



Referendum in Wales: draft Orders

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A referendum on the powers of the National Assembly for Wales is planned for 3 March 2011. It will take place under provisions of the *Government of Wales Act 2006*, and of the *Political Parties, Elections and Referendums Act 2000*. If the Welsh electorate approves the referendum question, the National Assembly will gain the capacity to pass laws on a much wider range of subjects than at present. These subjects are set out in Schedule 7 to the 2006 Act.

On 21 October 2010 the Secretary of State for Wales, Cheryl Gillan, laid Orders to bring about the referendum and govern the procedures applying to it. There are three Orders contained in draft Statutory Instruments:

- *the National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc) Order 2010*, which brings about the main substance of the referendum
- *the National Assembly for Wales Referendum (Assembly Act Provisions) (Limit on Referendum Expenses Etc) Order 2010*, which governs the expenditure of campaign groups
- *the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010*, which updates the substance of Schedule 7 to take account of those powers gained by the Assembly since the Schedule was last updated in 2007

The first of these Orders needed to be passed by a two-thirds majority of the National Assembly for Wales, and by each House of Parliament, before the referendum could take place. The third Order also needed approval by the National Assembly, as well as each House of Parliament. The necessary approvals in the National Assembly, including the two-thirds majority, were secured on 9 November 2010. In the House of Commons, the third Order on the list above was approved without debate on 24 November 2010, and the remaining two Orders were approved without debate on 25 November 2010. All three were approved by the House of Lords on 25 November 2010 after a short debate.

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The Welsh Affairs Committee published a report on 22 November 2010, [*The proposed amendment of Schedule 7 to the Government of Wales Act 2006*](#), HC 603 2010-11, which discussed the Order on amending Schedule 7.

A separate Note explains the background to the referendum and what it is about: [*Referendum for Wales: extending the scope of Assembly powers*](#), SN/PC/5685, 27 October 2010. Brief details of this are given below.

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1 Background

At present the National Assembly for Wales may pass laws, known as “measures”, on a restricted set of topics. These are set out in [Schedule 5](#) of the *Government of Wales Act 2006*, where they are grouped under general headings (“fields”), and then broken down into more specific items (“matters”). This list can be expanded in two ways. On the one hand, Parliament can include a provision in an Act stating that some aspects of what the Act covers can be dealt with by the National Assembly for Wales. It does this by adding them to the list of matters in Schedule 5. On the other hand, the Assembly can request an Order in Council that specifies new topics on which it may legislate. These would usually be matters, in other words, items of some detail, although it is possible that they might include whole new fields. They are added in the same way, by amending Schedule 5.

The *Government of Wales Act 2006* also includes an arrangement whereby the Assembly could exercise primary law making powers in respect of a much greater number of issues, albeit still restricted within the same broad headings. This would be subject to approval in a referendum. It is contained in Part 4 of the Act, and is known as “Assembly Act provisions”.

On 9 February 2010 the Assembly passed a Resolution calling for such a referendum. The First Minister gave notice of this to the Secretary of State on 17 February 2010. After the general election the new Secretary of State for Wales, Cheryl Gillan, set in motion the process of devising a question. A draft was sent to the Electoral Commission, which suggested changes to improve understanding. Mrs Gillan stated on 9 September 2010 that, with the agreement of the First Minister and Deputy First Minister in Wales, she had decided to accept the Electoral Commission’s suggested text.

On 21 October 2010 Mrs Gillan laid three draft Statutory Instruments, containing Orders necessary to bring about and manage the referendum. She made a [Written Ministerial Statement](#) at the time,¹ and the Wales Office also issued a [press release](#).

The Orders provided for the referendum, they embodied the question, and they set the date as 3 March 2011, as suggested by the Welsh Assembly Government. They also governed the financial arrangements for campaign groups, and brought up to date the competence that would be available to the National Assembly for Wales in the event of a “yes” vote.

On 9 November 2010 the National Assembly for Wales approved two of the Orders, on the question, date etc, and on updating the list of powers. It had no role in respect of the financial arrangements Order.

