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LEGISLATIVE GUIDE

WELSH DEVOLUTION

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The Devolution Settlement - Wales

1. Introduction

The devolution settlement in Wales is one that is continually evolving. This guide outlines the modern devolution settlement by looking at the following legislative developments:

- The 1998 Government of Wales Act and the introduction of a new National Assembly for Wales with areas of executive competence to introduce secondary legislation;
- The 2006 Government of Wales Act and the introduction of a conferred model of legislative competence enabling the National Assembly to introduce primary legislation on 20 subject fields;
- The Wales Act 2014 and the extension of legislative competence into identified areas of taxation; and
- The future of the devolution settlement with the introduction of the Wales Bill and the proposal to move from a conferred model to a reserved model of devolution.

2. History of Devolution

Devolution in Wales extends back over many decades and even to the end of the 19th Century when there was an unsuccessful campaign for Welsh 'home rule'¹.

However, it was in the 20th Century, that Welsh devolution began to develop in earnest.

Key dates during the 20th Century include:

- 1951 - new junior government post of Minister of State for Welsh Affairs was created by the UK Conservative Government;
- 1964 - creation of a Secretary of State for Wales by the UK Labour Government. Areas of responsibility grew from housing, local government and roads to include education and training, health, trade and industry, and the environment and agriculture;
- 1979 - proposal to create a Welsh Assembly rejected in a public referendum; and
- 1997 - successful referendum to create a Welsh Assembly.
- 1998 - Government of Wales Act 1998

This sections considers the developments from the 1998 Act to the 2006 Act.

2.1 The Government of Wales Act 1998



Source: National Assembly for Wales – the Senedd

The Government of Wales Act 1998 (1998 Act) established the National Assembly for Wales as a corporate body. Within the NAW, the executive (the government) and the legislature (the Assembly itself) operated as one.

The powers provided in the 1998 Act were statutory delegated powers, which before 1998 had been exercised in relation to Wales by UK Government Ministers, usually the Secretary of State for Wales. They were powers listed within specific Acts.

As such, the 1998 Act introduced executive competence and therefore limited the law-making powers of the NAW to that of solely making secondary legislation in the 18 areas that were listed in Schedule 2 of that Act. The scope of this settlement therefore was similar to that of the pre-devolution Wales Office.

The devolution of these powers was done through a series of 10 Transfer of Functions Orders (TFO). The first order was made in 1999ⁱⁱ and listed nearly 400 functions to be transferred to the NAW. Throughout this period, the executive powers were continually being increased through powers provided in a number of different Acts.

In 2002, the term ‘Welsh Assembly Government’ was used to describe the work of the cabinet in contrast to that of the NAW in order to provide greater clarity between the two roles.

In 2004, the Richard Commissionⁱⁱⁱ, established by the Welsh Assembly Government to examine the powers and electoral arrangements of the Assembly, recommended the legal separation of the executive and legislature as individual legal entities.

This was formally achieved following the 2007 Assembly elections and the coming into force of the Government of Wales Act 2006 (2006 Act).

KEY DATES

1998 – 1st Government of Wales Act

1999 – 1st Transfer of Functions Order

2002 – Executive body became known as the Welsh Assembly Government

2004 – Richard Commission reports on the powers and electoral arrangements of the National Assembly for Wales

2005 – Better Governance for Wales White Paper

2006 – 2nd Government of Wales Act

2.2 The Government of Wales Act 2006



The 2006 Act advanced the Welsh devolution settlement by:

- Establishing the formal separation between the NAW and the Welsh Government to provide clarity of the respective remit and role of the legislature and the executive, and therefore improve effective scrutiny;

KEY DATES

2007 – NAW uses powers to make Assembly Measures

2011 – referendum passed to use enhanced primary legislation making powers

2012 – first Assembly Acts are passed: Wales (Official Language) (Wales) Act 2012 and the Local Government (Byelaws) (Wales) Act 2012

2012 – Silk Commission 1st report

2014 – Silk Commission 2nd report

2014 – new Wales Act

- enhanced legislative powers for the NAW through a new category of legislation called Assembly Measures;
- enhanced legislative powers to introduce primary legislation called Assembly Acts which were dependent upon the outcome of a successful referendum.

