);

(b) the agreements and other arrangements specified for the purposes of subsection (2)(b)

(4) Subsections (5) and (6) apply for a period of 2 years starting with the day on which the person ceases to be Auditor General.

(5) The person must not—

(a) hold an office or position to which a person may be appointed, or recommended or nominated for appointment, by or on behalf of—

(i) the Crown,

(ii) the National Assembly, or

(iii) the National Assembly Commission; or

(b) be a member, director, officer or employee of a person listed in subsection (7).

(6) The person must not, in any capacity, provide services to—

(a) the Crown or any body or other person acting on behalf of the Crown,

(b) the National Assembly or any body or other person acting on behalf of the Assembly,

(c) the National Assembly Commission or any body or other person acting on behalf of the Commission, or

(d) a person listed in subsection (7).

(7) The persons are—

(a) a person whose accounts, or statements of accounts, fall to be examined by the Auditor General in accordance with provision made by or by virtue of an enactment;

(b) a person to whom a value for money study or examination carried out by the Auditor General in accordance with provision made by or by virtue of an enactment relates;

(c) a person to whom a study carried out by the Auditor General in accordance with section 145A(2) of the Government of Wales Act 1998 (studies relating to the provision of services by any relevant body or bodies) relates;

(d) a registered social landlord to whom the Auditor General provides advice or assistance under section 145D of the Government of Wales Act 1998;

(e) a person in respect of whom the Auditor General has functions, or in respect of whom the Auditor General exercises functions on behalf of the Welsh Ministers, by virtue of section 146A of the Government of Wales Act 1998 (transfer of functions of Welsh Ministers);

(f) a person to whose financial affairs and transactions accounts prepared by the Welsh Ministers under section 131 of the Government of Wales Act 2006 are to relate by virtue of subsection (3) of that section;

(g) a person to whose financial affairs and transactions accounts prepared by the National Assembly Commission under section 137 of the Government of Wales Act 2006 are to relate by virtue of subsection (2) of that section.

(8) But subsections (5) and (6) do not prevent a person from holding any of the following offices—

(a) Comptroller and Auditor General;

(b) Auditor General for Scotland;

(c) Comptroller and Auditor General for Northern Ireland.

(9) In this section, "a value for money study or examination" means a study or examination into the economy, efficiency and effectiveness with which a person has discharged that person's functions, or has used resources in discharging those functions.

6 Status etc

(1) The person for the time being holding the office of Auditor General continues, by the name of that office, to be a corporation sole.

(2) The Auditor General is not to be regarded as holding office under Her Majesty or as exercising any functions on behalf of the Crown.

(3) But the Auditor General is to be taken to be a Crown servant for the purposes of the Official Secrets Act 1989.

7 Remuneration

(1) Before a person is appointed as Auditor General, remuneration arrangements are to be made in respect of that person by the National Assembly.

(2) But before those arrangements can be made, the First Minister must be consulted.

(3) The remuneration arrangements—

(a) may make provision for a salary, allowances, gratuities, arrangements for a pension and other benefits, and

(b) may include a formula or other mechanism for adjusting one or more of those elements from time to time.

(4) But no element is to be performance-based.

(5) The National Assembly Commission must make payments to the Minister for the Civil Service, at such times as the Minister may determine, of such amounts as may be so determined, in respect of—

(a) the provision of pensions, allowances, gratuities or other benefits by virtue of section 1 of the Superannuation Act 1972 to or in respect of any person who holds or has ceased to hold office as Auditor General, and

(b) the expenses incurred in administering those pensions, allowances, gratuities or other benefits.

(6) Amounts payable by virtue of this section are to be charged on, and paid out of, the Welsh Consolidated Fund.

CHAPTER 2

AUDITOR GENERAL'S FUNCTIONS

General provision about the exercise of the Auditor General's functions etc

8 How functions are to be exercised

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

(2) But this discretion is subject to subsection (3).

(3) The Auditor General must—

(a) aim to carry out his or her functions efficiently and cost-effectively;

(b) have regard, as he or she considers appropriate, to the standards and principles that an expert professional provider of accounting or auditing services would be expected to follow;

(c) have regard to advice given to him or her by the WAO (see section 17(3)).

9 Supplementary powers

(1) The Auditor General may do anything calculated to facilitate, or which is incidental or conducive to, the carrying out of any of the Auditor General's functions.

(2) But the Auditor General may not do anything which is or could become the responsibility of the WAO by virtue of paragraphs (a) to (c) of section 21(2) (provision of resources for Auditor General's functions).

10 Code of audit practice

(1) The Auditor General must issue a code of audit practice prescribing the way in which the functions of the Auditor General specified in subsection (2) are to be carried out.

(2) The functions are—

(a) examining any accounts or statements of accounts that fall to be examined by the Auditor General in accordance with provision made by or by virtue of an enactment;

(b) carrying out, undertaking or promoting value for money studies or examinations in accordance with provision made by or by virtue of an enactment;

(c) those contained in, or transferred to the Auditor General under, the following provisions of the Government of Wales Act 1998—

(i) section 145A(2) (undertaking or promoting other studies relating to the provision of services by certain bodies);

(ii) section 145C(8) (disclosing information obtained in the course of a study in respect of a registered social landlord to the Welsh Ministers);

(iii) section 145D (providing advice and assistance to a registered social landlord);

(iv) section 146 (transfer of functions of the Comptroller and Auditor General in respect of certain bodies to the Auditor General);

(v) section 146A (transfer etc to the Auditor General of supervisory functions of Welsh Ministers in respect of certain bodies);

(vi) section 147 (transfer of functions of the Comptroller and Auditor General in respect of the Environment Agency to the Auditor General);

(d) those contained in the following provisions of the Public Audit (Wales) Act 2004—

(i) Part 2 (audit of local government bodies in Wales);

(ii) section 45 (conducting, or assisting the Secretary of State in conducting, benefit administration studies);

(iii) section 51 (referring matters related to social security to the Secretary of State);

(e) those contained in the following provisions of Schedule 8 to the Government of Wales Act 2006—

(i) paragraph 17 (access to documents);

(ii) paragraph 20 (certification of claims, returns etc at the request of a body).

(3) The Auditor General must comply with the code.

(4) The code must embody what appears to the Auditor General to be the best professional practice with respect to the standards, procedures and techniques to be adopted in carrying out functions of a kind specified in subsection (2).

(5) The code may make different provision for different cases or classes of case.

(6) Before issuing the code (including any revised code) the Auditor General must consult such persons as the Auditor General thinks appropriate.

(7) The Auditor General must arrange for the code (including any revised code) to be published.

(8) In this section, "a value for money study or examination" means a study or examination into the economy, efficiency and effectiveness with which a person has discharged that person's functions, or has used resources in discharging those functions.

Functions relating to local government

11 Audit of local government bodies

(1) For section 13 of the Public Audit (Wales) Act 2004 (audit of accounts of local government bodies in Wales) substitute—

"13 Audit of accounts of local government bodies in Wales

(1) A local government body in Wales—

(a) must make up its accounts each year to 31 March or such other date as the Welsh Ministers may generally or in any special case direct;

(b) must ensure that its accounts are audited in accordance with this Chapter.

(2) The Auditor General for Wales must audit the accounts of local government bodies in Wales.".

(2) In section 16 of the Local Government (Wales) Measure 2009 (meaning of "relevant regulators" and "relevant functions"), omit paragraph (e) of subsection (2).

Provision relating to the transfer of supervisory functions of the Welsh Ministers

12 Transfer etc of supervisory functions of Welsh Ministers: consultation

In the Government of Wales Act 1998, in section 146A (transfer etc to the Auditor General of supervisory functions of Welsh Ministers in respect of certain bodies), after subsection (1) insert—

"(1A) But before making an order under subsection (1), the Welsh Ministers must consult the Wales Audit Office.".

PART 2

THE WALES AUDIT OFFICE AND ITS RELATIONSHIP WITH THE AUDITOR GENERAL

CHAPTER 1

THE WALES AUDIT OFFICE

13 Incorporation of Wales Audit Office

(1) There is to be a body corporate called the Wales Audit Office ("the WAO").

(2) Schedule 1 contains provision about the WAO.

14 Powers

The WAO may do anything (including acquiring or disposing of any property or rights and accepting gifts of money or other property) which is calculated to facilitate, or which is incidental or conducive to, the exercise of any of its functions.

15 Efficiency

The WAO must aim to carry out its functions efficiently and cost-effectively.

CHAPTER 2

RELATIONSHIP BETWEEN THE AUDITOR GENERAL AND THE WAO

General

16 Relationship with the Auditor General

(1) The Auditor General is to be the chief executive (but not an employee) of the WAO.

(2) Schedule 2 contains further provision about the relationship between the WAO and the Auditor General.

17 WAO to monitor and provide advice

(1) The WAO must, in such manner as it considers appropriate, monitor the exercise of the Auditor General's functions.

(2) The WAO may provide advice to the Auditor General about the Auditor General's functions.

(3) The Auditor General must have regard to any advice given.

18 Delegation and joint exercise of functions of the Auditor General

(1) The Auditor General may delegate any of the functions of that office to—

(a) an employee of the WAO,

(b) a person who provides services to the WAO, or

(c) an employee of the WAO and a person who provides services to the WAO acting jointly.

(2) But a function may only be delegated if the employee or other person is authorised (or in the case of subsection (1)(c) both are authorised) to exercise functions of the Auditor General under a scheme prepared by the Auditor General and approved by the WAO.

(3) A scheme under subsection (2) may include different provision for different cases or classes of case.

(4) The Auditor General may revise a scheme at any time, but any revision must be approved by the WAO.

(5) If the scheme makes provision to that effect, any function of the Auditor General may be exercised jointly by—

(a) the Auditor General and an employee of the WAO,

(b) the Auditor General and a person who provides services to the WAO, or

(c) the Auditor General, an employee of the WAO and a person who provides services to the WAO.

(6) A delegation does not prevent the Auditor General from doing anything personally.

(7) Provision made under subsection (1) for the delegation of a function, or under subsection (5) for the joint exercise of a function, does not affect the Auditor General's responsibility for that function.

(8) The function of preparing a scheme under this section may not be delegated.

Provision of services

19 Provision of services

(1) Arrangements may be made between the WAO and a relevant authority—

(a) for any function of the authority to be exercised by the WAO or by an employee of the WAO;

(b) for any function of the authority to be exercised by the Auditor General;

(c) for administrative, professional or technical services to be provided—

(i) to or for the purposes of the authority by the WAO,

(ii) by, or on behalf of, the authority to the WAO, or

(iii) by, or on behalf of, the authority to the Auditor General;

(d) for administrative, professional or technical services to be provided to or for the purposes of the authority by the Auditor General.

(2) Any arrangements under subsection (1)(a) or (b) for the exercise of a function of a relevant authority do not affect the relevant authority's responsibility for that function.

(3) If the condition in subsection (4) is met, the WAO and a relevant authority, a qualified auditor, or an accountancy body may—

(a) make arrangements to co-operate with, and give assistance to, each other, or

(b) make arrangements for that authority, auditor or body and the Auditor General to co-operate with, and give assistance to, each other.

(4) The condition is that—

(a) the WAO considers that to do so would facilitate, or be conducive to, the exercise of the functions of the Auditor General or the WAO, and

(b) the relevant authority, qualified auditor or accountancy body in question considers that to do so would facilitate, or be conducive to, the exercise of the functions of that authority, person or body.

(5) The WAO may make arrangements under this section on such terms, including terms about payment, as the WAO thinks fit.

(6) But terms relating to payment to the WAO must be made in accordance with a scheme for charging fees prepared under section 24.

(7) In this section—

"accountancy body" means—

(a) a body which is a recognised supervisory body for the purposes of Part 42 of the Companies Act 2006, or

(b) an approved European body of accountants;

"qualified auditor" means a person who is—

(a) eligible for appointment as a statutory auditor under Part 42 of the Companies Act 2006, or

(b) a member of an approved European body of accountants;

"approved European body of accountants" means a body of accountants which—

(a) is established in the United Kingdom or another EEA state, and

(b) is for the time being approved by the Welsh Ministers by order;

"relevant authority" means any Minister of the Crown or government department, any public authority (including any local authority), or the holder of any public office.

Income and expenses

20 Expenditure

(1) For each financial year the Auditor General and the WAO must jointly—

(a) prepare an estimate of the income and expenses of the WAO, and

(b) lay the estimate before the National Assembly.

(2) Each estimate must cover (amongst other things) the resources required for the purposes of section 21 (resources for Auditor General).

(3) Each estimate must be laid before the National Assembly at least five months before the beginning of the financial year to which it relates.

(4) The National Assembly may make any modifications to the estimate which it considers appropriate (subject to subsection (5)).

(5) No modification can be made under subsection (4) unless—

(a) the Auditor General and the WAO have been consulted, and

(b) any representations that either may make have been taken into account.

21 Provision of resources for Auditor General's functions

(1) The WAO must provide resources for the exercise of the Auditor General's functions as required by the Auditor General.

(2) In particular, the WAO is responsible for—

(a) employing staff to assist in the exercise of those functions;

(b) securing services from any person for the purposes of those functions;

(c) holding property for the purposes of those functions;

(d) holding documents or information acquired or generated in the course of, or otherwise for the purposes of, those functions (see paragraph 2(2) of Schedule 2);

(e) keeping records in relation to those functions.

22 Borrowing

The WAO may borrow sums in sterling (by way of overdraft or otherwise) to be applied for the purpose of meeting a temporary excess of expenditure over sums otherwise available to meet it.

Fees

23 General provision relating to fees

(1) Fees and other sums received by the Auditor General must be paid to the WAO.

(2) The WAO may charge a fee in relation to the audit of a person's accounts or statement of accounts by the Auditor General.

(3) The WAO may charge a fee in relation to—

(a) an examination, certification or report under paragraph 18(3) of Schedule 8 to the Government of Wales Act 2006 (certain examinations into the economy etc with which a person has used resources);

(b) an examination under section 145 of the Government of Wales Act 1998 (examinations into the use of resources) or a study under section 145A of that Act (studies for improving economy etc in services), where undertaken at a person's request;

(c) an examination or study undertaken by the Auditor General at a person's request under section 46(4) of the Environment Act 1995;

(d) any services provided or functions exercised under section 19.

(4) The WAO must charge a fee in relation to—

(a) the provision of services to a body under paragraph 20 of Schedule 8 to the Government of Wales Act 2006 (certification of claims, returns etc at the request of a body);

(b) a study at the request of an educational body under section 145B of the Government of Wales Act 1998.

(5) Fees under this section—

(a) may only be charged in accordance with a scheme prepared by the WAO under section 24;

(b) may not exceed the full cost of exercising the function to which the fee relates;

(c) are payable to the WAO by the person to whom the function being exercised relates.

24 Scheme for charging fees

(1) The WAO must prepare a scheme relating to the charging of fees by the WAO.

(2) The scheme must include the following—

(a) a list of the enactments under which the WAO may charge a fee;

(b) where those enactments make provision for the WAO to prescribe a scale or scales of fees, that scale or those scales;

(c) where those enactments make provision for the WAO to prescribe an amount to be charged, that amount;

(d) where no provision is made for a scale or scales of fees or for an amount to be prescribed, the means by which the WAO is to calculate the fee.

(3) The scheme may, amongst other things—

(a) include different provision for different cases or classes of case, and

(b) provide for times at which and the manner in which payments are to be made.

(4) The WAO—

(a) must review the scheme at least once in every calendar year,

(b) may revise or remake the scheme at any time, and

(c) must lay the scheme (and any revision to it) before the National Assembly.

(5) Where the Welsh Ministers prescribe a scale or scales of fees under—

(a) section 64F of the Public Audit (Wales) Act 2004 (fees for data matching), or

(b) section 27A of the Local Government (Wales) Measure 2009 (Welsh Ministers' power to prescribe a scale of fees),

to have effect instead of a scale or scales prescribed by the WAO, the WAO must revise the scheme to include the scale or scales prescribed by the Welsh Ministers instead of those prescribed by the WAO.

(6) If a revision made in accordance with subsection (5) is the only revision to a scheme, it does not require the approval of the National Assembly.

(7) The scheme takes effect when approved by the National Assembly or, in the case of a revision made in accordance with subsection (5), once it has been laid before the Assembly.

(8) The WAO must publish the scheme (and any revision to it) as soon as reasonably practicable after it takes effect.

Annual plan

25 Annual plan

(1) Before the beginning of each financial year, the Auditor General and the WAO must agree upon an annual plan for that year.

(2) The annual plan must set out the following—

(a) the Auditor General's work programme;

(b) the WAO's work programme;

(c) the resources available, and which may become available, to the WAO;

(d) how those resources are to be used in order to undertake the Auditor General's programme;

(e) how those resources are to be used in order to undertake the WAO's programme;

(f) the maximum amount of the resources available, and which may become available, that it is anticipated will be allocated by the WAO to the Auditor General for the purpose of undertaking the Auditor General's programme.

(3) In this Chapter—

"Auditor General's work programme" means the Auditor General's priorities for the year in exercising his or her functions;

"WAO's work programme" means the WAO's priorities for the year in exercising its functions under this Act.

26 Annual plan: resources to be allocated to the Auditor General

(1) This section applies for the purposes of determining the amount to be included in the annual plan by virtue of section 25(2)(f) (maximum amount of resources to be allocated by the WAO to the Auditor General)

(2) The Auditor General must submit a statement to the WAO, for the financial year in question, setting out the following—

(a) the Auditor General's work programme;

(b) an estimate of the maximum amount of resources required to undertake the programme.

(3) The WAO may either—

(a) agree the statement and incorporate the content into the annual plan, or

(b) reject the statement, or part of it, and ask the Auditor General to reconsider and submit a new or amended statement.

(4) But the WAO may only reject a statement if it, or any part of it, is unreasonable.

27 Annual plan: National Assembly

The Auditor General and the chair of the WAO must lay the annual plan before the National Assembly.

28 Annual plan: effect

The Auditor General and the WAO are not to be bound by the annual plan, but they must have regard to it in the exercise of their functions, including (but not limited to) when exercising functions relating to the provision of resources by the WAO to the Auditor General under section 21.

PART 3

MISCELLANEOUS AND GENERAL

29 Functions of the National Assembly

(1) The National Assembly may by standing orders make provision regarding the exercise of the functions conferred upon it by or under this Act.

(2) Such provision includes, but is not limited to, delegating functions to the Presiding Officer, the Deputy Presiding Officer, a committee or sub-committee of the National Assembly or the chair of such a committee or sub-committee.

(3) This section does not apply to the National Assembly's functions under section 31 (orders).

30 Indemnification

(1) There is to be charged on and paid out of the Welsh Consolidated Fund any amount payable by an indemnified person in consequence of any liability for a breach of duty.

(2) The liability must not be to another indemnified person.

(3) The following are indemnified persons—

(a) a former or current Auditor General appointed under this Act;

(b) the WAO;

(c) a former or current member of the WAO;

(d) a former or current employee of the WAO;

(e) a person who is providing, or has provided, services to the Auditor General or to the WAO under arrangements made by the WAO.

(4) A breach of duty for the purposes of subsection (1) means a breach of duty (whether under a contract or agreement or otherwise, and whether by reason of an act or omission) incurred by an indemnified person in exercising functions that fall to be exercised by that person in accordance with the provision of an enactment.

31 Orders

(1) A power of the Welsh Ministers to make an order under this Act is exercisable by statutory instrument.

(2) A statutory instrument containing an order under section 34 (transitional, supplementary etc provision) that contains a provision amending, repealing or otherwise modifying an enactment (other than an enactment contained in subordinate legislation) or prerogative instrument may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the National Assembly.

(3) Any other statutory instrument containing an order under this Act, apart from an instrument containing only an order under section 36 (commencement), is subject to annulment in pursuance of a resolution of the National Assembly.

(4) Any power of the Welsh Ministers to make an order under this Act (apart from an order under section 36 (commencement)) includes power—

(a) to make different provision for different cases or classes of case, or for different purposes;

(b) to make provision generally or subject to specific exemptions or exceptions, or in relation to specific cases or classes of case;

(c) to make such supplementary, transitional, transitory, consequential, saving, incidental and other provision as the Welsh Ministers think necessary or appropriate.

32 Directions

(1) Any direction given under this Act—

(a) must be given in writing;

(b) may be varied or revoked by a later direction;

(c) may make provision generally or in relation to specific cases or classes of case;

(d) may make different provision for different cases or classes of case, or for different purposes.

(2) Subsection (1) does not limit the powers under this Act to give directions.

33 Interpretation

In this Act—

"Auditor General" ("*Archwilydd Cyffredinol*") means the Auditor General for Wales (see Chapter 1 of Part 1);

"enactment" ("*deddfiad*") means any enactment whenever passed or made, including—

(a) an enactment contained in this Act, any other Act of the Assembly or an Assembly Measure, and

(b) subordinate legislation (within the meaning given in the Interpretation Act 1978), whether made under an Act of the Assembly, an Assembly Measure or otherwise;

"financial year" ("*blwyddyn ariannol*") means the 12 months ending with 31 March;

"local government body" ("*corff llywodraeth leol*") has the meaning given in section 12 of the Public Audit (Wales) Act 2004;

"National Assembly" ("*Cynulliad Cenedlaethol*") means the National Assembly for Wales;

"National Assembly Commission" ("*Comisiwn y Cynulliad Cenedlaethol*") means the National Assembly for Wales Commission;

"National Assembly's Public Accounts Committee" ("*Pwyllgor Cyfrifon Cyhoeddus y Cynulliad Cenedlaethol*") means the committee referred to as the "Audit Committee" in section 30 of the Government of Wales Act 2006;

"WAO" ("*SAC*") means the Wales Audit Office (see Chapter 1 of Part 2);

"Welsh Government" ("*Llywodraeth Cymru*") means the Welsh Assembly Government.

34 Transitional, supplementary and saving provisions etc

(1) Schedule 3 (transitional etc provisions) has effect.

