

LOCAL GOVERNMENT AND ELECTIONS (WALES) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6: Performance and Governance Of Principal Councils

Chapter 1: Performance, Performance Assessments and Intervention

Section 89 – Duty of principal council to keep its performance under review

445. This section places a continuing duty on a principal council to consider the extent to which it is achieving the matters set out in paragraphs (a) and (b) of subsection (1), and the extent to which its governance is effective to enable it to achieve those matters.
446. The matters set out in subsection (1) are referred to in this Chapter as “the performance requirements”.
447. Those matters are intended to encapsulate the essence of how a principal council is expected to exercise its functions, use its resources and generally govern itself.
448. In particular, in relation to the use of resources, the performance requirements reflect one of the matters that the Auditor General is required by section 17(2)(d) of the 2004 Act to satisfy themselves of in auditing a principal council’s accounts; namely that the council “has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources”.
449. If the Welsh Ministers issue guidance to principal councils about the performance requirements or the exercise of any functions of a principal council under Chapter 1, principal councils must have regard to that guidance.

Section 90 – Duty to consult local people etc. on performance

450. This section requires that, at least once a year, a principal council must consult with those listed in this section to obtain their views about the extent to which the council is meeting its performance requirements. “Local people” is defined in section 171 and means people who live, work or study in the area of a principal council.

Section 91 – Duty of principal council to report on its performance

451. This section requires a principal council to make a report (a “self-assessment report”) in respect of each financial year, setting out the council’s conclusions about the extent to which it met its performance requirements during that year. The views which the council has come to about its performance as a result of complying with the duty in section 89 will be able to inform the conclusions set out in the report, and those conclusions must take into account the views of local people about the council’s performance. The views of local people may be ones which were obtained by the council in complying with the consultation duty in section 90 or ones which it has obtained through other mechanisms;

for example, as a result of letters sent to the council commenting on whether the council has exercised particular functions effectively.

452. The council must make a self-assessment report in respect of a financial year as soon as reasonably practicable after the end of that financial year. The report must set out any things the council intends to do, or has already done, in order to improve its performance in the next financial year. Then, when the council makes the report in respect of that next financial year, it must set out its conclusions on how much those things have improved its performance.
453. The section sets out other requirements applying to the report, including who should receive a copy of the report, and when it must be published.
454. The principal council's governance and audit committee must review a draft of the self-assessment report and may recommend changes. Governance and audit committees were established as audit committees under section 81 of the 2011 Measure. Section 115 of this Act changes their name and makes some changes to their functions (see also Chapter 2 of this Part for provisions about their membership and proceedings).
455. Where the governance and audit committee recommends changes to the conclusions in the draft report, or to actions which the council intends to take or has taken in order to improve its performance, but the principal council decides against making those changes, the council must give its reasons in the final version of the self-assessment report.

Section 92 – Duty of principal council to arrange panel performance assessment

456. Subsection (1) of this section places a duty on a principal council to make arrangements for a panel to assess the extent to which the council is meeting the performance requirements (this is referred to as a “panel performance assessment”).
457. Under the council's arrangements, a panel performance assessment should take place at least once during the period between two consecutive ordinary elections of councillors to the council. The panel's report should be published at least six months before the next ordinary election and the council's response to that report (under section 93) should be published at least four months before the next ordinary election.
458. The section also sets out whose views a panel must seek and take into account in undertaking a panel performance assessment (see section 171 for the definition of “local people”).
459. Following a panel performance assessment a panel must produce a report setting out its conclusions and any actions the panel recommends the council take to increase the extent to which it meets its performance requirements in the future.
460. This section also requires the council to provide a copy of the report to its governance and audit committee.
461. The effect of subsection (8) is that panel members can only do things jointly with the other members of the panel, not by themselves.

Section 93 – Duty of principal council to respond to report of panel performance assessment

462. This section places a duty on a principal council to respond to a panel performance assessment report which it receives. In its response, the council is required to set out the extent to which it accepts the panel's conclusions and the extent to which it intends to follow any recommendations contained in the report. The principal council should also identify any actions it proposes to take to increase the extent to which it meets the performance requirements.

