

Devolution Guidance Note 16

Orders in Council under section 95 of the Government of Wales Act 2006

SUMMARY

- The Government of Wales Act 2006 ('the 2006 Act') created, from May 2007, a separate legislature, the National Assembly for Wales, and executive, the Welsh Assembly Government. The 2006 Act provides, at Section 95, for a procedure for Her Majesty to confer enduring legislative competence on the National Assembly for Wales (the 'National Assembly') by Order in Council. Additional competence will be conferred on the Assembly by inserting new matters into the fields listed in Part 1 of Schedule 5. This will allow it to pass legislation, known as Assembly Measures, which can do anything an Act of Parliament can do within the general constraints set out in the 2006 Act, and within the scope of the particular legislative competence granted.
- New matters can also be added to Schedule 5 through 'framework powers' in Parliamentary Bills. Devolution Guidance Note 9 (DGN9) sets out the procedure for conferring legislative competence on the National Assembly in this way. DGN9 can be found on the Ministry of Justice website at www.justice.gov.uk/guidance/devolutionguidancenotes.htm#nine.
- Orders in Council under section 95 of the Act, amending Schedule 5, must be approved by the National Assembly and both Houses of Parliament. Proposed Orders will be subject to Pre Legislative Scrutiny in both Legislatures.
- The Welsh Assembly Government, individual Assembly Members and Assembly Committees can propose Orders in Council. Most Orders will originate with the Welsh Assembly Government. The terms of each such Order should be agreed between the Welsh Assembly Government and the UK Government before the proposed Order is published.
- In considering proposals for legislative competence, UK Government Departments should seek legal advice and involve their central devolution contact, Ministers, the Wales Office, devolution secretariats in MoJ and Cabinet Office, and other interested departments at an early stage.
- The Secretary of State for Wales is responsible for presenting draft Orders in Council to Parliament, and is a member of the Legislation and Constitution Committees to represent Welsh interests.

Introduction

1. This Guidance Note seeks to assist UK Government officials involved with Orders in Council by: setting out the new legislative arrangements in Wales; setting out the principles to be applied when considering requests for enhanced legislative competence; and, explaining the procedures governing this process.

How the structure works

2. Part 4 of the Government of Wales Act 2006 provides for the National Assembly for Wales to have primary law making powers on a broad range of subjects where executive functions are already devolved, if voted for in a Welsh referendum. No referendum has yet been held. The subjects are set out in Schedule 7 to the Act, listed under 20 broad headings.
3. In the meantime, Part 3 of the Act provides for legislative competence to be granted in respect of specified matters that relate to the same 20 fields. This competence will allow the Assembly to pass legislation, known as Assembly Measures. Assembly Measures can do anything an Act of Parliament can do within the general constraints set out in the Act, and within the scope of the particular legislative competence granted. Provision about the Assembly's competence to pass Measures is set out in Part 3 of the Act, and the fields and matters (along with a number of restrictions and exceptions) are in Schedule 5.

Schedule 5 Explained

4. Schedule 5 to the Act can be amended in two ways, either by Orders in Council under section 95 of the Act (referred to as 'Legislative Competence Orders' by the Assembly) or by the inclusion of provisions in UK Parliamentary Bills (referred to as 'Framework Powers' by the UK Government and 'Measure-making powers' by the National Assembly).
5. Part 1 of Schedule 5 lists the 'matters' in relation to which the National Assembly may pass Measures, listed under 20 'fields'. Parts 2 and 3 of Schedule 5 set out general restrictions on the National Assembly's legislative competence and exceptions from those restrictions. An Order in Council under section 95 may amend Schedule 5 by:
 - inserting a new matter which relates to one or more of the fields listed in Part 1, or varying or removing an existing matter;
 - inserting a new field (so long as the Welsh Assembly Government already has an executive function in that field) or varying or removing a field;
 - amending the general restrictions on legislative competence in Part 2 or the exceptions from those restrictions in Part 3.

