

EXPLANATORY MEMORANDUM TO
THE GOVERNMENT OF WALES ACT 2006 (CONSEQUENTIAL
MODIFICATIONS, TRANSITIONAL PROVISIONS AND SAVING) ORDER 2009

2009 No. 2958

1. This Explanatory Memorandum has been prepared by the Wales Office and is laid before Parliament by command of Her Majesty.

2. Purpose of the Instrument

2.1 This Order is being made to continue the implementation of changes consequential upon the Government of Wales Act 2006 (“GoWA 2006”) which changed the structure of the devolution settlement in Wales.

2.2 Schedule 10 to GoWA 2006 made provision for minor and consequential amendments to Acts of Parliament. Further such provision was made by the Government of Wales (Consequential Modifications and Transitional Provisions) Order 2007 (S.I. 2007/1388) (“the 2007 Order”).

2.3 This Order makes a number of additional consequential modifications to legislation that have since been identified.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative context

4.1 This Order, amongst others, is required to implement GoWA 2006.

4.2 GoWA 2006 established a separate legislature (the National Assembly for Wales, “the new Assembly”) and executive (the Welsh Assembly Government, including the Welsh Ministers). It also established the National Assembly for Wales Commission that provides property, staff and services to the new Assembly.

4.3 The executive functions that had previously vested in the National Assembly for Wales (“the old Assembly”) established by the Government of Wales Act 1998 (GoWA 1998) transferred to and vested in the Welsh Ministers under GoWA 2006. The new Assembly scrutinises the actions of the Welsh Assembly Government and has legislative powers to pass Assembly Measures.

4.4 As a result of these changes, a number of consequential modifications have been required to existing enactments to replace references to GoWA 1998 and the old Assembly and to insert references to GoWA 2006 and the new entities established by GoWA 2006.

4.5 Schedule 10 to GoWA 2006 contained a number of consequential amendments to enactments. As it was not practicable for that Schedule to identify and amend all enactments

that needed amendment in consequence of GoWA 2006, section 160(2) conferred on the Secretary of State a power by order to make modifications to enactments as the Secretary of State considered appropriate in consequence of GoWA 2006.

4.6 Subsequently, in the exercise of that order making power, a number of other consequential modifications were made in the 2007 Order.

4.7 This Order makes further consequential modifications that have since been identified and which the Secretary of State considers appropriate to make. The modifications are considered in detail below in paragraph 4.8 and the Annex to this Memorandum. The modifications are essentially technical in nature to reflect the new “split” in Welsh devolution between the legislature (the new Assembly) and the executive (the Welsh Assembly Government) and that the executive is a separate emanation of the Crown, as the Crown in right of the Welsh Assembly Government (see section 89 GoWA 2006). The date that the modifications will come into force is the day after the day on which the Order is made.

4.8 The enactments modified by this Order are:

- (a) **British Nationality Act 1981(c.61)** – the definition of “Crown service under the government of the United Kingdom” in section 50(1) of that Act is amended to include service with the Crown in right of the Welsh Assembly Government. There are related revocations to 2 Orders made under that Act and consequential transitional provision and saving.
- (b) **Constitutional Reform Act 2005 (c.4)** – the definition of “devolution matter” in section 41(4)(a) of that Act is amended to include questions referred to the new Supreme Court under certain provisions of GoWA 2006; and
- (c) **Companies Act 2006 (c. 46)** – sections 54, 482, 1193 and 1231 in that Act are amended to reflect the new devolution settlement in Wales consequent upon GoWA 2006.

Further details on these modifications are set out in the Annex to this Memorandum.

5. Extent

This Order generally extends to the United Kingdom but each modification has the same extent as the enactment it modifies.

6. European Convention on Human Rights

The Secretary of State for Wales has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Government of Wales Act 2006 (Consequential Modifications, Transitional Provisions and Saving) Order 2009 are compatible with the Convention rights.

7. Policy background

7.1 GoWA 2006 received Royal Assent on 25 July 2006. The purpose of GoWA 2006 is to make provision about the government of Wales.

7.2 GoWA 2006 effected the formal separation between the executive and legislative arms of the old Assembly. It did so by dissolving the old Assembly; establishing the new Assembly as the legislature and establishing the Welsh Assembly Government (comprising the First Minister, Welsh Ministers and their deputies and the Counsel General) as the executive separate from, but accountable to, the new Assembly. As the Crown in right of the Welsh Assembly Government, the Welsh Assembly Government was established as a separate emanation of the Crown.

