

Proposed Order in Council: The Government of Wales Act 2006 (Amendment) Order 2019

September 2019

Introduction

1. The Government of Wales Act 2006 (Amendment) Order 2019 (the proposed Order) was laid before the National Assembly for Wales (the National Assembly) by the Counsel General, Jeremy Miles AM on 16 July 2019.
2. On 16 July 2019, the Business Committee agreed, in accordance with Standing Order 25.7(i), to refer the proposed Order to the Constitutional and Legislative Affairs Committee (the Committee) to consider and report on the proposed Order in accordance with Standing Order 25.8.
3. In accordance with Standing Order 25.9, the Business Committee agreed that the Committee should report to the Assembly by 30 September 2019.¹

Background

4. Section 109 of the Government of Wales Act 2006 (2006 Act), provides a mechanism, through an Order in Council, to amend Schedule 7A and 7B of that Act. An Order in Council made under section 109 can enhance, restrict or change the Assembly's legislative competence to pass Acts.
5. Schedule 7A of the 2006 Act sets out the matters that are reserved to the UK Parliament and about which the National Assembly cannot legislate.
6. Schedule 7B sets out restrictions on the Assembly's power to legislate.

¹ The Business Committee considered the proposed order at its meetings on 16 July 2019 and 17 September 2019.



7. For a matter to be within the National Assembly’s legislative competence, it must not (amongst other conditions set out at section 108A of the 2006 Act) relate to a reserved matter, and it must not breach any of the restrictions in Part 1 of Schedule 7B. In considering whether a matter breaches a restriction in Part 1, regard must be had to any exceptions set out in Part 2.

8. Paragraph 8 of Schedule 7B to the 2006 Act provides that a provision in an Assembly Act cannot:

- “confer or impose any function on a reserved authority;
- modify the constitution of a reserved authority;
- confer, impose, modify or remove functions specifically exercisable in relation to a reserved authority,”

without Minister of the Crown consent.

9. Paragraph 9 of Schedule 7B contains exceptions to paragraph 8, while paragraph 10 provides that a provision of an Act of the Assembly cannot remove or modify any function of a public authority (other than a devolved Welsh authority), unless the appropriate Minister consents.

10. Standing Order 25 provides for the procedure to be followed in respect of the consideration of Orders in Council that are to be made under section 109 of the 2006 Act.

11. Once a proposed Order has been considered in accordance with Standing Orders 25.7 to 25.11, the Welsh Government may introduce a draft Order for approval by the National Assembly. Draft Orders must also be approved by the House of Commons and House of Lords.

12. An Order in Council is made by Her Majesty the Queen acting on the advice of the Privy Council.

The proposed Order

13. The Explanatory Memorandum says that the main purpose of the proposed Order is to amend Schedule 7B to enable the National Assembly to legislate for changes to electoral registration processes in Wales for devolved elections, without the need for consent. It adds that the proposed Order is required to facilitate a programme of canvass reform with the UK and Scottish Governments.

14. Electoral Registration Officers (EROs) appointed under section 8 of the *Representation of the People Act 1983* are a reserved authority for the purposes of the 2006 Act, as they have functions relating to both devolved and non-devolved elections, and they are not included in the exemptions in paragraphs 9 or 10, which list the reserved authorities to which specified consent requirements do not apply.

15. Article 45 of the Welsh Ministers (Transfer of Functions) Order 2018 (the 2018 Order) transfers to the Welsh Ministers functions relating to electoral legislation, so far as those functions are exercisable within devolved competence.

16. According to the Explanatory Memorandum accompanying the proposed Order the existing legislation means that:

“... whilst the Assembly now has competence to legislate in relation to Assembly elections and local government elections, it would not be able to legislate for certain changes to electoral registration processes in Wales for devolved elections where such changes relate to the functions of EROs, without Minister of the Crown consent. (...) The combined effect of Schedule 7B and the way in which the TFO² transfers functions relating to electoral legislation means that key electoral functions relating to EROs were not transferred and cannot be exercised by Welsh Ministers.”³

17. Article 2 of the proposed Order seeks to amend paragraphs 9 and 10 of Schedule 7B to the 2006 Act. Its effect is to disapply the restrictions contained in paragraphs 8 and 10 of that Schedule, thereby permitting the National Assembly for Wales to make provision about EROs in Wales in relation to their non-reserved functions without the consent of a UK Minister of the Crown.

18. In relation to the 2018 Order, the effect of the amendments made by article 2 of the proposed Order is to alter the scope of “devolved competence” under article 45 of the 2018 Order to include Ministerial functions in relation to EROs. By virtue of Article 3 of the proposed Order, those Ministerial functions are treated as transferring to the Welsh Ministers under article 45 of the 2018 Order, but only with effect from the date that the proposed Order comes into force (having been laid and approved in draft).

² The 2018 Order

³ Welsh Government, *Explanatory Memorandum, The Government of Wales Act 2006 (Amendment) Order 2019, 2019 No. [xxxx]*, July 2019

Evidence from the Counsel General

19. We took evidence from the Counsel General and his officials on 16 September 2019.

20. He told us that:

“The purpose of the Order is to confer functions on an electoral registration officer in relation to the canvass reform programme, which is intended to commence next year. The objective is to facilitate a reform that enables several innovations in canvass arrangements, introducing a national data match so that EROs are able to base their assessment of people who are entitled to be registered on other public records—council tax records and similar—then to allow that matching exercise to dictate or suggest the form of registration that follows and to provide some additional flexibility for the way in which the canvass is communicated to electors. So, the driver for the Order is the need to put in place arrangements for the canvass reform ...”⁴

21. He added that the proposed Order would:

“... ensure that it's easier to register individuals on the register, and to ensure that the EROs can use publicly available information in order to analyse who is likely to be able to be registered, and then to ensure that they can keep a database of that information. And there is also the possibility of introducing an electoral piloting system to introduce measures. At the moment, it's possible for the Welsh Government to do that with the consent of the EROs, but ... as a result of these provisions that could happen without having to have that consent—that the Government would have the powers to introduce those pilots independently, as it were.”⁵

22. The Counsel General also highlighted the relationship between the proposed Order, the Senedd and Elections (Wales) Bill and the Welsh Government's forthcoming Local Government Bill, noting in the case of the latter that:

⁴ Constitutional and Legislative Affairs (CLA) Committee, 16 September 2019, RoP [4]

⁵ Constitutional and Legislative Affairs (CLA) Committee, 16 September 2019, RoP [33]

“... by introducing and bringing the Order into effect, that will remove the need for Minister of the Crown consent, because it will have the effect of altering the competence that we have here to exercise.”⁶

23. In the course of our questioning, it was acknowledged that the proposed Order is correcting an error.⁷

Our view

24. We are content with the proposed Order.

⁶ Constitutional and Legislative Affairs (CLA) Committee, 16 September 2019, RoP [8]

⁷ Constitutional and Legislative Affairs (CLA) Committee, 16 September 2019, RoP [16-20]
