

Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales

SUMMARY

- Part 4 of the Government of Wales Act 2006 (GoWA) confers on the National Assembly for Wales (the 'Assembly') primary law-making powers in relation to a broad range of subjects set out in twenty areas in Schedule 7 to the 2006 Act. These subjects define the areas in which the Assembly has *legislative competence*.
- UK Government Departments should ensure that devolution aspects are properly considered when developing policy and preparing parliamentary Bills. Early engagement between Departments and the Welsh Government¹ is crucial, and Departments should seek advice from the Wales Office before engaging with Welsh Government colleagues. In some instances the Welsh Government may want provisions in a Bill to apply to Wales even though they fall within the Assembly's legislative competence. All devolution aspects should be substantively resolved by the time PB&L Committee considers the Bill for introduction.
- The UK Government would not normally bring forward or support proposals to legislate in relation to Wales on subjects in which the Assembly has legislative competence without the Assembly's consent. If the UK Government agrees to include provisions which are within the Assembly's legislative competence in a parliamentary Bill, Welsh Ministers will need to gain the consent of the Assembly via a Legislative Consent Motion. This should be laid in the Assembly as soon as possible after the Bill's introduction in Parliament.
- Acts of the Assembly may not modify certain functions of Ministers of the Crown without the consent of the Secretary of State. The Welsh Government should consult the UK Government as early as possible about provisions in proposed Assembly Bills affecting Minister of the Crown functions. The Wales Office monitors the progress of Assembly legislation and will write to Departments when an Assembly Bill is introduced. If any concerns are raised over the Bill's impact the Wales Office will facilitate discussions between the Welsh Government and the relevant Department to seek a resolution.
- Early engagement and effective communication between the UK Government and the Welsh Government are crucial in ensuring that the Welsh devolution settlement works well, and it is expected that Departments and the Welsh Government establish and maintain close working relationships when developing policy and taking forward legislation in relation to Wales.

¹ The statutory name for the Welsh Government is the Welsh Assembly Government. Departments may use the term *Welsh Government* in formal or informal communication, but need to be mindful that the statutory title should be used in any relevant legal context (see paragraph 2).

Introduction

1. This Guidance Note for UK Government Departments² explains the main features of the Welsh devolution settlement; the possible effects of the settlement on policy development and legislation and the procedures relating to devolution which should form part of the legislative process. Annex 1 provides further explanation of the terminology used in this guidance.
2. The Government of Wales Act 2006 (GoWA) describes the devolved institutions in Wales as the National Assembly for Wales (“the Assembly”) and the Welsh Assembly Government. The Welsh Assembly Government comprises the First Minister, Welsh Ministers appointed by the First Minister under section 48 of GoWA, the Counsel General and Deputy Welsh Ministers. Following the Assembly elections in May 2011, and the coming into force of the Assembly’s enhanced law-making powers, the Welsh Assembly Government announced that it wished to be known henceforth as the Welsh Government. Departments may use the term *Welsh Government* in formal or informal communication, but need to be mindful that the statutory title is *Welsh Assembly Government*. Departments should use this term in any relevant legal context, but should note that executive functions are generally conferred on the Welsh Ministers.
3. Effective communication between the UK Government and the Welsh Government is crucial to ensure the Welsh devolution settlement operates well. Departments should be mindful of the need to establish a collaborative working relationship with the Welsh Government as early as possible and to ensure that reciprocal arrangements are in place to exchange and share where possible information in a timely way. The Wales Office is responsible for oversight of the Welsh devolution settlement, and Departments should inform the relevant contact listed in paragraph 79 of this guidance if any problems arise in establishing or maintaining this relationship.

How the Welsh devolution settlement works

4. The Assembly Act provisions in Part 4 of GoWA confer primary law-making powers on the Assembly in relation to a broad range of subjects, set out under twenty headings listed in part 1 of Schedule 7 to GoWA. The areas covered by these headings are areas in which the Welsh Government already had executive functions. The Assembly can legislate by Acts of the Assembly in relation to these subjects.

² The Welsh Government’s reciprocal guidance is at: <http://wales.gov.uk/legislation/guidance/guidance/?lang=en>