7.3 Most of the executive functions of the old Assembly became functions of the Welsh Ministers following Her Majesty's appointment (on 25th May 2007) of the first First Minister for Wales under section 46 of GoWA 2006.

7.4 This Order is required to effect the continued implementation of GoWA 2006. It makes technical changes to Acts that have been identified since the 2007 Order was made.

8. Consultation

8.1 This Order continues the implementation of GoWA 2006. It does not contain new policy on which public consultation is required.

8.2 GoWA 2006 followed the White Paper "Better Governance for Wales" (Cm. 6582), which was issued by the Secretary of State for Wales for public consultation. GoWA 2006 achieved the UK Government's stated policy objective of separating the legislative and executive arms of the old Assembly, and providing for the new legislature to have legislative powers (to pass Assembly Measures) and for the executive to exercise executive powers. The 2007 Order subsequently made a considerable number of consequential modifications.

8.3 This Order makes further consequential modifications to other enactments, as a result of the separation of the legislature (the new Assembly) and executive (the Welsh Assembly Government, including the Welsh Ministers); the new roles of the Assembly and the Welsh Ministers and the establishment of the Crown in right of the Welsh Assembly Government.

8.4 Although there has been no public consultation on this Order when in draft, relevant interested parties have been consulted.

9. Guidance

9.1 No public guidance will be provided on this instrument. Staff of the Welsh Assembly Government who serve overseas will be informed of the amendments to the British Nationality Act 1981 through their Terms and Conditions of Service.

10. Impact

10.1 An Impact Assessment has not been prepared for this Order as it has no new impact on business, charities or voluntary bodies.

10.2 There is no new impact on the public sector.

11. Regulating small business

11.1 The legislation has no new impact on small business.

12. Monitoring and review

12.1 Monitoring and review are not considered necessary.

13. Contact

13.1 Susan Olley at the Wales Office (tel: 029 20 898568 or e-mail Susan.Olley@walesoffice.gsi.gov.uk) can answer any queries regarding the instrument.

Annex

(References to numbered Articles are to the relevant Articles in the Order)

British nationality: modifications and other provisions

Articles 3 to 6

1. Article 3 amends the definition of “Crown service under the government of the United Kingdom” in section 50(1) of the British Nationality Act 1981 (“the 1981 Act”) to include service with the Welsh Assembly Government.

2. As originally enacted the term “Crown service under the government of the United Kingdom” was defined by reference to Crown service under Her Majesty’s government in the United Kingdom or under Her Majesty’s government in Northern Ireland. That definition was amended by SI 1999/1042 to include service under the new emanation of the Crown established under the Scotland Act 1998 namely the Crown in right of the Scottish Administration. GoWA 2006 has established the Crown in right of the Welsh Assembly Government as a new separate emanation of the Crown. The amendment by this article reflects that.

3. So far as is relevant to this Order, that definition is used in the following provisions of the 1981 Act, namely section 2 (acquisition of British citizenship by descent) and in Schedule 1 (requirements for naturalisation as a British citizen).

(a) Section 2 of the 1981 Act (acquisition by descent)

4. Section 2(1) of the 1981 Act explains which people born outside the United Kingdom on and after 1st January 1983 acquire British citizenship automatically at birth. Section 2(1) is

now to be read in conjunction with the British Nationality (Falkland Islands) Act 1983 (c.6) and the British Overseas Territories Act 2002 (c.8). Paragraphs (a) and (b) of section 2(1) are considered below. Paragraph (c) of section 2(1) is not relevant to this Order .

5. Under section 2(1)(a), a person born outside the United Kingdom and the qualifying territories on or after 21st May 2002 is a British citizen at birth if, at the time of the birth, either parent is a British citizen “otherwise than by descent”.

6. Under section 2(1)(b), as amended by that Act of 2002, a person born outside the UK on and after 21st May 2002 is a British citizen otherwise than by descent if, at the time of birth:

(a) either parent is a British citizen; and

(b) that parent is serving outside the United Kingdom and the qualifying territories –

(i) in Crown service under the government of the United Kingdom or of a qualifying territory; or

(ii) in service of any description designated by order of the Secretary of State under section 2(3); and, in either case

(iii) was recruited for that service in the United Kingdom or a qualifying territory.

7. A person who is a British citizen under section 2(1) of the 1981 Act is

- a British citizen by descent, if a British citizen by virtue of section 2(1)(a) only; and

- a British citizen otherwise than by descent in all other circumstances.

