

EXPLANATORY MEMORANDUM TO

THE NATIONAL ASSEMBLY FOR WALES REFERENDUM (ASSEMBLY ACT PROVISIONS) (REFERENDUM QUESTION, DATE OF REFERENDUM ETC) ORDER 2010

2010 No. 2837

1. This Explanatory Memorandum has been prepared by The Wales Office and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

This instrument prescribes the date, together with the question and preceding statement that will be on the ballot paper, for the referendum in Wales on whether the provisions in Part 4 (the Assembly Act provisions) of the Government of Wales Act 2006 (the 2006 Act) should come into force. It also sets out, amongst other things, the rules for the conduct of the referendum and those in relation to absent voting at the referendum. If the majority of those voting in the referendum vote yes and the Welsh Ministers commence the Assembly Act provisions, the legislative competence of the National Assembly for Wales (“the Assembly”) will be that set out in Part 4 of and Schedule 7 to the 2006 Act. If the majority vote no then the legislative competence will remain governed by Part 3 of and Schedule 5 to that Act – i.e. with the possibility of continuing conferral of competence under Part 3 of the 2006 Act or through Acts of Parliament.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None.

4. **Legislative Context**

4.1 Section 103 of the 2006 Act empowers Her Majesty, by Order in Council, to cause a referendum to be held throughout Wales about whether the Assembly Act provisions (defined in section 103(8) of the 2006 Act) should come into force. Schedule 6 of the 2006 Act makes further provision in relation to the referendum and the contents of the Order. Section 104 requires the Secretary of State to lay a draft of an Order in Council under section 103(1) if she receives written notification from the First Minister of the Welsh Assembly Government that the Assembly has passed a resolution, by a two thirds majority of all Assembly Members that it is in favour of making a recommendation to Her Majesty to make such an Order in Council. Notice from the First Minister was received on 17th February 2010. By virtue of section 104(3) if the Secretary of State for Wales refuses to lay such an Order within 120 days of the receipt of the notice, she must

inform the First Minister and give her reasons. The Secretary of State informed the First Minister of her reasons on 15th June 2010 and gave a commitment to lay a draft Order in Council as soon as was practicable.

4.2 The draft Order in Council must, in accordance with s103(4) of the 2006 Act, be approved by each House of Parliament and the Assembly. In the case of the Assembly the Order must be approved by a vote of two thirds of the total number of Assembly seats (40 out of 60) (s103(5) of the 2006 Act).

4.3 Should the majority of those voting in a referendum vote in favour of the Assembly Act provisions coming into force, those provisions will come into force by Order of the Welsh Ministers exercising the power under section 105 of the 2006 Act. That Order is subject to the affirmative procedure in the Assembly.

5. Territorial Extent and Application

This instrument extends to the United Kingdom except that the modifications made to enactments applied to the referendum have the same extent as the enactment modified. The practical application of the Order is limited to Wales.

6. European Convention on Human Rights

The Rt Honourable Cheryl Gillan MP, Secretary of State for Wales, has made the following statement:

“In my view the provisions of the National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum etc) Order 2010 are compatible with the Convention rights”.

7. Policy background

7.1 The 2006 Act makes provision for the Assembly to have legislative competence under Part 3 of the Act or Part 4. Currently competence is governed by Part 3 and competence is conferred over “Matters” that are inserted into the 20 Fields in Schedule 5 to the 2006 Act. This is done either by Legislative Competence Orders made under section 95 or provisions in Acts of Parliament amending Schedule 5. These matters enable the Assembly to pass laws known as Measures. The competence under Part 4 of the Act can be triggered following a majority vote in the referendum in favour of those “Assembly Act provisions” being commenced. In that case the Assembly will have all the primary legislative powers set out in Part 4 of and Schedule 7 to the 2006 Act and will be able to pass laws known as Acts of the Assembly.

7.2 On the 9th February 2010 the Assembly passed a resolution calling for a referendum in Wales to commence the Assembly Act provisions. As a result the First Minister wrote to the Secretary of State for Wales on

th February 2010 giving formal notice of the Assembly's resolution. The referendum will take place following the Secretary of State presenting a draft Order to Her Majesty in Council after it has been approved by a two-thirds majority of all Assembly Members in the Assembly and both Houses of Parliament.

Referendum Question

7.3 The referendum question will be:

“Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for.”

The question will be preceded by an explanatory preamble. The question and the preamble are from the revised version proposed by the Electoral Commission and agreed with the Secretary of State and the First Minister.

Date of referendum

7.4 The Secretary of State, having consulted with the First Minister, agreed that the referendum should take place on 3 March 2011 subject to Parliament and the Assembly approving the draft Order in Council.

