

GOVERNMENT OF WALES ACT 2006

EXPLANATORY NOTES

DETAILED COMMENTARY ON SECTIONS IN PART 2

Supplementary

Section 89: Rights and liabilities of the Crown in different capacities

310. The Crown was originally regarded as indivisible. The effect of devolution to Wales, Scotland and Northern Ireland is however that the devolved administrations are, within the scopes of their respective powers, autonomous even though they exercise their functions on behalf of the Crown. In practice, therefore, each, together with the United Kingdom government, is a distinct entity and this section makes it clear that as far as legal rights and liabilities are concerned, each (“the Crown in right of Her Majesty’s Government in the United Kingdom”, “the Crown in right of the Welsh Assembly Government” and so on) is to be treated as having separate legal personality. Property may be transferred between them, contracts between them may be entered into and they may be separate parties to legal proceedings.

Section 90: Documents

311. This section makes provision in relation to the execution and authentication of legal documents by or on behalf of the First Minister, the Welsh Ministers or the Counsel General.

Section 91: Validity of acts

312. This section ensures that the validity of the acts of a person as First Minister are not affected by any defect in that person’s nomination by the Assembly and that, similarly, the validity of any act of a person as Counsel General is not affected by any defect in the Assembly’s agreement to that person’s appointment to that office. Similar protection is given in relation to the Presiding Officer and Deputy Presiding Officer (section 25(14), members of the Assembly Commission (Schedule 2 paragraph 10(b)), and the Auditor General for Wales (Schedule 8 paragraph 1(4)).

Section 92: Official secrets

313. This section provides that the First Minister (and any person designated to exercise the functions of the First Minister), the Welsh Ministers, the Counsel General (and any person designated to exercise the functions of the Counsel General) and Deputy Welsh Ministers are Crown servants for the purposes of the Official Secrets Act 1989.

Part 3: Assembly Measures

Overview of Part 3

314. **Part 3** of and Schedule 5 to the Act introduce the new mechanism for enhancing the Assembly’s legislative powers which was proposed in paragraphs 3.14 to 3.21 of “Better Governance for Wales”. It should be noted that, with minor exceptions

mentioned below, the Act does not itself confer additional legislative powers on the Assembly; rather, it provides a mechanism whereby such powers can be conferred on a case by case basis as appropriate, with Parliamentary consent.

315. The White Paper envisaged that enhanced legislative competence would be conferred on the Assembly by way of Orders in Council. Section 95 makes provision for such Orders in Council. Such an Order in Council confers competence by modifying Schedule 5. Within that competence as it appears from time to time in that Schedule, the Assembly can pass laws known as Assembly Measures in relation to “matters” set out in that Schedule (as amended by such Orders in Council). Such “matters” must relate to one or more of the fields which are also set out in Part 1 of Schedule 5 to the Act. The Order in Council¹ will be able to amend the list of fields in relation to which “matters” can be specified, but it will not be possible for these Orders in Council to add a field, and so potentially give the Assembly legislative competence, if no function in the field is exercisable by the Welsh Ministers, the First Minister or the Counsel General.
316. The effect of an individual Order in Council will be to insert, under the relevant field heading in Part 1 of Schedule 5, a description of the “matter” in relation to which the Assembly is to be given enhanced legislative competence, together with any specific exceptions necessary accurately to define its scope. Part 2 of Schedule 5 lists restrictions which a provision in an Assembly Measure must not breach if it is to be within legislative competence. There are exceptions from those restrictions, which are set out in Part 3 of Schedule 5. In Part 1 of Schedule 5, under the heading “Field 13: the National Assembly for Wales”, several entries are listed on the face of the Act as “matters” in relation to which the Assembly may pass Measures. These are the only examples of the Act itself conferring additional legislative powers on the Assembly; and the form of the entries may be taken as a guide to the way in which further “matters” will be added to Schedule 5 by future Orders in Council conferring enhanced legislative competence.
317. The Act provides for the Assembly and both Houses of Parliament to approve draft Orders in Council before they are recommended to be made by Her Majesty in Council. In circumstances where the Welsh Assembly Government has initiated the proposal, the main procedural stages will normally include:
- a) preparation of a proposed draft Order in Council following discussion between the Welsh Assembly Government, relevant Whitehall Departments, and the Wales Office. This will focus on ensuring there is clarity about the *vires* / scope of the Order in Council and confidence that it will give the necessary legislative competence to enable the Assembly Government’s policy objective to be achieved;
 - b) pre-legislative (non-statutory) scrutiny of a proposed draft Order in Council by the Assembly and Parliament. The precise nature of pre-legislative scrutiny undertaken by the National Assembly and Parliament will be a matter for those two institutions to determine. The processes are not prescribed in the Act , although, in this context, paragraph 3.21 of the White Paper “Better Governance for Wales” said “The consideration (i.e., consideration by Parliamentary Committees or perhaps a joint Committee of both Houses) could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future. However, as the power would be a general and continuing one for that particular policy area, this would serve only as an example of what could be done; the issue for the Committees and for each House would be the appropriateness in general of delegating legislative authority to the Assembly on the particular policy area specified in the draft Order in Council”. This stage will enable modifications to be made to the proposed draft, if required, in the light of comments made;

¹ An Order in Council, of whatever nature, under Part 3 of the Act can only be made if a draft of the Order in Council has first been approved by the Assembly and both Houses of Parliament.

