

MEMORANDUM FROM THE WELSH ASSEMBLY GOVERNMENT

CONSTITUTIONAL LAW: DEVOLUTION, WALES

Proposal for a Legislative Competence Order on Culture and other fields

Introduction

1. This Memorandum has been prepared and laid in accordance with Standing Order (SO) 22.14. It sets out the background to the provisions in the attached government proposed Legislative Competence Order which would confer additional legislative competence upon the National Assembly for Wales. It is laid in accordance with SO 22.13 and explains the scope of the power requested.
2. The constitutional context to this request is set out by the Government of Wales Act 2006 (“the 2006 Act”) and the UK Government’s policy. The UK Government’s White Paper “Better Governance for Wales” published in June 2005 set out the UK Government’s commitment to enhance the legislative powers of the National Assembly for Wales, as a democratically elected institution with its own detailed scrutiny procedures.
3. Section 95 of the 2006 Act empowers Her Majesty, by Order in Council, to confer competence on the National Assembly for Wales to legislate by Assembly Measure on specified matters. These matters may be added to Fields within Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in relation to matters, subject to the limitations provided for in Part 3 of the 2006 Act. An Order in Council under Section 95 of the 2006 Act is referred to as a Legislative Competence Order (“LCO”) in this memorandum.
4. Matters may be inserted into the fields contained in Schedule 5 to the 2006 Act, by either an Act of Parliament or an LCO, approved by the

Assembly and both Houses of Parliament. The latter route enables the Assembly to initiate the process for conferral of such competence, via an LCO.

5. The proposed LCO would confer further legislative competence on the Assembly, in the fields of Ancient Monuments and Historic Buildings (field 2 within Schedule 5 to the 2006 Act), Culture (field 3 within Schedule 5 to the 2006 Act) and Sport and Recreation (field 16 within Schedule 5 to the 2006 Act). [Attached at Annex A is a copy of Schedule 5 showing the legislative competence that the Assembly has acquired to date and the mechanism by which it was conferred].
6. New legislative powers in respect of the specified 'matters' will enable the Welsh Assembly Government, Assembly Members and Assembly Committees to bring forward proposals for legislation, in the form of Measures. These Measures will be subject to thorough scrutiny and approval by the Assembly.

Background

7. Culture is not a luxury. Its importance as a vital element of everyone's lives, everyday, should be recognised. Welsh culture has and continues to play a fundamental role in the creation of our national identity. It is one of our most important tools in attracting those who want to work, learn, visit and invest in Wales - the Welsh arts and creative industries play an important part in the Welsh economy and contribute to the prosperity of Wales; cultural tourism, the built heritage and major cultural events generate income for Wales. At the local level culture is an important element of community regeneration; cultural activities are widely recognised as an essential element for developing and sustaining community cohesion; sport and recreational activities are an essential element of the health and well-being agenda; culture is an essential part of the education and development of children, young people and lifelong learning and makes an important contribution to adult skills development. And at the individual level cultural activities bring pleasure and wellbeing into our lives.
8. The Welsh Assembly Government's aim is to widen participation to the full range of arts, cultural, sport and recreational services and activities. Low income, background or where people live should not be a barrier to access and participation to high quality cultural experiences. The *One Wales* Programme of Government contains a large number of commitments aimed at promoting arts and culture and encouraging sport and recreational activity.
9. The key role that Welsh local authorities play in the provision of cultural services and activities to their local communities is fully recognised. It is in this context that '*One Wales*' identified as a key area strengthening and supporting the role of local authorities in the development and delivery of arts and cultural services and activities across Wales. To

deliver this, 'One Wales' contains a commitment to placing a statutory obligation on local authorities to promote culture and encourage partnership to deliver high quality cultural experiences for their communities. Implementation of the 'One Wales' commitment will require new legislation. But the decision for new legislation is not about regulation for its own sake – it is a resolution by the Welsh Assembly Government towards helping to ensure that all the people of Wales have access to high quality cultural provision in their communities.

