



24 Cathedral Road / Heol y Gadeiriau
Cardiff / Caerdydd
CF11 9LJ
Tel / Ffôn: 029 20 320500
Fax / Ffacs: 029 20 320600
Email / Epost: wales@wao.gov.uk
www.wao.gov.uk

Ms Jocelyn Davies AM
Chair, Finance Committee
National Assembly for Wales
Cardiff Bay
Cardiff CF99 1NA

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Dear Jocelyn

THE PUBLIC AUDIT (WALES) ACT 2013 IN APPLICATION

I refer to your Committee's recommendation in its November 2014 report on the Wales Audit Office Estimate that the Public Audit (Wales) Act 2013 be amended to clarify the audit fee charging requirements. Having worked to the Act for over a year now, charging requirements form one of a couple of areas that we feel would benefit from amendment, should the Welsh Government be so persuaded by the Committee's reasoning. In addition there is an area where we consider the Assembly's Standing Orders could usefully be developed to complement the provisions of the Act. We should welcome your consideration of the following areas.

Provisions relating to fees

Section 23 requires that fees under this section "in relation to the audit of a person's accounts... [and]... in relation to...the provision of services to a body...may not exceed the full cost of exercising the function to which the fee relates". The Committee, in hearing our evidence, indicated that it saw merit in revising this provision. The precise wording of the section creates complexity, and in turn inefficiency and scope for legal challenge because of the terms "full cost" and "function".

To assist our interpretation of the legislation, we obtained independent legal advice. Following that advice we have to conclude that the legislation means that the "may not exceed the full cost" constraint applies to each particular function at a particular audited body. (The audit of accounts is an example one particular function, and the certification of grant claims is an example of another particular function.) Section 23 allows no regard to be given to work we may do for a particular body in the round, so the scenario could easily arise where we have to refund costs for one piece of work while raising additional invoices for another—all for the same audited body. Calculating and administering the

payment of refunds takes up staff time and incurs other transaction costs. While invoice differences may be offset so as reduce the number and quantity of actual payments, such offsetting still entails calculations and requires careful recording, which take up staff time.

We do not believe that the Act was intended to cause this level of complexity and expense. Instead, we believe that the problem is the unforeseen effect of a minor drafting issue—essentially that the “may not exceed the full cost” constraint has been included in section 23 (and in certain places in other legislation) rather than section 24. Unfortunately, the positioning in section 23 results in a strict liability in relation to individual payments rather than requiring fee scales and fee amounts to be set at an appropriate level in the fee scheme.

To address this problem, we suggest that the Act is amended so that the “may not exceed the full cost” constraint applies to the setting of fee scales and fee amounts in the section 24 Scheme for charging fees, rather than the fees actually charged under section 23 (and relevant provisions in other legislation). Making this change would retain the discipline of requiring fee scales and fee amounts to be set with a view to recovering no more than the full cost of particular functions, but it would eliminate the strict liability to provide refunds or offsets and the consequent administrative expense. The changes would be of the nature of a minor correction: omission of subsection 23(5)(b) (together with omission of the newly inserted subsection 20(5A) of the Public Audit (Wales) Act 2004 and subsection 27(4A) of the Local Government (Wales) Measure 2009) and the inclusion of a new subsection in section 24 along the lines of:

“In setting scales, amounts to be charged and means by which the WAO is to calculate fees included in a scheme under this section, the WAO must aim to ensure that fees charged to a person do not exceed the full cost of exercising each of the functions to which those fees relate.”

To set this out in context, I enclose relevant extracts of the 2013 Act showing the proposed amendments. (Subsections 20(5A) of the Public Audit (Wales) Act 2004 and 27(4A) of the Local Government (Wales) Measure 2009 were consequential amendments made by the 2013 Act that have the same effect as subsection 23(5)(b) in relation to local government fees. The 2013 Act made other similar consequential amendments to other fee charging provisions, but due to the infrequency with which the powers to which those provisions relate are used, we do not suggest that they require amendment.)