5. Section 108 of, and Schedule 7³ to, GoWA define the scope of the Assembly's *legislative competence*. Part 1 of Schedule 7 sets out the subjects in relation to which the Assembly may legislate, together with exceptions to the Assembly's legislative competence. Subject to limited exceptions, the Assembly cannot legislate about matters which are not covered by the subjects, either because they are not listed as subjects or because they are specifically listed as exceptions. These are termed *non-devolved* areas, and only Parliament is able to legislate about these issues. Parts 2 and 3 of Schedule 7 also contain restrictions on the Assembly's competence and exceptions to those restrictions. Departments will need to assure themselves that the Assembly acts within the boundaries of its legislative competence. Parliament retains the right to legislate on any issue within the Assembly's legislative competence, but would normally only do so with the Assembly's consent.
6. The commencement of the Assembly Act provisions was subject to an affirmative vote in a referendum in Wales. A referendum took place on 3 March 2011, and resulted in a vote in favour of enhanced law-making powers for the Assembly. The Assembly assumed these powers on 5 May 2011 by virtue of an Order approved by the Assembly bringing the Assembly Act provisions into force. Any further changes to the legislative competence of the Assembly will require Schedule 7 to be amended. This is done through Orders in Council under Section 109 of GoWA or provisions in parliamentary Acts. Further information is set out in Devolution Guidance Note (DGN) 17.
7. Prior to the Assembly Act provisions coming into force the Assembly's law making powers were set out in Schedule 5 to, and Part 3 of, GoWA. The Assembly legislated by way of Assembly Measures, rather than Assembly Acts as it does now. The Assembly's legislative competence under Schedule 5 was much more limited than it is under Schedule 7, and was enhanced by way of framework powers in parliamentary Acts and Legislative Competence Orders (LCOs). Schedule 5 and Part 3 ceased to have effect when the Assembly Act provisions came into force (but this does not affect Assembly Measures which have already been enacted).
8. The Welsh Ministers exercise executive functions. Most, but not all, of these functions are in areas where the Assembly has legislative competence. Functions are transferred to, or conferred on, the Welsh Ministers. The Assembly Act provisions have not changed the way in which functions are conferred on the Welsh Ministers, and they can only act to the extent that specific powers have been conferred on, or transferred to, them. The same is true in respect of the First Minister and the Counsel General.
9. Section 108(7) of GoWA sets out a 'purpose test' to decide whether a proposal to legislate relates to a subject within the Assembly's legislative competence. It specifies that the question of whether a provision of an Act of the Assembly relates to one or more of the subjects in Part 1 of Schedule 7 or falls within an exception should be determined by reference to the purpose of

³ The current Schedule can be seen at: <http://www.walesoffice.gov.uk/legislation/primary-legislation/wales-only-acts/>

the provision, having regard (amongst other things) to its effect in all circumstances. Provision of Assembly Acts may also be within competence if they meet the requirements of section 108(5) of GOWA⁴.

10. When developing a parliamentary Bill, Departments need to consider whether a Legislative Consent Motion (see paragraph 38 and following) is necessary, and should consult their legal advisers and the Wales Office at an early stage in developing proposals if in any doubt about whether a proposal is within the Assembly's legislative competence. There may be Law Officers' advice or previous cases which would help in coming to an agreed UK Government view. Having come to an agreed view, Departments should speak to the Welsh Government at official level to ascertain its view. The relevant officials to contact in the Welsh Government are listed in paragraph 79 of this guidance.
11. The UK Government and the Welsh Government may not necessarily take the same view about whether a proposal is devolved or non-devolved. It should be borne in mind that the boundaries between devolved and non-devolved issues are not always clear cut, especially given the wider breadth of legislative competence the Assembly now exercises and the more general descriptions of devolved subjects listed in Schedule 7. A specific proposal could appear to be both devolved and non-devolved, depending on perspective. For example, time off from work for training purposes could relate to the subject of employment, which is generally non-devolved, or to skills, which is devolved, depending on the specific nature of the proposed provisions. Departments should speak to the Wales Office in the first instance if in any doubt as to whether a proposal is devolved or non-devolved, and may then wish to speak to the Welsh Government to gain a better understanding of its view.

Developing Parliamentary Legislation

12. GoWA requires the Secretary of State for Wales to consult the Assembly about the UK Government's legislative programme as soon as reasonably practicable after the beginning of each session of Parliament. In practice, the Secretary of State for Wales appears before a plenary session of the Assembly, usually within a few weeks of the Queen's Speech, to explain the UK Government's legislative programme and answer questions on it from Assembly Members.
13. The Wales Office keeps the Welsh Government informed of progress on the UK Government's legislative programme as a whole. Departments should develop close working relationships with the Welsh Government on individual Bills and specific areas of devolved policy relating to those Bills, and should ensure regular contact and, where possible, the timely sharing of information from an early stage in the legislative process. The Wales Office advises and supports Departments in doing this.

⁴ Under Section 108(5) of GoWA, an Assembly Act may also make what could be broadly described as ancillary provision, which may include provision in relation to England - for example, in order to make a provision of an Assembly Act effective or to make provision for its enforcement.

