

MEMORANDUM FROM THE WELSH ASSEMBLY GOVERNMENT

CONSTITUTIONAL LAW: DEVOLUTION, WALES

The Draft National Assembly for Wales (Legislative Competence)(Culture and other fields) Order 2010

Introduction

1. This Memorandum sets out the background to the provisions in the National Assembly for Wales (Legislative Competence)(Culture and other fields) Order 2010 (“the LCO”) which confers additional legislative competence upon the National Assembly for Wales and which has been laid in accordance with SO 22.31. This Memorandum is laid in accordance with SO 22.32 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, contained in the White Paper “Better Governance for Wales”. 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. Matters may be added to the fields within Part 1 of Schedule 5 to the 2006 Act. Assembly Measures may make any provision which could be made by Act of Parliament, in relation to matters, subject to the limitations provided for in 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.

3. The LCO confers further legislative competence on the National Assembly for Wales, in the fields of Ancient Monuments and Historic Buildings (Field 2 within Part 1 of Schedule 5 to the 2006 Act), Culture (Field 3) and Sport and Recreation (Field 16).

Context

4. 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. At the national level 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 of 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. At the individual level cultural activities bring pleasure and wellbeing into our lives.
5. The Welsh Assembly Government's aim is to widen participation in the full range of artistic, cultural, sporting and recreational services and activities. People's background, their level of income or where they live should not be a barrier to access to and participation in high quality cultural experiences. The *One Wales* Programme of Government contains a commitment aimed at promoting arts and culture and encouraging sport and recreational activity.

Current legislative framework

6. The current law in relation to culture encompasses a general local authority power and a series of specific powers and duties which are conferred by a wide range of legislation.

7. The widest power can be found in section 2 of the Local Government Act 2000. This power enables local authorities to do anything to promote or improve the economic, social or environmental well-being of their areas. The power may be exercised for the benefit of all or any persons in a local authority's area. In determining whether or how to exercise this power a local authority must have regard to its community strategy and to any guidance issued by the Welsh Ministers. This power is further limited in that:
 - (i) it 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) it 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, by virtue of this power, anything that is specified, or is of a description specified, in that order.

8. This wide-ranging power, in conjunction with other 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 actual duties on local authorities to provide the majority of such services and activities.

There are however some exceptions to this position. The key areas of cultural provision where local authorities have statutory 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 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;
- Public access to monuments under public control – The Ancient Monuments and Archaeological Areas Act 1979 places a duty on local authorities to provide public access to monuments under their ownership or guardianship;
- Allotments – The Small Holdings and Allotments Act 1908 places a duty on local authorities to assess the demand for allotments within their area and to provide and let a sufficient number of allotments according to that demand.

Rationale

9. The key role that Welsh local authorities play in the provision of cultural services and activities in their own 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. However, at the current time, the National Assembly for Wales does not have the necessary legislative competence over this subject area with which to consider updating the legislative framework to respond to the particular cultural needs and aspirations in Wales.

10. The current permissive legislative framework has resulted in variations in the range and quality of the local authority cultural services and activities provided across Wales. To respond to this need, *One Wales* contains a commitment to place a statutory duty on local authorities to promote culture and encourage partnership to deliver high quality cultural experiences for their communities. The aim of the *One Wales* commitment is to improve the delivery of high quality cultural experiences across the whole of Wales by placing local authority cultural services and activities on a statutory footing. By doing so, this could help to:

- enhance the contribution of cultural activities to cross cutting agendas such as regeneration, health and social inclusion, and to sharpen the focus on local authority performance in such areas;
- raise the profile of cultural activities and the crucial role local authorities play in promoting and supporting them;
- improve cultural service provision by local authorities over time;
- ensure that local communities are made aware of the local authority cultural services and activities available to them;
- increase access to and participation in local authority cultural services and activities, particularly for those groups of people that are not currently engaged or are under engaged in this provision, so that participation is not dependent on where people live or their background;
- encourage local authorities to co-operate with each other and with a range of organisations such as public bodies, the third sector, associations and clubs in order to promote and deliver their cultural services and activities through the greater use of partnerships.