6. Nearly all of the Section 95 Orders will be conferring legislative competence on the National Assembly in line with the first bullet point above. If you find yourself dealing with a proposal which appears to relate to either the second or third bullet point above, for example to insert a new field, this might involve a more fundamental change to the constitutional framework set out in the 2006 Act, and you should contact the Wales Office straight away for advice.
7. An Order in Council will normally contain 'matters', which if approved by the UK Government, the National Assembly and Parliament will be inserted into fields listed within Part 1 of Schedule 5 of the Act. As a consequence the National Assembly will have the legislative competence to pass Assembly Measures in relation to those matters. It will only be possible to specify matters in this way if they relate to the fields specified in Schedule 5. A copy of Schedule 5 as it currently stands is available on National Assembly website at www.assemblywales.org/bus-home/bus-legislation.htm or via the Wales Office website at www.walesoffice.gov.uk/devolution.

What is a 'matter'?

8. A matter is a statement of the scope of an aspect of legislative competence. Explanatory Memoranda prepared by the Welsh Assembly Government, which accompany Orders in Council and Framework Powers in Acts, explain the intended scope and policy context of matters included in each Order or Act. A matter should be expressed as concisely as possible.

Considering Proposals for Legislative Competence

9. This section sets out the guiding principles which should inform Whitehall Departments' consideration of proposals for enhanced legislative competence from the Welsh Assembly Government.
10. In doing so, colleagues should be clear about the reason for the proposal coming forward. Why does the Welsh Assembly Government want the National Assembly to have legislative competence? For example, is there a manifesto pledge or public commitment to seek competence? Is the Welsh Assembly Government currently unable to fulfil its legislative programme and deliver its policy commitments using its existing powers? Potential measures that the Welsh Assembly Government may wish to bring forward in the short to medium term may prove helpful in gaining this understanding. But the Welsh Assembly Government is not only limited to implementing policies mentioned in Explanatory Memoranda, and departments' consideration should focus on the appropriateness of the scope and content of proposed Orders rather than the likely detail of any Measures that may be presented to the National Assembly once the Order is made.

11. The Welsh Assembly Government has undertaken to consult the UK Government at an early stage in the development of proposed Orders, so as to facilitate a mutual understanding of their intended scope and their relationship with existing devolved functions. There is an expectation that the UK Government will work closely with the Welsh Assembly Government in considering proposals (see also DGN 9, paragraph 4).
12. The 2005 White Paper 'Better Governance for Wales' made clear that the Government favours an incremental approach to conferring enhanced legislative competence on the National Assembly. This will both permit the National Assembly to develop the capacity to deal with enhanced powers and allow Parliament and the National Assembly to develop a balance between them which provides the best possible legislative framework for Wales and the UK. **There is therefore an expectation that proposals for legislative competence will be granted providing the proposed Order meets the following guiding principles:**
 - i. **Deepen not broaden the settlement**
13. The policy of enhancing the National Assembly's legislative competence is to deepen devolution in Wales rather than to broaden it. In other words, proposals for legislative competence must relate to one or more of the 'fields' listed in Schedule 5 to the 2006 Act, which correspond to policy areas where Welsh Ministers already have executive powers. No new field can be added to Schedule 5 unless the Welsh Ministers have functions in that field. Proposals to transfer executive functions from the UK Government to the Welsh Assembly Government will continue to be considered separately on a case by case basis and brought forward by way of Orders under section 58 of the 2006 Act. Proposals for a Section 95 Order to create a new field in Schedule 5 would be a significant broadening of the devolution settlement in Wales. The Wales Office will work closely with the relevant UK Departments should such instances arise to consider the case for the National Assembly having competence in the new area.
14. This does not imply that the National Assembly's legislative competence must exactly match the executive functions of the Welsh Ministers. The purpose of having legislative competence may be precisely to enable the National Assembly to make new provision that is within one or more of the policy areas which are generally the responsibility of the Welsh Assembly Government. The division of responsibility between the Welsh and UK Ministers can be complicated, and UK Departments should consider whether it is desirable to preserve that current division when defining legislative competence or where boundaries should be drawn in order to enable the National Assembly to achieve greater legislative coherence in relation to a particular topic.

