

Devolution Guidance Note 17: Modifying the Legislative Competence of the National Assembly for Wales

SUMMARY

- **Part 4 of, and Schedule 7 to, the Government of Wales Act 2006 sets out the legislative competence of the National Assembly for Wales and the exceptions to, and restrictions on, that competence.**
- **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; 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.**
- **The Assembly's legislative competence may also be modified in parliamentary Acts.**
- **Section 109 Orders replace the previous process of using Orders in Council made under Section 95 of the 2006 Act to enhance the Assembly's legislative competence. These Orders were known as Legislative Competence Orders, or 'LCOs', and modified Schedule 5 to the 2006 Act. Schedule 7 (which came into force on 5 May 2011) replaced Schedule 5 following the referendum on 3 March 2011, in which electors voted in favour of primary law-making powers for the Assembly as set out in Part 4 of the Act.**
- **Section 109 Orders must be approved in draft by both Houses of Parliament and the National Assembly for Wales before they are made at a meeting of the Privy Council.**
- **This guidance note supersedes DGN 16, which described the process for making LCOs.**

Introduction

1. This guidance note for UK Government Departments explains the process for modifying the legislative competence of the National Assembly for Wales ('the Assembly'). The Assembly's legislative competence is set out in Schedule 7 to the Government of Wales Act 2006 ('GoWA'), and Annex 1 provides further explanation of terminology used in that Act.
2. Effective communication between the UK Government and the Welsh Government¹ is crucial in ensuring this process works 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 information, when it is feasible to do so, in a timely way.
3. 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, the Welsh Ministers appointed by the First Minister under section 48 of GoWA, the Counsel General and Deputy Welsh Ministers. Following the May 2011 Assembly elections and the Assembly's enhanced law-making powers coming into force, the Welsh Assembly Government announced that it wished henceforth to be known 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*.

The current Welsh devolution settlement

4. The Assembly Act provisions in Part 4 of the GOWA confer on the Assembly a broad range of primary law making powers in relation to subjects that appear under 20 headings; these are areas in which the Welsh Government also has functions. The Assembly can legislate by passing Acts of the Assembly in relation to these subjects.
5. Section 108 of, and Schedule 7² 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 by Act, together with exceptions to the Assembly's legislative competence, under twenty headings. The twenty

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.

² The current Schedule can be seen at: <http://www.walesoffice.gov.uk/legislation/primary-legislation/wales-only-acts/>

headings cover areas such as agriculture, fisheries and forestry, culture, including the Welsh language and ancient monuments, economic development education and training, the environment, fire and rescue services, health services, highways and transport, housing, local government, social welfare, planning (except major energy infrastructure) and water supplies.

6. Subject to limited exceptions, the Assembly cannot legislate about matters which are not within Part 1 of Schedule 7, 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 legislative competence and exceptions to those restrictions. Parliament may legislate in areas devolved to the Assembly, but by convention the Government will normally ask Parliament to legislate in those areas only with the Assembly's consent (see Devolution Guidance Note 9).
7. The commencement of the Assembly Act provisions was subject to an affirmative vote in a referendum in Wales. A referendum on enhanced law-making powers for the Assembly took place on 3 March 2011, and resulted in a vote in favour of the primary law-making powers for the Assembly in Part 4 of GoWA. The Assembly assumed these powers on 5 May 2011. Any further changes to the legislative competence of the Assembly require Schedule 7 to be amended. This may be done through Orders in Council under Section 109 of GoWA (paragraph 10) or provisions in parliamentary Acts (paragraph 12).
8. 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. Measures that have been passed by the Assembly and received Royal Approval have the same effect as Assembly Acts, and are unaffected by the coming into force of the Assembly Act provisions.
9. The process in the Assembly for passing an Act is similar to that for passing a Measure. The Assembly's legislative competence under Schedule 5 was much more limited than 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. This guidance note replaces DGN 16, which described the process for making LCOs.

Section 109 Orders

10. The subjects set out in Schedule 7 are comprehensive, in the sense that they enable the Assembly to legislate in the areas in which the Welsh Ministers have responsibilities. The Commission on Devolution in Wales - the Silk

Commission - is expected to report in 2013 on the powers of the Assembly, and to make recommendations specifically on modifications to the boundary between what is devolved and non-devolved likely to have a wide degree of support. The UK Government does not intend to make further significant changes to the Assembly's legislative competence while the Commission is carrying out its work. However, minor or technical changes could be made on a case by case basis, and section 109 of GoWA provides a mechanism for Schedule 7 to be modified by an Order in Council if and when required.

11. Modifications to the Assembly's legislative competence may be proposed by the UK Government, the Welsh Government, Assembly Committees or individual Assembly members. In practice, both the UK Government and the Welsh Government would need to agree in principle to the change before work on an order could be taken forward.

