

To: Business Committee

From: Rhodri Morgan AM  
First Minister

## **EXPLANATORY MEMORANDUM**

### **CONSTITUTIONAL LAW**

### **DEVOLUTION, WALES**

### **THE NATIONAL ASSEMBLY FOR WALES (TRANSFER OF FUNCTIONS) (No.2) ORDER 2006**

#### **Summary**

**This Order makes provision for, and in connection with, the transfer to the Assembly of a range of functions of UK Ministers of the Crown relating to the following:**

- sections 1 and 3 of the Census Act 1920;**
- section 156 of the Environmental Protection Act 1990 in so far as it applies to Part 2 of that Act; and**
- sections 47(2)(g), 53(2)(c), 55(4) and 66A(6) of the Water Industry Act 1991.**

**In particular, the proposed transfer of the Census Act 1920 functions, contained within the Order, will:**

- (a) direct that a Minister of the Crown consult the Assembly before recommending to Her Majesty in Council that a Census Order be made under section 1 of the Census Act 1920, where that Census Order includes reference to Wales; and**
- (b) transfer to the Assembly of the function of making Census Regulations under section 3 of the Census Act 1920, in so far as that function is exercisable in relation to Wales.**

**The transfer of section 156 of the Environmental Protection Act 1990 will enable the Assembly to make Regulations, in relation to Wales, giving effect to Community and other international obligations in relation to waste management on land.**

**Section 156 powers can be used to modify the application of certain provisions of the Environmental Protection Act 1990 and the Radioactive Substances Act 1993. The main advantage of section 156 powers is that they are not subject to the same limitations as attached to the use of section 2(2) of the European Communities Act 1972, especially in relation to the maximum penalties that may be imposed.**

**Whilst the proposed transfer of functions under the Water Industry Act 1991 will enable the Assembly to make regulations under sections 74, 47, 53, 55, and 66A of that Act in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales (but not in relation to any licensed water supplier), prescribing requirements in relation to water fittings, contravention of which will release a water undertaker from its water supply duties in certain circumstances.**

1. This Memorandum is submitted to the Assembly's Business Committee in relation to The National Assembly for Wales (Transfer of Functions) (No.2) Order 2006, in accordance with Standing Order 26.
2. A copy of the Instrument is submitted with this Memorandum.

### **Enabling Power**

3. The powers enabling this Instrument to be made are contained in sections 22 and 24(1) of, and paragraphs 1 and 3 of Schedule 3 to, the Government of Wales Act 1998. In accordance with section 22(4)(b) of the Government of Wales Act 1998, the National Assembly for Wales' approval to the Instrument is required before it can be made.

### **Legislative Background**

4. This draft Transfer of Functions Order is the latest in a series of Transfer of Functions Order to be made under section 22 of the Government of Wales Act 1998.
5. Section 22 of the 1998 Act provides that Her Majesty may by Order in Council provide for the transfer to the Assembly of any function so far as exercisable by a Minister of the Crown in relation to Wales or direct that any function so far as is exercisable shall be exercisable by the Assembly concurrently with the Minister of the Crown.
6. Section 22(4) also provides, however, that no recommendation may be made to Her Majesty in Council to make such an Order unless a draft of the Instrument containing it has been laid before, and approved by a resolution of, each House of Parliament and, in the case of an Order varying or revoking a previous Transfer of Functions Order, unless such a draft has also been laid before, and approved by a resolution of, the Assembly.
7. Sections 47(2)(g), 53(2)(c), 55(4) and 66A(6) of the Water Industry Act 1991 and section 156 of the Environmental Protection Act 1990 vary the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672). Therefore, the entire Transfer of Functions Order must be approved by the Assembly in Plenary, in accordance with section 22(4)(b) of the Government of Wales Act 1998.

### **Policy Background**

#### Sections 1 and 3 of the Census Act 1920

8. The Census of Population is conducted to enumerate the whole population periodically and to collect information on the characteristics of people and households. Central and local government use the information to form policy, to plan services for specific groups of people, and, in particular, to distribute resources effectively. It is also a vital source of information for users in the academic community and private sector. Only a census can provide the information on a

uniform basis both about the country as a whole and about individual small areas and sub-groups of the population in relation to one another.