ii. Allow scope for policy divergence

15. A clear purpose of devolution is to enable different policies to be pursued to reflect different needs in the constituent parts of the UK. Government departments therefore should not normally object to proposals for legislative competence on the grounds that the Welsh Assembly Government could pursue policies that differ from England (or any other part of the UK), or because policy divergence could incur criticism of one of the distinct approaches. Provided that the proposal is otherwise consistent with the principles set out here, then any concerns that conferring legislative competence could lead to policy divergence should properly be dealt with at Ministerial level.

iii. Ensure the case for powers is made

16. When considering a proposal, UK Departments will want to have an indication of the purpose for which the competence is being sought. This will help officials determine whether the scope of the proposed Order is appropriate and advise Ministers on the suitability of devolving competence. One key element is that the Welsh Assembly Government should be able to make the case for the legislative competence it is seeking.

17. For example, it may be seeking powers because it has made a political commitment to do so or because it would like to consolidate an area of the law. Or it may be seeking powers because of a statutory deficit; the executive powers of the Welsh Ministers may be insufficient to enable the Welsh Assembly Government to deliver commitments in its programme of government or to respond to identified policy needs.

18. The Welsh Assembly Government might, in some cases, seek powers when its policy is yet to be settled – for instance, where consultations are planned. In such cases, UK Government departments will want to clarify the scope of the policy area for which the Welsh Assembly Government is seeking competence in order to consider fully the case for conferring competence.

19. The UK Government will need sufficient information on the broad policy intentions of the Welsh Assembly Government in order to gain a clear understanding of the rationale for the scope of the powers being sought. There is an expectation that the Welsh Assembly Government will share this information with the UK Government.

20. But UK Government Departments should maintain a clear distinction between the scope of legislative competence in the proposed Order and the detail of any Measures likely to be brought forward as a result of the Order being made. The contents of likely Assembly Measures are a matter for the National Assembly, and discussions should not focus on them.

21. Legislative competence conferred by the Order will be enduring. It should not therefore be the aim to make an Order which is drafted so tightly that it would only allow the delivery of the Welsh Assembly Government's immediate objective. Orders will normally have sufficient flexibility to allow the delivery of other policy aims in the future within the subject area.

iv. Clearly defined scope

22. In order to determine whether the National Assembly should gain legislative competence, UK Government Departments will need to scrutinise carefully the scope of the competence being sought. The UK Government will only wish to promote a proposal to Parliament where the scope is clearly understood and disclosed. In particular, there is a need to consider carefully the meaning of key terms used in the proposed Order. In doing so, UK Departments should be mindful of the need to ensure Parliament will have all the information it requires to decide whether or not to confer the legislative competence.

23. Legislative competence may in future be used to deliver policies undeveloped at the time the power is sought. This should not mean that the competence conferred is unclear, but where appropriate, its scope should be sufficiently wide around its core purpose so that it is flexible enough to allow other aims to be pursued in the future.

v. Appropriate Breadth of Matters

24. The 2005 White Paper 'Better Governance for Wales' made clear that, when appropriate, matters which are widely drawn may be added into Schedule 5, but Orders should not give the National Assembly powers over the whole of any of the fields listed in Schedule 5 in one go, nor should subjects normally be imported wholesale from Schedule 7 into Schedule 5 unless a clear case for doing so is made. Defining matters to be added to Schedule 5 should be approached on a case by case basis, from the standpoint of what the matter is intended to cover. However, Departments may find it helpful to look at the existing content of Schedule 5 in considering whether the scope of matters in proposed Orders is appropriate.

vi. Ensure coherence of law

25. Assembly Measures have to operate within a common England and Wales legal jurisdiction and UK Departments need to consider the impact of enhanced legislative competence on the coherence of law within that jurisdiction. Departments should also be mindful of ensuring that the internal coherence, intelligibility and consistency of Schedule 5 are maintained. The Schedule is populated by both Framework Powers in UK Acts and Orders in Council and will include exceptions to legislative

competence originating from both mechanisms. The Wales Office has primary responsibility within the UK Government for ensuring the ongoing coherence of Schedule 5, but Departments should be aware of the potential effects of a particular proposed Order on the Schedule.

