

EXPLANATORY MEMORANDUM TO
THE LOCAL GOVERNMENT (WALES) MEASURE 2009 (CONSEQUENTIAL
MODIFICATIONS) ORDER 2009

[2009] No. [XXXX]

1. This explanatory memorandum has been prepared by the Wales Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1. This Order makes consequential provision to ensure that fees charged by the Auditor General for Wales under the “local government improvement regime” created by the Local Government (Wales) Measure 2009 are treated in the same way as fees charged under the previous “best value” regime. In particular, it allows the Auditor General for Wales to retain fees charged for audit and inspection work under the Measure, rather than paying them into the Welsh Consolidated Fund.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1. This is the first order to be made under section 150 of the Government of Wales Act 2006 (“the 2006 Act”).

4. Legislative Context

- 4.1. Under Part 3 of the 2006 Act, the National Assembly for Wales may make laws known as Assembly Measures. The Local Government (Wales) Measure 2009 (“the Measure”) was passed by the National Assembly for Wales on 4 April 2009 and approved by Her Majesty in Council on 10 June 2009. The Welsh Assembly Government intends that it should come into force on a phased basis until April 2011.
- 4.2. Among the Measure’s provisions is the substantial repeal and replacement of Part 1 of the Local Government Act 1999 (“the 1999 Act”) in relation to local authorities, National Park authorities and fire and rescue authorities in Wales. Part 1 of the 1999 Act places those authorities (referred to as “Welsh best value authorities”) under a general “best value” duty which requires them to make arrangements to secure continuous improvement in the exercise of their functions and to prepare best value performance plans. By virtue of sections 7 and 8A of the 1999 Act, an authority’s best value performance plan must be audited by auditors appointed by the Auditor General for Wales (“the Auditor General”), and the authority must pay

the Auditor General a fee in respect of the audit. Under sections 10A and 12A, the Auditor General has the power to inspect an authority's compliance with the requirements of Part 1, and the authority is required to pay a fee to the Auditor General in respect of that work.

- 4.3. Part 5 of the 2006 Act establishes a Welsh Consolidated Fund ("the Fund") and provides that the expenses of the Auditor General and the Wales Audit Office are to be met from the Fund. Equally, under section 120(1)(c) of the 2006 Act, any income that the Auditor General receives is to be paid into the Fund. However, paragraph 9(3) of Schedule 8 to the 2006 Act allows the Auditor General to retain income from specified sources (rather than pay it into the Fund) for use in connection with certain functions. The income which may be retained includes fees charged for work under Part 1 of the 1999 Act, and the functions for which retained income may be used include those under Part 1 of the 1999 Act.
- 4.4. Paragraph 12 of Schedule 8 to the 2006 Act requires the Auditor General to prepare an estimate of the income and expenses of the office of the Auditor General and submit the estimate to the Audit Committee of the National Assembly for Wales. The Audit Committee is required to examine the estimate and then lay it before the Assembly (with any modifications which the Committee considers appropriate). However, paragraph 12(5) excludes certain categories of income and expenses from examination, including those relating to Part 1 of the 1999 Act.
- 4.5. The Measure repeals and replaces the functions of the Auditor General under Part 1 of the 1999 Act in relation to Welsh best value authorities. Part 1 of the Measure places a new "improvement" duty on local authorities, National Park authorities and fire and rescue authorities in Wales (now referred to as "Welsh improvement authorities"). Sections 17 and 18 require the Auditor General to carry out an annual audit of each Welsh improvement authority's compliance with the requirements relating to improvement information and planning, and to carry out an annual "improvement assessment" of whether each authority is likely to comply with Part 1. Section 22 empowers the Auditor General to carry out a special inspection of an authority's compliance with Part 1. Improvement authorities are required by section 28 to pay fees in respect of these audits, assessments and inspections.
- 4.6. This Order extends the provisions of Schedule 8 to the 2006 Act which currently apply to fees charged by the Auditor General in connection with the exercise of functions under Part 1 of the 1999 Act, so that they also apply to fees charged in connection with the exercise of functions under Part 1 of the Measure. It allows the Auditor General to retain those fees, rather than pay them into the Fund, and prevents the Audit Committee examining estimates of income or expenses relating to Part 1 of the Measure. Provision to this effect could not be included in the Measure itself, because paragraph 6 of Part 2 of Schedule 5 to the 2006 Act specifically provides that an Assembly Measure cannot amend the 2006 Act (subject to certain exceptions which are not relevant).