(2) The Welsh Ministers may by order make such supplementary, transitional, transitory, consequential, saving, incidental and other provision as they think appropriate in connection with, or to give full effect to, this Act.

(3) The provision that may be made under subsection (2) includes, amongst other things, amendments, repeals and revocations of any enactment or prerogative instrument.

(4) Nothing in Schedule 3 limits the power conferred by subsection (2); and such an order may, amongst other things, make modifications of that Schedule.

35 Minor and consequential amendments

Schedule 4 (minor and consequential amendments) has effect.

36 Commencement

(1) The following provisions come into force on the day on which this Act receives Royal Assent—

(a) section 31;

(b) this section;

(c) section 37.

(2) Subject to subsection (1), this Act comes into force in accordance with provision made by the Welsh Ministers by order.

(3) An order under subsection (2) may—

(a) make provision for different days to be appointed for different purposes;

(b) include supplementary, transitional, transitory, consequential, saving, incidental and other provision in relation to commencement.

37 Short title

The short title of this Act is the Public Audit (Wales) Act 2013.

SCHEDULE 1
(introduced by section 13(2))

INCORPORATION OF WALES AUDIT OFFICE

PART 1

MEMBERSHIP AND STATUS

Membership

1 (1) The WAO is to have 7 members.

(2) They are to be—

(a) 5 persons who are not employees of the WAO ("non-executive members") (see Part 2 of this Schedule),

(b) the Auditor General (see Part 3 of this Schedule), and

(c) one employee of the WAO ("the employee member") (see Parts 4 and 5 of this Schedule).

Appointment of non-executive and employee members

2 (1) The members of the WAO (other than the Auditor General) are to be appointed in accordance with the provisions of this Schedule.

(2) All appointments must be on merit.

(3) A person cannot be appointed as a member of the WAO if the person is disqualified from being appointed on any of the grounds specified in Part 6 of this Schedule.

(4) A person ceases to be a member of the WAO if the person is disqualified on any of those grounds.

Status

3 (1) Neither the WAO nor any of its members is to be regarded—

(a) as the servant or agent of the Crown, or

(b) as enjoying any status, immunity or privilege of the Crown.

(2) But members of the WAO are to be taken to be Crown servants for the purposes of the Official Secrets Act 1989.

(3) The WAO's property is not to be regarded as property of, or held on behalf of, the Crown.

(4) This paragraph does not apply to the Auditor General (and for provisions about the status of the Auditor General, see section 6).

PART 2

NON-EXECUTIVE MEMBERS

Appointment of non-executive members

4 (1) Non-executive members are to be appointed by the National Assembly.

(2) Appointments made under sub-paragraph (1) must be based on the conclusions of a fair and open competition.

Appointment of chair of the WAO

5 (1) The chair of the WAO is to be appointed by the National Assembly from amongst the non-executive members.

(2) But no appointment can be made until the First Minister has been consulted.

(3) The National Assembly may extend an appointment under this paragraph in accordance with the procedure required for the original appointment.

(4) An extension of an appointment counts as a separate appointment for the purposes of paragraphs 6 to 8.

Period of appointment and re-appointment

6 (1) An appointment under this Part of this Schedule is to be for a period of no more than 4 years.

(2) A person may not be appointed under this Part of this Schedule more than twice.

Remuneration arrangements

7 (1) The National Assembly may make remuneration arrangements in relation to the person who chairs the WAO (subject to sub-paragraph (2) and paragraph 9).

(2) But no arrangements can be made until the First Minister has been consulted.

(3) Amounts payable by virtue of sub-paragraph (1) are to be charged on, and paid out of, the Welsh Consolidated Fund.

(4) The National Assembly may make remuneration arrangements in relation to any other non-executive member.

(5) Amounts payable under sub-paragraph (4) are to be paid by the WAO.

(6) Remuneration arrangements under this paragraph—

(a) may provide for a salary, allowances, gratuities, and other benefits to cover expenses properly and necessarily incurred, but not for a pension, and

(b) may include a formula or other mechanism for adjusting one or more of those elements from time to time.

(7) But no element is to be performance-based.

Other terms of appointment

8 (1) The National Assembly may determine other terms for an appointment under this Part of this Schedule (subject to paragraph 9).

(2) Those terms may include restrictions on—

(a) the offices or positions (including offices and positions to which persons may be appointed, or recommended or nominated for appointment, by or on behalf of the Crown, the National Assembly, or the National Assembly Commission)—

(i) that the non-executive member may hold while, or after ceasing to be, a member;

(ii) that the chair of the WAO may hold while, or after ceasing to be, chair, and

(b) the agreements or other arrangements (including agreements and arrangements with the Crown, the National Assembly or the National Assembly Commission or bodies or other persons acting on behalf of the Crown, the National Assembly or the National Assembly Commission)—

(i) to which the non-executive member may be a party while, or after ceasing to be, a member;

(ii) to which the chair of the WAO may be a party while, or after ceasing to be, chair.

(3) But restrictions may only be imposed while a person is a non-executive member and for a maximum of 2 years afterwards, starting with the day on which the person ceases to be a non-executive member.

Consultation

9 (1) No arrangements under paragraph 7 or determination under paragraph 8 may be made unless there has been consultation with an appropriate person with oversight of public appointments.

(2) Consultation required under sub-paragraph (1) is in addition to the consultation required under paragraph 7(2).

Termination of appointments

10 (1) The person who chairs the WAO may resign from the position of chair by giving written notice to the National Assembly.

(2) A non-executive member may resign by giving written notice to the National Assembly.

(3) The term of appointment of a person who resigns in accordance with sub-paragraph (1) or (2) ends when the resignation is accepted.

11 (1) The National Assembly may terminate the appointment of a non-executive member by giving the member written notice if—

(a) the member has been absent from meetings of the WAO without the WAO's permission for a period or periods totalling 3 months or more in any 12 month period,

(b) the member has become bankrupt or has made an arrangement with creditors,

(c) the member's estate has been sequestrated in Scotland or the member has entered into a debt arrangement programme under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 as the debtor or has, under Scots law, made a composition or arrangement with, or granted a trust deed for, the member's creditors,

(d) the member is unfit to continue the appointment because of misconduct,

(e) the member has failed to comply with the terms of the appointment, or

(f) the member is otherwise unable, unfit or unwilling to carry out the member's functions.

(2) If a non-executive member whose appointment is terminated under sub-paragraph (1) is the chair of the WAO, that person's appointment as chair is also terminated.

12 (1) The National Assembly may terminate the appointment of a non-executive member as chair of the WAO.

(2) But before an appointment can be terminated the First Minister must be consulted.

(3) The National Assembly may terminate the appointment if the chair of the WAO—

(a) has failed to comply with the terms of appointment, or

(b) is otherwise unwilling to carry out the functions of chairing the WAO.

PART 3

AUDITOR GENERAL

Additional remuneration of the Auditor General

13 (1) The WAO may make provision for additional payments to be made to the Auditor General by way of allowances and other benefits to cover expenses properly and necessarily incurred by the Auditor General in his or her capacity as a member and chief executive of the WAO.

(2) Payments made under sub-paragraph (1) may be made in addition to the remuneration payable to the Auditor General under section 7.

(3) Amounts payable by virtue of sub-paragraph (1) are to be paid by the WAO.

PART 4

EMPLOYEE MEMBER

Appointment

14 (1) The employee member is to be appointed by the non-executive members as follows.

(2) If there is a vacancy, the Auditor General must recommend a person to the non-executive members for appointment.

(3) The non-executive members must—

(a) appoint that person, or

(b) appoint another person of their choosing.

Terms of appointment

15 (1) The terms of the employee member's appointment are to be determined by the non-executive members.

(2) The terms may include remuneration arrangements which—

(a) may provide for allowances, gratuities, and other benefits to cover expenses properly and necessarily incurred by the person in the capacity of member of the WAO, and

(b) may include a formula or other mechanism for adjusting one or more of those elements from time to time.

(3) The remuneration arrangements may not provide for payment of a salary or, subject to sub-paragraph (5), a pension.

(4) Amounts payable by virtue of sub-paragraph (2) are to be paid by the WAO.

(5) If the employee member ("E") is a participant in a pension scheme under the terms of E's employment with the WAO, the remuneration arrangements must (without affecting the continuity of that employment) provide for E's service as the employee member to be treated for the purposes of the scheme as service as an employee of the WAO.

Other terms of appointment

16 (1) The non-executive members may determine other terms for an appointment of an employee member.

(2) Those terms may include restrictions on—

(a) the offices or positions (including offices and positions to which persons may be appointed, or recommended or nominated for appointment, by or on behalf of the Crown, the National Assembly, or the National Assembly Commission) that the employee member may hold while, or after ceasing to be, a member;

(b) the agreements or other arrangements (including agreements and arrangements with the Crown, the National Assembly or the National Assembly Commission or bodies or other persons acting on behalf of the Crown, the National Assembly or the National Assembly Commission) to which the employee member may be a party while, or after ceasing to be, a member.

(3) But restrictions may only be imposed while a person is the employee member and for a maximum of 2 years afterwards, starting with the day on which the person ceases to be an employee member.

Termination of appointments

17 The appointment of the employee member terminates—

(a) if the terms of appointment provide for it to expire at the end of a period, at the end of that period, and

(b) in any event, when the member ceases to be an employee of the WAO.

18 (1) The employee member may resign by giving written notice to the non-executive members.

(2) The appointment is terminated upon acceptance of the resignation by the non-executive members.

19 The non-executive members may terminate the appointment of the employee member by giving the member written notice if—

(a) the member has been absent from meetings of the WAO without the WAO's permission for a period or periods totalling 3 months or more in any 12 month period,

(b) the member has become bankrupt or has made an arrangement with creditors,

(c) the member's estate has been sequestrated in Scotland or the member has entered into a debt arrangement programme under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 as the debtor or has, under Scots law, made a composition or arrangement with, or granted a trust deed for, the member's creditors,

(d) the member is unfit to continue the appointment because of misconduct,

(e) the member has failed to comply with the terms of the appointment, or

(f) the member is otherwise unable, unfit or unwilling to carry out the member's functions.

PART 5

EMPLOYEES

Appointment

20 (1) The WAO may employ staff.

(2) A person cannot be appointed as a member of staff of the WAO if the person is disqualified from being appointed on any of the grounds specified in Part 6 of this Schedule.

(3) A person ceases to be a member of staff of the WAO if the person is disqualified on any of those grounds.

(4) Staff of the WAO are to be employed on such terms as the WAO may determine.

(5) But the WAO must ensure that—

(a) the procedures for the recruitment and selection of persons as members of the staff of the WAO are broadly in line with those applying to the recruitment and selection of persons as members of the staff of the Welsh Government, and

(b) their terms of employment are broadly in line with those of the members of the staff of the Welsh Government.

(6) A person who is an employee of the WAO may not hold any office or position to which a person may be appointed, or recommended or nominated for appointment, by or on behalf of the Crown, the National Assembly or the National Assembly Commission.

Status

21 A member of the staff of the WAO is not to be regarded—

(a) as the servant or agent of the Crown, or

(b) as enjoying any status, immunity or privilege of the Crown.

22 But a member of the staff of the WAO is to be taken to be a Crown servant for the purposes of the Official Secrets Act 1989.

Remuneration arrangements

23 (1) The WAO must pay employees such remuneration as may be provided for by or under the terms of their employment.

(2) The WAO must make payments to the Minister for the Civil Service, at such times as the Minister may determine, of such amounts as may be so determined in respect of—

(a) the provision of pensions, allowances, gratuities or other benefits by virtue of section 1 of the Superannuation Act 1972 to or in respect of any persons who are or have been members of the staff of the WAO, and

(b) the expenses incurred in administering those pensions, allowances, gratuities or other benefits.

PART 6

DISQUALIFICATION AS MEMBER OF, OR EMPLOYEE OF, THE WAO

24 (1) A person cannot be appointed as a member or employee of the WAO if the person is disqualified on any of the grounds specified in sub-paragraph (3).

(2) A person ceases to be a member or employee of the WAO if the person is disqualified on any of the grounds specified in sub-paragraph (3).

(3) A person is disqualified from being a member or employee of the WAO if the person is—

(a) a Member of the National Assembly;

(b) the holder of any other office or position to which a person may be appointed, or recommended or nominated for appointment, by or on behalf of—

(i) the Crown,

(ii) the National Assembly, or

(iii) the National Assembly Commission;

(c) a Member of the House of Commons or House of Lords;

(d) a Member of the Scottish Parliament; or

(e) a Member of the Northern Ireland Assembly.

(4) Sub-paragraph (3)(b) is to be disregarded in the case of the Auditor General.

PART 7

PROCEDURAL RULES

General

25 The WAO must make rules for the purpose of regulating the WAO's procedure.

Quorum for WAO meetings

26 (1) The rules must provide for a quorum for any meetings of the WAO (including meetings of committees or sub-committees set up under paragraph 27).

(2) The rules may provide that different quorums may apply in different circumstances (for example, in relation to particular meetings or for particular purposes).

(3) The rules must provide that in all circumstances a quorum cannot be met unless a majority of the members present are non-executive members.

Committees

27 (1) The rules may include—

(a) provision for the setting up of committees of the WAO and for those committees to set up sub-committees, and

(b) provision regulating the procedures of those committees and sub-committees.

(2) An employee of the WAO who is not the employee member may be a member of a committee or sub-committee.

(3) A person who is neither a member of the WAO nor an employee of the WAO may be a member of a committee or sub-committee, provided that no functions of the WAO are delegated to the committee or sub-committee (see paragraph 29).

PART 8

OTHER MATTERS

Validity

28 The validity of anything done by the WAO (including anything done by its non-executive members, the employee member, any committee or sub-committee and by any employee of the WAO) is not affected by—

(a) a vacancy, or

(b) a defective appointment.

Delegation of functions

29 (1) The WAO may delegate any of its functions to—

(a) any of its members, employees or committees, or

(b) a person who provides services to the WAO.

(2) A committee may delegate functions (including functions delegated to it) to a sub-committee.

(3) The delegation of a function does not prevent the WAO or the committee (as the case may be) from carrying out the function itself.

(4) The delegation of a function does not affect the WAO's or the committee's responsibility for the function (as the case may be).

(5) Functions under the following provisions may not be delegated—

(a) section 20(1)(a) (estimating the income and expenses of the WAO for each financial year);

(b) section 25(1) (agreeing an annual plan for each financial year with the Auditor General);

(c) paragraph 25 of Part 7 of this Schedule (making rules for the purpose of regulating the WAO's procedure);

(d) paragraph 31(2) of Part 8 of this Schedule (recommending a person to audit the accounts of the WAO, etc);

(e) paragraph 1 of Part 1 of Schedule 2 (jointly preparing a report or an interim report each financial year on the exercise of the functions of the Auditor General and the WAO);

(f) paragraph 3 of Part 2 of Schedule 2 (designating another person to temporarily exercise the functions of the Auditor General).

WAO accounts

30 (1) The Auditor General is to be the accounting officer for the WAO.

(2) The accounting officer must, for each financial year, in accordance with directions given by the Treasury—

(a) keep proper accounts and proper records in relation to them, and

(b) prepare a statement of accounts.

(3) A statement of accounts must give a true and fair view of—

(a) the state of the WAO's affairs at the end of the financial year, and

(b) the WAO's income and expenditure in the financial year.

(4) The directions which the Treasury may give include (but are not limited to) directions as to—

(a) the financial affairs and transactions to which the accounts or statement of accounts are to relate;

(b) the information to be contained in the accounts and the manner in which the accounts are to be presented;

(c) the methods and principles in accordance with which the accounts are to be prepared;

(d) the additional information (if any) that is to accompany the accounts or statement of accounts.

(5) The directions which the Treasury may give may also include directions to prepare accounts relating to financial affairs and transactions of persons other than the WAO.

(6) The accounting officer for the WAO has, in relation to the accounts and finances of the WAO, such other responsibilities which are from time to time specified by the National Assembly's Public Accounts Committee.

Audit etc of the WAO

31 (1) It is for the National Assembly to appoint a person as auditor of the WAO's accounts, and to determine that person's terms of appointment.

(2) The WAO may recommend a person for the purposes of sub-paragraph (1).

(3) A person is eligible for appointment only if the person is a qualified auditor as defined in section 19.

(4) If a person appointed as the auditor ceases to be a qualified auditor, the person ceases to be the auditor.

(5) The person appointed as auditor must, as that person considers appropriate, have regard to the standards and principles that an expert professional provider of accounting or auditing services would be expected to follow.

(6) The WAO must pay the auditor such remuneration as may be provided for by or under the terms of the auditor's appointment.

32 (1) A statement of accounts prepared under paragraph 30 must be—

(a) signed by the accounting officer of the WAO, and

(b) submitted by the chair of the WAO to the auditor appointed under paragraph 31,

no later than 5 months after the end of the financial year to which the statement relates.

(2) The auditor must—

(a) examine and certify any statement of accounts received under sub-paragraph (1), and

(b) lay the statement of accounts as certified by him or her, together with his or her report on it, before the National Assembly.

(3) The auditor must, in particular, be satisfied from an examination of the statement of accounts—

(a) that the expenditure to which the statement relates has been incurred lawfully and in accordance with the authority which governs it;

(b) that money to which the statement relates, received by the WAO for a particular purpose or particular purposes, has not been expended otherwise than for that purpose or those purposes;

(c) that the statement complies with the requirements of any enactment applicable to the accounts or statement;

(d) that proper practices have been observed in the compilation of the statement.

(4) The auditor has a right of access at all reasonable times to every document which appears to the auditor to be necessary for the purposes of the audit of the accounts.

(5) The auditor may—

(a) require any person holding or accountable for such document to provide any assistance, information or explanation which the auditor reasonably thinks necessary for those purposes;

(b) require a relevant person to provide the auditor, at times specified by the auditor, with accounts of such of the transactions of the relevant person as the auditor may specify.

(6) A "relevant person" means—

(a) the Auditor General,

(b) the WAO, or

(c) any person to whose financial affairs and transactions the accounts relate in consequence of paragraph 30(5).

(7) The auditor may—

(a) carry out examinations into the economy, efficiency and effectiveness with which the Auditor General has used resources in discharging the Auditor General's functions;

(b) carry out examinations into the economy, efficiency and effectiveness with which the WAO has used resources in discharging the WAO's functions;

(c) lay a report of the results of any such examinations before the National Assembly.

(8) For the purposes of carrying out such examinations, the auditor—

(a) has a right of access at all reasonable times to every document in the possession, or under the control, of the Auditor General or the WAO which the auditor reasonably requires for those purposes;

(b) may require any person holding or accountable for any of those documents to provide any assistance, information or explanation which the auditor reasonably thinks necessary for those purposes.

Documentary evidence

33 (1) The application of the WAO's seal is to be authenticated by the signature of—

(a) a member of the WAO, or

(b) an employee of the WAO authorised (whether generally or specifically) for that purpose by the WAO.

(2) A document purporting to be duly executed under the WAO's seal or signed on its behalf—

(a) is to be received in evidence, and

(b) is to be taken to be executed or signed in that way, unless the contrary is proved.

SCHEDULE 2
(introduced by section 16(2))

RELATIONSHIP BETWEEN THE AUDITOR GENERAL AND THE WAO

PART 1

REPORTS AND DOCUMENTS

Reports

1 (1) The Auditor General and the chair of the WAO must for each financial year jointly prepare an annual report on the exercise during the year of the functions of the Auditor General and the WAO.

(2) An annual report must include (amongst other things) an assessment of the extent to which—

(a) the exercise of the functions of the Auditor General and the WAO has been consistent with the annual plan agreed for the year under section 25;

(b) the priorities set out in the plan were achieved.

(3) The Auditor General and the chair of the WAO must also jointly prepare interim reports on two occasions during each financial year on the exercise of the functions of the Auditor General and the WAO.

(4) An interim report must include (amongst other things) an assessment of the extent to which—

(a) the exercise of the functions of the Auditor General and the WAO has been consistent with the annual plan agreed for the year under section 25;

(b) progress has been made to achieve the priorities set out in the plan.

(5) The Auditor General and the chair of the WAO must jointly—

(a) lay the annual report before the National Assembly as soon as practicable after the end of a financial year;

(b) lay the interim reports before the National Assembly on dates to be determined from time to time by the Assembly.

Documents and information

2 (1) Any document or information which a person is required to provide, or may provide, to the Auditor General, may be provided to the WAO (either by that person or by the Auditor General).

(2) For the purposes of section 3(2) of the Freedom of Information Act 2000 and regulation 3(2) of the Environmental Information Regulations 2004 (or any regulations replacing those regulations), any document or information held by the WAO as mentioned in section 21(2)(d) of this Act is treated as held by the WAO on its own behalf.

PART 2

TEMPORARY EXERCISE OF THE FUNCTIONS OF AUDITOR GENERAL BY ANOTHER PERSON

3 The WAO, with the agreement of the National Assembly, may designate a person to exercise the functions of Auditor General temporarily in place of the Auditor General ("a temporary designation").

4 A temporary designation may occur only in the following circumstances—

(a) the office of Auditor General is vacant,

(b) the Auditor General is unwilling to discharge the functions of the office,

(c) the WAO and the National Assembly consider that the Auditor General is unable to discharge the functions of the office, or

(d) the WAO and the National Assembly consider that there are grounds to remove the Auditor General from office because of misbehaviour.

5 The functions of the Auditor General referred to in paragraph 3 include (amongst other things)—

(a) functions as chief executive of the WAO (see section 16);

(b) if relevant, functions as accounting officer of the WAO (see paragraph 30(1) of Part 8 of Schedule 1);

(c) the power to delegate under section 18.

6 A person who is designated to exercise the functions of the Auditor General must be an employee of the WAO.

7 A person who is designated to exercise those functions will continue to be employed by the WAO on the same terms.

8 But that person will be designated to exercise functions on such additional terms (including terms as to remuneration) as are agreed by the WAO and the National Assembly.

