

EXPLANATORY MEMORANDUM TO ACCOMPANY THE DRAFT ORDER

CONSTITUTIONAL LAW: DEVOLUTION, WALES

THE GOVERNMENT OF WALES ACT 2006 (AMENDMENT) ORDER 2015

Draft Order under section 109 of the Government of Wales Act 2006 relating to legislative competence to amend section 79 of that Act (sustainable development)

Introduction

1. This Memorandum is laid under Standing Order ("SO") 25 which relates to Orders in Council to be made under section 109 of the Government of Wales Act 2006 ("the 2006 Act").
2. Section 109 of the 2006 Act empowers Her Majesty, by Order in Council, to amend Schedule 7 to the 2006 Act, provided that the Order has first been approved by the National Assembly for Wales and both Houses of Parliament.
3. SO 25.13 prescribes that, at the same time as a draft Order under SO 25.12 is laid, an Explanatory Memorandum must also be laid. SO 25.14 sets out what must be included in the Explanatory Memorandum and that information is provided from paragraph 29 onwards. This Explanatory Memorandum also sets out the background to the provisions in the draft Government of Wales Act 2006 (Amendment) Order 2015.

Summary and purpose of the Order

4. The instrument ("the Order") would amend Schedule 7 to the 2006 Act so as to confer legislative competence upon the National Assembly for Wales ("the Assembly") to make modification of, or confer power by subordinate legislation to make modification of, section 79 (sustainable development) of the Government of Wales Act 2006 ("the 2006 Act").
5. This Order itself does not make any other change, but would merely allow the Assembly to consider amending section 79 of the 2006 Act, should it choose to do so. The Welsh Government would hope to bring forward such an amendment to section 79 during the course of the Well-being of Future Generations (Wales) Bill ("the WFG Bill").

Legislative context

6. Section 108 of the 2006 Act, together with Schedule 7, sets out the extent of the Assembly's legislative competence to pass Acts of the Assembly. The 2006 Act contains provisions specifying that an Act of the Assembly cannot make modifications of the 2006 Act (Schedule 7, Acts

of the Assembly, Part 2, General Restrictions, paragraph 5, sub-paragraph (1)).

7. Part 2, paragraph 5, sub-paragraph (2) of Schedule 7 to the 2006 Act specifies a list of specific provisions within the 2006 Act to which sub-paragraph (1) does not apply, and to which an Act of the Assembly may therefore make modifications of, or confer power by subordinate legislation to make modifications of, provisions contained in the 2006 Act.
8. Section 109 of the 2006 Act specifies that Her Majesty may by Order in Council amend Schedule 7 to the 2006 Act.
9. This Order amends paragraph 5(2)(a) of Part 2 of Schedule 7 to the 2006 Act to include section 79 (Sustainable development) so as to confer legislative competence upon the Assembly to amend section 79 of the 2006 Act (sustainable development).
10. The Order will come into effect on the day after the day it is made.
11. The WFG Bill introduced in the Assembly by the Welsh Government on 7 July 2014 and currently under Assembly scrutiny provides for duties on the Welsh Ministers in respect of sustainable development. An amendment to the Bill will be tabled to include a provision making such amendment to the 2006 Act, should this Order be approved.
12. The Bill, subject to the will of the Assembly and to Royal Assent, is anticipated to become law in April 2015.

Policy background

13. Acting on sustainable development is a part of the current Welsh devolution settlement. The Welsh Government is in the process of legislating to add depth and detail to sustainable practice across the public sector and enshrine the commitment to sustainable development within legislation requiring specified public sector organisations to make progress to contribute to the well-being of a sustainable Wales.
14. The current duty on the Welsh Ministers in respect of sustainable development at section 79 of the 2006 Act is to publish a scheme setting out how they will promote sustainable development; report on how the scheme has been implemented each financial year; and report on the scheme's effectiveness.
15. The effectiveness reviews suggest that the existing duty does not go far enough, and there is agreement with this suggestion amongst stakeholders.
16. The independent effectiveness reviews of the implementation of the duty have levelled criticism that the statutory scheme is *"being seen as one of*

a number of competing priorities, rather than the means by which the [Welsh] Government manages its competing priorities"¹.

17. This has also been recognised by the current Commissioner for Sustainable Futures for Wales in his independent commentary on the Welsh Government's Sustainable Development Annual Report 2012/13, where he highlighted "*systemic weakness in the current governance structures for sustainable development and the associated reporting of progress*".
18. The WFG Bill seeks to address these weaknesses by ensuring that the Welsh Ministers (together with specified public bodies) set well-being objectives that are aligned with the well-being goals provided for within the WFG Bill, and that these well-being objectives are being achieved in a sustainable way. This means applying the sustainable development principle provided by the WFG Bill, employing the five governance approaches of collaboration (working together); long term thinking (future proofing); prevention (avoiding problems from arising in the first place); integration (looking at all the goals together); and citizen centred policymaking (engaging with people). Embedding sustainable development throughout specified Welsh public bodies requires strong leadership and an exemplary approach at the highest levels.
19. As noted above, the WFG Bill provides substantive duties on the Welsh Ministers in respect of sustainable development and the amendment to section 79 of the 2006 Act will ensure alignment and consistency between the two pieces of legislation and provide clarity in the statute book.
20. The WFG Bill strengthens existing governance arrangements for improving the well-being and sustainable development of Wales in order to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs (the sustainable development principle). It identifies well-being goals which specified public bodies are to seek to achieve in order to improve the well-being and sustainable development of Wales both now and in the future. The Bill will:
 - a. Set six statutory well-being goals for the pursuit of the "common aim" of improving the economic, social and environmental well-being of Wales. Specified public bodies will contribute to the well-being goals through the setting and meeting of well-being objectives in accordance with the sustainable development principle;

