

Local Authority General Power of Competence



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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?

There are uncertainties around its scope, and it tends to only be used as a power of last resort when no other specific power can be identified.

However, there are risks in using it in this way as a power of last resort, as courts have interpreted the power to advance wellbeing in a restrictive way, due to the existence of the ultra vires doctrine. Courts have taken the approach that local authorities can only do what they are specifically allowed to do and unless a clear power can be identified, from the caselaw it appears that a Court is likely to hold that a local authority's actions are ultra vires.

Also, the reference to being able to do "anything" in section 20 of the 2003 Act does not, in fact, mean anything and there are still limitations as can be seen from caselaw, including the Portobello v City of Edinburgh Council case, even where it is accepted as being likely to promote or improve the well-being of its area and/or persons within that area.

In addition, the challenges of Council finances are well-documented, and the existing legislative framework prevents new means of raising funds to deliver what Councils may regard as services which would advance wellbeing. It is difficult to advance wellbeing with limited funds. The tightly controlled and highly restricted funding arrangements which have existed in local government for many years are a significant barrier.

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?

There are qualifications to the power to advance wellbeing contained in section 22 of the 2003 Act. If it is not clear that these have been met, there may be challenges to local authority actions. As noted above, the Courts, in applying the ultra vires principle have interpreted the power to advance wellbeing in a restrictive manner. There is a concern that actions relying on the power may potentially be unsafe, so it has been little used. As regards market confidence, due to all of this, it is probably not a power which the markets would be keen to be relied upon for lending, which also causes potential issues.

There is also a requirement when using the power to advance wellbeing to identify a specific benefit to the area which must be a direct link between the wellbeing of citizens in the area. Courts have decided that delivering savings which could be used to fund front-line services is not a direct link to the wellbeing of citizens. This therefore puts limitations on the use of the power.

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.

Yes, the removal of the restriction in Paragraph 7 of section 22 of the 2003 Act (prohibiting a local authority from doing anything for the purposes of raising money, whether by levying or imposing any form of tax or charge, by borrowing or otherwise) would undoubtedly facilitate any aspirations of local authorities to increase local revenue generating powers.

Currently, in theory, only the specific power in the 1970 Act can be relied upon to generate revenue through the supply of goods and services but at the moment, no limit has been set by Scottish Ministers under the 1970 Act, therefore consent is required. It is therefore not suitable for this limited power in the 1970 Act to be the only power for local authorities to rely on to generate revenue. Additional explicit powers are needed. However, these do need to be balanced against the local authority's primary role in delivering statutory services, however due to severe restrictions on funding through government grant, additional income generation is required.

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?

Under the 1970 Act, a local authority can only generate revenue through the supply of goods and services up to the value of any statutory limit set by Ministers. No statutory limit has been set, so any supply of goods or services currently requires the consent of the Scottish Ministers. This is currently a barrier.

Existing legislation establishes governance and reporting requirements which are not conducive to collaboration among public bodies including between local authorities who may wish to pursue greater collaboration and joint working. Each partner is answerable in law for its decisions and use of resources as a single entity and this makes it more challenging and riskier to effect fundamental reform and change.

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?

Yes, this could provide an effective alternative to a General Power of Competence. It would be helpful if the very strict requirement in the 2003 Act to identify a specific benefit to the area/a direct link to the wellbeing of citizens in an area. Courts have decided that delivering savings which could be used to fund front-line services is not a direct link to the wellbeing of citizens.

There is also the option of creating further specific statutory powers within the 2003 Act to explicitly permit certain activities that would enable a local authority to generate income.

Councils exist in a straitjacket in terms of funding (huge reliance on government grant) and powers to do other than what is already set down in legislation. The room to innovate or effect fundamental change is therefore extremely limited.

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.

Creating further specific statutory powers within the 2003 Act to explicitly permit certain things may provide an effective alternative to a General Power of Competence.

Examples of specific powers and how they may be used are: -

- To enable a local authority to generate income that could be used to fund services.
- To enable delegation of duties and powers to other providers including other Councils.

However, as detailed in the Consultation document, there are various pieces of legislation relevant to this which have been brought in at different times and don't work well together. Adding to the 2003 Act and the power to advance wellbeing is not the best way to achieve what local authorities need and a more wholesale look at all current legislation would be more effective, in order to arrive at a position where the powers are clear and unambiguous.

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.

The provision in the 2003 Act states that the Power to Advance Wellbeing cannot be used to unreasonably duplicate the statutory functions of another person. This does have the potential to restrict a local authority's pursuit of service transformation, other income generating activity or any other activity to a certain extent, e.g. entering into commercial agreements, providing additional non statutory services.

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.

Removal of the restriction on duplication of functions, contained within section 22 of the Local Government in Scotland Act, may provide an effective alternative to a General Power of Competence. There will likely be a limit as to how much a local authority wants to get involved in commercial provision of services, but there are examples where a service is already provided by the Council and could also be offered on a commercial basis – e.g. cleaning, staff provision of training, payroll.

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?

The difficulty with the 1970 Act is that a local authority can only enter into an agreement up to the value of any statutory limit set by Ministers. No statutory limit has been set, so any supply of goods or services currently requires the consent of the Scottish Ministers.

Regarding whether there is trading activity a local authority would want to pursue beyond the current power to provide goods and services, contained in the 1970 Act – the 1970 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, it 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. Also, the 1970 Act requires a local authority, before entering any such agreement, to have regard to whether the action would be likely to promote or improve the well-being of their area and persons within that area. It may be helpful for these restrictions to be removed in order to provide greater flexibility to local authorities.

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?