9 The terms as to remuneration—

(a) may provide for allowances, gratuities, and other benefits to cover expenses properly and necessarily incurred by the person in exercising the functions, and

(b) may include a formula or other mechanism for adjusting one or more of those elements from time to time.

10 But the terms as to remuneration may not provide for payment of an additional salary or pension.

11 The WAO must pay the person such remuneration as may be provided for by or under any additional terms as to remuneration as are agreed.

12 The duration of a temporary designation in relation to a circumstance referred to in paragraph 4—

(a) may not exceed 6 months; but

(b) may be extended once by the WAO in relation to that circumstance, with the agreement of the National Assembly, for up to a further 6 months.

SCHEDULE 3
(introduced by section 34(1))

TRANSITIONAL, SUPPLEMENTARY AND SAVING PROVISIONS

PART 1

THE AUDITOR GENERAL

Previous Auditor General to continue to be Auditor General

1 (1) This paragraph applies to the person who is the Auditor General immediately before the appointed day.

(2) On and after the appointed day the person—

(a) continues to be the Auditor General and is treated as having been appointed to that office under Part 1 of this Act;

(b) holds the office for 8 years less a period equal to that during which the person was the Auditor General before the appointed day.

(3) The person's remuneration arrangements under section 7 are to be made by the National Assembly before the appointed day (but are not to cover any period before the appointed day).

(4) But before those arrangements can be made, the First Minister must be consulted.

(5) In this paragraph "the appointed day" means the day on which this paragraph comes into force.

Savings for auditors appointed under section 13 of the Public Audit (Wales) Act 2004

2 (1) This paragraph applies where, immediately before the coming into force of section 11 (audit of accounts of local government bodies in Wales), an appointment of a person as an auditor in relation to the accounts of a local government body in Wales has effect under section 13 of the Public Audit (Wales) Act 2004.

(2) That appointment of the person as an auditor continues to have effect until the end of the period for which the appointment was made (subject to any earlier termination).

(3) The Public Audit (Wales) Act 2004 applies with the following modifications in relation to an auditor whose appointment is continued by sub-paragraph (2)—

(a) Part 2 and section 64E(4) have effect as if they had not been amended by this Act, and

(b) section 20 has effect as if each reference to the Auditor General for Wales were a reference to the WAO (and any scale of fees already prescribed by the Auditor General for Wales under that section continues to have effect in relation to the auditor whose appointment is continued unless and until varied or replaced by a scale prescribed by the WAO).

(4) The following provisions of the Local Government (Wales) Measure 2009 have effect in relation to an auditor whose appointment is continued by sub-paragraph (2) as if they had not been amended by this Act—

(a) section 16(2)(e);

(b) section 25(5)(b).

Savings in respect of restrictions on disclosure of information

3 (1) Where information has been obtained by—

(a) an auditor appointed under section 13 of the Public Audit (Wales) Act 2004 under a provision of that Act that has been amended by this Act,

(b) a person acting on his or her behalf, or

(c) a person acting on behalf of the Auditor General under a provision of any of the following enactments that has been amended by this Act—

(i) section 145C of the Government of Wales Act 1998,

(ii) Part 1 of the Local Government Act 1999,

(iii) Part 1 or Part 3A of the Public Audit (Wales) Act 2004, or

(iv) Part 1 of the Local Government (Wales) Measure 2009,

the operation of any provision about the disclosure of information is not affected by the amendment of that provision.

(2) So far as may be necessary for continuing the operation of any provision about the disclosure of information, information obtained as mentioned in sub-paragraph (1) is to be treated in the same way as information obtained by the Auditor General.

PART 2

THE WAO

WAO's procedural rules before rules are made under paragraph 25 of Schedule 1

4 (1) This paragraph applies until the first rules under paragraph 25 of Schedule 1 are made.

(2) Any matter to be decided by the WAO (including any matter to be decided for the purpose of preparing or making those rules) is to be decided in accordance with the procedure determined by the chair of the WAO (which may include the procedure for determining the quorum for any meeting at which the matter is to be decided).

PART 3

TRANSFER OF FUNCTIONS ETC

Transfer of staff

5 (1) On the appointed day the members of the staff of the Auditor General are transferred to the employment of the WAO.

(2) For any purpose relating to a person who becomes an employee of the WAO by virtue of sub-paragraph (1)—

(a) that person's contract of employment—

(i) is not terminated by the transfer, and

(ii) has effect from the appointed day as if originally made between that person and the WAO;

(b) a period of employment as a member of the staff of the Auditor General immediately before the appointed day—

(i) is to be treated as a period of employment with the WAO, and

(ii) is to be treated as continuous employment as a member of the staff of the WAO for the purposes of section 218(3) of the Employment Rights Act 1996.

(3) Without prejudice to sub-paragraph (2), where a person becomes an employee of the WAO by virtue of sub-paragraph (1)—

(a) all property, rights and liabilities which the Auditor General has under or in relation to the contract of employment of that person are transferred to the WAO, and

(b) anything done before the appointed day by or in relation to the Auditor General in respect of the person or the contract is to be treated from that day as having been done by or in relation to the WAO.

(4) A contract of employment (or rights, powers, duties and liabilities under or in connection with it) is not transferred under this paragraph if the employee objects to the transfer and informs the Auditor General or the WAO of that objection.

(5) If the employee informs the Auditor General or the WAO of an objection under sub-paragraph (4)—

(a) the contract of employment is terminated immediately before the appointed day; but

(b) the employee is not treated, for any purpose, as having been dismissed by the Auditor General.

(6) Nothing in this paragraph affects any right of a person to terminate his or her contract of employment if (apart from the change of employer) a substantial change is made to the person's detriment in his or her working conditions.

(7) In this paragraph "the appointed day" means the day on which this paragraph comes into force.

Transfer of other property, rights and liabilities

6 (1) On the transfer day, the property, rights and liabilities to which the Auditor General is entitled or subject in connection with any transferred function are transferred to and vest in the WAO.

(2) Sub-paragraph (1) operates in relation to property, rights and liabilities—

(a) whether or not they would otherwise be capable of being transferred;

(b) irrespective of any kind of requirement for consent that would otherwise apply.

(3) Anything (including legal proceedings) which relates to—

(a) any transferred function, or

(b) any property, rights or liabilities transferred by virtue of sub-paragraph (1) in connection with any transferred function,

and which is in the process of being done by or in relation to the Auditor General immediately before the transfer day may be continued on or after that day by or in relation to the WAO.

(4) Anything which was done by or in relation to the Auditor General for the purposes of or in connection with—

(a) any transferred function, or

(b) any property, rights or liabilities transferred by virtue of sub-paragraph (1) in connection with any transferred function,

and which is in effect immediately before the transfer day has effect on or after that day as if done by or in relation to the WAO.

(5) In any instruments, contracts or legal proceedings which relate to—

(a) any transferred function, or

(b) any property, rights or liabilities transferred by virtue of sub-paragraph (1) in connection with any transferred function,

and which are made or commenced before the transfer day, a reference to the Auditor General is to be treated on or after that day as a reference to, or as including a reference to, the WAO.

(6) This paragraph does not apply in relation to rights and liabilities under a contract of employment as a member of the staff of the Auditor General transferred to the WAO by virtue of paragraph 5.

(7) In this paragraph—

"transferred function" ("*swyddogaeth a drosglwyddir*") means a function—

(a) conferred or imposed on the WAO by a provision of this Act which re-enacts (with or without modifications) a provision of any enactment which conferred or imposed the same or substantially the same function on the Auditor General, or

(b) conferred or imposed on the WAO by any enactment in consequence of the amendment of that enactment by or under this Act;

"transfer day" *("diwrnod trosglwyddo"),* in relation to a transferred function, means the day when the function first became exercisable by the WAO.

7 (1) A certificate issued by the Welsh Ministers that property has been transferred by virtue of paragraph 6(1) is conclusive evidence of the transfer.

(2) Paragraph 6 has effect in relation to property, rights or liabilities to which it applies in spite of any provision (of whatever nature) which would otherwise prevent, penalise or restrict the transfer of the property, rights or liabilities.

(3) A right of pre-emption, right of return or other similar right does not operate or become exercisable as a result of any transfer of property or rights by virtue of paragraph 6(1).

(4) Any such right has effect in the case of any such transfer as if the transferee were the same person in law as the transferor and no transfer of the property or rights had taken place.

(5) Such compensation as is just is to be paid to any person in respect of any such right which would, apart from sub-paragraph (3), have operated in favour of or become exercisable by that person but which, in consequence of the operation of that sub-paragraph, cannot subsequently operate in favour or become exercisable by that person.

(6) But no compensation is to be paid under sub-paragraph (5) to the Auditor General, to the WAO, or to a former Auditor General.

(7) Compensation payable by virtue of sub-paragraph (5) is to be paid by the WAO.

(8) Any amount paid under sub-paragraph (7) is to be charged on and paid out of the Welsh Consolidated Fund.

(9) Sub-paragraphs (2) to (8) apply in relation to the creation of rights or interests, or the doing of anything else, in relation to property as they apply in relation to a transfer of property, and references to the transferor and transferee are to be read accordingly.

(10) In this paragraph "right of return" means any right under a provision for the return or reversion of property in specified circumstances.

Criminal liability of the Auditor General

8 (1) To the extent that any criminal liability incurred by the Auditor General is connected with property, rights or liabilities transferred to the WAO by virtue of paragraph 6, that criminal liability is transferred to the WAO.

(2) Paragraph 6(3) to (5) applies in relation to criminal liability transferred by virtue of this paragraph as it applies to a liability transferred by virtue of paragraph 6(1).

Indemnification

9 (1) The liabilities covered by section 30 include—

(a) liabilities that arise before the coming into force of that section, and

(b) liabilities that arise in relation to any act or omission occurring before the coming into force of that section.

(2) Sub-paragraph (3) applies where—

(a) a sum becomes payable by a former Auditor General appointed before the coming into force of section 2, and

(b) that sum would have been charged on the Welsh Consolidated Fund under paragraph 9(1) of Schedule 8 to the Government of Wales Act 2006 prior to the repeal of that paragraph by this Act.

(3) Paragraph 9(1) of Schedule 8 to the Government of Wales Act 2006 continues to have effect with respect that person and that sum as if that repeal had not come into force.

SCHEDULE 4
(introduced by section 35)

MINOR AND CONSEQUENTIAL AMENDMENTS

Superannuation Act 1972

1 In Schedule 1 to the Superannuation Act 1972 (offices to which section 1 of that Act applies), in the list of "Other bodies" for "Employment as a member of the staff of the Auditor General for Wales" substitute "Employment as a member of the staff of the Wales Audit Office".

Finance Act 1989

2 In section 182 of the Finance Act 1989 (disclosure of information), in subsection (4)(a), after sub-paragraph (iii), insert—

"(iiia) of the Wales Audit Office and any member or employee of that Office,".

Social Security Administration Act 1992

3 In subsection (8) of section 123 of the Social Security Administration Act 1992 (unauthorised disclosure of information relating to particular persons) after paragraph (ba), insert—

"(bb) any member of the staff of the Wales Audit Office, and any person providing services to that Office".

Education Act 1997

4 In section 41A of the Education Act 1997 (inspections involving collaboration of Auditor General for Wales), in subsection (6), for "the Auditor General for Wales an amount equal to the full costs incurred by the Auditor General for Wales in providing the assistance" substitute "the Wales Audit Office a fee, in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013 (which may not exceed the full cost incurred by the Auditor General in providing the assistance)".

Government of Wales Act 1998

5 The Government of Wales Act 1998 is amended as follows.

6 (1) Section 145C is amended as follows.

(2) In subsection (2), omit "or on his behalf".

(3) In subsection (3) (studies relating to registered social landlords), for "make good to the Auditor General for Wales the full costs incurred by him in undertaking the programme" substitute "pay to the Wales Audit Office a sum in respect of the costs incurred (which may not exceed the full cost incurred in undertaking the programme), in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013".

(4) In subsection (5), omit "or on his behalf".

7 (1) Section 145D (advice and assistance for registered social landlords) is amended as follows.

(2) In subsection (2), for "the Auditor General for Wales thinks fit" substitute "the Wales Audit Office thinks fit, but any terms as to payment may only be made in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013".

(3) After subsection (2), insert—

"(2A) Any sums charged in relation to advice or assistance provided under this section may not exceed the full cost of providing that advice or assistance.".

(4) In subsection (3), for "paragraph 21 of Schedule 8 to the Government of Wales Act 2006 (arrangements between Auditor General for Wales and certain bodies)" substitute "section 19 of the Public Audit (Wales) Act 2013 (arrangements for the provision of services between the Wales Audit Office and certain bodies)".

8 In subsection (2) of section 146 (transfer of functions of Comptroller and Auditor General), in paragraph (b), after "the Auditor General for Wales," insert "the Wales Audit Office,".

Local Government Act 1999

9 The Local Government Act 1999 is amended as follows.

10 In section 11 (inspectors' powers and duties), in paragraph (b) of subsection (7), for "a member of his staff or a person providing services to him" substitute "or a person exercising the functions of the Auditor General for Wales by virtue of a delegation made under section 18 of the Public Audit (Wales) Act 2013,".

11 (1) Section 12A (fees: inspections under section 10A) is amended as follows.

(2) In subsection (1), for "the Auditor General for Wales" substitute "the Wales Audit Office".

(3) In subsection (2), for "the Auditor General for Wales" substitute "the Wales Audit Office, in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013,".

(4) In subsections (3) and (4), for each reference to "Auditor General for Wales" substitute "Wales Audit Office".

(5) After paragraph (b) of subsection (4) insert—

"(5) A fee charged under this section may not exceed the full cost of exercising the function to which it relates.".

12 (1) Subsection (7) of section 23 (accounts) is amended as follows.

(2) Omit "or the Auditor General for Wales".

(3) After "accounts", insert "or, in relation to best value authorities in Wales, the Auditor General for Wales".

13 In subsection (3) of section 33 (finance), in paragraph (b), for "the Auditor General for Wales" substitute "the Wales Audit Office".

Freedom of Information Act 2000

14 The Freedom of Information Act 2000 is amended as follows.

15 (1) Subsection (5) of section 36 (exempt information: prejudice to effective conduct of public affairs) is amended as follows.

(2) In paragraph (gb), after "the Auditor General for Wales" insert ", the Wales Audit Office".

(3) In paragraph (k)—

(a) after the first reference to "the Auditor General for Wales", insert "or the Wales Audit Office", and

(b) for the second reference to "the Auditor General for Wales" substitute "the Wales Audit Office".

16 In Part 6 of Schedule 1 (public authorities to which the Act applies - other public bodies and offices: general), insert at the appropriate place "the Wales Audit Office".

Public Audit (Wales) Act 2004

17 The Public Audit (Wales) Act 2004 is amended as follows.

18 Omit section 14 (appointment of auditors) and 15 (persons to assist auditors).

19 Omit section 16 (code of audit practice).

20 (1) Section 17 (general duties of auditors) is amended as follows.

(2) In subsection (2), for "An auditor must" substitute "The Auditor General for Wales must".

(3) Omit subsections (3) and (4).

(4) Accordingly, the heading of section 17 becomes "General duties on audit of accounts".

21 Omit section 18 (auditors' rights to documents and information) and 19 (auditor' rights to documents and information: offences).

22 (1) Section 20 (fees for audit) is amended as follows.

(2) Before subsection (1), insert—

"(A1) The Wales Audit Office must, in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013, charge a fee in respect of functions exercised by the Auditor General for Wales—

(a) in auditing the accounts of local government bodies in Wales under this Chapter, and

(b) in undertaking studies at the request of a local government body under section 44.".

(3) Accordingly, the heading of section 20 becomes "Fees in respect of functions exercised by the Auditor General for Wales".

(4) In subsection (1), for "The Auditor General for Wales" substitute "The Wales Audit Office".

(5) In subsection (2)—

(a) for "the Auditor General for Wales" each time those words appear substitute "the Wales Audit Office";

(b) in paragraph (a), for "of local authorities" substitute "of local government bodies";

(c) for paragraph (b), substitute—

"(b) such other persons as the Wales Audit Office thinks fit.".

(6) Omit subsection (3).

(7) In subsection (4), for "the Auditor General for Wales" substitute "the Wales Audit Office".

(8) In subsection (5)—

(a) for "the Auditor General for Wales" each time those words appear substitute "the Wales Audit Office";

(b) omit "him when prescribing".

(9) After subsection (5) insert—

"(5A) But a fee charged under this section may not exceed the full cost of exercising the function to which it relates.".

(10) Omit subsection (6).

23 Omit section 21 (fees prescribed by Assembly).

24 (1) Section 22 (immediate and other reports in the public interest) is amended as follows.

(2) For each reference to "an auditor" or "the auditor" substitute "the Auditor General for Wales".

(3) In subsection (5), omit ", and a copy of the report to the Auditor General for Wales,".

(4) In subsection (6), omit ", and a copy of the report to the Auditor General for Wales,".

25 In section 23 (general report), for each reference to "an auditor" or "the auditor" substitute "the Auditor General for Wales".

26 In section 24 (consideration of reports in the public interest), for "an auditor" substitute "the Auditor General for Wales".

27 (1) Section 25 (procedure for consideration of reports and recommendations) is amended as follows.

(2) In subsection (2), for "an auditor of" substitute "the Auditor General for Wales, in auditing".

(3) In subsection (4), for "the auditor" substitute "the Auditor General for Wales".

(4) In subsection (6), for "An auditor" substitute "The Auditor General for Wales".

28 In section 26 (publicity for meetings under section 25), for each reference to "an auditor" or "the auditor" substitute "the Auditor General for Wales".

29 (1) Section 27 (additional publicity for immediate reports) is amended as follows.

(2) In subsection (1), for "an auditor" substitute "the Auditor General for Wales".

(3) In subsection (5), for "An auditor who has made a report under section 22(3)" substitute "The Auditor General for Wales".

30 (1) Section 28 (additional publicity for non-immediate reports) is amended as follows.

(2) For each reference to "an auditor" or "the auditor" substitute "the Auditor General for Wales".

(3) Omit subsection (4).

31 (1) Section 29 (inspection of statements of accounts and auditors' reports) is amended as follows.

(2) In paragraph (b) of subsection (1), for "an auditor" substitute "the Auditor General for Wales".

(3) Accordingly the heading of section 29 becomes "Inspection of statements of accounts and Auditor General for Wales' reports".

(4) Accordingly the cross-heading before section 29 becomes "Public inspection etc and action by the Auditor General for Wales".

32 (1) Section 30 (inspection of documents and questions at audit) is amended as follows.

(2) In subsection (2)—

(a) for "the auditor of those accounts" substitute "the Auditor General for Wales", and

(b) for "the auditor" substitute "the Auditor General".

(3) In subsection (3), for "a body's auditor" substitute "the Auditor General for Wales".

33 In section 31 (right to make objection at audit), for each reference to "the auditor" substitute "the Auditor General for Wales".

34 (1) Section 32 (declaration that item of account is unlawful) is amended as follows.

(2) In subsection (1)—

(a) for "an auditor" substitute "the Auditor General for Wales in", and

(b) for "the auditor" substitute "he".

(3) In subsection (4), for "an auditor" substitute "the Auditor General for Wales".

(4) In subsections (6) to (9), for each reference to "an auditor" or "the auditor" substitute "the Auditor General for Wales".

35 (1) Section 33 (advisory notices) is amended as follows.

(2) In subsection (1)—

(a) for "An auditor of accounts of a local government body in Wales" substitute "The Auditor General for Wales", and

(b) after "is met" insert "in respect of a local government body in Wales".

(3) In paragraph (d) of subsection (4), for "the auditor of the body's accounts" substitute "the Auditor General for Wales".

(4) In paragraph (c) of subsection (6), for "the auditor by whom the notice is issued" substitute "the Auditor General for Wales".

(5) In subsection (7), for "The auditor by whom an advisory notice is issued" substitute "The Auditor General for Wales".

(6) In subsection (10), for "the person who for the time being is the auditor of the body to which, or to an officer of which, the notice was addressed" substitute "the Auditor General for Wales".

(7) In subsection (11), for "The auditor by whom an advisory notice is withdrawn" substitute "The Auditor General for Wales".

(8) Omit subsection (12).

36 (1) Section 34 (effect of an advisory notice) is amended as follows.

(2) In paragraph (b) of subsection (5), for "the person who is for the time being the auditor of the body's accounts" substitute "the Auditor General for Wales".

(3) In subsection (8)—

(a) for "An auditor" substitute "The Wales Audit Office", and

(b) for "by him" substitute "by the Auditor General for Wales".

37 In subsection (3) of section 35 (advisory notices: legal actions), for "an auditor" substitute "the Auditor General for Wales".

38 (1) Section 36 (power of auditor to make a claim for judicial review) is amended as follows.

(2) In subsection (1)—

(a) for "An auditor appointed to audit accounts of a local government body in Wales" substitute "The Auditor General for Wales", and

(b) for the first reference to "the body" substitute "a local government body in Wales".

(3) In subsection (3) for "an auditor" substitute "the Auditor General for Wales".

(4) In subsection (4)—

(a) for "an auditor" substitute "the Auditor General for Wales", and

(b) for "the auditor" substitute "the Auditor General for Wales or the Wales Audit Office".

39 (1) Section 37 (extraordinary audit) is amended as follows.

(2) For each reference to "the Assembly" substitute "the Welsh Ministers".

(3) In subsection (1) omit "direct an auditor to".

(4) In subsection (4) omit "direct an auditor to".

(5) In subsection (5), omit paragraph (a).

(6) In subsection (8), for "The Auditor General for Wales" substitute "The Wales Audit Office".

40 In subsection (2) of section 38 (audit of accounts of officers), for "The auditor of a body's accounts" substitute "the Auditor General for Wales".

41 (1) Section 39 (accounts and audit regulations) is amended as follows.

(2) For each reference to "Assembly" substitute "Welsh Ministers".

(3) In subsection (2), for each reference to"it" substitute "them".

