



**APSE briefing 12-17**

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To all APSE main contacts in England, Wales, Scotland and Northern Ireland

## **The new General Power of Competence conferred by the Localism Act**

### **Key Issues**

- The new General Power of Competence applies to English local authorities and the Welsh Assembly Government may, if it chooses, convey a similar power to Welsh local authorities.
- The General Power of Competence extends beyond the former 'well-being' powers for English local authorities and impacts on a range of matters including charging and trading for commercial purposes.

### **1. Introduction**

The Localism Act received Royal Assent on 15 November 2011. The Act is subject to commencement orders which bring into force certain provisions and so far two Commencement Orders have been made: the Localism Act 2011 (Commencement No 1 and Transitional Provisions) Order 2011 and the Localism Act 2011 (Commencement No 2 and Transitional Provisions) Order 2012.

This second commencement Order was expedited to bring into effect the General Power of Competence much more quickly than originally planned. This was a reaction by the Secretary of State for Local Government to a challenge to Bideford District Council, brought by the national secular society, which challenged the right of the Council to say prayers as part of council business at council meetings. It was anticipated that the General Power of Competence (GPC) would not come into effect until April 2012 but is now in force.

### **2. What does the Power of General Competence mean?**

Paragraph 10 of the explanatory notes to the Act says that '*Section 1 provides a general power of competence for local authorities. It gives local authorities the same power to act that an individual generally has and provides that the power may be used in innovative ways, that is, in doing things that are unlike anything that a local authority - or any other public body - has done before, or may currently do. The section defines the meaning of an 'individual' so as to avoid referring to the reduced powers exercised by, for example, a child.*

Subsections (4), (5) & (6) further define the extent of the power where the authority can do something under the power; the starting point is *'that there are to be no limits as to how the power can be exercised.'* For example, the power does not need to be exercised for the benefit of any particular place or group, and can be exercised anywhere and in any way.

Subsection (7) gives effect to Schedule 1, which makes consequential amendments. The amendments to the Local Government Act 2000 mean that the well-being power provided in section 2 of that Act will no longer apply to English local authorities but will continue to apply in Wales.

### **3. Well-being powers and the new General Power of Competence**

There has been some debate as to whether the new General Power of Competence was necessary given the wide-ranging powers already available under the 'well-being' provisions of Section 2 of the Local Government Act 2000. However there are distinct differences between the two powers. For example the Section 2 well-being powers could generally only be exercised *'in relation to or for the benefit of the whole or any part of a local authority's area, or all or any persons resident in a local authority's area'* whereas the new GPC allows local authorities to rely upon its provisions without regard to whether or not there is a benefit to local people or residents. This lifts any potentially restrictions using well-being powers that relate to geographic boundaries.

The well-being powers were also drafted to ensure that local authorities took into account their community strategy but there is no similar restrictions in respect of the new GPC.

The new GPC will also provide some comfort to authorities that sought to rely upon well-being powers to produce financial benefits for their authority. This was tested in the case of the Court of Appeal case (*Brent London Borough Council v Risk Management*) which limited the boundaries of the well-being power. Under the new GPC there are no such restrictions intended, though as with all new areas of Law there will be future interpretations applied but it is clear from the wording that there is no intention to restrict local authorities in this way.

### **4. Restrictions and limitations**

The explanatory notes in section 2 sets out the boundaries of the GPC stating that *'local authorities to act in accordance with statutory limitations or restrictions. Restrictions that apply to existing powers that are overlapped by the general power are applied to the general power. So for instance if an existing power requires a particular procedure to be followed, the same procedure will apply to the use of the general power to do the same thing. It also applies any express prohibitions, restrictions and limitations within primary or secondary legislation, to the use of the general power. A distinction is drawn between restrictions in pre-commencement legislation, and those in post-commencement legislation. Restrictions in post-commencement legislation will only apply to the general power where they are expressed to do so.'*

It is also important to note that throughout the Localism Act the Secretary of State has reserve powers to issue further guidance and this would presumably allow for the Secretary of State to intervene should the new general power be misused in any way.

