

GOVERNMENT OF WALES ACT 2006

EXPLANATORY NOTES

DETAILED COMMENTARY ON SECTIONS IN PART 3

Section 93: Assembly Measures

325. This section confers on the Assembly the power to pass a type of subordinate legislation in relation to Wales called “Measures of the National Assembly for Wales” in English, or “Mesurau Cynulliad Cenedlaethol Cymru” in Welsh. They are referred to in this Act as Assembly Measures. The ultimate right of Parliament to legislate in relation to Wales, even in principle on a matter over which legislative competence has been conferred on the Assembly, is preserved.
326. Assembly Measures will, subject to the limitations set out in this section and in Schedule 5 as to what provisions they may contain, have the same effect as an Act of Parliament. In other words they may modify the effect of legislation made or enacted before or after this Act is enacted, or make entirely new provision.
327. An Assembly Measure will be enacted (i.e., will become law) when:
- (a) it has been passed by the Assembly, or
 - (b) alternatively, when it has been “approved” by the Assembly, in the case of a Measure which has been reconsidered in accordance with provision made under section 98(6),
- and it has been approved by Her Majesty in Council (i.e. Her Majesty attending a meeting of the Privy Council).
328. If an Assembly Measure is enacted, but it then appears 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 effect of section 93(3) is that the invalidity or irregularity will not render the Measure invalid and it will still be law. However, this subsection will not save a purported Assembly Measure which has not been passed at all by the Assembly because, in those circumstances, section 93(2) would not have been complied with.
329. Assembly Measures are to be judicially noticed. This means that, if an Assembly Measure is relevant in any Court proceedings, the court will apply its provisions without them having to be proved in court by evidence.

Section 94: Legislative competence

330. The purpose of this section and Schedule 5 is to set out the extent of the Assembly’s power to pass Measures (the Assembly’s “legislative competence”). Its legislative competence may be altered by Order in Council under section 95, amending Schedule 5.
331. Provided it complies with the limits set by this section and by Schedule 5, an Assembly Measure can have the same effect as an Act of the UK Parliament. In other words it can, for example, modify existing Acts of Parliament or other enactments and it can make new provision not covered by existing statutes.

332. Subsection (2) makes it clear that if an Assembly Measure contains a provision which is outside the Assembly's legislative competence (that is, it goes beyond the limits set by this section and by Schedule 5, as amended from time to time), that provision has no legal effect. However, the whole Measure is not rendered invalid, provided that the provision which is outside legislative competence can be severed from the Measure.
333. Subsections (3) to (6) set out the rules with which a provision in a Measure must comply in order to be within the Assembly's legislative competence. It will only be within competence if it satisfies the criteria in *either* 94(4) *or* 94(5), *and* it also complies with 94(6).
334. In order to satisfy the criteria in section 94(4):
- a) the provision in question must relate to one of the "matters" specified in Part 1 of Schedule 5; and
 - b) 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 exercisable other than in relation to Wales.
335. [Part 1](#) of Schedule 5 contains a list of fields, but only one of them ("National Assembly for Wales") has any matters specified in relation to it, and those relate to the internal arrangements of the Assembly. Orders in Council under section 95 will have the effect of adding matters under different field headings, thereby enabling the criteria referred to in (a) above to be satisfied over wider policy areas.
336. In order to satisfy the criteria in section 94(5):
- a) the provision in question must be one which enables a provision of an Assembly Measure (i.e. one which itself satisfies the criteria in subsection (4)) to be enforced or 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 such a provision.
337. So if a provision satisfies the criteria in subsection (5) it is not subject to the limitation in subsection (4) that a provision in a Measure may only relate to Wales. This, for example, will enable the Assembly to include in Measures necessary consequential amendments to Acts of Parliament to make it clear where they no longer apply in relation to Wales or to include provisions enabling the courts of England and Wales to enforce Assembly Measures effectively.
338. In order to comply with section 94(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 5 to the Act. There are exceptions from these restrictions, which are set out in Part 3 of Schedule 5; and
 - b) the provision in question may not "extend" to any jurisdiction other than England and Wales. (England and Wales is a single legal jurisdiction and Assembly Measures will form part of the law of that jurisdiction. Although they will only, with limited exceptions, apply to Wales, they will be able to be enforced by the courts of England and Wales generally. They will not, however, be able to make provision forming part of the law of other legal jurisdictions such as Scotland); and
 - c) the provision in question must not be incompatible with the European Convention on Human Rights or European Community law.
339. Subsection (7) lays down the test to be used to decide whether a particular provision in an Assembly Measure relates to a matter or matters listed in Part 1 of Schedule 5,

