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Local Government Update

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INTRODUCTION

1. This update covers three local government topics, an Act, a (draft) Bill and subordinate legislation. The Act is the Well-being of Future Generations (Wales) Act 2015 (“the Well-being Act”), with which there is associated consultation draft Welsh Government Guidance. The Bill is the draft Local Government (Wales) Bill (“the Local Government Bill”). The subordinate legislation is made pursuant to Part III (Conduct of Local Authority Members) of the Local Government Act 2000 (“LGA 2000”). There are draft Regulations relating to Standards Committees, Investigations, Dispensations and Referrals (“the Standards Regulations”). There is also an Order relating to the Model Code of Conduct (“the Code of Conduct Order”). In addition, the Independent Commission on Local Government Finance in Wales, chaired by Professor Tony Travers of LSE, and supported by CIPFA, has concluded that reform to council funding in Wales, including local authorities raising a far greater share of their income from local taxes, would deliver “significant benefits”; and a Consultation, begun on 15 March 2016, ended on 6 June 2016, on a proposal to revoke the Local Government (Performance Indicators) (Wales) Order 2012, made under the Local Government (Wales) Measure 2009, because the indicators are regarded as largely duplicated or superseded by other performance data.

THE WELL-BEING ACT

2. Part 2 of the Well-being Act:-

- (1) Explains what is meant by “sustainable development” and requires public bodies to carry out sustainable development (Sections 2 and 3);
- (2) Requires the bodies to set well-being objectives that are to contribute to the achievement of well-being goals and to take steps to meet those objectives (Section 3);
- (3) Requires the bodies to do those things in accordance with the sustainable development principle (Section 3);

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- (4) Explains what the well-being goals are and what it means to do things in accordance with the sustainable development principle (Sections 4 and 5);
- (5) Requires indicators that measure progress towards achieving the well-being goals (Section 10), and reports on future trends in the well-being of Wales (Section 11), to be published by the Welsh Ministers;
- (6) Requires the bodies to report annually on their progress towards meeting their well-being objectives (Sections 12 and 13 and Schedule 1); and
- (7) Requires the Auditor General for Wales to carry out examinations into the extent to which public bodies set objectives and take steps to meet them in accordance with the sustainable development principle (Section 15).

3. Part 3 of the Act:-

- (1) Establishes the office of Future Generations Commissioner for Wales (Section 17 and Schedule 2);
- (2) Provides for the Commissioner to promote the needs of future generations by monitoring and reporting on the extent to which the public bodies are setting and seeking to meet their well-being objectives in accordance with the sustainable development principle (Section 18);
- (3) Provides for the Commissioner to carry out reviews of public bodies (Section 20); and
- (4) Establishes a panel of advisers to the Commissioner (Sections 26 to 28).

4. Part 4 of the Act:-

- (1) Establishes a public services board for each local authority area in Wales and sets out who else a board may work with (Chapter 1);

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- (2) Requires boards to improve the well-being of their area by contributing to the well-being goals, which they are to do by assessing well-being in their area, setting local objectives designed to maximise the board's contribution (within its area) to the achievement of the well-being goals and taking steps to meet those objectives (Chapter 2, Section 36);
- (3) Requires boards to do those things in accordance with the sustainable development principle (Chapter 2, Section 36);
- (4) Requires boards to publish local well-being plans setting out their local objectives and how they propose to take steps to meet them (Chapter 2, Section 39);
- (5) Makes specific provision about how local well-being plans apply to community councils and how, in that way, a community council may contribute to the activity of the public services board in its area (Chapter 2, Section 40); and
- (6) Provides for boards to merge or otherwise collaborate (Chapter 3).

LOCAL GOVERNMENT BILL

5. The Local Government Bill, preceded by the White Paper, "Reforming Local Government: Power to Local People" (February 2015) was the subject of consultation between 24 November 2015 and 15 February 2016. Its objective is to complete the programme of local authority mergers in Wales, commenced by the Local Government (Wales) Act 2015, and set out a revised legislative framework for local authority obligations. It consists of eight Parts:-

- (1) Local government areas in Wales;
- (2) A General Power of Competence ("GPOC");
- (3) Promoting Access to Local Government;
- (4) Functions;
- (5) Improvement of Governance;
- (6) Community Councils;
- (7) Workforce matters; and
- (8) General.

