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Annwyl Simon

#### **INQUIRY INTO THE FINANCIAL ESTIMATES ACCOMPANYING LEGISLATION**

Thank you for your invitation to give evidence to the Finance Committee as part of its inquiry into the financial estimates accompanying legislation.

As I have indicated before in my evidence to the Fourth Assembly's Constitutional and Legislative Affairs Committee's inquiry into 'Law Making in Wales', (written submission of 13 April 2015 and oral evidence on 18 May 2015), I think the examination of the costs of legislation is of great importance given the Assembly's role in determining Welsh public expenditure. Clearly, this importance will only increase with the development of fiscal devolution.

In examining the costs of a sample of legislation, together with the reporting and monitoring arrangements for costs after implementation, and seeking to establish the effectiveness and quality of regularity impact assessments, the Committee has set itself a wide-ranging and challenging terms of reference. Even the more limited invitation to me to provide views on the process used by the Welsh Government in compiling regulatory impact assessments and the consistency and accuracy of financial estimates provided, covers a very substantial set of issues, and I can therefore at this stage only provide some initial thoughts.

At a strategic level, the main point I would make is that as well as considering the estimated cost of proposed legislation (so as to make sure that it legislates responsibly), I think it would be appropriate for the Assembly to be examining the costs of legislation retrospectively as part of its post-legislative scrutiny work. In my view, such post-

legislative scrutiny should not be a matter of a few isolated exercises, but a regular feature of Assembly business. I recognise, of course, that Assembly resources, including in terms of Assembly Member time, are limited.

A further complication is that the retrospective consideration of the costs of legislation is not a simple task. The majority of expenditure estimated to be incurred by virtue of Welsh legislation is public sector staff time (salaries and wages). I gather that most such activity is not systematically recorded—certainly generally not allocated to particular legislation—so outturn figures are generally not readily available. Post-legislative costing therefore requires estimation work, in much the same way as is needed for pre-legislative costing in explanatory memoranda.

While there is probably scope for debate, in the case of Welsh Government-sponsored legislation, which is, of course, the majority of legislation, I do not think it would be realistic for the Assembly to undertake such post-legislative estimation itself. Instead, I think that at least for Welsh Government-sponsored legislation, as part of its role of managing the Welsh public finances, the Welsh Government should undertake such estimation work. This would seem to be an appropriate part of the activity of a Welsh Treasury function. The appropriate role of the Finance Committee would be to review the Welsh Government's work. I therefore think that the Committee may wish to explore the compilation of outturn figures for Welsh Government-sponsored legislation with the Welsh Government.

In terms of my views on the process used by the Welsh Government in compiling regulatory impact assessments, I have not undertaken any substantive work in this area since undertaking my study on the Regulatory Impact Assessment of the Well-being of Future Generations (Wales) Bill and a small amount of work building on that and some existing processes so as to contribute to the Constitutional and Legislative Affairs Committee's inquiry into 'Law Making in Wales'. I therefore do not have much to add the evidence that I provided to the Constitutional and Legislative Affairs Committee. I can, however, provide some limited comment on the results of that work.

The inquiry report included an extract from my written evidence which provided a suggestion on how the requirements of Standing Order 26.6 could be amended to provide for clearer presentation of financial information in explanatory memoranda. Most aspects of these suggestions were reflected in the Business Committee's recommendations to amend Standing Order 26, which were approved by the Assembly in March 2016. While the specific suggestion that a template summary table of costs be required in explanatory memoranda was not included in the revised Standing Order, I note that all Bills introduced into the Fifth Assembly include such a summary table.

While I have not undertaken extensive work to assess the quality and effectiveness of such tables, and I do have some concerns as to the time periods for which recurring amounts are analysed, it does seem to me that estimates of the costs of Bills in the fifth Assembly are much more readily apparent from their explanatory memoranda than has been the case in the past.