8. This means that if a person (A) is born overseas to a person (B) who is a British citizen otherwise than by descent, then A becomes a British citizen by descent only. In that case if A subsequently has a baby born overseas that baby does not become a British citizen by birth. If B was a British citizen by descent only then A would not be a British citizen by birth. This reflects the general principle that British citizenship can be passed down one generation by birth but not two generations. However, if B was at the time of A’s birth serving overseas in Crown service under the government of the United Kingdom or in service designated by order by the Secretary of State, then A would become a British citizen otherwise than by descent. In that case if A subsequently had a baby that was born overseas then that baby would be a British citizen at birth

(b) Schedule 1 to the 1981 Act (Requirements for naturalisation as a British citizen)

9. Under Schedule 1 to the 1981 Act, service outside the UK in Crown service under the government of the United Kingdom by an applicant for naturalisation as British citizen or by the spouse or civil partner of such an applicant can fulfil one of the requirements for naturalisation under section 6 of the 1981 Act (acquisition of citizenship by naturalisation). There are proposed amendments to that section 6 and Schedule 1 in the Borders, Citizenship and Immigration bill (see in particular clauses 39 (application requirements: general); 40 (application requirements: family members etc); and 41 (qualifying period) as amended in Public Bill Committee printed 19th June 2009) but these are not relevant to the amendment made by article 3 .

Articles 4 and 5

10. Pending amendment to the definition of “Crown service under the government of the United Kingdom”, the Secretary of State for Home Affairs, in exercise of the power under section 2(3) of the 1981 Act to designate descriptions of service, made the British Citizenship (Designated Service) (Amendment) Order 2008 S.I. 2008/135 (“the 2008 Order”). That order came into force on 14th February 2008. By designating service with the Welsh Assembly Government, that service was, from that date, service to which section 2(1)(b) of the 1981 Act applied. It did so by inserting an entry for the Welsh Assembly Government in paragraph 15 of Schedule 2 to the British Citizenship (Designated Service) Order 2006 (S.I. 2006/1390) (“the 2006 Order”).

11. Following the amendment to the definition of “Crown service under the government of the United Kingdom” made by article 3, that designation is no longer appropriate. Service with the Welsh Assembly Government overseas will continue to be service to which section 2(1)(b) of the 1981 Act applies but henceforth by virtue of it being Crown service under the government of the United Kingdom. This will be the same as service under Her Majesty’s governments in the United Kingdom and in Northern Ireland and under the Scottish Administration.

12. Articles 4 and 5 accordingly make appropriate revocations in respect of the 2006 and 2008 Orders.

Article 6

13. Article 6 makes a related transitional provision and a saving in relation to children born overseas to a member of staff of the Welsh Assembly Government serving overseas or to the spouse or partner of that member of staff:

(a) after 25th May 2007, when the Crown in right of the Welsh Assembly Government came into being under GoWA 2006 (see section 161(4) and (5) GoWA 2006 and the appointment on 25th May 2007 of the First Minister for Wales by Her Majesty under section 46 GoWA 2006) and before 14th February 2008, when the 2008 Order designating service under the Welsh Assembly Government came into force; or

(b) between 14th February 2008 and the date this Order comes into force.

14. In a case to which paragraph 13(a) refers, the effect of paragraphs (1) and (2) of article 6 is that, from the date this Order comes into force, then so long as that person is a British citizen by birth, that person is for all purposes a British citizen by virtue of section 2(1)(b) of the 1981 Act (parent a British citizen in Crown service abroad under the government of the United Kingdom etc.), that is, a British citizen “otherwise than by descent” rather than as at present a British citizen by descent only.

15. In a case to which paragraph 13(b) refers, the effect of paragraphs (3) and (4) of article 6 is that, from the date this Order comes into force, then so long as that person is a British citizen because of the citizenship that person acquired at birth, that person continues to be for

all purposes a British citizen by virtue of section 2(1)(b) of the 1981 Act, that is, a British citizen “otherwise than by descent” notwithstanding the revocation of the 2008 Order.

16. Paragraphs (5) and (6) of article 6 make related supplementary provision.

Other modifications

Constitutional Reform Act 2005 (c. 4)

Article 7

17. Section 41 of the Constitutional Reform Act 2005 (“the 2005 Act”) provides for the relationship of the new Supreme Court of the United Kingdom with other courts in the UK.

