

**THE 'GENERAL POWER OF COMPETENCE' IN THE LOCALISM ACT 2011:
DEVOLVING DEMOCRACY OR THE END OF ACCOUNTABILITY?**

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INTRODUCTION

The Localism Act 2011 is ostensibly, as its title suggests, the implementation of a localist political agenda. As Eric Pickles, the Secretary of State for Communities and Local Government said, introducing the 2010 bill to the House of Commons it was intended to prioritise local decision making over other scales of governance. It would, he said:

"reverse the centralist creep of decades and replace it with local control. It is a triumph for democracy over bureaucracy. It will fundamentally shake up the balance of power in this country, revitalising local democracy and putting power and back where it belongs, in the hands of the people".

The rationale is, therefore, what the EU would call a 'subsidiarity principle' - though the government would avoid any such Euro-language, and calls it "power being exercised at the lowest practical level".

An appeal to the importance of devolved power and local democracy is nothing new. In 1969, Lord Redcliffe Maud said¹ that

"In a period of great change, when huge unrepresentative organisations seem to control the lives of individuals and restrict personal freedom, people might be tempted to give up as a bad job the effort to master these impersonal forces. If they yielded, the loss would be irreparable. In this situation, local self-government should be a crucial influence. It should represent the citizen and be the means whereby he bring his views to bear on those public problems that touch most nearly his personal and domestic life. If local self-government withers, the roots of democracy grow dry. If it is genuinely alive, it nourishes the reality of democratic freedom".

Nor, indeed is the suggestion of a general power of competence for local government a novel suggestion. As long ago as 1983, the Labour Party manifesto² pledged to

"expand the scope for local democracy. Instead of local councillors never being completely sure what is permitted and what is *ultra vires*, we shall give a power of general competence to all local authorities to carry out whatever activities are not expressly forbidden by statute".

Powers for local authorities to act as they thought fit for the general wellbeing of their area were enshrined in the Local Government Act 2000. But these powers were not intensely used. It has been suggested that this was a result of over-cautious advice by risk adverse lawyers, but their warnings may have been apt: in the *London Authorities Mutual Limited* litigation, the Court of Appeal held that neither section 111 Local Government Act 1970 nor the general power of well-being gave local authorities power to create mutual insurance

¹ Command Paper 4039, *Local Government Reform - Summary (1969)*.

² "The New Hope for Britain": Labour Party Manifesto 1983.

companies³. A report for the Department for Communities and Local Government (DCLG) said:

"Use of the well-being remained limited ... as local authorities had a tendency to use more specific powers to achieve their goals".

The Localism Act therefore includes, as section 1, a general power of competence for local authorities to do that which a private individual could do.

But critics of the Act say that, far from putting control in the hands of local people, the Act will divorce local government from clear and transparent accountability mechanisms, making it difficult for local people to challenge its actions effectively, whilst at the same time failing to give local government realistic powers of local taxation which would really unfetter its power.

The Act was certainly not introduced in a way which promoted debate and participation: preceded by no White Paper, the rationale for the Bill was left largely unexplained before its introduction, and whilst the Parliamentary debates on the Bill were long on assertions of the joys of local control and the delights of devolution, they were rather shorter on concrete explanations as to why the Bill was either necessary or desirable.

The Act introduces important legal changes, which DCLG's "Plain English Guide to the Localism Act" describes as being divided into four strands:

New freedoms and flexibility for local government

New rights and powers for communities

Reform of the planning system to make it (we are told) "clearer, more democratic and more effective".

Ensuring housing decisions are taken locally

It also contains - though these are not mentioned in the "Plain English Guide" - powers for central government to foist the financial consequences of breaches of EU law by local authorities onto those bodies.

The planning and housing aspects of the Act are highly significant, but are outside the scope of this paper. This is addressed to the significant changes to the *structure* of local government power and in particular the impact of the general power of competence and associated provisions: whether, in its context, it will significantly augment the powers of local authorities, and what it will mean for accountability.

³ *Brent LBC v Risk Management Partner s Ltd & Harrow MBC* [2009] EWCA Civ 490 (the case went to the Supreme Court on a different point, [2011] UKSC 7).

