

Consultation on a Local Authority General Power of Competence

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Foreword

The Scottish Government would like to invite you to respond to this consultation on a local authority General Power of Competence.

We are pleased to be taking forward this work as part of our commitment to joint partnership working with COSLA and Local Government and would like to ask for your views and perspectives on potential legislative changes to enable local authorities to more effectively deliver public services.

Background to Request for Consideration of a Local Authority General Power of Competence

Currently, local authorities may do only those things which statute empowers them to do. Anything else is *ultra vires*¹.

A General Power of Competence is 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”² and is currently available to local authorities in England, Wales, and Northern Ireland.

A number of representations have been made to the Scottish Government seeking the introduction of a similar General Power of Competence for local authorities in Scotland.

However, despite the existence of a General Power of Competence in England, Wales and Northern Island, 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.

The general power of competence introduced by the Localism Act 2011 enables councils in England to do things:

- a) an individual may generally do
- b) anywhere in the UK or elsewhere
- c) for a commercial purpose or otherwise, for a charge or without a charge
- d) 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).

However, limits apply where a local authority provides a service otherwise than for a commercial purpose. The general power confers power to charge a person for providing a 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) the authority does not have an existing power to charge for providing the service.

A local authority cannot trade in services that it has a statutory duty to provide. A local authority also cannot use the general power to introduce new local taxes or to undertake borrowing outwith the existing rules. As such, a local authority cannot use the general power primarily to raise money but it can receive income as a consequence of using the power for a different primary purpose.

Whilst there appear to be no limits on charging for commercial enterprises, a local authority cannot use the general power to profit from charging for services – this power is instead conferred by the Local Government Act 2003. The general power is

¹ “*Ultra vires*” is a Latin phrase meaning “beyond the powers” and is commonly defined in law as an action that exceeds the legal scope of an entity’s authority.

² Paragraph 163 of the [Local Government and Elections \(Wales\) Act 2021](#)

subject to a duty to secure that, taking one financial year with another, the income from charges as permitted by the general power does not exceed the costs of provision. This provision applies separately to each type of service.

As well as including restrictions on profiting from charging for services, the General Power of Competence can also not be used to levy taxes or to borrow beyond existing statutory powers and the requirements of the prudential framework.

The Local Government Act 2003 enables councils to trade in activities related to their functions on a commercial basis with a view to profit through a company. In addition, the 2003 Act empowers councils to charge for any discretionary services on a cost recovery basis.

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.

This consultation also seeks to explore how best to deliver a level of confidence and assurance to local authorities to ensure that any further powers are utilised effectively.

Responses are sought, in relation to both existing legislative powers in Scotland and the wider legislative powers in England, Wales and Northern Ireland, on the barriers to using such power, the concerns and perceived risks, and potential conflict with other legislative provisions.

Views are also sought on how best to ensure that legislation contains the right balance of flexibility and control to mitigate risks arising from any greater statutory freedoms.

The Existing Statutory Framework

This section of the paper summaries the existing legislative powers relevant to consideration of a general power of competence. Annex A provides more detail on the existing legislative provisions.

Local Authority General Powers

The following key pieces of legislation are intended to provide local authorities with 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 Local Authorities (Goods and Services) Act 1970³ Supply of Goods and Services

This Act allows a local authority to enter into an agreement for the supply of goods and services, including use of property or facilities, and maintenance of land or buildings.

However, this excludes authority to construct any buildings or works; or to be supplied with any property or provided with any service except for the purposes of a local authority's statutory functions.

Limitations of the Local Authorities (Goods and Services) Act 1970

A local authority can only enter into an agreement up to the value of any statutory limit set by Ministers. For any supply of goods or services above this limit, Ministerial consent is required. As no statutory limit has been set, any supply of goods or services currently requires the consent of the Scottish Ministers. It is open to Ministers, by order, to set a statutory limit if that was thought desirable.

A local authority must also consider whether such activity will contribute to the well-being of local individuals or the local area, thereby precluding a local authority from trading beyond the local area. The concept of contributing to well-being may also be subject to significant disparity in its interpretation, potentially introducing an element of risk in how a contribution to well-being is defined.

Section 69 of the Local Government (Scotland) Act 1973⁴ Subsidiary Powers

Section 69 of the 1973 Act gives a local authority the power "to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions".

Section 83 of the Local Government (Scotland) Act 1973⁵ Power of Local Authorities to Incur Expenditure for Certain Purposes Not Otherwise Authorised

Section 83 of the 1973 Act permits a local authority to incur expenditure on contributions to any charitable body, any body which provides a public service in the United Kingdom otherwise than for the purposes of gain; or any fund which is raised in connection with a particular event directly affecting persons resident in the United Kingdom.

Limitations of the Local Government (Scotland) Act 1973

The subsidiary power in section 69 of the 1973 Act does not include power to raise money, whether by means of rates or borrowing, or to lend money, except in accordance with the enactments relating those matters. In other words, it is legislation on those specific topics that governs the extent to which councils can levy

³ [Local Authorities \(Goods and Services\) Act 1970](#)

⁴ [Section 69 Local Government \(Scotland\) Act 1973](#)

⁵ [Section 83 Local Government \(Scotland\) Act 1973](#)

rates and borrow or lend money, and section 69 cannot be relied upon for those matters. The powers to borrow and lend money are contained in the Local Authority (Capital Financing and Accounting) (Scotland) Regulations 2016. The power of local authorities to invest money is governed by the Local Government Investments (Scotland) Regulations 2010, under which the consent of the Scottish Ministers is required.