Executive Functions

The executive functions that had been passed to the NAW by the 1998 Act and TFOs was now transferred to the Welsh Ministers by the 2006 Act^{iv}. In addition, the executive became known as the Welsh Government.

Assembly Measures

Between 1997 and 2011 the NAW had powers to make what were called Assembly Measures on a matter within the 20 devolved fields listed in Schedule 5 of the 2006 Act. A matter became specified under Schedule 5 (and therefore was able to be legislated upon) in one of two ways, either:

- by a provision made by a UK Parliament Act, or
- by a Legislative Competence Order (LCO) made under section 95 of 2006 Act – a type of subordinate legislation. The LCO process required authorization of the Order by the UK Parliament.

Once a matter was devolved to a field of Schedule 5 the NAW could make primary legislation on that matter.

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An example of an Assembly Measure was the Waste (Wales) Measure 2010, which introduced extended powers in relation to introducing a charge for single use carrier bags^v and powers for waste targets^{vi}.

2011 Referendum

However, in 2011 a successful referendum enabled the NAW to introduce primary legislation through the application of Part 4 of, and Schedule 7 to, the 2006 Act.

The difference between the procedure for an Assembly Measure under Schedule 5 and an Assembly Act under Schedule 7 of the 2006 Act is that there would no longer be a need to request devolution of specific Matters within a Field from the UK Parliament. Rather it would be taken that if a subject was listed under Schedule 7 the NAW had competence to legislate on any issue relating to that subject as long as it was not listed as an exception within the 2006 Act.

Schedule 5 of the 2006 Act has been repealed^{vii}.

3. Current Devolution Powers

The current devolution settlement in Wales is based on a 'conferred powers' model, which enables the NAW to legislate on a number of subject fields in relation to Wales^{viii}.

3.1 Schedule 7 of 2006 Act



Source: National Assembly for Wales - the Chamber

Part 4 of, and Schedule 7 to, the 2006 Act sets out the legislative competence of the NAW and the exceptions to, and restrictions on, that competence.

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Section 108 of the 2006 Act sets down the test, with both conditions needing to be met:

- 1. it relates to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and, subject to subsection (4A), does not fall within any of the exceptions specified in that Part of that Schedule (whether or not under that heading or any of those headings), and**
- 2. it neither applies otherwise than in relation to Wales nor confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales.**

A provision will also be in competence if it provides for the enforcement of a provision satisfying the two conditions or otherwise be incidental to or consequential (*see paragraph 2.4*) on such a provision (s. 108(5)). The effect of this is that where devolved legislation is for enforcement or is incidental or consequential, it is not required to apply only in relation to Wales, and can apply to matters in England.

Schedule 7 of the 2006 Act lists the conferred areas of devolution upon which the NAW can legislate, it reflects the executive function areas covered by the 1998 Act and the 1999 Transfer Order.

There are 20 subject fields each with further subject related matters, the majority of which include exceptions where the UK Government retain the power to legislate over that particular issue.

Some of the major subjects effectively 'reserved' to Westminster are:

- Constitution;
- Defence;
- Tax and National Insurance;
- Broadcasting;
- Employment Rights and Duties;
- Foreign Affairs;
- Immigration and Nationality;
- National Security; and
- Civil Service

It is important to note that an exception under one subject heading applies across all of the 20 subject fields. For example, an exception under 'culture' is broadcasting, which applies equally to culture as it does to the Field - Welsh language.

