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Dear Mike

Environment Governance and Principles

Thank you for your letter of 8 May 2019 in which you invite my views on:

- the Welsh Government's proposals for a new body to oversee the implementation of environmental laws in Wales, as outlined in its consultation document, *Environmental Principles and Governance in Wales Post European Unit Exit*, and particularly my views on the implications of the proposals for the delivery of my functions;
- the level of engagement between the Welsh Government and my office to date regarding how my role might fit with the new environmental governance arrangements; and
- any other aspect of the Welsh Government's consultation, or any other matters referred to in the Committee's terms of reference.

I address these lines of enquiry below. First, however, I think it may be helpful if I outline the differences between audit on the one hand and regulation on the other, as I think it is important that those differences are clear from the outset.

The differences between audit and regulation

In essence, audit is a matter of examining accounts and the stewardship of resources, including arrangements for such stewardship, and reporting on such work so as to provide "assurance" (meaning independent, objective assessment). While an auditor may report, for example, that a body has poor arrangements for achieving value for money, and may provide recommendations for improving arrangements, it is not the role of audit to set standards, nor enforce standards. Those are regulatory functions.

It is, however, sensible to recognise that there are some overall practical similarities between audit and regulation. Both are forms of external review, and

there are therefore elements of common experience and transferable learning between the two. Nevertheless, it is important not to see audit and regulation as the same thing.

The Welsh Government's proposals for a new environmental oversight body and the implications for the delivery of my functions

I do not see major problems arising from the creation of an environmental oversight body in terms of my functions. This is chiefly because I do not see myself as having a *direct* role in filling the environmental regulatory gap left by Brexit. While I have a function under the Well-being of Future Generations (Wales) Act 2015 of assessing the extent to which public bodies have acted in accordance with the sustainable development (SD) principle of that Act when setting and pursuing well-being objectives, that activity does not intersect with the regulation currently provided by the EU Commission. My examination function under the 2015 Act is in essence a matter of reporting on the way objectives are set and pursued, such as the extent to which a body is taking account of the need to prevent problems (see section 5 of the Act, which sets out the “five ways of working”). This is quite removed from EU Commission regulatory activity, such as taking legal proceedings against a government for inadequate measures to prevent illegal waste transfers.

My examination function under the 2015 Act is quite limited. My examinations under the Act do not even extend to examining *whether* bodies have set appropriate well-being objectives, nor whether those objectives are being achieved. (Those are specific functions of the Future Generations Commissioner (FGC) (section 20(2) of the 2015 Act).) My functions do not approach anywhere near the regulatory and enforcement work currently undertaken by the EU Commission.

I do, however, see some implications for my audit work from the creation of a new Welsh public body with environmental regulatory functions, but these are much the same as for any other new Welsh public body. A new Welsh public body will almost certainly require some form of funding from the Welsh public finances. If the Assembly is to provide funding, whether directly by supply from the Welsh Consolidated Fund or indirectly from the Fund via the Welsh Government, it would be important for the Assembly's assurance that public funds are being used as intended for the body to be audited by me, and that there is provision for me to lay reports before the Assembly on the body's accounts and stewardship of resources. I do not think a new audit would be particularly onerous.

An alternative would be provision for the Assembly to appoint a commercial auditor. However, commercial auditors are generally not well-acquainted with the requirements of regularity reporting (that funds are used as intended by the Assembly), so I do not think that that is a good option.

The level of Welsh Government engagement regarding how my role might fit with the new environmental governance arrangements

I have responded to the Welsh Government's consultation document, and I enclose a copy of my response. Given, as indicated above, that I do not see any problematic intersection between environmental regulation and audit, I am not sure that it has been particularly necessary for the Welsh Government to specifically engage with me regarding the creation of the regulator. I should, however, welcome any early engagement regarding making appropriate audit arrangements.

Views on any other aspect of the Welsh Government's consultation and other matters in the Committee's terms of reference

While I have not specifically examined regulatory systems to any great depth to date, I think it may be helpful to outline on the basis of wider experience of *review* arrangements some features that a sensible regulatory regime of the future might possess.