Following my report on the Regulatory Impact Assessment of the Well-being of Future Generations (Wales) Bill, the Welsh Government prepared a revised Explanatory Memorandum on the Bill. Most of the recommendations in my report related specifically to the presentation of the Regulatory Impact Assessment for that Bill. However, I recommended that the Welsh Government review and strengthen its overall arrangements for the development and internal review of future regulatory impact assessments. I also recommended that the review consider the protocols for engaging with key stakeholders during the development of regulatory impact assessments. Staff of the WAO met with Welsh Government officials to discuss taking forward this and other recommendations from that report and also my suggestions to the Constitutional and Legislative Affairs Committee. I have not, however, examined the extent to which the Welsh Government has acted upon this recommendation.

I should perhaps make clear that I do not routinely examine the quality of regulatory impact assessments. While it would be open to me to examine assessments in exercising my power to undertake studies, I do not consider that it would be an appropriate use of that power to undertake studies in respect of assessments on an ongoing basis. I consider that it is for the Welsh Government in the first instance to ensure good stewardship of public resources, and that an important element of that stewardship is the Welsh Government's Treasury role of ensuring that legislative developments amount to good management of public resources. My studies are principally a mechanism for reporting to the Assembly and the public on the Welsh Government's stewardship of resources. Using study powers as routine assistance to the management of resources could amount to encroaching on the role of the Welsh Government.

As I emphasised in my December 2014 report, my examination of the Regulatory Impact Assessment for the Future Generations Bill was the first time that I had formally examined the detail of an impact assessment. I was not therefore able to comment on whether the overall estimation and presentation of the costs in that case was any better or worse than for previous Bills. Nor have I since undertaken any equivalent audit review in respect of any other Bill.

My other work in relation to Bills is also quite limited in focus and does not represent a source of extensive information on the quality of costing of legislation. As I explained to the Constitutional & Legislative Affairs Committee, we review Bills for two main reasons.

First, we check for provisions that enable direct charges on the Welsh Consolidated Fund. (Such provisions are appropriate for such matters as indemnities and pensions, where, for example, it would not make sense to make the funding of such items subject to Assembly budget motions.) Standing Order 26.6 (xi) requires me to provide a report on whether such provisions are reasonable. We also have to be aware of such provisions so as to be prepared to consider requests to draw from the Welsh Consolidated Fund. Second, we review Bills so as to help ensure that appropriate audit provisions are in place, as, for example, are necessary with the establishment of new bodies.

We also aim to provide useful responses to consultations on Bills and their regulatory impact assessments, and staff of the WAO endeavour to engage with Bill teams to help ensure, for example, that appropriate audit provisions are included. For example, on the Housing (Wales) Bill, I provided a stand-alone response to the consultation on the Bill which commented, in part, on matters arising from the regulatory impact assessment. Again, however, while such responses may query the absence of a particular cost, or query the levels of the estimates of particular costs, these do not represent comprehensive analyses of the quality of assessments.

I should perhaps, however, mention that in relation to the Qualifications Wales Act, WAO staff engaged with Welsh Government officials regarding the audit clauses of the Bill. However, it appears that instead of asking us for an estimate of the audit fee, the bill team devised their own estimates: £25,000 in 2015-16 and £42,000 “ongoing” (i.e. each subsequent year). The actual audit fee for 2015-16 was £20,091 and that for 2016-17 is calculated to be £18,141. While these amounts make little difference to the overall cost of the Act, this example indicates the need for Bill teams to consult with relevant parties so as to obtain reasonable estimates.

Finally, the Committee may be interested to know that I am currently planning to include in my 2018-19 programme of local government work a series of studies focusing on the implementation of legislation. Specifically, the Social Services and Well-being (Wales) Act 2014, the Planning (Wales) Act 2015 and the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015. Wales Audit Office staff gathered some initial evidence from public bodies on their response to these Acts during 2016. We did not seek specific feedback on issues relating to the costs of delivering new functions, although in some cases public bodies commented in general terms on their concerns about the availability of funding to support delivery. Should the Committee’s inquiry highlight particular issues or concerns about the costs of implementing any of these three pieces of legislation when compared with the original estimates then there may be scope for me to consider those issues in more detail as part of the work I plan to start during 2018-19.

