

# GOVERNMENT OF WALES ACT 2006

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## EXPLANATORY NOTES

### DETAILED COMMENTARY ON SECTIONS IN PART 4

#### *Referendum*

#### *Section 103: Referendum about commencement of Assembly Act provisions*

377. This section allows a referendum to be held in Wales on whether those sections in the Act which give the Assembly power to pass Acts (“the Assembly Act provisions”), should come into force.
378. If the majority of voters in a referendum vote for the Assembly Act provisions to come into force, they are to be brought into force by commencement order made by the Welsh Ministers.
379. There is no power to bring the sections into force without the prior approval of the majority of voters in a referendum.
380. The section deals with the mechanism for calling a referendum.
381. Subsection (3) makes it clear that, if the majority of voters vote against the Assembly Act provisions being brought into force, this will not bar the holding of a later referendum on the same issue.
382. Subsection (4) provides that a recommendation to Her Majesty to make an Order initiating a referendum may only be made if the draft Order has been approved by the House of Commons, the House of Lords and the Assembly.
383. Subsection (5) provides that any Assembly resolution to approve a draft Order in Council will only be effective if the number of Assembly Members voting for it represent two-thirds or more of the total Assembly seats (as opposed to the total number of Assembly Members voting).

#### *Section 104: Proposal for referendum by Assembly*

384. This section provides the mechanism under which the First Minister or a Welsh Minister can initiate a proposal that a referendum be held on bringing the Assembly Act provisions into force.
385. If a sufficient number of Assembly Members approve the proposal, the Secretary of State is required, within 120 days, to either lay before Parliament a draft Order in Council which will initiate a referendum, or give formal notice refusing to do so which sets out the reasons for that refusal.

#### *Section 105: Commencement of Assembly Act provisions*

386. The purpose of this section is to give the Welsh Ministers the power, by order, to bring into force the Assembly Act provisions following endorsement in a referendum.

387. Subsection (3) allows a commencement order made by the Welsh Ministers to include provisions modifying other legislation, prerogative instruments, other instruments and documents, where the Welsh Ministers consider such amendments are appropriate in connection with the coming into force of the Assembly Act provisions.
388. Subsection (4) provides that an order made by the Welsh Ministers bringing the Assembly Act provisions into force on a date specified in the order, must be approved by the Assembly.

***Section 106: Effect on Measures of commencement of Assembly Act provisions***

389. This section provides that, as soon as the Assembly Act provisions have come into force (i.e. under an order made by the Welsh Ministers under section 105), Part 3 of the Act ceases to have effect.
390. This means that the Assembly will no longer have the power to pass Assembly Measures. The vehicle for laws that might formerly have been made by Assembly Measure will, from then on, be Acts of the Assembly.
391. However, Assembly Measures which have already been enacted (i.e. passed or approved by the Assembly, and approved by Her Majesty in Council) will continue to be law.

***Section 107: Acts of the Assembly***

392. This section confers on the Assembly the power to pass legislation in relation to Wales called “Acts of the National Assembly for Wales”, or “Deddfau Cynulliad Cenedlaethol Cymru”. They are referred to in the Act as Acts of the Assembly.
393. It also confirms that the power of the UK Parliament to legislate in relation to Wales, if it chooses to do so, is not affected.
394. Subsection (1) provides that the National Assembly for Wales may enact Acts of the Assembly.
395. Subsection (2) provides that a proposed Act of the Assembly (to be known as a Bill) will become law when:
- a) it has been passed by the Assembly (or “approved” by the Assembly, in the case of a Bill which has been reconsidered), and
  - b) it has received Royal Assent.
396. Subsection (3) provides that if, after an Act is enacted, it becomes apparent that there was some invalidity or procedural irregularity in the Assembly proceedings which led up to its enactment (for example, a rule in the Assembly’s standing orders was not complied with), the invalidity or irregularity will not render the Act invalid and it will still be law. However, it is thought that this subsection will not save a purported Act which had not been passed by the Assembly at all because, in those circumstances, section 107 (2) would not have been complied with.
397. Subsection (4) means that, if a particular Act of the Assembly is relevant in any Court proceedings, its existence and validity need not be proved to the Court in the same way that other types of evidence have to be proved to the Court before the Court will take it into account.
398. Subsection (5) makes it clear that the UK Parliament is sovereign and retains the power to make laws in relation to Wales. This is the case even in relation to matters where the power to pass an Act has been given to the Assembly.

