

Devolution Guidance Note 11

Ministerial Accountability after Devolution

- **The Scotland Act 1998, the Government of Wales Acts 1998 and 2006 and the Northern Ireland Act 1998 are the basis for the devolution settlements in the UK. UK Ministers are accountable to the UK Parliament for all functions which have not been devolved. This note does not supplant legislation itself. It provides only general advice on matters which remain the responsibility of UK Ministers and for which they are accountable to the UK Parliament.**

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Introduction

1. The Scotland Act 1998 defines the respective functions of the UK Government and the devolved administration in Scotland. The Government of Wales Acts 1998 and 2006 are the basis of the Welsh devolution settlement. The Northern Ireland Act 1998 (as amended) sets out excepted matters (on which the NI Assembly cannot generally legislate) and reserved matters (on which the Assembly can legislate with consent). Executive functions in these fields (which in Northern Ireland are assigned by specific legislation) remain the responsibility of UK Ministers accountable to Parliament.

Scotland

2. Under the Scotland Act 1998 (“1998 Act”), functions previously undertaken by Ministers of the Crown under pre-commencement enactments have been devolved to the Scottish Government, to the extent that the functions are exercisable within devolved competence. This devolved competence is the same as the legislative competence of the Scottish Parliament, which is set out in section 29 of the Act. In particular, the Scottish Parliament and Scottish Government may not legislate in relation to matters which are reserved to the UK Parliament. The question of whether a provision *relates to* a reserved matter is determined by reference to the purpose and effect of the provision (see section 29(3) and Schedule 4 paragraphs 2 and 3 of the 1998 Act) and will ultimately be a matter for the courts to decide. UK Ministers are accountable to the UK Parliament for matters that are reserved by Schedule 5 of the 1998 Act.

3. The UK Parliament has Legislative competence for all the subject matters reserved in Schedule 5 of the 1998 Act (and reserves the right to legislate on any matter). However, **Section 63 of the 1998 Act allows for executive devolution of functions to Scottish Ministers.**¹ The exercise of functions, and therefore operational authority, can be transferred to Scottish Ministers by means of an Executive Devolution Order made under Section 63 of the 1998 Act. That would have the effect of maintaining the relevant reservation (i.e. the subject matter remains reserved to the UK Parliament), but a Section 63 Order under the 1998 Act would allow for any functions, so far as they are exercisable by a Minister of the Crown; by the Scottish Ministers instead of by the Minister of the Crown; by the Scottish Ministers concurrently with the Minister of the Crown; or by the Minister of the Crown only with the agreement of, or after consultation with, the Scottish Ministers.

4. This power was first exercised in 1999 when relevant powers were transferred to the Scottish Government by virtue of *the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (SI 1999/1750)*. That Order, being made at the commencement of the Scottish devolution settlement, provided for the transfer of an extensive and wide ranging scope of executive responsibility.

5. Subsequent Section 63 Orders have been made under the 1998 Act, to transfer distinct functions to Scottish Ministers. A comprehensive list of Orders taken forward under the Scotland Act 1998 can be found on the Scotland Office website.

¹ The Order in Council transfers functions to the Scottish Ministers, but by virtue of section 44 the Scottish Ministers make up the Scottish Executive

6. Although **Section 93 of the Scotland Act allows UK Ministers and the Scottish Government to enter into agency arrangements** (so that particular functions can be exercised by one on behalf of the other, these arrangements do not affect a person's responsibility for the exercise of their functions²). UK Ministers will therefore answer questions relating to reserved functions, regardless of any agency arrangements which have been made.

Wales

7. The National Assembly for Wales as constituted by the Government of Wales Act 1998 (the "1998 Act") was a corporate body exercising executive functions. Most of the functions previously exercised by the Secretary of State for Wales were transferred to that Assembly by a Transfer of Functions Order under the 1998 Act (The National Assembly for Wales (Transfer of Functions) Order 1999³) and additional functions were either transferred by Transfer of Functions Orders⁴ or conferred directly by or under primary legislation. The Government of Wales Act 2006 (the 2006 Act) provided for the separation of the National Assembly for Wales, the legislature, from the Welsh Government, the executive, and by virtue of paragraph 30 of Schedule 11 to that Act, nearly all of the executive functions of the previous Assembly were transferred to the Welsh Ministers. Since 2006 further functions have been transferred to the Welsh Ministers by Transfer of Functions Orders⁵ and conferred on them by or under primary legislation of the UK Parliament. The Welsh Ministers may also be designated under section 2(2) of the European Communities Act 1972 for the purpose of implementing EU law (see section 59 of the 2006 Act). Functions may also be conferred by prerogative instruments.

8. After the favourable vote in the referendum in March 2011 on whether the Assembly should acquire further law making powers under Part 4 of the Government of Wales Act 2006 the procedure in Part 3 of the 2006 Act, no longer applies. The National Assembly for Wales has power to pass Acts in relation to a range of subjects set out in Schedule 7 to the Act which are listed under 20 broad headings. In Schedule 7, there are exceptions which are not devolved and are carved out from the Assembly's competence as specified in the subjects.

9. The UK Parliament continues to legislate for Wales either in relation to areas which are not devolved or in relation to areas that are devolved but (where required)

² under section 93(2) of the Scotland Act

³ SI 1999/672

⁴ The National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999 No. 672); National Assembly for Wales (Transfer of Functions) Order 2000 (SI 2000 No. 253); National Assembly for Wales (Transfer of Functions) (Variation) Order 2000 (SI 2000 No. 1829); National Assembly for Wales (Transfer of Functions) (No. 2) Order 2000 (SI 2000 No. 1830); National Assembly for Wales (Transfer of Functions) Order 2001 (SI 2001 No. 3679); National Assembly for Wales (Transfer of Functions) Order 2004 (SI 2004 No. 3044); National Assembly for Wales (Transfer of Functions) Order 2005 (SI 2005 No. 1958); National Assembly for Wales (Transfer of Functions) Order 2006 (SI 2006 No. 1458); National Assembly for Wales (Transfer of Functions) (No.2) Order 2006 (SI 2006 No. 3334).