I hope that this initial response is helpful to the Committee. I have asked my colleagues to discuss with you the prospect of their attendance before the Committee to provide oral evidence on these issues. There may, however, be relatively little that they can add at this point to the evidence already available from their contributions in support of the work of other committees in the Fourth Assembly.

Yn gywir



**HUW VAUGHAN THOMAS**  
**AUDITOR GENERAL FOR WALES**

## THE FINANCIAL CONTENT OF EXPLANATORY MEMORANDA FOR ASSEMBLY BILLS

1. In order to support wider work on contributing to National Assembly consultations on Assembly Bills, the WAO's Compliance Section has undertaken a brief review of the financial content of the Explanatory Memoranda that have accompanied Assembly Bills since November 2011.
2. Two main findings arise from the review:
  - a. a general lack of clarity in the presentation of estimates of costs and timescales within Explanatory Memoranda regarding the proposed legislation;
  - b. variations in the completeness of estimates of costs, leading to a lack of an overall view of the cost of the legislation
3. This paper explains these findings and suggests some potential means of addressing them.

### Lack of clarity of estimates of costs and timescales within Explanatory Memoranda

4. Standing Order 26.6 requires the Member in charge of a Bill to lay an Explanatory Memorandum to accompany the Bill. Standing Order 26.6 (vi) requires the Explanatory Memorandum to set out:

*...best estimates of:*

  - (a) *the gross administrative, compliance and other costs to which the provisions of the Bill would give rise;*
  - (b) *the timescales over which such costs would be expected to arise; and*
  - (c) *on whom the costs would fall...*
5. This requirement is entirely appropriate, given that the Assembly does not just make laws but also determines overall how much money the Welsh Government and other relevant bodies can spend on particular purposes. Clearly, the Assembly needs information on the expected costs that arise from its legislation if it is to legislate responsibly and for the overall benefit of the people of Wales.
6. The Explanatory Memoranda are all quite extensive documents containing sections labelled "Costs and Benefits". In most cases, those sections together with supporting annexes run to some 30 pages. Yet the information required by Standing Order 26.6(vi) is usually not readily apparent. Much relevant information is provided, but even for a Bill of limited scope, the reader has to do a fair amount of work to arrive at an overall understanding of the estimates of (a) the costs, (b) the timescales and (c) on whom the costs would fall.

7. Examples of this include:
- a. **The Qualifications Wales Bill Explanatory Memorandum**—this provides a table that, at first reading, could be taken to summarise the costs of the Bill (Table 4 on page 56). However, in order to identify the real cost of the Bill, the totals in Table 1 (on page 52) must be subtracted from the totals in Table 4. The need for this is only evident from a careful reading of para 228, which says, “the highest costs shown relate to staffing costs which, for functional staff, are largely already met from Welsh Government budgets”. Table 4 also does not have a title to make clear what it is setting out, although its position in the text indicates that it is the costs of “option 3”, which is elsewhere indicated as the option pursued by the Bill. And to find the table requires the reader to consider most of the Costs and Benefits section of the Memorandum. The five year period for costs is also not explained, which could lead to an inference that costs will only be incurred for five years, unlikely though that may seem.
  - b. **The Renting Homes (Wales) Bill Explanatory Memorandum**—this identifies costs for 2015-16 to 2019-20 for the Welsh Government, private landlords, community landlords, third sector organisations and legal professionals. It considers these costs in some detail not just in terms of the option represented by the Bill but also in terms of an alternative option, as well giving some cost consideration to the “do nothing option”. Consequently, the cost information covers 27 pages, and unfortunately there is no summary table to encapsulate the estimated cost of the Bill. Again, a five year costing is given without explanation.
  - c. **The Higher Education (Wales) Bill Explanatory Memorandum**—this provides extensive cost analysis for three options. The 36 page “Costs and benefits” section provides 22 tables, and, as a result, table 8, which provides an estimate of the cost of the Bill from 2015-16 to 2019-20, is rather lost in the detail.
8. As indicated by these examples, the cost information provided in Explanatory Memoranda is in practice set out as part of an analysis of options, with such options generally including “do nothing”, “introduce legislation” (ie introduce legislation as per the Bill) and often a mid-way or enhanced variation on this. The complex and inconsistent layout means that the reader needs to exercise considerable care to avoid confusing costs that are attributable to other options with those attributable to the Bill as introduced.
9. Such detailed option analysis is not strictly required by Standing Order 26.6, though it is relevant to Standing Order 26.6(iii), which requires the Explanatory Memoranda to:
- ...set out whether alternative ways of achieving the policy objectives were considered and, if so, why the approach taken in the Bill was adopted...*