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LOCAL GOVERNMENT AREAS

6. Part 1 of, and Schedules 1 to 5 to, the Local Government Bill contain provisions for the reorganisation of County and County Borough Councils in Wales, and the establishment of eight or nine new Counties and Councils from 1 April 2020, the difference being the configuration of the proposed new Counties in North Wales. Part 1 also makes provision about the constitution of the new Councils and the election of their Members. Schedule 1 sets out the new Counties. It contains two alternative tables. This is to reflect the two options under consideration.

7. The new Cabinet Secretary for Finance and Local Government has, however, announced that these plans, which have met with strong resistance, are to be reviewed.

GPOC

8. Chapter 1 of Part 2 of the Local Government Bill provides a “qualifying authority” with GPOC. A “qualifying authority” is a County Council or “a community council with competence”. Chapter 2 relates to community councils with competence. The power is similar to GPOC in England under the Localism Act 2011. It will enable alternative delivery models and shared services to be developed.

9. GPOC is a power of first resort. It is intended to be a broader power than the power of well-being provided by LGA 2000, and construed restrictively by the Court of Appeal in Risk Management Partners Ltd v Brent LBC (2009) EWCA Civ 490, (2010) LGR 99: paragraph 95 of the Explanatory Notes. Resort to GPOC involves a five stage process.

10. The first question is whether what is proposed is within the extremely broad language of Clause 23 of the Local Government Bill, which confers GPOC. GPOC has the following features:-

- (1) The power is to do anything “that individuals generally may do”;
- (2) The breadth of “things that an individual may do” is emphasised by the statement that GPOC applies to things which an individual may do even though they are “in nature, extent or otherwise ... unlike anything” that the authority may do, apart from GPOC, or unlike anything that other public bodies may do;

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- (3) Subject to some exceptions, the power to do something is a power to do it “in any way whatever”, including power -
- (i) “to do it anywhere in Wales or elsewhere”,
 - (ii) “to do it for a commercial purpose or otherwise for a charge, or without charge”, and
 - (iii) “to do it for, or otherwise than for, the benefit of the authority, its area, or persons resident or present in its area”.

11. GPOC is, importantly, expressed not to be limited by the existence of any other power. Nor is any other power limited by the existence of GPOC.

12. Limits are, however, placed on GPOC. This takes one on to the second question. That is whether there is a limitation or restriction for the purposes of Clause 24 of the Local Government Bill. For this purpose there is a distinction between pre-commencement limitations and post-commencement limitations.

13. Moreover, any statutory duties which must be discharged in connection with the exercise of any power, for example the PSED, and all EU obligations, must be duly fulfilled. The third question is what duties there may be and whether they have been fulfilled.

14. On the basis that, (i) what is proposed is within the broad GPOC power, (ii) there is no Clause 24 limitation, and (iii) all relevant statutory duties have been and/or will be duly discharged, the fourth question is whether the manner of exercise of the power is in accordance with all the general administrative law principles that apply to the exercise of any power, including GPOC. These of course include propriety of purpose and reasonableness. See the decisions on GPOC in England in Manydown Co Ltd v Basingstoke and Deane BC (2012) EWHC 977 (Admin), at paragraph 145, and R (MK) v Barking and Dagenham LBC (2013) EWHC 3486 (Admin).

15. The fifth, and, final stage is to consider whether “charging” (not making a profit) is involved, in which case one must look at Clause 25 of the Local Government Bill; or whether a “commercial purpose” is involved, in which case one must look at Clause 26, and trading through a company

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is required, when the activity can be carried out for a commercial purpose, i.e. when it is an activity which could also be carried out for a non-commercial purpose.

PROMOTING ACCESS

16. Chapter 1 of Part 3 of the Local Government Bill contains an overview of Part 3 on a proposed single overarching public participation duty and the confirmation of the requirement to consult on the annual budget. Chapter 2 contains provisions requiring County Councils to promote access to, and public participation in, local government. There must be a Public Participation Strategy: Clauses 38 and 39.