14. Departmental Bill teams should contact the Wales Office as early as possible after being established to seek initial advice before engaging with the Welsh Government on any Welsh devolution issues relating to a Bill. Policy teams may wish to establish contact with the Welsh Government before a Bill team is set up, and as policy is being developed, especially if the policy area overlaps the boundary between devolved and non-devolved matters in the devolution settlement; is likely to have an impact on the Assembly's legislative competence or the Welsh Ministers' executive powers; might otherwise impact on devolved matters (for example, if it is likely to affect the resources of devolved bodies); or is likely to prove controversial in terms of relations between the UK Government and the Welsh Government. The expectation is that the Welsh Government will co-operate constructively. In practice, policy teams in many Whitehall departments already have strong working relationships with equivalent teams in the Welsh Government. In addition to providing initial advice, the Wales Office can advise Departments further as policy and legislation is developed.
15. The Welsh Government would ordinarily bring forward its own legislation in the Assembly in areas within the Assembly's legislative competence. But it may, on occasion, prefer to include specific provisions in a parliamentary Bill rather than promote a separate Assembly Bill on the same subject. This may be particularly the case if specific provision is being made in a parliamentary Bill which would not warrant bringing forward an Assembly Bill. Provisions may relate to the Assembly's powers; Welsh Ministers' functions or Minister of the Crown functions.
16. The UK Government is content in principle to include provisions sought by the Welsh Government in parliamentary Bills providing that:
 - The Welsh Ministers confirm that there is no suitable Assembly Bill in the Welsh Government's current legislative programme in which to make provision;
 - The provisions fall within the scope of the parliamentary Bill;
 - Including provision would not adversely affect the handling or timing of the parliamentary Bill; and
 - The provisions relate to Wales and either fall within devolved areas of policy or are provisions in new policy areas where it is considered appropriate for responsibility to be devolved.
17. A clear purpose of devolution is to enable policies to be pursued in ways which reflect the different needs of the constituent parts of the UK. Departments should therefore not normally refuse to include provision sought by the Welsh Government in parliamentary Bills (providing the provisions meet the criteria in paragraph 16) on the grounds that it differs from policy in England (or any other part of the UK). Welsh Government policy can, and does, diverge from UK Government policy, but Departments should ensure provision sought by the Welsh Government does not contradict UK Government policy. Departments should give particular consideration to requests from the Welsh Government for provision in specific areas where the

Welsh Ministers have functions but the Assembly has no legislative competence.

18. In the event of being unable to agree to include provision in a Bill, Departments may wish to discuss with the Welsh Government other ways of enabling the Welsh Ministers to achieve their aims (for example by transferring existing functions to them using Transfer of Functions Orders under GoWA). Further information on the main alternatives is set out in DGN17, and the Wales Office can provide further advice.
19. Subject to reaching agreement at official level between the lead Department, the Wales Office and the Welsh Government, the inclusion of provisions in the Bill should be confirmed in principle by an exchange of Ministerial correspondence between the UK Government and the Welsh Government. Correspondence should be copied to the Secretary of State for Wales.
20. This in principle agreement is subject to UK Government collective agreement to include the relevant provisions in the Bill. Consent is obtained via either the Bill Minister or the Secretary of State for Wales writing to the relevant Cabinet Committee to seek clearance. Departments should discuss with the Wales Office which Minister is best placed to write. It would be helpful if, by this stage, Departments have agreed with the Welsh Ministers that they will promote a Legislative Consent Motion (LCM) in the Assembly (see paragraph 36). Agreement is certainly needed in time for PB&L Committee's consideration of the Bill (see paragraph 24).
21. The Government observes the convention that Departments should normally only develop legislative proposals relating to a devolved area at the request of the Welsh Ministers, or because the policy would be unworkable unless there is provision for Wales. Departments should therefore check whether the proposals they intend to include in a Bill apply in relation to Wales and
 - (a) fall within the legislative competence of the Assembly or relate to areas where the Welsh Ministers have executive functions; and
 - (b) alter the way in which the Assembly can use its legislative competence or the way in which Welsh Ministers can exercise their executive functions.
22. Provisions may alter directly or indirectly the way in which the Assembly and the Welsh Ministers can exercise their powers. For example, they may directly amend Schedule 7 to broaden or narrow a subject within the Assembly's legislative competence or an exception to that competence. But provisions may also indirectly affect the way the Assembly can exercise its powers; for example by restricting the instances in which those powers may be exercised.
23. If provisions do either of the above, Departments should be clear as to their rationale for including Welsh provisions in the Bill and, if they have not already done so, should contact the Welsh Government immediately to

establish whether the Welsh Ministers support the provision, keeping the Wales Office informed.

Preparing Parliamentary Bills

24. Devolution issues form an important part of the memorandum presented to PB&L Committee to inform its consideration of whether a Bill is ready to be introduced in Parliament. Devolution issues are also relevant to the *territorial extent and application* of a Bill described in the accompanying Explanatory Notes. All devolution issues should be substantively resolved by the time the Committee considers whether a Bill should be introduced, including reaching agreement with the Welsh Ministers to seek any Assembly consent needed for provisions in the Bill (see paragraph 38).
25. The Bill Memorandum presented to PB&L Committee should describe succinctly any devolution issues which the Bill has raised, and include a clear statement that they have been substantively resolved. It should also summarise:
- the effect of the Bill in Wales and whether provisions relate to devolved or non-devolved subjects; and
 - any consultation which has taken place with the Welsh Government, the Assembly or other devolved institutions and bodies in Wales, and any agreements reached with them.

Departments should consult the Wales Office in preparing memorandums for Bills that include provisions which apply to Wales.