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Areas of Welsh Devolution - Schedule 7

Subject Fields	Subject Matters
Agriculture, fisheries, forestry and rural development	Agriculture. Horticulture. Forestry. Fisheries and fishing. Animal health and welfare. Plant health. Plant varieties and seeds. Rural development.
Ancient monuments and historic buildings	Archaeological remains. Ancient monuments. Buildings and places of historical or architectural interest. Historic wrecks.
Culture	Arts and crafts. Museums and galleries. Libraries. Archives and historical records. Cultural activities and projects.
Economic development	Economic regeneration and development, including social development of communities, reclamation of derelict land and improvement of the environment. Promotion of business and competitiveness.
Education and training	Education, vocational, social and physical training and the careers service. Promotion of advancement and application of knowledge.
Environment	Environmental protection, including pollution, nuisances and hazardous substances. Prevention, reduction, collection, management, treatment and disposal of waste. Land drainage and land improvement. Countryside and open spaces (including the designation and regulation of national parks and areas of outstanding natural beauty). Nature conservation and sites of special scientific interest. Protection of natural habitats, coast and marine environment (including seabed). Biodiversity. Genetically modified organisms. Smallholdings and allotments. Common land. Town and village greens. Burial and cremation, except coroners' functions.
Fire and rescue services and promotion of fire safety	Fire and rescue services. Provision of automatic fire suppression systems in newly constructed and newly converted residential premises. Promotion of fire safety otherwise than by prohibition or regulation.
Food	Food and food products. Food safety (including packaging and other materials which come into contact with food). Protection of interests of consumers in relation to food.
Health and health services	Promotion of health. Prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder. Control of disease. Family planning. Provision of health services, including medical, dental, ophthalmic, pharmaceutical and ancillary services and facilities. Clinical governance and standards of health care. Organisation and funding of national health service.
Highways and transport	Highways, including bridges and tunnels. Streetworks. Traffic management and regulation. Transport facilities and services.
Housing	Housing. Housing finance except schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits. Encouragement of home energy efficiency and conservation, otherwise than by prohibition or regulation. Regulation of rent. Homelessness. Residential caravans and mobile homes.
Local Government	Constitution, structure and areas of local authorities. Electoral arrangements for local authorities. Powers and duties of local authorities and their members and officers. Local government finance.
National Assembly for Wales	Complaints about Assembly members (including provision for and about an office or body for investigating such complaints and reporting outcome of investigations). Assembly Commission. Salaries, allowances, pensions and gratuities for and in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General and Deputy Welsh Ministers. Register of interests of Assembly members and the Counsel General. Meaning of Welsh words and phrases in Assembly Measures and Acts of the Assembly, in subordinate legislation made under Assembly Measures and Acts of the Assembly and in other subordinate legislation if made by the Welsh Ministers, the First Minister or the Counsel General. Private legislation in the Assembly. Financial assistance for political groups to which Assembly members belong. The Welsh Seal. Arrangements for the printing of Acts of the Assembly, of subordinate legislation made under Assembly Measures

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	and Acts of the Assembly and of other subordinate legislation if made by the Welsh Ministers, the First Minister or the Counsel General. Budgetary procedures.
Public administration	Public Services Ombudsman for Wales. Auditor General for Wales. Audit, examination, regulation and inspection of auditable public authorities. Inquiries in respect of matters in relation to which the Welsh Ministers, the First Minister or the Counsel General exercise functions. Equal opportunities in relation to equal opportunity public authorities. Access to information held by open access public authorities.
Social welfare	Social welfare including social services. Protection and well-being of children (including adoption and fostering) and of young adults. Care of children, young adults, vulnerable persons and older persons, including care standards. Badges for display on motor vehicles used by disabled persons.
Sport and recreation	Sport and recreational activities
Taxation	Devolved taxes (as defined in section 116A(4)) ^{ix}
Tourism	Tourism
Town and country planning	Town and country planning, including listed buildings and conservation areas. Caravan sites. Spatial planning. Mineral workings. Urban development. New towns. Protection of visual amenity.
Water and flood defence	Water supply, water resources management (including reservoirs), water quality and representation of consumers of water and sewerage services. Flood risk management and coastal protection.
Welsh language	Welsh language

Parts 2 and 3 of Schedule 7 also contain restrictions on the Assembly's legislative competence and exceptions to those restrictions.

