

**National Assembly for Wales**  
Legislation Committee No. 4

Proposed National Assembly for Wales  
(Legislative Competence)  
(Culture and other fields) Order 2009

Committee Report  
November 2009



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## Committee Members

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Mike German (Chair)	Liberal Democrats	South Wales East
Lorraine Barrett	Labour	Cardiff South & Penarth
Bethan Jenkins	Plaid Cymru	South Wales West
Jonathan Morgan	Welsh Conservative Party	Cardiff North
Joyce Watson	Labour	Mid and West Wales
Kirsty Williams	Liberal Democrats	Brecon and Radnorshire

## Summary

Our conclusions and recommendations are as follows:

- We agree in principle that legislative competence in the areas identified within the proposed Order should be conferred on the National Assembly.
- We agree that the proposed Order should only apply to county and county borough councils in Wales.
- We consider that the words ‘support, improvement and promotion’ in Matters 2.1, 3.1 and 16.4 are appropriate.
- We recommend that the words ‘of the appreciation by the public’ should be removed from Matter 2.1. In addition, we draw attention to our comments below regarding the fixed exception in respect of this matter.
- We are content with Matter 3.1 as drafted, save for our comments below regarding fixed exceptions (a) and (b) in this matter.
- We are content with Matter 16.4 as drafted.
- We recommend that the fixed exceptions in Matters 2.1 and 3.1 are removed from the proposed Order.
- If the Welsh Government decides to retain the fixed exception (a) under Matter 3.1, we recommend that it is amended to read:

“This matter does not include-

(a) removal of arrangements for the care, preservation and management of local authorities records.”
- We consider that the floating exceptions in Article 3 of the proposed Order are appropriate.

## 1. Introduction

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### *Background*

1. On 15 June 2009, the Minister for Heritage (“the Minister”) laid the proposed *The National Assembly for Wales (Legislative Competence) (Culture and other fields) Order 2009* (“the proposed Order”) and Explanatory Memorandum, in accordance with Standing Orders 22.13 and 22.14. The proposed Order and Explanatory Memorandum are attached at Annexes 1 and 2 respectively. The Minister made a statement in Plenary about the proposed Order on 16 June 2009.<sup>1</sup>

2. At its meeting on the 16 June 2009, the Business Committee agreed to refer the proposed Order to Legislation Committee No.4 for detailed consideration. It agreed that the Committee must report on the proposed Order by no later than 6 November 2009.

### *Scope of the Committee’s Scrutiny*

3. At our meeting on 1 July 2009, we agreed the scope of our scrutiny, as set out below:

- i. to consider the general principles of the proposed Order and whether legislative competence in the areas identified in Matters 2.1, 3.1 and 16.4 be conferred on the Assembly; and
- ii. to consider whether the terms of the proposed Order are too broadly or too narrowly defined.

### *Evidence*

4. We issued a general call for evidence and invited key organisations to submit written evidence to inform our work. A copy of our consultation letter is attached at Annex 3. A list of consultation responses is attached at Annex 4.

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<sup>1</sup> RoP, pages [41-44], 16 June 2009



5. We took oral evidence from a number of organisations, details of which are attached at Annex 5.

6. We met informally with the House of Commons Welsh Affairs Committee on 3 November 2009 to discuss the work undertaken in relation to the proposed Order.

7. Under Standing Order 22.21, in preparing our report we must, so far as is reasonably practicable, take into account any recommendations made on the proposed Order by:

(i) any other committee of the National Assembly for Wales;

and

(ii) any committee of the House of Commons, the House of Lords or any Joint Committee of both Houses of Parliament.

No such recommendations have been made in respect of the proposed Order.

8. The following report and recommendations represent the conclusions we have reached based on the evidence received during the course of our work.

## 2. Principle of the proposed Order

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### *Background*

9. The purpose of the proposed Order is to amend Part 1 of Schedule 5 to the *Government of Wales Act 2006* ('the 2006 Act') to confer legislative competence on the National Assembly by inserting new matters into Fields 2 (ancient monuments and historic buildings), 3 (culture) and 16 (sport and recreation) of that Schedule.

10. The conferral of legislative competence on the National Assembly by the proposed Order will enable the Welsh Assembly Government ("Welsh Government"), Assembly committees or individual Assembly Members to bring forward proposals for legislation, in the form of Assembly Measures, within the scope of Matters 2.1, 3.1 and 16.4.

### *Explanatory Memorandum<sup>2</sup>*

11. In the Explanatory Memorandum accompanying the proposed Order, the Welsh Government states that Welsh culture is a vital element in everyday life<sup>3</sup>. It also states that:

"... 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."<sup>4</sup>

12. The Welsh Government explains that the principle purpose of the proposed Order is (in line with the commitment contained in the 'One Wales' programme of government<sup>5</sup>) to enable the National Assembly to make Measures that will "...improve the delivery of high

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<sup>2</sup> Welsh Assembly Government, *Memorandum from the Welsh Assembly Government, Constitution Law: Devolution, Wales, Proposal for a Legislative Competence Order on Culture and other fields*, June 2009

<sup>3</sup> Explanatory Memorandum, paragraph 7

<sup>4</sup> *ibid*

<sup>5</sup> Welsh Assembly Government, *One Wales: A progressive agenda for the government of Wales*, June 2007

quality cultural experiences across the whole of Wales by placing all local authority cultural services and activities on a statutory footing”<sup>6</sup>. This will, in turn, “widen participation to the full range of arts, cultural, sport and recreational services and activities”<sup>7</sup>. In addition, it will help ensure that low incomes, people’s backgrounds or where they live are not a barrier to accessing and participating in high quality cultural experiences.<sup>8</sup>

13. The Welsh Government also said that it aims, through the statutory duty to “improve cultural service provision by local authorities over time and bring the poorer performers in line with the better performers.”<sup>9</sup>

14. In making the case for the National Assembly acquiring legislative competence, the Welsh Government states that “there is currently no law that imposes a single general statutory duty in relation to the provision of local authority cultural services and activities”<sup>10</sup>. While it acknowledges that there are a series of specific powers and duties in this area<sup>11</sup>, it considers that:

“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.”<sup>12</sup>

15. The Welsh Government explains that the proposed Order is therefore required to address this variation in cultural provision across Wales.<sup>13</sup> In adopting a legislative approach, they note that issuing guidance alone would not achieve the stated aim of the proposed Order.<sup>14</sup>

### *General views - evidence from organisations*

16. There was widespread support for the proposed Order: most of the 37 responses to the consultation exercise were in favour of

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<sup>6</sup> Explanatory Memorandum, paragraph 14

<sup>7</sup> Explanatory Memorandum, paragraph 8

<sup>8</sup> *ibid*

<sup>9</sup> Explanatory Memorandum, paragraph 14

<sup>10</sup> Explanatory Memorandum, paragraph 10

<sup>11</sup> *ibid*

<sup>12</sup> Explanatory Memorandum, paragraph 14

<sup>13</sup> Explanatory Memorandum, paragraphs 14 - 15

<sup>14</sup> Explanatory Memorandum, paragraph 15

legislative competence in the areas identified in the proposed Order being conferred on the National Assembly.

17. Monmouthshire County Council supported the broad aims of the proposed Order, noting that “a fairly broad approach is necessary at this stage, given the scope and range of the cultural activities delivered by local authorities, and the cross cutting nature of many of them.”<sup>15</sup>

18. Conwy County Borough Council, in supporting the proposed Order, “agreed strongly with the aim of raising the profile of cultural activities” and noted that the “promotion of cultural services is key to attracting new audiences and thus widening participation.”<sup>16</sup>

19. Fforwm Crefft Cymru supported “the Assembly having greater powers to improve or direct others to provide and improve the access to cultural experience in the lives of citizens.”<sup>17</sup> They added that:

“Since Local Authorities have a reach to every part of Wales the ability of the Assembly to require action by them ... is sensible. It has to be recognised that existing involvement by local Authorities in the field that concerns FfCC is very variable and also differs often according to the particular art forms.”<sup>18</sup>

20. The Children’s Commissioner for Wales suggested that placing a statutory duty on local authorities would help ensure that there is equality of access to cultural and recreational activities across Wales and also noted that:

“Any improvement in the provision of cultural and recreational activities could potentially contribute to the Welsh Assembly Government’s aim of reducing child poverty.”<sup>19</sup>

21. The Welsh Local Government Association (“WLGA”) said that they did not oppose the proposed Order and recognised that “the Assembly Government’s desire to acquire legislative competence in culture, sport recreation and other fields is consistent with its current strategic

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<sup>15</sup> Monmouthshire County Council, Written Evidence, CD32

<sup>16</sup> Conwy County Borough Council, Written Evidence, CD27

<sup>17</sup> Fforwm Crefft Cymru, Written Evidence, CD14

<sup>18</sup> Ibid

<sup>19</sup> Children’s Commissioner for Wales, Written Evidence, CD29

approach to policy development”.<sup>20</sup> They also welcomed the proposed Order’s focus on the central role of local authorities in the provision of arts and culture generally and of sport and leisure, and supported “its aim of improving the scope and quality of provision, and its emphasis on equality of access.”<sup>21</sup>

22. Nevertheless, the WLGA expressed some reservations about the timing of the proposed Order, stating that:

“The Association does not believe that the current economic climate and the state of public finances are conducive to placing a statutory obligation on local authorities in relation to culture, the arts, sport and recreation.”<sup>22</sup>

