

Proposed Order in Council: The Government of Wales Act 2006 (Amendment) Order 2021

January 2021

Introduction

1. The Government of Wales Act 2006 (Amendment) Order 2021¹ (“the proposed Order”) was laid before the Senedd by the Counsel General, Jeremy Miles MS (“the Counsel General”) on 10 December 2020. The proposed Order was accompanied by an Explanatory Memorandum from the Welsh Government (“the Explanatory Memorandum”),² together with the UK Government’s Explanatory Memorandum.³
2. On 15 December 2021, the Business Committee agreed, in accordance with Standing Order 25.7(i), to refer the proposed Order to the Legislation, Justice and Constitution Committee (“the Committee”) to consider and report on the proposed Order in accordance with Standing Order 25.8. In accordance with Standing Order 25.9, the Business Committee agreed that the Committee should report to the Senedd by 14 January 2021.⁴

¹ [The Government of Wales Act 2006 \(Amendment\) Order 2021](#)

² Welsh Government, [Explanatory Memorandum The Government of Wales Act 2006 \(Amendment\) Order 2021, 2021 No. \[XXXX\]](#), 10 December 2020

³ UK Government, [Explanatory Memorandum to the Government of Wales Act 2006 \(Amendment\) Order 2021 \[Year\] No. \[XXXX\]](#)

⁴ Business Committee, [Timetable for consideration of The Government of Wales Act 2006 \(Amendment\) Order 2021, in accordance with Standing Order 25.7\(i\)](#), December 2020



Background

Government of Wales Act 2006

3. Section 109 of the *Government of Wales Act 2006* (“the 2006 Act”), provides a mechanism, through an Order in Council, to amend Schedules 7A and 7B to the 2006 Act. An Order in Council made under section 109 can enhance, restrict or change the Senedd’s legislative competence to pass Acts.

4. Schedule 7A to the 2006 Act sets out the matters that are reserved to the UK Parliament and about which the Senedd cannot legislate.

5. Schedule 7B sets out specific restrictions on the Senedd’s power to legislate.

6. For a matter to be within the Senedd’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 Schedule 7B.

7. Paragraphs 8 to 11 of Schedule 7B restrict the Senedd’s ability to affect the functions of reserved authorities (i.e. non-devolved public authorities).

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

- confer or impose any function on a reserved authority,
- modify the constitution of a reserved authority, or
- 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 (often referred to as carve-outs) to paragraph 8. For example, paragraph 8 does not apply to conferring or imposing functions on the Electoral Commission or the Food Standards Agency.

10. Paragraph 10 provides that a provision of an Act of the Senedd cannot remove or modify any function of a public authority (other than a devolved Welsh authority), without Minister of the Crown consent. Paragraph 10 also contains exceptions; for example, paragraph 10 does not apply to removing or modifying the functions of the Electoral Commission or the Food Standards Agency. Paragraph 10 also does not apply to removing or modifying the functions of a Minister of the Crown.

- 11.** However, paragraph 11 sets out a separate restriction on removing or modifying the functions of a Minister of the Crown. Paragraph 11 sets out a list of Minister of Crown functions that the Senedd cannot remove or modify without Minister of the Crown consent. The list includes “qualified devolved functions”, which include concurrent functions, i.e. functions that both the Welsh Ministers and a Minister of the Crown can exercise on a concurrent basis.
- 12.** Before the process of exiting the European Union began, the restriction on removing or modifying such concurrent functions received relatively little attention. However, the process of exiting the European Union created many new concurrent functions. As a result, we began to pay increasing attention to them and in particular their impact on the Senedd’s legislative competence.
- 13.** Standing Order 25⁵ 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.
- 14.** 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 Senedd.
- 15.** An Order in Council is made by Her Majesty the Queen acting on the advice of the Privy Council, but only if the draft Order has been approved by the Senedd, the House of Commons and the House of Lords.