26. There should be close working between officials and legal advisers in Departments, the Wales Office and the Welsh Government when preparing instructions to Parliamentary Counsel where these relate to Assembly or Welsh Ministers' responsibilities. Deadlines for finalising instructions are often very tight, and establishing an effective tripartite relationship is crucial in order to agree instructions and deliver them on time.
27. It is crucial that all parties are clear about roles and deadlines: *who is doing what by when*. Departments should be mindful that the Welsh Government's procedures differ from those of the UK Government, and the Welsh Government may find it difficult to meet deadlines which have not been previously agreed - if a deadline falls during an Assembly recess for example. Whilst deadlines for a Bill must be met, the Welsh Government should be given as much time as possible to obtain the necessary Ministerial clearances. Departmental Bill Teams should seek to agree timescales and deadlines with the Wales Office and Welsh Government as early as possible in the Bill process.
28. Departments should be mindful that there may be occasions when either or both Cabinet clearance and Welsh Ministers' clearance is required on an issue in relation to instructions to Parliamentary Counsel. Whilst Ministers'

policy clearance should be obtained before instructions are drafted, unforeseen issues may arise during drafting for which clearance is required. The agreed timescales for submitting instructions should seek to take account of this risk.

29. Where provisions are to be included at the request of the Welsh Government, an arrangement which has proved effective is for Welsh Government legal advisers to draft instructions for the lead Department and Wales Office colleagues to agree before they are sent. There is usually some iteration and clarification before instructions are agreed and forwarded to Parliamentary Counsel by the lead Department, and before commenting on and approving the draft instructions the lead Department and the Wales Office should reach a unified UK Government view. Alternatively, lead Departments can draft instructions for agreement by the Welsh Government and the Wales Office. It is important that all three parties agree a procedure before starting to draft instructions, and that instructions are agreed by all three parties before being sent to Parliamentary Counsel.
30. The same procedure should be adopted in respect of any subsequent correspondence with Parliamentary Counsel about the instructions or draft Bill provisions, and for any supplementary instructions which may be needed.
31. Exceptionally two or more Departments may be responsible for the area of policy being instructed on. Departments and the Wales Office should agree in such cases who is best placed to act as the lead Whitehall Department for the purpose of approving instructions.
32. All agreements between the UK Government and the Welsh Government to include provisions in Bills that relate to Assembly or Welsh Ministers' responsibilities are subject to the Welsh Government supporting the work needed to prepare the Bill. Departments should develop an effective working relationship at official level from the outset to ensure the Welsh Government can provide the support required. To encourage this, Departments need to, for example, keep the Welsh Government informed of progress and deadlines and share information relevant to Assembly or Welsh Ministers' responsibilities at the earliest opportunity, bearing in mind UK Cabinet clearance procedures. Whilst there is no necessity to do so, Departments may wish to confirm the Welsh Government's commitment to meet Bill deadlines by Ministerial correspondence. The Wales Office can advise Departments further.
33. Departments should also consult the Welsh Government in relation to Bill provisions in non-devolved areas which may inhibit the Assembly or Welsh Ministers in using their powers. The Wales Office can advise Departments on whether specific provisions are likely to do so. The Welsh Government will also take a view on whether provisions have such an effect, and early consultation should help resolve any difficulties.

During the passage of legislation

34. The Welsh Government will provide full support to Ministers and Departments during the parliamentary passage of legislation as required and on request: for example, in providing initial drafts of notes for Stand Part debates and notes on amendments to relevant clauses. Again, these should be agreed by the relevant Department and the Wales Office before being submitted to the relevant Bill Minister. The Welsh Government will also provide officials and legal advisers, if required, to support Ministers during parliamentary debates on the relevant clauses relating to Wales.
35. These arrangements also apply if the UK Government proposes to amend a Bill, or to accept an amendment, which would fall within the Assembly's legislative competence, alter the way in which the Assembly could exercise its powers or relate to the Welsh Ministers' areas of responsibility. Such amendments should be approved by (at least) PB&L Committee and the Assembly and/or Welsh Ministers. Where an amendment does not fall within the terms of any LCM for the Bill which the Assembly has already agreed, Departments should ensure they have the agreement of the Welsh Ministers to promote a supplementary Legislative Competence Motion (LCM) in the Assembly before the amendment is debated in Parliament. Departments should consult the Wales Office for advice as soon as they become aware of such amendments.

Legislating on subjects devolved to the Assembly

36. **The UK Government would not normally ask Parliament to legislate in relation to Wales on subjects which have been devolved to the Assembly without the consent of the Assembly.** The Assembly grants consent by approving Legislative Consent Motions (LCMs).