Provisions in Parliamentary Acts

12. The UK Government and the Welsh Government may agree to modify the legislative competence of the Assembly by including provisions in parliamentary Acts. These provisions do the same job as Section 109 Orders by amending Schedule 7 to GoWA, and could be used to amend the Assembly's legislative competence. This mechanism does not however provide for a formal role for the Assembly to approve the changes being made to its legislative competence. Departments should therefore presume in favour of a Section 109 Order whenever feasible, rather than provisions in parliamentary Acts, when the Assembly's legislative competence is to be modified.
13. Exceptionally, there may be occasions when it would be more straightforward to modify the Assembly's legislative competence in a parliamentary Bill rather than by a Section 109 Order (for example, if the scope of a Bill covered the subject area in which the UK Government and Welsh Government had agreed legislative competence should be conferred on the Assembly). It would not however be appropriate for the scope of a Bill to be widened simply to accommodate a provision modifying the Assembly's legislative competence. The UK Government and the Welsh Government have agreed that the Welsh Ministers should seek the consent of the Assembly when such provisions are included in Bills. Any such provision should be included in Bills on Introduction. Further advice on the content of parliamentary Bills which relates to Wales can be found in DGN 9.
14. Departments should seek the advice of the Wales Office on the most appropriate mechanism to use to modify the Assembly's legislative competence. Departments should also consult the Wales Office and the Welsh Government if considering making consequential amendments to Schedule 7 through either primary or secondary legislation. Though the

consent of the Welsh Ministers is not required in such cases, departments should be mindful to ensure that making consequential amendments would not fetter the Assembly's ability to exercise its legislative competence.

Issues to Consider

15. Either the UK Government or (more usually) the Welsh Government might identify a need to change the Assembly's legislative competence and modify Schedule 7. The need to consider a change might arise for a wide variety of reasons, including:

- the Welsh Government has made a public commitment, such as a manifesto commitment, to seek to devolve legislative competence to the Assembly on a certain subject;
- either the UK Government or the Welsh Government wish to bring forward legislative proposals in an area where Schedule 7 is not sufficiently specific (see paragraph 19); or
- there is a need to define the boundaries of the devolution settlement in a new subject area (see paragraph 20).

16. Departments should seek the advice of their legal advisers as soon as any change to Schedule 7 is proposed. They should also contact the Wales Office who can advise if any wider engagement with other Departments or interested parties is necessary at this stage. Officials from the relevant Department(s), and the Wales Office, may wish to meet colleagues in the Welsh Government at the earliest practicable opportunity to discuss a proposal in more detail.

The Effect of New Provision

17. Departments should bear in mind that inserting new subjects or exceptions into Schedule 7 may affect the interpretation of existing provisions in the Schedule. Most of the subjects in Schedule 7 are expressed in general terms - for example "education", "housing" and "tourism" - and seeking to insert more detailed subjects than the existing entries may affect the approach the courts would take to interpreting the Schedule. Seeking to modify an existing subject (or exception) in the Schedule may have a similar effect, and may harm UK Government interests. For example, adding detailed provisions to an exception to make clear what it does and doesn't include could raise questions about the scope of other exceptions which do not include similar detail. There is also a risk that defining a subject (or exception) in greater detail could inadvertently exclude areas which should be captured.

18. Departments should remember that Part 1 of Schedule 7 lists both subjects which are within the Assembly's legislative competence and exceptions to those subjects which are not. There are also 'carve-outs' from some

exceptions to enable the Assembly to legislate in a specific area which would otherwise be covered by an exception. Each exception applies to all of the subjects in Part 1 of the Schedule, regardless of the headings under which they are listed. Therefore any new or amended subjects inserted into Schedule 7 will be affected by all of the existing exceptions; and any new or amended exceptions will apply to all of the existing subjects (unless they are defining exceptions which are fixed only to the specific subject(s) in question). Departments should also bear in mind that some areas which are outside the Assembly's competence (such as immigration and defence) have not been included as exceptions in Part 1 of Schedule 7 on the basis that they could not be regarded as falling within any of the existing subjects.

19. Section 109 Orders should not be used ordinarily as means to clarify the precise boundaries of the settlement. That should generally be a matter for the courts. It might however be appropriate for a subject or exception to be clarified if:

- the Welsh Government intends to bring forward legislation in the Assembly in relation to a subject;
- the UK Government and the Welsh Government believe that there is a significant risk of legal challenge to that legislation; and
- the UK Government agrees that it is appropriate to amend Schedule 7 in this way.

20. There may also be cases where new circumstances, such as technical innovations or new legal concepts, make it desirable to clarify or expand the Schedule. These cases should be determined on their merits following consultation with the Wales Office and the Welsh Government.

Political Aspects

21. A Section 109 Order must be approved in draft by both the UK Parliament and the Assembly and may be politically controversial in terms of content. Departments should be mindful that any agreement to modify Schedule 7 would require often complex inter-governmental negotiation, and should factor in considerable lead time for such negotiation in timetabling the delivery and implementation of the Order.

