

EXPLANATORY MEMORANDUM TO
THE GOVERNMENT OF WALES ACT 2006 (CONSEQUENTIAL
MODIFICATIONS AND TRANSITIONAL PROVISIONS) ORDER 2007

2007 No. 1388

1. This Explanatory Memorandum has been prepared by the Wales Office and is laid before Parliament by command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

This Order is being made to implement changes in the structure of the devolution settlement in Wales under the Government of Wales Act 2006 (“GOWA 2006”). Schedules 10 and 11 to GOWA 2006 provide for minor and consequential amendments to Acts of Parliament and transitional provisions, respectively. This Order makes further appropriate consequential modifications to legislation and transitional provisions.

3. **Matters of special interest to the Joint Committee on Statutory Instruments.**

There are no such matters of special interest to the Joint Committee.

4. **Legislative background**

- 4.1 This Order, amongst others, is required to implement GOWA 2006.

- 4.2 At present, under the Government of Wales Act 1998 (“GOWA 1998”), the National Assembly for Wales (“the GOWA 1998 Assembly”) is a corporate body, and there is no legal separation of the executive and legislature within that body. Under GOWA 2006, there will be a separate legislature (the National Assembly for Wales, “the new Assembly”) and executive (the Welsh Assembly Government, including the Welsh Ministers), together with the National Assembly for Wales Commission that will provide property, staff and services to the new Assembly. The new Assembly is an unincorporated association, while the Assembly Commission is a body corporate. The executive functions that are currently vested in the GOWA 1998 Assembly will be transferred to and vested in the Welsh Ministers. The new Assembly will have new legislative powers to pass Assembly Measures.

- 4.3 As a result of these changes, a number of consequential modifications are required to existing pieces of legislation that refer to the GOWA 1998 Assembly or to GOWA 1998. In addition, transitional provisions are required, amongst other things, to apply a legislative procedure in the Assembly (in most cases akin to equivalent parliamentary procedure) to

subordinate legislation made by the Welsh Ministers. No such procedures apply at present under GOWA 1998, because the function of making subordinate legislation is a function of the GOWA 1998 Assembly as a corporate body, and the GOWA 1998 Assembly's Standing Orders provide for the procedures to be followed when subordinate legislation is made.

- 4.4 Schedule 10 to GOWA 2006 already contains a number of consequential amendments to other legislation. Schedule 11 contains transitional provisions, including provisions (paragraphs 33 to 35) that will apply Assembly legislative procedures to subordinate legislation made by Welsh Ministers under existing powers to make such legislation. Where, following legal separation, the Welsh Ministers acquire new powers to make subordinate legislation under Acts or Assembly Measures, the parent Act or Measure will provide for the appropriate Assembly legislative procedure – the transitional provisions are required only in respect of existing powers to make subordinate legislation which transfer to the Welsh Ministers under paragraphs 30 of Schedule 11 to GOWA 2006. The appropriate Assembly legislative procedures in relation to existing subordinate legislation powers are determined as follows. Where a Minister of the Crown has an equivalent function to the Welsh Ministers' function to make subordinate legislation in relation to Wales, then under the transitional provisions in Schedule 11, the Assembly equivalent of the parliamentary legislative procedure that applies when the Minister of the Crown exercises the function, applies to the exercise of that function by the Welsh Ministers. Where there is no equivalent Minister of the Crown function, the Assembly legislative procedure has to be specified or no procedure will apply. The relevant procedure for each power is specified in Tables 1 and 2 of Schedule 11, paragraph 35.
- 4.5 This Order makes further appropriate consequential modifications, in addition to those already contained in Schedule 10 to GOWA 2006. Those consequential modifications are set out in Schedule 1 to the Order. It also makes transitional provisions. Those transitional provisions are in Schedule 2 to this Order.
- 4.6 There is a relationship between this Order and an Order in Council made under the power in GOWA 2006, Schedule 11, paragraph 31(1)(c) and (4). This is the National Assembly for Wales (Diversion of Functions) Order (“the Diversion of Functions Order”) [SI 2007/1117]. The GOWA 1998 Assembly resolved on 21st March to recommend that the Diversion of Functions Order be made by Her Majesty in Council. The Diversion of Functions Order was then made at the Privy Council meeting on 4 April. As it had been recommended to be made by the Assembly, it was not subject to any parliamentary procedure, by virtue of paragraph 31(8) of Schedule 11.
- 4.7 The Diversion of Functions Order is required because, under GOWA 2006, Schedule 11, paragraph 30(1), “relevant Assembly functions” (i.e. certain

functions of the GOWA 1998 Assembly: *see* paragraph 30(2)) are transferred to the Welsh Ministers once the new First Minister has been appointed following the 2007 Assembly elections. That is how the executive functions, (including powers to make subordinate legislation) that are currently functions of the GOWA 1998 Assembly, will be transferred to the Welsh Ministers.