The subsidiary power in section 69 of the 1973 Act ostensibly gives a local authority wide latitude in the discharge of its functions whilst implicitly restricting a local authority's ability to do 'anything' to only those things which facilitate an existing statutory function.

The Local Government in Scotland Act 2003⁶ Power to Advance Well-being

Section 20 of the 2003 Act gives a local authority a power to "do anything which it considers is likely to promote or improve the well-being of its area and/or persons within that area". It includes the power to incur expenditure, give financial assistance to any person, enter into arrangements or agreements with any person, co-operate with, or facilitate or co-ordinate the activities of, any person, exercise on behalf of any person any functions of that person, and provide staff, goods, materials, facilities, services or property to any person.

Existing power for Scottish Ministers to extend the meaning of well-being

Paragraph 5 of Section 20 of the 2003 Act permits the Scottish Ministers to extend the meaning of "well-being" by means of a statutory instrument, provided that a draft of it has been laid before and approved by resolution of the Scottish Parliament and that local authorities have been consulted.

Limitations of the Local Government in Scotland Act 2003

The 2003 Act states that the power cannot be used to do something that the local authority is explicitly prohibited or prevented from doing under another enactment. It also cannot be used to unreasonably duplicate the functions of another person (unless the person concerned consents).

This restriction may preclude a local authority from entering into commercial agreements or agreements to provide services beyond existing statutory functions, which could theoretically be provided by another person or entity. In other words, the availability of section 20 of the 2003 Act does not enhance the ability of local authorities to enter into commercial agreements or agreements to provide services.

The general power for a local authority to 'do anything to advance well-being' is restricted to its local area and/or persons living within that area.

Section 22 says expressly that the power under section 20 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.

⁶ [Local Government in Scotland Act 2003](#)

Local authorities may be reluctant to go too far in relying on section 20 of the 2003 Act, for fear of being held to have acted ultra vires. In terms of constraints on the section 20 power, whilst case law is fairly limited, the case of *Portobello Park Action Group Association v City of Edinburgh Council* gives some indication of the approach of the courts. It indicates an inclination to interpret the provision in a narrow way. The judgement makes clear that, even though section 20 refers to a power to do “anything”, this should not be understood as conferring a power to act contrary to domestic law, or to breach contractual obligations, disregard third party rights or disregard planning or other administrative constraints. A similarly narrow approach was taken in England, in applying the [now repealed] equivalent power to advance wellbeing, namely that in section 2 of the Local Government Act 2000. This arose in the case of *R v Risk Management Partners Ltd ex parte the Council of the London Borough of Brent and the London Authorities Mutual Limited and the Council of the London Borough of Harrow*. This concerned a number of local authorities in London which had set up a mutual insurance company, in reliance on section 20, the argument being that this would save considerable sums of money on insurance. The savings could be used to deliver front-line services and so enhance the wellbeing of citizens in the respective local authority areas. It was held that this could not be done in reliance on section 20, given that there was no direct link between delivering savings which could be used to deliver front-line services and the wellbeing of citizens.

Powers to borrow and invest money

The Local Authority (Capital Financing and Accounting) (Scotland) Regulations 2016 (the 2016 Regulations)⁷

The 2016 Regulations set out the purposes for which a local authority may borrow which include for financing capital expenditure of the authority or certain third parties, to provide grants for use towards capital expenditure, and to lend to common good funds and other statutory bodies.

Limitations of the Local Authority (Capital Financing and Accounting) (Scotland) Regulations 2016

A local authority can only borrow for capital expenditure, in line with the UK budgetary framework, or to lend to other public bodies, as defined in the 2016 Regulations. A local authority may borrow money for other purposes, but only with the consent of the Scottish Ministers.

Local Government Investments (Scotland) Regulations 2010⁸

These Regulations require the consent of the Scottish Ministers for a local authority to invest money. The consent is provided by statutory guidance⁹ and the terms of the consent must be complied with.

The consent permits a local authority to invest money for any purpose relevant to its functions under any enactment, or for the purposes of the prudent management of its financial affairs.

⁷ [The Local Authority \(Capital Finance and Accounting\) \(Scotland\) Regulations 2016](#)

⁸ [The Local Government Investments \(Scotland\) Regulations 2010](#)

⁹ [Local government finance circular 5/2010: investment by Scottish Local Authorities](#)

Local authorities are therefore able to determine what investments they make, both the type of investment and also the duration of the investment.

In taking investment decisions, a local authority must have regard to (a) 'Treasury Management in the Public Services: Code of Practice and Cross-sectoral Guidance Notes' published by the Chartered Institute of Public Finance and Accountancy in 2017; and (b) 'The Prudential Code for Capital Finance in Local Authorities' published by the Chartered Institute of Public Finance and Accountancy in 2017.