9. Following discussions on the matter of recording Welsh identity in the 2001 Census of population, the Economic Secretary to the Treasury and the Registrar General for England and Wales agreed that the Assembly should have a more formal role in agreeing future census forms in Wales.
10. Officials of the Welsh Assembly Government, the Office for National Statistics (ONS) and the Wales Office, including legal advisers, have considered various options and identified one, which gives the Assembly the widest possible role within existing legislation. This builds on the agreement reached between the National Statistician and the Assembly Permanent Secretary for an addition to the Statistics Concordat (part of the overall Memorandum of Understanding between the UK Government and the Devolved Administrations).
11. About a year before the Census, a draft Order is laid before Parliament; this sets out the date on which the Census shall be taken, who shall make returns, and the particulars to be stated in returns. Following this, the Chancellor of the Exchequer makes the Census Regulations; these set out the arrangements for conducting the Census - appointing enumerators, delivering forms and returns, roles and responsibilities of Census enumerators and their managers, and the precise content of the Census form.
12. The function (under section 1 of the Census Act 1920) of making a Census Order is exercisable by Her Majesty in Council. Such functions do not fall within section 22 of the Government of Wales Act 1998 and cannot be transferred to the Assembly. However, under section 22(1)(c) of the Government of Wales Act 1998 it is possible to direct that the function of a Minister of the Crown in recommending that such an order be made can only be exercised after the Minister has consulted and/or obtained the consent of the Assembly. Functions of the Registrar General, such as taking the Census and processing the returns also fall outside section 22, and cannot be transferred.
13. The function of making Census Regulations (under section 3 of the Census Act 1920) does fall within section 22 of the Government of Wales Act 1998. Therefore, in so far as that function is exercisable in relation to Wales, it can be transferred to the Assembly.

Section 156 of the Environmental Protection Act 1990

14. The devolution settlement gives the Assembly extensive responsibilities for environmental matters, including waste management. The National Assembly has powers to give effect to Community law obligations with respect to waste management under section 2(2) of the European Communities Act 1972 (ECA 1972) and these powers have normally been sufficient for these purposes. The Welsh Assembly Government normally seeks to keep the waste management regulatory framework the same in Wales as in England to avoid inappropriate cross border waste flows, potential disadvantage to business and to make easier the task of the Environment Agency of regulating waste management in both countries. This has been achieved either by legislating jointly with the Secretary of State or by making Regulations in Wales, which as far as possible, have substantially the same effect as those made by the Secretary of State in relation to England.

15. Recently, the Secretary of State made Regulations partly in reliance on section 156 of the Environmental Protection Act 1990 (EPA), and partly in reliance on section 2(2) of the ECA 1972. Because functions under section 156 have not been transferred to the Assembly, the Assembly was unable to make the same provision in Regulations in relation to Wales and consequently the Secretary of State exercised the section 156 function in relation to Wales.
16. Section 156 powers can be used to modify the application of certain provisions of the Environmental Protection Act 1990 and the Radioactive Substances Act 1993, in order to give effect to Community and other international obligations. It has not been relied upon as often as powers under section 2(2) of the ECA 1972, because it is narrower in scope applying only to a limited number of provisions, and lacking the flexibility of section 2(2) of the ECA 1972 with respect to the power to make consequential and related provision. For this reason, where section 156 powers are used, they are usually used in conjunction with a combination of other powers, for example section 2(2) ECA.
17. The main advantage of section 156 powers is that they are not subject to the same limitations as attached to the use of section 2(2), particularly in relation to the maximum penalties that may be imposed. The Hazardous Waste (England and Wales) Regulations 2005 were made by the Secretary of State for Environment, Food and Rural Affairs partly in reliance upon section 156 and consequently the Regulations, (which amend provisions relating to penalties in the EPA 1990) were able to include provision on penalties beyond the maximum, which would have been permitted had the Regulations been made under section 2(2) ECA 1972 alone. The penalties under the Environmental Protection Act 1990 are on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding £50,000 or both; and on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both.
18. Because of the need to rely on section 156 for the Hazardous Waste (England and Wales) Regulations 2005, those Regulations were required to cover England and Wales for the section 156 related issues and England only for the section 2(2) issues. The Assembly made Regulations covering Wales only for the section 2(2) related issues. Acting alone, the Assembly did not have sufficient powers to give effect to its policy objectives in an area where it already had extensive devolved competence. This is both untidy and confusing to stakeholders. Even where the Assembly and the Secretary of State make Regulations together, those Regulations have to reflect the different powers held by both parties.
19. Where it is necessary to base legislation on section 156, the Assembly is, therefore, dependent on the Secretary of State to use these powers on its behalf. This can produce an untidy and potentially confusing set of regulations in relation to Wales. This situation can be avoided by the transfer of section 156 powers under the draft Order.

Sections 47(2)(g), 53(2)(c), 55(4) and 66A(6) of the Water Industry Act 1991

20. Section 74 of the Water Industry Act 1991 provides for regulations to be made for the purpose of, amongst other matters, preventing contamination or waste of the water supply with respect to water fittings. Such Regulations (the Water Fittings Regulations) were last made jointly by the Secretary of State for the Environment and the Secretary of State for Wales in 1999.