A 'GENERAL POWER OF COMPETENCE'

Section 1 of the Localism Act 2011: the 'general power of competence' for local authorities in England to do "anything that individuals generally may do". This power replaces the general power of well-being in the Local Government Act 2000 for local authorities in England.

It was brought into force on 18 February 2012 - rather than earlier than was first planned - in response to the judgment of Ouseley J in *R(National Secular Society) v Bideford Town Council* [2012] EWHC 175 (Admin), [2012] 2 All ER 1175, handed down just eight days earlier, on 10 February.

In that case, the National Secular Society brought a challenge to the saying of Christian or Quaker prayers at the beginning of full Council meetings. The judge held that the council did not have power to hold prayers as part of a formal council meeting, because the public saying of prayers as part of the formal business of the Council required statutory authority. There being no express statutory authority, the only possible source of power was section 111 of the Local Government Act 1972, which permits the doing of that which is 'calculated to facilitate' or 'conducive or incidental' to the discharge of any of the Council's functions. However, s111 did not permit the religious views of one set of councillors to exclude, burden or mark out those who did not share them.

The Secretary of State for Communities and Local Government, Eric Pickles, expressed disappointment with this ruling and brought forward the implementation of the "general power of competence", with regulations to extend the power to certain parish councils taking effect in April. The general power of competence also extends to Fire and Rescue Authorities, Integrated Transport Authorities, Passenger Transport Executives, Combined Authorities and Economic Prosperity Boards.

Department for Communities and Local Government guidance on this aspect of the Act says that the conventional assumption that "local authorities' powers and responsibilities are defined by legislation" has been "turned ... upside down" by the introduction of the general power of competence. It provides that:

"Instead of being able to act only where the law says they can, local authorities will be freed to do anything - provided they do not break other laws".

Those of a nervous disposition will be pleased to know that the impact assessment on the general power gave as an example of something local councillors would not be able to do

"waging thermonuclear war",

which - you will be pleased to learn - is prohibited by the Nuclear Materials (Offences) Act 1983, the Nuclear Safeguards Act 2000 and the Environmental Permitting (England and Wales) Regulations 2010. Perhaps more realistically, local authorities engaging in provision

of financial services will need to provide by the regulatory regime set out by the Financial Service Authority.

Thus, the general power of competence confers upon local authorities the power to do anything that an individual can do which is not specifically prohibited. But not the funds to do it with or power to acquire such funds directly from local government electors: the DCLG guidance says that

"they will not, for example, be able to impose new taxes, as an individual has no power to tax".

Innovative solutions which have been suggested - such as provision of financial services, and estate agency services - can only be conducted through wholly owned local government companies.

Limits on the general power of competence

The 'general power of competence' is not boundless. Section 2 of the Act describes the "boundaries of the general power", and they are quite tight. Section 2 provides that the general power does not apply to things which the authority is unable to do by virtue of a pre-commencement limitation, or a post-commencement limitation which is expressed to apply to the general power; to all the authority's powers, or to all the authority's powers with exceptions excluding the general power. (In other words, the general power cannot be used to 'blue-pencil' the contours of express statutory powers and duties). It is not clear how broadly the limitation provisions will be interpreted. 'Pre-commencement limitation' w is said to mean a 'prohibition, restriction or limitation expressly imposed by a statutory provision', but how express is express will be a moot point. It may be questioned whether courts will permit the general power to be used in a way which enables decision-makers to ignore the purpose of legislation conferring pre-existing powers for particular purposes so as to enable them to be to be used outside those purposes. Certainly there are differing views as to whether the general competence power would enable Bideford Town Council to reinstate its pre-meeting prayers.

Nor does the general power permit local authorities to make or alter governance arrangements, to contract out, or delegate the discharge of an authority's functions to committees, officers etc (section 2(3)). In other words, there can be no new creative arrangements for discharge of functions by stakeholder boards or privatised entities using the general power (though see the 'community right of challenge' (below)).

However, there are specific powers in the Act to broaden Councils' powers to run area committees, and the role of overview and scrutiny committees, or to re-introduce a

committee system of governance in preference to the 'Cabinet' style of government now adopted by the majority of local authorities.