23. The WLGA emphasised this point when questioned<sup>23</sup> and suggested alternatives to a legislative approach. These included considering “outcome agreements, which would be used to hold local government to account on its service provision across a range of areas” and using the performance measurement framework.<sup>24</sup>

24. The Society of Local Authority Chief Executives and Senior Managers in Wales (“SOLACE”), whilst supportive of the general principle of the proposed Order, took a similar view to the WLGA suggesting that:

“The ongoing development of a framework for outcome agreements, which focus on the outcomes delivered for citizens and communities as the critical success factor, may be a better mechanism than legislation to encourage improvements in cultural services and activities.”<sup>25</sup>

25. They went on to say:

“... a new cultural duty would not confer any statutory enabling powers that local authorities do not already have. Further legislation in the current economic situation would be inappropriate at the present time and disproportionate, in terms

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<sup>20</sup> Welsh Local Government Association, Written Evidence, CD36

<sup>21</sup> RoP, paragraph [120], 24 September 2009, Legislation Committee No.4

<sup>22</sup> Welsh Local Government Association, Written Evidence, CD36

<sup>23</sup> RoP, paragraph [122], 24 September 2009, Legislation Committee No.4

<sup>24</sup> RoP, paragraphs [134 - 135], 24 September 2009, Legislation Committee No.4

<sup>25</sup> SOLACE, Written Evidence, CD23

of costs and additional pressure on existing resources, to the benefits it would achieve.”<sup>26</sup>

26. The Association of Public Service Excellence (APSE) supported “the laudable aims of the Order to improve cultural service provision by local authorities over time and bring the poorer performers in line with the better performers.”<sup>27</sup> Nevertheless, they commented that some of their members thought the proposed Order is too narrowly drawn, in that “the interface with Health, Culture and Wellbeing should be further developed”, while other members thought that it is too broad in terms of the range of disciplines that it is trying to cover (from archaeology to sport) particularly as these address different outcomes<sup>28</sup>.

27. However, when questioned on this apparent conflict they said:

“It was not a conflict, as such; it was more about the fact that we thought that the sport and recreation matter could be widened to fit in more with the health and wellbeing agenda and that the three matters were hitting different objectives and different outcomes.”<sup>29</sup>

*Comments covering specific aspects – evidence from organisations*

28. The proposed Order covers the functions of local authorities in relation to three related but individually identifiable areas, namely: ancient monuments and historic buildings, culture and sport and recreation.<sup>30</sup> As a consequence, a range of organisations expressed their views in the context of their own specific areas of interest. In particular, many organisations highlighted difficulties that exist with the current situation regarding provision in their respective areas. Paragraphs 29 to 39 highlight these points.

29. In commenting on Matters 2.1 and 3.1, the Council for British Archaeology said that it:

“... strongly supports the general principle of legislative competence in these areas for the National Assembly of Wales.

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<sup>26</sup>ibid

<sup>27</sup> APSE, Written Evidence, CD24

<sup>28</sup> ibid

<sup>29</sup> RoP, paragraph [99], 1 October 2009, Legislation Committee No.4

<sup>30</sup> Fields 2, 3 and 16 respectively of Schedule 5 to the Government of Wales Act 2006.

We believe there will be considerable public benefit in employing these powers to support consistent standards and improvement in local authorities, encouraging greater public enjoyment, access to and engagement with the historic environment and historic collections in museums, galleries and archives. Such beneficial improvements will bring financial implications that should be recognised.”<sup>31</sup>

30. The Dyfed Archaeological Trust, in supporting the general principle that legislative competence be conferred on the National Assembly, said that local authorities would be encouraged “to take further ownership of and promote public engagement with the historic environment.”<sup>32</sup>

31. The Arts Council of Wales felt that a non-legislative approach would not achieve the stated aims of the proposed Order:

“We do not believe that a voluntary approach - rather than statutory legislation - would achieve the desired outcomes.

... the non-statutory framework means that there are wide variances across different local authorities in the range and quality of activity provided. There is no current obligation on local authorities to address this.

... What is statutory will get done. Without this obligation, arts and culture will be pushed to the margins.”<sup>33</sup>

32. The difficulties with the current situation were also highlighted by the Wales Association for the Performing Arts:

“Arts groups are only too well aware that as provision is currently discretionary and not mandatory, it can be reduced, compromised or withdrawn at times of financial pressure. We agree with the view that culture should not be an add-on and should be part of the fabric of Welsh society. Therefore we see this Order and the resulting legislation as something which will introduce that notion for the first time and give the provision of

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<sup>31</sup> Council for British Archaeology, Written Evidence, CD18

<sup>32</sup> Dyfed Archaeological Trust, Written Evidence, CD13

<sup>33</sup> Arts Council of Wales, Supplementary Written Evidence, CD35

culture and artistic activity a deserved status alongside health and education.”<sup>34</sup>

33. The permissive nature of the current legislative framework and the problems associated with it was highlighted by many consultees. Gwynedd Museum and Art Gallery commented that:

“The current permissive statutory position in relation to local authority cultural services has been woefully inadequate to date. We would welcome the raised profile of cultural activities and increased recognition of the contribution cultural services can make to cross cutting agendas on a national and local level.”<sup>35</sup>

34. The Federation of Museums and Art Galleries of Wales believed that:

“... for too long there has been a slow erosion of provision where it is provided. We hope that the provisions of the LCO will mean better support for museums and galleries in Wales.”<sup>36</sup>

35. Film Agency Wales also expressed some concerns about the current situation, commenting that:

“It is ... our experience that all local authorities are not equal in this area, which currently leads to a post-code lottery as to cultural provision with some areas being much more strongly supported than others. In this regard, the proposed enhanced powers for the Assembly [are] welcome - to ensure that cultural provision is available through the support of local authorities throughout all of Wales - especially at a time when the impact of the recession and associated public spending cuts may lead to an increased focus on public services being cut back further in the cultural sphere.”<sup>37</sup>

36. Similarly, the Museums Association saw the proposed Order as “an opportunity to both safeguard the collections and services in museums with improved protection from funding cuts, and to develop these services further”. This would in turn improve “cultural provision

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<sup>34</sup> Wales Association for the Performing Arts, Written Evidence, CD16

<sup>35</sup> Gwynedd Museum and Art Gallery, Written Evidence, CD20

<sup>36</sup> The Federation of Museums and Art Galleries of Wales, Written Evidence, CD12

<sup>37</sup> Film Agency Wales, Written Evidence, CD33



where it may currently fall below standards achieved in some parts of Wales.”<sup>38</sup>

37. Commenting specifically in relation to Matter 16.4, the Welsh Sports Association noted that:

“sport and recreation have been severely disadvantaged over the years. Lack of accessible, affordable and quality facilities has resulted in a decrease in regular sporting and recreational activities, which in turn, has led to an unfit population. This inevitably will have major health implications in the future...

It is our view, that the National Assembly for Wales must have legislative powers which underpin the functions of local authorities in "the support, improvement and promotion of sport and recreational activities". It is also, in our opinion, important that these legislative powers are linked to standards”.<sup>39</sup>

38. The Sports Council for Wales explained why they supported the principle of the proposed Order:

“Not only is there differential provision throughout Wales, but differential rates of participation. If we are to improve that situation and its contribution to health, wellbeing and social inclusion, we believe that this area of activity needs to be given higher priority through a statutory measure rather than just through a discretionary measure. Therefore, in principle, we are very supportive of it. However, we do believe that it needs to be underpinned by standards.”<sup>40</sup>

39. The Sports Council for Wales also noted that “a number of local authorities, in times of difficulty and economic hardship, will simply look at giving priority to mandatory services rather than discretionary services.”<sup>41</sup> They agreed that legislation is the best way to achieve the Government’s aim of improving the delivery of high-quality experiences<sup>42</sup>, but considered that legislation is not a panacea and

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<sup>38</sup> Museums Association, Written Evidence, CD26

<sup>39</sup> Welsh Sports Association, Written Evidence, CD15

<sup>40</sup> RoP, paragraph [5], 24 September 2009, Legislation Committee No.4

<sup>41</sup> RoP, paragraph [28], 24 September 2009, Legislation Committee No.4

<sup>42</sup> RoP, paragraphs [32 - 33], 24 September 2009, Legislation Committee No.4

should not be considered as the only answer.<sup>43</sup> They added that what legislation will do is:

“... put duties on local authorities in particular to look at the issues, not just of provision, but opportunities and participation, the work of their sports development teams, how they join up together, how they involve their countryside departments and how they work with education on after-school activities. So, it is very much about looking at what opportunities can and should be created locally.”<sup>44</sup>

#### *Statutory vs. non-statutory services – evidence from organisations*

40. As is apparent from some of the evidence already referred to above, one of the issues raised in evidence has been the different ways in which statutory and non-statutory services are treated during a challenging financial climate. A number of organisations also commented about the positive role legislation has had in improving the provision of library services. These issues are considered in paragraphs 41 to 46 below.