Now that all three Orders have been approved by each House of Parliament, the referendum can go ahead. If the majority votes “no”, the powers of the National Assembly for Wales will remain as they are at present. Further referendums could be held in future, but each would need fresh approval of an Order, under the terms of the 2006 Act, to bring it about. If the majority votes “yes”, the Assembly Act provisions will come into effect by virtue of a commencement order laid by the Welsh Ministers and approved by the National Assembly for Wales.

¹ HC Deb 21 October 2010, cc71-4WS.

2 The National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc) Order 2010

This is the longest of the three Orders, and it contains the substantive arrangements for the referendum. It is mostly technical in nature, and draws on precedents used elsewhere in the UK for a variety of elections and referendums, including elections to the National Assembly for Wales. It is made under the *Government of Wales Act 2006*, specifically Section 103 and Schedule 6. There is interaction with Part 7 of the *Political Parties, Elections and Referendums Act 2000* (PPERA), which provides for referendums in the UK.

2.1 Date

Article 3 sets the date of the referendum as 3 March 2011.

2.2 Question

Article 4 gives the question, the English text of which is as follows:

Question

Do you want the Assembly now to be able to make laws on **all** matters in the 20 subject areas it has powers for?

This will be preceded on the ballot paper by the following statement:

The National Assembly for Wales: what happens at the moment

The Assembly has powers to make laws on 20 subject areas, such as:

agriculture	education
the environment	health
housing	local government

In each subject area, the Assembly can make laws on **some** matters, but not others. To make laws on any of these other matters, the Assembly must ask the UK Parliament for its agreement. The UK Parliament then decides each time whether or not the Assembly can make these laws.

The Assembly cannot make laws on subject areas such as defence, tax or welfare benefits, whatever the result of this vote.

If most voters vote 'yes'

The Assembly will be able to make laws on **all** matters in the 20 subject areas it has powers for, without needing the UK Parliament's agreement.

If most voters vote 'no'

What happens at the moment will continue.

The ballot paper is shown in Schedule 6 to the Order, where it is given as Form D.

2.3 The electorate and voting

The electorate is set in the *Government of Wales Act 2006* as the electorate for local government elections (and by extension for the National Assembly for Wales).² The Order creates a cut-off point after which alterations to the register are disregarded, which is given in paragraph 15(4) of Schedule 1.

Schedule 1 to the Order covers voting in the referendum. Paragraph 1 of Schedule 1 allows for voting in person, by post or by proxy. Further details on postal and proxy voting are given in paragraphs 2 to 14, while the whole of Schedule 2 is devoted to the issue and receipt of postal ballot papers. For those who are not existing postal or proxy voters, the deadline to apply for postal votes, including by proxy, is 5.00pm on the eleventh day before the poll, while the deadline to apply for proxy votes not by post is 5.00pm on the sixth day before the poll. Existing postal and proxy voters should apply before the end of the eleventh day if they need their papers sent to an alternative address to the one under which they are listed in the records of absent voters.³

Registration is covered in paragraphs 15 to 26 of Schedule 1. This includes the register itself, its supply to polling stations, the duties of registration officers, and expenses incurred in administering the register, which are to be paid by the county or county borough council appointing the registration officer.

2.4 Administration of the referendum

Under Article 6 of the Order the polling districts and places are the same as for local elections.

Articles 9 to 14 cover the Counting Officers. These are largely governed by Section 128 of PPERA, with a couple of modifications. The Articles provide for the Chief Counting Officer, who has responsibility for the conduct of the referendum within the terms of the Order, and is either the Chair of the Electoral Commission or their appointee,⁴ one or more Deputy Chief Counting Officers, and the Counting Officers, who will conduct the referendum in each voting area, including responsibility for the issue and receipt of postal votes, and for the count itself. Counting Officers may also appoint other people to assist them in their duties. The Counting Officers' expenses are to be paid by the Welsh Assembly Government. The advent of Deputy Chief Counting Officers and the capacity of Counting Officers to appoint people to assist them are special to the Order, in addition to the basic arrangements set out in PPERA.

The Electoral Commission has a role, in line with Schedule 6, paragraph 7 of the *Government of Wales Act 2006*, of promoting public awareness about the referendum, the subject matter of it, and how to vote in it.⁵ In addition, there is a duty on local electoral officers and counting officers to encourage participation in the referendum.⁶ It is also possible for the Assembly Commission to promote awareness of the current and possible future systems of devolved government in Wales, under Schedule 2, paragraph 5 to the 2006 Act. According to the Explanatory Memorandum on the Order, the Commission will use this power to carry out a public information campaign on the powers the Assembly would have in the event of either outcome in the referendum.