**Section 108: Legislative competence**

399. The purpose of this section and Schedule 7 is to set out the extent of the Assembly's power to pass Acts. The section calls this the Assembly's "legislative competence". Its legislative competence may be altered by Her Majesty making an Order in Council under section 109.
400. Subsection (1) makes it clear that within the limitations imposed by the Act an Act of the Assembly can have the same effect as an Act of the UK Parliament.
401. The Assembly's power to pass Acts will be limited to the legislative competence given to it by this Act, which may be modified by Order in Council.
402. Subsection (2) means that if an Act contains a provision which is outside the Assembly's legislative competence, that provision has no legal effect.
403. Subsections (3) to (6) identify when a provision of an Act will be within the Assembly's legislative competence.
404. It will only be within competence if it satisfies the criteria in *either* section 108(4) *or* 108(5), *and* it complies with section 108(6).
405. In order to satisfy the criteria in section 108(4):
- a) the provision in question must relate to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7. (Section 109 allows Her Majesty to make Orders in Council listing further headings and subjects in Part 1 of Schedule 7, or changing or removing those which are already there); and
  - b) the provision in question must not fall within any of the exceptions listed in Part 1 of Schedule 7. For example, a provision in an Act which related to the subject of the Welsh Language (heading 20 in Part 1 of Schedule 7), but which sought to legislate on broadcasting would not meet the criteria in section 108(4)(a), because it would fall within the exception of "broadcasting" under heading 3 in Part 1 of Schedule 7; and
  - c) the provision in question must apply only in relation to Wales, and it must not confer, impose, change or remove (or give anyone else the power to confer, impose, change or remove) functions to be carried out in relation to countries other than Wales (e.g. England).
406. In order to satisfy the criteria in section 108(5):
- a) the provision in question must be one which allows a provision contained in any Act of the Assembly (i.e. one which did meet the criteria in section 108(4)) or in an Assembly Measure, to be enforced, or be one which is otherwise appropriate for making such a provision effective; or
  - b) the provision in question must be one which is incidental to or consequential on a provision contained in any Act of the Assembly or Assembly Measure which *does* meet the criteria in section 108(4).
407. In order to comply with section 108(6):
- a) the provision in question must comply with restrictions on the Assembly's legislative competence which are set out in Part 2 of Schedule 7 to the Act. There are exceptions from these restrictions, which are set out in Part 3 of Schedule 7; and
  - b) the provision in question must form part of the law of England and Wales only (for example, the provision cannot form part of the law of Scotland); and

- c) the provision in question must not be incompatible with the European Convention on Human Rights or European Community law.
- 408. Subsection (7) lays down the test to be used to decide whether a particular provision in an Act of the Assembly relates to a subject listed under any of the headings in Part 1 of Schedule 7, and does not fall within any of the exceptions.
- 409. The correct approach will be to consider the purpose of the provision having regard to its effect in all the circumstances.

### ***Section 109: Legislative competence: supplementary***

- 410. The purpose of this section is to allow amendments to be made to Schedule 7 to the Act, so as to enhance, restrict or change the Assembly's legislative competence to pass Acts.
- 411. Subsection (1) provides that Her Majesty may, by making an Order in Council, add further subjects and headings to Part 1 of Schedule 7. The Order in Council may also remove or change subjects or headings already listed.
- 412. Her Majesty may also amend Parts 2 and 3 of Schedule 7, which set out general restrictions on the passing of Bills, and exceptions to those restrictions respectively.
- 413. Subsection (2) provides that Orders in Council made by Her Majesty amending Schedule 7 can also make changes to enactments, including Acts of the Scottish Parliament and instruments made under those Acts, prerogative instruments, and other instruments or documents, where those changes are appropriate in connection with the amendment to Schedule 7.
- 414. Subsection (3) provides that Orders in Council under this section can make provisions which apply retrospectively.
- 415. For example, this power could be used to clarify the extent of a subject in Part 1 of Schedule 7, where there has been a legal challenge to the validity of an Act of the Assembly made in relation to that subject, and there is a need for legal certainty about the extent of the subject.
- 416. Subsection (4) provides that, except in relation to the first Order in Council amending Schedule 7 a recommendation to Her Majesty to make such an Order must only be made if the draft Order in Council has been approved by the House of Commons, the House of Lords and the Assembly.
- 417. Subsection (5) makes it clear that if a change is made to Schedule 7, and thus to the Assembly's power to pass Acts, the change is to have no effect upon Acts already passed (or approved, in the case of Acts which have been reconsidered and amended) by the Assembly. They will remain law. This is subject to any retrospective provision that may be made in the Order in Council.