¹ *Effectiveness Review of the Sustainable Development Scheme*, 31 January 2012.
<http://wales.gov.uk/topics/sustainabledevelopment/publications/effectivenessreview2012/?lang=en>

- b. Establish the office of the Future Generations Commissioner for Wales;
- c. Establish a Public Services Board for each local authority area in Wales and require them to prepare and publish assessments of local well-being and local well-being plans. (In doing so, the Bill simplifies current requirements as regards integrated community planning, including repealing duties for Health and Social Care Well-being plans, Children and Young People's plans and Community plans.)

Consultation outcome

- 21. This Order has been discussed and agreed with the Wales Office.
- 22. There has been no public consultation on this draft Order. A number of public consultations have already taken place on the primary legislation which the Welsh Government has introduced which relates to the topic which this Order applies to, as described below, including the impact on the existing duty.
- 23. An engagement event held in December 2011 to investigate what legislative measures stakeholders considered appropriate highlighted support for the proposal to legislate in respect of the now introduced WFG Bill.
- 24. A consultation paper took public opinion on what a new legislative proposal may look like in respect of sustainable development in Wales; the consultation ran from 9 May to 17 July 2012. Where present, opinion on how a new law should look in comparison to the existing duty at section 79 was uniform: stakeholders wanted a duty on the Welsh Ministers which went further than the existing provisions requiring a 'scheme to promote' sustainable development.
- 25. A white paper was published in December 2012 with specific proposals on a new sustainable development law in Wales. The consultation ran from 3 December 2012 to 4 March 2013 and generated 3927 responses (including 3749 campaign responses), which directly informed the development of the approach outlined in the white paper.
- 26. Responses to this consultation raised no issues with the aim, explicitly stated in the paper, of seeking to amend the existing duty at section 79 of the 2006 Act, so long as doing so did not delay the new sustainable development legislation. Some stakeholders also recognised the importance of a duty in section 79 of the 2006 Act which complemented the new sustainable development legislation.
- 27. The Welsh Government's report on the Consultation Summary was published in May 2013 and all the responses were published on the Welsh Government website in June 2013. The summary report included

details of the organisations notified of the White Paper consultation together with a list of respondents.

Financial Implications

28. There would be no financial implications arising from this Order. A full impact assessment was carried out on the WFG Bill at the time of its introduction to the National Assembly for Wales and will be revised following Stage 2 scrutiny.

Recommendations made by committees scrutinising the Order in the Assembly and Parliament

Assembly scrutiny

29. The Constitutional and Legislative Affairs Committee considered the proposed Order and concluded that it was content with the Order. The Committee welcomed the Welsh Government's decision to publish its proposed amendment to section 79 of GOWA, which it noted will enable stakeholders to make representations on the proposed amendment in advance of its formal tabling for the WFG Bill. The Committee did not make any recommendations.
30. The Environment and Sustainability Committee considered the proposed Order and noted that it supported the principle of conferring power on the Assembly to amend section 79 of GOWA. The Committee members voiced their concern however with the process that meant the Order was laid at such a late stage of their scrutiny of the Bill, and noted that it had been unable to allocate as much time to considering the proposed Order as it believed necessary. The Committee also expressed a concern that this did not set a precedent for short scrutiny periods for any future amendments to the 2006 Act.
31. The Committee recommended that the Welsh Government should make it clear in the amendment it intends to table to the Bill, that any further changes to section 79 of GOWA should only be made through primary legislation to ensure that sufficient scrutiny is included in the process.
32. The Welsh Government recognises the Committee's concerns and confirms that any future provision amending or providing for the amendment of section 79 of GOWA would need to be created by primary legislation, and therefore that proposed power would be subject to the full scrutiny of the Assembly. The proposed amendment to Schedule 7 of GOWA would not enable section 79 to be amended by subordinate legislation, and therefore no such power as referred to by the Committee is created.

Parliamentary scrutiny

33. In Parliament, the Joint Committee on Statutory Instruments considered the Order and found no cause to report it to Parliament on technical grounds.
34. The House of Lords Secondary Legislation Scrutiny Committee also considered the Order and determined that it need not be drawn to the special attention of the House of Lords on policy grounds.
35. There are therefore no recommendations made by either of the Parliamentary committees.
36. The draft Order is unchanged from the proposed Order as previously laid and considered by the committees above.

Carl Sargeant
Minister for Natural Resources
December 2014