and therefore whether it meets the criteria in 94(4)(a). The correct approach will be to consider the purpose of the provision having regard to its effect in all the circumstances.

Section 95: Legislative Competence : supplementary

340. This section provides a mechanism by which amendments may be made to Schedule 5 to the Act, so as to enhance, restrict or otherwise change the Assembly's legislative competence to pass Assembly Measures. Amendments are made by Order in Council, which can:
- a) add to, remove or change the fields set out in Part 1 of Schedule 5;
 - b) list a matter or a further matter under a field, or remove or change a matter already listed;
 - c) amend Parts 2 or 3 of Schedule 5, which set out general restrictions on the passing of Assembly Measures, and exceptions to those restrictions respectively.
341. A field cannot be added to Schedule 5 if it is one in which no functions are exercisable by the Welsh Ministers, the First Minister or the Counsel General.
342. An Order in Council amending Schedule 5 can also make changes to any enactment, 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 5.
343. Orders in Council under this section can make provisions which apply retrospectively (i.e., to things which have already been done). So, for example, this power could be used to clarify the extent of a matter in Part 1 of Schedule 5, where there has been a legal challenge to the validity of an Assembly Measure made in relation to that matter, and there is a need for legal certainty about the extent of the matter.
344. An Order in Council under this section may only be made if the draft of it has been approved by the Assembly, the House of Commons and the House of Lords. Thus Parliament retains control over the fields and matters in relation to which the Assembly has power to pass Measures.
345. Once a draft Order in Council has been approved by the Assembly, the First Minister must, as soon as reasonably practicable, send the Secretary of State written notice of that fact and a copy of the draft approved by the Assembly. The Secretary of State must then decide whether to lay the draft Order in Council before Parliament with a view to obtaining approval of the two Houses. The Secretary of State is not obliged to lay the draft before Parliament but if the Secretary of State does not do so before the end of 60 days (not counting days when Parliament is dissolved or prorogued or adjourned for more than four days) written notice of the reasons for refusing to do so must be given to the First Minister, who must then lay it before the Assembly. The Assembly must publish it.
346. Under subsection (10), if a change is made to Schedule 5, and thus to the Assembly's legislative competence to pass Measures, the change is to have no effect upon Assembly Measures which have already been passed (or approved, in the case of Measures which have been reconsidered and amended) by the Assembly. So even if the powers of the Assembly were narrowed so as to remove the power to pass a particular Measure it would remain law. This is subject to the power to make retrospective provision in the Order in Council.

Section 96: Scrutiny of proposed Orders in Council

347. Under this section the Counsel General or the Attorney General may refer a proposed Order in Council to the Supreme Court for a decision as to whether the matter which it proposes to add to Part 1 of Schedule 5 relates to a field listed in that Part.

Procedure

Section 97: Introduction of proposed Assembly Measures

- 348. This section imposes certain requirements in relation to the introduction into the Assembly of proposed Assembly Measures.
- 349. A proposed Assembly Measure 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 proposed Measure.
- 350. The person in charge of a proposed Assembly Measure must, on or before the proposed Measure's introduction, make a statement expressing their view that the provisions in the proposed Measure are within the Assembly's legislative competence.
- 351. The Presiding Officer of the Assembly must on or before introduction of a proposed Measure, decide whether or not it is within the Assembly's legislative competence and state that decision.