Avoidance of overlapping or interlocking functions between several bodies

Overlapping functions clearly risk inefficiency, but interlocking functions also risk confusion, duplication and inefficiency. A sensible regulatory regime would avoid such a situation.

By way of illustration, my examination function under the Well-being of Future Generations (Wales) Act 2015 interlocks with the functions of the FGC, as mentioned above. While in theory there is a clear separation between the FGC's role in monitoring and assessing progress towards meeting wellbeing objectives and the Auditor General's role in assessing the extent to which bodies have acted in accordance with the SD principle, this separation is unsurprisingly hard to maintain.

In my examinations work, I will inevitably review the progress of actions taken to meet wellbeing objectives while assessing the extent to which the SD principle has been followed in taking those actions. Similarly, it is inevitable that the FGC's work to review "whether a body has set well-being objectives and taken steps to meet them in accordance with the sustainable development principle" involves examining the same evidence as when the AGW assesses "the extent to which" the setting of objectives and steps taken is in accordance with the SD principle.

In practice we have sought to mitigate the potential for duplication of work (and minimise the burden on public bodies) through, for example, arranging joint fieldwork with the FGC to discharge our separate duties simultaneously. The former AGW and the FGC also agreed a memorandum of understanding setting out how they seek to discharge their duties in a complementary manner. The staff of the WAO and the FGC's staff also meet regularly to discuss and co-ordinate respective activities. These co-ordination efforts do, however, have their own cost.

They also present potential problems in terms of ensuring audit independence, as I am the auditor of the FGC.

Avoidance of combining advisory functions with review functions in the same body

Combining advisory functions with review functions in one body tends to lead to apparent, if not actual, conflicts of interest and reduces confidence in the review functions. This is evident from the crisis in commercial audit where advisory work is widely seen as having detracted from statutory audit work or has actually undermined the rigour of such audit work. (See, for example, <https://www.theguardian.com/news/2018/may/29/the-financial-scandal-no-one-is-talking-about-big-four-accountancy-firms>.)

The danger of undermining objectivity by providing advisory services is explained in the 2016 Ethical Standard published by the Financial Reporting Council. While that Standard is specific to audit, many of the principles are transferable. In my view, a sensible review system will avoid giving a review body advisory functions.

Avoidance of proliferation of functions and principles in a review system

Increasing the number of functions and principles in a system (and over-prescribing them) tends to impede operational efficiency and effectiveness. A sensible review system will avoid such proliferation and focus on a small number of key principles.

The need for avoiding such proliferation has been evident from our own experience of the Local Government (Wales) Measure 2009. For example, section 15(2) of the Measure requires Welsh improvement authorities¹ to report on numerous specific matters each year (see box overleaf for details). In addition, a further five subsections of section 15 impose specific publication requirements.

To accompany these requirements on authorities, section 17 of the Measure requires the Auditor General to “audit” each authority’s compliance with section 15. This sits alongside the Auditor General’s duty to assess compliance with the general improvement and all the various specific duties in Part 1 of the Measure, and to report on all this work each year. Furthermore, all the Measure work sits alongside the audit of accounts under the Public Audit (Wales) Act 2004, which includes a duty to consider arrangements for securing economy, efficiency and effectiveness (which covers many of the matters required by the Measure), as well as the requirement for examinations under the Well-being of Future Generations (Wales) Act 2015.

Overall, the numerous functions and principles imposed by the 2009 Measure have led to performance improvement work being seen as burdensome and bureaucratic by some authorities. At the same time, it is not clear that the

¹ Currently, county and county borough councils, national park authorities and fire authorities

performance improvement requirements of the Measure have actually led to improvement in authorities' performance, though it is difficult to identify particular effects given the complex environment that local government operates in, especially with reductions in funding.