- c) the formal (statutory) processes for the Assembly and both Houses of Parliament to give their approval to the final draft Order in Council, modified as appropriate following the pre-legislative scrutiny processes. At this stage the draft Order in Council will not be able to be amended as both the Assembly and Parliament will need to approve identical text.
318. When a draft Order in Council has been approved by the Assembly, the First Minister will be required, as soon as reasonably practicable, to give notice in writing of that fact to the Secretary of State, who must, by the end of 60 days (not counting days when Parliament is dissolved or prorogued or adjourned for more than four days) either have laid the draft Order in Council before both Houses of Parliament or have given the First Minister written reasons for not being prepared to do so.
319. Once an Order in Council conferring enhanced legislative powers in relation to a “matter” has been made, the competence conferred will be of a continuing character; that is to say, although a request for such powers may have been stimulated by a particular project of reform, use by the Assembly of the competence conferred to address that project will not preclude further Assembly Measures relating to that matter, again in the future, perhaps with some different policy objective in view. The Assembly’s legislative competence under Part 3 of the Act will be the sum total of the matters listed in Part 1 of Schedule 5 read with the restrictions and exceptions to those restrictions specified in Parts 2 and 3 of that Schedule respectively.
320. Assembly legislation made under the legislative competence of the Assembly will be known as Measures of the National Assembly for Wales. Section 94 specifies the tests that proposed Assembly Measures must satisfy if they are to be within the legislative competence of the Assembly. In particular, Measures must relate to one or more of the matters specified in Part 1 of Schedule 5 and comply with the restrictions set out in Part 2 of Schedule 5. The question whether a particular provision of a Measure relates to a matter specified in Part 1 of Schedule 5 “is to be determined by reference to its purpose, having regard (among other things) to its effect in all the circumstances” (section 94(7)). Within the legislative competence conferred, an Assembly Measure may make any provision that could be made by Act of Parliament (section 94(1)).
321. Measures may only make provision in relation to Wales or in relation to functions relating to Wales (section 94(4)(b)). However, an Assembly Measure may make provision which applies in relation to England (but not beyond) for the enforcement of Assembly Measures or which it is appropriate to make for making a provision of a Measure effective (section 94(5)(a)). Incidental and consequential amendments of the law applying in relation to England, for example to ensure that the statute book reflects accurately the effect of changes to the law made by a Measure, will also be possible (section 94(5)(b)). The Secretary of State’s power of intervention under section 101 will ensure that the Assembly does not use its powers in a way which the Secretary of State has reasonable grounds to believe would have an adverse effect on operation of the law applying in England.
322. [Sections 97](#) and [98](#) make provision about Assembly proceedings on proposed Measures. Subject to exceptions for special categories of Measure (see section 98(3)), standing orders must include provision for general debate and a vote on the principles of a proposed Measure; for detailed scrutiny of its provisions; and for a final endorsement of the draft (as reconsidered and amended by the Assembly, if that is the case). Once Assembly consideration of the proposed Measure is complete, the Clerk of the Assembly submits the proposed Measure to Her Majesty in Council for approval, and the Measure is enacted on receiving such approval.
323. A period of four weeks following completion of the Assembly’s deliberations on the proposed Measure must elapse before it can be submitted to Her Majesty for approval, during which time the Counsel General or the Attorney General may refer to the Supreme Court any question as to whether the proposed Measure is within the

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

Assembly's legislative competence ; or the Secretary of State may prevent it from being submitted to Her Majesty 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, would have an adverse effect on the operation of the law as it applies in England or matters which are not specified in Part 1 of Schedule 5, or might have a serious adverse impact on water resources or water supply in England, or the quality of water in England. However, the Clerk may submit a proposed Assembly Measure for approval by Her Majesty before the end of the four weeks following its passing, provided that the Clerk has received notifications from the Attorney General and the Counsel General that they are not going to make a reference to the Supreme Court, and from the Secretary of State that the Secretary of State is not going to make an order under section 101

324. [Section 98\(6\)](#) requires the standing orders to provide for Assembly reconsideration of the proposed Measure provisions if the Secretary of State intervenes under section 101, or if the Supreme Court has ruled that the proposed Measure is *ultra vires* or if the proposed Measure has been the subject of a reference by the Supreme Court to the European Court of Justice which has been withdrawn as a result of a request by the Assembly to be allowed to reconsider the proposed Measure.