Section 98: Proceedings on proposed Assembly Measures

- 352. 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 Measures which are reconsidered and amended) of proposed Measures by the Assembly.
- 353. Standing orders must ensure that, generally, Measures must pass through three stages.
- 354. There must firstly be an opportunity for a general debate about the proposed Measure 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.
- 355. There must then be a stage involving consideration of, and an opportunity for Assembly members to vote on, the details of the proposed Measure, corresponding to the committee stage of a Bill at Westminster.
- 356. Finally there must be a stage at which members can vote on whether to pass the proposed Measure in its final form. This is equivalent to the Third Reading of a Parliamentary Bill.
- 357. Standing orders may allow a different procedure in the case of proposed Measures which fall within certain categories, namely those which restate the law, those which repeal or revoke spent enactments and "private" proposed Assembly Measures. In the case of the first two, standing orders may permit a streamlined procedure whilst in the case of "private" proposed Measures procedures they are likely to include an opportunity for individuals affected to make representations to the Assembly, as in the case of private Parliamentary Bills.
- 358. Standing orders must include provision for securing that, except in specified circumstances (which are left to standing orders to define) a proposed Assembly Measure can only be passed if the text of the proposed Measure is in both English and Welsh.
- 359. Standing orders must provide for a proposed Measure which has been passed by the Assembly to be reconsidered in certain circumstances. These are:
 - a) where the Supreme Court has decided that the proposed Measure is outside the Assembly's legislative competence, following the Counsel General or the Attorney General referring that issue to the Supreme Court under section 99;
 - b) where the Counsel General or the Attorney General has referred the issue of whether the proposed Measure is within the Assembly's legislative competence

to the Supreme Court under section 99, 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 proposed Measure; or

- c) where the Secretary of State has made an Order under section 101 prohibiting the Clerk of the Assembly from submitting a proposed Measure for approval by Her Majesty.
360. If a proposed Assembly Measure is, upon reconsideration, amended by the Assembly, then there must be a further final stage at which the amended proposed Assembly Measure can be approved or rejected by the Assembly.

Section 99: Scrutiny of Proposed Assembly Measures by Supreme Court

361. 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 proposed Assembly Measures or particular provisions of proposed Assembly Measures are within the Assembly's legislative competence. This may only be done within the four week period starting with the date the Measure was passed by the Assembly or, in the case of a Measure which has been reconsidered and approved by the Assembly, starting with the date the Measure was approved by the Assembly.
362. 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 proposed Measure has subsequently been reconsidered and approved).

Section 100: ECJ references

363. Where the Counsel General or the Attorney General has referred a proposed Assembly Measure 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 proposed Measure under provision made under section 98(6). If it does so the person who referred the proposed Measure 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 proposed Measure 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 proposed Measure to the Supreme Court, a fresh reference may be made, within four weeks of that approval.

Section 101: Power to intervene in certain cases

364. This section enables the Secretary of State to intervene and, by order which would be subject to annulment in pursuance of a resolution of either House of Parliament, prohibit the Clerk from submitting a proposed Measure for approval by Her Majesty in Council if the Secretary of State has reasonable grounds to believe that its provisions:
- a) would have an adverse effect on matters which are not within the legislative competence of the Assembly;
 - b) might have a serious adverse impact on water resources in England, water supply in England or the quality of water in England;
 - 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 obligation or the interests of defence or national security.

365. The first ground set out above on which the Secretary of State may make an order, appears in the Act in the form “would have an adverse effect on any matter which is *not specified* in Part 1 of Schedule 5”. Matters which are not specified (i.e., as ones in respect of which the Assembly has legislative competence) include those which are excepted from a matter that is specified.
366. Such an order may be made within four weeks of the passing of the proposed Measure, or of the approval of the proposed Measure following reconsideration under provision made under section 98(6) or, if a reference to the Supreme Court has been made under section 99, 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 proposed Measure such an order is barred in relation to it, unless the proposed Measure is reconsidered and approved by the Assembly under provision made under section 98(6) after that notification was given.

