

John Griffiths MS
Chair of Equality, Local Government &
Communities Committee
Welsh Parliament
Cardiff Bay
Cardiff CF99 1SN

30 September 2020

Dear John,

Local Government & Elections Bill: Legislative Competence

Thank you for your letter of 5 August 2020 in which you summarise the advice the Committee has received regarding section 118 of the Local Government & Elections Bill.

I regret, however, that we do not agree with several key points set out in your summary, and we continue to consider that section 118 of the Bill is outside the Senedd's legislative competence. I appreciate that the making of legislation is a matter for the Senedd and your Committee has its own sources of expert advice. The issue of concern to us, however, goes to the heart of the fundamental constitutional principle enshrined in the Public Audit (Wales) Act 2013, namely the independence of the office of the Auditor General. I hope you will understand, therefore, why we feel the need to write again and that you will consider this further submission as you complete Stage 2 scrutiny of the Bill.

In your letter you say, "Section 118 creates a new power and reciprocal duty, but they do not place any controls on the way in which the Auditor General for Wales exercises functions." We do not think that section 118 will not have such impact on the way in which the Auditor General is able to exercise existing functions. As your summary notes, section 118 requires the Auditor General to produce timetables for the exercise of his functions, including having to consult the "relevant regulators" beforehand. It also requires the Auditor General to "take all reasonable steps to adhere to the timetable[s]". However, your summary does not mention that Table 1 of section 119 sets out that one of the relevant regulators is the Welsh Ministers (the executive). We therefore have a situation where the Auditor General must (a) consult the Welsh Ministers regarding the exercise of his functions, (b) by virtue of public law take that consultation into account in producing timetables and (c) "take all reasonable steps" to adhere to the timetables in exercising his functions. In addition, when exercising the existing functions referred to in section 119, the Auditor General will be subject to a duty to have regard for the need for co-ordination with the relevant regulators.

We do not agree with your view that section 118 creates a new power; in our view it imposes duties. We remain of the view that sections 118 and 119 are outside the Senedd's legislative competence, as they subject the Auditor General to the "direction or control of the ...Welsh Government" contrary to section 8(1) of the Public Audit (Wales) Act 2013 and section 108A of the Government of Wales Act 2006.

Your summary suggests that the requirements of section 118 are merely a matter of timing and do not impinge on the manner in which functions are exercised. However, timing and manner are significantly interrelated. The additional constraint on the timescales for the exercise of the Auditor General's functions necessary to accommodate the Welsh Ministers will affect the manner in which those functions are exercised. The additional restriction on timescales will inevitably reduce the breadth and/or depth of audit examination and studies.

If it were the case that section 118 did not have any impact on the way in which the Auditor General for Wales is able to exercise functions, the question must arise, "what is the purpose of the section?" I note that the Minister has said the section will reduce administrative burdens in relation to audit. However, the opposite is much more likely to be case. The section will increase administrative burdens, as the Auditor General will have to recommence consulting on and drawing up timetables—a burden of the 2009 Measure that was impliedly removed by the 2013 Act. As noted in my letter of 26 June 2020, suitable co-ordination is provided on a discretionary basis through our voluntary "Inspection Wales" arrangements. Aside from questions of legislative competence, section 118 is therefore not only not necessary but is a re-imposition of an administrative burden.

The final point in your summary is that if section 8(1) of the 2013 Act were construed so widely that the Senedd may not legislate to impose or modify requirements around the timing of existing functions, then that could mean that the relaxation of reporting requirements, as, for example, was recently done in the Public Service Ombudsman Wales Act 2019, would be outside the Senedd's competence. There appears, however, to be a misconception within that suggestion. Legislation that relaxes reporting requirements (or rather in the case of the 2019 Act, legislation that enables statutory deadlines to accommodate the requirements of natural justice) clearly does not amount to a reduction in the Auditor General's discretion in exercising functions. Neither does it, again in terms of competence, subject the Auditor General to the direction or control of the Senedd or Welsh Government. A relaxation of timing requirements does not fall foul of section 8(1) of the 2013 Act or section 108A of the Government of Wales Act 2006. But section 118 is not a relaxation of timing requirements; it is the imposition of requirements that subject the Auditor General to direction and/or control of the Welsh Government, as described above.

I hope that you can take these points on board in your Stage 2 consideration of the Bill. I should be happy to discuss this further.

Given the Minister's role in this matter, I am copying this letter to the Minister. And given the prospect of reduction in the Auditor General's discretion in the exercise of functions, I am also copying this letter to the Chairs of the Public Accounts and Finance Committees.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Martin Peters', with a long horizontal flourish extending to the right.

Martin Peters

Head of Law & Ethics