21. Regulations made under section 74 of the Act are relevant for the purposes of each of the following provisions of the Act:

- section 47(2)(g) – conditions of connection with water main – empowers water undertakers to make compliance with prescribed requirements of Regulations made under section 74 a condition of their own compliance with connection notices served by the owners/occupiers of any premises;
- section 53(2)(c) – conditions of compliance with domestic supply duty – provides for water undertakers to make compliance with prescribed requirements of Regulations, made under section 74, a condition of their own compliance in providing a first time supply of water on receipt of a demand in that respect (for the purposes of section 52(2) of the 1991 Act);
- section 55(4) – supplies for non-domestic purposes – imposes on water undertakers a duty to supply water for non-domestic purposes in certain circumstances. A water undertaker is not required to comply with the duty imposed under this section if there is a contravention of prescribed requirements of regulations made under section 74 in relation to the water fittings used or to be used in connection with the supply or use of water to or in those premises; and
- section 66A(6) – wholesale water supply by primary water undertakers – imposes on water undertakers a duty to give licensed water suppliers access to their supply systems to supply water to eligible premises in certain circumstances. A water undertaker is not required to comply with the duty imposed under this section if there is a contravention of prescribed requirements of Regulations made under section 74 in relation to the water fitting used or to be used in connection with the supply or use of water to or in those premises.

22. An anomaly exists in the way in which the functions, under section 74 and sections 47(2)(g), 53(2)(c), 55(4) and 66A(6), have been transferred to the Assembly. The power to make Regulations, under section 74, has transferred in relation to water undertakers whose areas are wholly or mainly in Wales, but not in relation to any licensed water suppliers (the ‘Welsh’ undertakers). While the powers, under sections 47(2)(g), 53(2)(c), 55(4) and 66A(6), have transferred ‘in relation to Wales’. Water undertakers are the principle suppliers of public water and are appointed under section 6 of the Water Industry Act 1991 (e.g. Dwr Cymru). Licensed Water Suppliers are a fairly new phenomenon. The Water Act 2003 introduced new provisions into the Water Industry Act 1991 permitting companies that are holders of a Water Supply Licence to have access to water undertakers’ supply system, enabling the licensee to supply water to eligible ‘non-household’ premises. Prospective suppliers have to obtain a license from Ofwat.

23. The areas of supply of the ‘Welsh’ water undertakers do not align with the boundary of Wales and consequently some functions are transferred to the Assembly on a water undertakers’ area basis, such as section 74. Because the functions under sections 47(2)(g), 53(2)(c), 55(4) and 66A6 of the Act are exercisable by reference to Regulations made under section 74 of the Act, the basis of transfer of all of these provisions should be aligned.

## Effect

### Sections 1 and 3 of the Census Act 1920

24. The proposed transfer of functions in relation to the 2011 Census of Population would give the Assembly the right in law to be consulted on the Census Order, and the power to make Regulations for the Census in Wales. It would give the Assembly greater influence in the decisions the Office of National Statistics (ONS) take and the final say on the content of the Census in Wales as well as the way it is conducted.
25. Census data is crucial in supporting policy-making for – and resource allocation decisions in - Wales, and it is important that the Assembly has a role in ensuring that Census returns continue to meet the data needs in Wales. Where there is a sufficiently strong case to do so, different information could be collected on Census forms in Wales as is currently done for data on Welsh language ability.
26. Without the proposed transfer of functions, consultation and liaison with the ONS would continue, but there would be no formal and legal recognition of the situation.
27. Although Scotland and Northern Ireland conduct separate, devolved, censuses the major contracts for processing the Census are usually entered into jointly for the whole of the UK. Transferring responsibility for making the Census Regulations to the Assembly would not change these arrangements as the ONS would still be responsible for carrying out the Census in Wales.
28. The Financial Secretary to the Treasury has confirmed that he is content to transfer certain powers in relation to the Census Act 1920 in so far as they affect Wales.

### Section 156 of the Environmental Protection Act 1990 in so far as it applies to Part 2 of that Act

29. The intended effect of the transfer of section 156 of the Environmental Protection Act 1990, is to enable the Assembly to make Regulations, in relation to Wales, giving effect to Community and other international obligations in relation to waste management on land. The Assembly already has certain powers, under section 2(2) of the European Communities Act 1972, which it has used generally to legislate in the same way as the Secretary of State. However, the transfer of section 156 will be a tidying up measure, avoiding current practical difficulties in maintaining a common waste management regulatory framework across the Wales-England border. It will ensure that the waste management regulatory framework is the same in Wales as in England, thus avoiding inappropriate cross border waste flows, as well as the potential disadvantage to business and to make the Environment Agency's task of regulating waste management in both Wales and England easier. Section 156 powers can be used to modify the application of certain provisions in the Environmental Protection Act 1990 and the Radioactive Substances Act 1993 in order to give effect to Community and other obligations. The main advantage of section 156 powers is that they are not subject to the same limitations as attached to the use of section 2(2) of the European Communities Act 1972, especially in relation to the maximum penalties that may be imposed.
30. The Secretary of State for Environment, Food and Rural Affairs, the Assembly Minister for Environment, Planning and Countryside and the Secretary of State for Wales are agreeable to the transfer.