Standing Order 30C - Notification in relation to Statutory Instruments made by UK Ministers in devolved areas under the European Union (Withdrawal) Act 2018 not laid before the Senedd

- 16.** Standing Order 30C puts in place a notification process through written statements in relation to statutory instruments made by UK Ministers in devolved areas under the *European Union (Withdrawal) Act 2018* (“the 2018 Act”). It was introduced in response to our report on the scrutiny of regulations arising under the 2018 Act.⁶
- 17.** In a subsequent progress report on our scrutiny of regulations made under the 2018 Act, we highlighted concerns and issues arising from the written

⁵ Welsh Parliament, Senedd Business, [Standing Orders of the Welsh Parliament](#), November 2020

⁶ Constitutional and Legislative Affairs Committee, [Scrutiny of regulations made under the European Union \(Withdrawal\) Act 2018: operational matters](#), July 2018. More information about Standing Order 30C statements is available on our [website](#).

statements produced by the Welsh Government as result of the requirements of Standing Order 30C.⁷ These included the reduction of the Senedd's legislative competence as result of the creation of new qualified devolved functions, in the form of "concurrent functions" and "concurrent plus" functions.

18. A concurrent function is a function that can be exercised in relation to Wales by both the Welsh Ministers and a Minister of the Crown independently of the other, i.e. they are both given the same power.

19. A concurrent plus function is a type of concurrent function. It also can be exercised in relation to Wales by both the Welsh Ministers and a Minister of the Crown acting independently of each other. However, before the Minister of the Crown can exercise the power, the consent of the Welsh Ministers is required.

20. Under Schedule 7B to the 2006 Act, the Senedd cannot remove or modify the UK Ministers' side of a concurrent function without Minister of the Crown consent. Therefore, the more concurrent functions that are created, the more things that are outside the legislative competence of the Senedd (because the Senedd cannot modify or remove the Minister of Crown's side of those concurrent functions).

21. The Senedd can, of course, remove or modify the Welsh Ministers' side of a concurrent function, without needing consent.

22. Written statements laid by the Welsh Ministers under Standing Order 30C have repeatedly said that the negative impact on the legislative competence of the Senedd caused by the creation of new concurrent functions will be addressed by an Order in Council made under section 109 of the 2006 Act.

The proposed Order

23. The Explanatory Memorandum states that the proposed Order will:

- correct a number of deficiencies in Schedules 7A and 7B to the 2006 Act arising from the UK's exit from the European Union;

⁷ Constitutional and Legislative Affairs Committee, [Scrutiny of regulations made under the European Union \(Withdrawal\) Act 2018: progress report](#), February 2019. See also [correspondence](#) between the Committee and the Welsh Government on 6 February 2019, 11 March 2019 and 25 March 2019, as well as 7 February 2019, 21 February 2019 and 27 March 2019

- correct drafting errors that were inserted into the 2006 Act by the *Wales Act 2017*;
- provide a carve-out from the consent requirements in Schedule 7B in respect of concurrent and concurrent plus functions created by EU exit legislation and the *Coronavirus Act 2020*.⁸

24. The Explanatory Memorandum states that:

“The carve outs from consent requirements negate the potential restrictions on competence that would have arisen as a result of the number of concurrent and concurrent plus functions that were created in consequence of the EU Exit SI programme, EU Exit Bills and the *Coronavirus Act 2020*.”⁹

25. Articles 4(5) and 6(3) of the proposed Order remove the requirement for the Senedd to obtain Minister of the Crown consent in relation to:

- (a) removing the Minister of Crown’s side of specified concurrent functions,
- (b) removing the Welsh Ministers’ function of giving consent to a Minister of the Crown in respect of specified concurrent functions,
- (c) removing a Minister of the Crown’s function of giving consent to the Welsh Ministers in respect of specified concurrent functions.