⁵ The Welsh Ministers (Transfer of Functions) Order 2008 (SI 2008 No. 1786); Welsh Ministers (Transfer of Functions) Order 2009 (SI 2009 No. 703); Welsh Ministers (Transfer of Functions) (No. 2) Order 2009 (SI 2009 No. 3019); Welsh Zone (Boundaries and Transfer of Functions) Order 2010 (SI 2010 No. 760).

subject to the consent of the Assembly (expressed through the passing of a legislative consent motion by the Assembly) or the Welsh Ministers (See DGN 9) (and reserves the right to legislate on any matter).

Northern Ireland

10. The Northern Ireland Act 1998 has the effect of separating matters into three categories: excepted, reserved and transferred. UK Ministers remain responsible for excepted and reserved Matters and reserve the right to legislate on any matter, Northern Ireland Ministers for transferred matters:

11. **Excepted** – as defined by Schedule 2 to the Act: Matters of UK-wide significance (inc. international relations, national security, defence and foreign relations, UK-wide taxation and electoral law) which it is assumed will remain the responsibility of the UK Government. UK ministers remain accountable for these matters, and they cannot move to the transferred field without primary legislation at Westminster.

12. **Reserved** - as defined by Schedule 3 to the Act: Matters which are the responsibility of UK Ministers and for which they remain accountable. The Assembly can legislate on these matters with the Secretary of State's consent. These matters can move to the transferred field following the request of the Northern Ireland Assembly and secondary legislation approved at Westminster.

13. **Transferred** – those matters not specified by either Schedule 2 or 3 – broadly, the full range of social and economic matters, including social security and (since April 2010) most policing and justice matters. These are within the legislative competence of the Assembly. While Northern Ireland Ministers are accountable to the Assembly for all devolved matters and functions; they have no power to make, confirm, or approve legislation that conflicts with EU Convention rights or Community law.

Concurrent powers

14. In both Wales and Scotland, UK Ministers retain certain powers to act concurrently with the devolved administrations. Where a power is exercised concurrently, UK Ministers are accountable for any functions which they have exercised or may be proposing to exercise. This may include, according to the circumstances, questions relating to the repeal by UK Ministers of regulations made by the Scottish or Welsh Ministers.

15. In the case of Scotland, concurrent functions are set out in Sections 56(1) and 57 of the Scotland Act 1998. Further functions may be specified by order under section 56(2), and this power has been exercised in making the Scotland Act 1998 (Concurrent Functions) Order 1999⁶, which specifies various functions in connection with sea fisheries, animal health, export promotion and fire statistics and research. Functions may also be made concurrent by an Order in Council under section 63.

16. The Scotland Act makes special provision for “cross-border public authorities”. These are specified bodies, government departments, offices or office-holders which

⁶ SI 1999/1592

have mixed functions, some of which relate to devolved matters in Scotland. The Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999⁷, made under section 88 of the Scotland Act, designates some 65 bodies. Examples include the Forestry Commissioners, which deal with devolved matters in Scotland and elsewhere, and the Rail Users' Consultative Committee for Scotland which, although only operating in Scotland, deals with both reserved and devolved matters.

17. The effect of designation is that Ministerial responsibility for functions relating to the bodies remains with UK Ministers, but they are required to consult the Scottish Ministers in the circumstances set out in section 88(2) (appointments, or functions affecting devolved matters in Scotland). These consultation arrangements may be adjusted by an Order in Council under section 89, which may also provide for additional functions to be transferred to the Scottish Ministers or for existing functions to be adjusted. Such orders should be consulted to establish whether bespoke arrangements have been made for any given body

18. No further orders will be made under section 88 of the Scotland Act, that power being exercised to designate relevant bodies as Cross Border in nature at the point of devolution (i.e. as a snapshot). However, where bodies have been established since devolution which exercise mixed functions (e.g. the Health Protection Authority) it will normally be the case that their establishing statute will contain provision aligning those bodies to the Cross Border provisions in the Scotland Act in a quasi nature.

19. In Wales, section 58 of the Government of Wales Act 2006 provides that an Order in Council transferring ministerial functions may contain provisions for the concurrent exercise of powers. Provision for the concurrent or joint exercise of powers are therefore contained in the relevant Transfer of Functions Orders made either under section 58 of the 2006 Act or under its predecessor, section 22 of the Government of Wales Act 1998. Transfer of Functions Orders may also make provisions for the concurrent exercise of functions in relation to cross-border bodies or make provision that a function may be exercisable by Welsh Ministers subject to agreement by, or consultation with, a Minister of the Crown.

20. There is no provision in the Northern Ireland Act 1998 for UK Ministers to act concurrently with Northern Ireland Ministers.

21. It should be noted that the concurrent powers will likely be affected once the Public Bodies Bill has passed. This will require a review of this section of the Guidance Notes.

Cabinet Office (Last Updated – November 2011)

⁷ SI 1999/1319 Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) (Amendment) Order 2002/2636, Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) (No. 2) Order 2000/3251, Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) Order 1999/1747, Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) Order 2000/1102, Scotland Act 1998 (Cross-Border Public Authorities) (British Wool Marketing Board) Order 2000/1113, Scotland Act 1998 (Cross-Border Public Authorities) (Forestry Commissioners) Order 2000/746, Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999/1319, Scotland Act 1998 (Cross-Border Public Authorities) (Traffic Commissioner for the Scottish Traffic Area) Order 2007/2139