10. It therefore appears that, as the detail of the option analysis that meets Standing Order 26.6(iii) provides material that is relevant to requirements of Standing Order 26.6(vi), those who draft Explanatory Memoranda consider that Standing Order 26.6(vi) is adequately met by such option analysis. However, it is arguable that even where such option analysis does contain all the relevant estimates, this is not a satisfactory approach because of the considerable burden it places on the reader, as explained above. It risks creating confusion amongst AMs when considering Bills and hampers effective scrutiny.
11. Given the importance of Assembly Members being informed of the cost of legislation, it is a matter of some concern that identifying the estimates of costs, timescales and those on whom costs fall in respect of individual Assembly Acts and Bills from looking at the Explanatory Memoranda laid before the Assembly is not straightforward. One solution to this problem would be amendment of Standing Order 26.6(vi) so as to provide greater clarity. Such an amendment could specifically require the completion of a table summarising the estimates of (a) the costs of the legislation, (b) the timescales for those costs and (c) on whom the costs would fall. Such a table, in a standard format, should enable all AMs to be clear about the main cost implications of each Bill that they vote on. A potential template is set out in the Annex to this paper.
12. As indicated in the Annex, given the recent passage of the Well-being of Future Generations (Wales) Bill, it might also be appropriate for there to be an additional cell to summarise the environmental and social dis-benefits that cannot be quantified financially. However, this would require an addition to the list of items currently contained in Standing Order 26.6(vi).
13. Though in some cases it might be appropriate to include a summary table for each main policy/Part of a Bill, in any event it would be helpful to have one overall summarising table for each Bill as a whole.

#### **Variations in the completeness of estimates of costs**

14. Explanatory Memoranda frequently say that estimates cannot be made for some effects of the legislation, and, as a consequence, no figures are given for those effects. It is certainly the case that it can be difficult to provide estimates when, for example, the level of take-up of a new programme is not known. However, the complete omission of any costing for some effects alongside the provision of detailed figures for other aspects (those that can be relatively easily estimated) can lead to a rather misleading picture of the overall costs of the legislation.
15. For example, the costing set out in the **Explanatory Memorandum for the Local Government (Wales) Bill** of January 2015 does not give a full overview of the likely gross or net costs of the Bill. This is not because of the understandable uncertainty about the future shape of local government in Wales, but because rather than clearly allowing for that uncertainty the Memorandum gives partial and not well-signposted information:



