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STATUTORY INSTRUMENTS

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**2007 No. 1270**

**CONSTITUTIONAL LAW  
DEVOLUTION, WALES**

**The Government of Wales Act 2006  
(Transitional Provisions) Order 2007**

*Made - - - - 18th April 2007*  
*Laid before Parliament 23rd April 2007*  
*Coming into force in accordance with article 1(2)*

The Secretary of State makes the following Order in exercise of powers conferred on him by section 162(2) of the Government of Wales Act 2006(1).

**Citation and commencement**

1.—(1) This Order may be cited as the Government of Wales Act 2006 (Transitional Provisions) Order 2007.

(2) This Order shall come into force immediately after the end of the initial period(2).

**Amendments to Schedule 11 to Government of Wales Act 2006**

2.—(1) Schedule 11 to the Government of Wales Act 2006 (transitional provisions) is amended as follows .

(2) After paragraph 35 insert—

**“Instrument containing provisions under transferred power and provision under power in section 2(2) of the European Communities Act 1972: Assembly procedure**

**35A.**—(1) Paragraph 2A of Schedule 2 to the ECA 1972 applies to a draft of a statutory instrument laid before the Assembly pursuant to section 59(3) of this Act as it applies to a draft of a statutory instrument laid before Parliament pursuant to paragraph 2(2) of Schedule 2 to the ECA 1972.

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(1) 2006 c.32.

(2) For the meaning of “the initial period”, see section 161(5) of the Government of Wales Act 2006.

(2) Paragraph 2B of Schedule 2 to the ECA 1972 applies to a statutory instrument laid before the Assembly pursuant to section 59(3) of this Act as it applies to a statutory instrument laid before Parliament pursuant to paragraph 2(2) of Schedule 2 to the ECA 1972.

(3) Paragraph 2A, or paragraph 2B, is subject to the following modifications in its application by virtue of this paragraph—

(a) references to Parliament and to each or either House of Parliament are to be read as references to the Assembly;

(b) the reference in paragraph 2A(1)(a), or in paragraph 2B(1)(a), to a power conferred by any other enactment is to be read as a reference to a power which—

(i) is transferred to, or made exercisable by, the Welsh Ministers, the First Minister or the Counsel General by or by virtue of paragraph 30 or 31 of this Schedule, or

(ii) is conferred on the Welsh Ministers, the First Minister or the Counsel General by a provision of any Act in consequence of the amendment of that Act by or under this Act.

(4) In this paragraph, ECA 1972 means the European Communities Act 1972.”

(3) After paragraph 42 insert—

#### **“Criminal Liability of the Assembly**

**42A.**—(1) In this paragraph, “criminal liability of the Assembly” means criminal liability incurred by the Assembly constituted by the Government of Wales Act 1998.

(2) To the extent that any criminal liability of the Assembly is connected with property, rights and other liabilities transferred to the Assembly Commission by the National Assembly for Wales (Transfer of Property, Rights and Liabilities) Order 2007, that criminal liability is transferred to the Assembly Commission.

(3) Subject to sub-paragraph (2), the criminal liability of the Assembly is transferred to the Welsh Assembly Government.

(4) Paragraph 39(2) to (4) applies in relation to criminal liability transferred by this paragraph as it applies to a liability transferred by paragraph 39; and in that application of paragraph 39(2) to (4)—

“transfer time” means the time immediately after the end of the initial period;

“transferee of the transferred function” means the Assembly Commission or, as the case may be, the Welsh Assembly Government.”

#### **Devolution Issues**

**3.**—(1) This article shall apply where a devolution issue within the meaning of paragraph 1(1) of Schedule 8 to the Government of Wales Act 1998 arises in any proceedings commenced before the end of the initial period and that devolution issue has not been determined by that date.

(2) Subject to paragraph (3), that devolution issue shall, after the end of the initial period, be treated as a devolution issue arising under paragraph 1(1) of Schedule 9 to the Government of Wales Act 2006**(3)**.

(3) In the case of a question arising under—

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(3) See paragraphs 66 and 67 of Schedule 11 to the Government of Wales Act 2006 for modifications to Schedule 9 to that Act pending the coming into force of section 23(1) of the [Constitutional Reform Act 2005 \(c.4\)](#).

- (a) paragraph 1(1)(a) or (b) of the said Schedule 8 , it shall be treated as a question arising under paragraph 1(1)( b) or , as the case may be, (c) of the said Schedule 9 in relation to the Welsh Ministers, the First Minister or the Counsel General to the extent that the function of the 1998 Act Assembly is exercisable by the Welsh Ministers, the First Minister or, as the case may be, the Counsel General immediately after the end of the initial period;
  - (b) paragraph 1(1)(c) of the said Schedule 8, it shall be treated as a question arising under paragraph 1(1)(d) of the said Schedule 9 in relation to the Welsh Ministers, the First Minister or the Counsel General to the extent that the duty of the 1998 Act Assembly is imposed on the Welsh Ministers, the First Minister or, as the case may be, the Counsel General immediately after the end of the initial period;
  - (c) paragraph 1(1)(d) of the said Schedule 8 ,it shall be treated as a question arising under paragraph 1(1)(e) of the said Schedule 9 in relation to the Welsh Ministers, the First Minister or the Counsel General to the extent that the failure to act by the 1998 Act Assembly is treated as a failure to act by the Welsh Ministers, the First Minister or, as the case may be, the Counsel General immediately after the end of the initial period.
- (4) In the proceedings the Counsel General shall be substituted for the 1998 Act Assembly to the extent that that Assembly is a party to those proceedings for the purpose of the determination of the devolution issue.
- (5) Anything which is done by or in relation to the 1998 Act Assembly in those proceedings for the purpose of or in connection with the determination of the devolution issue under the said Schedule 8 and which is in effect immediately before the end of the initial period shall have effect after that date as if done by or in relation to the Counsel General for the purpose of the determination of the devolution issue under the said Schedule 9.
- (6) In this article, “the 1998 Act Assembly” means the Assembly constituted by the Government of Wales Act 1998.