Section 102: Approval of proposed Assembly Measures

367. Once a proposed Measure has been passed (or approved upon reconsideration) by the Assembly, it is for the Clerk to submit it for approval by Her Majesty in Council
368. However, the Clerk may not do so:
- a) if the Counsel General or the Attorney General is still entitled to refer to the Supreme Court under section 99 the issue of whether a provision in the proposed Measure 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 99 which has not yet been decided or disposed of;
 - c) if the Secretary of State is still entitled to make an order under section 101 (see the notes to that section) prohibiting the Clerk from submitting the proposed Measure for approval.
369. The Clerk may not submit a proposed Measure for approval by Her Majesty in its unamended form if:
- a) the Supreme Court has ruled, on a reference under section 99, that the proposed Measure, 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 Measure.
370. Once Her Majesty in Council has approved a proposed Measure the Clerk must write the date of that approval on the text of the Measure, must publish the instrument by which Her Majesty approved the Measure and must, in accordance with standing orders, notify the Assembly of the date of that approval.

Part 4: Acts of the Assembly

Overview of Part 4

371. Following paragraphs 3.22 - 3.29 of “Better Governance for Wales”, this Part of the Act makes provision for the Assembly to have primary legislative powers across the broad range of the subjects in Part 1 of Schedule 7 without the need for further recourse to Parliament. As the White Paper made clear, such powers will only be conferred on the Assembly following approval for this in a referendum, and this Part of the Act also makes provision for holding one.

372. [Section 103](#) of the Act provides for a referendum to be authorised by Order in Council (and Schedule 6 makes more detailed provision in relation to its organisation), but an Order in Council may not be submitted to Her Majesty in Council for approval unless a draft has been approved by both Houses of Parliament and the Assembly; and in the case of the Assembly, such approval must be demonstrated by Assembly Members representing not less than two-thirds (i.e. 40) of the Assembly seats voting in support of the motion. If a referendum is held and there is majority support for conferring these powers on the Assembly, the effect of section 105 is that the Welsh Ministers would be able to make a commencement order to bring the relevant “primary power” provisions into force. Once that is done, the Order in Council/Measure provisions of Part 3 of the Act will cease to have effect, and the Assembly would in future be able to pass legislation, to be known as Acts, in relation to one or more of the “subjects” set out in Schedule 7.
373. The White Paper stated that conferring primary legislative powers on the Assembly would mean that “it would be able to make law on all subjects within its devolved fields”. That is, the Assembly’s primary legislative powers would extend to those subjects where the Assembly constituted by the Government of Wales Act 1998 already has executive competence, and would preserve restrictions in particular areas where they exist now. The Act sets out those subjects, and some restrictions, in Schedule 7. Section 109 provides Order in Council powers for this Schedule to be updated to take account of any Measure making powers granted or transfers of functions agreed by Parliament between enactment and the time when any referendum might be in prospect; in other words, any referendum would proceed on the basis of an up to date statement of the scope of the powers to be conferred if the electorate approved of the Assembly gaining these powers.
374. Unlike the Scotland Act 1998, the Act defines the scope of the Assembly’s “primary” legislative powers (after a referendum) by listing the subjects in relation to which the Assembly would be able to make law, rather than only listing those areas outside its legislative competence. The reasons for this were set out in a joint Memorandum from the Secretary of State for Wales and the First Minister for Wales to the Welsh Affairs Committee¹:

“Under the approach of the Scotland Act 1998 changes to the law which are made by the Scottish Parliament are not limited to specific subjects. They can include changes to basic principles of law. For example, the Scottish Parliament has made changes in land law in Scotland, beginning with the Abolition of Feudal Tenure etc. (Scotland) Act 2000).

Scotland has its own distinct legal jurisdiction, with its own system of courts, judges, legal profession and provision for legal education. An ability on the part of its legislature to change basic principles of law and specific rules relating to subjects such as land law which have a general impact across almost all day-to-day activities is consistent with this situation.