11. The current permissive statutory position in relation to local authority cultural services and activities means that it is not possible to achieve the policy aim of the *One Wales* commitment without new legislation. Issuing guidance to local authorities (which the Welsh Assembly Government could do under existing powers) which is not backed by a

statutory duty would not achieve the policy aim of the *One Wales* commitment as set out in paragraph 10 above.

12. The Welsh Assembly Government is mindful that in taking forward the *One Wales* commitment there is a need to preserve the flexibility of individual local authorities to determine and meet the cultural service needs of their own communities. There is also a need to ensure that putting culture on a statutory footing does not create a minimum standard which could have the unwanted impact of lowering provision in some areas rather than securing improvement.
13. The LCO will provide the necessary competence to enable the Welsh Assembly Government to propose an Assembly Measure that will implement the *One Wales* commitment and achieve its policy objectives.

Scope

14. The LCO confers further legislative competence on the National Assembly for Wales by inserting one matter into each of the following fields; Field 2 (Ancient Monuments and Historic Buildings), Field 3 (Culture) and Field 16 (Sport and Recreation) in Part 1 of Schedule 5 to the 2006 Act, to enable the National Assembly for Wales to legislate in these areas by way of Assembly Measure.

Matter 2.1- archaeological remains, ancient monuments, buildings and places of historical or architectural interest, and historic wrecks.

15. Article 2(2) inserts matter 2.1 into Field 2. This matter provides the National Assembly for Wales with legislative competence in relation to the functions of local authorities in the support, improvement and promotion of the appreciation by the public of archaeological remains, ancient monuments, buildings and places of historical or architectural interest, and historic wrecks.

16. Matter 2.1 is worded differently to matters 3.1 and 16.4 in that it includes the words *‘the appreciation by the public of’* which the other two matters do not. The *One Wales* commitment is aimed at delivery of services and activities to the public. Many of the local authority functions in relation to the areas covered by matter 2.1 are regulatory in nature and do not necessarily result in services or activities being delivered to the public. These words have been included to encompass those local authority functions that are relevant to the *One Wales* commitment.

Matter 3.1 - museums, galleries and libraries, arts and crafts, archives and historical records, and cultural activities and projects

17. Article 2(3) inserts matter 3.1 into Field 3. The matter provides the National Assembly for Wales with legislative competence in relation to the functions of local authorities in the support, improvement and promotion of museums, galleries and libraries, arts and crafts, archives and historical records, and cultural activities and projects. The matter does not include licensing the sale and supply of alcohol, provision of entertainment and late night refreshment (see paragraph 26).

Matter 16.4 – sport and recreation

18. Article 2(4) inserts matter 16.4 into Field 16. The matter provides the National Assembly for Wales with legislative competence in relation to the functions of local authorities in the support, improvement and promotion of sport and recreational activities. It also excludes licensing the sale and supply of alcohol, provision of entertainment and late night refreshment (see paragraph 26).
19. Each of these matters is concerned with the functions of local authorities. ‘Function’ is a term defined in section 158(1) of the 2006 Act as meaning ‘power or duty’.

20. The application of these matters is specifically linked to the support, improvement or promotion of local authority cultural provision. The matters reflect the wording used in section 60 and 61 of the 2006 Act and section 2 of the Local Government Act 2000. The wording encompasses functions that will enable the policy aim of the *One Wales* commitment to be achieved including, by way of example, functions of finance, planning, consultation, collaboration and co-operation.
21. Competence is limited to the functions of local authorities. Local authorities are defined as meaning “councils of counties and county boroughs in Wales”.

