

EXPLANATORY MEMORANDUM
THE GOVERNMENT OF WALES ACT 2006 (AMENDMENT) ORDER 2021
2021 No. [XXXX]

Introduction

1. This explanatory memorandum has been prepared by the Welsh Government in accordance with Standing Order 25.5. It should be read in conjunction with the Explanatory Memorandum prepared by the Office of the Secretary of State for Wales.

Summary of this proposed Order

2. The proposed Order is to be made under section 109 of the Government of Wales Act 2006 (GoWA). It will:
 - correct a number of deficiencies in Schedules 7A and 7B to GoWA arising from the UK's exit from the European Union;
 - correct drafting errors that were inserted into GoWA by the Wales Act 2017; and
 - 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.

Legislative context

3. The whole Order will come into force on the day after it is made as set out in Article 1(1).

Amendment of Schedule 7A to the 2006 Act

4. The amendments in Article 2(2) to paragraph 10(3)(a) of Schedule 7A remove references to obligations under EU law, which will be unnecessary as a result of the UK leaving the European Union.
5. The amendments in Article 2(3) – (7) to section B1 (Elections) of Schedule 7A remove references to the European Parliament and remove the European Parliamentary Elections Act 2002 from the definition of “existing elections acts”. The reservation at paragraph 30 of Schedule 7A, concerning “free movement of persons within the European Economic Area”, is also removed.
6. The amendment in Article 2(8) after paragraph 54, the reservation concerning the “Misuse of and dealing in drugs or psychoactive substances”, corrects the reference to the Psychoactive Substances Act 2016, which is erroneously dated as 2015.

Amendment of paragraph 7 of Schedule 7B to the 2006 Act

7. The amendments in Article 3 to paragraph 7 of Schedule 7B correct an error that was inserted by the Wales Act 2017. They reflect the fact that section 51 of GoWA is in Part 2, rather than in Part 1, where it had been incorrectly listed.

Amendment of paragraph 9 of Schedule 7B to the 2006 Act

8. The amendments in Article 4(2) to paragraph 9 of Schedule 7B, insert the Controller of Plant Variety Rights into the list of cross border bodies in paragraph 9(2). The bodies listed in those paragraphs are exempt from the requirements in paragraph 8(1)(a) to obtain UK Government consent to Senedd legislation which includes provisions that confer functions on or remove functions of reserved authorities.
9. Article 5(2) makes the same amendment in relation to paragraph 10 of Schedule 7B.
10. Amendments in Article 4(3) and (4) correct a drafting error inserted by the Wales Act 2017 and inserts an amendment providing a missing definition of “devolved function” in relation to the exemption of conferring and imposing functions on courts from Minister of the Crown consent requirements.
11. Article 4(5) also inserts paragraphs 9(8) and (9) into Schedule 7B. These paragraphs provide carve outs from the consent requirements of 8(1)(c), where a function of the Welsh Ministers is exercisable specifically in relation to a reserved authority.
12. New sub-paragraph (8) provides the carve out from the consent requirement in paragraph 8(1)(c), in so far as it would be engaged if an Act of Senedd Cymru sought to remove a “concurrent plus” function (where the function can be exercised by the UK Government in relation to Wales, but only with the consent of the Welsh Ministers). The carve out applies only to relevant functions which exist by virtue of any enactments which are specified, by description or by name in sub-paragraph (8). These are:
 - functions created by regulations made under s.8 of the European Union (Withdrawal) Act 2018. This will cover the number of new functions created in regulations made under this Act as part of the EU Exit SI programme;
 - functions conferred by, or in regulations made under
 - (a) the European Union (Withdrawal Agreement) Act 2020;
 - (b) the Direct Payments to Farmers (Legislative Continuity) Act 2020;
 - (c) the Coronavirus Act 2020;
 - (d) the Agriculture Act 2020;
 - (e) the Fisheries Act 2020; and
 - (f) the Trade Bill.
13. New sub-paragraph (9) provides an additional carve out where there is a Welsh Minister function of obtaining consent from, or consulting the Secretary of State, in connection with a substantive function that is to any extent exercisable concurrently. The carve applies to functions conferred by, or in regulations made under:
 - (a) the European Union (Withdrawal Agreement) Act 2020;
 - (b) the Fisheries Act 2020; and

(c) the Trade Bill.