26. With regard to paragraph 25(a) and (b), the specified concurrent functions are:

- those created by regulations made under the *EU (Withdrawal) Act 2018* (but not the concurrent functions contained in the 2018 Act itself);
- those contained in the following Acts, including regulations made under them:
 - the *EU (Withdrawal Agreement) Act 2020*,
 - the *Direct Payments to Farmers (Legislative Continuity) Act 2020*,
 - the *Coronavirus Act 2020*,

⁸ Explanatory Memorandum, paragraph 2

⁹ Explanatory Memorandum, page 4

- the *Agriculture Act 2020*,
- the *Fisheries Act 2020*, and
- an Act of the UK Parliament resulting from the Trade Bill.

27. With regard to paragraph 25(c), the specified functions are those contained in the following Acts, including regulations made under them:

- the *EU (Withdrawal Agreement) Act 2020*,
- the *Fisheries Act 2020*, and
- an Act of the UK Parliament resulting from the Trade Bill.

28. These carve-outs only apply where the Senedd wishes to **remove** those functions identified in paragraph 25(a), (b) and (c) above. If the Senedd wishes to **modify** those functions, then the consent requirements will continue to apply (see also paragraph 32 below).

Evidence from the Counsel General

29. We took evidence from the Counsel General on 14 December 2020.¹⁰

Overview

30. The Counsel General explained the background to the proposed Order:

“The Order started, really, as a means of amending Schedule 7A to the Government of Wales Act 2006, so that a range of references in the Schedule, which would become redundant effectively as a consequence of leaving the European Union, were cleaned up, effectively ... But then it became clear that it could also be used to solve a challenge that we identified as part of that process of legislating to leave the European Union, which is that, as a consequence of creating concurrent and concurrent plus functions between Welsh Ministers and UK Government Ministers, we identified a risk, given a feature of our devolution settlement here in Wales, that it might require Minister of the Crown consent in the future when the Senedd was legislating in

¹⁰ Legislation, Justice and Constitution (LJC) Committee, *R.O.P.*, 14 December 2020

the areas covered by that EU legislation. So, we took the opportunity of that pre-existing section 109 Order, if you like, to solve that question.”¹¹

31. He also noted that the particular issues around concurrent functions arise as a result of the Welsh constitutional settlement, and they do not arise in Scotland and Northern Ireland. He said:

“The reason the issue arises in our constitutional settlement in Wales—it doesn't exist in Scotland and Northern Ireland—is the requirement of this Minister of the Crown consent... the judgment at the time of the ... the Government of Wales Act ... was that because there were so few examples of these issues, and we expected that they would decline over time, that it wasn't felt to be an especially significant issue, if I can put it in those terms. But, as a consequence of, I suppose, an unexpected development in terms of legislating to leave the European Union, it became clear, in that context, that providing concurrent functions to map the complex range of powers and obligations that Ministers have right across the UK was sometimes the most effective way of doing that.

... So, from my own point of view as Counsel General, I was and continue to be copied into all the ministerial advice to portfolio holders where this issue arises, so that I can give my view as to whether it's an appropriate way of dealing with the transfer of functions in that particular context. The criteria that I have in mind are, really, is there any other way of doing it, and if I was satisfied that there isn't, the question then is, is this concurrent function issue also being solved, as it were, by the section 109 Order that we have in front of us today? So, those tests are the ones that I apply to looking at any of that advice, effectively.”¹²

32. The Counsel General also noted the implications of the distinction between removing and modifying consent functions:

“... there is a body of consent requirements where we can essentially say, 'If the powers are to be removed in future, then that, obviously, doesn't impose new, as it were, burdens on the relevant authority. But if you're modifying or creating a new one, that remains within the framework of

¹¹ LJC Committee, RoP [5], 14 December 2020

¹² LJC Committee, RoP [8], 14 December 2020

the original intention in the Wales Act 2017.' So, it's an acknowledgement that that's the underpinning framework, if you like, rather than a particular choice.