Section 15(2) of the Local Government (Wales) Measure 2009: an illustration of excessive numbers of functions and over-prescription

(2) The authority must make arrangements for the publication of—

(a) the authority's assessment of its performance during a financial year—

(i) in discharging its duty under section 2;

(ii) in meeting the improvement objectives it has set itself under section 3 which are applicable to that year;

(iii) by reference to performance indicators specified under section 8(1)(a) and self-imposed performance indicators which are applicable to that year;

(iv) in meeting performance standards specified under section 8(1)(b) and self-imposed performance standards which are applicable to that year;

(b) the authority's assessment of its performance in exercising its functions during a financial year as compared with—

(i) its performance in previous financial years; and

(ii) so far as is reasonably practicable, the performance during that and previous financial years of other Welsh improvement authorities and other public authorities (to the extent that those authorities exercise similar functions to those exercised by the authority);

(c) details of the ways in which the authority has during a financial year exercised its powers of collaboration for the purpose of discharging or facilitating the discharge of its duties under sections 2(1), 3(2) and 8(7) during that year;

(d) details of the information collected under section 13 in respect of a financial year and what the authority has done to discharge its duties under section 14 in relation to that year.

Funding and governance arrangements that ensure sufficient independence and avoid perverse disincentives

We know from experience that funding and governance arrangements need to ensure sufficient independence and avoid perverse disincentives. For example, before 2014, studies for improving economy etc and services in local government bodies (studies under section 41 of the Public Audit (Wales) Act 2004) were funded by fees to local authorities. It was apparent from discussions with local authorities that they were not overly keen on such studies, including in terms of the effect on their audit fees, and that they preferred the number and scope of such studies to be minimised. Since 2014, local government studies have been funded by supply from the Welsh Consolidated Fund. This has enabled more

constructive dialogue with authorities, so helping study planning to have a clearer focus on the areas of significant risk to value for money.

Similarly, it is important that bodies are sufficiently resourced to enable them to exercise their functions. My predecessor's report, *The development of Natural Resources Wales*, February 2016, noted that NRW faced challenges of lacking capacity and capability for the functions it was given (see page 16). Subsequent audit work has found that NRW has struggled with regularity issues in the exercise of its forestry functions. The costs of a new organisation or system should not be underestimated, as, for example, my predecessor found in his, *Review of the Regulatory Impact Assessment of the Well-being of Future Generations (Wales) Bill*, December 2014.

Robust access rights

Robust access rights are essential for efficient and effective review work. While the legislation governing the Auditor General's work is not perfect, one of its great strengths is the access rights that it provides. These access rights have enabled the Auditor General to rigorously examine the use of public money provided to private and voluntary sector entities. For example, the Auditor General's access rights under paragraph 17 of Schedule 8 to the Government of Wales Act 2006 enable him to examine the records of NHS contractors, such as dentists and opticians. Even the local health boards making payments to such contractors do not have such access rights. As a result, the Auditor General is able to examine issues such as counter fraud much more effectively and efficiently than NHS bodies themselves.

My colleagues and I should be happy to support the Committee further, and I hope that this material is helpful to you.

Yours sincerely



ADRIAN CROMPTON
Auditor General for Wales

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name: Adrian Crompton, Auditor General for Wales

Organisation (if applicable):

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WalesAuditOffice@audit.wales

Your address: 24 Cathedral Road, Cardiff CF11 9LJ

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

Question 1: Do you agree the following principles should be included within legislation for Wales?

If the Welsh Government wishes to have Welsh arrangements that provide governance that approaches the standard currently provided by the EU Commission (which would seem appropriate), then I consider these principles need to be included in legislation for Wales.

Question 2: Do you think there are other principles, which may also need to be included?

Again, if the Welsh Government wishes to have Welsh arrangements that provide governance that approaches the standard currently provided by the EU Commission, then the Precautionary principle should be included explicitly (and, to ensure consistency, with reference to EU Commission interpretation). I am not convinced by the Welsh Government's analysis that the Precautionary principle is already covered in Welsh legislation. I recognise that there are some similarities between the Sustainable Management of Natural Resources (SMNR) principles (set out in section 4 of the Environment (Wales) Act 2016) and the Precautionary principle (set out in Art 191 of the Treaty on the Functioning of the European Union (TFEU) and explained in Communication (COM 2000)—for example, the mention of uncertainty. However, there are also significant differences. For example, COM 2000 sets out a specific preliminary condition of identification of potential adverse effects. It also sets out specific informing principles, including risk evaluation, and it provides a clear emphasis on determination of the degree of scientific uncertainty.