Amendment of paragraph 10 of Schedule 7B to the 2006 Act

14. Article 5 amends paragraph 10 of Schedule 7B (removal or modification of Minister of the Crown functions). This mirrors the amendments made under Article 4 paragraphs (2) and (3).

Amendment of paragraph 11 of Schedule 7B to the 2006 Act

15. Article 6 amends paragraph 11 of Schedule 7B and inserts a new sub-paragraph (2A). This ensures that where the removal of a relevant Minister of the Crown function does not require consent in consequence of the amendments made to paragraph 11 by this Order, there is nonetheless a requirement to consult the UK Government.

16. Article 6(3) inserts new sub-paragraphs (6) to (9) into paragraph 11 of Schedule 7B. This new text disapplies, in part, the consent requirement relating to the removal of Minister of the Crown functions that relate to qualified devolved functions.

17. The new sub-paragraph (6) will only disapply the consent requirement in paragraph 11(1)(a) in respect of Minister of the Crown functions that are to any extent exercisable concurrently with the Welsh Ministers. Again, the carve out will only apply to the removal of the relevant Minister of the Crown functions that exist by virtue of the following list of enactments:

- functions created by regulations made under s.8 of the European Union (Withdrawal) Act 2018. This will cover the number of new functions created in regulations made under this Act as part of the EU Exit SI programme;
- functions conferred by, or in regulations made under
 - (a) the European Union (Withdrawal Agreement) Act 2020;
 - (b) the Direct Payments to Farmers (Legislative Continuity) Act 2020;
 - (c) the Coronavirus Act 2020;
 - (d) the Agriculture Act 2020; and
 - (e) the Fisheries Act 2020.
- (f) the Trade Bill.

18. The new sub-paragraph (7) disapplies the consent requirement of 11(1)(a) where the Minister of the Crown function being removed relates to Welsh Minister functions that are only exercisable after obtaining the consent or agreement of, or after consultation with the Minister of the Crown. This will ensure that in addition to being able to remove the relevant substantive Minister of the Crown functions without consent, the Senedd can also remove the incidental functions of the Minister of the Crown that relate to the extra restrictions imposed on the Welsh Ministers' exercise of the relevant functions.

19. New sub-paragraph (8) provides an exception to the previous carve out such that it does not have effect where the Minister of the Crown function to be removed is

a function of regulating British fishing boats, except Welsh fishing boats, in the Welsh zone. New sub-paragraph (9) cross-refers to the relevant definitions in the Fisheries Act 2020.

Policy context

There are three main purposes of the amendments to Schedule 7A and Schedule 7B to GoWA. The first category of amendments correct deficiencies that arise as a result of the United Kingdom leaving the EU. The second category is to correct drafting errors in GoWA. The third category removes some of the Minister of the Crown consent requirements in relation to concurrent and concurrent plus functions created by EU exit legislation and by a number of listed enactments. This final category is important in terms of protecting the Senedd's legislative competence. 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.

There are no future policy obligations arising from this Order. Orders made under this power are made subject to the affirmative procedure in both Houses of Parliament as well as the Senedd. Officials from the Welsh Government and Office of the Secretary of State of Wales have worked in conjunction to develop and negotiate the content of the Order.

Consultation

There has been no consultation on this Order, but the Welsh Government and the Office of the Secretary of State for Wales have worked together to develop it.

Scrutiny

In accordance with Standing Order 25.14 I can confirm that:

- i. the Order was considered by the House of Lords Secondary Legislation Scrutiny Committee on 12 January, by the UK Parliament Joint Committee on Statutory Instruments on 13 January, and in a report of the Senedd's Legislation, Justice and Constitution Committee published on 14 January, with none of these committees recommending any changes;
- ii. as a result of the above, there are no differences between the draft Order and the proposed Order to which it relates.

Financial Implications

There are no financial implications associated with this Order.

Jeremy Miles MS

Counsel General and Minister for European Transition