(4) In paragraph (b) of subsection (5), for "an auditor" substitute "the Auditor General for Wales or the Wales Audit Office".

(5) In subsection (6), after "may be recovered" insert "by the Wales Audit Office".

42 (1) Section 40 (documents relating to police authorities) is amended as follows.

(2) For each reference to "Assembly" substitute "Welsh Ministers".

(3) In subsection (1), for "receives a copy of a report under section 22(5) or (6)" substitute "makes a report under section 22".

43 (1) Section 41 (studies for improving economy etc in services) is amended as follows.

(2) In subsections (1) to (5), omit each reference to "or promote", "or promotes" and "or promoting".

(3) In subsection (6), for "the Assembly" substitute "the Welsh Ministers".

44 (1) Section 42 (studies on impact of statutory provisions etc) is amended as follows.

(2) In subsection (1)—

(a) omit "or promote", and

(b) in paragraph (b) for "the Assembly" substitute "the Welsh Ministers".

(3) In subsection (2), for each reference to "the Assembly" substitute "the National Assembly for Wales".

(4) In subsection (3), omit "or promoting".

(5) In subsection (4), for each reference to "Assembly" substitute "Welsh Ministers".

45 In subsection (1) of section 44 (studies at request of local government bodies in Wales), omit "or promote".

46 (1) Section 45 (benefit administration studies for Secretary of State) is amended as follows.

(2) In subsection (7), for the second reference to "the Auditor General for Wales" substitute "the Wales Audit Office".

(3) In subsection (8), for "the Auditor General for Wales" substitute "the Wales Audit Office, (but may not exceed the full cost incurred by the Auditor General for Wales in conducting, or assisting the Secretary of State to conduct, the study)".

(4) After subsection (8), insert—

"(9) A fee payable under this section must be charged in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013.".

47 In subsection (2) of section 46 (performance standards: relevant bodies), for "the Assembly" substitute "the Welsh Ministers".

48 In subsection (5) of section 47 (publication of information as to standards of performance), for "The Assembly" substitute "The Welsh Ministers".

49 (1) Section 51 (social security references and reports to Secretary of State) is amended as follows.

(2) Omit subsection (2).

(3) In subsection (3), for paragraph (a) substitute—

"(a) made by him under section 22, and".

50 (1) Section 52 (rights of Auditor General for Wales to documents and information) is amended as follows.

(2) In subsection (2), in paragraph (c), for "the Assembly" substitute "the Welsh Ministers".

(3) Omit subsection (6).

(4) In subsection (8), for "the Assembly" substitute "the Welsh Ministers".

(5) After subsection (8) insert—

"(9) A statutory instrument containing an order under subsection (2)(c) is (unless a draft of the order has been laid before, and approved by a resolution of the National Assembly for Wales) subject to annulment in pursuance of a resolution of the Assembly.".

51 (1) Section 53 (rights of Auditor General for Wales to documents and information: offences) is amended as follows.

(2) In paragraph (b) of subsection (3), after "the Auditor General for Wales" insert "or the Wales Audit Office".

(3) In subsection (4), after "may be recovered" insert "by the Wales Audit Office".

52 (1) Section 54 (restriction on disclosure of information) is amended as follows.

(2) In subsection (1), omit "or an auditor, or by a person acting on behalf of the Auditor General for Wales or an auditor".

(3) In subsection (2)—

(a) in paragraph (b), omit "or an auditor", and

(b) in paragraph (e), for "the Assembly" substitute "the Welsh Ministers".

(4) Omit subsection (2ZB).

(5) In subsection (2ZC)—

(a) omit "or (2ZB)", and

(b) omit "or an auditor".

(6) Omit subsections (6) to (8).

53 (1) Section 54ZA (consent under section 54(2ZC)) is amended as follows.

(2) In subsection (3), omit "or an auditor".

(3) In subsection (6), for "A person to whom a request for consent is made" substitute "The Auditor General for Wales".

54 In subsection (1) of section 56 (publication of information by Auditor General for Wales), in paragraph (a), omit "by an auditor".

55 In section 58 (orders and regulations), for each reference to "the Assembly" substitute "the Welsh Ministers".

56 In section 59 (interpretation of Part 2), omit subsections (2) and (3).

57 In section 61 (audit of Welsh NHS bodies), in paragraph (b) of subsection (2), for "the Assembly" substitute "the National Assembly for Wales".

58 (1) Section 62 (co-operation with Assembly, Audit Commission or CHAI) is amended as follows.

(2) In paragraph (a) for "the Assembly" substitute "the Welsh Ministers".

(3) Accordingly, the heading of section 62 becomes "Co-operation with Welsh Ministers, Audit Commission or Care Quality Commission".

59 In subsection (1) of section 64A (power to conduct data matching exercises), omit "or arrange for them to be conducted on his behalf".

60 (1) Section 64B (mandatory provision of data) is amended as follows.

(2) In subsection (1) omit—

(a) "or a person acting on his behalf", and

(b) "or that person".

(3) In subsection (4)—

(a) after "the Auditor General" insert "or by the Wales Audit Office", and

(b) after "from that body" insert "by the Wales Audit Office".

61 In subsection (1) of section 64C (voluntary provision of data), omit "or a person acting on his behalf".

62 (1) Section 64D (disclosure of results of data matching etc) is amended as follows.

(2) In subsection (1) omit "or on behalf of".

(3) In subsection (2)—

(a) omit "or on behalf of", and

(b) in paragraph (b) for "an auditor" substitute "the Auditor General".

63 In subsection (4) of section 64E (publication), omit "an auditor or".

64 (1) Section 64F (fees for data matching) is amended as follows.

(2) Before subsection (1), insert—

"(A1) The Wales Audit Office may, in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013, charge a fee in respect of a data matching exercise undertaken by the Auditor General for Wales.".

(3) In subsections (1) and (6) for each reference to "Auditor General for Wales" substitute "Wales Audit Office".

(4) In subsection (2), for "the Auditor General for Wales" substitute "the Wales Audit Office".

(5) In subsections (3), (4), (5) and (8) for each reference to "Auditor General for Wales" substitute "Wales Audit Office".

(6) In subsection (7), for "the Assembly" substitute "the National Assembly for Wales".

(7) After subsection (8) insert—

"(9) Any terms as to payment agreed by the Wales Audit Office under subsection (8) must be in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013.

(10) A fee charged under this section may not exceed the full cost of exercising the function to which it relates.".

65 In subsection (4) of section 64G (code of data matching practice), in paragraph (a) for "then Assembly" substitute "the National Assembly for Wales".

66 (1) Section 67A (assistance by Auditor General to inspectorates) is amended as follows.

(2) In subsection (2), for "the Auditor General for Wales" substitute "the Wales Audit Office".

(3) At the end of subsection (2), after the word "agree", insert ", but any terms as to payment agreed by the Wales Audit Office must be made in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013".

(4) After subsection (2), insert—

"(3) Any sums charged in relation to assistance provided under this section may not exceed the full cost of providing that assistance.".

Government of Wales Act 2006

67 The Government of Wales Act 2006 is amended as follows.

68 In section 37 (power to call), in subsection (1), after "functions" insert ", relevant to the exercise of any of the Auditor General for Wales' functions, or relevant to the oversight and supervision of the Auditor General for Wales, or to the oversight and supervision of the exercise of any of his or her functions".

69 In subsection (1)(c) of section 120 (destination of receipts), for "the Auditor General" substitute "the Wales Audit Office".

70 In subsection (3)(c) of section 124 (payments out of Welsh Consolidated Fund), for "the Auditor General" substitute "the Wales Audit Office".

71 In subsection (4) of section 129 (approvals to draw), for "the Auditor General" substitute "the Wales Audit Office".

72 In subsection (1) of section 143 (Audit Committee reports), in paragraph (b) for "paragraph 14 of Schedule 8" substitute "paragraph 32 of Schedule 1 to the Public Audit (Wales) Act 2013".

73 (1) Subsection (2) of section 144 (publication of accounts and audit reports etc) is amended as follows.

(2) In paragraph (b) for "paragraph 14 of Schedule 8" substitute "paragraph 31 of Schedule 1 to the Public Audit (Wales) Act 2013".

(3) In paragraph (c) omit "or estimate" and "or paragraph 12(3) of Schedule 8".

(4) After paragraph (c) insert—

"(d) any estimate of income and expenses of the Wales Audit Office laid before the Assembly under section 20(2) of the Public Audit (Wales) Act 2013 (including any modifications made to that estimate under section 20(5)(b) of that Act),

(e) any scheme for charging fees laid before the Assembly by the Wales Audit Office under section 24(4)(c) of the Public Audit (Wales) Act 2013,

(f) any annual plan laid before the Assembly by the Auditor General and the chair of the Wales Audit Office under section 27 of the Public Audit (Wales) Act 2013,

(g) any report laid before the Assembly under paragraph 1(5) of Schedule 2 to the Public Audit (Wales) Act 2013 (reports on the exercise of the functions of the Auditor General and the Wales Audit Office).".

74 (1) Section 145 (Auditor General) is amended as follows.

(2) Omit subsection (1).

(3) In subsection (2) for "the Auditor General see Schedule 8" insert "the Auditor General for Wales or Archwilydd Cyffredinol Cymru (referred to in this Act as "the Auditor General") see Schedule 8 and the Public Audit (Wales) Act 2013".

75 (1) Schedule 8 (Auditor General for Wales) is amended as follows.

(2) Omit paragraphs 1 to 16.

(3) In sub-paragraph (1) of paragraph 17 (access to documents), in paragraph (c), for "Act" substitute "enactment".

(4) In sub-paragraph (7) of paragraph 17—

(a) for "Act" substitute "enactment", and

(b) at the end of the sub-paragraph, before the full stop, insert ", apart from accounts that fall to be examined under Part 2 of the Public Audit (Wales) Act 2004".

(5) In paragraph 18 (other powers)—

(a) in sub-paragraph (1), after "the Welsh Ministers may", insert ", having first consulted the Wales Audit Office,", and

(b) after sub-paragraph (3) insert—

"(3A) But before entering into an agreement under subsection (3), the Welsh Ministers or a Minister of the Crown (as the case may be) must consult the Wales Audit Office.".

(6) Omit paragraph 21.

Companies Act 2006

76 The Companies Act 2006 is amended as follows.

77 In subsection (6) of section 1229 (supervision of Auditors General by the Independent Supervisor), after "to any person" insert "or, in the case of the Auditor General for Wales, for payment by the Wales Audit Office of such a fine".

78 In section 1230 (duties of Auditors General in relation to supervision arrangements), after subsection (3)(b), insert—

"(c) in the case of expenditure of the Auditor General for Wales, to be regarded as expenditure of the Wales Audit Office for the purposes of section 20 of the Public Audit (Wales) Act 2013.".

Local Government (Wales) Measure 2009

79 The Local Government (Wales) Measure 2009 is amended as follows.

80 (1) Section 21 (special inspections) is amended as follows.

(2) In subsection (4)—

(a) for "direct the Auditor General to" substitute "request that the Auditor General", and

(b) for "direction" substitute "request, unless it is not reasonable to do so".

(3) In subsection (5), for "direction" substitute "request".

(4) In subsection (6), for "giving a direction" substitute "making a request".

(5) In paragraph (b) of subsection (7), for "directed the Auditor General to" substitute "requested that the Auditor General".

81 In section 25 (statement of practice), omit paragraph (b) of subsection (5).

82 In section 26 (inspectors' powers and duties), in subsection (11), for "a member of the Auditor General's staff or a person providing services to the Auditor General" substitute "or a person exercising the functions of the Auditor General for Wales by virtue of a delegation made under section 18 of the Public Audit (Wales) Act 2013,".

83 (1) Section 27 (fees) is amended as follows.

(2) In subsection (1), for "The Auditor General for Wales" substitute "The Wales Audit Office".

(3) In subsection (3), for "the Auditor General for Wales" substitute "the Wales Audit Office, in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013,".

(4) In subsection (4), for the reference to "the Auditor General" and "the Auditor General for Wales" substitute "the Wales Audit Office".

(5) After subsection (4) insert—

"(4A) But a fee charged under this section may not exceed the full cost of exercising the function to which it relates.".

(6) In subsection (5), for both references to "the Auditor General" substitute "the Wales Audit Office".

(7) Omit subsection (6).

84 After section 27 (fees) insert—

"27A Welsh Ministers' power to prescribe a scale of fees

(1) The Welsh Ministers may, by regulations, prescribe a scale or scales of fees to have effect instead of a scale or scales prescribed by the Wales Audit Office under section 27(1),

(2) A scale of fees prescribed under subsection (1) has effect for the period specified in relation to it in the regulations.

(3) Subsection (4) applies if—

(a) a scale of fees is prescribed under subsection (1) in place of a scale prescribed by the Wales Audit Office, and

(b) the scale prescribed by the Wales Audit Office would otherwise be the appropriate scale for the purposes of section 27(3) and (4).

(4) The references to the appropriate scale in section 27(3) and (4) are to be read as references to the scale prescribed under subsection (1).

(5) Before making regulations under subsection (1) the Welsh Ministers must consult—

(a) the Wales Audit Office,

(b) any associations of local government bodies in Wales which appear the Welsh Ministers to be concerned, and

(c) such other persons as they think fit.

(6) Regulations made under this section are subject to annulment in pursuance of a resolution of the National Assembly for Wales.".

Local Democracy, Economic Development and Construction Act 2009

85 The Local Democracy, Economic Development and Construction Act 2009 is amended as follows.

86 In section 46 (codes of practice), in subsection (4) for "section 16 of the Public Audit (Wales) Act 2004 (c 23)" substitute "section 10 of the Public Audit (Wales) Act 2013".

87 (1) Section 50 is amended as follows.

(2) In subsection (1), for "under this Chapter must pay the appointing audit authority", substitute "by the audit authority under this Chapter must pay the Audit Commission".

(3) After subsection (1), insert—

"(1A) An entity in relation to which a person is appointed by the Auditor General for Wales under this Chapter must pay the Wales Audit Office, in accordance with a scheme for charging fees prepared under section 24 of the Public Audit (Wales) Act 2013, a fee in respect of the discharge by that person of any of the functions specified by subsection (2) in relation to the entity.".

(4) In subsections (3), for "the audit authority", each time those words appear, substitute "the Audit Commission or the Wales Audit Office (as the case may be)".

(5) In subsection (4)—

(a) for the first reference to "this section" substitute "subsection (1)", and

(b) for "the audit authority" substitute "the Audit Commission".

(6) After subsection (4), insert—

"(4A) The amount of a fee payable under subsection (1A) is, subject as follows, to be such as may be specified in or determined under a scale or scales of fees prescribed by the Wales Audit Office for the purposes of this section.

But a fee charged under subsection (1A) may not exceed the full cost of exercising the function to which it relates.".

(7) In subsection (5)—

(a) for "subsection (4)" substitute "subsection (4) or (4A)", and

(b) for "the audit authority" substitute "the Audit Commission or the Wales Audit Office (as the case may be)".

(8) In subsection (6), for "the audit authority" substitute "the Audit Commission or the Wales Audit Office (as the case may be)".

(9) Omit subsections (10) and (11).

(10) In subsection (12), for each reference to "the audit authority" substitute "the Audit Commission or the Wales Audit Office (as the case may be)".

Equality Act 2010

88 In Part 2 of Schedule 19 to the Equality Act 2010 (public authorities: relevant Welsh authorities), under the heading "other public authorities", insert at the appropriate place "the Wales Audit Office or Swyddfa Archwilio Cymru.".

Llywodraeth Cymru
Welsh Government

PUBLIC AUDIT (WALES) BILL

Explanatory Memorandum

incorporating the
Regulatory Impact Assessment
and Explanatory Notes

July 2012

The Public Audit (Wales) Bill

Explanatory Memorandum to the Public Audit (Wales) Bill

This Explanatory Memorandum has been prepared by the Local Government and Communities Directorate of the Welsh Government and is laid before the National Assembly for Wales**.**

Member's Declaration

In my view the provisions of the Public Audit (Wales) Bill, introduced by me on 9 July 2012, would be within the legislative competence of the National Assembly for Wales.

Jane Hutt AM

Minister for Finance and Leader of the House
Assembly Member in charge of the Bill

9 July 2012

Contents

PART 1 – OVERVIEW

1 Description

1 The Public Audit (Wales) Bill aims to strengthen and improve the accountability and governance arrangements relating to the Auditor General for Wales (AGW) and the Wales Audit Office (WAO) whilst protecting the AGW's independence and objectivity.

2 It will improve the National Assembly for Wales' oversight of the AGW and strengthen the accountability and transparency of that Office. The Bill, if enacted, will establish a new WAO, responsible for the corporate functions currently vested in the AGW. It will also have a duty to monitor, and a power to advise, him or her. The Bill also includes provisions that will make the AGW the statutory auditor of local government bodies in Wales.

2 Legislative background

3 The National Assembly for Wales (the Assembly) has the legislative competence to make provision in relation to "audit, examination, regulation and inspection of auditable public authorities" and in relation to "Auditor General for Wales" by virtue of section 108 of and Part 1 (Heading 14 (Public Administration)) of Schedule 7 to the Government of Wales Act 2006 (the 2006 Act).

4 Section 27 of, and Schedule 6 to, the Budget Responsibility and National Audit Act 2011, inserted into that Heading in Schedule 7 to the 2006 Act the subject "Auditor General for Wales". It also made various changes to the general restrictions in Part 2 of that Schedule (including by making some exceptions to those restrictions) in order to provide the Assembly with the power to make provision in an Assembly Act linked to oversight of the AGW and the Wales Audit Office (WAO).

5 Heading 14 from Part 1 of Schedule 7 to the 2006 Act is reproduced below (the relevant Subjects of competence are highlighted):

Public administration

14 *Public Services Ombudsman for Wales, Auditor General for Wales, Audit, examination, regulation and inspection of auditable public authorities. Inquiries in respect of matters in relation to which the Welsh Ministers, the First Minister or the Counsel General exercise functions. Equal opportunities in relation to equal opportunity public authorities. Access to information held by open access public authorities.*

The following are "auditable public authorities" and "equal opportunity public authorities"—

(a) the Assembly,
(b) the Assembly Commission,
(c) the Welsh Assembly Government,
(d) persons who exercise functions of a public nature and in respect of whom the Welsh Ministers exercise functions,
(e) persons who exercise functions of a public nature and at least half of the cost of whose functions in relation to Wales are funded (directly or indirectly) by the Welsh Ministers, and
(f) persons established by enactment and having power to issue a precept or levy.

The following are "open access public authorities"—

(a) the Assembly,
(b) the Assembly Commission,
(c) the Welsh Assembly Government, and

(d) authorities which are Welsh public authorities, within the meaning of the Freedom of Information Act 2000 (c 36).

Exception—
Regulation of the profession of auditor.

6 The most relevant general restrictions, and exceptions to those restrictions (from Parts 2 and 3 of Schedule 7 to the 2006 Act) related to this Bill, are reproduced in the box below. Other general restrictions relevant to this Bill include the restriction on modifying etc. Minister of the Crown functions in paragraph 1 of Part 2 of Schedule 7 to the 2006 Act (which by virtue of section 158(1) of the 2006 Act includes Treasury functions) and the exception relating to modification of the functions of the Comptroller and Auditor General in paragraph 4 of that Part of that Schedule. Reliance is also placed, for the purposes of this Bill, on the exception in paragraph 8 of Part 3 of that Schedule relating to provisions that restate the law.

Enactments other than this Act

2

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

TABLE

Enactment	*Provisions protected from modification*
European Communities Act 1972 (c 68)	The whole Act
Data Protection Act 1998 (c 29)	The whole Act
Government of Wales Act 1998 (c 38)	Sections 144(7), 145, 145A and 146A(1)
Human Rights Act 1998 (c 42)	The whole Act
Civil Contingencies Act 2004 (c 36)	The whole Act
Re-Use of Public Sector Information Regulations 2005 (SI 2005/1505)	The whole set of Regulations

[(2) Sub-paragraph (1) does not apply to any provision making modifications, or conferring power by subordinate legislation to make modifications, of section 31(6) of the Data Protection Act 1998 so that it applies to complaints under an enactment relating to the provision of redress for negligence in connection with the diagnosis of illness or the care or treatment of any patient (in Wales or elsewhere) as part of the health service in Wales.]

[(3) Sub-paragraph (1), so far as it applies in relation to sections 145,

145A and 146A(1) of the Government of Wales Act 1998, does not apply to a provision to which sub-paragraph (4) applies.

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

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

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

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

(Government of Wales Act 2006)

5

(1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, provisions contained in this Act.

[(2) Sub-paragraph (1) does not apply to the following provisions—

(a) sections 20, 22, 24, 35(1), 36(1) to (5) and (7) to (11), 53, 54, 78, 146, 147, 148 and 156(2) to (5);

(b) paragraph 8(3) of Schedule 2;

[(c) any provision of Schedule 8, other than paragraphs 1(1) to (3), 2(2) to (4) and 3].]

(3) Sub-paragraph (1) does not apply to any provision—

(a) making modifications of so much of any enactment as is modified by this Act, or

(b) repealing so much of any provision of this Act as amends any enactment, if the provision ceases to have effect in consequence of any provision of, or made under, an Act of the Assembly.

[(4) Sub-paragraph (1) does not apply in relation to a provision to which paragraph 2(4) applies.

(5) But, subject to sub-paragraph (6), a provision to which paragraph 2(4) applies cannot modify, or confer power by subordinate legislation to modify, paragraph 3 of Schedule 8.

(6) Sub-paragraph (5) does not prevent the conferral of functions on a committee of the Assembly that—

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

(i) the First Minister or any person designated to exercise functions of the First Minister,

(ii) a Welsh Minister appointed under section 48,

(iii) the Counsel General or any person designated to exercise the functions of the Counsel General, or

(iv) a Deputy Welsh Minister, and

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

3 Purpose and intended effect of the legislation

3.1 Background and current position

7 Detailed provisions about the appointment and status of the Auditor General for Wales (AGW), the AGW's staff, financial affairs and general powers of the AGW are set out in Part 5 of and Schedule 8 to the Government of Wales Act 2006 (the 2006 Act). The office of the AGW is a corporation sole. The Wales Audit Office (WAO) has no legal personality of its own, but is a collective term used to describe the AGW and the AGW's staff. The AGW is appointed by Her Majesty on the nomination of the National Assembly for Wales (the Assembly). 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. The current AGW has been appointed for a term of 8 years.

