

# **PUBLIC BODIES ACT 2011**

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## **EXPLANATORY NOTES**

### **COMMENTARY**

#### **Part 1: General Order-Making Powers**

##### ***Section 1: Power to abolish***

20. **Section 1** confers power on a Minister to make provision by order to abolish any body or office listed in Schedule 1. As *subsection (2)* describes, such an order can include provision transferring any or all of the functions of an abolished body or office to an “eligible person” (as defined in *subsection (3)*). On this basis, an order made under section 1 might, for instance, abolish a body and all its functions, or might abolish a body and transfer some or all of its functions to a Minister, to another person exercising public functions, a company limited by guarantee, co-operative society, a charitable incorporated organisation, or any other eligible person permitted by *subsection (3)*.

##### ***Section 2: Power to merge***

21. **Section 2** confers power on a Minister to make provision by order to merge any group of bodies or offices (or both) listed in Schedule 2. Such provision might involve the establishment of a new body corporate or office (including provision for constitutional arrangements) to replace the bodies being merged, or the abolition of all but one body or office in a group (in which case the remaining body or office would assume some or all of the functions previously held by other members of the group). An order under this section may also include a transfer of functions to an eligible person (as defined in section 1(3)) which is not included in the group of bodies or offices involved in the merger.

##### ***Section 3: Power to modify constitutional arrangements***

22. **Section 3** confers power on a Minister to make provision by order to modify the constitutional arrangements of any body or office listed in Schedule 3. The term “constitutional arrangements” refers to a wide range of arrangements relating to the structure, governance and functions of a body or office: Examples of provision that could be made are stated in *subsections (2) and (3)* and provision that could be made under section 3 includes:

- Provision to ensure a particular number of non-executive directors on the board of a body or office;
- Provision requiring a body to report publicly on how it has sought to increase efficiency in the exercise of its functions;
- Provision requiring permission from a Minister in relation to employment of staff, or remuneration of staff in excess of an agreed threshold;
- Provision requiring that the chair of a body, or an office-holder, be required to undergo a pre-appointment hearing process before taking up their post.

#### ***Section 4: Power to modify funding arrangements***

23. **Section 4** confers power on a Minister to make provision by order to modify the funding arrangements of a body or office listed in Schedule 4. *Subsection (2)* requires the consent of Treasury for an order to be made under section 4. *Subsection (3)* specifies that the power includes alterations to the funding a body or office receives from a Minister, or giving a body or office-holder the power to charge a fee for a function that body or office carries out. For example, an order made under this section might give a body which issues licences for a particular purpose the power to charge a fee for the issue of such a licence.

#### ***Section 5: Power to modify or transfer functions***

24. **Section 5** confers power on a Minister to make provision by order to modify the functions of a body or office-holder listed in Schedule 5, or to transfer a function of such a body or office-holder to an eligible person. *Subsection (2)* describes the modification of functions as including the conferral of new functions, the abolition of functions, or changes to the purpose for which, or conditions under which, functions are exercised. So, for example, an order under section 5 might give new functions to a body, while transferring some of its existing functions to a Minister or other eligible person.

#### ***Section 6: Consequential provision etc***

25. **Section 6** provides that an order under sections 1 to 5 may include consequential, supplementary, incidental or transitional provisions or savings. This includes a power to allow an order under sections 1, 2 or 5 transferring functions to make consequential provisions to modify the functions or constitutional or funding arrangements of the transferor or transferee. For example, this power could be used to amend the qualification requirements for members of a body if a new function is conferred on it under section 5.

#### ***Section 7: Restrictions on Ministerial powers***

26. **Section 7** imposes restrictions on the use of the order-making powers conferred on Ministers by sections 1 to 5. *Subsection (1)* stipulates that an order must not prevent an affected function from being exercised independently of Ministers in any of the cases set out in *subsection (2)*. *Subsection (3)* requires that provision made by an order made under sections 1 to 5 must be proportionate to the reasons for the order. The reasons for the order will be set out in the explanatory document which accompanies an order, as required by section 11(2).