Curiously, for a measure intended to devolve power to the people, section 5 of the Act contains power for the Secretary of State by Order - scarcely the most democratic of legislative instruments⁴ - to amend, repeal, revoke or disapply any statutory provision which he thinks prevents or restricts local authorities from exercising the general power or which overlaps with it. And - still more curiously - he may, by order, make provision *preventing* local authorities from doing, in the exercise of their general power, anything which is specified, or is of a description specified, in the order, or specify conditions, either general or particular, in relation to doing anything specified or of a description specified.

That section 5 power can (by section 6) only be exercised after consultation, with such bodies 'as the secretary of state considers appropriate' and can (by section 7) be exercised only to the extent proportionate to the policy objective intended to be secured; striking a fair balance between the public interest and the interests of any person adversely affected; and if the provision does not remove any necessary protection; or prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise; and - finally and most broadly - if "the provision is not of constitutional significance".

Despite these restrictions, exceptions and the conferral of Henry VIII powers on the Secretary of State, the general power of competence in Part 1 Chapter 1 of the Localism Act will - says the DCMS guidance - give local authorities "increased confidence to do creative, innovative things to meet local people's needs". One thinks back to the interest rates swaps cases of the late 1980s and early 1990s; the amount of money that was stashed away in Icelandic banks, and wonders how much temptation there may be for local authorities, with so much more power, but with no more power to raise funds, to exercise their general power to do that which a competent adult can do, to gamble.

While the contours of the prohibitions on the use of the general power are developed, expect a rash of new 'improper purpose' judicial reviews, as local authorities are challenged on uses of the general competence which it is said conflict with functions more properly implemented through other legislation.

Or maybe not, since section 45 repealed the fledgling duty on local authorities under the Local Democracy, Economic Development and Construction Act 2009 to provide information to people about how local governance systems work has been abolished.

The effect of the general power of competence on local government finance

⁴ Though there are complicated provisions as to whether and when negative, affirmative or 'super-affirmative' resolution procedures should be used.

Whilst some criticise the general power of competence for muddying the water as to the extent of local authority power or the scope of the 'proper business' of local government, others suggest that, for a measure which is intended to devolve more genuine power to local government, the Act is too limited. In particular, it makes it very difficult for local government to generate new funds.

As noted above, although local authorities are elected public bodies, the general power of competence is limited only to the powers which a private individual would have, and explicitly, not to raise new taxes. One of the major fetters on local government power is the 'capping' which central government has previously been able to impose on council tax rises. The Localism Act 2011 permits local authorities to raise council tax *above* the rate set by local government, but only if the rise is approved in a local referendum. One might fairly ask - if the real aim is to devolve *power* to local authorities - why local government elections are not seen as a sufficient opportunity for electors to choose both the services which they wish their local authorities to provide, and the charges which they wish them to make for them, as in a national election: after all, no one votes separately in a referendum on income tax rises.

Likewise, local authorities will have no power to increase local business rates, but they will have power to reduce them, or to offer business rate discounts to particular groups in the interests of attracting businesses to their area, apparently (in this regard) untrammelled by the need for a referendum. It is, perhaps, a strange feature of the legislation that authorities have power to reduce rates of local taxation, at least in one category, but no power to raise them.

The extent to which the general power can be used to charge for provision of public services is also limited by section 3 of the Act: local authorities cannot use the general power to charge for services which a statutory provision requires the authority to provide; nor services provided without a person's agreement; nor for services in relation to which "ignoring this section and s93 Local Government Act 1993" the local authority has no power to charge. Nor, rather puzzlingly, can it make a profit from providing services (s3(3) of the Act provides that the income from charges cannot exceed the costs of provision).

Although local authorities will be permitted to use the general power of competence to undertake activities for "a general commercial purpose", section 4 of the Localism Act provides that they may only do so if they are things which the authority may, in exercise of the general power, do otherwise than for a commercial purpose. Nor may they do things for a commercial purpose in relation to a person if a statutory provision requires them to do those things in relation to the person. Moreover, they may only do so through a company. The Communities & Local Government Select Committee asked Eric Pickles, in written

questions, why that was, and he answered that it would be unfair for local authorities to use their status as such to achieve a commercial advantage⁵.

