

A local authority General Power of Competence (Scottish Government Consultation)

To: All Chief Executives, Main Contacts and APSE Contacts in Scotland. For information only for England, Northern Ireland and Wales

1 Executive summary

The Scottish Government has released a consultation on a local authority General Power of Competence. A General Power of Competence is currently available to local authorities in England, Wales and Northern Ireland. However, Scottish Government note that “many local authorities continue to be reluctant to use that power to explore activity beyond those functions explicitly set out in statute, due to concerns as to potential legal challenge and interpretations by the courts of the limitations of the scope of this power”.

This consultation therefore seeks to establish what functions, beyond those already conferred by statute, local authorities in Scotland may wish to pursue and whether new legislation or amendments to existing legislation would be required to deliver those additional functions.

The consultation closes on 28 March 2025. [Click here](#) to complete the consultation. [Click here](#) to read the consultation report.

2 Overview

At present, local authorities are only able to do things which statute empowers them to do and anything else is ultra vires - beyond the powers.

A General Power of Competence is most commonly defined as a statutory power to do “anything that individuals may generally do” enabling local authorities to do “things that are unlike anything they, or any other public body, have done before” and is currently available to local authorities in England, Wales and Northern Ireland but not in Scotland.

Scottish Government has confirmed that a number of representations have been made to seek a similar power for Scottish local authorities. APSE's Chief Executive and the APSE Scotland Chair have also made representatives of this nature during evidence sessions with the Scottish Parliament Local Government, Housing and Planning Committee.

The consultation paper provides information on what the general power of competence, introduced through the Localism Act 2011 in England, enables local authorities to do. For example in England, local authorities can do things:-

- An individual may generally do
- Anywhere in the UK or elsewhere
- For a commercial purpose or otherwise, for a charge or without a charge
- Without the need to demonstrate that it will benefit the authority, its area or persons resident or present in its area (although in practice councils will want to realise such benefits)

There are limits in terms of where a local authority provides a service otherwise than for a commercial purpose. For local authorities in England, the general power enables them to charge a person for providing a service to the person only if:-

- The service is not one that a statutory provision requires the authority to provide to the person
- The person has agreed to its being provided
- The authority does not have an existing power to charge for providing the service

There are other limitations for English authorities which include being unable to trade in services that they have a statutory duty to provide and they cannot use the general power to introduce new local taxes or to undertake borrowing out with the existing rules. An authority cannot use the general power to raise money however it can receive income as a consequence of using the power for a different primary purpose. The power to profit from charging and trading for services, is presented many in many historic pieces of legislation including within the Local Government Act 2003 and repeated with the Localism Act, with differentiation made to charging and trading (through a company).

Before moving onto the consultation questions, the consultation paper outlines the key pieces of legislation which are intended to provide local authorities in Scotland, the freedom to design and deliver services according to local need. "However, some local authorities may be reluctant to rely

upon these provisions in the absence of specific statutory powers or duties to perform the action in question, due to concern as to legal challenge and the interpretation of the extent of the powers conferred by these legislative provisions". The legislation includes:-

- The Local Authorities (Goods and Services) Act 1970 and the limitations of the Act
- Section 69 and 83 of the Local Government (Scotland) Act 1973 and limitations associated with the Act
- The Local Government in Scotland Act 2003, Existing power for Scottish Ministers to extend the meaning of well-being and the limitations of the Act
- The Local Authority (Capital Financing and Accounting) (Scotland) Regulations 2016 (the 2016 Regulations) and the limitations
- Local Government Investments (Scotland) Regulations 2010 and limitations of the statutory guidance
- CIPFA Prudential and Treasury Management Codes of Practice

A full breakdown of the existing statutory framework can be found in [Annex A](#). As well as a breakdown of the above, the consultation paper also provides a comparison with local authority legislative powers in England, Wales and Northern Ireland. For further information on this please [click here](#)

3 Consultation questions

Power to Advance Wellbeing

Question 1

What are the perceived barriers and risks to fully exploring the scope of the 'Power to Advance Wellbeing' contained in section 20 of the Local Government in Scotland Act 2003?