vii. Respect UK powers and interests

26. UK Government Departments should, in considering a proposed Order, also consider the possible impact on non-devolved functions and the potential to inhibit the UK Government's ability to deliver its policy objectives. Section 101 of the 2006 Act gives the Secretary of State a power to intervene to prevent a measure being made which would have certain adverse impacts, and section 99 of the same Act enables the Attorney General to refer to the Supreme Court¹ the question of whether an Assembly Measure is within competence, but these powers should not be seen as a substitute for defining matters clearly.
27. The 2006 Act permits the National Assembly to legislate in ways that touch on non-devolved areas. The principal test of whether a provision in an Assembly Measure is within the National Assembly's competence is whether it relates to a matter in Schedule 5. That question is to be determined by reference to the purpose of the provision, having regard (amongst other things) to its effect in all the circumstances. The National Assembly also has the express power to make various kinds of ancillary provision (for example to enable provisions in a Measure to be enforced or to make them effective) which may extend into non-devolved areas of policy. Similarly, the UK Government may make provision to amend legislation made by, or within the competence of, the National Assembly (see paragraph 17 of DGN9). Departments should contact the Wales Office if in any doubt about how the tests of legislative competence may apply.
28. Departments should also be mindful of the extent to which the 2006 Act protects executive powers exercised by the UK Government. For example, the 2006 Act prohibits any Assembly Measure removing or modifying a Minister of the Crown function (without the consent of the Secretary of State), but does not provide similar safeguards for all the UK Government functions carried out by other public bodies, nor UK Government policy responsibilities which are discharged direct through statute rather than by conferring executive powers on Ministers. In some areas, such as planning, energy and the environment, there are potential overlaps between the responsibilities of the UK Government and the Welsh Assembly Government, or subjects where different policy responsibilities may impinge on one another. In such cases the existing boundaries of the devolution settlement need to be clearly identified.

¹ The Judicial Committee of the Privy Council until the Supreme Court takes over this responsibility.

29. The Welsh Assembly Government has given a commitment that before it introduces a Measure in the National Assembly, the relevant Welsh Minister will have resolved any issues which may impact on the responsibilities of the UK Government. This is not limited solely to impacts on Minister of the Crown functions. The Welsh Minister will do so in consultation with the Wales Office and other relevant UK Government Departments. This commitment mirrors that made by the UK Government in DGN9, relating to legislating in devolved areas.

Order in Council Process

30. The making of Orders in Council is a six-stage process:

- Stage 1: Agreeing the proposed Order
- Stage 2: Pre-Legislative Scrutiny
- Stage 3: UK Government and Welsh Assembly Government clearance of the draft Order
- Stage 4: Formal approval by the National Assembly for Wales
- Stage 5: Parliamentary approval
- Stage 6: Approval by Her Majesty in Council and coming into force.

31. UK Government Departments are most closely engaged in the first three stages of this process. This guidance therefore focuses on those stages and sets out the procedure to be adopted in considering requests for legislative competence.

32. Proposals for Orders in Council can be initiated by the Welsh Assembly Government, Committees of the National Assembly or individual Assembly Members. This section focuses on Orders proposed by the Welsh Assembly Government – see the end of this section for guidance on where Orders brought forward by Assembly Committee or Assembly Members differ from this approach.

Stage 1: Agreeing the Proposed Order

33. The purpose of the first stage is to ensure agreement between the UK Government and Welsh Assembly Government on the scope and content of the proposed Order.

34. DGN9 sets out the principle (at paragraph 4) that the UK Government will normally consult the Welsh Assembly Government at an early stage in the development of its legislative proposals. The Welsh Assembly Government has equally agreed that it will normally consult the UK Government at an early stage in the development of Orders in Council and agree the terms of a proposed Order before it is published. Discussions may be in confidence where necessary.