18th April 2007

*Nick Ainger*  
Parliamentary Under Secretary of State  
Wales Office

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

The Order makes provision in respect of the transition from the National Assembly for Wales constituted by the Government of Wales Act 1998 (“the 1998 Act Assembly”) to the National Assembly for Wales constituted by the Government of Wales Act 2006 (“the new Assembly”) and the Welsh Assembly Government.

Article 2 amends Schedule 11 to the Government of Wales Act 2006 (“the 2006 Act”) by inserting two new paragraphs into that Schedule, namely paragraphs 35A and 42A.

Article 2(2) inserts the new paragraph 35A. That paragraph makes provision as to procedures of the new Assembly (“Assembly procedures”) that apply to statutory instruments made by the Welsh Ministers under section 2(2) of the European Communities Act 1972 (“the 1972 Act”) in accordance with section 59 of the 2006 Act (implementation of Community law).

It does so by applying to Assembly procedures the new paragraphs 2A and 2B inserted into Schedule 2 to the 1972 Act by section 29 of the Legislative Reform and Regulatory Powers Act 2006.

Paragraph 35A(1) deals with the case where the affirmative Assembly procedure is being followed for a statutory instrument to be made by the Welsh Ministers under section 59(3) of the 2006 Act. It will enable that instrument to include provision under a power of the Welsh Ministers, the First Minister for Wales (“the First Minister”) or the Counsel General to the Welsh Assembly Government (“the Counsel General”) vesting in them under Schedule 11 paragraph 30 or 31 to the 2006 or under an Act amended by or under the 2006 Act (“the other statutory powers”) and which provision would otherwise be subject to the negative Assembly resolution procedure, other less onerous Assembly procedures or would not even be required to be laid before the new Assembly. In each case, the provision made under the other statutory powers will be subject to the affirmative Assembly procedure rather than any less onerous procedures which would otherwise apply.

The affirmative Assembly procedure means that the instrument can not be made by the Welsh Ministers unless a draft of it has first been laid before and approved by a resolution of the new Assembly.

Paragraph 35A(2) deals with the case where the negative Assembly procedure is being followed for a statutory instrument made by the Welsh Ministers under section 59(3) of the 2006 Act. It will enable that instrument to include provision under a power of the Welsh Ministers, the First Minister or the Counsel General vesting under the other statutory powers and which would otherwise have to be laid before the new Assembly after being made, but would not be subject to annulment nor have to be approved; or would not even be required to be laid before the new Assembly. In this case, the power vested under the other statutory powers will be subject to the negative Assembly resolution procedure rather than any less onerous procedure which would otherwise apply.

The negative Assembly procedure means that the instrument must be laid before the new Assembly after it is made by the Welsh Ministers and can then be annulled by resolution of that Assembly.

Paragraph 35A(3) makes consequential modifications to the way paragraphs 2A and 2B to Schedule 2 to the 1972 Act are applied by paragraph 35A(1) and (2).

Article 2(3) inserts the new paragraph 42A. That paragraph makes provision in respect of any criminal liability of the 1998 Act Assembly. Although the 1998 Act Assembly exercises its functions on behalf of the Crown (see section 1(3) of the Government of Wales Act 1998) and as such would not normally be subject to criminal liability, there are some instances where it could be subject to such liability. The provision in this paragraph is to ensure that any such liability will not lapse with

the dissolution of the 1998 Act Assembly but will, at that time, generally transfer to the Welsh Assembly Government (as to its establishment, see section 45 of the 2006 Act). However, there is transferred to the National Assembly for Wales Commission (“the Assembly Commission”) any criminal liability that is connected with the property, rights and other liabilities of the 1998 Act Assembly that are transferred to the Assembly Commission by the National Assembly for Wales (Transfer of Property, Rights and Liabilities) Order 2007 (S.I. 2007/1269) (as to the establishment of the Assembly Commission, see section 27 of the 2006 Act).

Article 3 contains a transitional provision to cover proceedings which raise a devolution issue in respect of the 1998 Act Assembly. Schedule 8 to the Government of Wales Act 1998 provides a procedure where proceedings in which a devolution issue in relation to the 1998 Act Assembly has arisen can be referred to a higher court. A devolution issue basically means an issue as to whether the 1998 Act Assembly has the power to do something; has acted outside its powers; or has failed to act when it should have done. The procedure enables a higher court to give an authoritative ruling on the issue.

Schedule 9 to the 2006 Act contains similar provision for devolution issues in relation to the Welsh Ministers, the First Minister and the Counsel General. There is also a new provision in relation to the new Assembly and Assembly Measures and Acts of the Assembly but that is not relevant to the Order.

The provision in article 3 apply, where there are proceedings which raise a devolution issue under Schedule 8 to the 1998 Act and that issue has not been determined by the time that the 1998 Act Assembly is abolished. The transitional provisions ensure that the devolution issue raised in the proceedings can continue as if it was a devolution issue raised in relation to the Welsh Ministers the First Minister or the Counsel General under Schedule 9 to the 2006 Act. It also provides that the Counsel General will replace the 1998 Act Assembly in those proceedings so far as relating to the determination of the devolution issue.