Conduct of the Referendum

7.5 The referendum will be supervised by the Chief Counting Officer (the Chair of the Electoral Commission). The Chief Counting Officer may appoint a Deputy Chief Counting Officer and will appoint Counting Officers for the Referendum. The Counting Officers will be appointed in accordance with s128 of the Political Parties Elections and Referendums Act (2000). The rules of the referendum are set out in Schedule 3 of the draft Order.

Public Awareness of the referendum in Wales

7.6 The draft Order in Council (article 16) makes provision for the Electoral Commission to take such steps as they think appropriate to promote public awareness in Wales about the referendum (the subject matter of the referendum and how to vote in it). The Electoral Commission will also, in the event that it cannot designate a permitted participant to be the lead organisation (the designated organisation) for each outcome in the referendum, take such steps as it thinks appropriate to provide information for voters about the arguments for each answer to the referendum question (Schedule 6 paragraph 8 to the 2006 Act). The draft Order in Council will also require electoral

registration officers and counting officers to encourage participation in the referendum (Schedule 6 paragraph 7 to the 2006 Act, then Schedule 5 paragraph 1 to the 2006 Act applying section 69 of the Electoral Administration Act 2006).

- 7.7** The 2006 Act (Schedule 2, paragraph 5) also enables the National Assembly Commission to promote public awareness of the electoral system and the system of devolved government in Wales. The Assembly Commission will use these powers to carry out a public information campaign, to raise awareness in Wales of how the existing system of devolved government works, including what powers the Assembly has at present to make laws, and the powers it would have in the event of either outcome in the referendum.
- 7.8** There will be a statutory restriction on publication of promotional material which will apply to all levels of government and publicly funded bodies in accordance with s125 of the Political Parties, Elections and Referendums Act 2000 (PPERA 2000) for the 28 days before the poll.

Scope

- 7.9** The draft National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum etc) Order 2010 will enable a referendum to take place on 3 March 2011 for the people of Wales to decide if the National Assembly for Wales should have the power under Part 4 of and Schedule 7 to the 2006 Act to pass “Assembly Acts”.

8. Consultation on the referendum question/statement

Before laying a draft Order in Council, the Secretary of State has a duty to consult as she thinks appropriate in accordance with section 103 (6) of the 2006 Act. There was no public consultation on the draft Order in Council. However, the Secretary of State consulted key stakeholders as appropriate. The Secretary of State also consulted the Electoral Commission on the wording of the proposed question and preceding statement in accordance with section 104(4) of the PERA 2000 (c41) and has issued a Written Ministerial Statement dealing with the views of the Electoral Commission as to the intelligibility of the question and confirming that she has placed copies of the Electoral Commission’s report on the intelligibility of the question in Parliament. This report has also been sent to the First Minister in accordance with paragraph 3(3) of Schedule 6 to the 2006 Act.

9. Guidance

No guidance has been, or will be, issued in relation to this draft Order in Council. This Explanatory Memorandum explains the scope and policy context of matters included in the draft Order in Council. However, the Electoral Commission will provide guidance to the counting officers and registration officers on the conduct of the referendum, and to permitted participants on the requirements for registration and accounting for their expenditure running their campaigns. They

have the power to issue such guidance by virtue of section 10 of PPERA 2000 as modified by the draft Order in Council (Schedule 6 paragraph 1 to the 2006 Act).

10. Impact

A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. Regulatory Impact Assessments in relation to any Assembly Acts will be a matter for the Assembly.

11. Regulating small business

This does not apply to this Order in Council.

12. Monitoring & review

This draft Order in Council enables a referendum in Wales to take place; if the majority of those voting in the referendum vote in favour of the Assembly Act provisions coming into force, they will be commenced by an Order made by the Welsh Ministers. There will be no further monitoring of the effect of this Order in

Council. The Electoral Commission has a duty to prepare and publish a report on the administration of the referendum under s5 of PPERA 2000. Counting officers will be required by the Order to submit accounts to the Welsh Ministers, and Welsh Ministers can apply to the court for those accounts to be taxed (articles 13 and 14). If directed to do so by HM Treasury, the Welsh Ministers must also prepare accounts in respect of their expenditure in relation to the referendum (Article 15).

13. Contact

Queries about the content of the instrument or this memorandum should be addressed to Sandie Green (Tel: 029 20898202 or email Sandie.green@walesoffice.gsi.gov.uk).

Susan Olley (Tel: 02920 89 8568 or email Susan.olley@walesoffice.gsi.gov.uk) can answer legal queries about the instrument.