35. The Welsh Assembly Government's proposed Orders will form part of the legislative programme agreed by the Cabinet of the Welsh Assembly Government. Once agreed, the First Minister will write to the Secretary of State for Wales informing him of the programme. Discussions on proposed Orders will normally be initiated by a letter from the lead Welsh Assembly Government Minister to their equivalent UK Government Minister and the Secretary of State for Wales. The letter will set out the intention to develop an Order, its proposed scope and indicate the timetable for making the Order, within the Welsh Assembly Government's legislative programme. This letter will initiate engagement between the administrations, enabling the Welsh Assembly Government to address any concerns of the UK Government when drafting the proposed Order. Relevant information should be shared between the two governments to help inform discussions, including drafts of the proposed Order and the Explanatory Memorandum (see paragraph 37).
36. The relevant Welsh Assembly Government and UK Government departments should work together to agree the text of the proposed Order at official level. The Wales Office and the Welsh Assembly Government's Constitutional Affairs and Legislation Management Division should be closely engaged in supporting these discussions. The broad framework for managing this stage of the process is set out overleaf.
37. Once agreement has been reached at official level, firstly the Cabinet of the Welsh Assembly Government and then the UK Government's Cabinet will be asked to agree formally the proposed Order. The Attorney General will need to agree the proposed Order before UK Cabinet clearance is obtained. To seek the agreement of the UK Cabinet, the Secretary of State for Wales will write to Cabinet colleagues enclosing the proposed Order and its accompanying Explanatory Memorandum. The Memorandum should provide a clear description of the context and rationale for the powers in the short to medium term, for which the powers are sought. This will help Ministers decide the appropriateness of the National Assembly gaining legislative competence in the relevant policy area.
38. Subject to the UK Cabinet agreeing the proposed Order, the Secretary of State for Wales will submit the proposed Order and Explanatory Memorandum to Parliament for pre-legislative scrutiny by the House of Commons Welsh Affairs Committee (WAC). In parallel, the lead Minister in the Welsh Assembly Government will lay the proposed Order for scrutiny by an ad-hoc Committee of the National Assembly.

Assembly Member and Assembly Committee Proposed Orders

39. As with Welsh Assembly Government proposed Orders early engagement of the UK Government is essential. The Memorandum of Understanding sets out that, at official level, the UK Government deals with devolved administrations and not with individual members of devolved legislatures. As a result negotiations to seek agreement on the text of Member and

Committee proposed Orders which the UK Government can accept will be conducted in liaison with the Welsh Assembly Government.

40. Private Members secure the right to introduce an Order by submitting their proposal into a ballot. A member who is successful in the ballot has 25 working days to bring forward a proposal for approval in principle by the National Assembly. If the National Assembly votes in favour of the proposal the Member has leave to proceed and can begin to develop their Order. Assembly Committees can bring forward proposed Orders whenever they choose.
41. As soon as practicable after an Assembly Member has been granted leave to proceed, the Welsh Assembly Government will inform the Wales Office whether or not it intends to support the Member proposed Order. If the Welsh Assembly Government supports the Order, fully or conditionally, similar arrangements to those for Welsh Assembly Government proposed orders would be established. It will be for the Welsh Assembly Government to feed UK Government comments on the proposal and any drafts of the Order back to the individual Assembly Member or Assembly Committee.

Managing the Process

42. In order to operate the Order in Council process successfully, the UK Government and Welsh Assembly Government have agreed that discussions to agree the terms of proposed Orders should be underpinned by a strong project management approach.

Project Teams

43. An intergovernmental project team should be established once the lead Minister from the Welsh Assembly Government has written giving notice of a proposed Order. The remit of the team is to negotiate the terms of the draft Order and manage its delivery through the legislative process of making the draft Order. The team should be clear of about its role at each stage of the process. The first stage, for example, requires the team to ensure timely agreement (at official level) of the scope and content of the proposed Order.
44. Each project team will normally be established and chaired by the Wales Office, which is responsible within the UK Government for managing the process of agreeing the proposed Order. The membership of the team must include a lead official from the UK department with the main policy interest in the Order (the 'lead department'), nominated representatives from other departments with a significant policy interest as appropriate, the Welsh Assembly Government's lead officials, and representatives from the Wales Office's Legislation Team and the Welsh Assembly Government's Constitutional Affairs and Legislation Management Division. Lawyers from the lead department, the Wales Office and the Welsh Assembly Government will also be members of the team. Other departmental lawyers may be nominated as appropriate. Each project team should be clear about the respective roles and expertise of each team member.
45. Those UK Government Departments with a lesser interest in the content of the proposed Order need not become members of the team but should make clear to the team if they wish to be kept informed of progress.
46. The members of each Project team will be accountable to their respective Ministers – Welsh Ministers and UK Government Ministers, including the Secretary of State for Wales and Secretaries of State in the relevant UK Government Departments represented on the project team.
47. Orders are drafted by Welsh Legislative Counsel (part of the Welsh Assembly Government) on instructions from the relevant lawyers in the Welsh Assembly Government. The Office of the Parliamentary Counsel is available to advise UK Government Departments on drafting issues that may affect legislation on non-devolved matters.