Sections 47(2)(g), 53(2)(c), 55(4) and 66A(6) of the Water Industry Act 1991

31. The proposed transfer will rectify the anomaly that exists in the way that powers under the Water Industry Act 1991 have transferred to the Assembly. It will enable the Assembly to make Regulations prescribing requirements in relation to water fittings, preventing the contamination or waste of the public water supply by water or sewerage undertakers whose areas are wholly or mainly in Wales. Contravention of which release a water undertaker from the duty to supply water in certain circumstances.
32. The Minister of State for Climate Change and the Environment, The Assembly Minister for Environment, Planning and Countryside, and the Secretary of State for Wales have agreed to the transfer.

**Target Implementation**

33. It is intended that this Instrument will proceed to Plenary on 18 October 2006 for the Assembly to consider giving its approval to the draft Order. If the Assembly does approve the Order, the Wales Office will then lay it before Parliament in October in order for the Parliamentary process to begin. If agreed by the UK Parliament, the powers being transferred to the National Assembly for Wales will come into force on the day after the meeting of the Privy Council meeting to approve the Order. The date of the Privy Council meeting is not yet known.
34. The Order is currently entitled The National Assembly for Wales (Transfer of Functions) (No.2) Order 2006 on the basis that it will have completed all the Parliamentary stages and been approved by the Privy Council before the end of this year. However, if this is not possible then the Order will be re-titled The National Assembly for Wales (Transfer of Functions) Order 2007 to reflect the year in which it is made. This issue will be clarified once the specific date of the Privy Council meeting is made known.

**Financial Implications**

Sections 1 and 3 of the Census Act 1920

35. The TFO and the proposed agreement on funding would not impose any financial implications on the Assembly. The funding for a Census in England and Wales will remain the responsibility of the ONS, but there are potential cost implications for the Assembly if decisions are made leading to significant differences in either the content or the methodology of the Census in Wales.
36. The Assembly's Minister for Finance and the Financial Secretary to the Treasury have agreed to the principles of a funding agreement (Ministerial exchange of letters July 2006) – essentially that the ONS would pay for business as usual and the Assembly would pay for changes it imposed (although there is still scope in the agreement for the ONS to fund variations in the Census for Wales as long as they come out of the normal decision process). These costs would be met from the Assembly budget. Accordingly, there will be no budgetary transfer from UK Government to the Assembly.
37. The small, additional administrative costs associated with a greater involvement in Census planning and in the preparation of the Census Regulations themselves will be funded from the Assembly's own resources. It is not yet known from which Welsh Assembly Government budget the costs will be met. This will depend on the

nature of the differences. There is the possibility that there will be a requirement for programme costs in a future Budget Planning Round but it is not yet possible to quantify the extent of these costs and how they would be affected by different information requests. Further advice on this will be provided as soon as the necessary cost data becomes available. Any decisions on the extent of the different information requirements for Wales will then need to be assessed in the light of the resources available and the potential value of the additional information.

Sections 47(2)(g), 53(2)(c), 55(4) and 66A(6) of the Water Industry Act 1991

38. Any costs associated with the preparation of Regulations, consequent to the making of the Transfer of Functions Order, will be accommodated from within existing administration budgets. The costs of preparing the Regulations will be met from the DRCs of the Environment Protection and Quality Division and the Legal Services Department.

Section 156 of the Environmental Protection Act 1990 in so far as it applies to Part 2 of the Act

39. There are no significant issues regarding costs relating to this section of the Act.

## **Consultation**

### With Stakeholders

40. With regard to the transfer of functions under sections 47(2)(g), 53(2)(c), 55(4) and 66A(6) of the Water Industry Act 1991 and section 156 of the Environmental Protection Act 1990, no consultation has taken place other than with the Department for Environment, Food and Rural Affairs and the Wales Office.

41. In respect of sections 1 and 3 of the Census Act 1920, officials from the Welsh Assembly Government and the Office for National Statistics were all heavily involved in the initial discussions. The Financial Secretary to the Treasury has approved the transfer of functions under sections 1 and 3 of the Census Act 1920 and Cabinet Committee clearance has, of course, been secured.

### With Subject Committee

42. The First Minister wrote to all Subject Committees Chairs and the Chair of the Equal Opportunities Committee on 22 August 2006, notifying them of the draft Transfer of Functions Order. Unfortunately, this letter was not copied to Committee Clerks and it would appear not circulated to all Committee Members. Therefore, the letter was reissued to Committee Clerks on 27 September 2006.