

EXPLANATORY MEMORANDUM TO
THE GOVERNMENT OF WALES ACT 2006 (AMENDMENT) ORDER 2021
2021 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Wales and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This Order made under section 109 of the Government of Wales Act 2006 (GoWA) amends Schedules 7A and 7B to that Act in light of the United Kingdom's exit from the European Union. The Order removes references in the list of reservations in Schedule 7A that are no longer relevant outside of the EU. It also modifies the consenting arrangements in Schedule 7B in relation to the removal of Minister of the Crown functions that are exercised concurrently with Welsh Ministers. The Order makes a small number of corrections to both Schedules.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies to England and Wales only.
- 3.3 In the view of the Department, for the purposes of House of Commons Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the Senedd Cymru / Welsh Parliament if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is UK wide.
- 4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Wales David Davies MP has made the following statement regarding Human Rights:

"In my view the provisions of the Government of Wales Act 2006 (Amendment) Order 2021 are compatible with the Convention rights."

6. Legislative Context

Consent Requirements

- 6.1 Section 8 of the European Union (Withdrawal) Act 2018 (EUWA) provides a power for Ministers of the Crown to fix deficiencies in retained EU law that would arise on exit day. In correcting deficiencies, a number of SIs made under this power have provided for functions currently exercised in the context of the UK's membership of the EU to be exercised concurrently by Ministers of the Crown and devolved administrations after exit. A number of new concurrent functions are also being established through the UK Government's primary legislative programme subject to the Senedd's consent.
- 6.2 Many of the concurrent functions created by EU exit SIs and recent primary legislation are within the Senedd's legislative competence and the Secretary of State can exercise those functions in relation to Wales only with the consent of Welsh Ministers. A number also require the Welsh Ministers to consult or seek the consent of a Minister of the Crown before exercising them.
- 6.3 Paragraph 11 of Schedule 7B to GoWA places restrictions on the Senedd's ability to remove or modify Minister of the Crown functions in devolved areas. Paragraph 11(1)(a) provides that an Act of the Senedd cannot, without the consent of the appropriate Minister of the Crown, remove or modify, or confer a power by subordinate legislation to remove or modify any function of a Minister of the Crown that relates to a qualified devolved function. A qualified devolved function is defined in paragraph 11(3) as a function that is conferred or imposed on, or transferred to, the Welsh Ministers, the First Minister or Counsel General by any Act or statutory instrument and is exercisable concurrently or jointly with a Minister of the Crown or only with the consent or agreement after consultation with a Minister of the Crown.
- 6.4 Were a Senedd Bill to seek to amend these concurrent functions so that they are exercised solely by Welsh Ministers, the Welsh Government would need to seek the UK Government's consent. This restriction is intended to protect those concurrent or joint powers set out in Schedule 3A to GoWA. This Schedule was inserted into GoWA by the Wales Act 2017 and at this point it was not envisaged that a significant number of additional concurrent functions would be created. The consent requirements are not considered to be appropriate in relation to the legislation referred to within this order.
- 6.5 Furthermore paragraph 8(1)(c) of Schedule 7B provides that the Senedd cannot, without the consent of the appropriate Minister of the Crown, confer, impose, modify, or remove¹ functions specifically exercisable in relation to a reserved authority. Paragraph 8(3) of Schedule 7B provides that a reserved authority means a Minister of the Crown or government department or any other public authority apart from a devolved Welsh authority. Section 157A of GoWA defines a devolved Welsh authority as a public authority whose functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters.
- 6.6 The Welsh Ministers' ability to give consent to the Secretary of State, or requirements on them to consult or seek the consent of a Minister of the Crown constitute a function in relation to a reserved authority. The Senedd could remove a function's concurrency

¹ The Senedd also cannot, without consent, confer a power by subordinate legislation to confer, impose, modify or remove functions specifically exercisable in relation to a reserved authority.

- so as to provide that Welsh Ministers exercise the function solely - only with the consent of the appropriate Minister of the Crown (because doing so would remove a function of a Minister of the Crown (a reserved authority) and therefore engage the restriction at paragraph 8(1)(c).