² Section 12 and Schedule 6, para 1.

³ Paragraph 11 for all closing dates.

⁴ Article 2 footnote (h), with reference to Section 128 (2), *Political Parties, Elections and Referendums Act 2000*.

⁵ Article 16.

⁶ This is provided for in Schedule 6, para 7 to the 2006 Act. It is enacted by Schedule 5, para 1 to the present Order, by reference to and modification of Section 69 of the *Electoral Administration Act 2006*.

Under Article 18 groups campaigning for either outcome (“permitted participants”) may appoint referendum agents in individual voting areas, of whom the counting officer must be notified at midday on the 16th day before the poll.

Schedule 3 includes most of the arrangements for the conduct of the vote, known as the “referendum rules”. These are based on the arrangements used for Assembly elections, with modifications specific to the referendum. The Schedule commences with the timetable, which at 25 days reflects the length of the timetables for local government elections and for the referendum in the *Parliamentary Voting System and Constituencies Bill 2010-11*:

1. The proceedings in the referendum are to be conducted in accordance with the following Table—

<i>Proceeding</i>	<i>Time</i>	<i>Provision</i>
Publication of notice of referendum	Not later than the twenty-fifth day before the day of the poll	Rule 3(1)
Issue of official poll card	As soon as practicable after publication of notice of referendum	Rule 15(1)
Publication of notice of poll	Not later than the sixteenth day before the day of the poll	Rule 11(1)
Notice of appointment of referendum agents	Not later than the sixteenth day before the day of the poll	Article 18(3)
Notice of appointment of polling and counting agents	Not later than the fifth day before the date of the poll	Rule 17(6)
Notice of designation of a designated counting agent	At the same time as notice of appointment of the counting agent	Rule 17(6) and (8)
Polling	Between the hours of 7a.m. and 10p.m.	Rule 4

It goes on to cover notice of the referendum, hours of polling, the ballot paper, polling stations, postal ballot papers and poll cards, the voting procedure, including for people with disabilities, and, in paragraphs 33 to 40 the count and declaration of the result.

Schedule 4 creates offences and sentences, and it lists the disqualifications that follow conviction for certain of those offences. In general, these follow the offences applying to elections. One point of interest here is the provision in paragraph 29 of Schedule 4 for extra-territorial jurisdiction over offences created by the Schedule, which is based on Section 178 of the *Representation of the People Act 1983*, as amended.

Schedule 5 covers the other enactments relevant to the referendum which are modified for its purposes (mostly to make them specific to the referendum in hand).

Schedule 6 includes various forms associated with the referendum, including the ballot paper itself.

2.5 Referendum period

The “referendum period” referred to in PPERA in respect of financing arrangements is defined in Article 5 of the Order as starting on the date on which the Order comes into force and ending with the date of the poll. Campaigners intending to spend more than £10,000

during the referendum period must notify the Electoral Commission, which registers them as permitted participants.⁷ The Electoral Commission may also designate a lead campaign group on each side (not on one only) from the permitted participants,⁸ known as a “designated organisation”, which is eligible for assistance under PPERA not exceeding £600,000 and being equal for each designated organisation.⁹

Under the 2006 Act, if the Electoral Commission does not designate an organisation on each side, it may provide information to voters which in its view is “likely to promote awareness” about “the arguments for each answer to the referendum question.”¹⁰

3 The National Assembly for Wales Referendum (Assembly Act Provisions) (Limit on Referendum Expenses Etc) Order 2010

This Order is made under the *Political Parties, Elections and Referendums Act 2000* (PPERA). It has three purposes:

- To extend the period during which permitted participants in the referendum campaign may apply to become the designated organisation (lead campaign group) for their preferred outcome
- To set the expenditure limits for the campaign
- To make it clear that media coverage is exempt from the spending limits

3.1 Registration as designated organisation

Article 3 of the Order varies the application of PPERA such that permitted participants have a week longer than the Act would allow to apply to become the designated organisation for their desired outcome in the referendum. Whereas PPERA allows 28 days from the beginning of the referendum period to apply for designation,¹¹ the Order allows 35 days. The referendum period, as mentioned above, begins on the date that the Order comes into force. Since this is expected to be a date in December 2010, the normal 28 day period for applications would clash with Christmas and the New Year. According to the Explanatory Memorandum, this is the reason for the extra week created by the Order.