Local authorities are required to produce an Annual Investment Strategy. Within this strategy, a local authority is required to set out the types of investments they will permit in the financial year and the limit set on such investments at any time in the year. Local authorities are also required to identify the different types of treasury risk that their permitted types of investment are exposed to: credit or security risk (of default); liquidity risk (risks associated with committing funds to longer-term investments); and market risk (effect of market prices on investment value). The Strategy should describe the controls in place to mitigate those risks.

Limitations of the Statutory Guidance

In the event that a local authority makes an investment that is not listed as a permitted investment in their Annual Investment Strategy that investment will not be made in accordance with the Consent and as such it will be ultra vires. The exception to this is where the Consent requires the local authority to recognise as an investment a financial transaction that relies on separate legislative powers, for example loans to third parties.

CIPFA Prudential and Treasury Management Codes of practice

Local authorities are required by legislation to comply with the Prudential Code for Capital Finance in Local Authorities and the Treasury Management in the Public Services: Code of Practice and Cross-Sectoral Guidance Notes. These Codes are intended to ensure that all capital expenditure plans and treasury management plans are prudent, affordable and sustainable and that there are effective financial planning, option appraisal, risk management and governance strategies in place to achieve a prudential approach to capital expenditure, investment and debt.

The Prudential Code requires that 'The local authority shall ensure that all of its capital and investment plans and borrowing are prudent and sustainable. In doing so it will take into account its arrangements for the repayment of debt (including through MRP/repayment of loans fund) and consideration of risk and the impact, and potential impact, on the authority's overall fiscal sustainability.'

The Prudential Code also states: 'In order to ensure that over the medium term net debt will only be for a capital purpose, the local authority should ensure that gross external debt does not, except in the short term, exceed the total of the capital financing requirement in the preceding year plus the estimates of any additional capital financing requirement for the current and next two financial years.'

Authorities **must not borrow more than or in advance of their needs purely in order to profit** from the investment of the extra sums borrowed. Authorities are also required to consider carefully whether they can demonstrate value for money in borrowing in advance of need and can ensure the security of such funds.

Comparison with Local Authority Legislative Powers in England, Wales and Northern Ireland

General provisions

The Localism Act 2011 provides local authorities in England with a general power of competence, described as “power to do anything that individuals generally may do...even though they are in nature, extent or otherwise unlike anything the authority or other public bodies may otherwise do... 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.

In England, the General Power of Competence sits alongside local government’s existing powers to trade and charge. New powers contained in the Localism Act also provide the ability to charge for discretionary services on a cost recovery basis.

The Local Government and Elections (Wales) Act 2021 and The Local Government Act (Northern Ireland) 2014 provide similar powers to local authorities in those areas.

Unlike in England where the general power operates alongside the power to advance well-being, in Wales the well-being power will no longer apply to Welsh local authorities once the general power is commenced.

Boundaries of the general power

In England, Wales and Northern Ireland, the general power does not enable a local authority to do anything which the authority is unable to do by virtue of a any prohibition, restriction or other limitation expressly imposed by a statutory provision.

The general power does not confer power for a local authority to:

- a) make or alter arrangements for the discharge of its functions by committees, joint committees, officers etc);
- b) make or alter arrangements for local authority governance;
- c) make or alter any contracting-out arrangements.

Limits on charging in exercise of general power

Limits apply, in England, Wales and Northern Ireland, where a local authority provides a service otherwise than for a commercial purpose.

The Localism Act 2011 provides that the general power confers power to charge a person for providing a 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) the authority does not have an existing power to charge for providing the service.

Under the Localism Act, a local authority cannot trade in services it has a statutory duty to provide.

A local authority also cannot use the general power to introduce new local taxes or to undertake borrowing out with the existing rules. As such, a local authority cannot use the general power primarily to raise money but they can receive income as a consequence of using the power for a different primary purpose.

The Localism Act also states that a local authority cannot use the general power to profit from charging for services. “The general power is subject to a duty to secure that, taking one financial year with another, the income from charges as permitted by the general power does not exceed the costs of provision. This provision applies separately to each type of service.”

The Local Government and Elections (Wales) Act 2021 and the Local Government Act (Northern Ireland) 2014 contain similar provisions.

Limits on doing things for commercial purpose in exercise of general power

The general power in the Localism Act 2011 confers power on a local authority to do things for a commercial purpose only if they are things which the authority may, in exercise of the general power, do otherwise than for a commercial purpose.

When undertaking activity for a commercial purpose, the Localism Act requires that a local authority must do them through a company.

A local authority may not do things for a commercial purpose in relation to a person if a statutory provision requires the authority to do those things in relation to the person.

The Local Government and Elections (Wales) Act 2021 contains similar provisions but includes a further requirement that local authorities have a duty to have regard to guidance issued by the Welsh Ministers about exercising the general power of competence to do anything for a commercial purpose.

The Local Government Act (Northern Ireland) 2014 contains no express limitations on doing things for a commercial purpose in exercise of the general power.

Power to make supplementary provision

Each of the Acts set out similar requirements with regards to supplementary provisions. The Acts are described more fully in Annex B.