- 6.7 This Order provides carve-outs from the consent requirements as described above. Article 6(3) inserts new sub-paragraphs (6) to (9) into paragraph 11. The new sub-paragraph (6) provides that the consent requirements do not apply to a provision of an Act of the Senedd which removes, or confers a power to remove, any devolved function of a Minister of the Crown that is to any extent exercisable concurrently where that function exists to any extent by virtue of regulations made under sections 8 to 8C of EUWA; is conferred by, or by regulations made under, the European Union (Withdrawal Agreement) Act 2020, the Direct Payments to Farmers (Legislative Continuity) Act 2020, the Coronavirus Act 2020, the Agriculture Act 2020, the Fisheries Act 2020 or an Act of Parliament resulting from the Trade Bill that was introduced into the House of Commons on 19 March.
- 6.8 The new sub-paragraph (7) removes the consent requirements in relation to a Minister of the Crown function concerning consent or agreement to, or consultation about, the exercise of a function where that function is to any extent exercisable concurrently with a Minister of the Crown. This applies to a subset of enactments listed in sub-paragraph (6) that contain concurrent functions which require Welsh Ministers to consult or seek the consent of a Minister of the Crown before exercising them.
- 6.9 In accordance with new sub-paragraph (8), the new sub-paragraphs (6) and (7) do not have effect in relation to the removal of a Minister of the Crown function to regulate British fishing boats in the Welsh zone. For these purposes, British fishing boats do not include Welsh fishing boats, and those terms have the same meaning as in the Fisheries Act 2020. This is consistent with other devolution legislation under which the Secretary of State retains concurrent powers, in certain cases, to regulate fishing boats of a devolved administration fishing outside that administration's waters.
- 6.10 The new paragraph 11(2A), inserted by article 6(2) of this Order, provides that the Welsh Ministers must consult the appropriate Minister of the Crown before removal of a function to which the consent requirements have been disapplied by the new sub-paragraphs (6) and (7).
- 6.11 Article 4(5) of this Order provides that the restriction in paragraph 8(1)(c) of Schedule 7B does not apply to an Act of the Senedd which removes, or confers a power to remove, a function that is exercisable in relation to a Minister of the Crown in two circumstances. Firstly, where the function is the giving of consent by the Welsh Ministers and that function exists to any extent by virtue of regulations made under sections 8 to 8C of the European Union (Withdrawal) Act 2018 or is conferred by any of the legislation listed in the new paragraph 9(8)(b) of Schedule 7B. This is the same list of legislation as is included in the new paragraph 11(6), which is mentioned above at paragraph 6.7. The second circumstance is where the function is the seeking of consent, or consultation, by the Welsh Ministers in relation to their exercise of a function that is to any extent exercisable concurrently with a Minister of the Crown where it was conferred by a subset of that legislation – the same subset as is relevant to the new paragraph 11(7).

Controller of Plant Variety Rights

- 6.12 This Order also provides a carve out from the consent requirements in Schedule 7B in respect of the Controller of Plant Variety Rights.
- 6.13 Paragraph 8(1)(a) and (b) of Schedule 7B to GoWA places restrictions on the ability of the Senedd to confer or impose functions on a reserved authority or modify the constitution of a reserved authority without the consent of a Minister of the Crown. Paragraph 10(1) places a similar restriction on the ability of the Senedd to remove or modify the functions of a reserved authority.
- 6.14 Paragraph 9 of Schedule 7B to GoWA includes a number of carve outs to the consent requirements in paragraph 8 in respect of specified reserved authorities that exercise a mix of devolved and reserved functions in relation to Wales. Paragraph 9(6) sets out a list of reserved authorities that are excepted from the consent requirements in paragraph 8(1). Paragraph 10(2) provides an equivalent list of bodies that are excepted from the consent requirements at paragraph 10(1). This Order adds the Controller of Plant Variety Rights to these lists so the Senedd can modify their functions within devolved competence without needing the consent of a UK Government Minister.

Modifications to Schedule 7A in light of EU exit

- 6.15 Schedule 7A to GoWA sets out the subject matters that are reserved to the UK Parliament. Paragraph 10(1) of this Schedule reserves international relations, the regulation of trade and international development assistance and co-operation.
- 6.16 Paragraph 10(3) provides exceptions to this reservation including for observing and implementing obligations under EU law. Paragraph 20 reserves elections for membership of the European Parliament, including the subject matter of existing elections Acts so far as they may be applied in respect of such membership. These Acts are listed in the interpretation section that follows Paragraph 27 and includes the European Parliamentary Elections Act 2002. Paragraph 26 reserves campaign expenditure by political parties and donations to third parties where a regulated period for elections to the Senedd Cymru or local government elections in Wales overlaps with the regulated period for elections to the House of Commons or the European Parliament.

Other modifications to GoWA

- 6.17 Paragraph 54 of Schedule 7A to GoWA reserves the ‘misuse of and dealing in drugs or psychoactive substances’. The interpretation section defines psychoactive substances as having “the meaning given in section 2 of the Psychoactive Substances Act 2015”. This is a drafting error in that the Psychoactive Substances Act gained Royal Assent in 2016. This Order corrects the error.
- 6.18 Paragraph 7(1) of Schedule 7B to GoWA provides that an Act of the Senedd cannot modify, or confer a power to modify, provisions contained in GoWA. This restriction however does not apply to the sections listed in sub-paragraphs 7(2)(a)-(e). Paragraph 7(2)(a) lists those sections which are in Part 1 of GoWA. In error however it includes section 51 which is in Part 2 and should instead be included within the equivalent list for Part 2 at paragraph 7(2)(b). This Order therefore moves the reference to section 51 at 7(2)(a)(xviii) to the list at paragraph 7(2)(b).
- 6.19 Paragraph 8(1) of Schedule 7B sets out the restrictions on Acts of the Senedd from conferring functions on, or modifying the functions of, a reserved authority without

consent of the appropriate Minister. Paragraph 9 contains exceptions to this, including at 9(4)(a) that the consent requirement does not apply to “the conferral or imposition on a court of a devolved function (within the meaning of paragraph 6 of Schedule 7A)”. Paragraph 6 reserves the registration, funding and accounting requirements on political parties and is therefore referenced in error. This error also appears in paragraph 10(4)(a) of Schedule 7B that sets out the exceptions to the consent requirement at paragraph 10(1).