What I would say, though, is that in the negotiation, I suppose, around the modification of function, which would require consent from UK Ministers, then, plainly, the fact that the Senedd could simply remove that function is, as it were, leverage in that discussion, isn't it? It's a fallback that will obviously provide some context in the negotiation itself, if you like."¹³

Specific issues

33. We asked the Counsel General if he was content with the list of enactments in new paragraphs 9(8), 9(9), 11(6) and 11(7) of Schedule 7B to the 2006 Act (as inserted by articles 4(5) and 6(3) of the proposed Order) and therefore the extent of the carve-outs that allow the Senedd to remove concurrent functions without UK Government consent. In response, the Counsel General said:

“Generally speaking, yes. The scope of the Order is broader than it was at the outset. The first carve-out only applied in the context of legislation on exiting the European Union, and specifically, at the outset at least, that was subordinate legislation. It's now broadened beyond that more recently. So, I do think that that list does demonstrate what legislation includes the concurrent and concurrent plus functions.”¹⁴

34. An official accompanying the Counsel General explained that the drafting of the new paragraphs to provide carve-outs needed to reflect relevant restraints on the exercising of functions by the Welsh Ministers.¹⁵

35. We asked the Counsel General whether he would have preferred the proposed Order to be future-proofed, so as to carve out concurrent functions created under all future UK Parliament Acts. In response he said that the proposed Order did contain “an element of futureproofing within the element dealing with regulations specifically” and also indicated that there is an

¹³ LJC Committee, RoP [12-13], 14 December 2020

¹⁴ LJC Committee, RoP [19], 14 December 2020

¹⁵ LJC Committee, RoP [22], 14 December 2020

opportunity for the Welsh Government and Senedd to consider the issue in future through the legislative consent process.¹⁶

36. The carve-outs provided in paragraphs 9(8), 9(9), 11(6) and 11(7) of Schedule 7B to the 2006 Act by the proposed Order do not include UK Ministers' functions in respect of regulating British fishing boats in the Welsh zone, which means that the Senedd will not be able to remove the UK Ministers' side of any concurrent function in this area without UK Government consent. When questioned on this point, the Counsel General said:

“... the changes in the Order reflect the changes in what is now the fisheries Act ... I think people accept, generally speaking, that this is quite a difficult and complex area that we may need to return to when Governments and legislatures have a little more time following this particular period.

What this does mean is that the Secretary of State does have remaining functions in terms of British fishing boats, apart from Welsh fishing boats in the Welsh zone, because that just reflects the arrangements already in place between the four nations. So, this has more to do with the process of bringing order to fisheries legislation than other aspects of the Order.”¹⁷

37. We wrote to Lesley Griffiths MS, Minister for Environment, Energy and Rural Affairs on this point on 13 November 2020.¹⁸ In her response of 16 December 2020 she stated:

“The Fisheries Act 2020 and the EU Exit SIs contain concurrent powers. The UK Government is bringing forward a section 109 Order under GOWA to provide a carve out from the consent requirements in paragraphs 8 and 11 of Schedule 7B to GOWA...

This carve out seeks to ensure Minister of the Crown consent will not be required where the Senedd legislates to remove concurrent functions in specified enactments, including the Fisheries Act 2020 and Fisheries

¹⁶ LJC Committee, RoP [24], 14 December 2020

¹⁷ LJC Committee, RoP [27], 14 December 2020

¹⁸ Letter to Lesley Griffiths MS, Minister for Environment Energy and Rural Affairs, UK Fisheries Bill, 13 November 2020

EU Exit SIs. However, the proposed carve out is subject to some very specific exceptions in relation to the regulation of fishing boats.