Responding to this Consultation

We are inviting responses to this consultation by 31 March 2025.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/local-government-and-communities/a-local-authority-general-power-of-competence>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 31 March 2025.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Local Government Finance
Scottish Government
Victoria Quay
Edinburgh
EH6 6QQ

Responses may also be emailed to: GPCconsultation@gov.scot

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted,

please send them to the contact address above or at GPCconsultation@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Respondent Information Form

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- ☐ Individual
- ☐ Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email Address

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- ☐ Publish response with name
- ☐ Publish response only (without name)
- ☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- ☐ Yes
- ☐ No

Questionnaire

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.

Annex A

Existing Local Authority Legislative Powers in Scotland

Local Authority General Powers

1. The following key pieces of legislation are intended to provide local authorities with the freedom to design and deliver services according to local need. However, due to the ultra-vires rule many local authorities are reluctant to explore the scope of these provisions beyond specific statutory duties due to concern as to legal challenge and the interpretation of the extent of the powers conferred by these legislative provisions.

The Local Authorities (Goods and Services) Act 1970¹⁰ (the 1970 Act)

Supply of Goods and Services

2. Chapter 39, section 1 of the 1970 Act allows a local authority to enter into an agreement for:
 - (a) the supply of any goods or materials;
 - (b) the provision of any services;
 - (c) the use of any property belonging to or facilities under the control of the authority and the services of any person employed in connection with the property or facility in question;
 - (d) the carrying out of maintenance in connection with land or buildings for which the body is responsible and the purchase and store of any associated goods or materials which may be required.

On such terms as the parties consider appropriate.

3. However, the 1970 Act specifically excludes authority to:
 - a) construct any buildings or works; or
 - b) to be supplied with any property or provided with any service except for the purposes of a local authority's statutory functions
4. The 1970 Act also includes a provision that prohibits a local authority from entering into an agreement under the trading operation provisions if the commercial services income accruing to it in any financial year will exceed the statutory limit without the prior consent of the Scottish Ministers. No statutory limit has ever been set and therefore any such activity will require Ministerial consent (regardless of materiality).
5. Further, a local authority is required to have regard to whether entering into an agreement for the supply of goods or services will be likely to promote or improve the well-being of either or both their local area and persons within that area.

The Local Government (Scotland) Act 1973 (the 1973 Act)

Subsidiary Powers

6. Section 69 of the Local Government (Scotland) Act 1973 provides local authorities with the power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any

¹⁰ [Local Authorities \(Goods and Services\) Act 1970](#)

property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

7. However, the Act also imposes limitations on this, requiring that a “local authority shall not by virtue of this section raise money, whether by means of rates or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.”
8. Section 69 also permits two or more local authorities to make arrangements for defraying any expenditure incurred by one of them in exercising any functions exercisable by both or all of them.
9. The provisions of the Act, whilst specifically excluding borrowing or lending powers, which are contained in 2016 regulations, give a local authority wide latitude in the discharge of its functions whilst implicitly restricting a local authority’s ability to do ‘anything’ to only those things for which a statutory function exists.

The Local Government in Scotland Act 2003

Power to Advance Well-being

10. Section 20 of the 2003 Act gives a local authority a power to do anything which it considers is likely to promote or improve the well-being of its area and/or persons within that area. This includes the power to incur expenditure, give financial assistance to any person, enter into arrangements or agreements with any person, co-operate with, or facilitate or co-ordinate the activities of, any person, exercise on behalf of any person any functions of that person, and provide staff, goods, materials, facilities, services or property to any person.
11. However, this power is subject to some limits and restrictions, as set out in section 22 of the 2003 Act. These include that the power cannot be used to do something that the local authority is prohibited or prevented from doing under another enactment. It also cannot be used to unreasonably duplicate the functions of another person.
12. The power under section 20 contains an express limitation: it states that it does not enable a local authority to do anything for the purposes of enabling the authority to raise money, whether by levying or imposing any form of tax or charge, by borrowing or otherwise.

Section 83 Local Government (Scotland) Act 1973¹¹

Power of Local Authorities to Incur Expenditure for Certain Purposes Not Otherwise Authorised

13. Section 83 of the 1973 Act permits a local authority to incur expenditure on contributions to any charitable body, any body which provides a public service in the United Kingdom otherwise than for the purposes of gain; or any fund which is raised in connection with a particular event directly affecting persons resident in the United Kingdom.

¹¹ [Local Government \(Scotland\) Act 1973](#)

Limitations

Limitations imposed by the Local Authorities (Goods and Services) Act 1970:

14. A local authority must consider whether such activity will contribute to the well-being of local individuals or the local area, thereby precluding a local authority from trading beyond the local area. The concept of contributing to well-being may also be subject to significant disparity in its interpretation, potentially introducing an element of risk in how a contribution to well-being is defined.
15. A local authority must gain Ministerial consent to pursue income through the supply of goods and services.

Limitations imposed by the Local Government (Scotland) Act 1973

16. The Local Government (Scotland) Act 1973 imposes limitations on the power 'to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions', requiring that a 'local authority shall not by virtue of this section raise money, whether by means of rates or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.'
17. The powers to generate income from trade, undertake borrowing and undertake investments are contained in the Local Authorities (Goods and Services) Act 1970, the Local Authority (Capital Financing and Accounting) (Scotland) Regulations 2016 and section 40 of the Local Government in Scotland Act 2003 respectively.