General restrictions under Part 2 including modifying the functions of Ministers of the Crown (*see paragraph 2.8*), a number of UK Acts, which cannot be amended by a NAW Act, this includes the European Communities Act 1972 and the Human Rights Act 1998 as well as the 1998 Act.

Part 3 provides some exceptions to Part 2 in particular that a modification of the function of the Minister of the Crown is permissible if the Minister consents (*see paragraph 2.8*).

Schedule 7 can be amended by amended by a Section 109 (Government of Wales Act) Order in Council^x.

3.2 EU and Human Rights Law

All Acts of the NAW must be in compliance with international or European obligations of the United Kingdom and the Human Rights Act 1998^{xi}. If a proposed Bill was contrary to the Human Rights Act, it would not be within the competence of the NAW.

3.3 The 'Purpose' Test

Section 108(7) of 2006 Act sets out a 'purpose test' to decide whether a proposal to legislate relates to a subject within the NAW's legislative competence. It specifies that

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the question of whether a provision of an Act of the NAW relates to one or more of the subjects in Part 1 of Schedule 7 or falls within an exception should be determined by reference to the purpose of the provision, having regard (amongst other things) to its effect in all circumstances. In effect this means considering the 'pith and substance' of a provision.

The purpose test has been determined in a number of cases both in relation to the Scottish and Welsh devolution settlements. In the Scottish case *Imperial Tobacco Ltd v Lord Advocate*^{xii} it was held that it 'indicates something more than a loose or consequential connection' and that 'its purpose may be clear from its context'. Whilst in the Welsh case *re Agricultural Sector (Wales) Bill*^{xiii}, it was held "As the section requires the purpose of the provision to be examined it is necessary to look not merely at what can be discerned from an objective consideration of the effect of its terms".

3.4 Incidental or consequential

What is 'incidental or consequential' was determined by the Supreme Court in the case of the Local Government (Byelaws) (Wales) Bill^{xiv}. The Advocate General had referred the Bill to the Court on the basis that it was not within the competence of the NAW on the grounds that provisions modified the functions of a Minister of the Crown for which no consent had been given (*see paragraph 2.8*).

The Supreme Court unanimously agreed that the Bill was within the competence of the NAW. What was incidental or consequential would turn on the facts of a case.

The court drew on a Scottish case (*Martin v Most*^{xv}), which held that the provision was incidental or consequential if it was 'intended to cover the kinds of minor modifications which are obviously necessary to give effect to a piece of devolved legislation, but which raise no separate issue of principle'.

It was held that the removal of the Minister's function was incidental to the primary purpose because to do otherwise would be bizarre.

3.5 Ghost Subjects

The current devolution settlement based on a conferred model as represented in Schedule 7 of the 2006 Act has led to a number of questions being raised about subjects that are neither listed in the Schedule nor in any of the exceptions or restrictions. This silence on many areas, would ordinarily be considered to be non-devolved.

However, decisions by the Supreme Court have extended the devolution settlement by holding that in certain circumstances, silent subjects may in fact fall within the competence of the NAW.

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The Agricultural Sector (Wales) Bill^{xvi}

The Supreme Court held in a case relating to the regulation of agricultural wages, that legislation is within the NAW's competence if it fairly and realistically relates to a devolved subject, even if it also relates to one on which Schedule 7 is silent.

Court held that the Bill was within competence on the grounds that it “fairly and realistically satisfies” the test in GOWA by relating to a devolved subject and not falling within an exception. It did not matter that the Bill could also relate to a subject not mentioned in Schedule 7.

The decision had wide application, as whilst this related to the case before it, it also related more widely to the competence of the NAW in relation to these silent (or ghost) subjects. A Bill would be in competence so long as it met the test in section 108 of the 2006 Act, whether or not it could also relate to a subject that was not expressly mentioned in Schedule 7.

3.6 Executive Competence

The Welsh Ministers are provided with executive powers under:

- Assembly Acts;
- Acts of Parliament; and
- Transfer of Functions Orders - between 2006 and 2012, two further Transfer of Functions Orders were made relating to The Mental Health Act 1983 and the Prisons Act 1952.