3.2 Limits on referendum expenses

For referendums held other than across the whole UK, PPERA requires the Secretary of State to consult the Electoral Commission on the limits to be applied to spending by permitted participants.¹² S/he may then prescribe different levels for different categories of permitted participant.

The Electoral Commission gave its views first to [Peter Hain](#), and later, with clarifications, to [Cheryl Gillan](#), in a letter to each and an accompanying [note](#) on the calculations.¹³ The Commission followed a number of principles:¹⁴

⁷ Sections 105 and 117, *Political Parties, Elections and Referendums Act 2000*.

⁸ Section 108, *Political Parties, Elections and Referendums Act 2000*.

⁹ Section 110, *Political Parties, Elections and Referendums Act 2000*.

¹⁰ Schedule 6, para 8 (2), *Government of Wales Act 2006*.

¹¹ Section 109 (2) (b).

¹² Schedule 14, para 2, *Political Parties, Elections and Referendums Act 2000*.

¹³ Letter to Rt Hon Peter Hain MP, 30 March 2010, Note on calculating expenditure limits, 30 March 2010, Letter to Rt Hon Cheryl Gillan MP, 22 July 2010. Available from the Electoral Commission’s web page for the [referendum](#).

¹⁴ Paraphrased from Letter to Rt Hon Peter Hain MP.

- The maximum spending limit should be set by reference to that applying to National Assembly elections
- The maximum should be allowed for designated organisations
- The limits for political parties registering as permitted participants should follow the structure in PPERA for UK-wide referendums, such that the limit is higher for those with a higher level of support in previous elections, in this case the National Assembly elections of 2007
- The minimum, for permitted participants which are neither designated organisations nor political parties, should be £100,000 or 10% of the maximum, whichever is higher

These were aimed at serving the larger principle set out previously by the Electoral Commission that limits for referendums not involving the whole UK should be high enough to allow effective campaigning for all outcomes, should not be so low as to distort reasonable campaigning or affect transparency, but should be low enough to deter excessive spending.¹⁵

On this basis the Electoral Commission recommended limits which the Government has embodied as follows:¹⁶

Designated organisations	£600,000
Political parties with more than 30% of the vote at the 2007 Assembly elections	£600,000
Political parties with more than 20% but not more than 30% of the vote at the 2007 Assembly elections	£480,000
Political parties with more than 10% but not more than 20% of the vote at the 2007 Assembly elections	£360,000
Political parties with more than 5% but not more than 10% of the vote at the 2007 Assembly elections	£240,000
Political parties with less than 5% of the vote at the 2007 Assembly elections	£100,000
Other permitted participants	£100,000

For political parties, the Labour Party would qualify for the £600,000 maximum, the Conservative Party and Plaid Cymru would qualify for £480,000 each, and the Liberal Democrats would qualify for £360,000.

¹⁵ *Key principles for referendums*, Electoral Commission, date unknown, link cited by Commission not working.

¹⁶ The Electoral Commission actually gave two different ways of expressing the figures. In the text of the letter to Peter Hain, the Commission wrote of “21-30%” for the £480,000 limit, “11-20%” for £360,000, and “6-10%” for £240,000. This makes no provision for fractions between 20% and 21%, 10% and 11% etc. In the table in the note on calculations illustrating how this would relate to actual party results from 2007, the Commission used “20-30%”, “10-20%” etc. This means that 20% appears in two bands, as do other borderline figures such as 30% or 10%.

The percentages are produced by combining the constituency and regional results, giving a two-thirds weighting to the constituency votes, and a one-third weighting to the regional votes. In order to secure a qualifying (or “relevant”) percentage of more than 5%, and hence qualify for the higher amounts of money, the party must have secured votes in 2007 in both the constituency and regional polls.