The removal of the requirement to gain Ministerial consent would certainly remove an unhelpful barrier. However, it would not fully deliver on the aspirations of local authorities in relation to pursuing income to deliver services and other changes are needed to make sure it is clear exactly what the power of local authorities would be in this regard.

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?

Councils have endured significant reductions to the funding for existing core services over many years and have had to make significant savings to meet the “balanced budget” requirements. Councils are underfunded relative to the duties they are required to deliver, and the continued pressure caused by increased demand in areas such as Additional Support for Learning. Change is needed in the balance of funding and how much income Councils can raise locally in addition to the grant funding they receive.

Consideration is required as regards alternative ways for Councils to generate funding and some examples of this are: -

- Local / additional levies for specific initiatives or projects as exists in the United States
- More scope to pursue commercial activities as a means of funding core service provision

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.

There should be some constraints to the types of goods and services a local authority can provide, e.g. areas where the Council has specific expertise or assets which make such commercial activity a natural progression of existing arrangements. There should be flexibility to enable local authorities to generate income in these circumstances.

However, in England, even with the GPC, income from charges must not exceed the cost of provision which is a barrier that would lead to the question of why bother to deliver the goods and services to other recipients if income cannot be generated.

Radical service transformation is required and there needs to be flexibility to enable local authorities to do this. However, this does need to be balanced against the requirement for local authorities to focus on delivering on their statutory duties.

Commercial Ventures

Question 13

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

In general terms the type of commercial activity a Council may wish to pursue should be in areas where the Council has specific expertise or assets which make such commercial activity a natural progression of existing arrangements. Assets in this context might include land, staff, data or economies of scale.

Pursuing commercial income should always be for the purposes of delivering or enhancing service provision not as an end in itself, and we would not wish to see a General Power of Competence used in Scotland to pursue some of the risky (and in some cases now problematic) commercial ventures that have happened in England.

Examples could include: - investment in tourism, waste services, children's services or support services – the key being to enable profits to be generated rather than only covering costs.

Councils are increasingly at the mercy of instances of limited market competition in areas such as transport and looked after children and more freedom to set up competition on a profit-making basis could bring some benefits in terms of best value.

Question 14

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

Yes, there should be some constraints on the types of commercial activity that a local authority can undertake. Local authorities provide statutory services that must always take priority. Any greater legislative powers must avoid the risk that trading/commercial activities damage competing local activities and priorities. A well-defined legal framework requires to be put in place to make those constraints clear.

See also comments under Q13.

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.

Yes, greater legislative powers should continue to constrain a local authority from engaging in commercial activity to a certain extent, other than limited scenarios of generating income. There should also continue to be some constraints on activity beyond the local area.

However, there should not be strict restrictions that prevent mutual and similar arrangements intended to reduce councils' costs e.g. it shouldn't prevent Councils from being able to set things up jointly, or that would hinder joint working with other public bodies, and on projects requiring joint working, including things like the Tay Cities Deal.

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?

The existing legislative framework for borrowing and investment has been reviewed in the relatively recent past and is considered broadly fit for purpose and in practice hasn't been overly restrictive.

Should a General Power of Competence result in more freedoms on trading and commercial activity the borrowing and investment arrangements would need to be assessed again in terms of whether they would support such additional freedoms.

The ability to borrow from the PWLB for commercial purposes is now restricted and that is a reserved matter, but market borrowing is still an option for Councils.

There would continue to be a need to distinguish between investment for long term commercial return and investment of surplus funds as part of day-to-day treasury management.

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.

See responses to earlier questions – very much linked to how commercial ventures would be funded.

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.

Existing legislation and reporting are considered to be adequate in this regard following recent changes to the Prudential Code in particular.

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.

Please see responses to previous questions. A General Power of Competence has the potential to give councils the specific legal basis and confidence to extend their services and support beyond the arena traditionally seen as the responsibility of local authorities. This assists in building greater economic growth and resilience in local communities.

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.

Having a legislative framework in one place that is clear and unambiguous is required.

There is a risk that it could be used as a tool to challenge officers who are taking a cautious approach in light of their own professional judgment and expertise. A GPC must be articulated in a way that respects statutory officers' responsibilities to ensure sound, lawful decision making must not be ignored.

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.

- Legal basis for the development of a range of initiatives to take forward the green energy agenda through a council owned holding company and to promote regeneration.
- Energy switching schemes whereby Councils secure better energy deals for domestic users through working with specialist energy switching companies.
- Various examples of lower tier councils doing things that are otherwise within the control of an upper tier Council – would not be applicable in Scotland though.
- Commercial Property Investment – this has been very risky and has led to great difficulties from some councils.

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.

Potential risks that Councils might face if they embark on establishing companies and trade for commercial purposes. These concerns stem from several councils in England having issued s.114 notices over the last decade in light of severe financial difficulties, with activities in commercial markets being a clear causal factor for some.

Continued reluctance to use the power to explore activity beyond those functions explicitly set out in legislation. This is due to their concerns around potential legal challenges and judicial interpretations of the scope of the power, which both entail potentially significant financial and reputational costs.

The GPC is subject to a duty that, taking one year with another, charges do not exceed the cost of provision/any charges should be set at a level which does not generate a profit or surplus, although it is recognised that more than one financial year may need to be taken into account. In light of the financial challenges and the increasing demands facing local authorities this again appears an unnecessary restriction. Also, there is a requirement to set up separate companies where income is generated but the political landscape in England is very different to that in Scotland - in England the justification for the company model may have been linked to a greater move for such services to private models.

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?

No, not necessarily. Consideration should be given to a wider General Power of Competence but with limitations as described in responses to other questions.

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.

The position of Island authorities is unique including the funding arrangements for island authorities. The Council would prefer to see a General Power of Competence rather than use the Islands legislation

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