Changes to the Proposed LCO following Pre-Legislative Scrutiny

22. Pre-legislative scrutiny of the proposed LCO was undertaken by the House of Lords Constitution Committee, the National Assembly for Wales Legislation Committee No 4 and the House of Commons Welsh Affairs Committee. The Committees published their findings on 15 October, 9 November and 7 December 2009 respectively.
23. The Welsh Affairs Committee recommended changes to the Explanatory Memorandum to clarify the use of the words 'support, improvement and promotion' in the LCO. These changes have been made. The Committee also recommended the use of the words 'public appreciation' and 'public awareness' be standardised across the LCO and EM. The Welsh Assembly Government has carefully reviewed the use of these terms.
24. A key recommendation of the National Assembly for Wales Legislation Committee No.4 was that the fixed exceptions contained within matters 2.1 and 3.1 should be removed. The Committee took the view that it was important for the National Assembly to have powers to legislate in all the areas covered by matters 2.1 and 3.1.

25. The LCO has been revised to remove these fixed exceptions. The Welsh Assembly and UK Governments, having considered this recommendation carefully, accept the Committee's view, concluding that removing the exceptions gives the National Assembly for Wales appropriate flexibility in this area and makes the competence contained in the LCO more coherent. The effect of the removal of these fixed exceptions is that the matters will encompass the local authority functions to which the exceptions related.
26. Following careful consideration of the scope of matters 3.1 and 16.4, the Welsh Assembly Government and the UK Government have agreed to insert an exception relating to the 'licensing of sale and supply of alcohol, provision of entertainment and late night refreshment'. The phrasing of this exception mirrors the exception contained in Subject 12 of Part 1 of Schedule 7 to the 2006 Act. It bites only on matters 3.1 and 16.4, and so applies specifically to these matters.
27. The National Assembly for Wales Legislation Committee No.4 recommended that the wording 'of the appreciation by the public' be removed from matter 2.1. This wording has been retained in the LCO as it encompasses those local authority functions that are relevant to the *One Wales* commitment.
28. The House of Lords Constitution Committee concluded that the LCO does not raise any matters of constitutional principle. It noted that looking forward, the Committee may want to take a closer look at the evolving constitutional relationship between the Welsh Assembly Government and local authorities in Wales.

Article 3 - General exceptions

29. The proposed LCO contained general exceptions that applied to all matters in Part 1 of Schedule 5 to the 2006 Act. Article 3 of the proposed LCO included the following six general or 'floating' exceptions:

- Public lending right.
- 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.

30. These exceptions mirror the exceptions contained in Subjects 3 and 16 of Part 1 of Schedule 7 to the 2006 Act..

31. Following pre-legislative scrutiny, the Welsh Assembly and UK Governments carefully considered the extent to which the six floating exceptions relate to the three matters in the LCO. They concluded that the competence provided by these matters would not extend to the areas covered by the following general exceptions contained within Article 3 of the proposed LCO: Broadcasting, 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. These general exceptions have been removed from the LCO as they have no substantive effect on the competence conferred by it.

32. The following general exceptions have been retained in the LCO:

- Public lending right.
- Classification of films and video recordings.
- Betting, gaming and lotteries.

A provision of an Assembly Measure will not be within competence if it falls within these general exceptions, which apply to all matters in Schedule 5.

Geographical limits of any Assembly Measure

33. The LCO would permit the National Assembly for Wales to legislate by Measure in relation to the specified functions of local authorities in Wales. There is no provision within the LCO that would enable the National Assembly for Wales to legislate in relation to English local authority functions.

Minister of the Crown functions

34. By virtue of Part 2 of Schedule 5 to the 2006 Act, a provision of 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, a provision of an Assembly Measure cannot remove or modify any function of a Minister of the Crown without the consent of the Secretary of State. The LCO has no impact on any Minister of the Crown functions.

Conclusion

35. For the reasons outlined above, the Welsh Assembly Government proposes that the legislative competence of the National Assembly for Wales should be extended in accordance with the LCO to which this Explanatory Memorandum relates.

Alun Ffred Jones
Heritage Minister

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