

'PRIMARY LEGISLATIVE POWERS' FOR WALES AFTER A REFERENDUM

The Government of Wales Act 2006 contains two sets of legislative powers for the National Assembly: the 'enhanced' powers under Part 3, and the 'primary legislative powers' set out in Part 4.

Part 3 of the Act has been in operation since May 2007, allowing the Assembly to make laws (known as Assembly Measures) within the specific areas where it has been given legislative power. These areas of competence can be added to by Legislative Competence Orders which have to be agreed by the Assembly and Westminster. New powers can also be conferred on the Assembly by Acts of Parliament – so-called 'framework powers'. The current legislative powers of the Assembly are to be found in Schedule 5 to the 2006 Act, which is regularly updated as new powers are transferred. It can be found at http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance/bus-legislation-guidance-documents/legislation_fields/schedule-5.htm.

Part 4 can only come into effect after a referendum, and the current One Wales government is committed to holding one by 2011. So if Wales does vote 'yes' to extra powers, what powers does it get?

The powers on offer

The legislative powers of the Assembly after a referendum are set out in Schedule 7 to the 2006 Act. This gives the National Assembly powers in 20 'Fields':

Field 1: agriculture, fisheries, forestry and rural development;
Field 2: ancient monuments and historic buildings;
Field 3: culture;
Field 4: economic development;
Field 5: education and training;
Field 6: environment;
Field 7: fire and rescue services and promotion of fire safety;
Field 8: food;
Field 9: health and health services;

Field 10: highways and transport;
Field 11: housing;
Field 12: local government;
Field 13: National Assembly for Wales;
Field 14: public administration;
Field 15: social welfare;
Field 16: sport and recreation;
Field 17: tourism;
Field 18: town and country planning;
Field 19: water and flood defence;
Field 20: Welsh language;

These are the same 20 Fields as apply at the moment under Part 3. However, while at present Schedule 5 has to be filled out, and the Assembly has to acquire legislative powers before it can make laws, Schedule 7 spells out what the full powers of the Assembly are. These are pretty extensive, and although they are subject to some qualifications and exceptions to reserve matters like the right to vote in local elections to Westminster, the Assembly gets a broad grant of legislative powers within these 20 Fields. This would allow the Assembly to pass laws on a much wider range of topics than it currently can, and would eliminate the need to seek time-consuming LCOs before it can legislate on a matter.

Restrictions on the Assembly's legislative powers

Despite this, there are many restrictions on what the Assembly can do. Most importantly, an Assembly Act – as laws passed by the National Assembly will be called – must relate only to

devolved matters. If they affect other matters as well, they may well be beyond its powers and so void. Beyond this:

- It can only legislate for matters within Wales – it has no power to pass laws that work outside the boundaries of Wales;
- Its laws must comply with the requirements of European Union law and the European Convention on Human Rights;

It cannot pass a law if that law:

- would have an adverse effect on any non-devolved matters;
- might have a serious adverse impact on water resources, water supply or the quality of water in England;
- would have an adverse effect on the operation of the law in England;
- would be incompatible with the UK's international obligation or the interests of defence or national security.

So far, we have no idea how the courts will approach decisions about whether legislation falls within devolved legislative powers or outside them. The courts have never had to consider a case where governments challenged each other about their legislative powers, and the differences between the rules for Scotland and Wales mean even Scottish precedents would give little clear assistance for Wales.

The difference between devolution for Wales and devolution for Scotland

The difference between Part 4 and the sort of devolution that Scotland got in 1998 is subtle but important. The Scottish Parliament has power to make laws for all matters save those expressly reserved to Westminster. The National Assembly can only legislate for those matters where it has been given express power to do so. The Richard Commission recommended 'legislative powers on the Scottish model' for the National Assembly – so Part 4 of the 2006 Act does not deliver what the Richard Commission recommended.

What are the differences?

- The Scottish Parliament has wider powers than the National Assembly – including civil and criminal law, policing, the courts, prisons and criminal justice;
- Scotland is a separate legal jurisdiction to England and Wales, and the Scottish Parliament has power to alter the laws of Scotland on civil matters like land and property law or divorce and family law, which the National Assembly will not have;
- Beyond this, at the margin Scottish legislation will probably be within the Parliament's powers if its subject matter is not specified in the Scotland Act. National Assembly legislation will only be valid if the Assembly can show that it clearly has the power to legislate on that subject;
- Any new topics or areas of legislation are likely automatically to fall within devolved powers in Scotland. The opposite would be the case in Wales;
- The overlap between Westminster and Holyrood parliaments is managed by the Sewel convention, which provides that the Scottish Parliament must consent to any Westminster legislation affecting devolved matters and any changes in the powers of the Scottish Parliament or Scottish Ministers. In principle the Sewel convention also applies to relations between Westminster and the National Assembly, but so far it has not been applied to conferrals of power and only once to Westminster legislation on a devolved legislative matter.

What Scotland gets is two Parliaments (at Holyrood and Westminster), each with generous legislative powers. By contrast, Wales will have a Parliament with generous (indeed, full) powers, and a National Assembly with significant but more limited powers.

Tomorrow's Wales Viewpoint

Tomorrow's Wales fully supports conferring primary legislative powers on the National Assembly for Wales, and welcomes the commitment of the One Wales government to campaign for a positive referendum result. We believe that the provisions of Part 4 are eminently preferable to those currently in operation under Part 3 and will provide for more stable, accountable and efficient government for Wales.

However, we believe that the distinction between the model of legislative devolution on offer to Wales and that which has been applied to Scotland is an important one. The model used for Wales limits the scope of what the Assembly may do, and constrains the Assembly's powers in ways that do not apply to the Scottish Parliament or Northern Ireland Assembly .

While implementing Part 4 would be a very positive step, it will not meet the aspirations and recommendations set out by the Richard Commission nor provide the breadth of legislative powers advocated by Cymru Yfory. The powers of the National Assembly for Wales would continue to be inferior to those enjoyed by the Scottish Parliament and the Northern Ireland Assembly.