41. The Council of British Archaeology Wales noted that:

“... museums are non-statutory, and you would not believe the number of times I have sat around a table and heard other colleagues say 'In times of crisis, let us just focus on the statutory provision, not on non-statutory services'. I have seen what happened to libraries when they became statutory services, with standards being raised. This legislation will ensure that local authorities see museums as essential services and are statutorily obliged to provide them or support them with funding.”<sup>45</sup>

42. The Society of Chief Librarians explained the benefits of the *Public Libraries and Museums Act 1964*. They thought that

“... the Act does a lot to support the public libraries service. It allows for a significant degree of interpretation, enabling services to be flexible and adaptive. However, its main effect is

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<sup>43</sup> RoP, paragraph [35]. 24 September 2009, Legislation Committee No.4

<sup>44</sup> RoP, paragraph [35]. 24 September 2009, Legislation Committee No.4

<sup>45</sup> RoP, paragraph [36], 1 October 2009, Legislation Committee No.4

to enshrine library services' statutory requirements. In many cases, the perception is that that provides some protection against budgetary reductions in local authorities."<sup>46</sup>

43. The Society of Chief Librarians went on to emphasise this point, noting that:

"... statutory status allows you to defend your service position. It is fairly important, especially from the public libraries' perspective, to have that statutory reinforcement."<sup>47</sup>

44. However, the WLGA pointed out that:

"Making a service statutory does not necessarily save it. It is the level of that statutory basis that is all-important."<sup>48</sup>

45. They went on to acknowledge the importance of statutory provision, noting that no members of the chief leisure officers group:

"... are opposed to statutory provision; the general wish is that we could wind the clock back and have statutory provision five, six or even 10 years ago. We would be in a stronger position now if we had that protectionism, if you want to call it that."<sup>49</sup>

46. Similar sentiments were expressed by the Museums Associations, who said that:

"The problem with non-statutory services is that they are always at risk. I realise that statutory status would not protect us completely, but if the choice is between cutting statutory and non-statutory services, the non-statutory ones will always be in the firing line, particularly given that museums are often in directorates alongside organisations such as schools, which have very definite funding needs ... Having statutory status would mean that core funding would have to be addressed better than it is for non-statutory services."<sup>50</sup>

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<sup>46</sup> RoP, paragraph [164], 8 October 2009, Legislation Committee No.4

<sup>47</sup> RoP, paragraph [184], 8 October 2009, Legislation Committee No.4

<sup>48</sup> RoP, paragraph [167], 24 September 2009, Legislation Committee No.4

<sup>49</sup> ibid

<sup>50</sup> RoP, paragraph [178], 8 October 2009, Legislation Committee No.4

*The general principles - evidence from the Minister*

47. In explaining the need for the legislation, the Minister said that the proposed Order recognised the important contribution of cultural activity in Wales and the need for greater consistency across local authorities:

“... culture is not a luxury. Cultural activities are widely recognised as essential elements for achieving community cohesion, for example, and sports and recreational activities are essential to the health and wellbeing agenda. Although local authorities have powers in relation to cultural provision, they are permissive at the moment, with the exception of the public right of access to the historical environment, which come under local authority control, library services, parkland services and the provision of allotments ... However, the rest are permissive and the Government believes that such provision should come under the statutory duties of local government. Although there are plenty of examples of good practice throughout Wales, practice is not consistent, and it is that consistency—not uniformity—that we are looking for. That is why we think that it is important. It also fulfils one of the ‘One Wales’ pledges.”<sup>51</sup>

48. The Minister also highlighted the important interface between culture and community regeneration:

“On a basic level, I think that it is becoming accepted that cultural activity is at the heart of any healthy community. It is acknowledged now to be an essential component of the regeneration of any community that has seen its fortunes dip and deteriorate ... In the Government’s view, cultural activities ... are essential components and everybody should be able to access them, irrespective of where they live and the kind of community in which they happen to live”.<sup>52</sup>

49. The Minister suggested that the inconsistency in provision has arisen because “... the present system has not worked for everyone”, noting that “one way to improve that is to place a statutory duty on

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<sup>51</sup> RoP, paragraph [10], 8 October 2009, Legislation Committee No.4

<sup>52</sup> RoP, paragraph [45], 8 July 2009, Legislation Committee No.4

local authorities so that they feel obliged to take such provision into account.”<sup>53</sup>

50. The Minister stated that taking the legislative route was “not a case of taking competence for its own sake”<sup>54</sup>, and that the purpose of the proposed Order is “to take powers to enable us to implement the ‘One Wales’ commitment.”<sup>55</sup>

51. When questioned on an alternative approach using ‘outcome agreements’ the Minister said that “the outcomes approach that is being pursued in other avenues with local government should not be inconsistent with this statutory duty”.<sup>56</sup>

52. In addition, the Minister felt that “statutory guidance would not be sufficient to achieve the aim”<sup>57</sup> of the proposed Order and said that “imposing a statutory duty is the best way to reach our goal.”<sup>58</sup>

#### *The general principle of the proposed Order – our view*

53. We have noted the Minister’s comments. In particular, we acknowledge the evidence of the Minister, and organisations, that shows that there has been variation in cultural provision by local authorities across Wales. We agree with the Minister that legislating by proposed Measure is the best way to address this issue; it will improve the consistency of cultural services provided to local communities and ensure that opportunities to participate are available to everyone. We also consider that a legislative approach is appropriate because, as the Minister and others have said, culture is part of the fabric of everyday life in Wales and has an important role to play in the general health and well-being of our local communities.

**54. We agree in principle that legislative competence in the areas identified within the proposed Order should be conferred on the National Assembly.**

55. We have noted that many respondents have commented on the need for the cultural duty to be appropriately funded. However, in our

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<sup>53</sup> RoP, paragraph [16], 8 October 2009, Legislation Committee No.4

<sup>54</sup> RoP, paragraph [12], 8 July 2009, Legislation Committee No.4

<sup>55</sup> *ibid*

<sup>56</sup> RoP, paragraph [16], 8 October 2009, Legislation Committee No.4

<sup>57</sup> RoP, paragraph [17], 8 July 2009, Legislation Committee No.4

<sup>58</sup> RoP, paragraph [12], 8 October 2009, Legislation Committee No.4

view this is a matter for the subsequent Measure arising from the conferral of legislative competence on the National Assembly.

56. We have also received specific evidence about the wording of Matters 2.1, 3.1 and 16.4, and this is considered in section 3.

### 3. Scope of the proposed Order

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#### *Definition of local authorities - evidence from organisations*

57. Under the terms of the proposed Order, local authorities are defined as county and county borough councils in Wales.

58. Amgueddfa Cymru suggested that, in light of their work with the Pembrokeshire Coast National Park, the cultural duty should also apply to national parks.<sup>59</sup>

#### *Definition of local authorities - evidence from the Minister*

59. When questioned as to why the proposed Order did not apply to community councils, the Minister explained that “by and large, it is local authorities that carry out the main functions in this area”<sup>60</sup>. In a letter to the committee, the Minister added that:

“There is no legislative reason that community councils could not be included. Indeed I recognise the point made by the Committee that community councils play a role in cultural provision. However not all parts of Wales have community councils. A Measure that places a statutory obligation on community councils would create an inequality for those areas and citizens without councils.

Furthermore, the One Wales commitment relates to placing a statutory obligation on *local authorities*, referring to county and county borough councils in Wales. As the Proposed Order is only seeking competence in order to implement the One Wales commitment, a policy decision was taken to apply the competence to county and county borough councils only.<sup>61</sup>”

60. As regards the inclusion of National Park Authorities within the scope of the proposed Order, the Minister said that “it is not the intention in ‘One Wales’ to include them” and that it would not be beneficial to include them “because the proposed LCO is specifically

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<sup>59</sup> Amgueddfa Cymru, Written Evidence CD21

<sup>60</sup> RoP, paragraph [88], 8 July 2009, Legislation Committee No.4

<sup>61</sup> Letter from Alun Ffred Jones AM, Minister for Heritage, 17 September 2009 (Annex 6)

aimed at the powers that local authorities have in relation to the provision of cultural duties.”<sup>62</sup>

*Definition of local authorities – our view*

61. We have noted the views of the Minister and **we agree that the proposed Order should only apply to county and county borough councils in Wales.**

*General wording of Matters 2.1, 3.1 and 16.4 – evidence from organisations*

62. A number of organisations suggested that the words ‘support, improvement and promotion’ in Matters 2.1, 3.1 and 16.4 of the proposed Order were too weak and needed strengthening because they do not encompass ‘encouraging collaboration’, ‘participating’, ‘provision’, ‘protecting’ and equality of opportunity. Paragraphs 63 to 70 consider these issues further.

63. The Arts Council of Wales noted that “the wide-ranging, eclectic nature of the arts means that it is unlikely that each local authority will possess professional expertise across all areas of the arts” and that a collaborative approach between local authorities and other partners would “spread knowledge, expertise and resources”<sup>63</sup>. They said that they would prefer to include ‘collaboration between local authorities’ in the wording of the proposed Order.<sup>64</sup>

64. The Arts Council of Wales also raised concerns that the proposed Order does not include any reference to participation:

“In the legislation as currently drafted there is nothing about participation. There is a great deal about provision, support, improvement and promotion, but something that encourages participation in the arts would be very important for this piece of legislation.”<sup>65</sup>

65. In particular, they felt that defining local authorities’ functions in terms of ‘support, improvement and promotion’ is too limited in that

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<sup>62</sup> RoP, paragraphs [51 and 53], 8 October 2009, Legislation Committee No.4

<sup>63</sup> Arts Council of Wales, Supplementary Written Evidence, CD35

<sup>64</sup> RoP, paragraph [93], 24 September 2009, Legislation Committee No.4

<sup>65</sup> RoP, paragraph [99], 24 September 2009, Legislation Committee No.4



“it does not adequately address people’s active participation in artistic activity”<sup>66</sup>. Instead, they preferred

“... an amended wording that talked of “...the support, improvement and promotion of, and encouragement of the participation in, the activities of...”<sup>67</sup>.

