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Date: 7 November 2012  
Our ref: HVT/1757/fgb  
Page: 1 of 4

Mr Darren Millar AM  
Chair, Public Accounts Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

*Dear Darren*

## **ISSUES ARISING FROM THE MINISTER OF FINANCE'S LETTER TO THE COMMITTEE OF 31 OCTOBER 2012 REGARDING THE PUBLIC AUDIT (WALES) BILL**

1. I have seen on the Assembly's website the Minister of Finance's letter of 31 October 2012 to the Committee regarding the Public Audit (Wales) Bill. I regret that there are several matters in that letter that should be subject to some clarification.

### ***Provision for compliance with International Standards on Auditing***

2. The Minister says in her third paragraph, "I can confirm that the interaction of clauses 8, 18, 20 and 25 provides for such compliance [with International Standards on Auditing]." Unfortunately, I have not had sight of any professional advice that the Welsh Government has obtained on this issue, but I certainly do not think it is the case that the clauses ensure that the Auditor General is able to put in place arrangements to secure compliance with International Auditing Standards. The key point is that whatever delegations are necessary to make such arrangements are subject to the approval of the WAO. There is therefore no guarantee that the Auditor General will actually be able to make such arrangements, as the necessary delegations will be subject to the WAO's approval.

### ***Provision for TUPE-like protection***

3. The Minister says in the fifth paragraph of the second page of her letter that, "it has always been the policy intention that principles of TUPE will be applied and that staff will be treated no less favourably as a result of the transfer." The phrase "principles of TUPE" is open to interpretation: it could be intended to mean one or two principles of TUPE, and that would accord with the Bill as drafted. However, that meaning would not accord with the Welsh Government's statement in paragraph 242 of its consultation document of 15 March 2012, which said,

“provision will be made so that the transfer of employment will be on no less favourable terms than would be the case if TUPE applied.” In any event, Schedule 3 of the Bill falls significantly short of provision for transfer on terms no less favourable than would be the case if TUPE applied, and this currently remains a serious concern for my staff, as may be seen from the enclosed letter that I have received today from Gareth Howells of the Prospect union.

4. As you know, the TUPE protection issue was discussed in the PAC evidence sessions with the Welsh Government on 24 September 2012 and 22 October 2012 (*please see the Annex to this letter*). From the oral evidence, there appeared to be recognition by the Welsh Government that the transfer provisions in Schedule 3 of the Bill were not sufficient to provide full TUPE-like protection for staff, that the Welsh Government would fully engage with my staff to resolve this, and that the Welsh Government were prepared to make whatever changes to the Bill that were necessary to ensure the actual protection provided in the Bill met the Welsh Government's stated policy intention.
5. My staff and I have raised these issues with the Welsh Government several times, starting with the March 2012 draft Bill. Most recently, my staff met with Welsh Government officials on 24 October 2012 and the next day provided a note to them on how the TUPE issue could be addressed. While it is helpful that the Welsh Government have indicated to my staff that they intend to address the problematic requirement for a corporate WAO to employ staff on terms broadly in line with those of the Welsh Government and any clauses that might cause confusion or conflict between provisions for existing staff and those for new staff, Welsh Government officials have not indicated how, if at all, they will address the significant shortfall in TUPE-like protection. I fear that the Welsh Government may be engaging with these issues too late in the day to do them justice. While I welcomed the Minister's general message to you in oral evidence regarding TUPE-like protection, the fact remains that the transfer provisions in Schedule 3 of the Bill are not sufficient as they stand.

### **Data matching**

6. In her final paragraph, the Minister says that, “I can confirm that there is nothing in the Bill that will prevent or inhibit the AGW from participating in the National Fraud Initiative.” I should of course like to welcome such confirmation, but again I have not had sight of any professional advice on which this assurance rests, and I cannot see on what basis it is given. It is disappointing that the queries on this matter made by my staff on 20 September 2012 did not receive any substantive response from the Welsh Government until 6 November 2012, and that response essentially asserts that there is no problem while providing no substantive explanation or evidence base in support of this.

7. The problem is that the Bill amends the Public Audit (Wales) Act 2004 so as to remove explicit provision for the Auditor General to arrange for persons to conduct data matching exercises on his behalf and similarly removes the existing provision for bodies to provide information to a person acting on behalf of the Auditor General. As I have already indicated to both the Committee and the Welsh Government, my concern is that the practical effect of these changes may well be to end the Auditor General's participation in the National Fraud Initiative (NFI), as such participation is only possible if the Auditor General can engage the same service provider as that engaged by other UK audit agencies to undertake the data processing required on his behalf.
8. It might be thought that clause 18 of the Bill would overcome this on the grounds that the clause enables the Auditor General to delegate his functions to contractors engaged by the proposed corporate WAO, subject to approval by the WAO of a scheme of delegation. However, aside from the possibility that the WAO might not approve the necessary delegation, I am advised that such a delegation may not meet the requirements of the Data Protection Act 1998 in terms of allowing bodies to provide personal information to a contractor working on behalf of the AGW. It is important to remember that the requirements of the Data Protection Act must be met for data matching to proceed.
9. As it currently stands, the 2004 Act is very specific in allowing information needed for matching to be disclosed to the Auditor General *or a person acting on his behalf*. This very particular wording is reflected in the equivalent provisions in UK, Scottish and Northern Irish legislation. For the processing of any personal information to meet the first data protection principle of the Data Protection Act, a condition in Schedule 2 to the Act must be met. The only condition that can really be relied on is Condition 5(b), i.e. that the "processing is necessary...for the exercise of any functions conferred on any person by or under any enactment." Under the Bill, a person acting on behalf of the Auditor General is no longer conferred the relevant functions. The reference to "acting on his behalf" is not an accidental unnecessary statement. Removing the explicit provision for information to be disclosed to a person acting on behalf of the Auditor General, as proposed in the Bill, risks a court interpreting this as removing the ability of bodies to provide information to persons acting on the Auditor General's behalf. Citing the ability of the Auditor General to delegate his functions under clause 18 of the Bill may well not be sufficient to satisfy a court that the requirements of the Data Protection Act are met.

