EXPLANATORY MEMORANDUM TO

THE NATIONAL ASSEMBLY FOR WALES (LEGISLATIVE COMPETENCE) (AMENDMENT OF SCHEDULE 7 TO THE GOVERNMENT OF WALES ACT 2006) ORDER 2010

2010 No.

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 instrument amends Schedule 7 to the Government of Wales Act 2006 (the "2006 Act"), which sets out the subjects in relation to which the National Assembly for Wales (the "Assembly") would be able to pass Acts of the Assembly, restrictions on the Assembly's legislative competence and exceptions to those restrictions.

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

None.

4. Legislative Context

4.1 The Assembly is currently able to pass legislation known as Assembly Measures in accordance with Part 3 of, and Schedule 5 to, the 2006 Act. Schedule 5 sets out the matters in relation to which the Assembly may legislate by Assembly Measure, restrictions on the Assembly's legislative competence to legislate by Assembly Measure and exceptions to those restrictions. Matters are listed under fields in Schedule 5; the 20 fields are broadly based on the areas in which the Welsh Ministers have executive functions. The Assembly's legislative competence may be enhanced by adding matters to fields. This is done in two ways; by Orders in Council under section 95 of the 2006 Act (such Orders are known as Legislative Competence Orders) and by provisions in Acts of Parliament.

4.2 Part 4 of the 2006 Act includes provisions which would enable the Assembly to pass legislation known as Acts of the Assembly (the "Assembly Act provisions"). It also provides that the Assembly Act provisions will come into force if the majority of those voting in a referendum vote in favour and the Welsh Ministers make an order commencing the provisions. If the majority vote against commencing the Assembly Act provisions in a referendum, the Assembly's

legislative competence will remain that in Part 3 of and Schedule 5 to the 2006 Act.

4.3 Section 108 of the 2006 Act, together with Schedule 7 to the 2006 Act ("Schedule 7"), define the Assembly's competence to pass Acts of the Assembly. Part 1 of Schedule 7 sets out the subjects in relation to which the Assembly may pass Acts, together with exceptions from those subjects. The subjects and exceptions are grouped under 20 headings, but exceptions apply across the whole of Part 1. Parts 2 and 3 of Schedule 7 set out restrictions on the Assembly's legislative competence and exceptions to those restrictions.

4.4 Section 109 of the 2006 Act provides that Her Majesty may amend Schedule 7 by Order in Council. Orders must be approved by a resolution of each House of Parliament and, except in the case of the first such Order, by a resolution of the Assembly. This is the second Order under section 109, the first Order amending Schedule 7 having been made in 2007 (S.I. 2007/2143).

4.5 A referendum is to be held in Wales on whether the Assembly Act provisions should be brought into force, in accordance with the National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum, Etc.) Order 2010. This Order updates Schedule 7 in preparation for that referendum, in order to reflect developments since Schedule 7 was amended in 2007 (and in particular to ensure that it does not omit competence which has been conferred on the Assembly in Schedule 5 to the 2006 Act), and to improve the drafting of certain provisions.

5. Territorial Extent and Application

This instrument amends the 2006 Act and has the same territorial extent as that Act. Although it extends to the whole of the United Kingdom its practical application is limited to Wales.

6. European Convention on Human Rights

The Rt. Hon. Cheryl Gillan MP, Secretary of State for Wales, has made the following statement:

"*In my view the provisions of the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010 are compatible with the Convention Rights.*"

7. Policy Background

7.1 This instrument amends Schedule 7 in order to reflect legislative competence which has been conferred on the Assembly under the current arrangements, and certain exceptions and restrictions which

have been applied to that competence, since Schedule 7 was last updated in 2007. The Order also makes amendments clarifying some subjects and exceptions.

Amendments to Schedule 7

Article 3

7.2 *Article 3* amends paragraph 1 of Schedule 7 to make clear that references to "animals" in Schedule 7 include all animals other than humans (including fish, birds and insects). The effect of this definition is that references to "fish" and "fish health" in the paragraph are no longer necessary and are omitted. Similar changes are made to Schedule 7 by *Article 4(2)* and *Article 7(6)*. *Article 3* also reorganises the subjects in paragraph 1, and amends them to clarify that all aspects of *fisheries and fishing* are included, and that *animal health and welfare* is included as a discrete subject area rather than as part of *Agriculture* (and includes the heath and welfare of fish).

Article 4

7.3 Matter 12.16 in Part 1 of Schedule 5 includes competence for the Assembly to legislate in respect to the pensions for members of community councils, county and county borough councils National Park authorities and fire and rescue authorities. Paragraph 12 in Part 1 of Schedule 7 includes competence for the Assembly to legislate in respect of local government, including the *powers and duties of local authorities and their members*. However, there is an exception listed after paragraph 4 in Part 1 of the Schedule for *occupational and personal pension schemes*. *Article 4(3)* inserts a qualification to this exception to ensure that the Assembly could legislate in relation to schemes for, or in respect of, members of local authorities (including county and county borough councils, National Park authorities and fire and rescue authorities).