- 4.7. The first of the inspection duties under the Measure for which the Auditor General can raise charges will come into force on 1 April 2010. The relevant provisions here will therefore also come into force on 1 April 2010.
- 4.8. The functions of the Auditor General relating to inspections under Part 1 of the 1999 Act also apply to police authorities in Wales. The Measure does not alter the Auditor General's duties in respect of Welsh police authorities, as the performance of those authorities lies outside the legislative competence of the National Assembly for Wales. The Auditor General will continue to have the power to inspect Welsh police authorities (and charge fees accordingly) under the terms of the 1999 Act. The references in Schedule 8 to the 2006 Act to fees charged under Part 1 of the 1999 Act thus need to remain in force and are not removed by this Order.

5. Territorial Extent and Application

- 5.1. This instrument applies to Wales.

6. European Convention on Human Rights

- 6.1. The Secretary of State for Wales has made the following statement regarding Human Rights:

In my view the provisions of the Local Government (Wales) Measure 2009 (Consequential Modifications) Order 2009 are compatible with the Convention rights.

7. Policy background

- 7.1. The Measure's provisions on local government improvement arise from a long-standing policy aim of the Welsh Assembly Government to replace the 'best value' regime with one more suited to the Welsh context, and which places more emphasis on meeting longer-term community needs than on pursuit of quantified performance targets. In particular, it broadens the definition of 'improvement' beyond 'economy, efficiency and effectiveness' in the 1999 Act, gives local authorities greater latitude to determine local priorities in line with that definition, and strengthens links between service improvement and longer-term strategic community planning. The detailed roles of auditors and inspectors also change in accordance with this new regime, but the need for local authority performance and governance to be subject to independent audit and inspection remains.
- 7.2. It is a long-standing principle throughout the UK that public sector audit takes place on a quasi-contractual basis between auditors and those they audit; and that the costs of the work are met at least partly by the levying of fees by auditors on the bodies that they audit. This aims to maintain audited bodies' responsibility for, and ownership of, the audits to which they are subjected, and to avoid a general charge

on the public purse. Furthermore, the extent (and thus the cost) of an audit is generally proportional to the level of risk within an organisation. Funding it via fees thus provides a further incentive to public bodies to improve their standards of corporate governance and resource management, leaving them liable to a lower fee. This principle is extended within the Measure.

- 7.3. The treatment of monies received by the Auditor General as inspection fees is governed by section 120 and paragraph 9 to Schedule 8 of the 2006 Act. These provisions permit the Auditor General to retain the inspection fees he charges under the 1999 Act for the current best value inspections. The intention behind these provisions was to permit income earned by the Auditor General through the exercise of functions related to local government in Wales to be retained and ploughed back into carrying out those duties. They ensure that the work involved does not create a general charge on the Fund, and maintain the quasi-contractual relationship between auditors and audited bodies which is necessary to realise many of the above benefits. The policy intent is that this ability to retain fees should be extended to cover the fees raised in connection with inspections undertaken in accordance with the Measure.

8. Consultation outcome

- 8.1. The Welsh Assembly Government carried out extensive consultation on its proposals for the Measure during 2007-8. The Measure was then subject to detailed scrutiny and debate in the National Assembly for Wales from September 2008 to April 2009.
- 8.2. There has been no separate consultation on this Order given its technical nature: the Order only affects the Auditor General and Wales Audit Office, and is intended to preserve current policy and practice. However, the Welsh Assembly Government has discussed the proposal to make the Order with the Wales Audit Office. The Wales Audit Office is content that the Order should be made, and indeed sees it as essential to the effective operation of the new improvement regime.

9. Guidance

- 9.1. No guidance will be issued on the terms of the Order, as it merely allows the current treatment of audit and inspection fees to apply to the regulatory regime created by the Measure. This memorandum explains the purpose and context of the Order.

10. Impact

- 10.1. The Order has no impact on any person or organisation except the Auditor General and the Wales Audit Office.

11. Regulating small business

11.1. The Order does not apply to small business.

12. Monitoring & review

12.1. The Order merely applies established practice in the context of the new improvement regime. There are no plans for a separate review of its effects.

13. Contact

Sandie Green at the Wales Office – Tel: 029 2089 8202 or email:
sandie.green@walesoffice.gsi.gov.uk – can answer any general queries regarding the instrument.

James George at the Wales Office – Tel: 029 2089 8484 or email:
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