Legislative Consent Motions (LCMs)

37. If the UK Government and the Welsh Government agree to include provision in a parliamentary Bill which is within the legislative competence of the Assembly the Welsh Ministers will need to seek the Assembly's consent via a LCM.
38. Departments should agree with the Welsh Government that the Welsh Ministers will promote the relevant motion in the Assembly. Agreement should be reached before PB&L Committee approves the Bill for Introduction in Parliament, and should include a commitment from the Welsh Government that it will support an LCM, and lay a motion and an accompanying legislative consent memorandum in the Assembly as soon as possible after the parliamentary Bill is introduced. The Assembly's Standing Orders⁵ require the Welsh Government to lay an LCM in the Assembly normally no later than two weeks after a Bill is introduced in Parliament. Consent should ideally have been obtained by the time the relevant clauses are debated in Committee, and certainly before the Bill reaches its final amending stage in the House of introduction. The absolute deadline is the last opportunity for the clauses to be amended while the Bill is still before Parliament (see paragraph 41).

⁵ Standing Orders of the National Assembly for Wales, May 2011.

39. To help meet these deadlines, Departments should be mindful that information needs to be shared with the Welsh Government on the relevant Bill provisions at the earliest opportunity. It would prove helpful for Departments to work closely with Welsh Government colleagues as they prepare a motion, in order to understand the rationale for the LCM and the case for the Assembly approving the motion. In doing so, the Welsh Government would be expected to share its thinking as the LCM is developed.
40. There are a number of factors which could influence the timing of a motion coming forward. The Assembly's sitting and recess dates are not necessarily the same as those of Parliament. For example, the Assembly tends to begin and end summer recess earlier than Parliament. Similarly, the Assembly's Business Committee may refer any legislative consent memorandum to another committee or committees of the Assembly for consideration. If this happens, the Assembly will not debate a LCM until the committee has reported. Scheduling time to debate the motion would also need to fit with the Assembly's other business, and will not necessarily take priority over that business. Departments should therefore engage with the Welsh Government as early as possible with respect to bringing forward an LCM.
41. In the event that the Assembly does not approve a motion, Departments should discuss next steps with the Wales Office, Cabinet Office and the Welsh Government. It is open to the UK Government, subject to collective agreement, to amend the relevant provisions so that either the Welsh Government is able to support them or so that an LCM is not required: for example, to amend the provision to ensure it either does not relate to devolved subjects or does so in a way likely to be acceptable to the Assembly. The last opportunity for amendment is at Third Reading in the Lords and Report stage in the Commons, but Departments should seek to resolve any issues well before these stages are reached. Departments should have regard to this in discussions with the Welsh Government, and should aim for the UK Government and the Welsh Government to agree a way forward. Removing provisions from the Bill without agreement would normally be considered only as a last resort.
42. There may be instances where the UK Government and the Welsh Government disagree on whether a Legislative Consent Motion is required. Departments should inform Ministers as soon as they become aware that the Assembly has rejected a motion relating to a Bill provision which the UK Government considers non-devolved, and should contact the Wales Office for advice on next steps. The UK Government would need to decide whether to modify the provision in such circumstances.
43. Departments should also consider the need for an LCM when Bills are amended, and be mindful that both Government and Opposition amendments, if accepted, could trigger the need for an LCM in the Assembly. Such amendments could present significant timing issues, particularly if they are approved in the second House, and Departments should inform the

Wales Office and Welsh Government immediately of such amendments, and particularly if departmental legal advisers advise that an amendment may trigger the need for an LCM. The Assembly's standing orders require the Welsh Government to table an LCM in the Assembly (if needed) normally no later than two weeks after an Opposition amendment is agreed to or a Government amendment is tabled.

44. The Welsh Government is responsible for drafting the terms of an LCM. It is usually helpful for the motion to be drafted in sufficiently broad terms to anticipate any Government amendments to the Bill in devolved areas. Departments may wish to discuss with Welsh Government colleagues to be reassured of this.
45. Departments should consult the Welsh Government if Bills include provisions within the Assembly's legislative competence which are purely supplementary, consequential, incidental, transitional or saving relating to provisions on non-devolved matters. The consent of the Assembly is not required in these cases. Departments may wish to consult the Wales Office in the first instance for a view on whether provisions fall into this category.

Legislating to alter the Legislative Competence of the Assembly

46. The Assembly's legislative competence may be modified or enhanced by provisions in Acts of Parliament or by Orders in Council under section 109 of GoWA. Both mechanisms amend Schedule 7 of GoWA. The procedures for doing so are set out in a separate guidance note, DGN 17.

Legislating in Non-Devolved Areas

47. Parliamentary Bills may include provisions relating to Wales on subjects which are non-devolved - for example, on employment relations or social security. Such provision may apply specifically to Wales or form part of a wider territorial extent, such as England and Wales or the UK as a whole. Provision which does not apply to Wales directly could impact on the way in which the Assembly and Welsh Ministers could exercise their powers.
48. Consent is not required from either the Assembly or the Welsh Ministers to include non-devolved provisions in parliamentary Bills (but see paragraph 49 below in respect of Welsh Ministers' executive functions). Departments would normally consult the Wales Office and the Welsh Government before Bills are introduced in relation to provisions which could impact directly on devolved areas, **mindful that appropriate clearances will sometimes need to be obtained on sensitive policy issues before information can be shared.**

Legislating on Welsh Ministers' functions

49. Provisions in parliamentary Bills may impose or confer new functions on the Welsh Ministers, or modify or remove their functions. **The UK Government would not normally legislate in these ways, or in a way which**

significantly affects Welsh Ministers' executive functions, without at least the consent of the Welsh Ministers.