Wales is different. It forms part of a single unified England and Wales jurisdiction with a common courts system, judges who can act throughout the two countries and lawyers who are educated and who practice in a way which does not distinguish between England and Wales. There is no intention to change this. The Assembly is to be able to make laws which apply in relation to activities in Wales but these will be part of the general law of the jurisdiction of England and Wales.

Lawyers who practice in Wales and judges who normally sit in Wales would inevitably be more familiar with laws which applied only to Wales than their colleagues in England but they would still be working within a single unified jurisdiction and if, in the course of a case being heard in England, it were relevant to consider something

¹ Evidence to the Committee, 10 November 2005.

done in Wales to which an Assembly Act applied then the court would apply that Act in exactly the same way as it would apply an Act of Parliament.

If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.

In order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects.

The other approach having, in principle, the same effect would be to transfer general law-making powers to the Assembly but then to reserve fundamental legal principles and basic legal rules to the UK Parliament. The view of Parliamentary Counsel is that such a reservation would be so complex and its effect so uncertain that the alternative of limiting devolved legislative competence to specific subjects would be by far the better approach.

There are further, subsidiary, reasons for adopting the Scotland Act 1978 approach in relation to Wales. Firstly, the list of reserved subjects which would apply in relation to Wales would be substantially longer and more complex than that in the Scotland Act 1998, in that it would need to include subjects such as criminal justice and the courts which are generally devolved in relation to Scotland but not in relation to Wales. Secondly, the task of formulating a list of devolved subjects in relation to Wales, which builds on the executive functions already devolved to the Assembly, is one which can develop out of the existing pattern of Welsh devolution and is therefore much easier to accomplish accurately and effectively than would be that of compiling an exhaustive list of subjects in relation to which the Assembly does not exercise executive functions”

375. Assembly legislation made in exercise of “primary” legislative powers will be known as Acts. Section 108 specifies the tests that provisions of Acts must satisfy if they are to be within its legislative competence. In particular, they must relate to one or more of the subjects in Part 1 of Schedule 7, and not fall within any of the exceptions in that Part. Restrictions on the use of the Assembly’s powers, within the scope of its general area of legislative competence, are set out in Part 2 of Schedule 7. The question whether a particular provision of an Act relates to a subject is to be determined by reference to its purpose, having regard (among other things) to its effect in all the circumstances” (section 108(7)). Subject to these and other tests being satisfied, an Assembly Act may make any provision that could be made by Act of Parliament.
376. [Sections 110](#) and [111](#) make provision about Assembly proceedings on draft Acts, which are referred to as Bills. Subject to exceptions for special categories of Bill (see section 111(3)), standing orders must include provision for general debate and a vote on the principles of a Bill; for detailed scrutiny of its provisions; and for a final endorsement of the Bill (including a final endorsement of a Bill which has been reconsidered and amended by the Assembly). Once Assembly consideration of the Bill is complete, the Clerk submits it to Her Majesty for Royal Assent, and the Bill becomes law on receiving this. But a period of four weeks following completion of the Assembly’s deliberations on the Bill must elapse before it can be submitted, during which time the Counsel General or the Attorney General may refer to the Supreme Court any question as to the vires of the Bill; or the Secretary of State may prevent it from being submitted for Royal Assent if the Secretary of State has reasonable grounds to believe that its provisions are incompatible with international obligations or the interests of defence or national security, or might have a serious adverse effect on water resources, water supply or water quality in England, or would have an adverse effect on the operation of the law as it applies to England, or on non-devolved matters. Section

*These notes refer to the Government of Wales Act 2006
(c.32) which received Royal Assent on 25 July 2006*

111(6) requires the standing orders to provide for Assembly reconsideration of the Bill's provisions in such circumstances. The Bill may be submitted for Royal Assent before the end of the four weeks following its passing by the Assembly, if the Attorney General and the Counsel General have notified the Clerk that they are not going to make a reference to the Supreme Court, and the Secretary of State has notified the Clerk that no order is going to be made under section 114.