8 The AGW appoints staff, sets their terms and conditions and has power to secure provision of services for assisting in the exercise of his or her functions. Funds required for these purposes and other expenses are paid from the AGW's budget, the estimate for which is considered by the Public Accounts Committee (PAC) of the Assembly (which may modify it) in accordance with paragraph 12 of Schedule 8 to the 2006 Act. Under the Standing Orders of the Assembly the estimate, modified or not, forms part of the overall budget motion moved annually in the Assembly (as required by section 125 of the 2006 Act).

9 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 an Assembly budget motion 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 specific services. Where that is the case, for example, fees charged for the audits of local government bodies, the sums received by the AGW are retained and do not form part of the AGW's budget estimate, cannot be scrutinised by the PAC, and do not feature as a component in the Assembly's annual budget motion.

10 In the exercise of his functions, the AGW is not subject to the direction or control of the Assembly or the Welsh Government. It is, therefore, of significant importance that the responsibilities conferred on the AGW and the business of his or her office should be conducted in an economic, efficient and effective way and that the systems of governance and internal controls operate to the highest standards.

11 The Welsh Government and the Assembly had concerns about the management, governance and accountability arrangements relating to the AGW and his or her Office. These concerns arose principally from the way in which a previous AGW undertook aspects of his duties which highlighted a lack

of robust external accountability. In addition, concerns were raised as to the way in which the AGW worked with other bodies and applied the public resources made available to him in support of his functions and the running of the WAO.

12 In view of the vital role of the AGW in ensuring the highest standards of probity and propriety in the use of public funds across the public service in Wales, in 2008 the Welsh Government began to explore the possibility of strengthening the current regime and making it more transparent. It sought to secure an opportunity through a suitable UK Government Bill that would provide the Assembly with further legislative competence to introduce primary legislation that would enable the Assembly to modernise and strengthen the governance and accountability arrangements for the AGW and the WAO.

13 The PAC expressed its own concern relating to the actions of the then AGW whilst in office. These related to accounting matters, compliance with international financial reporting standards, issues of propriety, and a failure to uphold high standards of governance. On 29 March 2011, the PAC published its report on *Accounting, Governance and Propriety Issues at the Wales Audit Office*[1]*,* in which those concerns were set out clearly.

14 Overall the main areas of concern are summarised below.

Accounting issues

15 As the Accounting Officer of the WAO the AGW is required to sign the accounts, take personal responsibility for their accuracy and compliance with the Financial Reporting Model (FRM). The AGW is also responsible for the financial management of the WAO including ensuring that transactions are regular, proper and that full regard is given to the need for value for money. There were a range of failures in this regard including accounts not complying with the FRM; expenditure on early retirement settlements; pension entitlements; and other cash received from the public purse had not been fully accounted for.

Propriety issues

16 A report tabled by the current AGW, for discussion at the PAC[2] sets out that a former AGW concealed information wilfully from his Audit Risk and Management Committee and senior AGW staff. In addition, in its 2011 report (see paragraph 13 above) the PAC concluded that a former AGW had misled the Assembly and that his actions amounted to misbehaviour for the purposes of paragraph 2(3) of Schedule 8 to the 2006 Act.

[1] http://www.assemblywales.org/report_on_governance_etc_at_the_wao_1.6_final-e.pdf
[2] "Due Diligence in the Wales Audit Office" (16 February 2011)

Governance structures

17 The AGW has three advisory committees: audit risk and management; resources; and remuneration. These have no legal basis and provide no guarantee of institutional continuity. Members of the three advisory committees are appointed by the AGW (with input from a nominee of the Chair of the PAC).

18 Early in his tenure the current AGW recognised the governance and accountability weaknesses he inherited and has taken action to remedy those shortcomings by strengthening his internal control systems and putting in place a number of regular review processes. Although these changes are welcome, their effectiveness is not consistent with accepted best practice because appointments to these advisory committees are entirely in the gift of the AGW, with no objective, independent and external appointments process.

19 Against this background, it is clear that the reputation of the AGW, along with the confidence of the Assembly, has been severely damaged. The Welsh Government has recognised for some time that, in view of the role of AGW in providing assurance as to the probity and propriety of some £14 billion of public expenditure in Wales, there is a pressing need to establish a set of arrangements that will restore the confidence of the public and, critically, audited bodies in the activities of the AGW and WAO.

3.2 Objectives

20 The intention of the Public Audit (Wales) Bill (the Bill) is to strengthen and improve the accountability and governance arrangements relating to the AGW and the WAO. However, in bringing forward this new set of arrangements, the Welsh Government is also acutely aware of the need to preserve and protect the independence and objectivity of the AGW. Meeting these objectives simultaneously is not straightforward, and in drafting the Bill the Welsh Government aimed to strike a reasonable balance between greater transparency in the deployment of public resources while ensuring that the AGW is not constrained in how he or she goes about his or her activities.

21 The Bill aims to:

a. address concerns relating to accounting, propriety and governance issues;
b. respond to the recommendations of the PAC report published in March 2011 (referenced in paragraph 13 of this Memorandum) to enhance oversight over the AGW;
c. substantially reduce the prospect of similar difficulties happening again; and
d. provide greater assurance to the Assembly and the public.

22 In order to achieve those objectives, the Government believes that the duties and responsibilities of the AGW and the WAO should be separated. Thus, the Bill will vest employer, financial and other administrative functions in the new WAO which, in conjunction with the AGW, will report to, and be scrutinised by, the Assembly. A fundamental principle which is established by the Bill is the

maintenance of the AGW's independence from the Assembly and the Welsh Government, and an express safeguard to provide the AGW with complete discretion in the manner of the exercise of audit etc functions. The Bill includes provision that will establish arrangements for the appointment, termination and tenure of the AGW, and provides, as now, for the AGW to be appointed by Her Majesty on the recommendation of the Assembly, and for the AGW to continue as a corporation sole. Corporation sole status means that the office can hold property (although the main property holding functions will now be vested in the WAO) and which subsists even when there is no person holding that office (ie. when the office is vacant) and means that there is automatic continuity in the exercise of the functions of that office.

3.3 A new Wales Audit Office

23 The Bill will establish a new WAO as a body corporate with seven members. Being defined as a body corporate will allow the WAO to undertake executive functions, such as being a budget holder, employing staff, and securing the provision of goods and services. The majority of members will be appointed by the Assembly on merit through open and fair competition. The new AGW will automatically be a member of and the chief executive officer of the new WAO, and there will be one employee member recommended by the AGW for appointment by the non-executive members of the board to ensure that employee experience is able to inform the Board's activities and actions.

24 The WAO will be responsible for all the corporate-type functions currently vested in the AGW. The intention is to ensure that such powers would no longer rest solely in the hands of one individual. The WAO will:

a have a duty to monitor and a power to advise the new AGW;
b employ staff;
c secure the provision of services; and
d hold property for the purposes of carrying out its functions and those of the AGW.

3.4 Planning and reporting

25 The new WAO and the AGW will be required to prepare an annual income and expenditure estimate which will be laid before the Assembly. The Assembly may modify it should it choose to do so. The estimate (modified or not as the case may be) will be included in the Assembly's Annual Budget Motion which is tabled before the Assembly in accordance with its Standing Orders. The WAO will be the budget-holder and the entire budget estimate for that office will, therefore, be subject to the Assembly's Annual Budget Motion procedure.

26 The WAO will have responsibility for the charging and collection of fee income associated with the AGW's functions.

27 The WAO will also be required, together with the AGW, to produce an annual plan and both parties must have regard to it. The annual plan will set out the intended programmes of work for the WAO and the AGW, their costs, and

projected outcomes for each coming financial year. At least twice a year, the WAO and the AGW will report on an interim basis to the Assembly on the progress made against the plan.

28 The AGW will have responsibility for his or her audit, examination and inspection etc functions. The WAO will provide the resources for the AGW to carry out his or her functions on the basis of regard to the annual plan of work, provided the requests for resources by the AGW are reasonable.

29 Although neither is bound by the annual plan, they must have regard to it. This means that in exercising their functions (including as to the provision of resources required by the AGW) both the AGW and the WAO must give the annual plan the appropriate weight in all the circumstances. If other unforeseen work arises then the need for that work to be done (and the resource implications) must be properly balanced against the planned work and resources allocated for that.

30 The annual plan must include the maximum resources that it is anticipated will be allocated by the WAO to the AGW for the purpose of undertaking the AGW's programme of work.

31 The Bill is designed to ensure that it is the AGW who determines his or her own work programme (to maintain the independence of the AGW) and it is the AGW who determines the maximum amount of resources that will be needed to achieve that work. This is critical in terms of maintaining an appropriate balance between, on the one hand, establishing appropriate governance and oversight arrangements for the AGW and, on the other, maintaining the principle that the AGW's audit independence and discretion is not inappropriately fettered. This is achieved by giving the AGW the lead role in this respect with the WAO only being able to step in if the AGW's proposals are unreasonable. In this regard "unreasonable" is intended to have its ordinary meaning and the test is intended to be objective. This further protects the AGW because the test is not whether the WAO subjectively considers something to be unreasonable. Rather the test is whether, in all the circumstances, what is being proposed is, objectively tested, unreasonable.

32 The main focus and impact of the Bill will be on the AGW, the WAO and the Assembly, with some provisions directly impacting on arrangements for local government audit. The Bill makes provision to make the AGW the statutory auditor of local government bodies in Wales. At present the AGW is not directly responsible for the audit of local government bodies. Instead auditors are appointed by the AGW to perform those audits. This is considered to be anachronistic and, given that the current AGW has other functions in respect of local government bodies (eg. in relation to value for money), is responsible for auditing the Welsh Government, Welsh NHS bodies etc, and given the thrust of other proposals in the Bill, the time is right for the audit of local government bodies in Wales to be vested with the new AGW.

33 In addition, all auditable public bodies in Wales will benefit from the legislation as they will continue to receive a highly professional public audit service, but

will have clarity on who is directly responsible for the audit of their accounts. In addition the audit regime will be more transparent and openly accountable.

3.5 Detailed implementation and delivery plan for the Bill

34 The main features of the legislation are on the face of the Bill. However the Bill does provide the Welsh Ministers with powers to make subordinate legislation in certain areas. These regulation-making powers are summarised in section 5 of this Explanatory Memorandum.

35 Subject to the approval of the Bill by the Assembly and subsequent Royal Assent, it is intended that the new arrangements for the WAO and AGW will come into force by 1 April 2014. This date, which reflects the beginning of a new financial year (which is appropriate for the work and financial planning arrangements associated with the new AGW and WAO), will provide sufficient time to ensure that all of the governance and operational architecture, such as appointments to the WAO Board and its running in a shadow form, are in place before April 2014.

3.6 Territorial extent

36 The Bill applies mainly to Wales. There are a small number of provisions that will necessitate changes to legislation that extend beyond England and Wales and discussions are in hand with the Wales Office to ensure the Bill can be properly given effect in all relevant jurisdictions by means of a Section 150 Order under the 2006 Act. As an Assembly Act can only change the law of England and Wales and generally only applies in Wales a section 150 GOWA 2006 Order may be needed to ensure that where amendments are needed to UK wide legislation the relevant changes are made in the law of Northern Ireland and, as appropriate, Scotland. An example relates to the proposed amendments in this Bill to the Superannuation Act 1972.

4 Consultation

37 The Welsh Government published its consultation paper on the Public Audit (Wales) Bill on 15 March 2012, and requested that consultees respond by 15 May 2012. The consultation was sent directly to the organisations specified below at annex B. The consultation paper was also published on the Welsh Government's web site[3], and was available as a hard copy upon request.

38 There were 31 responses to the consultation, from a broad cross-section of institutions and organisations, and one member of the public. Respondents are listed below:

Public Accounts Committee (PAC)

Local Government Bodies (12)

Brecon Beacons National Park
Bridgend County Borough Council
Conway CBC
Flintshire CBC
Mid and West Wales Fire and Rescue Service
National Parks Wales
Neath Port Talbot CBC
Powys CC (Sustainable Development Co-ordinator)
South Wales Fire and Rescue Service
Vale of Glamorgan CBC
Wrexham CBC
WLGA

Other public service bodies (4)

Countryside Council for Wales
Commissioner for Sustainable Futures
Environment Agency (Wales)
Local Government Boundary Commission (Wales)

Education institutions (5)

Cardiff Metropolitan University
Estyn
Glyndwr University, Wrexham
Higher Education Funding Council for Wales
University of Glamorgan

Audit/Accountancy bodies (5)

Association of Chartered Certified Accountants (ACCA)
Audit Commission
Chartered Institute of Public Finance Accountants (CIPFA)
Institute of Chartered Accountants in England and Wales (ICAEW)
Price Waterhouse Coopers (PwC)

[3] http://wales.gov.uk/consultations/improving/pawbill/?lang=en&status=closed

AGW and Staff Trades Unions (2)

Auditor General for Wales (AGW)
Prospect and the Public and Commercial Services Union (PCS)

Other (2)

World Wildlife Fund (Cymru)
Penny Gripper

ANALYSIS OF CONSULTATION RESPONSES

Summary

39 The substantive responses, around two-thirds, were almost unanimously in favour of strengthening the governance and accountability of the Auditor General for Wales (AGW), although there were mixed and divergent views on how that could and should be achieved. Overall, there was a majority in favour of a corporate WAO. Of the rest, around one third focussed on single interest matters ie, sustainable development, and whether the AGW should be the statutory auditor of Further and Higher Education Corporations, offering few or no comments on the main proposals for the Bill. All responses on consolidating and simplifying the current legislation were supportive. There was a noticeable balance in favour of introducing sustainable development provisions in the Bill.

PAC letter

40 In general, the Committee welcomes the proposals in the draft Bill and accepts its principal aim of strengthening governance and accountability. It seeks the rationale for giving it the oversight role and an explanation why the level of such responsibility is so detailed. It also wishes to know: why a corporate WAO is preferred to an advisory/supervisory Board model; the other options considered in determining the size of the WAO; how the proposed funding arrangements would operate in practice whilst ensuring the AGW's operational audit independence; what might happen should the AGW and the WAO fail to agree an annual plan; and the reason for changing the way the external auditor of the WAO is to be appointed? The Committee considers its power to call witnesses is restrictive and that should be addressed in the Bill.

Local government bodies, including the WLGA (12)

41 Seven LGBs supported the creation of a corporate WAO of which 6 supported the oversight functions of the PAC; 4 offered no comment; the WLGA considered the WAO provisions burdensome and the PAC function to be over-prescribed.

42 There was no firm consensus on the tenure of an AGW appointment but most considered 7 years to be reasonable; some thought the role should attract performance criteria, likewise for appointments and re-appointments to the WAO. Several thought the one employee member of the WAO should be appointed by open competition. One respondent made a case for appointing WAO members for 4 years with the option of renewal for another 4 years. With

one dissenter, restrictions post appointments were accepted. There was unease over fees with a wish for benchmarking, better consultation and penalties for the AGW missing agreed performance targets. With one exception, responses favoured the AGW becoming the auditor of Local Government Bodies.

Other public service bodies (PSB) (4)

43 One Public Service Body seemed in favour of a corporate WAO; one made no comment whatsoever; 3 commented only – and favourably - on including sustainable development provisions in the Bill.

Education Institutions (5)

44 Two institutions supported the creation of a corporate WAO and supported the oversight functions of the PAC; 3 made no comment.

45 Estyn considered there should be a protocol for appointments to the WAO; a performance review mechanism; offered a range of grounds for the removal from office of WAO members; and thought one interim, half-yearly report sufficient.

46 All institutions considered the AGW should not be the statutory auditor of Further and Higher Education Corporations.

Audit/Accountancy bodies (5)

47 Three bodies supported a corporate WAO with the PAC having the oversight role; 2 bodies supported a supervisory board.

48 There was some worry over the burdens to be placed on both the WAO and the PAC which might hinder the AGW's operational audit independence. More employee members could be beneficial and reasons for removal from office of the AGW and the WAO chair should include ill health.

AGW and staff Trade Unions (2)

49 The AGW opposed the proposals, considered the PAC oversight role to be over-prescribed, the composition of the WAO to be unbalanced, and preferred a Supervisory Board with no executive functions: the AGW staff's trades unions (Prospect and PCS) mainly concur with the AGW's views.

50 The main points in the AGW's detailed response were: the corporate governance proposals were over-prescriptive, unbalanced, unworkable and not appropriate. The PAC's oversight role would impair its ability to scrutinise Welsh Government expenditure: there should be a more proportionate oversight regime vested elsewhere (by the Assembly), thereby enabling the PAC to continue its primary role of holding the Welsh Government to account. Proposals for a corporate WAO with executive functions were too interventionist and would lead to inappropriate fettering of the AGW's

independence. The AGW should continue to have sole responsibility for all executive functions with a statutory Supervisory Board created to monitor and advise him. If a corporate WAO was to be established, with a stronger executive base, planning and resources arrangements must ensure the AGW's independence.

Other (2)

51 A member of the public supported the creation of a corporate WAO and favoured the PAC having the oversight functions. A charity commented only – and favourably - on including sustainable development provisions in the Bill.

52 The individual considered a WAO membership of 7 to be too small to exercise executive functions; that tenure of appointments should be staggered to avoid gaps; was unhappy with the AGW recommending the appointment of the employee member; thought restrictions post appointment should be permanent and that the combined functions of AGW/CEO should be separate posts with the CEO being the Accounting Officer.

5 Powers to make subordinate legislation

53 The Bill contains provisions to make subordinate legislation. Table 1 sets out in, relation to each provision:

- the person upon whom, or the body upon which, the power is conferred;
- the form in which the power is to be exercised;
- the appropriateness of the delegated power;
- the applied procedure (affirmative, negative, no procedure) if any.

Table 1: Summary of powers to make subordinate legislation

Clause	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
Clause 19(7)	Welsh Ministers	Order by Statutory Instrument	Suitable for order making powers as the provision enables Welsh Ministers to add a body of accountants to the approved list of those able to co-operate with, and provide assistance to, and receive assistance from, the WAO/AGW	Negative procedure	This Order will prescribe matters of detail which may change from time to time.
Clause 34(2)	Welsh Ministers	Order by Statutory Instrument	Suitable for order making powers as the provision enables the Welsh Ministers, by order, to make further transitional, transitory or saving etc. provisions in connection with or to give full effect to the Bill when enacted.	Negative procedure, unless Clause 31(2) is relevant, in which case the affirmative procedure will apply	The power has the potential to amend both this Act, other Acts of the UK Parliament and Acts and Measures of the Assembly as well as prerogative instruments (as the case may be).
Clause 36(2)	Welsh Ministers	Order by Statutory	This provision is required because	No procedure when an Order	This is normal for

	Instrument	the Bill does not come fully into force upon receiving Royal Assent but is to be implemented by Welsh Ministers	under Clause 36 is directly linked to commencement of provisions. But if the power to make an Order under Clause 36 is combined with the power to make an Order under Clause 34 then the instrument will be subject to the procedure that applies in respect of Clause 34.	commencement where they simply bring the provisions into force

54 In addition to the powers outlined in Table 1, the Bill makes amendments to the Public Audit (Wales) Act 2004 to make it clear on the face of the Bill that the power to make subordinate legislation is now vested in Welsh Ministers, and makes provision for the use of the relevant Assembly procedure rather than placing reliance on Schedule 11 to the Government of Wales Act 2006. As an example paragraph 41 of Schedule 4 amends section 39 of the Public Audit (Wales) Act 2004. This requires a resultant change to section 58 of that Act, which is achieved by paragraph 55 of Schedule 4 to the Bill.

6 Regulatory Impact Assessment (RIA)

55 A Regulatory Impact Assessment has been completed in accordance with Standing Order 26.6(vi) for the proposed Bill and follows in Part 2 of this Explanatory Memorandum. It includes a cost-benefit assessment.

56 A report from the AGW on the appropriateness of charging expenditure on the Welsh Consolidated Fund from provisions in this Bill, under The National Assembly's Standing Order 26.6(viii), is attached at Annex 3.

PART 2 – REGULATORY IMPACT ASSESSMENT

7 Options

57 This Regulatory Impact Assessment presents four options in relation to the policy objectives of the Bill. Each option is analysed in terms of how far it would achieve the Welsh Government's objectives, along with the associated risks, costs and benefits.

58 The options are:

a Option 1 – do nothing (maintain the current arrangements)
b Option 2 – allow the Auditor General for Wales (AGW) to strengthen internal control arrangements
c Option 3 – National Assembly for Wales (the Assembly) to create a statutory advisory board
d Option 4 – To legislate to establish new statutory oversight and governance arrangements for the AGW and the Wales Audit Office (WAO)

Option 1 – Do nothing (maintain the current arrangements)

59 Under this option the current governance and oversight arrangements for the AGW will remain in place.

60 Currently the AGW appoints staff, sets their terms and conditions and has power to secure provision of services for assisting in the exercise of his or her functions. Funds required for these purposes and other expenses are paid from the AGW's budget, the estimate for which is considered by the Public Accounts Committee (PAC) of the Assembly (which may modify it) in accordance with paragraph 12 of Schedule 8 to the Government of Wales Act 2006 (the 2006 Act). Under the Standing Orders of the Assembly the estimate, modified or not, forms part of the overall budget motion moved annually in the Assembly (as required by section 125 of the 2006 Act).

Option 2 – Allow AGW to strengthen internal control arrangements

61 This option allows the current AGW to continue to strengthen the WAO's corporate governance through arrangements proposed to the PAC on 7 October 2010 and which are now in place. Those arrangements included the establishment of three WAO committees (Remuneration, Resources, and Audit and Risk Management) each comprising four suitably qualified non-executive members recruited using public appointments' principles.