- 4.8 The majority of functions caught by Schedule 11, paragraph 30(1) are true executive functions that should be exercised by the Welsh Ministers. However, there are a few functions that are otherwise caught by paragraph 30(1) but which it is considered should be functions of the new Assembly. The Diversion of Functions Order provides for those functions to be functions of the new Assembly rather than transfer to the Welsh Ministers. Some powers of the GOWA 1998 Assembly to make subordinate legislation (known as ‘framework powers’ and contained in the Education and Inspections Act 2006 and the NHS Redress Act 2006) have been converted (under paragraph 31(2) of Schedule 11 GOWA 2006) into powers for the Assembly to pass Measures by a separate Order in Council (i.e. the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007) [SI 2007/910]. The GOWA 1998 Assembly approved a draft of that Order in Council and thereafter it was subject to negative parliamentary procedure.
- 4.9 The Diversion of Functions Order makes provision (as described above) in relation to certain functions of the GOWA 1998 Assembly under, for example, the Food Standards Act 1999, such as the receipt from the Food Standards Agency of annual and other reports under section 4(2), and of copies of statements of its general objectives and practices under section 22(6). This Order (i.e. The Consequential Modifications etc. Order) also makes consequential modifications to those Acts. Therefore, to understand the overall effect in terms of what the functions of the Assembly and of the Welsh Ministers will be under those Acts, this Order and the Diversion of Functions Order must be read together. However, the two Orders are legally independent of each other in the sense that each could stand alone if the other were not made.
- 4.10 Please note that paragraph 1 of Schedule 2 to this Order makes provision for the function of the GOWA 1998 Assembly under section 37(5) of the Food Standards Act 1999 of approving Orders in Council under sections 32 and 33 of that Act to be a function of the new Assembly rather than transfer to the Welsh Ministers. As that is a function of approving subordinate legislation, it falls outside the scope of a diversion Order in Council under Schedule 11 paragraph 30(1)(c). It is not appropriate for it to be made an Assembly measure-making power under Schedule 11 paragraph 31(2). Consequently, that provision has been made using the powers in section 162(2) as it is

considered that it is appropriate that the function of approving those Orders in Council should be with the legislature and not the executive.

5. Extent

This Order generally extends to the United Kingdom but each modification has the same extent as the enactment it modifies.

6. European Convention on Human Rights

The Secretary of State for Wales has made the following statement under section 19(1) (a) of the Human Rights Act 1998:

In my view the provisions of the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007 are compatible with the Convention rights.

7. Policy background

7.1 GOWA 2006 received Royal Assent on 25 July 2006. The purpose of GOWA 2006 is to make provision about the government of Wales.

7.2 The Act effects the formal separation between the executive and legislative arms of the GOWA 1998 Assembly; it establishes the Welsh Assembly Government (made up of the First Minister, Welsh Ministers and their deputies and the Counsel General) as an entity separate from, but accountable to, the new Assembly. Most of the statutory functions which are currently functions of the GOWA 1998 Assembly will become functions of the Welsh Ministers.

7.3 The dissolution of the GOWA 1998 Assembly and the creation of the new Assembly will take place following the election in May 2007.

7.4 This Order is required to implement GOWA 2006. In particular, it makes provision about who will exercise the functions of the GOWA 1998 Assembly where the provisions in paragraphs 30-32 of Schedule 11 to GOWA 2006 would not operate to transfer the functions to the Welsh Ministers. It also makes provision to implement further the separation of the executive and legislative functions of the GOWA 1998 Assembly.