### ***Procedure***

#### ***Section 110: Introduction of Assembly Bills***

- 418. This section imposes certain requirements in relation to the introduction into the Assembly of Assembly Bills.
- 419. A Bill may, subject to provisions of standing orders, be introduced by the First Minister, any of the Welsh Ministers, any Deputy Welsh Minister, the Counsel General or any Assembly Member. Standing orders might restrict the ability of some of these persons to introduce a Bill, for example by requiring Bills giving rise to public expenditure to be introduced by Ministers.

420. The person in charge of a Bill must, on or before the Bill's introduction, make a statement expressing their view that the provisions in the Bill are within the Assembly's legislative competence.
421. The Presiding Officer of the Assembly must on or before introduction of a Bill, decide whether or not it is within the Assembly's legislative competence and state that decision.

### ***Section 111: Proceedings on Bills***

422. This section requires the Assembly's standing orders to contain certain provisions in relation to the consideration and passing (or approval, in the case of Bills which are reconsidered and amended) of Assembly Bills.
423. Standing orders must ensure that, generally, Bills must pass through three stages.
424. There must firstly be an opportunity for a general debate about the Bill by the Assembly, and for Assembly Members to vote on its general principles. This stage mirrors the Second Reading stage of Bills in the UK Parliament.
425. There must then be a stage involving consideration of, and an opportunity for Assembly members to vote on, the details of the Bill, corresponding to the committee stage of a Bill at Westminster.
426. Finally there must be a stage at which members can vote on whether to pass the Bill in its final form. This is equivalent to the Third Reading of a Parliamentary Bill.
427. Standing orders may allow a different procedure in the case of Bills which fall within certain categories, namely those which restate the law, those which repeal or revoke spent enactments and "private" Bills, that is ones which change the law only on a very localised basis. In the case of the first two, standing orders may well permit a streamlined procedure whilst in the case of "private" Bills they are likely to include an opportunity for individuals affected to make representations to the Assembly, as in the case of private Parliamentary Bills.
428. Standing orders must include provision for securing that, except in specified circumstances (which are left to standing orders to define) a Bill can only be passed if the text of the Bill is in both English and Welsh.
429. Standing orders must provide for a Bill which has been passed by the Assembly to be reconsidered in certain circumstances. These are:
  - a) where the Supreme Court has decided that the Bill is outside the Assembly's legislative competence, following the Counsel General or the Attorney General referring that issue to the Supreme Court under section 112;
  - b) where the Counsel General or the Attorney General has referred the issue of whether the Bill is within the Assembly's legislative competence to the Supreme Court under section 113, the Supreme Court has then referred an issue arising out of it to the European Court of Justice for a preliminary ruling, but the reference to the Supreme Court has been withdrawn following a decision by the Assembly that it wishes to reconsider the Bill;
  - c) where the Secretary of State has made an Order under section 114 prohibiting the Clerk of the Assembly from submitting a proposed Bill for approval by Her Majesty.
430. If a proposed Assembly Bill is, upon reconsideration, amended by the Assembly, then there must be a further final stage at which the amended Bill can be approved or rejected by the Assembly.

***Section 112: Scrutiny of Bills by Supreme Court***

431. This section provides a mechanism through which either the Counsel General or the Attorney General can obtain a decision by the Supreme Court as to whether a Bill or particular provisions of a Bill are within the Assembly's legislative competence. This may only be done within the four week period starting with the date the Bill was passed by the Assembly or, in the case of a Bill which has been reconsidered and approved by the Assembly, starting with the date the Bill was approved by the Assembly.
432. If the Counsel General or the Attorney General formally notifies the Clerk that he or she is not going to make such a reference then he or she is afterwards barred from doing so (unless the Bill has subsequently been reconsidered and approved).

***Section 113: ECJ references***

433. Where the Counsel General or the Attorney General has referred a Bill to the Supreme Court, and the Supreme Court has referred a question in connection with the matter to the European Court of Justice for a preliminary ruling then, provided neither of these references has been decided or otherwise disposed of, the Assembly may opt to reconsider the Bill under provision made under section 111(6). If it does so the person who referred the Bill to the Supreme Court (i.e. Counsel General or the Attorney General, as the case may be), must request the withdrawal of the reference. If, following reconsideration, the Bill were to be approved, in an amended form, and the Counsel General or Attorney General are not satisfied that the amendment has removed the cause for referring the Bill to the Supreme Court, a fresh reference may be made, within four weeks of that approval.

