

THE LOCALISM BILL AND THE GENERAL POWER OF COMPETENCE

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Sources (all available via DCLG website):

- *Localism Bill, as amended in committee (latest version 22 July 2011), clauses 1-8*
- *Explanatory Notes to the Bill as introduced on 13 December 2010, paragraphs 1-17 and paragraphs 47-58*
- *Transcript of Committee Proceedings, Tuesday 1 February 2011 (morning session)*
- *Decentralisation and the Localism Bill: an essential guide (December 2010, with foreword by Nick Clegg and Greg Clark MP, Minister of State for Decentralisation); updated version, June 2011.*
- *Localism Bill: general power of competence for local authorities: Impact assessment, January 2011*
- *A plain English guide to the Localism Bill, DCLG, January 2011.*

1. The text of the Bill we have is as amended in committee, 22 July 2011. The Bill is currently at Report stage. Clauses 1-3 defining the general power of competence have survived unscathed and have not been amended since the Bill was introduced in December 2010.
2. The Bill introduces a *general power of competence*¹ for local authorities in England. It does not repeal outright the wellbeing powers in s.2 LGA 2000, but relegates them to applicability in Wales only (cl. 1(7) and Sch. 1). For Wales, it repeals s.2(3) and (3A) of the LGA 2000 (obligation to have regard to community strategy when exercising wellbeing powers), though the obligation to have a community strategy remains.
3. To state the obvious, the general power of competence is intended to increase the power of local authorities. It has, possibly partly for that reason, largely been greeted with approval by local authorities.
4. Why is the new power needed? According to the Impact Assessment (page 1):

Research has indicated that the existing broadly defined well-being power in the Local Government Act 2000 has not been widely used by local authorities. A recent Court

¹ Note the tautology in the expression 'power of competence'; cf. French *compétence*, meaning power in the sense of jurisdiction or Latin (plural) *vires* as in *ultra vires*.

judgement² also threw into doubt the use of the power in enabling local authorities to give guarantees and indemnities and to act in their own financial interest to generate efficiencies and secure value for money outcomes. Therefore, to both rectify this situation and promote the radical devolution of power away from Westminster and Whitehall to councils and communities, the Government is intending to replace the existing well-being power with a general power of competence for local government, to be taken forward through the forthcoming Localism Bill. This change can only be effected through primary legislation.

5. The option of amending the wellbeing powers is rejected because it would not deliver the required cultural shift and increased confidence of a bespoke general power of competence^(*ibid.*). The Court of Appeal's judgment in the *Brent* case disappointed local authorities particularly because by setting up a mutual insurance body they were practising imaginative cost sharing innovation, doing the very thing government wanted to encourage, yet were prevented by a narrow interpretation of the wellbeing powers in the LGA 2000.

6. Clauses 1-3 provide as follows:

1 Local authority's general power of competence

- (1) A local authority has power to do anything that individuals generally may do.
- (2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise:
 - (a) unlike anything the authority may do apart from subsection (1), or
 - (b) unlike anything that other public bodies may do.
- (3) In this section ~~an individual~~ means an individual with full capacity.
- (4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including:
 - (a) power to do it anywhere in the United Kingdom or elsewhere,
 - (b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and
 - (c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.
- (5) the generality of the power conferred by subsection (1) (~~the general power~~) is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.
- (6) Any such other power is not limited by the existence of the general power (but see section 5(2)).
- (7) Schedule 1 (consequential amendments) has effect.

² This must be *Brent MBC v. Risk Management Partners Ltd* [2009] EWCA Civ 490; judgment in SC has since been given: [2011] 2 AC 34, but the appeal was on the *Teckal* exemption point only; the CA's judgment remains authoritative on the interpretation of the well-being powers in ss.1-3 LGA 2000 and as such will remain relevant in Wales.

2 Boundaries of the general power

(1) If exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power.

(2) The general power does not enable a local authority to do-

(a) anything which the authority is unable to do by virtue of a pre-commencement limitation, or

(b) anything which the authority is unable to do by virtue of a post-commencement limitation which is expressed to apply-

(i) to the general power,

(ii) to all of the authority's powers, or

(iii) to all of the authority's powers but with exceptions that do not include the general power.

(3) The general power does not confer power to-

(a) make or alter arrangements of a kind which may be made under Part 6 of the Local Government Act 1972 (arrangements for discharge of authority's functions by committees, joint committees, officers etc);

(b) make or alter arrangements of a kind which are made, or may be made, by or under Part 1A of the Local Government Act 2000 (arrangements for local authority governance in England);

(c) make or alter any contracting-out arrangements, or other arrangements within neither of paragraphs (a) and (b), that authorise a person to exercise a function of a local authority.