66. Gwynedd Museum and Art Gallery also felt that:

“... the wording of 'to support, improve and promote...' museums, galleries, arts and crafts and other cultural activities and projects is too weak. A sentence such as 'that would safeguard and build upon existing provision' should also be included to acknowledge the existing patchy nature of service provided by Local Authorities and ensure that those that have a good service do not decline to a minimum standard.”<sup>68</sup>

67. The Art Fund suggested that Matter 3.1 be amended:

“... to include an explicit commitment for local authorities to protect museums, galleries and libraries and their collections. We are concerned some local authorities may use the new powers to unnecessarily rationalise and restructure cultural institutions under their control, which may result in more communities missing out on convenient, direct access to local cultural services.”<sup>69</sup>

68. They also felt that because the proposed Order “does not contain an explicit reference to encourage partnership working among local authorities”, it should be amended to make this commitment clearer.<sup>70</sup>

69. The Sports Council for Wales were of the view that the wording could be improved to impose a statutory obligation on local

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<sup>66</sup> Arts Council of Wales, Supplementary Written Evidence, CD35

<sup>67</sup> *ibid*

<sup>68</sup> Gwynedd Museum and Art Gallery, Written Evidence CD20

<sup>69</sup> The Art Fund, Written Evidence CD30

<sup>70</sup> *ibid*

authorities to provide sport and recreational facilities. They said that they:

“... would like to see the current wording strengthened; namely so there is a statutory obligation on local authorities to ensure there is provision of sport and recreational activities, and not just support, improve and promote them. We believe that the local authority should be accountable for such provision.

...

We therefore welcome the fact that the Welsh Order refers to sport and recreational *activities*, thereby encompassing the principles of sport development. This allows for local authorities to act as an enabler as well [as] a provider.

...

Matter 16.4 does not, however, fully take account of the aim of the *One Wales* commitment; increasing access to and participation in activities, and encouraging co-operation between partners is missing. We would like to see that these two aspects are reflected. This would strengthen the Order.”<sup>71</sup>

70. In terms of the proposed Order covering issues relating to equality of opportunity, the National Deaf Children’s Society noted the importance of ensuring that disability does not create a barrier to cultural activity.<sup>72</sup>

*General wording of Matters 2.1, 3.1 and 16.4 – evidence from the Minister*

71. When questioned on these points, the Minister indicated that all the suggestions for additional wording or phraseology were in fact already covered by the existing wording of ‘support, improvement and promotion’. The Minister advised that:

“Those terms have been used to link specifically with local authority functions, such as planning, consultation, collaboration, co-operation and promotion of arts and other

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<sup>71</sup> Sports Council for Wales, Written evidence, CD31

<sup>72</sup> National Deaf Children’s Society, Written Evidence, CD6

cultural activities. That is what local authorities do, and it has been drafted in such a way as to ensure that the competence provided will enable the policy aims of the One Wales Government to be achieved”<sup>73</sup>.

72. The Minister’s legal adviser also commented on the flexibility of the current wording and on the problems related to specifying exact functions in the proposed Order:

“... we have kept to the normal meaning of the words ‘support’, ‘improvement’ and ‘promotion’, as that allows flexibility to look at which local authority’s functions support, promote or improve the various cultural areas. If we were to try to specify exactly which functions, we would narrow the powers to such an extent that, if we wanted to bring a local authority function that we had not previously picked up within the competence, we would be precluded from doing so because it had not been included within the definition. That is why we have not defined those three words.”<sup>74</sup>

73. When questioned further about the meaning of these words, the Minister said that:

“I would have thought that the word ‘improve’ suggests that we are looking for something better in the future. It is not there to set whatever is in place in stone, and certainly not to reduce what exists. The words ‘improve’ and ‘promote’ will allow plenty of scope for provision to eventually be better.”<sup>75</sup>

74. These points were reinforced by the Minister’s legal adviser who said that:

“The words ‘support’, ‘promotion’ and ‘improvement’ relate to functions of the local authorities over which the Assembly Government is to have competence. They do not limit the types of provisions that may be made in a Measure, so long as the provisions relate to a function for local authorities in the support, promotion and improvement of the cultural fields. So,

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<sup>73</sup> RoP, paragraph [72], 8 July 2009, Legislation Committee No.4

<sup>74</sup> RoP, paragraph [86], 8 July 2009, Legislation Committee No.4

<sup>75</sup> RoP, paragraph [39], 8 October 2009, Legislation Committee No.4

as for protecting what is already there, a Measure could do that, because the functions or activities that you would want to protect would be functions of the local authorities in support, improvement or promotion of culture.”<sup>76</sup>

75. The Minister also confirmed that activities to increase, widen or encourage participation would be within the competence provided by the proposed Order<sup>77</sup> and that equality of opportunity is not ruled out.<sup>78</sup>

#### *General wording of Matters 2.1, 3.1 and 16.4 – our view*

76. We have noted the points made by organisations who have raised concerns that the words ‘support, improvement and promotion’ are not wide enough to encompass some of the activities that a subsequent Measure may wish to address.

77. However, having considered the Minister’s comments and our own legal advice, we believe that the words ‘support, improvement and promotion’ will provide the breadth of competence necessary to deliver the Welsh Government’s objectives. In our view, the addition of further words could have the effect of inadvertently narrowing the National Assembly’s competence and hinder the ability of the Welsh Government to deliver its objectives.

78. Accordingly, **we consider that the words ‘support, improvement and promotion’ in Matters 2.1, 3.1 and 16.4 are appropriate.**

#### *Matter 2.1 – evidence from organisations*

79. SOLACE noted that:

“some aspects of the proposed LCO currently fall outside the core services, competencies and resources of local authorities such as archaeological remains, ancient monuments, buildings and places of historical or architectural interest and historic wrecks.”<sup>79</sup>

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<sup>76</sup> RoP, paragraph [49], 8 October 2009, Legislation Committee No.4

<sup>77</sup> RoP, paragraph [101], 8 October 2009, Legislation Committee No.4

<sup>78</sup> RoP, paragraph [139 – 141], 8 October 2009, Legislation Committee No.4

<sup>79</sup> SOLACE, Written Evidence, CD23

80. When questioned on this point, they said that Matter 2.1:

“... covers the area of archaeological remains, ancient monuments and this sort of activity. There is some expertise in local government, but a lot of the expertise for this sort of activity lies outside local government.”<sup>80</sup>

81. Dyfed Archaeological Trust suggested that:

“The proposed Order should include reference to the historic landscape to ensure that all aspects of the historic environment are included. It may be useful to consider whether terminology should be used which is in line with that used in the Draft Heritage Protection Bill and the DCMS Draft PPS15: Planning for the Historic Environment, which we understand will, in due course, inform the proposed review of WO Circular 60/96 and 61/96, in Wales. For example the term “heritage asset” is defined as - a building, monument, site, or landscape of historic, archaeological, architectural or artistic interest.”<sup>81</sup>

82. The Archaeology Forum<sup>82</sup>, the Council for British Archaeology<sup>83</sup> and the Council for British Archaeology Wales<sup>84</sup> expressed similar views.

#### *Matter 2.1 - evidence from the Minister*

83. When questioned about the reason for including the phrase ‘of the appreciation by the public’ in Matter 2.1, the Minister’s legal adviser replied that:

“It is to differentiate in this area between the regulatory functions of local authorities with regard to historical monuments, for example, the listing of buildings, planning and so on, and the functions that we are trying to capture, which are related to appreciation by the public of these things. It would be

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<sup>80</sup> RoP, paragraph [74], 1 October 2009, Legislation Committee No.4

<sup>81</sup> Dyfed Archaeological Trust, Written Evidence CD13

<sup>82</sup> The Archaeology Forum, Written Evidence CD17

<sup>83</sup> Council for British Archaeology, Written Evidence CD18

<sup>84</sup> Council for British Archaeology Wales, Written Evidence CD19

odd to allow the Assembly to have functions to improve historic monuments”<sup>85</sup>.

84. As regards the points raised by SOLACE (paragraph 79 above), the Minister said:

“I am not sure why it is considered that these functions are entirely outside a local authority’s responsibility; they have existing permissive powers that can be used in relation to the historic environment. Local authorities can take action to advertise or promote the historic environment, and they often do. Consequently, there is a need to include this competence within the totality of local authority cultural activity.”<sup>86</sup>

85. The Minister also indicated that in his view, there was no need to make specific reference to the ‘historic landscape’ in the proposed Order because it was already covered<sup>87</sup>. In addition, he explained why using terminology contained in the Draft Heritage Protection Bill<sup>88</sup> would not be appropriate:

“We believe that it is more important for the terminology to be consistent with that of the Government of Wales Act 2006. As you know, the draft heritage protection Bill is not law. Definitions within that draft Bill are potentially subject to changes if it proceeds. It is not proceeding at the moment therefore it is more important that this proposed LCO is consistent with the Government of Wales Act 2006.”<sup>89</sup>

86. The Minister’s legal adviser emphasised how the proposed Order was consistent with the 2006 Act:

“I draw the committee’s attention to the wording of Schedule 7, section 2, of the Act which reads as follows:

‘Archaeological remains. Ancient monuments. Buildings and places of historical or architectural interest. Historic wrecks’.