***Section 114: Power to intervene in certain cases***

434. This section gives the Secretary of State a power to prevent, in certain circumstances, a Bill being submitted for Royal Assent.
435. Subsection (1) sets out the circumstances in which the Secretary of State may make an order namely, where the Secretary of State has reasonable grounds to believe that the Bill contains provisions which :
- a) would have an adverse effect upon any matter which is *not* listed in Part 1 of Schedule 7 to this Act, or which falls within any of the exceptions listed in that Part of the Schedule; or
  - b) might have a serious adverse impact on water resources in England, water supply in England or the quality of water in England; or
  - c) would have an adverse effect on the operation of the law as it applies in England; or
  - d) would be incompatible with any international obligations, or the interests of defence or national security.
436. Such an order may be made within four weeks of the passing of the Bill, or of the approval of the Bill following reconsideration under section 111(6) or, if a reference to the Supreme Court has been made under section 112, within four weeks of the reference being decided or otherwise disposed of. If the Secretary of State has formally notified the Clerk that no order is going to be made in relation to the Bill such an order is barred in relation to it (unless the Bill is reconsidered and approved by the Assembly under section 111(6) after that notification was given).

***Section 114: Royal Assent***

437. Once a Bill has been passed (or approved upon reconsideration) by the Assembly, it is for the Clerk to submitting it for Royal Assent. The Clerk may not however do so:

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(c.32) which received Royal Assent on 25 July 2006*

- a) if the Counsel General or the Attorney General is still entitled to refer to the Supreme Court under section 112 the issue of whether a provision in the Bill is within the Assembly's legislative competence (i.e. if the four week period for doing so has not expired and they are not both barred from making a reference as a result of having notified the Clerk that they do not intend to do so);
  - b) if the Counsel General or the Attorney General has made a reference to the Supreme Court under section 112 which has not yet been decided or disposed of;
  - c) if the Secretary of State is still entitled to make an order under section 114 (see the notes to that section) prohibiting the Clerk from submitting the Bill for Royal Assent.
438. The Clerk may not submit a Bill for Royal Assent in its unamended form if:
- a) the Supreme Court has ruled, on a reference under section 112, that the Bill, or any provision of it, would not be within the Assembly's legislative competence; or
  - b) such a reference has been withdrawn as a result of a decision by the Assembly that it wishes to reconsider the proposed Bill.
439. Once Royal Assent has been given the Clerk must write the date of that approval on the text of the Bill and must, in accordance with standing orders, notify the Assembly of the date of Royal Assent.

***Section 116: Welsh Seal and Letters Patent***

440. This section establishes a Welsh Seal and designates the First Minister as its keeper. The section also allows provision to be made by an Order in Council about the preparation and publication of the Letters Patent that signify that Royal Assent has been given to an Act of the Assembly.

**Part 5: Finance**

**Overview of Part 5**

441. **Part 5** puts in place new provisions, dealing with the administration of the finances of the Assembly and the Welsh Ministers. These draw on the relevant sections of the Scotland Act 1998. But the provisions concerning the manner in which the Assembly will decide on the spending plans of Welsh Ministers (and others) represent a new model.

***The Welsh Consolidated Fund***

442. **Section 117** establishes a Welsh Consolidated Fund (WCF). The Fund will receive payments from the Secretary of State out of moneys voted by Parliament (section 118). The moneys voted by Parliament to the Secretary of State will be calculated having regard to the "Barnett Formula", to determine what is known as the "Welsh Block Grant". The Secretary of State will deduct the administrative expenses of the Wales Office from this, and pay the remainder into the WCF. The Secretary of State will be required, at least four months before the beginning of each financial year, to prepare and lay before the Assembly a written statement with an estimate of payments to be made into the Fund, and to the Welsh Ministers, First Minister and Counsel General, in that financial year (section 119). Under section 120, provision can be made so that certain categories of receipts are to be dealt with other than by payment into the WCF, and section 130 makes provision for receipts paid into the WCF by mistake which need to be recovered.
443. **Sections 121 -123** make provision for the Welsh Ministers to borrow from the Secretary of State either to cover any short-term deficit in the Fund or to provide a working balance. The total of such borrowing may not exceed £500m at any given time. The

Secretary of State will be required to prepare accounts in respect of loans issued under these powers.