#### ***Section 8: Purpose and conditions***

27. *Subsection (1)* stipulates that a Minister may only make an order under sections 1 to 5 if the Minister considers that the order will serve the purpose of improving the exercise of public functions, having regard to the matters described in *subsection (1)(a) to (d)*.
28. *Subsection (2)* places restrictions on orders made by a Minister in that the Minister may only make an order under sections 1 to 5 if the Minister considers that it does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

#### ***Section 9: Devolution***

29. **Section 9** limits the powers of Ministers to make orders in relation to devolved matters.
30. *Subsection (1)* provides that orders made under sections 1 to 5 which contain provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament or which modifies the functions of Scottish Ministers require the consent of the Scottish Parliament, subject to *subsection (2)*.

31. *Subsection (3)* provides that orders made under sections 1 to 5 which contain provision which would be within the legislative competence of the Northern Ireland Assembly if it were contained in an Act of that Assembly or which modifies the functions of persons within *subsection (4)*, require the consent of the Northern Ireland Assembly. *Subsection (5)* provides that the stipulation in subsection (3)(a) does not apply if a Bill for an Act of the Northern Ireland Assembly containing the provision would require the consent of the Secretary of State under section 8 of the Northern Ireland Act 1998 and the provision does not affect, otherwise than incidentally, a transferred matter.
32. *Subsection (6)* provides that an order made under those sections requires the consent of the National Assembly for Wales if the order contains provision which would be within the legislative competence of the National Assembly if contained in a Measure or Act of that Assembly.
33. *Subsection (7)* provides that an order made under those sections requires the consent of the Welsh Ministers if it contains provision modifying a function of the Welsh Ministers, the First Minister or the Counsel General to the Welsh Assembly Government, or if it could be made by any of those persons. *Subsection (8)* sets out limitations on the definition of “function” for these purposes.

### ***Section 10: Consultation***

34. *Subsection (1)* requires a Minister who proposes to make an order under sections 1 to 5 to consult the persons described. *Subsection (2)* requires a Minister to carry out any appropriate further consultation if, following a consultation conducted under subsection (1), the Minister considers it appropriate to change all or part of the proposal. *Subsection (3)* provides that consultation carried out before the commencement of the section may be considered to meet the requirements of the section. *Subsection (4)* states that the requirement to consult a body or office affected by proposals under *subsection (1)(a)* does not apply where a body has no members or an office is vacant.

### ***Section 11: Procedure***

35. This section sets out the procedure applicable to orders made under sections 1 to 5. *Subsections (1) to (3)* require a Minister to lay a draft order and explanatory document before Parliament, but the Minister may not do so for 12 weeks from the beginning of the consultation process. *Subsection (4)* provides that any orders must be approved by Parliament through the use of the affirmative procedure (approval by a resolution of each House of Parliament) unless the procedure described in the following paragraph applies.
36. *Subsections (5) to (9)* provide for an enhanced affirmative procedure if either House of Parliament so requires, or a Committee of either House so recommends (and the recommendation is not rejected by the House). Such a resolution or recommendation must be made within 30 days of the laying of a draft order. The enhanced procedure extends the scrutiny period for an order to 60 days, and requires a Minister to have regard to any recommendations or representations made by Parliament during this period. Following the conclusion of the scrutiny period, a Minister would have the option of laying a revised draft order.

### ***Section 12: Time limits***

37. **Section 12** provides that each entry in Schedules 1 to 5 will cease to have effect 5 years after the commencement of that entry. This is, therefore, a form of “sunsetting” in that the relevant order-making power will only be exercisable in relation to the entry for five years.
38. *Subsection (5)* of section 6 provides that an order under sections 1 to 5 may also include provision repealing the relevant entry (which may be prior to the end of the five year time limit provided for by virtue of section 12).