- 6.20 On introduction of the then Wales Bill paragraph 6 described the reservation of the single legal jurisdiction which included a definition of devolved function. This reservation was amended during the Bill’s parliamentary passage and now appears at paragraph 8 but does not use the term devolved function. This term is not defined elsewhere in GoWA.
- 6.21 Article 4(4) of this Order inserts a new paragraph 9(4A) which defines ‘devolved function’ as one that involves deciding an application or appeal in relation to a matter that is not reserved, but this does not include the function of deciding an appeal from a court or tribunal to which paragraph 9 of Schedule 7A applies (this paragraph describes the reservation for tribunals other than devolved tribunals).

7. Policy background

What is being done and why?

Consent Requirements

- 7.1 In November 2018 the First Minister of Wales wrote to the Secretary of State for Wales to highlight an issue in respect of deficiency correcting SIs made under the European Union (Withdrawal) Act 2018 (the EUWA), that create functions exercisable concurrently by Ministers of the Crown and Welsh Ministers. Restrictions in GoWA prevent the Senedd from modifying concurrent functions without the consent of the appropriate UK Government Minister. New concurrent functions are also being established in the UK Government’s current legislation programme for the first session.
- 7.2 The UK Government agreed that the Senedd should be able to provide for Welsh Ministers to be able to exercise such a power solely, without needing the consent of a Minister of the Crown to make the change. This Order therefore provides carve-outs from the consent requirements in Schedule 7B to GoWA to allow the Senedd to remove such a function created either in an SI under the EUWA or in a small set of named Acts of Parliament.

Controller of Plant Variety Rights

- 7.3 The Plant Varieties Rights Office is a UK wide body established under the Plant Varieties and Seeds Act 1964 to administer UK plant breeders’ rights. The office was subsequently continued by the Plant Varieties Act 1997 under the Controller of Plant Variety Rights. Intellectual property with respect to plant varieties and seeds is devolved and the Controller acts under the direction of, and is appointed by, the Secretary of State, the Welsh Ministers, the Scottish Ministers, and the Northern Ireland Department. As such it is not appropriate that the consent of a Minister of the Crown is required should the Senedd seek to modify its devolved functions in future. This Order provides the necessary carve outs from the consent requirements in line with other reserved authorities that have a mix of devolved and reserved functions.

Modifications to Schedule 7A in light of EU exit

- 7.4 The UK's exit from the EU means we need to disentangle the UK's statute book from the EU's laws and processes. This includes correcting references to the EU, its institutions, regulations and processes where they appear in the statute book. There are references to the EU throughout GoWA, many of which result in deficiencies that need to be corrected.
- 7.5 The majority of these references in GoWA are corrected in EUWA, and will be removed when Schedule 3 to the Act is commenced at the end of the transition period. EUWA only corrects one reference in Schedule 7A to GoWA, to the reservation at Section C7 for 'technical standards and requirements in relation to products in pursuance of an obligation under EU law'. This was because of the direct read-across to amendments to the equivalent reservation in Schedule 3 of the Northern Ireland Act 1998. More widely, as the reservations define the competence of the Senedd, the Government committed to correcting these references via secondary legislation under section 109 of GoWA, to enable the Senedd to approve the corrections².
- 7.6 The key policy aim for corrections made to reservations is that they are "devolution neutral" i.e. the boundary between the competence of the Senedd and the competence of Parliament is not altered by these amendments.

Other modifications to GoWA

- 7.7 The Wales Act 2017 received Royal Assent on 30 January 2017 and inserted Schedules 7A and 7B into GoWA. A small number of minor errors within these schedules have since been brought to our attention. This Order provides an appropriate opportunity to correct them.
- 8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**
- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union because it removes references in Schedule 7A that are no longer relevant outside the EU.
- 9. Consolidation**
- 9.1 This Order amends Schedules 7A and 7B to GoWA; consolidation is therefore unnecessary.
- 10. Consultation outcome**
- 10.1 No formal consultation has been undertaken on this Order. We have engaged closely with the Welsh Government in its preparation. In line with the requirements in section 109 of GoWA this Order must also be approved by the Senedd Cymru.
- 11. Guidance**
- 11.1 No formal guidance has been, or will be, issued in relation to this Order.
- 12. Impact**
- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

² Orders under section 109 of GoWA need the approval of both Houses of Parliament and Senedd Cymru.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 There will be no monitoring of the effect of this Order.

15. Contact

15.1 David Harries at the Office of the Secretary of State for Wales Telephone: 07840 009179 or email: David.Harries@ukgovwales.gov.uk can be contacted with any queries regarding the instrument.

15.2 Geth Williams, Deputy Director for Constitution and Corporate Services, at the Office of the Secretary of State for Wales can confirm that this Explanatory Memorandum meets the required standard.

15.3 David Davies MP, Parliamentary Under-Secretary of State for Wales at the Office of the Secretary of State for Wales can confirm that this Explanatory Memorandum meets the required standard.