In general, the powers of the Welsh Ministers are within areas of devolution, however, the Welsh Ministers also have some executive competence in areas which are otherwise non-devolved. This is different to the other devolved administrations where the areas of legislative and executive competence are the same.

An example of this is the power to introduce trading schemes in the Climate Change Act 2008, whilst this may appear to fall under the legislative competence of the NAW due to climate change falling under subject matter 6 on the environment. However, there is an exemption in Schedule 7 on energy conservation unless this is in relation to promoting energy efficiency. However, this energy efficiency exception is further qualified in that it cannot be either regulatory or enforcement. Trading schemes under section 44 of the Climate Change Act (e.g. carbon reduction commitment energy efficiency scheme) are often supported by enforcement measures where administration requirements are not met.

The powers under the Climate Change Act 2008 are therefore executive within an area of non-devolved competence (enforcement and regulation of energy conservation).

3.7 Amending Competence

1. Orders in Council

Orders in Council made under section 109 of the 2006 Act may modify the legislative competence of the Assembly by amending Schedule 7 by expanding or restricting the NAW's competence. Competence can be expanded by inserting new subjects into the Schedule or it can be restricted by inserting new exceptions or restrictions to competence.

Section 109 Orders must be approved in draft by both Houses of Parliament and the NAW before they are made at a meeting of the Privy Council.

2. Acts of Parliament (see paragraphs 3 and 4)

An Act of the UK Parliament may also amend the areas of competence. This has been achieved by the Wales Act 2014, which extended the competence of the NAW with restricted powers in relation to tax.

3.8 Modifying the functions of Ministers of the Crown

Acts of the NAW cannot modify certain functions of Ministers of the Crown without the consent of the Secretary of State for Wales^{xvii} or the provision is incidental or consequential on some other provision within the Act (2006 Act s 108(5)(b)).

Consent is needed if an Assembly Act:

- Confers or imposes a new function on a Minister of the Crown; or
- Removes or modifies a function which a Minister of the Crown exercised before the Assembly Act provisions came into force (i.e. before 5 May 2011) unless the provisions removing or modifying the function is incidental to, or consequential on, any other provision in the relevant Assembly Act.

Bills, which do modify the functions of Ministers of the Crown, when introduced before the NAW should generally have the consent of the SoS as the Bill will technically not be in competence. However, in recent years, Bills have been introduced before the NAW without this consent on the understanding that the consent is forthcoming.

An Act of the NAW can do the following without requiring the consent of the SoS:

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- Modify a Minister of the Crown function if the Minister assumed the function, or if it became exercisable by the Minister, after the Assembly Act provisions came into force (i.e. after 5 May 2011); and
- Make changes to a Minister of the Crown function which are merely consequential or incidental

3.9 Legislative Consent Motions

The UK Government retains the power to legislate in relation to Wales even in the areas covered by the 20 subject headings.

However, there is a convention that the UK Government will seek the consent of the NAW. The procedure is known as a legislative consent motion (LCM)^{xviii}. This process applies to any amendments to the legislation that established devolution settlement.

3.10 UK Power to Restrict

If a provision in NAW Bill, which falls within Schedule 7 but would have an adverse effect on matters not devolved or to any exception listed in Schedule 7 or would adversely affect water resources, supply or quality in England, the operation of the law in England, or the UK's international obligations, defence or national security, the Secretary of State may prohibit it from receiving Royal assent (s. 114).

3.11 Extent

The legal jurisdiction of NAW Acts is the law of England and Wales but the application of the Act is in relation to Wales (s 108(4)(b)).

NAW Acts can have effect only as part of the law of England and Wales (s. (108(6)(b) so, for example, enforcement measures and consequential and incidental provisions cannot be applied to Scotland or Northern Ireland.

4. The Wales Act 2014

The 2014 Act introduced two primary changes to the 2006 Act:

- Changes to electoral arrangements for the NAW, including the frequency of elections changing from every 4 to every 5 years; and
- Implementing a number of the recommendations arising out of the Silk Commission^{xix} review of the current financial and constitutional arrangements in Wales.