#### ***Further co-operation***

10. As I think you will have gathered from the details above, there unfortunately seems to be some dissonance between officials' approaches to co-operation on the Bill and the Minister's stated intentions. Nevertheless, I remain very willing to work constructively with the Welsh Government. Indeed, my staff have suggested to Welsh Government officials that they could join in our liaison with

Date: 7 November 2012  
Our ref: HVT/1757/fgb  
Page: 4 of 4

HMRC in order to undertake due diligence work to mitigate any unhelpful tax effects of the Bill. To date, however, that suggestion has not been taken up.

11. I should be happy to discuss these matters further, but I think the Committee might find it helpful to pursue them further with the Minister.



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

Encs

cc *Ms Jane Hutt AM, Minister for Finance and Leader of the House*

## **Annex – Oral evidence regarding staff transfer provisions**

Extract from transcript of 24 September 2012 PAC evidence session:

[122] **Jane Hutt:** As it stands, the Bill seeks to ensure that TUPE will provide in full for the staff who are transferring, because they will be transferring from the current AGW to the new WAO, and we would expect them to be able to retain all their existing rights. There is clear policy guidance statutorily laid down, and 'Staff Transfers in the Public Sector' is the Cabinet Office's practice statement on transfer arrangements, which will be used. I note what the auditor general has raised with you—and I know that you are seeing him this afternoon—and I have asked officials to look at those issues and to review TUPE provisions to ensure that they are complete and can achieve the aim of protecting staff on their transfer to the new WAO. I would be happy to report back to the committee when we have had clarification on that.

Extract from transcript of 22 October 2012 PAC evidence session:

[241] **Jane Hutt:** Also, I know that there are concerns about the transfer of staff and I want the opportunity this afternoon—and I hope that I will have that—to reassure you on that matter. Perhaps that will come out in the questions

[242] **Darren Millar:** Why do you not refer to that now?

[243] **Jane Hutt:** This is something where we clearly see the importance of protecting staff. The matter of transferring staff is being discussed closely with the auditor general and his office. We have had good engagement with the auditor general's office and his staff on these matters. It is also vital that we ensure that the commitment and motivation of staff are maintained as they are crucial in terms of any transitional organisational change. It is our intention that the principles of the Transfer of Undertakings (Protection of Employment) Regulations 1981 be applied in line with the Cabinet Office's 'Staff Transfers in the Public Sector: Statement of Practice January 2000'. I wanted to reassure you, Chair, and the committee, that this is at the forefront of our discussions with the auditor general. We have been engaged on that matter, and I believe that meetings are being held on this. However, it is clear that the transfer of employment from the auditor general to a Wales Audit Office will be on no less favourable terms than would be the case if TUPE applied.

[244] **Darren Millar:** Okay. So, just to clarify, on that particular staff transfer point, if a corporate body were to be created, you would be happy to make whatever changes necessary on the face of the Bill to ensure that people's terms and conditions would be protected to at least an equivalent level?

[245] **Jane Hutt:** Yes.

*NB: It should be noted that the Transfer of Undertakings (Protection of Employment) Regulations 1981 have been replaced by the 2006 Regulations.*



Mr Huw Vaughan Thomas  
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7 November 2012  
GH/WAO/PAWB

Annwyl Huw

### **Public Audit Wales Bill (the Bill)**

Over recent months I have received many communications from my members within the Wales Audit Office expressing concerns regarding the above Bill. My members are particularly concerned about the lack of effective provisions within the Bill for the protection of staff transferring from the Auditor General for Wales' employment to that of a newly established Wales Audit Office.

My members are understandably concerned that the Bill does not include TUPE like provisions which they and I would have expected to be included as standard when statutorily transferring the employment of public servants from one public body to another. The lack of such provisions has resulted in members of staff being subjected to major anxiety. This is highly unfortunate when the inclusion of comprehensive provisions for the protection of staff is both reasonable and commonplace.

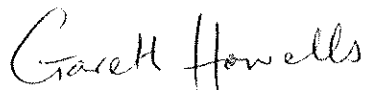
Paragraph 242 of the Explanatory Memorandum to the consultation version of the draft bill stated that "*provision will be made so that the transfer of employment will be on no less favourable terms than would be the case if TUPE applied.*" I am disappointed and unclear why this commitment has not been honoured in the published Bill. The resultant lack of security afforded to my members is having a negative impact on their morale, and is undermining their confidence in the good faith of the Welsh Government.

I am writing to you in your capacity as employer with a duty of care towards your staff. I am aware, and I am grateful, that you have raised concerns regarding the proposed staff transfer with the Welsh Government and the Public Accounts Committee. However, I request and urge you to make further urgent representations on this matter to both the Welsh Government and the Public Accounts Committee.

I am extremely concerned that unless this matter is resolved in a satisfactory way, the new organisation will face an extremely problematic beginning, with the potential for poor industrial relations and low morale. I am sure that this is something we both want to avoid.

I intend to raise the concerns of my members with the Welsh Government, and if necessary seek the support of the Wales TUC to address these concerns. I would be grateful for your assurances that you will make further representations regarding the staff transfer issues as the Bill is progressed within the National Assembly.

Yours sincerely

A handwritten signature in cursive script that reads "Gareth Howells".

**Gareth Howells**

Negotiations Officer, Prospect Wales

cc. Gary Biggin  
David Rees  
Jeremy Saunders