17. Chapter 3 requires the establishment by County Councils of Community Area Committees for the purpose of ensuring that community interests and priorities are taken into account by County Councils in exercising their functions. Chapter 4 places County Councils under duties in respect of “improvement requests”, which require a County Council to enter into discussions with certain community bodies for the purpose of improving local outcomes: Clauses 65-74. They are similar to “participation requests” introduced in Scotland by the Community Participation etc Act 2015, about which COSLA, and the Welsh LGA, have expressed concerns.

18. Chapter 5 makes provision about improving public access to local authority meetings. Chapter 6 requires County Councils to publish a guide in ordinary language to accompany their constitutions, together with official addresses for their Members to which correspondence may be sent. All in all, additional burdens at a time of austerity for front-line services.

FUNCTIONS

19. Chapter 1 of Part 4 of the Local Government Bill contains an overview of Part 4. The provisions within Chapters 2 to 4 impose duties upon the Members of County Councils relating to the performance of their functions as Members, and sets out how breaches of these duties are to be dealt with. The conflation of prescriptive and far-reaching “performance duties” with the Standards regime is likely to prove problematic.

20. Chapter 5 requires the Elected Mayor or Executive Leader of a County Council operating executive arrangements to set objectives for the executive, and requires candidates who wish to

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stand for Elected Mayor or Executive Leader to prepare a written manifesto. It also enables the appointment of Members as assistants to the executive.

21. Chapter 6 requires County Councils to have a Chief Executive and makes further provision about that role. It also makes provision about the position of the Head of Democratic Services.

22. Chapter 7 makes provision about Overview and Scrutiny Committees, including the voting rights of co-opted members of those Committees. It also requires Standards Committees to prepare Annual Reports on the exercise of their functions and other matters.

IMPROVEMENT OF GOVERNANCE

23. At present, County Councils are subject to a “general duty in relation to improvement” and the associated improvement assessment and intervention regime provided for in Part 1 of the 2009 Local Government (Wales) Measure (“the 2009 regime”). The 2009 regime will be repealed in relation to County Councils by Clause 147 of the Draft Bill. The provisions in Part 5 replace the 2009 regime with a regime focused on the quality of governance in County Councils, with greater local determination and accountability. However, they are not well aligned with the new duties in the Well-being Act, which in a number of respects they duplicate. Part 5 of the Local Government Bill sets out arrangements for a new regime to improve the governance of County Councils. Chapter 1 places a general duty on County Councils to make, implement and comply with governance arrangements which must in turn comply with the requirements imposed by and under the Bill. Under Chapter 2, County Councils must prepare and publish a Corporate Plan, consult on it, keep it under review and report on progress made against the matters set out in the Plan.

24. Chapter 3 sets out how County Councils’ compliance with their duties in relation to governance under Chapter 1 is to be assessed; through “self assessment”, “peer assessment” and “combined assessment” (that is, a joint assessment carried out by certain regulators).

25. Chapter 4 provides the Welsh Ministers with a power to arrange a review of a County Council’s governance arrangements and to intervene when they consider it necessary or appropriate in order to ensure that a County Council Complies with its duties in relation to governance under Chapter 1. It is proposed in Chapter 7 that the onus should be on the Corporate Governance and Audit Committee to hold the authority to account for taking action in response to

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a self assessment, peer assessment, combined assessment and independent governance review. All in all, more administrative burdens, costs and complexities.

COMMUNITY COUNCILS

26. Part 6 of the Local Government Bill relates to Community Councils. Chapter 1 provides for a review of Community Council arrangements. Chapter 2 places a duty on County Councils to consider the training needs of Community Councillors, and to make arrangements to meet those needs. It also places a duty on Community Councillors to complete compulsory training identified by the County Councils and sets out how breaches of this duty are to be dealt with. Chapter 3 provides that Community Council Elections will be fixed at every five years from 2023 and makes related changes to provision about Community Councillors' term of office.

WORKFORCE MATTERS

27. Part 7 of the Local Government Bill relates to workforce matters. It provides for Guidance from the Welsh Ministers on "workforce matters" to which regard must be had. They are defined by Clause 173. The Ministerial powers over workforce matters as outlined in Part 7 are far reaching. They potentially allow Welsh Ministers to make regulations that can affect all of the local authority workforce on a wide range of workforce matters. Part 7 also provides for the establishment of a statutory Public Services Staff Committee. Its objective is to ensure that the terms and conditions of local authority staff are protected so that no-one will be disadvantaged by transfer to a new authority.