62 In addition to the oversight undertaken by the Assembly as described under Option 1, this option would also propose that a strategic review of the WAO's operations be undertaken by the Chairs of the three committees and the AGW's Executive Committee every six months.

63 Further an annual WAO governance conference, bringing together the outcomes of the strategic reviews and an analysis of the WAO and AGW's work plan, would be held, resulting in a Governance Report which would be submitted to the PAC and/or Assembly for consideration.

Option 3 – The Assembly to create a statutory advisory board

64 This option would require an Assembly Bill (brought forward by an Assembly Committee, the Assembly Commission or the Welsh Government) to amend the 2006 Act in order to provide the Assembly with powers to appoint a Board (or Panel) to advise the Assembly on any matter relating to the functions of the AGW.

65 The Board, once appointed by the Assembly, could have functions that include oversight of the work of the AGW, the preparation of reports to the Assembly, and making recommendations on the efficiency and effectiveness of the AGW and his or her staff.

66 The legislation could include a requirement for the AGW and the Advisory Board to co-operate, for example by providing the Board access to the AGW's staff and papers to allow detailed, in-depth analysis of the AGW's work and effective scrutiny of his or her use of resources and the outcomes achieved.

67 In this option the Assembly could also retain its oversight functions as described in Option 1.

Option 4 – To legislate on establishing oversight and governance arrangements for the AGW and the WAO

68 Under this option an Assembly Bill (brought forward by the Welsh Government) would make provision for the oversight or supervision of the AGW with provisions to ensure protection of the AGW's independence from the Assembly and the Welsh Government, and complete discretion in the manner of the exercise of audit etc judgements.

69 A new corporate body, the WAO, would be created with a range of duties and powers in relation to itself and the AGW, accountable to the Assembly and independent of the Welsh Government. Most of the AGW's current administration and housekeeping-type functions would transfer to the new WAO, while explicit provisions would protect and safeguard the AGW's operational audit etc. independence and status.

70 The new WAO would comprise a chair and four members, appointed by the Assembly using appropriate and transparent public appointments procedures, plus the AGW (as chief executive officer) and a staff (or employee) member.

71 The new WAO's main functions would be to monitor, oversee and advise the AGW; prepare financial estimates (with the AGW) for approval (with or without modification by the Assembly); employ all staff; hold property; set and charge

fees for audits etc carried out by the AGW; provide resources in support of the AGW's functions; prepare (with the AGW) strategic and annual plans that would be laid before, and considered by, the Assembly (independently of the Welsh Government); and submit an annual report to the Assembly for its consideration.

72 The WAO, as the new governing body for an organisation of some 300 staff and an annual budget of over £24 million, would be separate from the Welsh Government whilst accountable to the Assembly. The choice as to whether the oversight functions are exercised by a Committee of the Assembly, by a Commission of the Assembly (comprising Assembly Members) or by some other mechanism would be a matter for the Assembly.

73 This is the preferred option of the Welsh Government, and these arrangements are provided for in the Public Audit (Wales) Bill.

8 Costs and benefits

74 This section contains a cost benefit analysis of the options detailed in section 7. All costs are estimates and are subject to variation depending on decisions taken in relation to the implementation of the Bill, if enacted. For example, the costs to the Assembly of scrutinising the AGW and WAO will depend on the approach to oversight which the Assembly determines is appropriate. Similarly, there is an element of choice as to whether the costs indicated should be regarded as additional or should be treated on the basis that existing resources could be reprioritised or that funding could be released through savings elsewhere. Further detail and sensitivity analyses can be provided if required: the figures given here err on the side of caution. Day rates, where given, are based on the rates for comparable functions undertaken through public appointments and include VAT and expenses.

Option 1 – Do nothing (maintain the current arrangements)

Costs

75 Under this option, the current processes and practices will continue as now. It is therefore estimated that there will be no additional expenditure over and above that already planned and provided for in baseline budgets. Given that there would be no change in approach, structures or processes, there will be no transitional costs arising.

76 The Auditor General for Wales' (AGW) current budget is £24.2 million a year. It is for the AGW to decide on the resource he or she applies to internal control and governance. The estimated costs of these arrangements, based on the 2010-11 Statement of Accounts, are £36,650 a year.

77 The AGW is required to have his or her accounts audited by an external auditor. Latest available figures for that external audit are £25,000 for the 2010-11 financial year.

78 The Public Accounts Committee (PAC) of the National Assembly for Wales (the Assembly) currently schedules one session per year to consider the AGW's financial estimates and to conduct overall oversight of the AGW. It is difficult to estimate the cost of that one meeting, or the part of the session that is taken up by activities relating to the AGW. The cost is met from the budget assigned to the Assembly Commission.

79 The Welsh Government places an annual Budget Motion (initially in draft and then in final form) before the Assembly (part of which includes the AGW's financial estimate and the potential call of that Office on the Welsh Consolidated Fund). This is subject to debate in Plenary. It is difficult to approximate the cost of that debate, which is nevertheless met from the budget assigned to the Assembly Commission. In any event only a fraction of this cost would be attributable to consideration of the AGW's financial estimate.

Benefits

80 There would be no extra financial cost with this option. However, there would also be no benefit either as the conditions that allowed the previous issues to occur would remain unchanged. Similarly, as the current internal governance arrangements for the AGW and his or her Office would continue to apply, there remains the risk that the failures of governance could be repeated. Consequently, there would be no action to meet the recommendations of the PAC report referred to in paragraph 13 of this Memorandum, or to ameliorate the damage to confidence in the WAO and office of the AGW. There is clearly a reputational risk to the AGW, and to the Assembly in that lack of effective oversight and the ability to effectively hold the AGW to account could be seen a sign of process, accountability, and democratic weakness.

81 It follows that this option would offer no benefit to the Assembly, auditable public bodies in Wales or to the Welsh public who rely on the AGW to represent their interests in the audit of public bodies in Wales.

Option 2 – Allow AGW to strengthen internal control arrangements

82 The Government considers that there would be costs associated with the establishment of strengthened internal control arrangements additional to those identified in option 1. Some would be transitional costs of establishing new arrangements, and some would recur each year. The costs would fall to the AGW and would be borne from within the agreed budget.

Transitional costs

83 The transitional costs to the AGW of establishing enhanced internal control mechanisms would be the staff costs associated with establishing new procedures and implementing new arrangements. We would estimate this to require no more than 40 person days at £250 per day. These resources would be provided from within the AGW's existing staff and agreed budgets.

Average annual costs

84 The annual cost of supporting the strengthened internal control arrangements set out above is estimated to be in the region of £60,000 compared to current costs of £36,650. These costs would be associated with the staff time in preparing, producing considering the additional reports (approximately £3,000 per report) and of preparing and implementing the governance conference (approximately £5,000). The full cost of these arrangements would be met by the AGW from within his or her annual agreed budget.

85 If the PAC or the Assembly decide to consider the governance report, there would be similar, un-quantifiable costs to those described in paragraph 78 and 79 above, associated with this, assuming consideration took place within a normal Committee or Plenary session. Any such costs would be met from the budget assigned to the Assembly Commission.

Benefits

86 This option would be likely to improve internal accountability, and require the AGW to report to the PAC and/or Assembly on internal control matters, in addition to the current annual interrogation of his or her financial estimates and operational outcomes.

87 However, while these enhanced governance arrangements would be welcome, and provide some assurance beyond that offered by Option 1, the implementation, management and ultimately the effectiveness of those arrangements would be entirely within the control of the AGW. It would not provide any enhanced external scrutiny or accountability of the AGW him or herself. Furthermore, it leaves the statutory position of the AGW with regard to staffing untouched, and therefore would not address the Welsh Government's principal requirement, set out in the *Programme for Government*, to legislate for the Auditor General for Wales and the Wales Audit Office to be accountable to the Assembly by establishing independent external governance arrangements for the AGW and his or her Office.

Option 3 – The Assembly to create a statutory advisory board

88 The Welsh Government considers that there would be costs associated with this option additional to those identified in the costs outlined in option 1. Some would be transitional costs of establishing new arrangements, and some would recur each year. The costs would fall to the AGW and to the Assembly.

Transitional costs

89 In addition to the costs associated with preparing, consulting upon and making an Assembly Act to give the Assembly the necessary powers to create a statutory board, there would also be a cost to the Assembly in establishing the Board. It is estimated these costs would be approximately £20,000 arising mainly from the need to advertise the posts and to undertake the competitive appointments process.

Average annual cost

90 The estimated full-year cost of supporting the Board's work and meeting its operating costs would clearly depend on its size and the frequency of meetings. Assuming a daily rate of £300, given that Board Members in this option would not have the same level of responsibility as those set out in paragraph 78, hence the lower rate, and board members working two days a month, together with the costs of secretariat and technical support, the costs might be in the range of approximately £50,000 a year. These costs would be additional to the current internal control costs of the AGW and would be borne by the WAO.

91 The Assembly may chose to increase or decrease the amount of time it schedules in Committee or Plenary each financial year to consider general oversight of the AGW, and/or to enable consideration of the Board's advice. It

is difficult to estimate any changes in cost arising from activities relating to the AGW under this option, as this will depend on the level of scrutiny the Assembly considers appropriate to undertake. The cost would be met from the budget assigned to the Assembly Commission.

92 There is likely to be ongoing costs to the Assembly of recruiting or replacing Board members should they choose to leave or reach the end of their tenure. These costs are estimated as £5,000 per member, based on the current costs of similar appointments. At a minimum it could be expected that each Member will need to be replaced (or reappointed as the case may be) every 4 years. This is slightly longer than the current tenure of Board members (which is 3 years) but provides an equitable basis to the costings in option 4 which are predicated on the proposals regarding tenure in the Public Audit (Wales) Bill.

Benefits

93 This option has distinct benefits and goes some way to meeting the Welsh Government's policy aims. Legislation would be used to create an independent Board remitted to advise the AGW, with that Board accountable to the Assembly. Public accountability of the AGW would be enhanced and some challenge brought to bear on the AGW. This would however be limited to an advisory capacity.

94 However, it would leave all the AGW's functions as they are at present, with no opportunity for the Board to do more than advise the AGW, and bring issues on which it had concerns to the attention of the PAC. This approach would therefore not achieve the desired significant improvement in the oversight and governance of the AGW and WAO.

Option 4 – To legislate to establish oversight and governance arrangements for the AGW and the WAO

95 The Government considers that there would be costs associated with this option additional to those identified in the costs outlined in option 1. Some would be transitional costs of establishing new arrangements, and some would recur each year. The costs would fall to the new WAO and to the Assembly.

Transitional costs

96 Under this option (and in accordance with the provisions of the Public Audit (Wales) Bill) there will be some costs incurred by the Assembly in advertising the posts of Chair and Board members, using an open, transparent and competitive public appointment process to fill those posts. The estimated costs for this are £20,000.

Average annual costs

97 Based on daily rates of £400 a day for members and £500 per day for the Chair, and assuming members are required to work an average of five days a month, and including the costs of secretariat and technical support, the full year

costs are estimated to be approximately £155,000 a year. Those sums would support the remuneration, gratuities and other allowances of the Chair of the WAO and the four WAO members. The cost of administrative support for the WAO would be borne by the WAO itself, which is funded to some extent from the Welsh Consolidated Fund, but receives the majority of its funding from fee income.

98 The Assembly could incur some additional costs arising from its enhanced oversight of the AGW and the WAO and the need to put in place appropriate arrangements to undertake this task. The estimated cost for this will depend on the nature of the oversight the Assembly undertakes and the arrangements it makes to support this. Any cost would be met from the budget assigned to the Assembly Commission.

Benefits

99 These arrangements would establish robust and effective accountability and governance arrangements for the AGW and the WAO, based in legislation. They would provide the Assembly with an enhanced ability to exercise appropriate oversight over the AGW and WAO without impinging on the AGW's independence and status.

100 This approach would fulfil the *Programme for Government* commitment, respond to the recommendations in the PAC Report *Accounting, Governance and Propriety Issues at the Wales Audit Office*, and the responses to the public consultation, all of which support reforming and modernising the governance of the AGW and his or her Office. It would also provide the maximum response to establishing full and effective levels of confidence in the WAO and AGW.

Costs of the options considered (£000)

	Option 1	Option 2	Option 3	Option 4
Preparation of accounts	25.0	25.0	25.0	25.0
Current support costs	37.0	37.0	0.0	0.0
PAC/other oversight costs	0.0	0.0	0.0	0.0
Board arrangements	0.0	23.0	50.0	155.0
Sub total	62.0	85.0	75.0	180.0
Transitional	0.0	10.0	20.0	20.0
Total	**62.0**	**95.0**	**95.0**	**200.0**

9 Summary and preferred option

101 Welsh Government policy, the report of the Public Accounts Committee ("*Accounting, Governance and Propriety Issues at the Wales Audit Office")* and the responses from consultees all indicate that change is necessary to strengthen governance and accountability of the Auditor General for Wales (AGW) and the Wales Audit Office (WAO), and to restore confidence.

102 On this basis, the Welsh Government considers that Option 4 (to legislate on establishing oversight and governance arrangements) offers the best way forward as it will provide robust and effective oversight of the AGW, allows for transparency and public accountability of the AGW's actions, while at the same time preserving the independence of that Office in undertaking audit functions and making professional judgements.

103 It is anticipated that the cost implications of the Public Audit (Wales) Bill and the benefits it is designed to deliver (as set out above) will be low relative to the overall resources available to the AGW and the WAO in undertaking their functions. The additional annual cost of Option 4 of £155,000 equates to 0.64% of the AGW's current budget of £24.2 million. This is considered to provide a cost-effective oversight function that provides appropriate challenge to the AGW, and establishes effective public accountability.

104 The costs to the National Assembly for Wales, both transitional and recurring, are judged to be proportionate in supporting the enhanced governance arrangements that will reduce the likelihood of financial and reputation costs being incurred in dealing with the outcome of poor governance.

10 Competition Assessment

105 The competition filter is required to be completed if the Bill affects business, charities and/or the voluntary sector. The provisions in the Bill will not affect business, charities and/or the voluntary sector. There is therefore no need for the competition filter to be applied in this case.

11 Post-implementation review

106 The Bill, if enacted, will be implemented by Local Government and Communities Directorate, working closely with the Assembly and key stakeholders. The approach to reviewing and developing the new arrangements will be agreed as part of the implementation process.

Annex A - Explanatory Notes

1 These Explanatory Notes relate to the Public Audit (Wales) Bill as laid before the National Assembly for Wales on 9 July 2012.

2 They have been prepared by the Local Government and Communities Directorate of the Welsh Government to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the National Assembly for Wales.

3 The Explanatory Notes need to be read in conjunction with the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision or part of a provision does not seem to require any explanation or comment, none is given.

List of terms and abbreviations used in the Explanatory Notes

4 The following terms and abbreviations are used in the Explanatory Notes:

The Assembly – the National Assembly for Wales
The Assembly Commission – the National Assembly for Wales Commission
The Bill – the Public Audit (Wales) Bill
The 2006 Act – the Government of Wales Act 2006

AGW – the Auditor General for Wales
WAO – the Wales Audit Office
WCF – the Welsh Consolidated Fund

Overview of the Bill

5 The Bill comprises 37 clauses, and 4 Schedules. As set out in Clause 1 (which is not intended to have any legal effect) of the Bill, the main provisions –

- prescribe the office of AGW is to continue;
- create a new corporate body, the WAO, and confer functions upon it;
- prescribe the governance arrangements for both the AGW and the WAO, and make provision for the relationship between the two;
- prescribe how the functions of the AGW are to be exercised and makes the AGW the auditor of local government bodies in Wales.

Part 1: Auditor General for Wales
Clause 2 – Office of Auditor General for Wales

6 This clause establishes that the office of the AGW continues. Before the enactment of this Bill the office of AGW is established under Schedule 8 to the 2006 Act. After enactment of this Bill the office of AGW will be established under clause 2. By referring to the office of AGW continuing the effect is that there is no break in the continuity of that office or in the exercise of the functions of that office. Under clause 2(2) Her Majesty is to appoint an

individual to that office on the nomination of the Assembly. Appointment to the office is for a maximum of 8 years; a person may only hold the office of AGW once.

7 The Assembly must be satisfied that reasonable consultation with those bodies representing the interests of local government bodies in Wales has been undertaken, before making a nomination to Her Majesty as to the person who should be appointed as AGW.

Clause 3 – Resignation or removal

8 The AGW holds office until the end of the term for which they have been appointed (which can be up to 8 years from appointment, see clause 2) unless:

- they are relieved of the appointment by Her Majesty at their request (namely, they resign);
- they are relieved of the appointment because Her Majesty is satisfied that they are no longer capable of performing the duties because of medical reasons and are also incapable for such reasons of requesting that they be relieved of office;
- they are removed from post by Her Majesty because of misbehaviour.

9 Removal from post on the grounds of misbehaviour is done only on the recommendation of the Assembly. Such a recommendation can only be made if at least two-thirds of all Assembly Members vote in favour of such action.

Clause 4 – Disqualification

10 This clause sets out the grounds which would disqualify a person from being AGW. The grounds relate to being a member of a legislature within the United Kingdom, an employee of the WAO, or holder of any other office or position appointed by the Crown, the Assembly or the Assembly Commission.

Clause 5 – Employment etc of former Auditor General

11 This clause prescribes the restrictions around future employment, office-holding or provision of services that will apply to persons who have been appointed as the AGW under this Bill but no longer hold this office. The restrictions only apply for two years beginning on the day the person ceases to hold office. The aim is to avoid any possible conflict of interest or perception of such a conflict when the person is AGW – e.g. to avoid the situation where an AGW nearing the end of his or her term of office carries out his or her functions leniently in respect of a body to which he or she may be appointed upon ceasing to be AGW.

Clause 7 – Remuneration

12 The Assembly is required to make remuneration arrangements for an AGW appointed under this Bill (prior to the appointment of the AGW), and such arrangements may include salary, allowances, gratuities, pension

arrangements and other benefits. In all cases these arrangements (or elements therein) cannot be performance-based.

13 In determining the arrangements the Assembly is required to consult with the First Minister.

14 Amounts payable will be charged on the WCF, this means that payment will be directly from that Fund rather than from monies voted annually by the Assembly. This is designed to further protect the independence of the AGW.

15 Note also paragraph 13 of Schedule 1 to the Bill, and paragraph 1 of Schedule 3 to the Bill – see below.

Clause 8 – How functions are to be exercised

16 This clause maintains and enhances the independence of the AGW in the exercise of his or her functions – the functions of the office are not subject to the direction or control of the Assembly or the Welsh Government and there is new provision to make clear that the AGW has complete discretion in the manner in which he or she exercises audit related functions.

17 However this is subject to the following. The AGW must seek to perform his or her functions efficiently, and in a cost-effective manner. They must also have regard to the standards and principles of professional practice in relation to auditing and accounting. The AGW must have regard to advice provided by the WAO and provided that the AGW does have regard to that advice the AGW has complete discretion in the exercise of his or her audit related functions.

Clause 9 – Supplementary powers

18 Clause 9 provides the AGW with a general power to do anything which facilitates, or is incidental or conducive to, the exercise of his or her functions. This general power does not extend however to functions which are or could become the responsibility of the WAO under this Bill, including borrowing money. In this respect see, in particular clause 9(2).

Clause 10 – Code of audit practice

19 The AGW must issue a code of practice which embodies the best professional practice to be adopted in the carrying out of functions by the AGW –

- relating to the examining of accounts (including of local government bodies in Wales);
- relating to the carrying out, undertaking or promoting value for money studies or examinations;
- as provided for in various provisions of the Government of Wales Act 1998, the Public Audit (Wales) Act 2004 and Schedule 8 to the Government of Wales Act 2006.

20 In preparing the Code the AGW is required to consult those persons he or she thinks appropriate. When the Code is made, and published, the AGW must comply with it.

Clause 11 – Audit of local government bodies

21 The purpose of clause 11 is to change who will be the auditor of local government bodies in Wales. Under the current provisions of section 13 of the Public Audit (Wales) Act 2004, the auditors of local government bodies are persons appointed by the (current) AGW. By virtue of the amendment to that Act made by clause 11 of this Bill, the auditor will be the AGW. This clause needs to be read with paragraph 2 of Schedule 3 to this Bill – see below.

22 At present the AGW is not directly responsible for the audit of local government bodies, instead auditors are appointed by the AGW to perform those audits. This is considered to be anachronistic and, given that the current AGW has other functions in respect of local government bodies (for example in relation to value for money), is responsible for auditing the Welsh Government, Welsh NHS bodies and others, and given the thrust of other proposals in the Bill, it is deemed appropriate for the audit of local government bodies in Wales to be vested with the AGW.

23 Section 16 of the Local Government (Wales) Measure 2009 currently provides that 'relevant regulators' (for the purposes of that Measure) include an auditor appointed under current section 13 of the Public Audit (Wales) Act 2004. Because of the amendments made by clause 11(1) of this Bill, a consequential amendment is required to the 2009 Measure as there will no longer be auditors appointed by the AGW in this context. This is achieved by clause 11(2) of the Bill.

Clause 12 – Transfer of Welsh Minister functions - consultation

24 Under section 146A of the Government of Wales Act 1998 certain functions of the Welsh Ministers may, by order, be transferred to or exercised on their behalf by the AGW. Such transfer, or exercise, can only be with the consent of the AGW.

25 Clause 12 of this Bill amends section 146A of that Act so as to require the Welsh Ministers to consult with the WAO before making such an order. The requirement for the AGW to consent to the transfer or exercise of such functions remains unchanged.

Part 2: The Wales Audit Office and its relationship with the Auditor General
Clauses 13 to 15 – relating to the Wales Audit Office

26 Clause 13 establishes that there will be a new body called the Wales Audit Office (the WAO). This clause also gives effect to Schedule 1 (which contains provision about the WAO).