The Local Government in Scotland Act 2003

18. The Local Government in Scotland Act 2003 Act, in which the general power for a local authority to 'do anything to advance well-being' is contained, is restricted to its local area and/or persons living within that area.
19. The Act also states that the power cannot be used to do something that the local authority is prohibited or prevented from doing under another enactment. It also cannot be used to unreasonably duplicate the functions of another person. This may preclude a local authority for undertaking activity to utilise the provisions of the 1970 Act to generate income from the supply of goods or services or to benefit the local area beyond specified statutory duties.
20. The power under section 20 also expressly states that it 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.
21. Consideration of the ultra-vires principle may also dissuade local authorities from exploring the full potential of this statute.

Powers to borrow and invest money

Section 40 Local Government in Scotland Act 2003¹²

Power Of Local Authorities to Invest Money

22. Section 40 of the 2003 Act governs the investment of money by local authorities. It permits a local authority to invest money in accordance with regulations made under that section. The current regulations made under that section are the Local Government Investments (Scotland) Regulations 2010¹³.
23. Regulation 2 of the 2010 Regulations stipulates that a local authority may invest money only with the consent of the Scottish Ministers. Finance Circular 5/2010 provides the current consent of the Scottish Ministers for a local authority to invest money and sets out the requirements attached to that consent.
24. Regulation 3 requires that, when making investments, a local authority must comply with the requirements of any consent issued by the Scottish Ministers and have regard to (a) 'Treasury Management in the Public Services: Code of Practice and Cross-sectoral Guidance Notes' published by the Chartered Institute of Public Finance and Accountancy in 2017; and (b) 'The Prudential Code for Capital Finance in Local Authorities' published by the Chartered Institute of Public Finance and Accountancy in 2017.

Finance Circular 5/2010 – The Investment of Money by Scottish Local Authorities¹⁴

25. A local authority may invest money for any purpose relevant to its functions under any enactment, or for the purposes of the prudent management of its financial affairs
26. A local authority must produce an Annual Investment Strategy within which it identifies permitted investments for the year and the limits on such investments at any time in the year.
27. The local authority should identify for each type of permitted investment the objectives of that type of investment. Further, the local authority should identify the treasury risks associated with each type of investment, together with the controls put into place to limit those risks. Treasury risks include credit or security risk of default, liquidity risk – the risks associated with committing funds to longer term investments and market risk – the effect of market prices on investment value.
28. Local authorities must not borrow more than or in advance of their needs primarily to profit from the investment return of the extra sums borrowed.
29. Local authorities must be able to demonstrate that borrowing is for a legitimate purpose such as the exercise of day-to-day cash management or the management of borrowing for capital purposes, as set out in the CIPFA Codes.

¹² [Local Government in Scotland Act 2003](#)

¹³ [The Local Government Investments \(Scotland\) Regulations 2010](#)

¹⁴ [Finance Circular 5/2010 – The Investment of Money by Scottish Local Authorities](#)

30. The statutory guidance states that borrowing in advance may be taken for risk management reasons subject to sound justification. When considering borrowing in advance authorities should balance investment risks, such as the credit and interest risks resulting from the temporary investment of the proceeds of borrowing, against the risk of adverse interest rate movements if borrowing is deferred. Consideration should also be given to the existing debt maturity profile over the medium term.
31. Before any borrowing in advance is permitted, a local authority is required to state this in its policy for borrowing in advance in the Annual Investment Strategy, with justification and reasons why borrowing in advance is considered desirable, the criteria which would be applied in deciding to undertake the borrowing in advance, the maximum extent to which borrowing in advance would be undertaken, and the implication of any borrowing in advance on the Annual Investment Strategy.

The Local Authority (Capital Financing and Accounting) (Scotland) Regulations 2016 (the 2016 Regulations)¹⁵

32. Part 2 of the 2016 Regulations permits a local authority to borrow:
- (a) for financing capital expenditure of the local authority;
 - (b) to give a grant to any person, whether for use by that person or by a third party, towards expenditure which would be capital expenditure of the local authority if incurred by it;
 - (c) for expenditure incurred on works to any land or building in which the local authority does not have an interest, which would be capital expenditure of the local authority if it had an interest in that land or building;
 - (d) for treasury management activities;
 - (e) to lend to other statutory bodies
 - (f) to lend to its common good funds (only in respect of expenditure which would be capital expenditure of the local authority if incurred directly by the authority); and
 - (f) for any other purpose for which the local authority is authorised under any enactment to borrow.
33. A local authority may borrow money for other purposes, but only:
- (a) with the consent of the Scottish Ministers;
 - (b) for expenditure or lending that the authority has power to incur in the exercise of any of its functions;
 - (c) for expenditure or lending of such a nature that the Scottish Ministers are satisfied should be met by such borrowing; and
 - (d) on such terms and conditions as to repayment as the Scottish Ministers allow.
34. Two or more local authorities may combine to exercise their powers of borrowing money jointly.
35. Part 3 permits a local authority to borrow to lend only to other statutory bodies that are authorised to borrow by virtue of being listed in regulation 10, or being so authorised by another enactment.