444. [Sections 124-129](#) are the provisions specifying the processes which must be complied with for expenditure out of the Fund to be regular. The norm is that sums may only be paid out of the WCF on the authority of a Budget resolution passed by the Assembly. There will be a small number of instances in which a sum may be paid out of the WCF without the need for a reference to it in a Budget motion, because the sum has been “charged on” the Fund by an enactment (for an example in this Act, see section 20(5)). As stated above, there is also special provision, in section 130, for monies that were paid into the WCF by mistake to be paid out of it without the authority of a Budget resolution. The only other exceptions to the principle that a Budget resolution of the Assembly is required before sums can be spent from the WCF are described in sections 127 and 128 (see below).
445. [Section 125](#) sets out the requirement for an annual Budget motion (which may be moved only by the First Minister or another Welsh Minister) seeking authorisation for:
- a) the amounts of resources that can be used on the “services and purposes” specified in the motion,
  - b) the amounts of accruing resources which may be retained (rather than being paid into the Welsh Consolidated Fund), and
  - c) the amounts of cash that may be issued from the Fund.
446. [Section 126](#) permits one or more Supplementary Budget motions to be moved to vary the amount of resources that can be used for specified services and purposes in a particular financial year, or to add new services and purposes and allocate resources to them. A Supplementary Budget motion may also vary the amounts of resources that can be retained instead of being paid into the WCF, or authorise new retentions. Once a Budget motion has been approved by the Assembly and becomes a Budget resolution, sums may be paid out of the WCF in support of the services and purposes referred to in the resolution; it will be for the Auditor General for Wales, under section 129, to give approvals for sums to be paid out, if satisfied that the payment out will be in accordance with the relevant Budget resolutions.
447. As mentioned above, sections 127 and 128 provide exceptions to the general principle of no payments out of the Fund without a Budget resolution (or a provision charging the payment in question on the WCF). Section 127 deals with the situation where no Budget resolution has been adopted by the Assembly by the beginning of the relevant financial year. In the absence of such a resolution, resources for services and purposes may be used up to a specified level, determined as a fixed percentage of the preceding financial year’s provision for that service or purpose; in this way, a failure by the Assembly to pass a Budget resolution by the beginning of the financial year will not automatically lead to the public services funded by the Welsh Ministers exhausting their resources within a few days of the beginning of the financial year. Section 128 allows for resources to be used, up to a specified level, in emergency situations where Welsh Ministers consider the expenditure to be in the public interest and it is not reasonably practicable, for reasons of urgency, for a Budget motion to be put down to authorise the expenditure. In such a situation, the Welsh Ministers are required as soon as possible to lay a report before the Assembly explaining why they considered the action they took to be necessary.

#### ***Accounts and Audit – Sections 131 – 145***

448. Provision is made in the Act for the preparation of accounts in respect of the use of resources by the Welsh Ministers and Counsel General; payments into and out of the WCF; the use of resources by the Assembly Commission; and for the preparation by the Welsh Ministers of “Whole of Government of Wales accounts”, a concept deriving



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from the Government Resources and Accounts Act 2000. The Act defines who are to be the Accounting Officers for the Welsh Ministers and the Assembly Commission. The Auditor General for Wales (AGW) has responsibility for examining and certifying these accounts, and for carrying out examinations into the economy, efficiency and effectiveness with which the Welsh Ministers and the Assembly Commission have used their respective resources in discharging their functions. The AGW can lay before the Assembly any report made by the AGW in the exercise of these responsibilities, and must do so in the case of reports on accounts, or where the AGW considers it is in the public interest to do so (Schedule 8, paragraph 19). The Audit Committee can give views on what examinations the AGW should carry out and can also under section 143 consider and report itself on the reports and accounts laid before the Assembly by the AGW. The Comptroller and Auditor General may carry out examinations into the payments into and out of the WCF, and report the results of such examinations to the House of Commons and the Assembly.

449. [Section 145](#) and Schedule 8 to the Act make revised provision for the office of AGW. In particular, it is for Her Majesty to make appointments to the office of AGW, on the nomination of the Assembly; but the AGW is not in the exercise of any functions to be subject to the direction or control of either the Assembly or the Welsh Assembly Government. The AGW obtains funding by submitting an estimate of the expenses of carrying out the functions of that office to the Audit Committee. This is then laid before the Assembly, with any modifications the Committee considers appropriate; but if modifications are to be proposed, that may only be done following consultation with the AGW. The Assembly will vote on the resources to be allocated to the AGW as part of the Budget resolution process, referred to above.