3.3 Media spending

According to the Explanatory Notes, “there is some ambiguity in PPERA over whether media organisations are caught by the spending restrictions which apply to campaigning groups.” This issue had also come up in the proceedings on the *Parliamentary Voting System and Constituencies Bill 2010-11*, where an amendment was made to remove the doubt.¹⁷ The Order is designed to overcome this ambiguity by stating that media coverage is not subject to the restrictions. This allows the media to report the referendum without having to register as permitted participants should their expenditure be greater than £10,000.

Article 5 of the Order provides that the relevant part of PPERA, Schedule 13, should be read as if its exemptions included “publication of any matter relating to the Welsh referendum other than an advertisement” in newspapers, periodicals, BBC or S4C broadcasts, and independent television and radio broadcasts, including digital and satellite services.

4 The National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010

Under Section 109 of the 2006 Act amendments may be made to the list in Schedule 7 of the subjects over which the Assembly would have legislative competence in the event of a move to Assembly Act provisions. This is done by means of an Order in Council, of which the present one is an example. This is subject to the affirmative procedure in each House of Parliament. The Order is also subject to approval by the Assembly, with the exception of the first such Order (and the present one is not the first).

According to the Wales Office the purpose of this Order is to bring up to date the list of legislative competence, taking into account changes that have been made already under the existing system of measure making powers.¹⁸

Schedule 7 was last updated in this way in 2007. The headings under which changes are made, in Articles 3 to 11, are Agriculture, Economic development, Environment, Fire and rescue services and the promotion of fire safety, Highways and transport, Social welfare, Town and country planning, and the power to modify existing enactments.

The Welsh Affairs Committee published a report on 22 November 2010, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, HC 603 2010-11, which discussed the Order on amending Schedule 7. In addition, the short debate in the House of Lords on the three Orders dwelt on this instrument in particular.¹⁹

¹⁷ HC Deb 25 October 2010, c27.

¹⁸ Wales Office [press release](#), 21 October 2010, accessed 12 November 2010.

¹⁹ HL Deb 25 November 2010, cc1249-60.

5 Process and progress

The Order on the referendum date, question and other arrangements requires approval by a two-thirds majority in the National Assembly for Wales and approval by each House of Parliament.

The Order amending Schedule 7 requires approval by the National Assembly for Wales as well by each House of Parliament.

The expenditure Order need be approved only by each House of Parliament.

On 9 November 2010 the National Assembly for Wales approved the Orders on the referendum question etc and on amendment of Schedule 7. The first Order was taken by recorded vote, and was passed unanimously by the 47 Assembly Members present.²⁰ To achieve the necessary two-thirds majority, 40 of the 60 Assembly Members needed to vote in favour. The second Order was approved without a vote.

The Welsh Affairs Committee published a report on 22 November 2010, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, HC 603 2010-11, which discussed the Order on amending Schedule 7. The same Order was considered by the 3rd Delegated Legislation Committee on 23 November 2010; the other two Orders were considered by the 4th Delegated Legislation Committee on 24 November 2010.

The Order amending Schedule 7 was approved by the House of Commons without debate on 24 November 2010, and the remaining two Orders were approved without debate on 25 November 2010. All three were approved by the House of Lords on 25 November 2010 after a short debate.²¹

Now that the necessary approvals have been obtained the Orders can be made, and the referendum may be held as planned.

If the majority votes “no” in the referendum, then the powers of the Assembly continue as at present, and there is no move to Part 4, the Assembly Act provisions. However, there is nothing to stop the holding of additional referendums, so long as they follow the same procedure as set out in the 2006 Act.²² Note that this procedure allows for, but does not insist on, the Assembly proposing that a referendum be held. This was what happened in this case, but the Act only requires that the referendum be held by Order in Council, and the Order be approved by Parliament and the Assembly, the latter on the two-thirds majority.²³

If the majority votes “yes” in the referendum, the Assembly Act provisions come into force by virtue of the Welsh Ministers making a commencement order under Section 105 of the 2006 Act. That order must be approved by a resolution of the Assembly.

²⁰ <http://www.assemblywales.org/bus-home/bus-chamber/bus-chamber-third-assembly-rop.htm?act=dis&id=202350&ds=11/2010#cynn>. See also, Welsh Assembly Government [press release](#), 10 November 2010, accessed 11 November 2010.

²¹ HL Deb 25 November 2010, cc1249-60.

²² *Government of Wales Act 2006*, Section 103 (3).

²³ Sections 103 and 104.