It may be thought, then, that local authorities have been given the theoretical means to extend their powers, but not the wherewithal to do so.

EU financial sanctions

It is a curious feature of DCLG's "plain English guide to the Localism Act" that it makes no mention of Part 2 of the Act relating to EU financial sanctions.

If local authorities have gained no significantly increased charging powers, they are set to acquire significant new financial responsibilities, or risks, in terms of EU financial sanctions. Part 2 of the Act gives a Minister of the Crown discretionary power to require a public authority to pay all, or part, of a financial sanction imposed upon the UK by the Court of Justice of the European Union, if the public authority has been designated in relation to a specific EU infraction, and after the issue of a warning notice.

This part of the Act is not yet in force. The Secretary of State must issue a policy statement concerning the operation of this part of the Act and consult prior to publication.

In other words, local government is going to be expected to shoulder some of the financial risk in relation to infractions of EU law. Again, one can see the prospect of challenges by local authority against financial sanctions orders as to the apportionment of blame for infractions of EU law.

OTHER GOVERNANCE PROVISIONS IN THE LOCALISM ACT

Abolition of the Standards Board

The Standards Board was the national body which regulated standards of behaviour in public life. There was a national code of conduct, which all local authorities had to adopt, and which they had to police by creation of a standards committee, to oversee the behaviour of their councillors and receive complaints. The behaviour of the standards committees themselves was regulated by the Standards Board.

No longer. The government considered that the standards committee regime was abused by the making of petty complaints. The Standards Board has therefore been abolished. It is now for local authorities to make and police their own codes of conduct. However, to deliberately withhold or misrepresent a financial interest will now become a criminal offence.

⁵ HC 931, 13 May 2011

Clarifying rules on pre-determination

A frequent theme in judicial review has been that consultation was not genuine, because Councillor X expressed the views, in a local newspaper, or a consultation meeting, that a proposal would go ahead. Such criticism is not often successful, since the courts have said on many occasions that it is quite proper for local councillors to express political views on subjects before them⁶ but the government plainly thought that it was in any event misplaced. Section 25 of the Localism Act therefore makes explicit statutory provision that if there is an issue as to the validity of a local government decision because of an allegation of bias, or because it is said that a decision-maker or decision-makers had or appeared to have a closed mind, a decision maker is not to be taken to have had a closed mind just because that decision maker has previously done something which directly or indirectly indicated what view the decision-maker took or would or might take, in relation to a relevant to the decision.

Officers, however, still need to be careful in expressing views before a decision has been taken, in circumstances where any aspect of the power is delegated to them, since section 25 only applies to elected or co-opted members of authorities and not employees.

Directly elected mayors

The government had powers under the Localism Act to trigger mayoral referenda in the largest cities outside London. The agenda behind the use of these powers was to seek approval for the government's perception that directly elected executive mayors would provide 'democratically accountable strong leadership'. These referenda were held in May of this year in England's 11 largest cities. However, of the ten cities asked whether they wanted a directly elected mayor (Birmingham, Bradford, Bristol, Coventry, Leeds, Manchester, Newcastle upon Tyne, Nottingham, Sheffield and Wakefield) only one (Bristol) voted yes. Doncaster voted to keep its elected mayor.

Powers of housing investment and economic work previously undertaken by the Homes & Communities Agency and the London Development Agency have been transferred to the Mayor of London. The Act also allows local authorities to make proposals to take over functions currently undertaken by central government or quangos - but they will only be permitted to do so if the Minister agrees: the Act contains an enabling power for the Minister to permit, not a power for local authorities to require.

New rights and powers for communities

Expressions of interest in running public services

⁶ For a recent summary of the caselaw see *R(TW Logistics Ltd) v Tendring District Council* [2012] EWHC 1209 (Admin) at 104-119.