50. The Welsh Ministers exercise most of their executive functions in areas where the Assembly has legislative competence. Accordingly, most provisions in parliamentary Bills amending functions of the Welsh Ministers will be within the Assembly's legislative competence. The UK Government would normally seek the consent of the Assembly (through an LCM) before legislating in this area.
51. The Welsh Ministers may also exercise functions in areas where the Assembly does not have legislative competence. If the UK Government and Welsh Government agree to include provision in a parliamentary Bill relating to Welsh Ministers' functions in such a non-devolved area (other than incidental or consequential provision), Departments normally need obtain only the consent of the Welsh Ministers. In accordance with the Assembly's Standing Orders, the Welsh Ministers should notify the Assembly in a written statement about provisions in parliamentary Bills which have a significant impact on the Welsh Ministers' functions, or which impact on the legislative competence of the Assembly, but would not normally seek the approval of the Assembly.
52. Departments should consult the Wales Office in the first instance for a view on whether provisions in Bills affecting Welsh Ministers' functions are purely supplementary, consequential, transitional or saving relating to provisions on non-devolved matters. The consent of the Welsh Ministers is not required in these cases, but Departments should consult the Welsh Government on provisions which fall into this category.

Using Subordinate Legislation to Amend Primary Legislation

53. The same principles and requirements for consent apply where UK Government Ministers have the power to use subordinate legislation (such as Orders) to amend primary legislation, and propose to make provisions which would be within the legislative competence of the Assembly or Welsh Ministers' areas of responsibility; or could inhibit the Assembly in using its competence or the Welsh Ministers in exercising their functions. Departments considering bringing forward such subordinate legislation should speak to the Wales Office in the first instance, and should allow adequate time for further consultation with the Welsh Government.
54. Departments proposing to bring forward Bills which would confer wider-ranging powers on UK Government Ministers to amend primary legislation by Order should pay particular attention to how those provisions are likely to interact with the powers of the Assembly and the functions of the Welsh Ministers.

Draft Parliamentary Bills

55. The procedures described above relate to Bills before Parliament, but departments should approach the Welsh Government on the same basis for Bills being published in draft. There is however no requirement to seek the consent of the Assembly in relation to provisions which are within its legislative competence before publishing a draft.

Private Members' Bills

56. Essentially the same procedures should be followed for Private Members' Bills (PMBs) which the Government is supporting, with some minor modifications to reflect the fact that procedures for PMBs are less certain than for Government Bills.

57. Departments should consult the Welsh Government at an early stage about any PMB that they are minded to support which includes provision for Wales in a devolved area, or would have a substantial effect on devolved matters. Where a PMB which the Government is minded to support includes provisions which would be within the legislative competence of the Assembly, an LCM would need to be brought forward in the Assembly, and departments should seek to agree with the Welsh Government that it will promote the relevant motion. However, Departments should note that the Assembly's Standing Orders permit the laying of an LCM in respect of PMBs only after Committee stage in the House of introduction.

58. The Government may decide not to support a Private Member's Bill which includes provision in a devolved area. Departments should inform the Welsh Government as soon as practicable once the Government's opposition is confirmed if the Bill would have a substantial effect on devolved matters. Even if the UK Government does not oppose the Bill on policy grounds, the Government would normally resist provisions on devolved matters if Welsh Ministers have not given their consent, and would move any necessary amendments at Commons Committee or Report stage.

59. PMBs may also include provision relating to Wales in non-devolved areas. Departments should inform the Welsh Government as soon as practicable once the UK Government's support or opposition to the Bill is confirmed if its provisions are likely to impact on devolved areas. It is not necessary to obtain the consent of the Assembly or the Welsh Ministers. Departments should again keep the Wales Office informed.

Assembly Bills

60. The First Minister usually announces the Welsh Government's annual legislative programme each July. The programme includes the legislation the Welsh Government intends to bring forward in the Assembly in the following twelve months. In July 2011 the First Minister announced the current Welsh Government's legislative programme for the next five years, and will subsequently make annual statements announcing Government Bills coming forward in the following twelve months.

61. **The Assembly cannot legislate about subjects outside its legislative competence** - i.e. subjects which are non-devolved. Assembly Bills can relate only to Wales⁶ and fall within the ambit of the devolved subjects listed in Schedule 7. Whether a provision relates to a subject is determined by applying the purpose test, summarised in paragraph 9 of this guidance. However, **Departments should also be alive to the fact that Assembly Acts can amend Acts of Parliament without the consent of the UK Government or Parliament.** Indeed, GoWA provides that within its area of competence the Assembly can make any provision that could be made in a parliamentary Act. It is expected that the Welsh Government would consult Departments in cases where such provision could have potentially significant effects as early as practicable in the legislative process.
62. The UK Government expects the principles of early engagement and information sharing to apply as much to Assembly Bills as to parliamentary Bills. With this in mind, Departments should respond in a timely way when contacted by Welsh Government colleagues about provisions in Assembly Bills.
63. The Wales Office monitors the progress of Assembly legislation, and writes to Departments at official level when a Bill is introduced in the Assembly to establish whether the Bill's provisions raise concerns (the Wales Office writes to Departments again when the Assembly passes a Bill - see paragraph 75). It is also important for Departments to keep a close eye on the progress of Assembly Bills to ensure any concerns can be addressed at an early stage.
64. In the event of concerns being raised, the Wales Office will facilitate discussion between officials in the relevant Department(s) and the Welsh Government to seek to resolve them. The issue may be escalated to UK Government Ministers and the Welsh Ministers if it remains unresolved.