Project Planning

48. Project Teams should prepare a plan for delivering the Order, including timescales and milestones. Project teams should normally work to timescales for agreeing an Order proposed by the Welsh Assembly Government and based on its legislative programme. These timescales should mark out clearly the progress the Project Team expects to make by a particular date, and when each of stage of the process should be completed. For example, milestones for the first stage would include dates by when the Team would agree the detailed policy, finalise instructions to Welsh Legislative Counsel on the requirements for the proposed Order and have successfully concluded discussions on the proposed Order (and its accompanying Explanatory Memorandum). These should help inform the dates for project team meetings, which should be held regularly throughout the discussions. Milestones will often be indicative for the latter stages of the process, where Parliamentary scheduling will be a significant factor.
49. If a Project Team envisages that it would be unable to deliver within the timescales proposed by the Welsh Assembly Government, it should refer the matter to senior officials within the lead Department (or other UK Government Departments as appropriate), the Wales Office and the Welsh Assembly Government for resolution.
50. Project teams should review progress regularly in order to determine whether the project is proceeding according to plan. Should delays occur, or significant differences emerge on how best to proceed, remedial action may be needed. If the Project Team is unable to resolve issues, matters should be referred in the first instance to senior officials within each UK Government Department and the Welsh Assembly Government. If resolution is not achieved, project teams should refer the issue to Ministers for determination.
51. The proposed Order and accompanying memorandum will need to be cleared by the UK Government's Cabinet before being presented for pre-legislative scrutiny. The Attorney General has the power to refer proposed Orders to the Supreme Court² and will therefore need to agree the proposed Order before UK Cabinet clearance is obtained. The Cabinet of the Welsh Assembly Government will have cleared the proposed Order before it is referred to the Attorney General.

Stage 2: Pre-legislative Scrutiny (PLS)

52. The second stage ensures the proposed Order is scrutinised thoroughly by the National Assembly and Parliament, with both legislatures reporting their findings and, if they so conclude, making recommendations for amending the proposed Order.

² The Judicial Committee of the Privy Council until the Supreme Court takes over this responsibility.

53. All proposed Orders are subject to pre-legislative (non-statutory) scrutiny. The House of Commons Welsh Affairs Committee (the 'WAC') will conduct the parliamentary pre-legislative scrutiny of any proposed Orders. The House of Lords Constitution Committee is also separately scrutinising the constitutional implications of each proposed Order for a twelve-month trial period from June 2007. The work of both Committees can be concurrent and complementary, but the timescale for such scrutiny is a matter for the Committees themselves.
54. In its report on the Order in Council process (HC 175) the WAC recommended that there may be cases where it may be appropriate for certain proposed Orders in Council to be referred to the Welsh Grand Committee. This will be decided on a case by case basis.
55. The precise form of pre-legislative scrutiny in the National Assembly is a matter for that body and its standing orders, but to date has involved the formation of an ad-hoc scrutiny committee. Each Committee has taken evidence from the Welsh Assembly Government and other interested parties before publishing a report. Similarly, the WAC has taken evidence from the UK Government before reporting on proposed Orders. It is anticipated that the WAC and the relevant National Assembly ad-hoc Committee may work together on pre-legislative scrutiny, conducting joint evidence sessions but reporting separately to their respective legislatures.
56. The Wales Office leads in taking proposed Orders through Parliamentary pre-legislative scrutiny, with support and input from Whitehall Departments. Wales Office will, for example, co-ordinate briefing for UK Ministers giving evidence to the WAC, based on contributions provided by the Welsh Assembly Government. Whitehall Departments will provide policy advice and expertise, and will be expected to support Ministers appearing before the Committee.
57. The powers granted to the National Assembly by way of matters in Schedule 5 are general and enduring for the particular policy area. The primary aim of pre-legislative scrutiny for Parliament is to inform consideration of the appropriateness of conferring the legislative competence on the National Assembly in the area specified in the proposed Order in Council.
58. At the conclusion of their respective pre-legislative scrutiny Parliamentary Committees and the National Assembly Committee publish their findings, which are likely to include recommendations about the scope of the enhanced powers being requested.