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<sup>85</sup> RoP, paragraph [116], 8 July 2009, Legislation Committee No.4

<sup>86</sup> RoP, paragraph [97], 8 October 2009, Legislation Committee No.4

<sup>87</sup> RoP, paragraph [95], 8 October 2009, Legislation Committee No.4

<sup>88</sup> *Draft Heritage Protection Bill*, Cm 7349

<sup>89</sup> RoP, paragraph [90], 8 October 2009, Legislation Committee No.4

This represents the competence that the Assembly will have in the event of a successful referendum.”<sup>90</sup>

87. In a subsequent letter of 17 September 2009, the Minister also pointed out that:

“The proposals in the Heritage Protection Bill are quite different from the Proposed Order which relates to the functions of local authorities in the support, improvement and promotion of the appreciation of the historic environment.”<sup>91</sup>

*Matter 2.1 – our view*

88. We accept the Minister’s view that the term ‘historic landscape’ comes within the scope of the proposed Order.

89. We agree that it would not be appropriate for the proposed Order to use terminology contained in the Draft Heritage Protection Bill, which, as the Minister points out, may not proceed. In so doing, we recognise that the subsequent Measure is a more appropriate vehicle for defining specific terms and would therefore provide an opportunity to ensure consistency with other legislation if considered necessary.

90. We have noted the reasons for including the words ‘of the appreciation by the public’ in Matter 2.1. We acknowledge that removal of these words would change substantially the effect of Matter 2.1 by giving a far wider scope for the National Assembly to legislate in the area it covers. We believe that this opportunity to widen the scope of the National Assembly’s legislative competence should be taken.

91. In considering the wording of Matter 2.1, we consider that an opportunity has been missed by the Welsh Government to seek legislative competence in relation to functions currently exercised by or on behalf of Welsh Ministers or by the Royal Commission on Ancient and Historic Monuments in Wales. We acknowledge that a proposed Order drafted in this way would take its scope significantly beyond that envisaged in the “One Wales” programme for government.

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<sup>90</sup> RoP, paragraphs [91- 93], 8 October 2009, Legislation Committee No.4

<sup>91</sup> Letter from Alun Ffred Jones AM, Minister for Heritage, 17 September 2009

However, we believe that such a proposed Order would have provided the National Assembly and the Welsh Government with the breadth of powers to enable a joined-up and innovative approach to law making in this policy area.

92. In the circumstances, **we recommend that the words ‘of the appreciation by the public’ should be removed from Matter 2.1. In addition, we draw attention to our comments below regarding the fixed exception<sup>92</sup> in respect of this matter.**

*Matter 3.1 – evidence from organisations*

93. Many organisations expressed concerns that the current wording of Matter 3.1 may exclude some cultural activities and therefore prevent the National Assembly from legislating in those areas in a subsequent Measure.

94. The Arts Council of Wales suggested that:

“... at the very least, the current definition of “arts and crafts” should be amended to read “music, the performing arts, visual arts, crafts, literature and film...”

We would, however, suggest going further to encompass the creative industries as an additional, separate category of definition. We make this recommendation because the creative industries are essential to the cultural and economic health of Wales. They can be powerful ‘tools’ for regenerate and wealth creation; a proper subject for the interest, support and encouragement of local authorities.”<sup>93</sup>

95. APSE also felt that the proposed Order may not cover creative industries and cultural tourism and therefore the full range of arts activities.<sup>94</sup> They also said that:

“Matter 3.1 refers to some cultural venues such as museums and art galleries but not others such as theatres which provide equally valuable cultural activities. Therefore, greater clarity is

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<sup>92</sup> See footnote 120

<sup>93</sup> Arts Council of Wales, Supplementary Written Evidence, CD35; See also RoP, paragraph [95], 24 September 2009, Legislation Committee No.4

<sup>94</sup> APSE, Written Evidence, CD24



needed on what is included and excluded from the Matter. There is also a risk that cultural venues which are excluded by the definition would become secondary in terms of priority for funding and importance.”<sup>95</sup>

96. The Council for British Archaeology Wales were unsure of the scope of Matter 3.1, stating that:

“... we feel that the penultimate phrase, 'archives and historical records', is really a reflection not of the historic environment record, which are the records generated by archaeologists, but in fact of what we would call family archives and business archives ... Given the fact that it is in with archives and the historical record, one is assuming that the reference to historical records relates to the kind of material that you would see in your local record office or your local archives, not the historic environment record, which the archaeological trust holds and which has links to the national monuments record held by the Royal Commission on the Ancient and Historical Monuments of Wales.”<sup>96</sup>

97. The Dyfed Archaeological Trust<sup>97</sup>, the Archaeology Forum<sup>98</sup> and the Council for British Archaeology<sup>99</sup> also expressed uncertainty as to whether Historic Environment Records came within the scope of Matter 3.1.

#### *Matter 3.1- evidence from the Minister*

98. When questioned about whether the terms used in Matter 3.1 adequately covered the full range of arts activity, the Minister said:

“The headings within each of the proposed matters are intended to be umbrella headings, and should be interpreted broadly. That is the assurance that I have been given, and therefore I do not think that we need to go down the road of naming individual activities, and it would be wrong, in a proposed LCO such as this, to do so.”<sup>100</sup>

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<sup>95</sup> ibid

<sup>96</sup> RoP, paragraph [22], 1 October 2009, Legislation Committee No.4

<sup>97</sup> Dyfed Archaeological Trust, Written Evidence CD13

<sup>98</sup> The Archaeology Forum, Written Evidence CD17

<sup>99</sup> Council for British Archaeology, Written Evidence, CD18

<sup>100</sup> RoP, paragraph [103], 8 October 2009, Legislation Committee No.4

99. The Minister also explained that the terms of the proposed Order as currently drafted covered creative industries and cultural tourism<sup>101</sup>, Historic Environment Records<sup>102</sup> and the full range of cultural venues (including for example theatres).<sup>103</sup>

100. A Welsh Government official accompanying the Minister explained the reasoning for the use of umbrella headings:

“If we were to set out every function in the proposed LCO and we missed any, those functions would not be within competence. It would also mean that, in future, if local authorities decided to provide different activities in the cultural field, they would not be included. That is why we have these umbrella headings that are there for interpretation, so that the competence is wide enough to cover what local authorities do now and in the future. It would be counterproductive if we started listing provisions in a way that the Arts Council of Wales and others have suggested. That, as the Minister has indicated, is for a Measure, and we would then look at how we ensure that the whole range of local authority provision is brought within it.”<sup>104</sup>

### *Matter 3.1- our view*

101. We have noted and accept the Minister’s explanation for the use of umbrella headings in Matter 3.1, and in particular that, as drafted, the proposed Order allows a subsequent Measure to legislate on the functions of local authorities to support, improve and promote creative industries and cultural tourism, Historic Environment Records and the full range of cultural venues.

102. Therefore, **we are content with Matter 3.1 as drafted, save for our comments below regarding fixed exceptions<sup>105</sup> (a) and (b) in this matter.**

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<sup>101</sup> RoP, paragraph [105], 8 October 2009, Legislation Committee No.4

<sup>102</sup> RoP, paragraph [108], 8 October 2009, Legislation Committee No.4

<sup>103</sup> RoP, paragraphs [110 and 112], 8 October 2009, Legislation Committee No.4

<sup>104</sup> RoP, paragraph [106], 8 October 2009, Legislation Committee No.4

<sup>105</sup> See footnote 120

*Matter 16.4 – evidence from organisations*

103. In its evidence, Wrexham County Borough Council suggested that:

“... the terminology in relation to matter 16.4 can be usefully updated by replacing the phrase - sport and recreation - with the more meaningful and accurate description - sport and physical activity.”<sup>106</sup>

104. APSE felt that Matter 16.4 “needs greater clarity in terms of what this includes”, noting that “if play and parks are excluded from the definition, then the definition is too narrow”.<sup>107</sup>

105. APSE also stressed the need to ensure that the definition of sports and recreation is wide enough so that it is “inclusive of children’s play, physical activity and other such areas” and that “the definition is not focused solely on sport, in the traditional meaning of sport, and includes a wider physical activity agenda.”<sup>108</sup> They argued “that if you exclude certain activities or services from the definition, they are then given less importance than those that are included”.<sup>109</sup>

106. The Children’s Commissioner for Wales also referred to the importance of recognising play given its positive role in children’s development:

“we question whether access to play facilities and social opportunities for children and young people should also be specifically mentioned on the face of the LCO.

Play is essential to children’s development in many ways. Lack of access to appropriate play facilities can adversely affect children’s health, learning and development of social skills.