463. The principal council's governance and audit committee must review a draft of the response and may recommend changes. Where the committee recommends changes to the statements made in the draft response under subsection (2), but the principal council decides against making those changes, it must give its reasons in the final version of the response to the report of the panel performance assessment.
464. The council must send its response to those persons listed in subsection (6), and publish it.
465. For an explanation of subsection (7), see the note to section 92.

Section 94 – Panel performance assessments: supplementary regulations

466. This section gives the Welsh Ministers a power to make provision by regulations for, and in connection with, the appointment, by principal councils, of panels which will conduct panel performance assessments. Ministers may, in particular, make provision about the appointment of panel members and about the payment of fees to, or in relation to, panel members (for example, provision about recompensing an employer who allows an employee time off work to be a member of a panel).

Section 95 – Power of Auditor General to carry out a special inspection

467. This section gives the Auditor General a power to carry out an inspection of a principal council to assess the extent to which the council is meeting the performance requirements (this inspection is referred to in Chapter 1 as a “special inspection”). The Auditor General may conduct such an inspection where they consider that a principal council is not, or may not be, meeting the performance requirements. The Auditor General must consult the Welsh Ministers before making the decision to conduct a special inspection, except in a case in which the Welsh Ministers have asked the Auditor General to consider undertaking a special inspection.
468. Before carrying out a special inspection, the Auditor General must provide notice to a principal council giving the reasons for the special inspection and the matters the Auditor General intends to inspect.
469. This section also requires the Auditor General to produce a report following the special inspection which must be published and sent to the council, Estyn and the Welsh Ministers. A council must make the report available to its governance and audit committee as soon as is reasonably practicable.

Section 96 – Duty of principal council to respond to Auditor General's recommendations

470. This section provides that a principal council must prepare a response to any recommendations to the council contained in a special inspection report under section 95(6)(b).
471. The principal council's governance and audit committee must review a draft of the response and may recommend changes. Where a principal council decides against making changes recommended by the governance and audit committee to statements in the response about any action which the council intends to take in response to recommendations from the Auditor General, the council must give its reasons in the final version of the response to the Auditor General's recommendations.

Section 97 – Duty of the Welsh Ministers to respond to Auditor General's recommendations

472. This section requires the Welsh Ministers to respond to any recommendations made by the Auditor General under section 95(6)(b) for action to be taken by the Welsh Ministers.

Section 98 – Auditor General’s powers of entry and inspection etc.

473. **Section 98** confers powers on the Auditor General, including a person to whom the Auditor General’s powers have been delegated (see subsection (5)) to do certain things for the purposes of a special inspection of a principal council under section 95.
474. Subsection (1) enables the Auditor General to enter the premises of a principal council to do things that the Auditor General considers necessary for the purposes of a special inspection of that council.
475. This includes inspecting documents held by the council. “Document” is defined in section 112 as including information recorded in any form. Having entered the premises of a council the Auditor General may inspect, for example, information held by that council on a computer or in an electronic information storage facility.
476. Examples of things the Auditor General could require from a principal council under subsection (2) are: to be sent a document or to be allowed to use an office or copying facilities in the council’s premises while the inspection is being carried out.
477. Subsection (3) allows the Auditor General to require a person to appear before them (for example, at the offices of the Auditor General or at an office in a principal council which the Auditor General is using) to provide:
- information;
 - an explanation (for example, an explanation of why that person thinks something happened); or
 - a document.
478. Subsection (4) sets out the Auditor General’s powers to make copies of documents, to require councils to make copies for the Auditor General’s use and to retain documents which the Auditor General has inspected or been provided with. If the Auditor General decides that it is necessary to retain a document (for example, the original of a letter which the Auditor General considers it necessary to examine further), the Auditor General may retain the document only for as long as is necessary for the purposes of the special inspection.