Note: Section 20 of the Local Government in Scotland Act 2003 provides a broad power for a local authority to "do anything which it considers is likely to promote or improve the well-being of its area and/or persons within that area".

Question 2

What are the limitations of the Power to Advance Wellbeing and how do these limitations restrict the aspirations of local authorities, for example, to explore new and innovative ways of delivering public services?

Question 3

Would the removal of the restriction imposed by paragraph 7 of section 22 of the Local Government in Scotland Act 2003 (see note below) facilitate the aspirations of local authorities to increase local

revenue generating powers. Please provide examples.

Note: Paragraph 7 of section 22 of the Local Government in Scotland Act 2003 says expressly that the power under section 20 of the Act does not enable a local authority to do anything for the purposes of raising money, whether by levying or imposing any form of tax or charge, by borrowing or otherwise. Only the specific power in the 1970 Act can be relied upon to generate revenue through the supply of goods and services.

Question 4

Are there any further existing legislative barriers to the delivery of public services and to a broader range of activity that local authorities would wish to undertake?

Question 5

Expansion of wellbeing powers

Would a broadening of the scope and meaning of 'wellbeing' contained in the 2003 Act (see note below) provide an effective alternative to a General Power of Competence?

Note: The Local Government in Scotland Act 2003 contains a provision that allows the Scottish Ministers to widen the definition of wellbeing and therefore the scope of the power of local authorities to advance wellbeing, under section 20 of the 2003 Act. Given the continued reluctance in England, Wales and Northern Ireland to rely on the general power due to concerns over legal challenge, it may be more effective to either broaden the scope and meaning of 'wellbeing' within the 2003 Act or to create further specific statutory powers within the 2003 Act to explicitly permit the greater freedoms local authorities wish to have.

Question 6

Expansion of wellbeing powers

Would the provision of specific greater powers within the 2003 Act (see note below) provide an effective alternative to a General Power of Competence? If so, please provide examples of such specific powers and how they may be used.

Note: The Local Government in Scotland Act 2003 contains a provision that allows the Scottish Ministers to widen the definition of wellbeing and therefore the scope of the power of local authorities to advance wellbeing, under section 20 of the 2003 Act. Given the continued reluctance in England, Wales and Northern Ireland to rely on the general power due to concerns over legal challenge, it may be more effective to either broaden the scope and meaning of 'wellbeing' within the 2003 Act or to create further specific statutory powers within the 2003 Act to explicitly permit the greater freedoms local authorities wish to have.

Duplication of Functions

Question 7

Does the provision within the 2003 Act, which states that the Power to Advance Wellbeing cannot be used to unreasonably duplicate the functions of another person, restrict a local authority's pursuit of service transformation, other income generating activity or any other activity? Please provide examples.

Note: Paragraph 4 of section 22 of the Local Government in Scotland Act 2003 prevents local authorities from unreasonably duplicating the functions of other bodies or people. The subsection states that local authorities must consider whether any proposed action is reasonable. The subsection also makes it clear that the exercise of power would not be considered unreasonable if the other person had consented.

Question 8

Would the removal of the restriction on duplication of functions, contained within section 22 of the Local Government in Scotland Act, provide an effective alternative to a General Power of Competence? If so, please explain.

Powers to Trade

Question 9

What **trading** activity would local authorities wish to pursue beyond the current power to provide goods and services, contained in the Local Authorities (Goods and Services) Act 1970?

Question 10

Would the removal of the requirement to gain Ministerial consent to pursue income through the supply of goods and services deliver the aspirations of local authorities?

Please provide examples of how the removal of this limitation would be utilised and the benefit that would be envisaged such as value for money, better allocation of resources, transformation of public services, better local outcomes etc

Note: The provisions contained within section 1A of the Local Authorities (Goods and Services) Act 1970 requires that a local authority must gain Ministerial consent to pursue income through the supply of goods and services. However, this restriction does not apply in respect of an agreement entered into by a local authority with either another local authority, a public body; or with a person providing functions of a public nature.

Goods and Services

Question 11

What further activity would local authorities wish to undertake, beyond providing goods and services to the local area and/or persons within that area?