Tax Raising Powers

The 2014 Act provided the NAW for the first time with tax raising powers. In particular, it enables legislation to be introduced in relation to stamp duty, land tax and

landfill tax. There are also powers to vary income tax in relation to Welsh tax payers but these are subject to a referendum.

5. Future of Devolution



The UK Government's new Wales Bill, with the first draft being published in 2015, aims to change the Welsh devolution settlement from a conferred to a reserved powers model. The effect of a reserved model is that it enables the NAW to legislate on any subject except those specifically reserved to the UK Parliament.

A reserved model, which is the basis of the Scottish devolution settlement, still means that the law-making powers of the NAW will continue to be limited and certain matters will be beyond its powers. The reserved model operates on the basis that anything that is not stated as 'reserved' to the UK Parliament will be within devolved powers.

'Reservations' may have exceptions. For example, one of reservations in the draft Bill is 'energy conservation', which has a qualified exception which is the encouragement of energy efficiency otherwise than by prohibition or regulation. Under a reserved model the NAW could legislate to encourage energy efficiency so long as this does not include provisions on prohibition or regulation.

The 2004 Richard Commission report had argued for a reserved model and the model was supported by the Silk Commission.

In addition, the proposed Bill also makes the following amendments to the 2006 Act:

- the NAW and the Welsh Ministers are considered permanent parts of the UK's constitutional arrangements and will not be abolished without a decision of the people of Wales, and that the UK Parliament will not normally legislate in devolved areas without the consent of the Assembly, whilst retaining the sovereignty to do so
- Devolving responsibility to Welsh Ministers for marine licensing and conservation and energy consents in the Welsh offshore region;
- Extending responsibility for building regulations to include excepted energy buildings;
- Devolving powers over the licensing of onshore oil and gas extraction;
- Enable the Assembly to be renamed as a Parliament;

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The Wales Bill was introduced into Parliament on the 7 June 2016 and it is expected to progress through the two Houses in Parliament within 12 months.

ⁱ Cymru Fydd - Young Wales was established in 1895 to achieve equality within the union but the movement collapsed in 1896.

ⁱⁱ National Assembly for Wales (Transfer of Functions) Order 1999 SI 1999/672

ⁱⁱⁱ The Richard Commission published its report in 2004 and found that the NAW's ability to achieve its legislative requirements had been hampered by practical difficulties, which could be overcome by enhancing the NAW's legislative powers along the lines of the Scottish Parliament.

^{iv} Government of Wales Act 2006, section 162 and Schedule 11, paragraph 30.

^v Waste (Wales) Measure 2010, section 1

^{vi} Waste (Wales) Measure 2010, section 3

^{vii} Government of Wales Act 2006, section 106(1)

^{viii} Government of Wales Act 2006, section 108(4)

^{ix} Section 116A(4) of the Government of Wales Act 2006 – taxation includes setting income tax rates for Welsh taxpayers and powers to introduce taxes in relation to stamp duty and landfill.

^x Section 109 of the Government of Wales Act 2006 has been used twice to date: SI 2007/2143 and SI 2010/2968

^{xi} Government of Wales Act 2006, section 108(6)(c)

^{xii} *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 6

^{xiii} *re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622, para 50

^{xiv} *Local Government Byelaws (Wales) Bill* [2012] UKSC 53

^{xv} *Martin v Most* [2010] UKSC 10

^{xvi} *ibid*

^{xvii} Government of Wales Act 2006, Schedule 7, Part 2, paragraph 1, Part 3, paragraph 6

^{xviii} In Scotland this is referred to as a Sewell Motion

^{xix} The independent Silk Commission was established in 2011 to review the present financial and constitutional arrangements in Wales. It carried out its work in two parts and published its work on Part 1 in November 2012, which looked at financial powers in relation to taxation and borrowing and on Part 2 in March 2014, which reviewed the then existing nonfinancial powers of the NAW.