Section 99 - Auditor General’s powers of entry and inspection etc.: notice and evidence of identity

479. **Section 99** sets out requirements which apply to the Auditor General’s exercise of the powers under section 98.
480. The effect of subsection (1) is that, subject to subsection (3), the Auditor General may exercise the power under section 98(1) to enter a council’s premises only if at least three clear working days’ notice in writing has been given to the principal council.
481. The meaning of the term “working day” is given by the Legislation (Wales) Act 2019 (anaw 4) (see Schedule 1 to that Act). It means a day which is not a Saturday, Sunday, Christmas Day, Good Friday or a bank holiday in England and Wales under the Banking and **Financial Dealings Act 1971 (c. 80)**.
482. Notice must be given to the council using one of the methods set out in subsection (5), though the method in paragraph (c) of subsection (5) can be used only if the council has notified the Auditor General of an email address to be used for that purpose. Paragraph (c) does not require councils to provide an email address for that purpose.
483. For example, if notice is posted first class to the principal office of the council on a Monday, the Auditor General can exercise the power under section 98(1) to enter the council’s premises no earlier than the Friday of that week.

484. Subsection (2) contains equivalent notice requirements applying to the exercise of the powers under section 98(2). Again, notice must be given to a council using one of the methods in subsection (5).
485. The effect of subsection (3) is that the Auditor General is not required to give notice before exercising a power under section 98(1) or (2) if the Auditor General considers that giving notice would prejudice, or would be likely to prejudice, the special inspection (for example, if the Auditor General considered it was necessary to inspect urgently certain information before it was deleted).
486. Subsection (4) contains notice requirements applying to the exercise of the powers under section 98(3) to require a person to appear before the Auditor General.
487. If the person required to appear is a member of a principal council or a member of the staff of a principal council, at least three clear working days' notice in writing is required. Notice must be given using one of the methods in subsection (6). In the case of other persons who are required to appear, seven clear working days' notice in writing is required and notice must be given using one of the methods in subsection (7).
488. A council etc., against whom a person is attempting to exercise a power under section 98, may request evidence of that person's authority to exercise the power. If the person does not produce the evidence they cannot exercise the power.

Section 100 – Auditor General's powers of entry and inspection etc.: offences

489. **Section 100** creates offences for failing, without a reasonable excuse, to comply with a requirement imposed under section 98, or for intentionally obstructing the exercise of the powers of entry and inspection, or the powers to copy and retain documents, under section 98.

Section 101 – Auditor General's Fees

490. This section requires the Wales Audit Office to set a scale of fees to carry out special inspections. The Wales Audit Office will have discretion to charge a fee which departs from the set scale if the work involved in a special inspection is substantially more or less than envisaged by the set scale. Before setting a scale of fees, the Wales Audit Office must consult the Welsh Ministers and such representatives of principal councils as the Wales Audit Office considers appropriate.

Section 102 – Support and assistance by the Welsh Ministers

491. Under this section the Welsh Ministers may provide such support and assistance to a principal council as the Welsh Ministers consider appropriate to increase the extent to which the council meets the performance requirements. This section also allows a principal council to request support and assistance from the Welsh Ministers for that purpose. Before providing support and assistance to a council under this section (whether or not in response to a request from the council), the Welsh Ministers must consult the council about the support and assistance they intend to provide.

Section 103 – Direction to a principal council to provide support and assistance

492. This section provides the Welsh Ministers with the power to direct a principal council to provide another principal council ("the supported council") with any support and assistance that the Welsh Ministers consider appropriate to increase the extent to which the supported council meets the performance requirements. The direction must set out what support and assistance must be given to the supported council.
493. Before giving the direction, the Welsh Ministers must consult with both councils affected by the direction.

Section 104 – Powers of the Welsh Minister to intervene

494. This section sets out the conditions which apply to the Welsh Ministers' exercise of the powers of direction in sections 105, 106 and 107 ("an intervention direction"). The Welsh Ministers must consider that the principal council, to which the direction will relate, is either not meeting, or is likely not to be meeting, the performance requirements.
495. This section also sets out the steps the Welsh Ministers must take before giving an intervention direction and the circumstances where these steps do not apply.

Section 105 - Direction to co-operate with provision of support and assistance

496. This section (which is subject to section 104) contains powers for the Welsh Ministers to direct a principal council, referred to as "the supported council", to cooperate with those persons listed in subsection (1) for the purposes of enabling support or assistance to be provided. This includes persons acting on behalf of, assisting or authorised by the persons listed in subsection (1).
497. The section sets out ways in which the supported council may be required to cooperate by, or under, a direction under this section.