27 Clause 14 provides that the WAO may do anything that facilitates or is incidental or conducive to the exercise of its functions, but the WAO (by virtue of clause 15) must aim to carry out its functions efficiently and cost-effectively.

Clause 16 – Relationship with the Auditor General

28 Clause 16 provides that the AGW is the chief executive of the WAO, but not an employee of it. This clause also gives effect to Schedule 2 (Relationship between the Auditor General and the WAO).

Clause 17 – WAO to monitor and provide advice

29 The WAO monitors and advises the AGW in respect of his or her functions; the AGW is under a duty (clause 17(3)) to have regard to any such advice.

Clause 18 – Delegation and joint exercise of functions of the Auditor General

30 Clause 18 enables the functions of the AGW to be carried out by an employee of the WAO or a person providing services to the WAO (for example, those who are contracted to provide audit support services to the AGW), provided that the employee or person is authorised to do so in a scheme of delegation. Where functions are carried out under the scheme of delegation, the responsibility for the function remains with the AGW.

31 The scheme of delegation must be prepared by the AGW (who cannot delegate this function), and must be approved by the WAO. The approval of the WAO will be needed as it will be, for example, the employer of staff.

Clause 19 – Provision of services

32 Clause 19 enables the WAO to make arrangements to receive (including under payment) administrative, professional or technical services that it or the AGW may need to carry out their respective functions. It also enables the WAO to make arrangements with a 'relevant authority' so that the WAO or AGW can provide those services to a relevant authority, or to exercise the functions of that authority. Clause 19 could be relied on to secure the provision of expert external audit services (for example, relating to tax); these could be provided by a person to whom the AGW can then delegate his or her functions.

33 'Relevant authority' is defined at clause 19(7) and includes local authorities (in Wales and in England), other public authorities and government departments.

34 The WAO will be able to make the arrangements on terms, including relating to payment, put in place under this clause. If the terms include fees payable to the WAO (for example, for the provision of services by the AGW to a relevant authority), these must be in accordance with the scheme of charges prepared under clause 24 (see below).

Clause 20 – Expenditure

35 The AGW and the WAO must jointly prepare an estimate for each financial year (to year ending 31 March) of all of the income and expenditure of the WAO, including in particular the resources needed for the exercise of the AGW's functions. The estimate must be laid before the Assembly for examination and possible modification. The estimate must be laid at least 5 months before the start of the financial year to which it relates.

36 Modifications by the Assembly to the estimate may only be made if the AGW and WAO have been consulted, and any views made by them taken into account.

37 The full estimate (modified or otherwise) will be included in the Assembly's Budget Motion under the Standing Orders of the Assembly. This full estimate must now include all elements, including that relating to audit of local government bodies. There will also no longer be any statutory authorisation to retain fee incomes as currently (see paragraph 9(4) of Schedule 8 to the Government of Wales Act 2006 which Schedule 4 to this Bill will repeal), and therefore all of these matters must be accounted for within the estimate and consequently also the Annual Budget Motion.

Clause 21 – Provision of resources for Auditor General's functions

38 Clause 21 recognises the WAO, as the budget-holder. It is responsible for providing resources to the AGW as required by the AGW so that he or she can carry out his or her functions. The resources are, in particular, -

- staff to assist the AGW
- services from any person (for example, external audit or tax services principally under clause 19)
- holding property, documents or other information, and
- keeping records relating to the functions of the AGW.

39 In order to fully understand clause 21 it must be read with clauses 25 to 28 (inclusive) of the Bill relating to the annual plan of work and resources – see below.

Clause 22 – Borrowing

40 As the budget holder the WAO has the power to borrow money, by way of an overdraft or otherwise, to meet a temporary excess of expenditure. A power to borrow is not available to the AGW.

Clauses 23 and 24 – relating to fees

41 Any income (fees or otherwise) received by the AGW must be passed to the WAO, as the budget holder (clause 23) and cannot be retained by the AGW.

42 The charging of fees by the WAO in relation to the exercise of functions by the WAO or the AGW must be in accordance with a scheme prepared by the WAO under clause 24. In any case any fee charged by the WAO can only cover the costs of exercising the functions (there cannot be an element of profit within them).

43 Clause 24(4)(c) requires the WAO to lay the prepared scheme before the Assembly for approval. Subject to the approval of the Assembly, the WAO must publish the scheme.

44 The scheme must be reviewed at least once a year by the WAO. If the scheme is revised or remade then it must be laid before the Assembly for approval except where subsection (7) applies – i.e. where Welsh Ministers use certain powers to prescribe scales of fees to replace WAO scales.

Clauses 25 to 28 – relating to the annual plan of work and resources

45 The AGW and the WAO must agree an annual plan. The annual plan will set out the planned work for both the AGW and the WAO, and required resources to achieve that planned work (clause 25).

46 Although neither are bound by the annual plan, they must have regard to it (clause 28). This means that in exercising their functions (including as to the provision of resources required by the AGW) both the AGW and the WAO must give the annual plan the appropriate weight in all the circumstances. If other unforeseen work arises then the need for that work to be done (and the resource implications) must be properly balanced against the planned work (and resources allocated for that).

47 The annual plan must be agreed by the AGW and the WAO before the start of the financial year in which that work is to be carried out (clause 25(1)). Once prepared it must be laid before the Assembly (clause 27) and the Assembly will be under a duty to publish it by virtue of section 144 of the 2006 Act (as amended by this Bill).

48 The annual plan must include the maximum resources that it is anticipated will be allocated by the WAO to the AGW for the purpose of undertaking the AGW's programme of work (clause 25(2)(f)). Clause 26 is the mechanism by which the anticipated maximum resources needed for the AGW's planned work programme for the year are is included in the annual plan.

49 Clause 26 is designed to ensure that it is the AGW who determines his or her own work programme (to maintain the independence of the AGW) and it is the AGW who determines the maximum amount of resources that will be needed to achieve that work. Clause 26 is, therefore, a critical provision in terms of maintaining an appropriate balance between, on the one hand, establishing appropriate governance and oversight arrangements for the AGW and, on the other, maintaining the principle that the AGW's audit independence and discretion is not inappropriately fettered. Clause 26 does this by giving the AGW the lead role in this respect with the WAO only being able to step in if the

AGW's proposals are unreasonable. In this regard "unreasonable" is intended to have its ordinary meaning and the test is intended to be objective. This further protects the AGW because the test is not whether the WAO subjectively considers something to be unreasonable. Rather the test is whether, in all the circumstances, what is being proposed is, objectively tested, unreasonable.

Part 3: Miscellaneous and general
Clause 29 – Functions of the National Assembly

50 This clause provides authority for the Assembly to make provision (within its Standing Orders) as to how the functions set out in this Bill falling to the Assembly (other than its functions of approving legislation) are to be exercised. The intention is that relying on this provision the Assembly could make provision in its standing orders so that one (or more of its committees) could exercise those functions relating to the oversight and supervision of the AGW. For example, the Assembly could provide that the function of appointing the non-executive members of the WAO will be exercised by a committee of the Assembly rather than by the Assembly acting in Plenary session.

Clause 30 – Indemnification

51 Clause 30 provides that any compensation to a third party for a breach of a duty (for example in contract or negligence) by an AGW appointed under this Bill, a person providing services to the AGW or WAO (for example under clause 19), the WAO's former or current members, employees is to be charged on and paid from the WCF (as such it is not to be subject to the approval of the Assembly in a Budget resolution). See also paragraph 8 of Schedule 3 to this Bill.

Clause 31 – Orders

52 This clause makes general provision about other powers in the Bill that enable subordinate legislation to be made (namely orders). Such legislation is to be made by statutory instrument. Sub-sections (2) and (3) establish the Assembly procedure for making those orders. Subsection (4) is a technical provision which ensures that the powers in the Bill to make such subordinate legislation are wide enough to make certain types of provision such as supplemental provisions.

Clause 32 – Directions

53 Clause 32 makes general provision in respect of the powers in the Bill to issue directions.

Clause 33 – Interpretation

54 This clause provides the meaning of various terms used throughout the Bill.

Clause 34 – Transitional, supplementary and saving provisions etc

55 Clause 34(1) gives effect to Schedule 3 (transitional etc provisions) which is where the principal transitional etc. provisions are to be found.

56 Subsection (2) enables the Welsh Ministers, by order, to make further transitional, transitory or saving etc. provisions in connection with the coming into force of the Bill or to give full effect to the Bill when enacted.

57 It is recognised that the matters with which this Bill are concerned are accommodated within existing (and often complex) legislative schemes set out in a raft of other legislation. It is further recognised that this legislative landscape will also change over time as further Acts of the Assembly or Parliament, as the case may be, are made. Therefore the power of the Welsh Ministers to make an order under clause 34(2) includes powers to amend, repeal or revoke other enactments or prerogative instruments. This power is limited as it can only be used in connection with, or to give full effect to, this Bill. The power cannot be used for other purposes.

58 Clause 34(4) enables an order under subsection (2) to modify the transitional etc. provisions set out in Schedule 3. This provision is a safety net provision to ensure that adjustments can be made to the detailed provisions set out in Schedule 3 should the circumstances at the time that this Bill comes into force dictate.

Clause 35 – Minor and consequential amendments

59 Clause 35 gives effect to Schedule 4 (minor and consequential amendments).

SCHEDULE 1 – INCORPORATION OF WALES AUDIT OFFICE

Part 1: Membership and status
Paragraph 1 – Membership

60 This paragraph establishes that the WAO will have 7 members, comprising 5 who are not employees of the WAO (known as 'non-executive members'), the AGW, and 1 employee of the WAO (known as the 'employee member').

Paragraph 2 – Appointment of non-executive and employee member

61 The appointments of the non-executive and employee members of the WAO are to be made on merit, and a person cannot be appointed (or remain appointed) if they are disqualified on the grounds set out in Part 6 of Schedule 1 – see below.

Part 2: Non-executive members

Paragraph 4 – Appointment of non-executive members

62 It is for the Assembly to appoint the non-executive members of the WAO, on the basis of a fair and open competition.

Paragraph 5 – Appointment of chair of the WAO

63 One of the 5 non-executive members of the WAO is to be appointed as the Chair of the WAO, by the Assembly. Before making such an appointment, there must be consultation with the First Minister. There may be consultation with other persons as appropriate.

64 A person cannot be appointed as Chair more than twice.

Paragraph 6 – Period of appointment and re-appointment

65 Appointment of the non-executive members and Chair of the WAO is for a maximum of 4 years, and a person cannot be appointed more than twice to these offices.

Paragraph 7 – Remuneration arrangements

66 The Assembly may make remuneration arrangements for the Chair of the WAO and the other non-executive members, and such arrangements may include salary, allowances, gratuities, and other benefits (but not pension arrangements). In all cases these arrangements (or elements therein) must not be performance-based.

67 Before the arrangements for the Chair can be made, there must be consultation with the First Minister (paragraph 7(2)). There must also be consultation with an appropriate person with oversight of public appointments (paragraph 9). There may be consultation with other persons as appropriate.

68 The amounts payable for the Chair of the WAO will be charged on the WCF; the amounts payable for the other non-executive members will be met by the WAO.

Paragraph 8 – Other terms of appointment

69 The Assembly may determine other terms and conditions applicable to the non-executive members of the WAO, including the Chair. These agreements or arrangements may include restrictions on the offices and other positions a non-executive member may hold for a period of up to two years after these cease to hold office.

70 Before making a determination on such terms and conditions there must be consultation with an appropriate person with oversight of public appointments the Assembly considers appropriate (paragraph 9).

Paragraphs 10 to 12 – Termination of appointments

71 The Chair and non-executive members of the WAO may resign their offices at any time by giving written notice to the Assembly (paragraph 10).

72 The Assembly may terminate the appointment of a non-executive member of the WAO on the grounds set out in paragraph 11(1). The Assembly may terminate the appointment of the Chair of the WAO (on the grounds set out in paragraph 12(3)), but only after there has been consultation with the First Minister. There may be consultation with other persons also. Termination of the appointment of Chair does not automatically remove him or her from being a non-executive member of the WAO. If the person who is the Chair is subject to termination as a non-executive member then he or she will also lose office as Chair.

Part 3: Auditor General
Paragraph 13 – Additional remuneration of the Auditor General

73 In addition to the arrangements made by the Assembly for remuneration of the AGW (see clause 7), the WAO may also make provision for additional payments to be made to the AGW to cover expenses incurred by that person as a member of and chief executive of the WAO. Such payments are to be made by the WAO.

Part 4: Employee member
Paragraph 14 – Appointment

74 Whenever there is a vacancy in the office of employee member of the WAO, the AGW must recommend a person to the non-executive members. The non-executive members must then appoint that person, or another of their own choosing.

Paragraph 15 – Terms of appointment

75 The terms of appointment of the employee member must be made by the non-executive members, and may include remuneration arrangements for allowances, gratuities, and other benefits to cover expenses. Such payments are to be made by the WAO. The employee member will continue to receive his or her salary as an employee of the WAO. There is to be no provision for a pension as employee member but if the person who is that member has a pension as a result of being an employee of the WAO then the person's service as employee member will also count towards that pension entitlement.

76 The employee member's term of office will not be regarded as a break in service of employment by the new WAO.

Paragraph 16 – Other terms of appointment

77 The non-executive members may determine other terms of appointment applicable to the appointment of the employee member; such terms may include restrictions on the offices and other positions the employee member may hold during that appointment and for a period of up to two years after they cease to hold that office.

Paragraphs 17 to 19 – Termination of appointments

78 The employee member may resign from that office (but remain an employee of the WAO) at any time by giving written notice to the non-executive members (paragraph 18). Their appointment would also cease at the end of any period of appointment set in their terms of appointment, or if they ceased to be an employee of the WAO.

79 Paragraph 19 of Schedule 1 also provides the process and grounds for the termination of the appointment by the non-executive members.

Part 5: Employees
Paragraphs 20 to 23 – relating to appointment, status and remuneration

80 The WAO has, by virtue of paragraph 20 of Schedule 1, powers to employ and remunerate staff on such terms as it considers appropriate, provided the procedures for recruitment and selection and the terms of employment are broadly in line with those of the staff of the Welsh Government (the latter being civil servants).

81 The WAO will be required to make payments in respect of superannuation benefits and their associated administration costs (paragraph 23(2)).

Part 6: Disqualification as member of, or employee of, the WAO

82 Part 6 of Schedule 1 prescribes the grounds upon which a person cannot be appointed (or remain appointed) as a member or employee of the WAO.

83 Paragraph 24(4) is needed to ensure that the AGW is not disqualified from being a member of the WAO given that the AGW is appointed by Her Majesty on the nomination of the Assembly.

Part 7: Procedural rules

84 The WAO must make internal rules to regulate its procedures (paragraph 25). The rules must provide for a quorum for any meetings of the WAO (paragraph 26), and may provide for setting up of committees of the WAO, and any sub-committees, including provision for regulating the procedures of the committees and sub-committees (paragraph 27).

85 Note also paragraph 3 of Schedule 3 of the Bill which enables the Chair of the WAO to make rules for the determination of the business of the WAO pending the making of the first set of formal rules.

Part 8: Other matters
Paragraph 29 – Delegation of functions

86 With certain exceptions (as set out in paragraph 29(5) of Schedule 1) the WAO may delegate any of its functions to members, employees or committees (including sub-committees) of the WAO, or to persons providing services to the WAO. The delegation of a function does not affect the responsibility of the new WAO for the exercise of the function.

Paragraph 30 – WAO accounts

87 This paragraph establishes that the AGW is the accounting officer for the WAO. The responsibilities of the accounting officer are set by virtue of paragraph 30(2), (5) and (6).

Paragraphs 31 and 32 – Audit etc of the WAO

88 The National Assembly is required to appoint an auditor of the WAO's accounts, and to establish the terms of appointment for that auditor. The WAO may recommend a person for appointment, but in any case must pay the auditor the remuneration provided for in the appointment.

89 The auditor will examine and certify the statement of accounts (prepared by the AGW as accounting officer of the WAO under paragraph 30), which are to be submitted to the auditor by the Chair of the WAO no later than 5 months after the end of the financial year. Once the statement of accounts has been audited and is certified, the auditor must lay the accounts (as certified) and his or her report on them before the Assembly.

90 Amongst other matters paragraph 32 makes provision as to the powers of the auditor to gather information (including documents) necessary for the purpose of auditing the accounts.

91 Paragraph 32 also enables the auditor to carry out economy, efficiency and effectiveness examinations in relation to the use of resources by the AGW and the WAO in the discharge of their functions; confers power on the auditor to gather information (including documents) for that purpose and provides that in connection with these examinations the auditor may lay a report on the findings before the Assembly.

SCHEDULE 2 – RELATIONSHIP BETWEEN THE AUDITOR GENERAL AND THE WAO

Part 1: Reports and documents
Paragraph 1 – Reports

92 Clauses 25 to 28 set out the arrangements relating to the annual plan of the AGW and the WAO. Paragraph 1 of Schedule 2 to the Bill sets out the arrangements for an annual report on the exercise of the functions, which includes (amongst other matters) an assessment of the extent to which the priorities of the annual plan were achieved.

93 In addition to the annual report, the AGW and the Chair of the WAO must also prepare two interim reports each financial year on the exercise of their functions and must include an assessment of the extent to which the priorities of the annual plan have been achieved.

94 The interim and annual reports must be laid before the Assembly – the latter as soon as practicable after the end of the financial year, and the former on dates to be decided by the Assembly.

Paragraph 2 – Documents and information

95 Paragraph 2 of this Schedule provides that any document or information which a person must or may provide to the AGW may be provided to the WAO. This supports the responsibility placed on the WAO to receive and hold documents and information for the new AGW and to maintain records (under clause 21 of the Bill).

Part 2: Temporary exercise of the functions of Auditor General by another person
Paragraphs 3 to 12 – Temporary exercise of the functions of the Auditor General by another person

96 Paragraph 4 sets out the circumstances in which a designation of a person to temporarily exercise the functions of the AGW in place of the AGW may take place. Such a temporary designation is made by the WAO, with the agreement of the Assembly, and cannot exceed 6 months in duration in respect of the circumstance that triggers the designation. The temporary designation may be extended once in respect of that circumstance by the WAO (with the agreement of the Assembly) for a further 6 months.

97 Any such temporary designation must be of a person employed by the WAO, who would continue to be employed by the WAO on the same terms (paragraphs 6 and 7). Additional terms, including remuneration, may be agreed by the WAO and the Assembly but those remuneration terms must not include an additional salary or pension.

SCHEDULE 3 – TRANSITIONAL, SUPPLEMENTARY AND SAVING PROVISIONS

Part 1 – The Auditor General

Paragraph 1 – Previous Auditor General to continue to be Auditor General

98 Paragraph 1 means that if a person holds office as AGW on the 'appointed day' that person will be treated on and after that day as if he or she had been appointed under Part 1 of the Bill. This will ensure continuity between the existing statutory regime and the new statutory regime under this Bill so far as the AGW is concerned.

99 The term 'appointed day' is defined in paragraph 1(5) and means the day on which this paragraph comes into effect.

100 Paragraph 1(3) provides that in such a case the remuneration arrangements under clause 7 of the Bill are to be made by the Assembly (following consultation with the First Minister). This must be done before the appointed day. This will ensure that the person holding office as AGW will hold it on the terms and conditions, including as to remuneration, set in accordance with the provisions of this Bill.

101 Because the Bill provides that the term of office of an AGW appointed under this Bill is 8 years, paragraph 1(2)(b) provides that if there is a serving AGW on the appointed day that person's term of office will be 8 years less any amount of time that he or she was AGW before the appointed day. The effect of this is that if Person A is the AGW before the appointed day and continues to hold that office on the appointed day, then Person A will be treated as being the AGW as if appointed under this Bill. If Person A's terms of office is 8 years (as the Bill also provides) but Person A has already served 2 years in office then on the appointed day that person's term of office as AGW under the Bill will be reduced to 6 years.

Paragraph 2 – Savings for auditors appointed under section 13 of the Public Audit (Wales) Act 2004

102 As a result of the changes made to section 13 of the Public Audit (Wales) Act 2004 by virtue of clause 11 of this Bill, paragraph 2 in Schedule 3 of the Bill is required.

103 This paragraph provides that an appointment made by the AGW of an auditor of local government bodies (in accordance with current section 13 of the 2004 Act), will continue until the end of the period of appointment, rather than ending when the relevant provisions of this Bill come into effect. Also preserved is the operational effect of appointment, including the scheme for fees which may be charged and the gathering and holding of relevant information; this ensures that work being done by the auditors appointed by the AGW can continue under the existing provisions of the 2004 Act, within the terms of the appointment.

Part 2 – The WAO
Paragraph 3 – WAO's procedural rules before rules are made under paragraph 24 of Schedule 1

104 The first formal procedural rules are to be made by the WAO (under paragraph 25 of Schedule 1 of the Bill). Before those rules are made there will be no rules in place to govern the order of business of the WAO. Therefore, this paragraph provides that business (including making the first set of rules) will be conducted in accordance with procedures set by the Chair of the WAO. Once the first rules are made the business will then be conducted in accordance with the provision made in those rules.

Part 3 – Transfer of functions etc
Paragraph 4 – Transfer of staff

105 Because the Bill will transfer the responsibilities for the employment of staff from the current AGW to the new WAO, paragraph 4 gives effect to the transfer of employment rights and liabilities of those staff.

Paragraphs 5 and 6 – Transfer of other property, rights and liabilities

106 Similarly, paragraphs 5 and 6 make provision as to the transfer of property, rights and liabilities from the current AGW to the new WAO. This reflects the transfer of certain functions of the AGW to the new WAO.

Paragraph 7 – Criminal liability of the Auditor General

107 In connection with paragraph 5 (relating to the transfer of the property, rights or liabilities that are transferred to the WAO), paragraph 7 provides for the transfer of any criminal liability that may have been incurred by the AGW in connection to those property, rights or liabilities to the WAO.