It appears that the Precautionary principle will be explicitly covered in UK legislation. Section 16 of the European Union (Withdrawal) Act 2018 already requires the Secretary of State to introduce legislation providing for maintenance of the Precautionary principle. It would, therefore, be unfortunate if Welsh legislation were to be less clear and rigorous than UK legislation.

Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Ensuring application of the principles set out in Art 191 of TFEU would seem appropriate. As mentioned in response to Q2, I am not convinced that application SMNR principles quite has that effect.

Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Please see responses to Qs 2 and 3. As I understand it, Art 191 of the TFEU applies to all public bodies as emanations of the state. If the intention is to provide comparable arrangements, this will need to be replicated.

Accountability

Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Essentially, yes, I agree with the gaps identified. As I understand it, the gaps reflect the role of the EU Commission.

Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

While it might be ancillary to environmental governance, I consider that it would be appropriate for the Auditor General for Wales to audit the accounts of any new Welsh public body. The Auditor General's functions in respect of the body should include consideration of arrangements for securing economy, efficiency and effectiveness, and consideration of the regularity of expenditure. I also think it would be appropriate for the Auditor General to have a power to undertake examinations of economy, efficiency and effectiveness. The Auditor General should report to Assembly in respect of all of these functions, so as to enable the Assembly to be assured of the proper stewardship of resources.

Those functions, however, relate to the use of public financial resources, especially resources provided by the Assembly, rather than matters of environmental governance *per se*. The assessment at para 3.20 of the consultation document that the Auditor General and the Public Services Ombudsman are not responsible for scrutinising implementation of environmental law is correct. Likewise, the the Future Generations Commissioner (FGC) is not responsible for scrutinising implementation of environmental law. This should perhaps be more clearly recognised, along with the overall nature of the Well-being of Future Generations (Wales) Act 2015, as has been underlined in the Cymer Afan case.

I should note that I agree with the views reflected in para 15 of the Climate Change, Environment and Rural Affairs Committee's report that the NRW and FGC are not appropriate bodies to fill the gaps left by exit from the EU—that fundamental change to their functions would be required, and that they lacked resources. My predecessor's report, *The development of Natural Resources Wales*, February 2016, noted that NRW faced challenges of lacking capacity and capability for the functions it was given (see

page 16). Subsequent audit work has found that NRW has struggled with regularity issues in the exercise of its forestry functions.

Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Generally, I think the outlined role is appropriate, but with the significant exception of acting in an advisory capacity. Having a specific function of acting in an advisory capacity risks undermining the regulatory functions. Combining advisory functions with review functions in one body tends to lead to apparent, if not actual, conflicts of interest and reduces confidence in the review functions. This is evident from the crisis in commercial audit where advisory work is widely seen as having detracted from statutory audit work, or has actually undermined the rigour of such audit work. (See, for example, <https://www.theguardian.com/news/2018/may/29/the-financial-scandal-no-one-is-talking-about-big-four-accountancy-firms>.)

As I understand its activities, the EU Commission sets strategy and provides interpretation of its principles, but it does not actually act in an advisory capacity to public bodies.

Question 8: Which policy areas should be included within the scope of new governance arrangements?

The list given in the consultation document, as per section 2 of Environment (Wales) Act 2016 seems a sensible starting point. There may be merit in making clear that the scope includes the interaction of the listed items with other items, such as noise, radiation, waste, emissions, discharges and other releases into the environment. It may also be useful to make clear that the interaction of public policies with the environment is in scope.

Question 9: Do you consider the proposed list of bodies to be appropriate?