¹⁵ [The Local Authority \(Capital Finance and Accounting\) \(Scotland\) Regulations 2016](#)

36. A local authority may borrow to advance money to any of its common good funds, but only in respect of expenditure by such a fund which would be capital expenditure of the local authority if incurred directly by the authority. This is in accordance with regulation 11.

Limitations of powers to borrow and invest money

Scope of borrowing powers

37. A local authority can only borrow for capital purposes, in line with the UK budgetary framework, or to lend to other public bodies, as defined in the 2016 Regulations. A local authority may borrow money for other purposes, but only with the consent of the Scottish Ministers.

The Islands (Scotland) Act 2018¹⁶

38. Part 3 section 15 of the Islands (Scotland) Act 2018 requires the Scottish Ministers to establish a scheme for a local authority to request legislation devolving a function to the authority.

39. The Scottish Ministers must also make a scheme for additional powers requests¹⁷¹⁸.

40. A local authority may request that additional functions, duties or responsibilities are transferred to the authority, and the Scottish Ministers are required to consider what action, if any, should be taken, and to publish a statement setting out how and when such action is to be taken.

41. A local authority can request a review of the Scottish Ministers' determination, as long as reasonable cause for making the request can be demonstrated and the Scottish Ministers must not unreasonably refuse to grant the request.

42. There are no equivalent statutory provisions in relation to mainland councils.

43. In relation to the Islands (Scotland) Act 2018, the consultation seeks to establish whether the introduction of similar provisions in relation to mainland councils would be sufficient, in place of a general power of competence, to enable councils to request specific legislative powers whilst avoiding the potential financial risks of a general power of competence and conflict with the statutory purpose of a local authority.

¹⁶ [Islands \(Scotland\) Act 2018](#)

¹⁷ [Additional Powers Request Regulations- non-statutory guidance](#)

¹⁸ [The Additional Powers Request \(Scotland\) Regulations 2019](#)

Competition Law

Local authorities & competition

44. Local authorities interact with markets in four main ways¹⁹:

- a) As a buyer of goods and services, local authorities can benefit from reduced prices, higher quality and innovation that are often the result of healthy competition. Local authorities can help drive healthy competition through effective design and execution of public procurements.
- b) As a shaper of markets, local authorities can seek to introduce competitive pressure between buyers and sellers in order to deliver wider policy objectives over the longer-term.
- c) As a supplier of goods and services, particularly those that would otherwise not be provided at the desired level.
- d) As a regulator of markets, local authorities help make markets function effectively for the benefit of local consumers.

45. A local authority is required to ensure that, when competing alongside private firms, they do not distort the market in ways that might harm the interests of service users and taxpayers.

Competition Act 1998²⁰

46. Competition law applies to any body which is: “(a) supplying a good or service, and (b) that supply is of a commercial nature.”

47. Activities of a commercial nature include:

- a) Profit-making activities in competition with private sector companies.
- b) Non-profit making activities if they are or could be provided by the private sector.
- c) Upstream purchasing if the purchased goods/services are subsequently used to conduct an economic activity downstream.

48. Conduct does not amount to economic activity if it is of a “wholly social nature”, defined as:

- a) Activities that could not conceivably be carried out for profit by a private sector body.
- b) Redistributive activities carried out according to principles of 'solidarity'.

49. This is consistent with existing powers in the 1973 Act which limit the scope of an authority’s ability to generate income to being relevant to a statutory power, and which would not unreasonably duplicate the functions of another person or body.

50. Section 2 sets out that agreements between undertakings and decisions by associations of undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited unless exempted within part 1 of the 1998 Act.

¹⁹ [Local authorities and competition](#)

²⁰ [Competition Act 1998 \(legislation.gov.uk\)](#)

Annex B

Legislative Powers in England, Wales and Northern Ireland

England

The Local Authorities (Goods and Services) Act 1970²¹

1. Under the Local Authorities (Goods and Services) Act 1970 councils were given powers to enter into agreements with each other and with other designated public bodies.

The Local Government Act 2000²²

2. Part I of the 2000 Act gives local authorities powers to take any steps which they consider are likely to promote the well-being of their area or their inhabitants. It also places authorities under a duty to develop community strategies, together with other local bodies, for this purpose. These provisions are intended to give local authorities increased opportunities to improve the quality of life of their local communities.
3. Part I also enables the Secretary of State to remove statutory constraints on authorities' ability to exercise the new well-being power and on their ability to plan co-ordinated local action.

The Local Government Act 2003²³

4. The Local Government Act 2003 enables councils to trade in activities related to their functions on a commercial basis with a view to profit through a company. In addition, the 2003 Act empowers councils to charge for any discretionary services on a cost recovery basis.
5. Originally, trading through a company was confined to certain categories of councils but a Trading Order, in force since October 2009, removed such restrictions.

Localism Act 2011²⁴

6. The Localism Act 2011 provides local authorities in England with a general power of competence, described as "power to do anything that individuals generally may do...even though they are in nature, extent or otherwise unlike anything the authority or other public bodies may otherwise do... 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.