7.4 Another exception listed after paragraph 4 of Schedule 7 is *generation, transmission and supply of electricity*. There are two broadly equivalent exceptions in Schedule 5. The first relates to electricity generation, and the second to *transmitting, distributing or supplying electricity*. The *distribution* of electricity is therefore referred to in Schedule 5 but not Schedule 7, and *Article 4(4)* addresses this anomaly.

7.5 There are exceptions for *nuclear energy* and *nuclear installations* in Schedule 5 and in Schedule 7. The exception in Schedule 5 is more detailed in two respects. First, it spells out that it includes *nuclear safety* and *liability for nuclear occurrences*. *Article 4(5)* inserts this additional wording into Schedule 7 to make this clear. Second, the Schedule 5 exception is qualified so as to enable the Assembly to

Article 5

7.6 The Assembly's current legislative competence in respect to waste activities is broader than the competence set out in Schedule 7. *Article 5* inserts the competence currently set out in Schedule 5 into Schedule 7, so that the Assembly may legislate about the *prevention, reduction and treatment* of waste rather than just waste *collection, management and disposal* in the event of the Assembly Act provisions coming into force.

Article 6

7.7 Matter 11.1 in Schedule 5 enables the Assembly to legislate on the provision of automatic fire suppression systems in new residential premises. *Article 6(2)* inserts a new subject into paragraph 7 in Part 1 of Schedule 7 to reflect this competence. *Article 6(1)* amends the title of the paragraph to reflect better the range of subjects it includes.

Article 7

7.8 An exception listed after paragraph 10 of Schedule 7 (which lists subjects relating to highways and transport) covers the regulation of the use of motor vehicles and trailers on roads, their construction and equipment and conditions under which they may be so used, apart from the regulation of vehicles carrying animals for certain purposes. The equivalent exception in paragraph A1 in Part 2 of Schedule 5 is expressed in slightly different terms, and is subject to two additional qualifications relating to trunk road charging (see paragraph 7.9 below) and arrangements for learner travel – the latter reflecting the Assembly's current legislative competence at Matter 5.10 of Schedule 5 in relation to travel arrangements for learners to and from the places where they receive education or training. *Article 7(2)* substitutes a new, simpler version of the exception into Schedule 7, including the two additional qualifications.

7.9 Matter 10.1 in Schedule 5 includes provision for the Assembly to legislate for and in connection with charging schemes on Welsh trunk roads. Exceptions to matters in Part 2 of Schedule 5 prohibit the Assembly from legislating about traffic regulation on special roads, apart from regulation relating to charging schemes on trunk roads, or about traffic signs, apart from the placing and maintenance of signs for

purposes relating to such schemes. The equivalent exception after paragraph 10 of Schedule 7 does not include these qualifications. *Article 7(3)* inserts the qualifications into Schedule 7 and, for clarity, substitutes separate exceptions for traffic regulation, pedestrian crossings, traffic signs and speed limits.

7.10 Schedule 7 includes an exception after paragraph 10 for the *provision and regulation of railway services*. The exception is subject to a qualification for financial assistance which, amongst other things, is not made in connection with Council Regulation (EEC) No 1191/69 (as amended) on public service obligations in transport. The Regulation has now been repealed and replaced by Regulation (EC) No 1370/2007 on public passenger transport services by rail and road. The equivalent exception in Schedule 5 refers to the 2007 Regulation, and *Article 7(4)* updates Schedule 7 in the same way.

7.11 An exception listed after paragraph 10 of Schedule 7 is for *transport security*. The equivalent exception in Part 2 of Schedule 5 includes a qualification enabling the Assembly to legislate in respect to supervising adults on vehicles used for learner transport. This reflects the Assembly's current legislative competence in relation to learner travel set out in Matter 5.10 of Schedule 5 (see paragraph 7.8 of this Memorandum). *Article 7(5)* inserts the qualification into Schedule 7.

7.12 Article 7(7) inserts an exception after paragraph 10 of Schedule 7 on the *technical specifications for fuel for use in internal combustion engines*. Matter 6.3 in Schedule 5, which describes the Assembly's legislative competence on protecting or improving the environment in relation to pollution, is subject to various exceptions relating to fuel and energy used in transport, including regulating the composition and content of fuel used in a means of transport, non-road mobile machinery or an agricultural or forestry tractor. The exception inserted into Schedule 7 by *Article 7(7)* covers the same ground as the exception in Schedule 5 but is expressed in simpler terms, reflecting the more general terminology used in Schedule 7.