Stage 3: UK Government and Welsh Assembly Government clearance of the Draft Order

59. On conclusion of pre-legislative scrutiny by Parliament and the National Assembly, the Welsh Assembly Government will consider any

recommendations and discuss with the UK Government any changes required to the proposed order and the accompanying Explanatory Memorandum. It will be for the Welsh Assembly Government to prepare the final draft order. Any changes to the Order at this stage will need to be cleared with the relevant UK Government department, and clearance may need to be obtained to short deadlines to meet agreed timescales (see paragraph 48). It is important that there is agreement on the final text of the draft Order before it is laid, because the same text must be approved by both legislatures. Once the draft Order is laid it is unamendable; it can only be approved or rejected following debate.

60. The Secretary of State for Wales will need to secure Cabinet agreement to the final draft order before it is laid in Parliament. This will normally occur after Welsh Assembly Government collective clearance and before the Order is laid before the National Assembly. The Attorney General will need to agree the draft Order before UK Cabinet clearance is obtained, and may do so to a shortened deadline if no significant changes have been made following pre-legislative scrutiny.

Stage 4: Formal Approval by the National Assembly for Wales

61. Once there is agreement between the two administrations the final draft Order will be laid before the Assembly for approval. If agreed by the National Assembly the First Minister sends notice in writing to the Secretary of State for Wales requesting that the draft Order be laid before Parliament for approval.

Stage 5: Parliamentary Approval

62. Under Section 95(7) of the Government of Wales Act the Secretary of State must within 60 days of receiving notice from the First Minister decide to lay the draft Order before Parliament, or give the First Minister notice in writing of his refusal to lay the draft Order along with the reasons for refusal. Draft Orders will normally have been agreed by the Welsh Assembly Government and UK Governments in advance of the formal vote in the Assembly. This would allow the Secretary of State to proceed directly to laying the draft Order as approved by the National Assembly, before Parliament.
63. It may not always be the case that a draft Order approved by the Assembly has been agreed by the UK Government or been subjected to pre-legislative scrutiny in Parliament. Section 95(7) of the Act provides the opportunity for the Secretary of State, in such circumstances, to consult colleagues or invite pre-legislative scrutiny in Parliament before deciding whether the draft Order as approved by the National Assembly should be laid before Parliament. This must take place within the 60-day period triggered by the First Minister's letter.
64. Once laid before Parliament the draft Order in Council will be subject to affirmative resolution of both Houses. As with other secondary legislation it

will not be possible for Parliament to amend a draft Order. Officials should stand ready to answer any queries from Members of Parliament before debates are held, in addition to briefing Ministers.

65. Following approval by both Houses of Parliament the draft Order will be submitted to the Privy Council to be made. The new legislative competence will then be inserted as a matter into the relevant Field in Schedule 5 to the Government of Wales Act 2006.

Assembly Measures

66. Once the Order has inserted the matter(s) into Schedule 5, the National Assembly for Wales has the legislative competence to pass Assembly Measures relating to those matters.

Useful Information

Readers may find the information below useful by way of background.

Flow Chart illustrating procedure described in previous pages

See Annex 1

Government of Wales Act

http://www.opsi.gov.uk/acts/acts2006/ukpga_20060032_en_1.htm

Welsh Affairs Committee Report on Order in Council Process

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmwelaf/986/98602.htm>

House of Lords Constitution Committee Report on Order in Council Process

<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/17/17.pdf>

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Ministry of Justice

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Annex 1