SCHEDULE 4 – CONSEQUENTIAL AMENDMENTS AND REPEALS

108 This Schedule sets out the repeals and consequential modifications to primary legislation to give effect to the Bill. These ensure (for example) that there are references to the new WAO as appropriate in legislation where previously the reference had only been to the AGW.

109 Consequential amendments and repeals are made to the –

- Superannuation Act 1972;
- Finance Act 1989;
- Social Security Administration Act 1992;
- Education Act 1997;
- Government of Wales Act 1998;
- Local Government Act 1999;
- Freedom of Information Act 2000;
- Public Audit (Wales) Act 2004;

- Government of Wales Act 2006
- Companies Act 2006;
- Local Government (Wales) Measure 2009;
- Local Democracy, Economic Development and Construction Act 2009; and
- Equality Act 2010.

ANNEX B – Consultation Distribution List

Chief Executives of County and County Borough Councils in Wales;
Chief Executive of the Welsh Local Government Association;
Chief Executives of National Park Authorities in Wales;
Chief Executives of Port Health Authorities in Wales;
Chief Fire Officers of Fire and Rescue Services in Wales;
Chief Executives of Police Authorities in Wales/Chief Constables in Wales;
Chief Executive of the Wales Probation Trust;
Chief Executives of Health Boards and Trusts in Wales;
The Older People's Commissioner for Wales;
The Children's Commissioner for Wales;
The Public Services Ombudsman for Wales;
Chief Executive Countryside Council for Wales;
Secretary Local Government Boundary Commission for Wales;
Secretary Boundary Commission for Wales;
Chief Executive Sport Wales;
Director Forestry Commission Wales;
Chief Executive Arts Council of Wales;
Chief Executive General Teaching Council for Wales;
Director General National Museum of Wales;
Librarian National Library of Wales;
Chief Executive Welsh Language Board/The Welsh Language Commissioner;
Accounting Officer Welsh Levy Board;
Secretary Royal Commission on Ancient and Historical Monuments in Wales;
Director Wales Centre for Health;
Chief Executive Care Council for Wales;
Director General Higher Education Funding Council for Wales;
Chairs of Further and Higher Education Governing Bodies;
Chief Executive of One Voice Wales;
The Auditor General for Wales;
Chief Executive of the Financial Reporting Council;
Comptroller and Auditor General;

Auditor General Scotland;
Comptroller and Auditor General of Northern Ireland;
Chief Executive Audit Commission;
Director NHS Confederation Wales;
The Chief Inspector of Education and Training in Wales;
Chief Executive Healthcare Inspectorate Wales;
Chief Inspector of Care and Social Services in Wales;
Secretary National Assembly Commission;
Assembly Members;
The Wales Office;
Her Majesty's Treasury;
Ministry of Justice;
Department of Work and Pensions;
Department of Communities and Local Government;
Home Office;
Scottish Government;
Northern Ireland Assembly;
Chartered Institute of Public Finance and Accountancy;
Head of the Association of Chartered Certified Accountants Wales;
The Institute of Chartered Accountants for England and Wales, Director for Wales;
Chartered Institute of Management Accountants.

ANNEX C – Report of Auditor General for Wales (Standing Order 26.6(viii))

Report of the Auditor General for Wales on whether charges on the Welsh Consolidated Fund provided in the Public Audit (Wales) Bill are appropriate

As the Bill contains provisions for charging expenditure on the Welsh Consolidated Fund (the Fund), Standing Order 26(6)(viii) of the National Assembly for Wales requires the Explanatory Memorandum to the Bill to incorporate a report by the Auditor General setting out his or her views on whether it is appropriate for such charges to be made on the Fund. I am making this report in accordance with that requirement having been shown what the Welsh Government informs me are the relevant provisions:

a) clause 7, Remuneration;

b) clause 30, Indemnification;

c) Schedule 1, paragraph 7, Remuneration of the Chair of the WAO;

d) Schedule 3, paragraph 6, Transfer of other property, rights and liabilities;

e) Schedule 3 paragraph 9, Indemnification.

I have not had sight of the whole Bill or its Explanatory Memorandum, so my report is confined to the provisions listed above and my interpretation of their effects and purposes, informed to some extent on remuneration and indemnification by the Welsh Government's consultation document on the draft Bill.

In making this report, I should also make clear that I have confined myself to consideration of whether it is appropriate for those charges to be made directly on the Fund under the Bill's provisions rather than through the normal supply provisions set out in Part 5 of the Government of Wales Act 2006. I am not covering in this report the merits of the wider policy objectives underlying such provisions, as I consider that to do so could be an inappropriate avenue of influence on the Assembly's consideration of the Bill.

Under the 2006 Act, which sets out the finance arrangements for the Welsh Ministers and other relevant persons, it is the norm that sums may only be paid out of the Fund on the authority of a Budget resolution passed by the Assembly. Direct charges are an exception to this norm, and, in order to maintain the integrity of the Budget resolution arrangements, such exceptions should only be provided where there are particular circumstances that make the Budget resolution procedure inappropriate. Such circumstances include the need to avoid political influence over the operation of constitutional offices—clearly the independence of such offices should not be undermined by party-political influence. Another relevant circumstance is the need to provide ensured financing for things such as statutory compensation arrangements—such arrangements would be incomplete if their financing is not ensured.

Clause 7 provides for the remuneration of the Auditor General to be charged directly on the Fund. As such, it appears in essence to be a restatement of paragraph 6(5) of Schedule 8 to the 2006 Act, and I gather that that provision was made so as to avoid political influence over the office of Auditor General through variation of the Auditor General's remuneration. Given that reason, I consider the charging of the Auditor General's remuneration on the Fund to be appropriate.

Clause 30 provides for amounts payable by indemnified persons, such as an Auditor General, to be charged on the Fund. This appears in essence to be a restatement and expansion of paragraph 9(1) of Schedule 8 to the 2006 Act, with extension to the new WAO. I gather that the 2006 Act provision was made so as to ensure financing of the indemnity provided by the paragraph. Given that reason, I consider it appropriate for sums payable under the indemnity to be charged on the Fund.

Schedule 1, paragraph 7 provides for the remuneration of the proposed Chair of the proposed corporate body WAO. I gather from the Welsh Government's consultation document on the draft provision (paragraph 7 of Schedule 1 of the draft Bill dated 15 March 2012), which this provision appears in essence to restate, that the reason for charging such remuneration directly on the Fund is to "shield the independence of the office of AGW from overt political influence". I consider that avoiding political influence over the Auditor General, and for that matter over the proposed Chair of the WAO, to be a reason that makes direct charge of remuneration on the Fund appropriate.

Schedule 3, paragraph 6 provides for compensation in relation to the proposed transfer of property, rights and liabilities from the Auditor General to a corporate WAO. Paragraph 6(8) provides for such compensation to be charged on the Fund. Such charging ensures financing of the compensation provision, and I therefore consider that it is appropriate.

Schedule 3, paragraph 9 provides continuity in coverage of the indemnity provisions mentioned above in relation to clause 30. For the reasons set out above, I consider it appropriate for sums payable under the indemnity to be charged on the Fund.

Huw Vaughan Thomas
Auditor General for Wales
June 2012

Public Audit (Wales) Bill

Powers to make subordinate legislation

ORDERS

1. The Bill, as it is proposed to be introduced, confers on Welsh Ministers the following powers to make the following orders:-

1.1 .**Section 19(7) -** Provision of services

Under this section arrangements may be made for the receipt of administrative, professional or technical services that the Wales Audit Office or the Auditor General for Wales may require to carry out their respective functions. These arrangements may be made, inter alia, with an approved European body of accountants. "Approved European body of accountants" is defined as body of accountants established in the United Kingdom or another EEA state and approved for the time being by the Welsh Ministers by order.

Procedure – as provided by section 31- **Negative.**

This is an administrative functions and the negative procedure is considered appropriate.

1.2. **Section 34 -** Transitional, supplementary and saving provisions etc

This section enables the Welsh Ministers to make such supplementary, transitional, transitory, consequential, saving, incidental or other provision as they think fit in connection with or to give full effect to the Bill.

The power includes amendment, repeal and revocation of any enactment (defined in section 33 as any enactment including the Bill, any other Act of the Assembly or Assembly Measure of subordinate legislation made under an Act of the Assembly, an Assembly Measure or otherwise).

Procedure – as provided by section 31 – **Affirmative.**

Given the nature of the power the affirmative procedure is considered appropriate.

1.3. **Section 36** – Commencement

Save for sections 31, 36 and 37, the bill will be commenced by order made by the Welsh Ministers.

As is usual, no procedure is prescribed for the making of a commencement order.

REGULATIONS

2. The Bill does not contain any regulation making powers.

There is a technical amendment to section 39 (accounts and audit regulations) of the Public Audit (Wales) Act 2004. This amendment, inter alia, expressly confers the *existing* regulation making power (relating to the keeping of accounts etc by local authorities) on the Welsh Ministers rather than on the Assembly. A consequential amendment is made to section 39(5) (costs incurred in connection with an offence under the regulations), which substitutes a reference to the "Auditor General for Wales or the Wales Audit Office" for the existing reference to "an auditor".

Legal Services
28 September 2012

John Griffiths AC /AM
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy
Minister for Environment and Sustainable Development

Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

Lord Dafydd Elis-Thomas AM
Chair of the Environment and
Sustainability Committee

27 September 2012

Annwyl Dafydd,

Further to my letter of 17 August 2012, please find attached a draft of the second order relating to the Natural Resources Body for Wales.

As I indicated in my previous letter, this is a working draft of the order which is being provided in English only at this stage. The draft order will need to undergo further revision and checking before the order is laid in the Assembly. It will also need to take account of issues raised in the responses to the supplementary public consultation which is due to end on 5 October.

I should also stress that some aspects are subject to change in light of ongoing discussions with Defra and other UK Government departments on drafting; in particular on powers of direction, and some of the cross border arrangements for water and flood risk management functions. We are still drafting the provisions on plant health, working closely with Forestry Commission GB, and any appropriate provisions will be included in the draft order which is laid. We are also looking at the best way of ensuring that the body comes under the terms of the Welsh Language Act 1993 and Equality Act 2010.

Nonetheless the order is essentially complete and should give your Committee a very good feel for the duties and powers that we intend to give the body, and how we intend to deliver the legal changes. I hope this will give you an opportunity to be better informed as to our intentions and to provide comments on the order. I would welcome your Committee's initial views.

I also attach a covering note to explain how the order has been drafted. The draft order that will be laid will of course be accompanied by an Explanatory Memorandum.

The covering note also briefly describes other legal provisions that will be required, some of which will need to be made via UK Government orders. We are discussing the best approach to deliver these changes with the Wales Office, Defra and other departments.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

English Enquiry Line 0845 010 3300
Llinell Ymholiadau Cymraeg 0845 010 4400
Correspondence.John.Griffiths@wales.gsi.gov.uk

As suggested in my earlier letter, it would be extremely useful if you could provide any preliminary comments or recommendations for changes by 18 October so that there is sufficient time to consider them prior to the draft order being laid.

I am copying this letter to the Chair of the Constitutional and Legislative Affairs Committee, should they also wish to take the opportunity to consider the draft order at this stage.

Dymuniadau gorau,

John Griffiths AC / AM
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy
Minister for Environment and Sustainable Development

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Constitutional and Legislative Affairs Committee

Report: CLA(4)-19-12 : 24 September 2012

The Committee reports to the Assembly as follows:

Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA169 – The National Health Service (Dental Charges) (Wales) (Amendment) Regulations 2012
Procedure: Negative.
Date made: 17 July 2012.
Date laid: 18 July 2012.
Coming in to force date: 1 September 2012

The Committee agreed to write to the Minister for Health and Social Services Lesley Griffiths AM to invite her comments on the accuracy of the Explanatory Memorandum to the Regulations.

CLA172 – The Higher Education Funding Council for Wales (Supplementary Functions and Revocation) Order 2012
Procedure: Negative.
Date made: 18 July 2012.
Date laid: 19 July 2012.
Coming in to force date: 31 August 2012

CLA173 – The Adoption Agencies (Wales) (Amendment) Regulations 2012
Procedure: Negative.
Date made: 18 July 2012.
Date laid: 19 July 2012.
Coming in to force date: 1 September 2012

CLA175 – The Housing (Wales) Measure 2011 (Consequential Amendments to Subordinate Legislation) Order 2012
Procedure: Negative.
Date made: 9 August 2012.
Date laid: 13 August 2012.
Coming in to force date: 3 September 2012

CLA176 – The Town and Country Planning (General Permitted Development) (Amendment) (Wales) (No. 2) Order 2012
Procedure: Negative.
Date made: 6 September 2012.
Date laid: 11 September 2012.
Coming in to force date: 5 October 2012

CLA177 – The Town and Country Planning (Compensation) (Wales) (No.2) Regulations 2012
Procedure: Negative.
Date made: 6 September 2012.
Date laid: 11 September 2012.
Coming in to force date: 5 October 2012

CLA178 – The Bluetongue (Wales) (Amendment) Regulations 2012
Procedure: Negative.
Date made: 15 September 2012.
Date laid: 19 September 2012.
Coming in to force date: 10 October 2012

Consideration of CLA178 – The Bluetongue (Wales) (Amendment) Regulations 2012 was deferred to the meeting 8 October 2012 to allow for the consideration of additional information.

Affirmative Resolution Instruments

CLA170 – The Smoke-free Premises etc. (Wales) (Amendment) Regulations 2012
Procedure: Affirmative.
Date made: not stated.
Date laid: not stated.
Coming into force date: 17 October 2012

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA171 – The Waste (England and Wales) (Amendment) Regulations 2012
Procedure: Negative.
Date made: 17 July 2012.
Date laid before Parliament: 19 July 2012.
Date laid before the National Assembly for Wales: 19 July 2012.
Coming into force date: 1 October 2012

CLA174 – The Conservation of Habitats and Species (Amendment) Regulations 2012
Procedure: Negative.

Date made: 20 July 2012.
Date laid before Parliament: 25 July 2012.
Date laid before the National Assembly for Wales: 25 July 2012.
Coming into force date: 16 August 2012

Affirmative Resolution Instruments

None

The Committee agreed the Reports under S.O.21.2 and S.O.21.3 on these statutory instruments, which are attached as Annexes 1 – 2.

Other Business

Committee for the Scrutiny of the First Minister: approach to work and topics for scrutiny

The Committee noted the potential future work programme of the Committee for the Scrutiny of the First Minister.

Committee Inquiries: Inquiry into the establishment of a separate Welsh jurisdiction

The Committee took oral evidence from Lord Carlile of Berriew C.B.E., Q.C.

Business Committee – Review of Committee Structure and Timetable

The Committee noted the Presiding Officer's letter to the Chair regarding the operation of the present Committee structure.

International research project on the control of the EU legislative process: Early Warning System

The Committee noted the Chair's response to Dr Karolina Boronska-Hryniewiecka's (Institute of Political Science, University of Wroclaw) request for information about the National Assembly's experience of the multilevel governance and subsidiarity control under the Early Warning System introduced by the Lisbon Treaty.

In accordance with Standing Order 17.42(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence submitted thus far on the Inquiry into the establishment of a separate Welsh jurisdiction and agree the Report on Committee study visit to Northern Ireland and the Report on the Food Hygiene Rating (Wales) Bill.

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

24 September 2012

Annex 1

Constitutional and Legislative Affairs Committee

(CLA(4)-19-12)

CLA171

Constitutional and Legislative Affairs Committee Report

Title: The Waste (England and Wales) (Amendment) Regulations 2012

Procedure: Negative

These composite regulations amend the Waste (England and Wales) Regulations to substitute regulation 13 and 14(2) to ensure the correct transposition of provisions of Directive 2008/98/EC (the revised Waste Framework Directive) relating to the separate collection of waste.

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 (ix) in respect of this instrument - that it is not made in both English and Welsh.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 (ii) in respect of this instrument – that it gives rise to issues of public policy likely to be of interest to the Assembly.

1. The Waste (England and Wales) Regulations 2011 transposed provisions of the revised Waste Framework Directive relating to the separate collection of waste paper, metal, plastic and glass.

Regulation 13 (2) of those Regulations provided that co-mingled collection (being the collection together with each other but separately from other waste of waste streams intended for recycling) is a form of separate collection.

Judicial review proceedings were brought, challenging the transposition in particular in relation to the provision concerning co-mingled waste. The Welsh Ministers and Defra accepted that the original regulation 13 did not properly implement the requirements of the revised Waste Framework Directive in relation to separate collection, and that consequently the 2011 Regulations needed to be amended.

In December 2011the proceedings were stayed until 13 June 2012 on the undertaking of the Welsh Ministers and Defra to consult on proposals to amend the 2011 Regulations.

The Explanatory Memorandum states that the instrument was laid before recess, in keeping with an agreement with the Claimants and Interested Parties, to extend the stay of proceedings in the judicial review from 13 June to 25 July, to allow the Welsh Ministers and Defra time to lay amending regulations before that date.

The Explanatory memorandum provides no further information as to whether the Claimants and Interested Parties in the litigation are satisfied that the Regulations as amended correctly transpose the revised Waste Framework Directive.

2. Regulation 2 (5) provides for the insertion of a new regulation 49 into the 2011 Regulations, which requires the Secretary of State to review the operation and effect of those Regulations in relation to England within 5 years after 1st October 2012 and within every 5 years after that. The Explanatory Memorandum is silent as to why in the event that it was not considered appropriate for the Welsh Ministers to carry out a review, this is the case.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

24 September 2012

The Government has responded as follows:

The Waste (England and Wales) (Amendment) Regulations 2012

1. Under Standing Order 21.2 (ix) – That the regulations are not made in both English and Welsh.
These composite regulations apply to England and Wales and are subject to approval by the National Assembly for Wales and by Parliament. It is therefore not considered reasonably practicable for this Instrument to be made bilingually.

2. Under Standing Order 21.3 (ii) – that it gives rise to issues of public policy likely to be of interest to the Assembly. The Explanatory Memorandum provides no further information as to whether the Claimants and Interested Parties in the litigation are satisfied that the Regulations as amended correctly transpose the revised Waste Framework Directive.
The Claimants and Interested Parties were provided with a draft of the regulations on 4 July 12. The Claimants indicated by letter on 13 July 12 that they were not content with the amending regulations, but gave no substantive reasons for their position. Substantive reasons were

provided by letter on 16 August, after the regulations were laid. It would therefore at best, only have been possible to have indicated in the Explanatory Memorandum, the bare fact that the Claimants were not satisfied.
In any event it would not have been appropriate to make legislation subject to approval by the Claimants or the Interested Parties .The purpose of the legislation was to correct what we acknowledged was a defect in the original regulation 13 , which did not properly implement the requirements of the revised Waste Framework Directive in relation to separate collection . The fact that the Claimants were not content with the amendments was relevant to the ongoing judicial review, but not to the making of this legislation.

3. Under Standing Order 21.3 (ii) – That it gives rise to issues of public policy likely to be of interest to the Assembly. The Explanatory Memorandum is silent as to why in the event that it was not considered appropriate for Welsh Ministers to carry out a review.

The current UK Government's policy is to include a clause in all regulations that requires a review in a specified timescale. The Welsh Government does not have a similar policy in Wales. Welsh Ministers are able to review the regulations at any time. Consequently, the inclusion of the review provision in the instrument, was relevant only to England.

Annex 2

Constitutional and Legislative Affairs Committee

(CLA(4)-19-12)

CLA174

Constitutional and Legislative Affairs Committee Report

Title: The Conservation of Habitats and Species (Amendment) Regulations 2012

Procedure: Negative

These composite regulations amend the Conservation of Habitats and Species Regulations 2010 (S.I. 2010/490) (the "Habitats Regulations"). They place new duties on the Secretary of State and Welsh Ministers, Natural England, Countryside Council for Wales, the Environment Agency, Forestry Commission, Local Authorities and, in relation to the marine area, other competent authorities to take measures to preserve, maintain and re-establish habitat for wild birds. The regulations place a duty on competent authorities to use all reasonable endeavours to avoid any pollution or deterioration of these habitats. The regulations also place a duty on any competent authority, in exercising any of their functions, to have regard to the requirements of Directive 2009/147/EC (the "Wild Birds Directive") and of Directive 92/43/EEC (the "Habitats Directive").

The regulations also make a number of further amendments to the Conservation of Habitats and Species Regulations 2010 to ensure certain provisions of the Wild Birds and Habitats Directives are transposed clearly.

The regulations also amend section 15 of the National Parks and Access to the Countryside Act 1949 to make clear that local authorities are able to designate Local Nature Reserves for the purposes of re-establishing bird habitat

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 (ix) in respect of this instrument – that it is not made in both English and Welsh.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 (ii) in respect of this instrument – that it gives rise to issues of public policy likely to be of interest to the Assembly.

1. The Explanatory Memorandum states that the amendments are being introduced in response to correspondence received from the European Commission regarding gaps in the UK transposition of the Wild Birds Directive, and that the Regulations have been made on a composite basis as they are required to be made urgently.

2. The Regulations are subject to the negative procedure. Welsh Ministers pursuant to the designation under Section 2(2) of the European Communities Act 1972 have a choice as to which Assembly procedure is to be followed. Whilst the Regulations do not amend any provision of an Assembly Act or Measure, they do make minor amendments to a piece of UK primary legislation.

3. Regulation 23 requires the Secretary of State to review the operation and effect of the 2010 Regulations and publish a report within five years after these Regulations come into force and within every five years after that. The Explanatory Memorandum is silent as to why in the event that it was not considered appropriate for the Welsh Ministers to carry out a review, this is the case.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

24 September 2012

The Government has responded as follows:

The Conservation of Habitats and Species (Amendment) Regulations 2012

These composite Regulations will apply to England and Wales and are subject to negative resolution procedure in the National Assembly for Wales and in both Houses of the UK Parliament. Because the Regulations will be subject to UK Parliamentary scrutiny, it is not considered reasonably practicable for this instrument to be made or laid bilingually.