7.5 The consequential modifications in this Order can be broadly separated into the following classes:

(a) Replacing references to –

(i) “the Assembly First Secretary” (as defined in section 53 GOWA 1998) with “the First Minister for Wales” (for example, in sections 27(2)(d), 28(5)(d) and 54(1)(d) of the Constitutional Reform Act 2005 – see Schedule 1, paragraph 110 of the Order);

(ii) “the Assembly Cabinet” (i.e. executive committee under section 56 GOWA 1998, as renamed by GOWA 1998 Assembly Standing Orders) usually with “the Welsh Ministers” (but in the case of Freedom of Information Act 2000, section 35(5) – see Schedule 1, paragraph 81 of the Order - it was considered appropriate, to refer to “the cabinet or any committee of the cabinet of the Welsh Assembly Government”);

(iii) provisions of GOWA 1998 with references to provisions of GOWA 2006 (for example, in section 7B(6)(b) of the Representation of the People Act 1983 – see Schedule 1, paragraph 17 of the Order);

(iv) GOWA 1998 Assembly with references to the new Assembly where that cannot be done through the Diversion of Functions Order (for example, function of approving Orders in Council under sections 32 and 33 of Food Standards Act 1999, referred to in 4.10 above);

(b) Making repeals (for example, repeal by paragraph 46 of Schedule 1 of the Order of section 16A(6) of the Environment Act 1995);

(c) The provisions in GOWA 2006, Schedule 11, paragraphs 30 to 32 are intended to ensure that references to the GOWA 1998 Assembly in existing legislation are references to the appropriate person or body following separation of the executive and legislature under GOWA 2006 and the transfer of GOWA 1998 Assembly functions to the Welsh Ministers. However, in some circumstances, those provisions do not work in a way that is consistent with the new devolution settlement. Therefore, this Order contains some modifications to deal with those situations (for example, in relation to section 150(4)(c) the Finance Act 2004 – see Schedule 1, paragraph 108 of this Order);

(d) Modifications to deal with the new constitutional arrangements in Wales and in particular the practical consequences of separation of the executive and legislature (for example, modifications to the Local Government Finance Act 1988 – see Schedule 1, paragraphs 21 to 40 of the Order). The functions of the GOWA 1998 Assembly in relation to making local government finance reports would merely transfer to Welsh Ministers under GOWA 2006, Schedule 11, paragraph 30. The effect of the modifications in this Order are to provide that the function of making such reports shall be exercised by the Welsh Ministers and to impose in respect of the Welsh Ministers’ function of making these reports a scrutinising and approval role for the new Assembly which mirrors the role of the House of Commons in relation to local government finance reports made by the Secretary of State in England.

7.6 The transitional provisions contained in Schedule 2, paragraphs 4 and 5 of this Order apply Assembly legislative procedures to subordinate legislation made by the Welsh Ministers under the specified powers where, otherwise, no procedure would apply to the making of that legislation under Schedule 11 paragraphs 33 to 35. The transitional provision in paragraph 3 of that Schedule disapplies Parliamentary procedure that was previously applied to the GOWA 1998 Assembly, under provisions in the Travel Concessions (Eligibility) Act 2002 and Enterprise Act 2002, as it is considered that this reflects more appropriately the new constitutional arrangements in Wales. Paragraph 2 makes it clear that when the Comptroller and Auditor General examines accounts of the Food Standards Agency under Schedule 4, paragraph 3(4) to that Act, he will be doing so on behalf of the new Assembly and not the Welsh Ministers.

Consultation

7.7 This Order implements GOWA 2006, and does not contain new policy on which public consultation is required.

7.8 GOWA 2006 followed the White Paper “Better Governance for Wales”, which was issued by the Secretary of State for Wales for public consultation. GOWA 2006 achieved the UK Government’s stated policy objective of separating the legislative and executive arms of the Assembly, and providing for the legislature to have new legislative powers (to pass Assembly Measures) and for the executive to exercise executive powers.

7.9 This Order makes consequential modifications to other enactments, as a result of the separation of the legislature (the new Assembly) and executive (the Welsh Assembly Government, including the Welsh Ministers), and the new roles of the Assembly and the Welsh Ministers. The transitional provisions in this Order are required as a result of the transfer of executive functions to the Welsh Ministers. In particular, they provide for an Assembly legislative procedure to apply in the case of the exercise of the specified Welsh Ministers’ functions to make subordinate legislation.

7.10 Although there has been no public consultation on this Order when in draft, relevant interested parties have been consulted.

8. Impact

A Regulatory Impact Assessment has not been prepared for this Order as it has no impact on business, charities or voluntary bodies

9. **Contact**

Susan Olley at the Wales Office Tel: 029 20898568 or e-mail:
susan.olley@walesoffice.gsi.gov.uk can answer any queries regarding the
instrument.