Current legislative framework

10. There is currently no law that imposes a single general statutory duty in relation to the provision of local authority cultural services and activities. Instead, there is a general local authority power and a series of specific powers and duties which are contained in the following legislation:
 - Public Health Act 1875
 - Open Spaces Act 1906
 - Small Holdings and Allotments Act 1908
 - Law of Property Act 1925
 - Public Health Act 1961
 - Local Government (Records) Act 1962
 - Local Authorities (Land) Act 1963
 - Public Libraries and Museums Act 1964
 - Countryside Act 1968
 - Local Government Act 1972
 - Local Government (Miscellaneous Provisions) Act 1976
 - Ancient Monuments and Archaeological Areas Act 1979
 - Wildlife and Countryside Act 1981
 - Cycle Tracks Act 1984
 - Planning (Listed Buildings and Conservation Areas) Act 1990
 - Local Government (Wales) Act 1994
 - Education Act 1996
 - Local Government Act 2000
 - Learning and Skills Act 2000
 - Countryside and Rights of Way Act 2000
 - Natural Environment and Rural Communities Act 2006

11. The widest power can be found in section 2 of the Local Government Act 2000. This power is designed to have sufficient breadth to enable local authorities to do anything to promote or improve economic, social and environmental well-being of their area or the persons in it. The power is wide-ranging and so can be used as a 'power of first resort'. Therefore, where there is any doubt as to whether an existing power would enable the local authority to take a particular course of action or deliver a particular service then the well-being power can, in principle, be relied upon to take forward that initiative. When exercising section 2 power, a local authority must have regard to its community strategy and also to

any guidance issued by the Welsh Ministers. This power is further limited in that:

- (i) the power cannot be used by local authorities to do anything that they are unable to do by virtue of any prohibition, restriction or limitation on their powers that is contained in any other enactment;
- (ii) the power does not enable a local authority to raise money (whether by precepts, borrowing or otherwise); and
- (iii) the Welsh Ministers may by order make provision preventing local authorities from doing anything that is specified, or is of a description specified, in that order.

12. This wide-ranging power, in conjunction with the specific powers and duties, means that local authorities have extensive powers to provide cultural services and activities. The majority of these powers are permissive, in that they do not place an absolute duty on local authorities to provide the majority of such services and activities, there are however some exceptions to this position. These key areas of cultural provision where local authorities have absolute duties are:

- Library Services – The Public Libraries and Museums Act 1964 places a duty on local authorities to provide a comprehensive and efficient library service. Libraries (though not Museums) are therefore a statutory service that local authorities in Wales are obliged to provide;
- Archive Services – The Local Government (Wales) Act 1994 places a duty on local authorities to make and maintain a scheme setting out their arrangements for the proper care, preservation and management of their records - both historical archives and records which belong to or are in the custody of the council;

13. Other absolute duties on local authorities include a duty to provide allotments (under the Small Holdings and Allotments Act 1908) and a duty to provide public access to “monuments” owned by local authorities (under the Ancient Monuments and Archaeological Areas Act 1979).

The need for change and the One Wales commitment

14. The current permissive legislative framework has resulted in huge variance in the range and quality of local authority cultural services and activities provided across Wales. The aim of the *One Wales* commitment is to improve the delivery of high quality cultural experiences across the whole of Wales by placing all local authority cultural services and activities on a statutory footing in order to:

- improve cultural service provision by local authorities over time and bring the poorer performers in line with the better performers;

- ensure that local communities are made aware of the local authority cultural services/activities available to them (ie better promotion);
 - increase access to and participation in local authority cultural services/activities, particularly by those groups of people that are currently not engaged or under engaged in this provision, so that participation is not dependent on where people live or their background;
 - encourage local authorities to co-operate more with a range of organisations such as public bodies, the third sector, associations and clubs etc and to collaborate with other local authorities in order to promote and deliver their cultural services/activities, through greater use of partnerships.
15. The current permissive statutory position in relation to local authority cultural services and activities means that the Assembly Government is unable to require local authorities to address the issues it considers necessary to achieve the policy aim of the *One Wales* commitment without new legislation. The Assembly Government does not believe that issuing guidance to local authorities (which it could do under existing powers available) not backed by specific statutory requirements would achieve the aim of the *One Wales* commitment. In particular, it is believed that legislating by Assembly Measure would:
- highlight the contribution of cultural activities to cross cutting agendas such as regeneration, health, social inclusion etc and sharpening the focus on local authority performance in such areas;
 - raise the profile of cultural activities and the role of local government in promoting and supporting them, both within each authority and with the public; and
 - encourage collaboration, both between local authorities and between local authorities and other organisations.
16. The Welsh Assembly Government is mindful in taking forward the *One Wales* commitment that there is a need to preserve the local flexibility of individual local authorities to determine and meet the cultural service needs of their own communities. There is also need to ensure that a statutory duty does not create a minimum standard which could have the unwanted negative impact of lowering provision in some areas rather than securing improvement.
17. The proposed LCO is required to provide competence to enable the Assembly to implement the *One Wales* commitment and achieve its policy objectives.