... The exceptions protect existing Secretary of State functions to regulate British fishing boats, apart from Welsh fishing boats, in the Welsh zone. We acknowledge such functions are a unique feature of the devolution of fisheries within the UK and the rationale provided for this carve out is consistent with the existing devolution of executive and legislative fisheries powers already in place across the wider fisheries statute book.”¹⁹

38. The UK Government’s Environment Bill included concurrent plus powers. Our report on the corresponding Welsh Government Legislative Consent Memorandum (LCM)²⁰ noted that the LCM referred to a UK Government ministerial commitment to carve-out these concurrent plus power from Schedule 7B to the 2006 Act. When we asked why the Environment Bill is not covered by the proposed Order, the Counsel General noted that unlike the Trade Bill, the Environment Bill had not neared the end of its scrutiny in the UK Parliament and “isn't sufficiently settled to persuade the Government that it's appropriate to list it” in the proposed Order (which is the case for the Trade Bill).²¹ He added:

“However, what that also means is, because the Bill is still in progress, if you like, there is also an opportunity to put the actual carve-outs on the face of the Bill, so in that sense it can be dealt with through the Bill itself rather than the Order that's intended to tackle this issue otherwise.”²²

The need for further Orders in Council

39. We asked the Counsel General whether there would be a need for any further Orders in Council related to exiting the EU or otherwise. He told us:

“My best judgment, Chair, as of today, is that the transition period would generate the need for another Order in Council. As we've discussed today, actually, a number of Members have raised points that

¹⁹ Letter from Lesley Griffiths MS, Minister for Environment Energy and Rural Affairs, 16 December 2020

²⁰ LJC Committee, The Welsh Government's Legislative Consent Memorandum on the Environment Bill, July 2020

²¹ LJC Committee, RoP [31], 14 December 2020

²² LJC Committee, RoP [31], 14 December 2020

are germane to the broader constitutional settlement, obviously, and so in that sense, there's a series of ongoing reflections at our end around that. But there isn't any live discussion, if you like, that would lead to an Order in Council. We certainly wouldn't rule that out in the future for obvious reasons, but there isn't anything that is current at the moment."²³

Our view

40. We welcome the opportunity to have been able to scrutinise the Counsel General on the proposed Order given not only its constitutional importance but also the limited time available.

41. We note that the proposed Order was originally intended to correct, in the *Government of Wales Act 2006*, deficiencies as result of the UK's exit from the EU and drafting errors.

42. We also note that the proposed Order is now being used to remove restrictions on the Senedd's legislative competence. Almost all these restrictions have arisen as a result of the Welsh Government's approach to permitting the UK Government to legislate in devolved areas to correct the statute book as a result of EU exit (a situation we have been highlighting in our scrutiny of Standing Order 30C written statements).

Conclusion 1. While we have expressed concerns about the Welsh Government's reliance on the UK Government to legislate on its behalf, we welcome the removal of the restrictions on the Senedd's legislative competence.

Conclusion 2. We hope that in the Sixth Senedd, should any further corrections be needed to the statute book as a consequence of the UK's exit from the EU, the Welsh Government legislates to make these corrections itself.

43. We note the Counsel General's confirmation that the proposed Order does not address the issues caused by the inclusion of concurrent plus powers in the UK Government's Environmental Bill and that an opportunity remains to correct the position through the addition of carve-outs on the face of the Bill.²⁴ We will monitor this position through our scrutiny of the Welsh Government's supplementary consent memoranda on that Bill.

²³ LJC Committee, RoP [50], 14 December 2020

²⁴ LJC Committee, RoP [31], 14 December 2020

44. We note also the Counsel General’s comment that “the transition period would generate the need for another Order in Council”. In our view, further clarity is needed on this point, given that we have now passed the period ending on 31 December 2020, that was commonly known as ‘the transition period’.

Recommendation 1. The Counsel General should clarify his comments regarding the need for a further Order in Council as a consequence of the transition period.

45. We would welcome continued action by the Counsel General that would keep the Committee updated with developments related to concurrent and concurrent plus functions; for example, relating to the regulation of British fishing boats in the Welsh zone as referred to by the Counsel General in his evidence (see paragraph 36).

Recommendation 2. The Counsel General should keep the Committee updated with developments related to concurrent and concurrent plus functions that have arisen or arise in the future, as a result of UK legislation.