Minister of the Crown Functions

65. An Act of the Assembly can do the following in relation to UK Ministers of the Crown only with the consent of the Secretary of State:
- Confer or impose a new function on a Minister of the Crown; and
 - Remove or modify a function which a Minister of the Crown exercised before the Assembly Act provisions came into force (i.e. before 5 May 2011) unless the provisions removing or modifying the function is incidental to, or consequential on, any other provision in the relevant Assembly Act.
66. The Secretary of State should consent to any provision in an Assembly Bill that does either of the above before the Bill is introduced in the Assembly. In practice, the approval of both Ministers in the relevant Department and the

⁶ Under Section 108(5) of GoWA, an Assembly Act may also make what could be broadly described as ancillary provision, which may include provision in relation to England - for example, in order to make a provision of an Assembly Act effective or to make provision for its enforcement.

Secretary of State for Wales should be obtained. The Welsh Government has undertaken to allow sufficient time for the UK Government to decide whether or not it agrees to the change, and in practice should engage with the relevant Department and the Wales Office as part of its policy development process if it is likely to want to include such provision in an Assembly Bill. When it does, Departments and the Wales Office should reach a unified UK Government view before responding.

67. The Welsh Government should also contact the relevant Department and the Wales Office if such provision is intended to be included in an Assembly Bill brought forward by an Assembly Committee or backbench Assembly Member which the Welsh Government supports. Departments should however be mindful that Bills may be brought forward by backbench Assembly Members without Welsh Government support. In such circumstances the Welsh Government may not be aware of the detailed content of the Bill before it is introduced. Departments should obtain advice from their legal advisers, and from the Wales Office, before seeking the views of Ministers. The consent of UK Government Ministers is not required if an Assembly Act merely makes changes to Minister of the Crown functions which are consequential or incidental.

68. An Act of the Assembly can do the following without requiring the consent of the Secretary of State:

- Modify a Minister of the Crown function if the Minister assumed the function, or if it became exercisable by the Minister, after the Assembly Act provisions came into force (i.e. after 5 May 2011); and
- Make changes to a Minister of the Crown function which are merely consequential or incidental.

This is a change from before the Assembly Act provisions came into force. Previously Assembly Measures could not generally confer or impose functions on a Minister of the Crown.

69. Any provision in an Assembly Bill affecting a Minister of the Crown function would need to relate to the devolved subjects set out in Schedule 7 and generally should apply only in relation to Wales.

70. It is expected that the Welsh Government would engage with Departments at an early stage if it proposed to modify existing Minister of the Crown functions. Departments should inform their senior official for devolution and the Wales Office should the Welsh Assembly Government come forward with proposals, and should seek the advice of Departmental legal advisers if in doubt as to whether a Minister of the Crown function pre or post dates the Assembly Act provisions coming into force.

Powers of Intervention

71. Section 114 of GOWA enables the Secretary of State to make an order prohibiting the Clerk of the Assembly from submitting an Assembly Bill for Royal Assent. The power is exercisable if there are reasonable grounds to believe that the Bill would have certain adverse effects on non-devolved interests. The Order is subject to annulment in either House of Parliament.
72. Specifically, an order may be made under section 114 if there are reasonable grounds to believe that an Assembly Bill contains provisions which:
- a. would have an adverse effect on any matter which is not specified in Part 1 of Schedule 7 (or falls within any of the exceptions);
 - b. might have a serious adverse impact on water resources in England, water supply in England or the quality of water in England;
 - c. would have an adverse effect on the operation of the law as it applies in England; or
 - d. would be incompatible with any international obligation or the interests of defence or national security.
73. Under section 112 of GoWA, the Counsel General or the Attorney General may also refer the question of whether an Assembly Bill, or any provision of an Assembly Bill, would be within the legislative competence of the Assembly to the Supreme Court for decision.
74. An order preventing an Assembly Bill from being enacted, or a reference to the Supreme Court, would need to be made within four weeks of the Assembly passing the proposed Bill. When the Assembly passes a Bill the Clerk of the Assembly writes to the Secretary of State for Wales to advise that the four week 'intimation' period has started.
75. The Wales Office writes at official level to Departments when a Bill is introduced in the Assembly, and again once the Assembly passes a Bill, to seek views on whether the Secretary of State should exercise her powers of intervention, and to ask on behalf of the Attorney General whether the Bill raises issues of legislative competence. Departments have ten working days to respond, and should consult departmental legal advisers and, if necessary, their policy and devolution Ministers, if in doubt about whether any provision in the Assembly Bill raises legislative competence issues or meets the Section 114 criteria.
76. In parallel, Wales Office legal advisers write to the Attorney General's Office following the introduction and passing of each Assembly Bill, to give their view on whether the provisions of the Bill fall within the competence of the Assembly.
- 77. The UK Government expects any concerns which could risk triggering an intervention to be resolved in practice during the passage of the Assembly Bill.** It is therefore important that Departments respond to Wales Office write-rounds and monitor the progress of Assembly legislation, informing the Wales Office and the Welsh Government if any concerns arise.