Assurances as to the appropriate setting of fee scales and fee amounts could be provided, as at present, through the independent auditing of our costing model.

Quorum

Schedule 1 to the Act sets out membership of the Wales Audit Office, in terms of:

- 5 non-executive members
- 3 employee members, and
- the Auditor General for Wales.

Paragraph 28(3) states that “the rules must provide that in all circumstances a quorum cannot be met unless a majority of the members present are non-executive members.” With five non-executive members and 4 other members, it takes only one non-executive member to be absent to make the Board inquorate. The Committee is aware that the Board was short of one non-executive member for four months recently, which had the potential to preclude the Board from lawful decision-making. The Board is therefore concerned that the governance of the organisation could be compromised by this section as currently drafted. The Board does not believe that the Act was drafted with the intention of precluding lawful decision-making whenever any one of five non-executive members is unable to attend a meeting, but rather, again, that the problem is the unforeseen effect of a minor drafting issue.

We propose that the subsection be reworded to state that “the rules must provide that in all circumstances a quorum cannot be met unless the number of non-executive members present exceeds the number of employee members present.” (As with the fee provisions, I enclose relevant extracts of the 2013 Act showing the proposed amendments.) Again, this change is in the nature of a minor correction. It retains the requirement for a majority of non-executive members over executive members, but removing the position of Auditor General from the quorum consideration reduces the risk of preclusion of lawful decision-making through the absence of one non-executive member.

Appointments of non-executive members

Part 2 of Schedule 1 to the Act provides for the non-executive members of the WAO to be appointed by the National Assembly based on the conclusions of a fair and open competition. These requirements are clearly appropriate, while at the same time, by avoiding further prescription, provide appropriate flexibility in terms of the competition method to be used by the Assembly.

An important aspect of the appointment of non-executive members, however, is not covered by the Schedule, namely the need to have an appropriate mix of knowledge, experience and abilities. Such a mix is needed to ensure strong governance. For many boards, in both the private and public sectors, a key means of achieving such a mix is the involvement of the chair of the board in the

non-executive selection process. An experienced chair is well-placed to identify complementary contributors from a field of applicants, and this is particularly important when it is necessary to fill an ad hoc vacancy on a board. Indeed, I am grateful to you for taking this point on board in making the arrangements for the appointment of a replacement member of the WAO at the beginning of this year.

The Act does not preclude the Chair of the WAO's involvement, but neither does it require it, and therefore there is the possibility of confusion in future. The Act could be amended to require such involvement, but we recognise that amendment of the Act could lead to rather more extensive and complex provisions. Appropriate involvement of the Chair of the WAO in the appointment process could instead be more easily facilitated by amendment of Assembly Standing Order 18.10(v). Such an amendment could take the form of the insertion after the first sentence of "In exercising the function of appointing non-executive members of the Wales Audit Office, a responsible committee must take account of the views of the Chair of the Wales Audit Office."

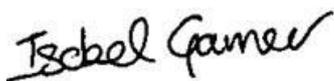
Means of effecting change to the 2013 Act

As indicated above, two of the problems that we have encountered with the 2013 Act (i.e. fees and quorum) appear to us to be the effects of minor drafting issues. As such, it may be appropriate for those issues to be addressed through amendments made by the Welsh Ministers by order under section 33 of the Act, rather than through further primary legislation. In any event, we would hope that the Welsh Ministers would not regard remedying addressing those issues as detracting from the policy intentions of the Act but rather as means of giving it full, efficient effect.

I am, of course, happy to discuss these proposals further, and staff of the Wales Audit Office stand ready to engage in detailed deliberations.

In view of the finance issues and the need for Welsh Ministers' support for the changes proposed, I am copying this letter to the Finance Minister.

Yours sincerely



ISOBEL GARNER
CHAIR, WALES AUDIT OFFICE

cc Ms Jane Hutt AM, Minister for Finance