²¹ [Local Authorities \(Goods and Services\) Act 1970](#)

²² [Local Government Act 2000 - Explanatory Notes](#)

²³ [Local Government Act 2003](#)

²⁴ [Localism Act 2011](#)

7. A provision is included that resolves any potential conflict with other statutes by stating that the general power is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.
8. The General Power of Competence sits alongside local government's existing powers to trade and charge. New powers contained in the Localism Act also provide the ability to charge for discretionary services on a cost recovery basis.

Boundaries of the general power

9. The general power enables councils to do things :
 - a) an individual may generally do
 - b) anywhere in the UK or elsewhere
 - c) for a commercial purpose or otherwise, for a charge or without a charge
 - d) 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).
10. The general power is limited by any restrictions imposed by a pre-commencement power in so far as it is overlapped by the pre-commencement power.
11. The general power does not enable a local authority to do anything which the authority is unable to do by virtue of a pre-commencement or post-commencement limitation (a prohibition, restriction or other limitation expressly imposed by a statutory provision).
12. The general power does not confer power for a local authority to:
 - make or alter arrangements for the discharge of its functions by committees, joint committees, officers etc);
 - make or alter arrangements for local authority governance;
 - make or alter any contracting-out arrangements.

Limits on charging in exercise of general power

13. Limits apply where a local authority provides a service otherwise than for a commercial purpose.
14. The general power confers power to charge a person for providing a 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) the authority does not have an existing power to charge for providing the service.
15. A local authority cannot trade in services it has a statutory duty to provide.
16. A local authority cannot use the general power to introduce new local taxes or to undertake borrowing out with the existing rules. As such, a local authority cannot use the general power primarily to raise money but they can receive income as a consequence of using the power for a different primary purpose. For example, a council could give financial assistance to a struggling local enterprise by purchasing share capital just as any individual could. Similarly the council could

lend money to support a local activity and earn interest on the loan and it can raise sponsorship for a community project.

17. A local authority cannot use the general power to profit from charging for services. The general power is subject to a duty to secure that, taking one financial year with another, the income from charges as permitted by the general power does not exceed the costs of provision. This provision applies separately to each type of service.

Limits on doing things for commercial purpose in exercise of general power

18. The general power confers power on a local authority to do things for a commercial purpose only if they are things which the authority may, in exercise of the general power, do otherwise than for a commercial purpose.
19. When undertaking activity for a commercial purpose, the Localism Act requires that a local authority must do them through a company.
20. A local authority may not do things for a commercial purpose in relation to a person if a statutory provision requires the authority to do those things in relation to the person.

Powers to make supplemental provision

21. The 2011 Act provides that if the Secretary of State thinks that a statutory provision (whenever passed or made) prevents or restricts local authorities from exercising the general power, the Secretary of State may by order amend, repeal, revoke or disapply that provision either permanently or for a particular period.
22. If the Secretary of State thinks that the general power is overlapped (to any extent) by another power then, for the purpose of removing or reducing that overlap, the Secretary of State may by order amend, repeal, revoke or disapply any statutory provision (whenever passed or made) either permanently or for a particular period.
23. The Secretary of State may by order make provision preventing local authorities from doing, in exercise of the general power, anything which is specified, or is of a description specified, in the order.
24. The Secretary of State may by order provide for the exercise of the general power by local authorities to be subject to conditions, whether generally or in relation to doing anything specified, or of a description specified, in the order.
25. Conditions may apply to
 - a) all local authorities,
 - b) particular local authorities, or
 - c) particular descriptions of local authority.
26. Before making supplement provisions, the Secretary of State must consult—
 - a) such local authorities,
 - b) such representatives of local government, and
 - c) such other persons (if any), as the Secretary of State considers appropriate.

Wales

Local Government and Elections (Wales) Act 2021²⁵

27. Section 24 of the Local Government and Elections (Wales) Act 2021 provides a general power of competence to qualifying local authorities in Wales.
28. The general power gives all principal councils and certain community councils, the same powers to act that an individual generally has, thus enabling them to do things that are unlike anything they, or any other public body, have done before.
29. It is not necessary for activities undertaken using the general power to benefit the qualifying local authority itself, its area or residents; however, there is no restriction on the activities doing so. In using the general power a qualifying local authority may undertake activities anywhere, including both in and outside of Wales.
30. The general power can be used by qualifying local authorities to, for example, act in their own financial interests, for a commercial purpose, or for a charge.
31. Unlike in England where the general power operates alongside the power to advance well-being, in Wales the well-being power will no longer apply to Welsh local authorities once the general power is commenced.

Boundaries of the general power

32. The general power does not provide qualifying local authorities with the ability to bypass existing prohibitions, limitations or restrictions in legislation passed by the Senedd or UK Parliament on, or before, the day on which this section comes into force.
33. The general power also does not provide qualifying local authorities with the ability to bypass prohibitions, limitations or restrictions in legislation passed by the Senedd or UK Parliament after this section comes into force, if that legislation states that it applies to:
- the general power;
 - all of the qualifying local authority's powers; or
 - all of the qualifying local authority's powers except for certain powers, and the general power is not listed as one of the excepted powers.
34. The general power may not be used to delegate or contract out any of a local authority's functions or to alter its governance arrangements, which remain subject to separate statutory provision

Limits on charging in exercise of general power

35. If using the general power to provide a service, a qualifying local authority may only charge for that service if that service is discretionary, i.e. not a service the authority is under a statutory duty to provide; and the recipient has agreed to the provision of the service.