If concerns are raised, the Wales Office will facilitate discussions between the Welsh Government and the relevant Department to seek a resolution.

78. The Secretary of State for Wales would normally reply to the Clerk of the Assembly within the four week intimation period only if she intends to exercise her powers to intervene. If there is no intervention or Supreme Court reference, the Clerk may submit a Bill for Royal Assent at the end of the period. There may occasionally be an urgent need for an Assembly Bill to receive Royal Assent. In such cases the intimation period may be shortened by agreement between the UK Government and the Welsh Government to ensure a specified deadline for enacting the Bill can be met. The Wales Office will contact relevant Departments if an Assembly Bill requires a shortened intimation period.

Contact Details

79. If you have any queries relating to this guidance please contact:

Geth Williams, Head of Constitution, Wales Office:

020 7270 0554 or geth.williams@walesoffice.gsi.gov.uk

Legal queries should be addressed to the Wales Office's legal advisers:

Susan Olley, on 029 2089 8568 or susan.olley@walesoffice.gsi.gov.uk

or

James George on 029 20898484 or james.george@walesoffice.gsi.gov.uk

For queries about Devolution Guidance Notes generally contact:

Kam Marshall, Devolution Strategy, Cabinet Office:

020 7271 6422 or kam.marshall@cabinet-office.gsi.gov.uk

For queries relating to the Welsh Government contact:

Zoe Holland, Head of Parliamentary Legislation, Welsh Government

02920 89 8585 or zoe.holland@wales.gsi.gov.uk

or

Claire Fife, Head of Legislative Programme Team, Welsh Government

02920 89 8585 or claire.fife@wales.gsi.gov.uk

Legal queries should be addressed to the Welsh Government legal adviser:

Phil Elkin on 02920 80 1059 or phillip.elkin@wales.gsi.gov.uk

Annex 1

This annex provides a brief explanation of the main terms used in this guidance note.

1. Schedule 7

Schedule 7 to GoWA defines the legislative competence of the National Assembly for Wales following the referendum on 3 March 2011 on enhancing the Assembly's legislative powers. If a subject is not listed in Schedule 7, it will not be within the Assembly's legislative competence. Exceptions listed to the subjects set out in Part 1 of Schedule 7 reflect non-devolved areas where Parliament remains responsible for legislating. There are also 'carve-outs' to exceptions whereby the subject which the exception referred to is non-devolved but within that subject a specifically defined area is within the Assembly's legislative competence.

The Schedule also contains general restrictions on the Assembly's competence, and exceptions to those restrictions. In particular, the Assembly will not be able to legislate so as to modify any pre-existing Minister of the Crown functions without the consent of the Secretary of State (unless the change is incidental or consequential). This means that, where there are isolated Minister of the Crown functions within subjects which are generally devolved, the protection of those functions need not be expressed by a specific reservation.

2. Assembly Acts

Following the referendum on 3 March 2011 on enhancing the Assembly's law-making powers, the Assembly's powers to legislate by Act of the Assembly came into force on 5 May 2011. The Assembly is now able to pass Acts of the Assembly (or Assembly Acts) within the legislative competence set out in Schedule 7, subject to the restrictions in that Schedule, and in the Government of Wales Act. A proposed Assembly Act is known as a Bill.

3. Section 109 of GOWA 2006

Orders in Council made under Section 109 of the 2006 Act may modify the legislative competence of the Assembly by amending Schedule 7. These amendments could increase the legislative competence of the Assembly by inserting additional subjects into the Schedule on which the Assembly can legislate or removing or narrowing exceptions; restrict the Assembly's competence by inserting further exceptions or restrictions into the Schedule; or clarify the Assembly's competence by modifying the descriptions already in the Schedule.

Section 109 Orders must be approved by the National Assembly for Wales and both Houses of Parliament before they are made at a meeting of the Privy Council.

Section 109 Orders replace the previous process of using Orders in Council made under Section 95 of the 2006 Act - commonly known as Legislative Competence orders (LCOs) - to enhance the Assembly's legislative competence

4. Transfer of Functions Orders

Orders in Council made under section 58 of the 2006 Act may transfer ministerial functions to the Welsh Ministers, the First Minister or the Counsel General. Such Orders require the approval of the Welsh Ministers and both Houses of Parliament.