It is also important to note that whilst there are few restrictions on charging and trading under the new general power (see below) it is not intended that the new power could be used to raise taxes. Since the power is likened to that of an individual, and an individual is unable to raise taxes, it is highly unlikely that tax raising activity would be considered to be within the scope of the new power. The Secretary of State has indeed stated that the power will not allow local authorities to *'impose taxes like modern day Sheriffs of Nottingham'*.

## **5. Contracting out functions or delegation**

In recent times the process of outsourcing local government services has raised concerns about the extent to which local authorities seek to contract out or delegate responsibilities to third parties; the Localism Act serves as a reminder that, despite the new general power, local authorities cannot rely upon this to delegate, or contract out, its functions nor alter governance arrangements and local authorities should be mindful of specific provisions in relation to these matters. The explanatory notes state that *'Subsection (3) provides that the general power does not give local authorities power to delegate or contract out of their functions, nor to alter governance arrangements. These matters remain subject to separate provision.'*

This therefore means for example that the local authority cannot make or change arrangements for the discharge of functions made under Part 6 of the Local Government Act 1972.

## **6. Charging and trading under the new general power**

APSE has advised and trained a number of our member local authorities on the use of charging and trading powers, both in terms of older powers, such as those provided under the Local Government Act 1972, and more recently provided for by Section 93 and Section 95 of the Local Government Act 2003 (for English and Welsh local authorities). The Localism Act and the new general power reaffirm the ability for English local authorities to rely upon the provisions of the new general power in order to charge or trade for services (rather than reliance upon the former well-being powers) but they contain similar restrictions.

Local authorities are able to rely upon the new general power in respect of charging and trading but certain conditions must be met:-

Local authorities can charge up to full cost recovery for discretionary services - that is those that they are not required to provide to a person, where that person has agreed to the services being provided. Like Section 93 of the Local Government Act 2003 there is a duty, within the Localism Act, to secure that *"taking one financial year with another, the income from charges.....does not exceed the cost of provision"*, i.e. limited to cost recovery.

A substantial difference between the previous provisions under the Local Government Act 2003 and the new general power is that whilst section 93 of the 2003 Act only gives a power to charge 'where there is an existing power to provide a service' Section 3 of the Localism Act is not subject to that restriction – because you can rely upon your general power of competence.

The use of charging in this context is subject to certain provisions which are that:

- a. the service is not one which the authority is required to provide by statute;
- b. the person has agreed to its provision; and
- c. (if section 3(2)) and section 93 of the Local Government Act 2003 - "the 2003 Act" – are left out of account), the authority would not otherwise have a power to charge for the service.

It is noted that the Section 93 powers under the Local Government Act 2003 allow for differential charging (for example charging more affluent residents more for a service or charging reduced rates for example to unemployed residents). Whilst this provision is not repeated under the Localism Act it can be assumed that the general power, by its nature, will nevertheless allow authorities to continue to do this.

Section 3(3) also imposes a duty to secure that, taking one year with another, the income from charges does not exceed the cost of any provision and a duty is imposed separately by reference to "each kind of service" .The 'each kind of service' is presumably to ensure an honest assessment of service costs to avoid cross-subsidy.

With great similarity to existing provisions Section 4 of the new Act restricts the ability of a local authority to do things for 'a commercial purpose' using the general power. The power does not authorise authorities to trade in a service with a person to whom they are already statutorily obliged to provide it and, as now, local authorities must also only trade commercially through a company. These provisions reflect the trading powers in section 95 of the Local Government Act 2003 though there are again differences.

For example the power conferred by section 95 (headed "power to trade in function-related activities through a company") depends on the making of delegated legislation by the appropriate person but there is no such requirement under section 1 of the Localism Act.

Trading for commercial purpose is required to be exercised through a company, but the definition of company appears to be more permissive under section 4 of the Act. The power under section 95 is to "*do for a commercial purpose anything which they are authorised to do for purpose of carrying on their ordinary functions*" but there is no such limit in section 4 (because local authorities would be able to rely upon the general power). It is also worth noting that the power in section 95 (under the 2003 Act) can be limited by order and a local authority must have regard to guidance but again there is no restrictions imposed of this nature under the provisions under the Localism Act.