²⁵ [Local Government and Elections \(Wales\) Act 2021](#)

36. A qualifying local authority may not profit in any financial year when using the general power to charge for a service, unless the service is provided for a commercial purpose. However, subject to that limitation, a qualifying local authority may set charges as it sees fit, including only charging some people for the service or charging different people, or groups of people, different amounts.

Limits on doing things for commercial purpose in exercise of general power

37. A qualifying local authority may use the general power to carry out an activity for a commercial purpose only if the activity is one the authority could also rely on the general power to carry out for a non-commercial purpose.
38. A qualifying local authority cannot carry out an activity in respect of someone for a commercial purpose, if the authority is required by legislation to carry out that activity.
39. If a qualifying local authority wishes to use the general power to do something for a commercial purpose, it must do so through a company or a registered society.
40. Local authorities have a duty to have regard to guidance issued by the Welsh Ministers about exercising the general power of competence to do anything for a commercial purpose.

Power to make supplementary provision

41. The Welsh Ministers may make regulations removing or changing statutory provisions that they think prevent qualifying local authorities from using the general power or obstruct them when using the general power.
42. The Welsh Ministers may make regulations removing overlaps between the general power and other powers (although this cannot be achieved by revising or cutting back the general power itself).
43. The Welsh Ministers may make regulations restricting what a qualifying local authority may do under the general power or making its use subject to conditions.
- 5.1 The Welsh Ministers may make regulations in respect of all qualifying local authorities, specific qualifying local authorities, or a type of qualifying local authority.
44. Before exercising any of these powers, the Welsh Ministers must consult with whichever qualifying local authorities they consider appropriate, any representatives of principal councils and community councils they consider appropriate, and any other persons they consider appropriate.
45. The duty to consult does not apply in respect of any regulations which merely amend earlier regulations so as to:
- extend their application to a specific authority or group of authorities;
 - reduce their application so they stop applying to a specific authority or group of authorities.

NORTHERN IRELAND

Local Government Act (Northern Ireland) 2014²⁶

46. The Local Government Act (Northern Ireland) 2014 provides local authorities in Northern Ireland with a general power of competence, described as “power to do anything that individuals generally may do...even though they are in nature, extent or otherwise unlike anything the authority or other public bodies may otherwise do... in any way whatever, including:
- (a) power to do it for a commercial purpose or otherwise for a charge, or without charge, and
 - (b) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.
47. A provision is included that resolves any potential conflict with other statutes by stating that the general power is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.

Boundaries of the general power

48. The general power is limited by any restrictions imposed by a pre-commencement power in so far as it is overlapped by the pre-commencement power.
49. The general power does not enable a local authority to do anything which the authority is unable to do by virtue of a pre-commencement or post-commencement limitation (a prohibition, restriction or other limitation expressly imposed by a statutory provision).
50. The general power does not confer power for a local authority to:
- make or alter arrangements for the discharge of its functions by committees, joint committees, officers etc);
 - make or alter arrangements for local authority governance;
 - make or alter any contracting-out arrangements.

Limits on charging in exercise of general power

51. Limits apply where a council provides a service otherwise than for a commercial purpose.
52. The general power confers power to charge a person for providing a 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) the authority does not have an existing power to charge for providing the service.
53. A local authority cannot trade in services it has a statutory duty to provide.
54. A local authority cannot use the general power to profit from charging for services. The general power is subject to a duty to secure that, taking one financial year with another, the income from charges as permitted by the general

²⁶ [Local Government Act \(Northern Ireland\) 2014](#)

power does not exceed the costs of provision. This provision applies separately to each type of service.

Powers to make supplemental provision

55. If the Department thinks that a statutory provision (whenever passed or made) prevents or restricts councils from exercising the general power, the Department may by order amend, repeal, revoke or disapply that provision.
56. If the Department thinks that the general power is overlapped (to any extent) by another power it shall seek to remove or reduce that overlap, taking into account the views of the bodies exercising the overlapping powers.
57. The Department may by order amend, repeal, revoke or disapply any statutory provision (whenever passed or made).
58. The Department may by order make provision preventing councils from doing, in exercise of the general power, anything which is specified, or is of a description specified, in the order.
59. The Department may by order provide for the exercise of the general power by councils to be subject to conditions, whether generally or in relation to doing anything specified, or of a description specified, in the order.
60. Before the Department makes an order under this section it must consult—
 - (a) such associations or bodies representative of councils;
 - (b) such associations or bodies representative of officers of councils; and
 - (c) such other persons or bodies, as appear to the Department to be appropriate.
61. If, following consultation, the Department proposes to make an order under this section it must lay before the Assembly a document explaining the proposals and, in particular—
 - (a) setting them out in the form of a draft order; and
 - (b) giving details of consultation under subsection (6).

Limits on power to make supplemental provisions

62. The Department may not make provision unless:
 - (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.
63. An order under this section of the Act may not make provision for the delegation or transfer of any function of legislating.



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