***Section 13: Powers relating to environmental bodies***

39. **Section 13** confers power on Welsh Ministers, by order, to modify and transfer functions of certain environmental bodies, or to transfer certain functions relating to the environment to specified bodies.
40. *Subsection (1)* confers power to modify functions of the Countryside Council for Wales (“the CCW”), the Environment Agency as it relates to Wales, the Forestry Commissioners as they relate to Wales or a Welsh Flood and Coastal Committee (as defined in *subsection (8)*).
41. *Subsection (2)* confers power to transfer functions of the CCW. The persons to whom functions may be transferred are a new body (provided for in *subsection (7)*), the Environment Agency or Forestry Commissioners or any other person exercising Welsh devolved functions.
42. *Subsection (3)* confers power to transfer Welsh devolved functions (as defined in section 36) of the Environment Agency or the Forestry Commissioners to a new body, the CCW, the Welsh Ministers or any other person exercising Welsh devolved functions.
43. *Subsection (4)* confers power to transfer functions of Welsh Flood and Coastal Committees to a new body, the Welsh Ministers or any other person exercising Welsh devolved functions.
44. *Subsections (5) and (6)* create further powers for Welsh Ministers to transfer any of their own functions relating to the environment or to transfer any Welsh environmental function which is exercisable by other persons. Transfers made under subsections (5) and (6) can be to a new body, CCW, the Environment Agency or the Forestry Commissioners.
45. *Subsection (7)* confers a power on Welsh Ministers to establish a new body corporate for the purposes of this section.
46. *Subsection (9)* stipulates that the Welsh Ministers must consult with the Secretary of State prior to making an order under subsection (1) or (4) relating to a Welsh Flood and Coastal Committee established for a region not wholly in Wales.

***Section 14: Powers relating to other bodies***

47. **Section 14** confers order-making powers on the Welsh Ministers in relation to other specified bodies.
48. *Subsection (1)* confers a power to abolish the bodies specified in that subsection. *Subsection (2)* provides power allowing the transfer of functions from such bodies, in the event of their abolition, to the Welsh Ministers or any other person exercising Welsh devolved functions.
49. *Subsection (3)* confers a power by order to modify the funding arrangements of drinking water inspectors appointed by the Welsh Ministers. This includes provision to make alterations to the funding inspectors receive from the Welsh Ministers (*subsection (4)*).
50. *Subsection (5)* confers order-making powers on the Welsh Ministers to modify the constitutional arrangements or functions of internal drainage boards for areas wholly or mainly in Wales, or to transfer those boards’ functions to any of the persons listed. *Subsection (7)* provides that prior to making an order in relation to a board which is for an area in England as well as Wales, the Welsh Ministers must consult the Secretary of State.

***Section 15: Powers of Welsh Ministers: consequential provision etc***

51. **Section 15** provides that an order made under section 13 or 14 may include consequential, supplementary, incidental or transitional provision.
52. *Subsection (2)* provides that where an order transfers functions under section 13 or 14, the order may also modify the constitutional or funding arrangements of the person from or to whom functions are transferred, or modify the functions of such persons. It also confers a power for the Welsh Ministers to make directions in relation to functions which have been transferred.
53. *Subsection (3)* provides that where an order modifies functions of a person under section 13 or 14 the order-making power includes power to modify the constitutional or funding arrangements of that person. *Subsection (4)* restricts the consequential or supplementary order-making powers in subsections (2) and (3) such that they may not be exercised to modify the constitutional or funding arrangements of the Environment Agency, Forestry Commissioners or any other cross-border operator (as defined in section 36). Instead, *subsection (6)* confers a power on the Secretary of State to modify the constitutional or funding arrangements of such a person in consequence of an order made by the Welsh Ministers under section 13 or 14.

***Section 16: Purpose and conditions for orders made by Welsh Ministers***

54. **Section 16** stipulates the purpose for which an order under section 13 or 14 can be made. The effect of this section is to ensure that the Welsh Ministers may only make an order under these sections if they consider that the order will serve the purpose of improving the exercise of public functions, having regard to the matters described in subsection (1)(a) to (d).
55. *Subsection (2)* places restrictions on orders made by the Welsh Ministers in that they may only make an order if they consider that it does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

***Section 17: Consent of UK Ministers***

56. This section sets out the circumstances in which consent of Ministers is required for an order made by the Welsh Ministers under section 13 or 14. *Subsection (1)* provides that an order transferring a function to or conferring a function on the Environment Agency, Forestry Commissioners or other cross-border operators requires the consent of the Secretary of State, and *subsection (2)* requires the Secretary of State's consent to an order which modifies non-devolved functions of such persons. *Subsection (3)* requires a Minister's consent to any order which transfers functions to, or modifies functions of, the Minister.