(4) In this section-

~~%~~post-commencement limitation+means a prohibition, restriction or other limitation expressly imposed by a statutory provision that-

(a) is contained in an Act passed after the end of the Session in which this Act is passed, or

(b) is contained in an instrument made under an Act and comes into force on or after the commencement of section 1;

~~%~~pre-commencement limitation+means a prohibition, restriction or other limitation expressly imposed by a statutory provision that-

(a) is contained in this Act, or in any other Act passed no later than the end of the Session in which this Act is passed, or

(b) is contained in an instrument made under an Act and comes into force before the commencement of section 1;

~~%~~pre-commencement power+means power conferred by a statutory provision that-

(a) is contained in this Act, or in any other Act passed no later than the end of the Session in which this Act is passed, or

(b) is contained in an instrument made under an Act and comes into force before the commencement of section 1.

3 Limits on charging in exercise of general power

(1) Subsection (2) applies where-

(a) a local authority provides a service to a person otherwise than for a commercial purpose, and

(b) its providing the service to the person is done, or could be done, in exercise of the general power.

(2) The general power confers power to charge the person for providing the service to the person only if-

(a) the service is not one that a statutory provision requires the authority to provide to the person,

(b) the person has agreed to its being provided, and

(c) ignoring this section and section 93 of the Local Government Act 2003,

the authority does not have power to charge for providing the service.

(3) The general power is subject to a duty to secure that, taking one financial year with another, the income from charges allowed by subsection (2) does not exceed the costs of provision.

(4) The duty under subsection (3) applies separately in relation to each kind of service.

7. Clause 4 is about commercial purposes and will be treated as outside the scope of this paper. The general power only confers power to do things for a commercial purpose which can be done in the exercise of the general power otherwise than for a commercial purpose (clause 4(1)). This requires further explanation meriting separate treatment.

8. Clauses 5-7 deal with the Secretary of State's powers to make supplemental provision including a Henry VIII power to amend obstructive primary legislation, and procedural matters. A new clause 6 has been introduced by amendment, which sets limits to the Secretary of State's power to change primary legislation: he can only do so if satisfied the conditions in clause 6(2) are met. The conditions are that:

(a) the effect of the provision is proportionate to the policy objective intended to be secured by the provision;

(b) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;

(c) the provision does not remove any necessary protection;

(d) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;

(e) the provision is not of constitutional significance.

9. How wide is the general power of competence? Fortified by *Pepper v. Hart*, Andrew Stunell, (Parliamentary Under-Secretary of State for Communities and Local Government), said during Committee stage on 1 February 2011:

... the hon. Member for Scunthorpe suggested that because the power of well-being did not turn out to be as fireproof as Ministers thought when it was introduced, that will also be true of the power of general competence. We believe that we have learned from the experience of the power of well-being. Indeed, the then Government and the right hon. Member for Greenwich and Woolwich proposed it in very good faith. They had high expectations and hopes, but it did not deliver. We have looked at what the problems were. We have picked up the idea of having a general power, which he discarded - no doubt for what looked like good reasons at the time - and we are putting it right at the beginning of the Bill.

We believe, and are advised, that we have produced a fireproof Bill. I assure the right hon. Gentleman that that is our intention. If the courts have any qualifications about what we have put in clause 1, I hope that my words today can be prayed in aid to confirm that it is intended to do exactly what it says: to give every council a general power of competence on behalf of the residents who elected it.

10. The ~~essential~~ guide to the Bill says (page 7) that the general power of competence ~~will~~ set them [local authorities] free to innovate in response to local needs. The explanatory notes (at paragraph 50) describe the new power in visionary language: ~~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.
11. What then might local authorities do with their new power? Where can they boldly go where no local authority has gone before? The Impact Assessment cites prosaic ~~activities~~ as diverse as estate regeneration in Wakefield to a waste transfer station in Devon. But could not those activities have been undertaken using the wellbeing powers?
12. In principle yes, if some perceived benefit enured directly or indirectly to the inhabitants of their area. This would be more likely if the authority concerned is geographically close to Wakefield or Devon. The latter restriction is swept away by clause 1(4)(c) which provides that where the general power confers power to do something, it may be done ~~for~~, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area. Under the new powers, the estate to be regenerated, or the waste transfer station, could be in Scotland or Latvia.
13. Or could it? When speaking on the wellbeing powers under s.2 LGA 2000 (before the case law on them), I used to give examples such as buying a goldmine in Siberia as something that might well be outside them even though not expressly prohibited by some other statutory provision passed before or after s.2 of that Act. Can a local

authority now do so? Could the result in cases such as *Hazell v. Hammersmith LBC* [1992] 2 AC 1 (the loan swaps case) now be different?