One feature of judicial reviews in the current age of austerity has been in relation to the support, or otherwise, available to people and bodies wishing to run public services, or, in many cases, not wishing to run public services, but offering to do so as a fall-back position if they are faced with closure.

Chapter 2 of the Localism Act contains what is referred to as the "community right to challenge". This permits community groups, parish councils and groups of local authority employees the right to express an interest in taking over the running of a local authority service. Such groups may generate a surplus, but that must be used for the purpose of the activities themselves or 'invested in the community'. The local authority must consider such an expression of interest. If it accepts that this is a service which could be run by an outside body or group in this way, it must run a procurement exercise for the service, in which the challenging organisation can bid.

It is interesting, though, that whilst elected councillors cannot increase council tax without a specific referendum on the issue, and can only 'take over' services currently provided by central government or quangos if they obtain ministerial approval, whole swathes of Council services could be 'taken over' by challenge groups without any specific democratic mandate beyond the result of a local government election, and with no legislative basis for the users of such services to be consulted.

This is one major feature of the Act which has led to allegations that it will not, in practice, lead to devolution of power to local people, but the end of accountability.

Bidding for assets of community value

The recession, and significant cuts to local government budgets have meant that many buildings which play a role in community life, whether privately or publicly owned - such as community centres, libraries, swimming pools, village shops, markets or pubs - are threatened with closure.

Chapter 3 of the Localism Act, which came into force on 21 September 2012, is designed to strengthen the hand of community groups which may wish to take over such amenities. As DCLG briefing notes observe, community groups seeking to bid for such amenities often need more time to organise a bid and raise money than private enterprises bidding against them.

Chapter 3 imposes a new duty on local authorities to maintain a list of assets of community value, nominated by the local community. It is presumably linked to the 'community right of challenge', since taking over the running of a service may sometimes be linked to the taking over of the premises in which it takes place. However, it goes beyond that: an asset of

community value is a building in which a public activity takes place, not necessarily a publicly owned or operated service.

When listed assets come up for sale or change of ownership, the Act requires the intended seller to notify the local authority in writing of its intention to dispose of the land. After an 'interim moratorium period' of six weeks, the disposal may proceed unless there has in the meantime been a written request from a community interest group to be treated as a potential bidder in relation to the land. If there is such a request, then the intended seller may not dispose of the land for six months after the notification of intention. If the seller does not dispose of the land within eighteen months of the notification, the duty to notify starts again.

The idea is the moratorium on sale for a period will allow community groups time to develop a bid and to raise the money to bid to buy the asset when it comes on the open market. However, where the owner of land can ask the authority to review its decision to include the land in the list, and one can envisage judicial reviews both of decisions to include and (less likely, given the resource implications of a challenge) to remove land from the list.

One also wonders how likely local authorities are to list buildings, since there is a power for the Secretary of State to make regulations requiring the payment of compensation for a building being included on the list.

Moreover, the Act currently contains no express sanction against owners of listed land who sell before the moratorium periods are over. Instead, an authority may make regulations setting out the consequences of such a sale, which could include provision for such transactions to be set aside. But no such regulations have yet been made.

CONCLUSIONS

The government considers that the Localism Act is a radical agenda for change, offering power to the people at local level and unshackling local government from the centralising power of Whitehall, enabling it to tailor services to local needs. Some consider that the transfer of power and functions to local authorities amounts to dumping extra responsibilities on local authorities, without offering them a realistic route to paying for it from their already over-stretched resources. Others think there is a real risk of local authority functions and assets being taken over by unaccountable privately-operated groups, and that the 'general power of competence' will eclipse local people's ability genuinely to hold local government to account. The devil will be in the detail, and how far the Act really engenders a change of culture in hard-pressed local authorities.

Speaking to the Law Gazette in July 2011, the director of the Local Government Information Unit, Jonathan Carr-West, summarised the effect of the (then) bill in this way:

"It is an odd bill. It could be hugely transformative. Equally, it might not be ... It's not a badly drafted bill. It's just trying to do some very complicated things"⁷.

For local government officers, councillors, service users and administrative lawyers, the Localism Act heralds interesting times.

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⁷ "The Localism Bill divides opinion, Law Gazette, 20 July 2011.