

GOVERNMENT OF WALES ACT 2006

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.