- a. Appendix A on page 104 of the Memorandum has the title “Costing the Options” but appears to be confined solely to the (relatively modest) cost of transition committees;
  - b. Tables 17 and 18 on pages 96 and 97 could be taken to summarise Welsh Government and local government costs, but para 208 on page 95 says “there are a few areas (notably policy intention 4) where it has not been possible to produce an estimate at this stage”;
  - c. The tables give the total additional costs for the Welsh Government and Local Government for the period 2015-16 to 2020-21 as £1.1 million and £1.2 million respectively (i.e. £2.3 million in total) on the basis of one voluntary merger. However, the Bill appears to provide complete primary legislative provision for voluntary mergers, and it would therefore be appropriate for the Explanatory Memorandum to give broad cost estimates for one or more such voluntary mergers (with the uncertainty noted);
  - d. The Memorandum provides no figures for an estimate of ongoing savings.
16. It is worth noting that, in contrast, the Assembly’s Research Service paper on the Local Government (Wales) Bill includes far more comprehensive cost estimates for local government restructuring overall. The Research Service paper refers to Chartered Institute of Public Finance & Accountancy (CIPFA) estimates for the transition costs of local government mergers (in terms of people, property, systems and programme costs) that range between £159.7 million and £267.9 million for nine mergers involving 19 authorities (and annual savings of £64.7 million a year after two or three years).
17. While not included in either CIPFA’s report or the Research Service paper, this would indicate broad brush costs of some £20 million for one merger (and annual savings of some £6 million). This indicates that the Explanatory Memorandum probably rather understates the likely initial cost, while also omitting to provide a figure for ongoing savings.
18. The Auditor General’s *Review of the Regulatory Impact Assessment of the Well-being of Future Generations (Wales) Bill* (4 December 2014), concluded that there was likely cost understatement within the Explanatory Memorandum, and that it did not present the estimates clearly enough. Furthermore, the Welsh Government’s view that the additional costs of the bill may need to be absorbed within existing resources, as expressed during the Environment and Sustainability Committee’s evidence session on 29 September 2014, was not made clear in the Explanatory Memorandum.
19. As the examples above show, there is a tendency for Explanatory Memoranda to provide an incomplete view of overall costs. To be fit for purpose, i.e. so that Assembly Members have an overall idea of the cost of the legislation, Explanatory Memoranda should give overall estimates of the costs. Clearly, this can be difficult for some effects, but it would also be more meaningful and useful for Explanatory Memoranda to give an overall broad brush estimate of a Bill’s gross cost (while acknowledging areas of

considerable uncertainty) than to provide very detailed figures on certain aspects but no overall estimate.

20. The current formulation of Standing Order 26.6 (vi) perhaps does not help ensure that an overall view of costs is given. The Standing Order requires the Explanatory Memorandum to set out "...best estimates of...the gross administrative, compliance and other costs to which the provisions of the Bill would give rise", but it does not specifically require the identification of such costs overall. It would seem relatively straightforward to include such a requirement in the Standing Order.
21. In order to improve the reasonableness of overall cost estimation it may be helpful for the Assembly to undertake or obtain some retrospective reviews of the actual costs arising against the estimates given in the relevant Explanatory Memorandum. Such reviews might well help identify some means of improving the cost estimation processes and presentation used. Another approach that might help ensure that Explanatory Memoranda include appropriate cost information would be for Standing Order 26.6 to require the inclusion of some form of certification that this is the case, as this would help AMs better understand the overall costs of the legislation they are being asked to vote on.

STANDING ORDER 26.6(vi) COST ESTIMATE SUMMARY TABLE TEMPLATE

	One-off amounts (eg initial set up costs, disposal proceeds and decommissioning costs) £M	Average annual recurring amounts £M	Number of years applying to annual recurring amounts	Total lifetime amount (lifetime of the legislation) (at Net Present Value) £M
A. Gross administrative cost of the Bill's provisions (ie the additional public expenditure arising as a consequence of the Bill before any financial savings): i) WG and related bodies, including NHS ii) Welsh local government iii) Other public bodies <b>Total</b> of i), ii) and iii)				
B. Estimate of administrative savings arising from the Bill: i) WG and related bodies, including NHS ii) Welsh local government iii) Other public bodies (specify) <b>Total</b> of i), ii) and iii)				
C. Net administrative cost of the Bill's provisions (i.e. the net additional public expenditure that will arise as a consequence of the Bill): i) WG and related bodies, including NHS ii) Welsh local government iii) Other public bodies <b>Total</b> of i), ii) and iii)				
D. Compliance costs (i.e. costs arising to members of public etc from complying with the Bill's requirements): i) general public; ii) businesses; iii) other non-public sector bodies (eg voluntary organisations) <b>Total</b> of i), ii) and iii)				
E. Any other financial costs (include brief description here)				
F. Brief description of environmental and social dis-benefits arising from the Bill that cannot be quantified financially: i) one-off ii) ongoing (Include estimates of tonnes of CO <sub>2</sub> )				