It should be noted that whilst these provisions relate to the power to trade in pursuance of the general power of competence, where local authorities wish to trade for a commercial purpose, in the market place, this type of trading should be distinguished from trading under other powers such as the Local Authorities (Goods & Services) Act 1970 and trading under Section 95 Local Government Act 2003, under current function related powers. With any commercial trading activity authorities still need to be mindful of competition law and state aid issues and should seek appropriate legal advice and guidance before embarking on this route.

## **7. Eligibility to use the new General Power of Competence**

The General Power of Competence will only apply to certain local authorities in England including:-

- Counties
- Districts
- London Boroughs and the Common Council of City of London
- Council of the Isles of Scilly
- Parish councils as specified by the Secretary of State by Order

In Wales the well-being Power is retained. The Secretary of State must consult the Welsh Ministers before making an order.

Where Parish Councils become eligible to exercise the General Power of Competence then they are removed from the ambit of s.137 Local Government Act 1972. The schedule also makes it clear that local authorities in Wales that continue to have the Wellbeing Power no longer have to have regard to a Sustainable Community Strategy to exercise the power. In any event as the new Best Value Code made clear ([see APSE briefing 11-53](#)) the Government has stated its intention to remove the requirements for a Sustainable Community Strategy altogether.

## **8. Fire and Rescue Authorities/Other Authorities**

The Localism Act provides wide powers to Integrated Transport Authorities, Passenger Transport Authorities, Economic Prosperity Boards and Combined Authorities (like Fire & Rescue Authorities that are not being given the general power of competence) to charge; trade; and do things that are indirectly incidental to functional purposes. Specifically Sections 9 and 10 introduce new powers for Fire & Rescue authorities to do things 'related to their purposes'. This new power applies to Metropolitan Fire & Rescue authorities, LFEPA and Combined Fire & Rescue Authorities (FRAs) in England and Wales, but not County Councils that benefit from the General Power of Competence.

The new s.5A inserted into the Fire & Rescue Services Act 2004 provides the powers to do anything the FRA considers appropriate for carrying out of any of its functions; anything appropriate for purposes incidental to its functions; or anything connected with those matters.

Any express prohibitions, restrictions and limitations within existing legislation remain, and there is again a distinction between pre and post legislation. There is no power for FRAs to borrow money, to do things they are statutorily obliged to do for a commercial purpose, nor to do things for a commercial purpose other than through a company or Co-operative Society.

## **9. APSE comment**

With any new area of legislation the boundaries of that legislation are bound to be tested by case law. Whilst it is anticipated that the new general power will reduce the number of challenges and judicial reviews (particularly in light of uncertainties created by the LAML judgement– [see APSE briefing 09-38](#)) one can also expect that there will be some nervousness about initial reliance upon the new general power. In any event the use of the power must be seen to be in line with ordinary principles of public law. The doctrine of 'ultra vires' remains and local authorities still have a fiduciary duty to local taxpayers not to act in an irresponsible or risky way and therefore, how the new general power is exercised, will be potentially subject to challenge through judicial review.

As with previous restrictions on commercial trading through a company APSE would point out that the formation of a company for these specific purposes can be time consuming and cumbersome to set up. Companies should only be considered after a full market assessment, taxation and market analysis. However local authorities could put to great effect better use of charging powers to realise additional income (in a sensible and sensitive way) for example through selling services to the public or private sector to help balance budgets, improve productivity and maximise the use of assets and human resources. The new general power should help to alleviate, for English local authorities, any previous uncertainties about the powers to charge for certain non-statutory services.

APSE has encouraged member authorities to be proactive in seeking new and innovative ways to deliver services, raise income and achieve efficiencies without simplistic service cuts during harsh economic times. It will be interesting to see whether the new general power creates a 'comfort blanket' for those authorities that have otherwise been timid in their approach to innovative solutions, to take forward service transformation plans with charging as part of that service improvement strategy.

APSE is hosting a training course Masterclass on the new Localism Act which will incorporate aspects of trading and charging under the new General Power of Competence with Walker Morris Solicitors on Wednesday 30 May in Leeds. For further information please email [mbaines@apse.org.uk](mailto:mbaines@apse.org.uk)

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