The list seems practically reasonable in itself, but please see answer to Q4. In addition to the general point of it being appropriate for all public bodies to be covered, I would suggest that if a selected list is used, consideration be given to the inclusion of national park authorities and Transport for Wales.

Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

Yes. See answer to Q4

Question 11: What should be the status, form and constitution of an oversight body?

I agree with the suggestion that the body should be accountable to the National Assembly rather than the Welsh Government. This is analogous with the arrangements for public audit, which is required for the sake of objectivity to be independent of the Welsh Government.

I also agree, as indicated at Q6, that the body should be audited by Auditor General. Furthermore, I agree that the body should have independent appointment arrangements and independent funding (independent from the Welsh Government).

Question 12: Should an oversight body be able to act in an advisory capacity?

As indicated above at Q7, no.

Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes. No other existing body (other than the EU Commission) lends itself to this function.

Question 14: What should be the extent of this function?

Audit experience shows that the function needs to be supported with good access rights, as indicated in the consultation document.

As for thematic reviews, I think it is important that such a function is clearly defined so that it substantively supports the setting and enforcement of environmental standards. Too wide a thematic review function would risk overlap with, for example, the functions of the FGC, and it may risk dilution of focus on monitoring and enforcing environmental standards.

Question 15: What powers should a body have in order to investigate complaints from members of the public about the alleged failure to implement environmental law?

The suggestions of powers to conduct investigations etc set out in the consultation document seem to be reasonable ways of addressing the gap left by not having the EU Commission operating in respect of Wales. While it seems appropriate that a new body should be required to give existing public bodies' complaints procedures a reasonable amount of time to operate and provide resolution, I do not think such procedures should be able to significantly delay the new body's investigations.

By analogy, I think the Freedom of Information Act 2000, together with Information Commissioner guidance, provides a sensible model in that the Commissioner normally expects complainants to exhaust public bodies' review procedures first, but generally limits the amount of time for such procedures to 20 or 40 working days. (Those timescales are probably too short for many environmental matters, but I think the principle is appropriate.) This contrasts with the arrangements provided for the Welsh Language Commissioner, whose legislation requires an investigation regardless of existing public bodies' complaints procedures. In my view, that model tends to lead to excessive duplication, yet does not lead to speedier resolution.

Question 16: What informal and formal methods of enforcement do you consider an oversight body should operate in order to delivery on its role and objectives?

I consider that emulating the informal and formal mechanisms operated by EU Commission, insofar as that is possible, is a sensible approach. I think, however, that it is important not to hamstring the body by imposing a duty to work collaboratively, without such a duty being made subject to the body's discretion to achieve enforcement by what it considers the most appropriate means. Omitting such prioritisation of duties would risk the body becoming toothless.

Question 17: What enforcement actions do you consider need to be available?

Again, the Freedom of Information Act 2000 may provide a useful model. Under that Act, the Information Commissioner reviews cases and issues decision notices, which may, for example, order disclosure of information. Those notices can be appealed by either party to the Information Tribunal. Tribunal decisions can be appealed to the High Court, but only on points of law. This model seems to provide a reasonably accessible and cost-effective means of dealing with alleged breaches of FOIA. An environmental law tribunal would of course have a cost, but it would be means of getting expert consideration of alleged breaches, without the very considerable cost of judicial review (in most cases).

Other

Question 18: Would there be advantages in having a shared core set of common environmental principles?

I think that there would be considerable advantages in having a shared core set of common environmental principles. Common principles should, for example, enable business to readily understand requirements in each territory. This would be particularly helpful for businesses that operate across the border. (Similarly, having a shared set of principles across not only Wales and England, but also with the EU, would also have strong advantages in terms of business understanding of compliance requirements.)

I think it is important not to overstate or misunderstand the existing differences in Welsh environmental governance. The difference are not ones that necessitate the establishment of differing core principles. In particular, as indicated at Q6, the Well-being of Future Generations (Wales) Act 2015 does not concern enforcement of environmental standards. Instead, it is a framework for aspirational corporate planning and governance. In essence, it operates by encouraging improvement rather than enforcement of standards.

Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

Not in a position to answer this question.