Section 106 - Direction to take or not to take etc. a specified step

498. This section (which is subject to section 104) provides that the Welsh Ministers may direct a principal council to take, not take or cease taking a specified step. It includes examples of the steps which a principal council may be required to take.

Section 107 – Direction that a function be performed by the Welsh Ministers or their nominee

499. This section (which is subject to section 104) provides that the Welsh Ministers may give a direction which has the effect that a function, or functions, of a principal council, as specified in the direction, is exercised by the Welsh Ministers or a person nominated by the Welsh Ministers.
500. Subsection (3) provides the Welsh Ministers with a power to make regulations to apply or disapply any statutory provisions in relation to functions which are to be exercised by the Welsh Ministers or their nominee as a result of a direction under this section.

Section 108 – Exercise of functions under this Chapter

501. This section provides that functions conferred on a principal council under this Chapter (other than functions conferred on a governance and audit committee) may be undertaken by the council or its executive, as decided by the council.
502. Subsections (2) to (4) provide that the functions listed in subsection (4) are not subject to the provisions of section 101 of the 1972 Act or sections 14 and 15 of the 2000 Act.
503. This means that if the council decides that one of those listed functions is to be the responsibility of the council, it may not be delegated to a committee or sub-committee or an officer of the council, or to another principal council. Similarly, if the council decides that one of those listed functions is to be the responsibility of the council's executive, it may not be allocated to, for example, a committee of the executive or an officer of the council.

Section 109 – Power of the Welsh Ministers to add to list of persons to whom reports etc. must be sent

504. **Section 109** enables the Welsh Ministers to make regulations to add to the lists of persons to whom certain reports and responses produced under this Chapter must be sent.

Section 110 - Power of the Welsh Ministers to amend etc. enactments and confer new powers

505. This section gives the Welsh Ministers power to amend, modify, repeal, revoke or disapply enactments (but not the provisions of this Chapter) that the Welsh Ministers consider prevent or obstruct a principal council from complying with this Chapter.
506. The Welsh Ministers may also confer new powers on principal councils that the Welsh Ministers consider necessary or expedient in order to permit or facilitate compliance with this Chapter.

Section 111 – Guidance

507. This section provides that any person who has functions under or by virtue of this Chapter (other than the Auditor General and principal councils; an equivalent guidance provision applying to principal councils is in section 89(3)) must have regard to guidance issued by the Welsh Ministers about the exercise of those functions.
508. If someone is exercising a function under this Chapter which relates to an assessment of the extent to which a principal council is meeting the performance requirements (for example, if a panel is carrying out an assessment under arrangements made under section 92), they must have regard to any guidance that the Welsh Ministers have issued about the performance requirements. Again, this requirement does not apply to the Auditor General or principal councils.

Section 113 – Disapplication of the 2009 Measure in relation to principal councils and repeal of provisions about co-ordination of audit

509. This section amends the 2009 Measure, which contains a performance assessment system, so that it ceases to apply to principal councils.
510. The section also repeals the provisions contained in the 2009 Measure dealing with the co-ordination of audit (section 23) and information sharing (section 33). Chapter 3 of this Part contains new provision about co-ordination between certain regulators and section 159 contains new provision about information sharing.

Section 114 – Amendment of the Well-being of Future Generations (Wales) Act 2015

511. This section amends paragraph 1 of Schedule 1 to the Well-being of Future Generations (Wales) Act 2015 (“the WFG Act”). This reflects section 91(11) of this Act and together the provisions allow a principal council to publish its self-assessment report within the same document as its report under paragraph 1 of Schedule 1 to the WFG Act, where the reports relate to the same financial year.

Section 115 and Schedule 10 – New name and functions of audit committees

512. **Section 115** amends section 81 of the 2011 Measure (principal councils to appoint audit committees) to change the name of audit committees to “governance and audit committees” and confer additional functions on those committees.
513. As a result of the change of name a number of consequential amendments are made to the 2011 Measure and these are set out in Schedule 10, which is introduced by this section.