NEW CONDUCT REGULATIONS

28. The Welsh Government issued a Consultation, for response by 10 January 2016, seeking views on the contents of two Statutory Instruments, both to be made under Part III of LGA 2000, in relation to the conduct of councillors in Wales. They were the Local Government (Standards Committees, Investigations, Dispensations and Referral) (Wales) Regulations 2016 and the Local Authorities (Model Code of Conduct) (Wales) (Amendment) Order 2016.

29. The draft Standards Committee Regulations would amend the Standards Committees (Wales) Regulations 2001, SI 2001/2283, the Local Government Investigations (Functions of Monitoring Officers and Standards Committees) (Wales) Regulations 2001, SI 2001/2281, and the

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Standards Committees (Grant of Dispensations) (Wales) Regulations 2001, SI 2001/2279. There are amendments to facilitate the establishment and operation of Joint Standards Committees; a change to the term of office of local authority members of Standards Committees; changes in relation to the publication of misconduct reports; provision for the referral of misconduct reports to another authority's Standards Committee; limitation upon the period of suspension imposed by a Standards Committee so that it does not extend beyond the end of a member's term of office; a proposed procedure for an application for permission to appeal a Standards Committee determination to the Adjudication Panel for Wales; and provision for the referral of a dispensation application to another authority's Standards Committee.

MODEL CODE OF CONDUCT

30. Section 50(2) of LGA 2000 requires a Model Code to be issued by Order as regards the conduct which is expected of members, and co-opted members, of "relevant authorities" (as defined) in Wales. These are County Councils, County Borough Councils, Community Councils, Fire and Rescue Authorities and National Park Authorities. There was duly made the Local Authorities (Model Code of Conduct) (Wales) Order 2008, S.I. 2008/788 (W.82), ("the 2008 Order"). The Schedule to the 2008 Order sets out such a Model Code of Conduct.

31. This is now amended by the Local Authorities (Model Code of Conduct) (Wales) (Amendment) Order 2016, S.I. 2016/84 (W.38), ("the 2016 Order"), which came into force on 1 April 2016. The 2016 Order recites that the Welsh Ministers (i) have carried out the requisite consultation and (ii) are satisfied that the amendments are consistent with the principles specified in the Conduct of Members (Principles) (Wales) Order 2001, S.I. 2001/2276.

32. Article 2 of the 2016 Order amends the following paragraphs of the Model Code set out in the Schedule to the 2008 Order:

paragraph 1(1), by inserting a definition of "register of members' interests";

paragraph 1(2), by inserting a definition of "proper officer" and providing clarification with regard to references to Standards Committees in relation to a Community Council;

paragraph 3(a), by omitting the reference to police Authorities;

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paragraph 6(1)(c), by removing the requirement for members to report potential breaches of their Code of Conduct to the Public Services Ombudsman for Wales;

paragraphs 11(4), 15(2), 16(2) and 17, by transferring some functions from Monitoring Officers to the proper officers of Community Councils;

paragraph 12(2)(b)(iv), to reflect the new provisions contained in Part 8 of the Local Government (Wales) Measure 2011 in relation to allowances and payments;

paragraph 14, by inserting new sub-paragraphs (2A) and (2B) which permit members to submit written submissions to a meeting which is dealing with a matter in respect of which a member has a prejudicial interest: written submissions are permitted only in those circumstances in which a member would otherwise be permitted to make oral representations to a meeting in relation to a matter, and if the member's authority adopts a procedure for the submission of written submissions, members must comply with that procedure;

paragraph 15 is restated. The restatement clarifies that any interest disclosed, whether that interest is disclosed in accordance with paragraphs 11 or 15 of the Model Code, should be registered in the authority's register of members' interests, by giving notification to the Monitoring Officer, or, in relation to a Community Council, to the proper officer of that authority.

33. Article 2 of the Order omits paragraph 10(2)(b) of the Model Code set out in the Schedule to the 2008 Order. This clarifies that a member of a relevant authority is not to be regarded as having a personal interest in a matter when making, or participating in, decisions on behalf of the authority simply for the reason that the business being considered at the meeting affects that member's ward.

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July 2016