Support for the Change

22. Departments may also wish to ensure that the Welsh Government has consulted any interested parties in England and other parts of the UK on the proposed change as well as those in Wales. Departments themselves may wish to consult interested parties (formally or informally) if a particularly significant change is proposed, building on any engagement carried out by the Welsh Government.

Scrutiny

23. Parliament and the Assembly may each wish to undertake scrutiny of a draft Section 109 Order before the draft Order is debated. Under the former system, the Welsh Affairs Select Committee, the Lords Constitution Committee and a committee of the Assembly all undertook scrutiny of proposed LCOs. Whilst such scrutiny is not a statutory requirement it is the prerogative of Parliament and of the Assembly to carry it out if they wish. Departments should be mindful that committee scrutiny of draft Orders could add significantly to the timescale for making the Order, and should discuss handling with the Wales Office and the Welsh Government.

Procedure for Making Orders

24. Subject to first reaching agreement at official level on the need for a Section 109 Order, the First Minister (or the Welsh Minister with policy responsibility in the relevant area) would normally write to the Secretary of State for Wales to seek agreement to the changes required, and the consequent modifications needed to Schedule 7. The letter should be copied to the Secretary of State in the relevant UK Government Department, and to any other Government Departments with a policy interest in the Order.

25. Collective agreement by UK Ministers and the Welsh Ministers is needed for an order to be taken forward. The consent of UK Ministers is obtained via the Secretary of State for Wales and the Secretary of State in the relevant UK Government Department writing to the relevant Cabinet Committee (currently Home Affairs (HA) Committee) to seek clearance.

26. Subject to clearance, the Secretary of State for Wales will reply formally to the First Minister (or relevant Welsh Minister) to confirm the UK Government's agreement to the change. Agreement should be reached at official level on instructing on, and drafting the Order. There should be close working between officials and legal advisers in Departments, the Wales Office and the Welsh Government in drafting instructions.

27. Instructions should be agreed by all three parties before the Order is drafted, and should be as clear and straightforward as possible. It is crucial that all parties agree a procedure before instructions start to be drafted, and are clear about roles and deadlines. It would be sensible for the party proposing the change to lead on drafting instructions. For example, if the Welsh Government proposes a change, it would draft instructions for the lead Department and the Wales Office to agree. The Order would then be drafted by the Welsh Government's Office of the Legislative Counsel³. Parliamentary

³ Formerly known as the Office of the Welsh Legislative Counsel (OWLC).

Counsel would need to agree the final draft Order given that it amends primary legislation (GoWA) made by Parliament.

28. Draft Orders must be approved by both Houses of Parliament and the Assembly before they are made at a meeting of the Privy Council. The Welsh Government will provide full support to Ministers and departments during the parliamentary passage of the draft Order.

29. The Wales Office and the Welsh Government will update Schedule 7 on their respective websites to reflect the changes by an Order.

Alternatives to Legislative Competence

30. Departments should be mindful that Section 109 Orders are used only to modify the legislative competence of the Assembly. Changes to the Welsh Ministers' executive functions are made in a number of other ways, including:

- Transfer of Functions Orders (TFOs), which are Orders in Council made under Section 58 of GoWA. TFOs are generally used to transfer functions from Ministers of the Crown to the Welsh Ministers, and must be approved by both Houses of Parliament and the Welsh Ministers before they are made. Departments should consult the Wales Office for guidance on the procedure for making TFOs.
- Acts of the Assembly may confer functions on the Welsh Ministers, or modify their existing functions. As set out in Part 3 of GoWA, they may also modify Minister of the Crown functions if the Secretary of State consents, if the modification is incidental or consequential on other provisions of the Assembly Act, or the function became exercisable by the Minister on or after the date when the Assembly Act provisions came into force (5 May 2011). In such cases the modification could, for example, remove a function from a Minister of the Crown and confer a similar function on the Welsh Ministers, or require the Minister of the Crown to exercise the function only with the agreement of, or following consultation with, the Welsh Ministers. Acts of the Assembly may also confer or impose a function on a Minister of the Crown with the consent of the Secretary of State. Further information on Minister of the Crown functions is set out in DGN 9.
- Acts of Parliament may confer or impose functions on the Welsh Ministers, or modify or remove their existing functions. The UK Government would normally include provisions having these effects in a parliamentary Bill only with the consent of the Assembly, in

areas in which the Assembly has legislative competence, or the Welsh Ministers, in non-devolved areas (see DGN 9).

- In certain cases the executive functions of the Welsh Ministers may be changed by making subordinate legislation, such as a Designation Order under section 2(2) of the European Communities Act and section 59 of GoWA, or an Order (other than a TFO) which amends a parliamentary Act or UK subordinate legislation (such as a Henry VIII Order).

31. When the Welsh Government proposes a change to the Assembly's legislative competence the UK Government might agree the request; refuse to agree; or agree to give regulation making powers to Welsh Ministers (for example, by means of a TFO) which would achieve the same or a similar result. Departments should seek advice from the Wales Office in terms of how to proceed.

Contact Details

32. 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 advisors:

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.