***Section 18: Consultation by Welsh Ministers***

57. This section requires the Welsh Ministers when proposing to make an order under section 13 or 14 to consult the persons described. *Subsection (2)* places a duty on the Welsh Ministers to carry out any appropriate further consultation if, following a consultation conducted under *subsection (1)*, they consider it appropriate to change all or part of the proposal. *Subsection (3)* provides that consultation carried out before the commencement of the section may be considered to meet the requirements of the section. *Subsection (4)* allows for the requirement to consult a body or person exercising public functions affected by proposals under *subsection (1)(a)* not to apply to a body with no members or an office which is vacant.



***Section 19: Procedures for orders by Welsh Ministers etc.***

58. This section details the legislative procedure applying to orders made under section 13 or 14. *Subsections (1) to (3)* require the Welsh Ministers to lay a draft order and explanatory document before the National Assembly for Wales after a period of not less than twelve weeks following the commencement of consultation for the purposes of section 18.
59. *Subsection (5)* provides that the National Assembly, or a Committee of the Assembly charged with reporting on the Order, can opt by resolution or recommendation respectively that an enhanced affirmative procedure, as described in *subsections (6) to (9)*, should apply in relation to any draft order laid before the Assembly in compliance with *subsection (1)*. Such a resolution or recommendation must be made within 30 days of the laying of a draft order. If no such resolution or recommendation is made, the affirmative procedure described in *subsection (4)* will apply to the order.

***Section 20: Restriction on creation of functions***

60. **Section 20** stipulates that an order made under the preceding provisions of the Act may not create powers of forcible entry, search or seizure, a power to compel the giving of evidence, or a power to make subordinate legislation. This does not prevent the repeal and re-enactment of a power (see *subsection (2)*).

***Section 21: Restriction on transfer and delegation of functions***

61. **Section 21** restricts the order-making powers in the preceding provisions of the Act in respect of the transfer of functions. Firstly, a transfer may only be made to a charity or to a person not otherwise exercising public functions who is not a charity if that charity or person has consented (*subsection (1)*). Secondly, an order may not transfer a function specified in *subsection (3)* to a person not otherwise exercising public functions.

***Section 22: Restriction on creation of criminal offences***

62. **Section 22** restricts the order-making powers in the preceding provisions of the Act in respect of the creation of criminal offences. An order may not create an offence where the offence is punishable by a term of imprisonment, or a fine, which exceeds certain limits. This does not prevent the repeal and re-enactment of an offence (*subsection (5)*).

***Section 23: Transfer schemes***

63. **Section 23** confers a power to make a scheme to transfer property, rights and liabilities on Ministers in connection with an order under sections 1 to 5, and on Welsh Ministers in connection with an order under sections 13 and 14. In the case of a scheme under *subsection (1)(a)* (schemes made by a Minister), the transfer of property, rights and liabilities must be to an eligible person or any body corporate unless constitutional or funding arrangements are being modified under sections 3 or 4, in which case the transfer must be to a Minister. In the case of a scheme under made by the Welsh Ministers under *subsection (1)(b)*, the transfer must be to the Welsh Ministers, a person exercising Welsh devolved functions or a body corporate.
64. *Subsection (6)* lists supplementary, incidental and transitional provision that may be made by a transfer scheme. These include making provision the same as or similar to the TUPE regulations (the [Transfer of Undertakings \(Protections of Employment\) Regulations 2006 \(S.I. 2006/246\)](#)). *Subsection (8)* makes provision in relation to individuals holding employment in the civil service.

***Section 24: Transfer schemes: procedure***

65. This section stipulates that transfer schemes may be included within the order to which they relate. If they are not included within the order, they must be laid before the

*These notes refer to the Public Bodies Act 2011 (c.24)  
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appropriate legislative body (Parliament for schemes in connection with sections 1 to 5, or the National Assembly for Wales for schemes in connection with section 13 and 14) after being made.

***Section 25: Transfer schemes: taxation***

66. **Section 25** confers power on the Treasury to make provision by order varying the way in which tax provisions will be applied either for anything transferred under a scheme made under section 23, or anything done for the purposes of, or in relation to a transfer under such a scheme.
67. Any such order is to be subject to the negative resolution procedure in the House of Commons (see *subsection (4)*).