14. The answer is a qualified yes. But the usual public law constraints (rationality, relevant considerations, procedural fairness, disregard of irrelevant considerations) will surely be applied by the courts to exercise of the power of general competence, even though an individual in the private sphere is not subject to them. An individual may justify a decision not by appealing to reason but by reference to the power of intuition, the supra-logic that cuts out all routine processes of thought and leaps straight from problem to answer³. An individual may behave capriciously or fecklessly.
15. Local authorities exercising the new general power would not be well advised to emulate such behaviour, nor to rely on intuition when defending any judicial review challenges. The familiar public law constraints are now so firmly embedded in the law that express words would be needed to exclude them and the equation with an individual is not itself sufficient to do so: an individual is not invested with heavy statutory responsibilities including stewardship of public funds.
16. So, some limits must be read into Mr Stunell's exuberant words. That view is supported by the Impact Assessment, which makes reference to the General Public Law Constraints and refers to the specific financial safeguards policed by the s.151 officer, the Accounts and Audit Regulations 2003 (SI 2003/533), the duty to balance the budget annually (Part 2 of the Local Government Act 2003) and the prudential borrowing code (under Part 1 of the same Act).
17. A further check on the exercise of the general power will be the need to comply with the obligation under s.149 of the Equality Act 2010 to have due regard to the goals in that Act, and in some cases an impact assessment will in practice be required to demonstrate compliance. The duty under s.149 applies to a public authority in the exercise of its functions (see section 149(1)) and those functions will include the general power.
18. Where prior legislation contains a specific prohibition, it cannot be overcome by the power of general competence. Thus, the original version of the plain English guide to the Bill said (page 5) that the general power of competence will give local authorities the legal capacity to do anything that an individual can do that is not specifically

³ Robert Graves, *The Abominable Mr Gunn*, in *Collected Essays, Stories and Poems* (Doubleday & Co. Inc, New York, 1958), p.237.

banned by other laws: they will not, for example, be able to impose new taxes, as other laws make clear they cannot+.

19. The June 2011 updated version of the plain English guide explains this slightly differently (page 7): the Bill %will give local authorities the legal capacity to do anything that an individual can do that is not specifically prohibited; they will not, for example, be able to impose new taxes, as an individual has no power to tax.+ This could be because the principle that a public body may not impose taxes without express statutory authority is one of common law rather than statute (*Attorney-General v. Wilts United Dairies Ltd.* (1921) 37 T.L.R. 884 (CA) (1922) 38 T.L.R. 781 (HL)).
20. In similar vein, the Impact Assessment page 12 gives local councillors a timely reminder (in case the public law constraints mentioned above are not themselves enough to discourage such conduct) that the general power of competence:
 - will not enable local councillors to wage thermonuclear war due to existing preventative legislation including: the Nuclear Materials (Offences) Act 1983, the Nuclear Safeguards Act 2000 and the Environmental Permitting (England and Wales) Regulations 2010.
21. And in describing the boundaries of the general power, the explanatory notes (paragraph 51) give the following example: %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+ This must be because following the procedure is a pre-commencement restriction within clause 2(1), or a pre-commencement limitation within clause 2(2), or both.
22. It is too early to predict the impact of, or the judicial approach to, this latest attempt to unleash local authorities as engines of creative entrepreneurial salvation. Coalition politicians are now, with this Bill, encouraging them to stray beyond local issues and into the wide world beyond. Their conservative predecessors in the distant 1980s, contrariwise, used to accuse them of failing to stick to local issues and lavishing taxpayers' money inappropriately on supporting causes abroad in e.g. Namibia or Nicaragua more enthusiastically than central government.
23. The general power of competence is a significant innovation. We are familiar with the refrain that local authorities are pure creatures of statute and as such can only do that which statute permits or requires. You must look for a positive source of power rather than a negative prohibition.
24. Under the Bill, the position is conceptually no different. But in practice the position is reversed: the statutory general power at a stroke puts the authority on a par (subject to

the power being properly exercised) with a private individual who under our libertarian unwritten constitution can do anything the law does not prohibit. History should remember that as a landmark in local government law, even if restrictive judicial decisions reduce its impact to little more than a variant of the superseded wellbeing powers.

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