Scope

18. It is proposed that one matter be inserted into each of Field 2 (Ancient Monuments and Historic Buildings), Field 3 (Culture) and Field 16 (Sport and Recreation) of Part 1 of Schedule 5 to the Government of Wales Act 2006, to enable the Assembly to legislate on these issues by way of an Assembly Measure.
19. Article 2 of the proposed LCO would insert new Matters 2.1, 3.1 and 16.4 and interpretation provisions into Field 2 (Ancient Monuments and Historic Buildings), Field 3 (Culture) and Field 16 (Sport and Recreation).
20. Article 2(2) would insert Matter 2.1 into Field 2. This matter is about archaeological remains, ancient monuments, buildings and places of historical or architectural interest, and historic wrecks. The matter would enable the Assembly Government to legislate in relation to the functions of local authorities in supporting, improving and promoting the appreciation by the public of archaeological remains, ancient monuments, buildings and places of historical or architectural interest, and historic wrecks.
21. This matter does not however extend to the removal of any public rights to have access to any such remains, monuments, buildings, places or wrecks. An Assembly Measure relating to matter 2.1 could not take away those rights, such as the obligation under section 19 of the Ancient Monuments and Archaeological Areas Act 1979.
22. Article 2(3) of the proposed LCO would insert a new Matter 3.1 into Field 3. This matter is about museums, galleries and libraries, arts and crafts, archives and historical records and cultural activities and projects. The matter would enable the Assembly Government to legislate in relation to the functions of local authorities in supporting, improving and promoting museums, galleries and libraries, arts and crafts, archives and historical records and cultural activities and projects.
23. This matter does not however extend to:
 - (i) the arrangements by local authorities for the care, preservation and management of local authority records; and
 - (ii) removal of the duty of local authorities to provide a comprehensive and efficient library service.

These aspects of the relevant service areas are outside the scope of the proposed competence.

24. Article 2(4) of the proposed LCO would also insert a new Matter 16.4 into Field 16. This matter is about sport and recreational activities. The matter would enable the Assembly Government to legislate in relation to the functions of local authorities in supporting, improving and promoting sport and recreational activities.
25. Each of the proposed three matters takes a common form. Each is concerned with the functions of local authorities. 'Functions' is a term widely used in the 2006 Act to encompass both powers and duties.
26. The application of each of the matters is specifically linked to three elements relating to local authority cultural provision namely, 'support', 'improvement' and 'promotion'. This will fully enable the policy aim of the One Wales commitment to be achieved including for instance planning, consultation, collaboration/co-operation, financial or other support, promotion etc.
27. Competence is limited to the functions of local authorities. Local authorities are defined as 'councils of counties or county boroughs' in Wales.
28. In addition to the specific exclusions to Matter 2.1 in Article 2(2) and Matter 3.1 in Article 2(3) set out in paragraphs 21 and 23 above, Article 3 adds a number of exceptions to paragraph A1 of Part 2 of Schedule 5 to the 2006 Act. Section 94 of the 2006 Act, as it is proposed to be amended by the National Assembly for Wales (Legislative Competence)(Exceptions to matters) Order 2009, makes clear that a provision of an Assembly Measure is not within competence if it falls within any of the exceptions listed in that paragraph. Article 3 will therefore apply the following exceptions to all matters in Part 1 of Schedule 5 of the 2006 Act. This mirrors the exceptions already contained in Subjects 3 and 16 of Part 1 of Schedule 7 to the 2006 Act:
 - Public lending rights
 - Broadcasting
 - Classification of films and video recordings
 - Government indemnities for objects on loan
 - Payments to Her Majesty's Revenue and Customs in respect of property accepted in satisfaction of tax, apart from property in which there is a Welsh national interest
 - Betting, gaming and lotteries.

Effect of other provisions in the 2006 Act

29. The effect of the proposed LCO needs to be considered in the context of the overall provisions of the 2006 Act.

Geographical limits of any Assembly Measure

30. The proposed LCO would permit the Assembly to legislate by Measure in relation to functions of local authorities in Wales relating to the specified cultural subject areas. There is no provision within the proposed LCO that would enable the Assembly to legislate in relation to English local authority functions.

Minister of the Crown functions

31. By virtue of Part 2 of Schedule 5 to the 2006 Act, an Assembly Measure cannot confer or impose any function on a Minister of the Crown. By virtue of Parts 2 and 3 of Schedule 5 of the 2006 Act, the Assembly may not by Measure remove or modify any functions of a Minister of the Crown without the consent of the Secretary of State.

Conclusion

32. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence should be conferred on the National Assembly for Wales in relation to the proposed LCO to which this Explanatory Memorandum relates.

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