There is a danger that, unless this is specifically included, the “adult” definitions of “sport and leisure” will be assumed.”<sup>110</sup>

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<sup>106</sup> Wrexham County Borough Council, Written Evidence, CD5

<sup>107</sup> APSE, Written Evidence, CD24

<sup>108</sup> RoP, paragraph [118], 1 October 2009, Legislation Committee No.4

<sup>109</sup> *ibid*

<sup>110</sup> The Children’s Commissioner for Wales, Written Evidence, CD29

107. The Sports Council for Wales did not agree with the suggestions that ‘physical activity’ or ‘parks’ needed to be referred to in the proposed Order, noting that:

“... the words ‘sport’ and ‘recreation’ have been used for at least 30 years to my knowledge, therefore there is an implication that the definition is fairly clear.”<sup>111</sup>

and

“With regard to parks, I would not support that, because that deals not so much with an activity but a place. For me, the important issue is what takes place in parks. So, if you play football, rugby, hockey, or if people walk there, that is covered there. ...I do not, therefore, think that parks per se should be included in the definition.”<sup>112</sup>

#### *Matter 16.4 - evidence from the Minister*

108. The Minister explained that the wording of Matter 16.4 would cover ‘play’<sup>113</sup> and relevant local authority functions regardless of whether they relate to cultural provision for children, young people or adults.<sup>114</sup>

109. As regards whether ‘sport and physical activity’ was a better phrase to include in Matter 16.4 than ‘sport and recreation’, the Minister’s legal adviser explained that in the 2006 Act:

“Subject 16 of Schedule 7 simply reads ‘Sport and recreation’. We feel that ‘sport and physical activity’ is narrower than ‘sport and recreation’, and that physical activity should be included in the definition of ‘sport and recreation’. If there was concern that it is not broad enough and we amended matter 16.4 to include ‘sport and physical activity’, the ‘physical activity’ part would not include recreation, so you would lose that part of it. If you were to amend it to include ‘sport and physical and recreational activities’, that would be an indication that recreational activities

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<sup>111</sup> RoP, paragraphs [50], 24 September 2009, Legislation Committee No.4

<sup>112</sup> RoP, paragraphs [48], 24 September 2009, Legislation Committee No.4

<sup>113</sup> RoP, paragraph [125], 8 October 2009, Legislation Committee No.4

<sup>114</sup> RoP, paragraph [127], 8 October 2009, Legislation Committee No.4

did not include physical activity. So, that would create problems. We believe that it is wide enough.”<sup>115</sup>

*Matter 16.4 – our view*

110. We agree that including the phrase ‘sport and physical activity’ in Matter 16.4 would narrow the scope of the proposed Order. We believe that including such a phrase would reduce the flexibility of the Welsh Government to legislate in this area. We also note that ‘sport and recreation’ is a term used in Schedule 7 to the 2006 Act<sup>116</sup> and are satisfied that it is wide enough to cover ‘physical activity’ and ‘play’.

111. We also note and agree with the Minister that Matter 16.4 could be applied in relation to all age groups, and believe that any attempt to specify certain age groups only, may have an unintended effect of narrowing the National Assembly’s competence in this area.

112. Therefore, **we are content with Matter 16.4 as drafted.**

*Fixed exceptions<sup>117</sup> – evidence from organisations*

113. There are three fixed exceptions included in the proposed Order; one under Matter 2.1 and two under Matter 3.1. They are as follows:

*“Matter 2.1*

*This matter does not include removal of any public right under an enactment to have access to any such remains, monuments, buildings, places or wrecks.*

*Matter 3.1*

*This matter does not include-*

*(a) arrangements for the care, preservation and management of local authorities’ records;*

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<sup>115</sup> RoP, paragraph [123], 8 October 2009, Legislation Committee No.4

<sup>116</sup> Following a successful referendum, Section 108 and Schedule 7 to the 2006 Act set out the extent of the National Assembly’s legislative competence to pass Acts.

<sup>117</sup> See footnote 120

*(b) removal of the duty to provide a comprehensive and efficient library service.”*

114. A number of organisations commented that they were pleased that existing statutory duties were not to be removed by the proposed Order. The Society of Chief Librarians Wales welcomed “the fact that the introduction of any new legislation will not remove the duty of local authorities to ‘provide a comprehensive and efficient library service’.”<sup>118</sup>

115. The Archives and Records Council Wales also stated that, in respect of the existing statutory duty relating to local authority archive services:

“We would not wish to see any removal or diminution of this statutory obligation on Welsh local authorities in subsequent legislation designed to promote cultural initiatives.”<sup>119</sup>

116. However, it was not clear whether organisations felt that the legislative competence in relation to removal of these duties should be held by the National Assembly.

#### *Fixed exceptions<sup>120</sup> – evidence from the Minister*

117. The Minister explained that the fixed exceptions within Matters 2.1 and 3.1:

“... are there because there are statutory duties already in place, and we do not want to weaken those, create the potential for weakening those or even give a signal that they might be weakened in any way.”<sup>121</sup>

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<sup>118</sup> The Society of Chief Librarians Wales, Written Evidence, CD7

<sup>119</sup> Archives and Records Council Wales, Written Evidence, CD9

<sup>120</sup> In evidence to the committee provided by the Welsh Government, reference is made to ‘carve outs’. However, it is our understanding that carve outs are “exceptions to exceptions”. As such, given that there are no exceptions to exceptions in the proposed Order, references to carve outs by the Welsh Government have been taken to mean fixed exceptions, and the report refers to them as such. Our understanding of the developing terminology in relation to Legislative Competence Orders is based on a recent report by the House of Lords Select Committee on the Constitution, *The Proposed National Assembly for Wales (Legislative Competence)(Environment) Order 2009*, 15 October 2009, HL Paper 159.

<sup>121</sup> RoP, paragraph [97], 8 July 2009, Legislation Committee No.4

118. In subsequent questioning, the Minister noted that they:

“have been included to protect the existing statutory obligations on local authorities in relation to these duties. In other words, they are there already in law and we have no intention of weakening them.”<sup>122</sup>

119. In seeking to clarify the reasoning for the inclusion of fixed exceptions, the Minister added that:

“We believe that, by placing statutory duties on local authorities to improve and promote cultural activities, we will improve provision throughout Wales, or at least bring forward an improvement in those areas where there is weakness. There is no need, at the moment, to improve or change the statutory duties as they have been laid out in the carve-outs<sup>123</sup>. Therefore, we believe that the quickest way to achieve our objectives is by leaving those statutory duties as they exist in present legislation.”<sup>124</sup>

120. When questioned as to why the fixed exceptions included in the proposed Order were not included in Schedule 7 to the 2006 Act (an approach that was inconsistent with other aspects of the drafting in the proposed Order<sup>125</sup>), he said that:

“The decision has been taken that the competence asked for within the proposed LCO is sufficient to improve cultural provision across Wales, which is what we are involved in.”<sup>126</sup>

#### *Fixed exceptions – our view*

121. We believe that the inclusion of the fixed exceptions in relation to Matters 2.1 and 3.1 is unnecessary. In our view it is a matter of principle that the power to remove existing statutory duties should rest with the National Assembly; we believe that it is important for the National Assembly to have the powers to legislate in all the areas

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<sup>122</sup> RoP, paragraph [59], 8 October 2009, Legislation Committee No.4

<sup>123</sup> See footnote 120

<sup>124</sup> RoP, paragraph [73], 8 October 2009, Legislation Committee No.4

<sup>125</sup> RoP, paragraphs [131-136], 8 October 2009, Legislation Committee No.4

<sup>126</sup> RoP, paragraph [137], 8 October 2009, Legislation Committee No.4

covered by Matters 2.1 and 3.1, irrespective of when it is intended, if at all, to use all the powers provided.

122. Therefore, **we recommend that the fixed exceptions in Matters 2.1 and 3.1 are removed from the proposed Order.** In so doing, we note that such an approach would be consistent with Schedule 7 to the 2006 Act<sup>127</sup>.

123. If the Welsh Government decides not to accept our recommendation to have the fixed exceptions removed, then in those circumstances, it is our view that one of the fixed exceptions needs to be amended.

124. Having obtained legal advice, it is our view that two out of the three fixed exceptions (in respect of Matter 2.1 and (b) of Matter 3.1), do not prevent the National Assembly from legislating in future to protect or promote the areas of cultural provision to which they relate.

125. The fixed exceptions in respect of Matter 2.1 and (b) of Matter 3.1 clearly state that the Assembly would not be able to take any action in relation to the “removal” of statutory rights in relation to access to historical remains, monuments, buildings, places or wrecks or provisions relating to a comprehensive and efficient library service.

126. However, the same cannot be said of fixed exception (a) listed under Matter 3.1. The wording here is as follows:

*“This matter does not include-*

*(a) arrangements for the care, preservation and management of local authorities records.”*

127. In the drafting of this fixed exception, there is no reference made to the “removal” of statutory rights. It can therefore be said that this fixed exception prevents the National Assembly from creating protective arrangements in this area or making any legislation in relation to the protection of local authority records at all.

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<sup>127</sup> Following a successful referendum, Section 108 and Schedule 7 to the 2006 Act set out the extent of the National Assembly’s legislative competence to pass Acts.



128. Therefore, if the Welsh Government decides to retain the fixed exception (a) under Matter 3.1, we recommend that it is amended to read:

**“This matter does not include-**

**(a) removal of arrangements for the care, preservation and management of local authorities records.”**

129. In our view, the effect of the re-worded fixed exception would be to allow the National Assembly to legislate in future to supplement or improve the current system dealing with local authority records if deemed necessary.

*Floating exceptions - evidence from the Minister*

130. When questioned on the reasons for the inclusion of floating exceptions in Article 3 of the proposed Order, and in particular the practical implications they would have on the scope of future Assembly Measures<sup>128</sup>, the Minister replied that:

“The objective of the proposed LCO is to obtain legislative competence in relation to the functions of local authorities in respect of cultural provision. It was not intended that competence would impinge on the non-devolved areas covered by the floating exceptions, hence their inclusion in the proposed LCO.”<sup>129</sup>

131. The Minister’s legal adviser also explained that “the particular floating exceptions in this proposed LCO mirror the Schedule 7 floating exceptions.”<sup>130</sup>

*Floating exceptions – our view*

**132. We consider that the floating exceptions in Article 3 of the proposed Order are appropriate.**

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<sup>128</sup> RoP, paragraph [140], 8 July 2009, Legislation Committee No.4

<sup>129</sup> RoP, paragraph [141], 8 July 2009, Legislation Committee No.4

<sup>130</sup> RoP, paragraph [135], 8 July 2009, Legislation Committee No.4

*Proposed Order for pre-legislative scrutiny.*

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DRAFT STATUTORY INSTRUMENTS

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**2009 No.**

**CONSTITUTIONAL LAW**

**DEVOLUTION, WALES**

**The National Assembly for Wales (Legislative Competence)  
(Culture and other fields) Order 2009**

*Made* - - - - [ ]

*Coming into force in accordance with Article 1*

At the Court at Buckingham Palace, the       day of    2009

Present,

The Queen's Most Excellent Majesty in Council

In accordance with section 95(5) of the Government of Wales Act 2006(a), a draft of this Order has been laid before, and approved by resolution of, the National Assembly for Wales and each House of Parliament.