18. Section 41(3) of the 2005 Act provides that decisions of the Supreme Court on devolution matters coming before it are not binding upon the Supreme Court itself but are otherwise binding in all legal proceedings. This maintains the status quo in relation to the effect of decisions in devolution proceedings of the Judicial Committee of the Privy Council which currently has jurisdiction.

19. “Devolution matter” is defined in section 41(4)(a) and (b) of the 2005 Act by reference to proceedings under certain provisions of the Scotland Act 1998 (c.46), the Northern Ireland Act 1998 (c.47) and (as substituted by the 2007 Order, Schedule 1 paragraph 111) under GoWA 2006.

20. Section 41(4)(b) of the 2005 Act refers to devolution issues under Schedule 9 to GoWA 2006 as well as devolution issues under respectively Schedule 6 to the Scotland Act 1998 and Schedule 10 to the Northern Ireland Act 1998.

21. Section 41(4)(a) refers to proceedings under provisions in the Scotland and Northern Ireland Acts involving questions whether a bill or provision of a bill of the Scottish Parliament or the Northern Ireland Assembly is within that body’s legislative competence. There was no reference to any such questions under the GoWA 1998 as the old Assembly did not have similar legislative competence to the Scottish Parliament and the Northern Ireland Assembly.

22. Given the legislative competence of the new Assembly under Part 3 (Assembly Measures) and (subject to a referendum under section 103) under Part 4 (Acts of the Assembly) of GoWA 2006, article 8 amends section 41(4)(a) of the 2005 Act by inserting a reference to proceedings arising under the following provisions of the GoWA 2006, namely section 96 (scrutiny by Supreme Court of proposed Orders in Council), section 95 (conferring legislative competence on the Assembly), section 99 (scrutiny by Supreme Court of proposed Assembly Measures) and section 112 (scrutiny by Supreme Court of Assembly Bills).

23. Other amendments to the 2005 Act were made by the 2007 Order (Schedule 1 paragraphs 110 and 111).

Companies Act 2006 (c. 46)

Articles 8 - 12

24. Article 8 merely introduces articles 9 -12.

25. Section 54 of the Companies Act 2006 (“the 2006 Act”) places restrictions on companies being registered with names suggesting connection with government or public authorities.

26. Article 9 amends section 54(1)(a) of the 2006 Act to include reference to the Welsh Assembly Government; this section already includes references to Her Majesty’s Governments in the United Kingdom and in Northern Ireland and also to any part of the Scottish Administration.

27. Section 482 of the 2006 Act provides that the audit requirements on companies under Part 16 of the 2006 Act do not apply to non–profit-making companies that are subject to public sector audit, that is, audit by the Comptroller and Auditor General and the Auditor Generals for respectively Wales, Scotland and Northern Ireland.

28. Article 10 substitutes in section 482(1), new paragraphs (a) and (ab) in place of the existing paragraph (a). The new paragraph (a) replicates the provision in sub-paragraph (i) of the existing paragraph (a) in relation to the Comptroller and Auditor General. The new paragraph (ab) replicates the provision in sub-paragraph (ii) of the existing paragraph (a) in relation to the Auditor General for Wales save that it replaces a reference to section 96 of the Government of Wales Act 1998 with a reference to paragraph 18 of Schedule 8 to GoWA 2006. Section 96 was repealed by Schedule 12 to GoWA 2006. The said Schedule 8 paragraph 18 replicates provision previously made in that section 96.

29. Section 1193 of the 2006 Act places restrictions on persons carrying on business in the United Kingdom under a name that would be likely to give the impression that the business is connected with government or public authorities.

30. Article 11 amends section 1193(1)(a) to include reference to the Welsh Assembly Government as well as to Her Majesty’s Governments in the United Kingdom and in Northern Ireland and also to any part of the Scottish Administration.

31. Section 1231 of the 2006 Act requires the Independent Supervisor, who supervises the Auditors General (including the Auditor General for Wales), in the exercise of statutory audit functions, to prepare at least once in each calendar year a report on the discharge of its functions. The Independent Supervisor is required to give copies of each report to the Secretary of State and the “first” Ministers in the 3 devolved administrations.

32. Article 12 amends section 1231 of the 2006 Act by :

(a) substituting a new subsection (2)(d) to refer to the First Minister for Wales; and

(b) inserting a new subsection (3A) to require the First Minister for Wales to lay a copy of each such report before the National Assembly for Wales. That requirement will not apply to calendar years before 2010.

33. An amendment to section 996(7) of the 2006 Act was made by the 2007 Order (Schedule 1 paragraph 142).