Article 8

7.13 Paragraph 15 of Schedule 7 includes competence for the Assembly to legislate for the *protection and well-being of children (including adoption and fostering)*. *Article 8(1)(a)* amends this subject to include the *protection and well-being of young adults*, reflecting the current legislative competence of the Assembly set out in Schedule 5. The paragraph also enables the Assembly to legislate about the care of young adults. *Article 8(1)(b)* amends the subject to make clear that paragraph 15 covers the *care of children*.

7.14 There are exceptions for child trust funds in Schedule 5 and Schedule 7. Part 2 of Schedule 5 sets out a general exception for child trust

funds, and includes a qualification enabling the Assembly to legislate in relation to subscriptions to such funds by a county council or county borough council, or the Welsh Ministers. This qualification is not included in the equivalent exception in Schedule 7, listed after paragraph 15, and is inserted by *Article 8(3)*. *Article 8* also corrects a punctuation error to clarify that the Assembly may legislate in relation to *welfare advice* in the context of family law and proceedings.

Article 9

7.15 *Article 9* inserts an exception after paragraph 18 of Part 1 of Schedule 7 to prevent the Assembly from legislating about the Infrastructure Planning Commission's functions under the Planning Act 2008 (which include considering and determining applications for orders granting development consent for certain major infrastructure projects). This exception reflects the fact that consents for such projects are non-devolved. A similar exception applies to matters 18.1 and 18.3 in Schedule 5 (concerning national and local development plans), but it is not a direct equivalent of the exception inserted by article 9. Article 9 reflects the current distribution of devolved and non-devolved functions in relation to development consents.

Article 10

7.16 Paragraph 2 in Part 2 of Schedule 7 provides that an Assembly Act cannot make (or confer power by subordinate legislation to make) modifications of certain enactments, including the whole of the Data Protection Act 1998 (the "DPA 1998"). Paragraph 3 in Part 2 of Schedule 5 imposes the same restriction on Assembly Measures, but paragraph 11 of Part 3 of Schedule 5 enables an Assembly Measure to modify section 31(6) of the DPA 1998 so that it applies to complaints under any Measure relating to Matter 9.1 (redress for NHS negligence). The effect is that the Assembly can exempt from the provisions of the DPA 1998 certain information processed for the purpose of considering complaints under Measures relating to NHS redress in Wales. *Article 10* amends Schedule 7 so that an Assembly Act will also be able to modify section 31(6) of the DPA 1998 in relation to complaints under legislation relating to NHS redress.

Article 11

7.17 Paragraph 5(1) in Part 2 of Schedule 7 prevents an Assembly Act from modifying (or conferring power to modify) the 2006 Act, but this does not apply to the sections of the Act specified in paragraph 5(2). Paragraph 6 in Part 2 of Schedule 5 makes equivalent provision for Assembly Measures, but unlike paragraph 5(2) in Schedule 7, it enables the Assembly to modify the provisions of the 2006 Act relating to the Welsh language. Those provisions are section 35(1) (relating to the conduct of Assembly proceedings), section 78 (requiring the Welsh

Ministers to adopt a Welsh language strategy and scheme) and paragraph 8(3) of Schedule 2 (relating to the functions of the National Assembly for Wales Commission). *Article 11* amends Schedule 7 so that an Assembly Act may also amend those provisions.

8. Consultation

There has been no public consultation on this Order. However, it has been discussed and agreed with all of the Government departments whose interests are affected, as well as with the Welsh Assembly Government.

9. Guidance

No guidance has been, or will be, issued in relation to this Order. This Explanatory Memorandum explains the scope and policy context of matters included in it.

10. Impact

10.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. If the Assembly Act provisions were brought into force, the Assembly Member in charge of an Assembly Bill would prepare a Regulatory Impact Assessment in accordance with the Assembly Standing Orders when bringing forward the Bill.

10.2 This instrument has no impact on the Assembly's current legislative competence, and so has no direct impact on the public sector. If the Assembly Act provisions were brought into force, the changes made in this Order are unlikely to affect significantly the overall workload of the Assembly and the Welsh Assembly Government.

11. Regulating small business

This Order does not apply to small business.

12. Monitoring and review

There will be no monitoring of the effect of this Order. The Government will keep Schedule 7 under ongoing review in the event of the Assembly Act provisions coming into force. The monitoring or review of Acts of the Assembly which would be brought forward as a result would be a matter for the Welsh Assembly Government and the Assembly.

13. Contact

Queries about the content of this instrument or this memorandum should be addressed to: Geth Williams (Tel: 020 7270 0554 or email geth.williams@walesoffice.gsi.gov.uk).

James George can answer legal queries about this instrument (Tel: 029 2089 8484 or email james.george@walesoffice.gsi.gov.uk).