Accordingly, Her Majesty, in pursuance of section 95(1) of the Government of Wales Act 2006, is pleased, by and with the advice of Her Privy Council, to order as follows:—

**Citation and commencement**

1. This Order may be cited as the National Assembly for Wales (Legislative Competence) (Culture and other fields) Order 2009 and it comes into force on the day after the day on which it is made.

**Amendments to Schedule 5 to the Government of Wales Act 2006**

2.—(1) Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended in accordance with this article.

(2) In field 2 (ancient monuments and historic buildings), insert—

---

(a) 2006 c.32.

*“Matter 2.1*

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.

This matter does not include removal of any public right under an enactment to have access to any such remains, monuments, buildings, places or wrecks.

*Interpretation of this field*

In this field—

“enactment” includes any future enactment;

“local authorities” has the same meaning as in field 15.”

(3) In field 3 (Culture), insert—

*“Matter 3.1*

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.

This matter does not include—

(a) arrangements for the care, preservation and management of local authorities’ records;

(b) removal of the duty to provide a comprehensive and efficient library service.

*Interpretation of this field*

In this field—

“local authorities” has the same meaning as in field 15;

“local authorities records” means materials under the control of a local authority setting out facts or events or otherwise recording information, including not only written records but records conveying information by any other means whatsoever.”

(4) In field 16 (sport and recreation), insert—

*“Matter 16.4*

The functions of local authorities in the support, improvement and promotion of sport and recreational activities.

*Interpretation of this field*

In this field—

“local authorities” has the same meaning as in field 15.”

**3.—**(1) Part 2 of Schedule 5 to the Government of Wales Act 2006 is amended in accordance with this article.

(2) Before “*Highways and transport (field 10 of Part 1)*”, insert—

*“Culture (field 3 of Part 1)*

(1) Public lending right.

(2) Broadcasting.

- (3) Classification of films, and video recordings.
- (4) Government indemnities for objects on loan.
- (5) 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."

(3) After the entry relating to "*Social Welfare (field 15 of Part 1)*", insert—

*"Sport and recreation (field 16 of Part 1)*

- (1) Betting, gaming and lotteries."

*Name*  
Clerk of the Privy Council

**EXPLANATORY NOTE***(This note is not part of the Order)*

This Order amends the Government of Wales Act 2006 (“the 2006 Act”). The Order extends the legislative competence of the National Assembly for Wales to make laws known as Measures of the National Assembly for Wales (referred to in the 2006 Act as “Assembly Measures”). The legislative competence conferred by this Order is subject to general limitations on the exercise of that legislative competence, which apply by virtue of section 94 of, and Schedule 5 to, the 2006 Act (as amended by this Order).

Article 2 inserts matters 2.1, 3.1 and 16.4 and interpretation provisions into fields 2 (ancient monuments and historic buildings), 3 (culture) and 16 (sport and recreation) of Part 1 of Schedule 5 to the 2006 Act.

Article 2(2) inserts matter 2.1 into field 2 (ancient monuments and historic buildings). This matter is about 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.

This matter does not include removing any public right under an enactment to have access to any remains, monuments, buildings, places or wrecks.

Article 2(3) inserts matter 3.1 into field 3 (culture). This matter is about functions of local authorities in supporting, improving and promoting museums, galleries and libraries, arts and crafts, archives and historic records, and cultural activities and projects.

This matter does not include—

- (a) arrangements for the care, preservation and management of local authorities’ records;
- (b) removing the duty to provide a comprehensive and efficient library service.

Article 2(4) inserts matter 16.4 into field 16 (sport and recreation). This matter is about functions of local authorities in supporting, improving and promoting sport and recreational activities.

Article 3 inserts provisions that modify Part 2 of Schedule 5 to the 2006 Act. The provisions insert exceptions into Part 2 that will apply to all matters in Part 1 of Schedule 5. The exceptions are—

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.

A full regulatory impact assessment has not been prepared for this Order as no impact on the private or voluntary sectors is foreseen.

# **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.

**Alun Ffred Jones**  
**Heritage Minister**

**June 2009**

Pwyllgor Deddfwriaeth Rhif.4  
Legislation Committee No.4



Cynulliad National  
Cenedlaethol Assembly for  
Cymru Wales

Bae Caerdydd / Cardiff Bay  
Caerdydd / Cardiff CF99 1NA

July 2009

Dear Sir / Madam

Consultation on *The National Assembly for Wales (Legislative Competence) (Culture and other fields) Order 2009*

1. As part of its consideration of the above Legislative Competence Order, the National Assembly for Wales' Legislation Committee No.4 is calling for evidence on the [\*The National Assembly for Wales \(Legislative Competence\) \(Culture and other fields\) Order 2009.\*](#)

[What is a Legislative Competence Order?](#)

2. A Legislative Competence Order ("Order") is a 'subordinate' piece of legislation which transfers specific powers from the UK Parliament to the National Assembly.

3. In practice, this means that each new Order will add a new matter (or matters) into the relevant field in [Schedule 5 of the Government of Wales Act 2006](#), providing the National Assembly with the power to make Measures (laws) within the policy areas defined by the matter.

4. In the Assembly, there will be a two stage process for considering an Order, involving:

- i) the scrutiny of a proposed Order by a committee; and
- ii) the approval, by the Assembly, of a draft Order.

5. *The National Assembly for Wales (Legislative Competence) (Culture and other fields) Order 2009* proposes enhancing the National Assembly's current legislative competence by inserting 3 new matters into Schedule 5 of the Government of Wales Act 2006:

Ffon / Tel: 029 2089 8032  
Ffacs / Fax: 029 2089 8021  
Minicom: 029 2082 3280

E-bost / E-mail: [legislationoffice@wales.gsi.gov.uk](mailto:legislationoffice@wales.gsi.gov.uk)

- i) **Matter 2.1 (ancient monuments and historic buildings):** 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.
- ii) **Matter 3.1 (culture):** 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.
- iii) **Matter 16.4 (sport and recreation):** The functions of local authorities in the support, improvement and promotion of sport and recreational activities.

**What does this Legislative Competence Order seek to achieve?**

6. The Explanatory Memorandum that accompanies the proposed Order states:

“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 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.

The proposed Order is required to provide competence to enable the Assembly to implement the One Wales commitment and achieve its policy objectives”.

**What is the committee’s role?**

7. The role of Legislation Committee No. 4 is to consider and report on the proposed Order (the first part of the two stage process outlined in paragraph 4 above). In doing so, the Committee has agreed to work within the following framework:

To consider:

- i) the general principles of the proposed Order and whether legislative competence in the area identified in Matters 2.1, 3.1 and 16.4 be conferred on the Assembly; and

- ii) whether the terms of the proposed Order are too broadly or too narrowly defined.

#### How you can help - the consultation questions

8. Further details of the proposed Order and the accompanying Explanatory Memorandum can be found on the National Assembly's website at:  
<http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-legislative-competence-orders/bus-legislation-lco-culture-2009.htm>
9. Evidence about the proposed Order was provided by the Minister for Heritage on 8 July, and a transcript of this evidence is also available on the above website.
10. The Committee would like to invite you to submit written evidence to assist in its scrutiny of the proposed Order. In particular, we would welcome your views on the questions listed in Annex 1.
11. If you wish to submit evidence, please send an electronic copy of your submission to [legislationoffice@wales.gsi.gov.uk](mailto:legislationoffice@wales.gsi.gov.uk) and entitle the e-mail *Consultation - Cultural Duty Order*.
12. Alternatively, you can write to:  
Owain Roberts, Deputy Committee Clerk, Legislation Office, National Assembly for Wales, Cardiff Bay, CF99 1NA.
13. Submissions should arrive by 4 September 2009. It may not be possible to take into account responses received after this date.
14. Further information on the legislative process can be found at:  
<http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance/bus-legislation-guidance-measures.htm>
- 15.1 When preparing your submission, please keep the following in mind:
- your response should address the issues before the Committee. Please reference your response using the title applied above;
  - the National Assembly normally makes responses to public consultation available for public scrutiny and they may also be seen and discussed by Assembly Members at Committee meetings;
  - **If you do not want your response or name published, it is important that you clearly specify this in your submission and your reasons for this.** However you should be aware that it may not be given the same weight by the Committee when considering the evidence. You should also be aware that the information you have provided in your response to this consultation, including company information, may be published or disclosed in accordance with the Freedom of Information Act 2000 (FOIA);



- please indicate whether you are responding on behalf of an organisation, or as an individual; and
- please indicate whether or not you would be prepared to give oral evidence to the Committee.

16. The Committee welcomes contributions in English and Welsh and will consider responses to the written consultation during the autumn term.