Question 12

Should the introduction of greater local authority legislative powers continue to constrain the types of goods and services a local authority can provide? If so, please provide examples.

Commercial Ventures

Question 13

What type of commercial activity would local authorities wish to pursue, utilising a General Power of Competence? Please provide examples.

Question 14

Should greater legislative powers continue to constrain the types of commercial activity that a local authority can undertake? Please provide reasons.

Question 15

Should greater legislative powers continue to constrain a local authority from engaging in commercial activity or any other activity beyond the local area. Please provide reasons.

Borrowing and Investment Powers

Question 16

What greater financial controls or limitations, particularly in relation to borrowing and investments, should accompany a General Power of Competence in Scotland to ensure such actions cannot be repeated or their impact limited to protect core services?

Question 17

What further investment powers do local authorities envisage requiring beyond those already conferred by statute and statutory guidance? Please provide examples of how such powers would be utilised to benefit the local area and people living within the local area.

Question 18

Should there be greater reporting/disclosure requirements to ensure transparency in the use of public funds for borrowing and investment purposes and how these activities directly benefit the local area? Please explain.

General Power of Competence

Question 19

How would a General Power of Competence be used to improve the delivery of public services, ensure greater efficiency in the use of available resources and maximise outcomes for the local area and persons within the local area. Please provide examples.

Question 20

How could we better articulate a General Power of Competence in Scotland to mitigate concerns and provide greater assurance both for local authorities and those they engage with? Please explain.

Question 21

Since the General Power was introduced in England, Wales and Northern Ireland how has this been used to benefit the local area? Please provide examples of use of the power and the resulting benefits.

Note: This question specifically relates to the general powers in operation in England, Wales and Northern Ireland. You may wish to refer to [Annex B](#) of the consultation document which sets out the relevant legislative provisions for England, Wales and Northern Ireland in detail.

Question 22

What are the perceived barriers and/or limitations of the General Power of Competence in place in England, Wales and Northern Ireland? Please explain.

Note: This question specifically relates to the general powers in operation in England, Wales and Northern Ireland. You may wish to refer to [Annex B](#) of the consultation document which sets out the relevant legislative provisions for England, Wales and Northern Ireland in detail.

Question 23

Should a local authority's use of a General Power of Competence be required to align to local regeneration or other demonstrable local area well-being enhancement?

Islands (Scotland) Act 2018 - Devolution of functions/additional powers

Question 24

Would similar provisions for mainland authorities to those provided for island councils by the Island (Scotland) Act 2018 provide sufficient or greater scope for local authorities to explore further envisaged activity? Please explain.

You may wish to refer to [Annex A](#) of the consultation document which sets out the relevant legislative provisions in detail.

4 APSE Comment

APSE encourages our members to respond to [this consultation](#) by the Scottish Government. This consultation provides the opportunity to present local authority views on the current powers as well as the potential introduction of the power of general competence. It is important for local authorities in Scotland to respond to this consultation as the outcomes of the consultation may change the current powers available to local authorities in Scotland.

APSE Scotland's Commercialisation network group will be meeting on Tuesday 11 March via MS TEAMS to discuss the consultation and General Power of Competence. This network group initially discussed this Power in a round table on 1 May 2024. APSE's Chief Executive presentation "[The Power of General Competence: Is Scotland Missing Out?](#)" provides an overview of the legislation in England, Wales and Northern Ireland; limitations and information on trading and charging. Following the roundtable in May 2024, we issued a survey to gather thoughts on this subject. We therefore intend to review and refresh the survey, issuing in advance of the meeting on the 11 March to help, to help gather discussion points and views. Should you wish to attend this important network meeting on 11 March please [click here](#) to register and [click here](#) to complete the refreshed survey. The discussions and information gathered during this meeting and from the survey, will also be used to form an APSE response to the consultation on behalf of the membership.

The APSE Scotland Commercialisation network is free to attend for APSE members. For more information and to access past presentations and agendas, please [click here](#). We also have a range of publications on this and similar topics which can be accessed for free on [our website](#).

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