17. If you have any queries, please contact Gareth Williams, Committee Clerk on 029 2089 8008 or Owain Roberts, Deputy Clerk on 029 2089 8101.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Michael German', with a stylized flourish at the end.

**Michael German AM**  
**Committee Chair**

*The National Assembly for Wales (Legislative Competence) (Culture and other fields) Order 2009*

**Consultation Questions**

1. What are your views on the general principle that legislative competence in the areas identified in Matters 2.1, 3.1 and 16.4 be conferred on the Assembly?
2. What are your views on the terms of the proposed Order? For example, are they too narrowly or too broadly drawn?
3. What are your views on the specific exclusions to Matter 2.1 and Matter 3.1, and the exceptions contained in Article 3?

*(The exclusions and exceptions are explained in paragraphs 20 to 28 of the [Explanatory Memorandum to the proposed Order](#))*

4. Do you have any additional comments relating to the proposed Order?

**Legislation Committee No 4**

**The Proposed National Assembly for Wales (Legislative Competence) (Culture and other fields) Order 2009**

**Consultation Responses**

- CD1 - Kate Montefiore, Penarth
- CD2 - Vale of Glamorgan Council
- CD3 - Llandudno Safe Cycling Group
- CD4 - Glamorgan-Gwent Archaeological Trust Ltd
- CD5 - Wrexham County Borough Council
- CD6 - NDCS Cymru; Annex 1
- CD6 - NDCS Cymru
- CD7 - The Society of Chief Librarians Wales
- CD8 - Theatr Fforwm Cymru
- CD9 - Archives and Records Council Wales
- CD10 - Michael Cousins, Grangetown
- CD11 - Carmarthenshire County Council Libraries and Heritage Service
- CD12 - The Federation of Museums and Art Galleries of Wales
- CD13 - Dyfed Archaeological Trust
- CD14 Fforwm Crefft Cymru
- CD15 Welsh Sports Association (WSA)
- CD16 Wales Association for the Performing Arts
- CD17 The Archaeology Forum
- CD18 Council for British Archaeology
- CD19 Council for British Archaeology Wales
- CD20 Gwynedd Museum and Art Gallery
- CD21 National Museum Wales
- CD22 Play Wales
- CD23 SOLACE Wales
- CD24 Association for Public Service Excellence (APSE)
- CD25 National Campaign for the Arts (NCA)
- CD26 Museums Association
- CD27 Conwy County Borough Council
- CD28 Musicians' Union
- CD29 Children's Commissioner for Wales
- CD30 The Art Fund
- CD31 Sports Council for Wales
- CD32 Monmouthshire County Council
- CD33 Film Agency for Wales
- CD34 Royal Commission on the Ancient and Historical Monuments of Wales
- CD35 - Arts Council of Wales
- CD35 - Arts Council for Wales: Supplementary Evidence, Annex 1
- CD36 - Welsh Local Government Association (WLGA)
- CD37 - Voluntary Arts Wales

**Legislation Committee No.4  
Proposed National Assembly for Wales (Legislative Competence)  
(Culture and other fields) Order 2009**

**Schedule of Oral Evidence**

<b>Date</b>	<b>Witnesses</b>
8 July 2009	Alun Ffred Jones AM, Minister for Heritage
24 September 2009	Sports Council for Wales; Arts Council of Wales; and Welsh Local Government Association
1 October 2009	Council for British Archaeology Wales; Society of Local Authorities Chief Executives Wales (SOLACE Wales); and The Association for Public Service Excellence
8 October 2009	Alun Ffred Jones AM, Minister for Heritage; The Society of Chief Librarians Wales; and The Museums Association

Transcripts of oral evidence sessions can be found at:  
<http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-lc4-agendas.htm>

**Alun Ffred Jones AC/AM**  
**Y Gweinidog dros Dreftadaeth**  
**Minister for Heritage**



Llywodraeth Cynulliad Cymru  
 Welsh Assembly Government

Ein cyf/Our ref LF/AJ/67/09

Mike German AM  
 Chair  
 Legislation Committee No 4  
 National Assembly for Wales  
 Cardiff Bay  
 CF99 1NA

17 September 2009

Thank you for the opportunity to provide evidence to Legislation Committee No 4 on 8 July 2009 on the draft National Assembly for Wales (Legislative Competence) (Culture and other fields) Order ("the Proposed Order"). You asked for further information on a number of issues. The information requested is as follows:

*Assessments undertaken to identify need for the Proposed Order*

The results of the scoping work undertaken by my officials to establish the range of local authority cultural provision is attached to this letter. As I advised on 8 July, the purpose of the information was not to identify areas wanting but to seek to establish the range of activities and services local authorities are providing. The information should not be interpreted as a definitive list as there may be unreported activities/services in the information provided by local authorities and the provision may have changed over time.

*Exclusion of 'Community Councils' from the Proposed Order*

I was asked by the Committee whether the reason for not including community councils in the Proposed Order was legislative or policy. There is no legislative reason that community councils could not be included. Indeed I recognise the point made by the Committee that community councils play a role in cultural provision. However not all parts of Wales have community councils. A Measure that places a statutory obligation on community councils would create an inequality for those areas and citizens without councils.

Furthermore, the One Wales commitment relates to placing a statutory obligation on *local authorities*, referring to county and county borough councils in Wales. As the Proposed Order is only seeking competence in order to implement the One Wales commitment, a policy decision was taken to apply the competence to county and county borough councils only.

*Encompassment of the functions of 'Community Councils' in the Proposed Order*

As presently drafted, the functions of community councils are not within the scope of the Proposed Order for the policy reasons set out above.

*Inclusion of exception in Matter 2.1 relating to 'enactments' in the Proposed Order*

Bae Caerdydd • Cardiff Bay  
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Wedi'i argraffu ar bapur wedi'i ailgylchu (100%)

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I undertook to further clarify the reason why the word '*enactment*' included within the exception to the proposed Matter 2.1 is defined to include '*any future enactment*'. This definition is applied solely in relation to the carve out to proposed Matter 2.1 in relation to "*...removal of any public right under an enactment to have access to any such remains, monuments, buildings, places or wrecks*". The carve out is limited to statutory public rights of access - ie a right conferred by an enactment. A policy decision was taken that statutory public rights of access to the historic environment should not be within the Assembly's competence and should remain with the UK government. This decision was based on the view that the right provided by section 19 of the Ancient Monuments and Archaeological Areas Act 1979 should be preserved, though of course if any other statutory public right of access was conferred by future enactments then they would also be covered. As I advised Committee on 8 July the 'carve-outs' are in the Proposed Order so that the competence does not create the potential to weaken or remove the existing statutory obligations on local authorities relating to cultural provision.

Consequently ensuring that the definition of enactment includes any future enactment was deemed necessary in case amendments are made to the legislation containing the right - ie the 1979 Act. If future enactments were not included by the definition, then for example, if section 19 of the 1979 Act was repealed and re-enacted in a similar or modified form by future legislation, then the protection of that right would be lost. Given the policy instruction that the Assembly should not have competence to remove any statutory rights of access, then this provision is necessary for protection of existing and future such statutory rights.

#### *Conferral of additional legislative powers to the Assembly relating to Heritage Protection*

The Committee asked about the discussions that had taken place on the inclusion of framework powers in the Heritage Protection Bill and whether given the uncertain status of the Bill whether there were any powers relating to Heritage Protection that now might be included in the Proposed Order.

The Heritage Protection Bill proposed equivalent powers for the Welsh Ministers as were intended for the Secretary of State in England in respect of heritage protection and was to replace completely all existing heritage protection legislation. It was developed on a co-operative basis between officials in Cadw and the Department for Culture, Media and Sport. The option of conferring competence on the Assembly to make a Measure was kept fully in view but not considered necessary as Cadw was able to incorporate into the Bill all the changes and distinctive provisions for Wales that it could envisage as needing in primary legislation for the foreseeable future.

The reason for a joint Bill is that it would be complex to consolidate and reform the law separately for England and Wales. In addition the case for reform in Wales is not considered as strong as in England. In England asset descriptions are generally poorer and thought not to be fit for purpose; there is also confusion caused by the involvement of various Government departments and agencies such as English Heritage. Although there is a need for some modernisation as in England, in Wales the protection system generally works well, which weakens the case for proceeding ahead of the introduction of the proposed Bill. Furthermore, a need for uniformity and consistency, particularly with regard to cross border designation and management of heritage assets, would lend support to proceeding on a joint – Wales and England - basis. However there are administrative steps we can take pending the introduction of the Bill and work is proceeding on a range of measures for reforming heritage protection arrangements which can be introduced without the need for primary legislation.

The proposals in the Heritage Protection Bill are quite different from the Proposed Order which relates to the functions of local authorities in the support, improvement and promotion of the appreciation of the historic environment. For the reasons set out above the Welsh

Assembly Government takes the view that it would be preferable to pursue joint England and Wales legislation in relation to heritage protection. Despite the uncertainty over the future of the Heritage Protection Bill, we believe that it still provides the most efficient and effective means of securing heritage protection reform in Wales. Consequently there are no additional powers relating to heritage protection I would wish to include in the Proposed Order.

I trust this information is of assistance to you in the Committee's scrutiny of the Proposed Order.

A handwritten signature in black ink, appearing to read 'Alun Ffred Jones', written in a cursive style.

**Alun Ffred Jones AC/AM**

Y Gweinidog dros Dreftadaeth / Minister for Heritage