

'A new General Power of Confidence'

## **The Localism Act 2011: a General Power of Competence**

The following essay 'A new General Power of Confidence' was commissioned by the Local Government Association from Nicholas Dobson of Pannone Solicitors in order to inform thinking, stimulate thought and generate debate around the potential of the new General Power of Competence that was implemented as part of the Localism Act 2011.

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## **‘A new General Power of Confidence’**

The Secretary of State for Communities and Local Government, Eric Pickles, was very clear about the purpose of the new general power of competence in Part 1 of the Localism Act 2011 (the competence power). It was to free up English local authorities; to let them off the leash. As he told the Local Government Association in July 2010, *“My job as Secretary of State is not to sit in my office, making all the decisions, pulling all the strings, coming up with more and more original ways to annoy you. It's to get out of your way: and to get everything else out of your way too. That's what localism means. Pushing power out to local government, and beyond into neighbourhoods and communities.”*

And the new power aims to do that by expressly giving authorities the power to take the reasonable action they need ‘for the benefit of the authority, its area or persons resident or present in its area’.

Following the 2009 decision of the Court of Appeal in LAML,<sup>1</sup> which found (amongst other things) that the well-being power in the Local Government Act 2000 did not empower authorities to set up and fund a mutual insurance company, there was a widespread failure of confidence amongst many authorities in using this power.

As the Department for Communities and Local Government (DCLG) pointed out in May 2011: *‘It is important that the general power should not only increase local authority powers, but increase the confidence of local authority officers and members in the scope of those powers.’* And, rebutting the suggestion of a possible pre-authorisation mechanism for proposed action, remarked that, *‘The general power of competence has been designed to give councils the confidence to act, using the power as their primary tool, without needing to refer back to central government. How they use the power is up to them – that's what decentralisation means.’*

### **So will the new power deliver?**

Whilst it remains to be seen how the power will fare under the microscope of future judicial review, on the face of the Act the position does look positive, given the measure's expressed breadth. Those authorities best prepared to get the most out of the competence power and

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<sup>1</sup> *Brent LBC v. Risk Management Partners Limited and London Authorities Mutual Limited and Harrow London Borough Council as interested parties* [2009] EWCA Civ 490. The Court of Appeal in LAML took a narrow view of the scope of well-being. The well-being power had been more widely interpreted in previous judicial decisions on well-being.

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defend potential challenges, will exercise it with well-charted public law principles in mind.

The Bideford Parish Council prayers case<sup>2</sup> in February 2012 kick-started the fast-tracking of a statutory order<sup>3</sup> to activate the competence power for principal authorities in England.<sup>4</sup> The case did to some extent reopen the wound of LAML, with the judgment again demonstrating the danger of narrow judicial interpretation curtailing the legal powers available to local democratically accountable councils. Parliament cannot be expected to predict the breadth of powers that local government will need over the forthcoming decade to lead the redesign of public services demanded by the modern world of diminishing public resources and increasing pressure on public services. At the same time it is incongruous to expect local public services to be driven from the bottom-up whilst retaining a system where Parliament continues to specify council's powers on piecemeal basis, and thus sets the boundaries for local innovation. The Government has recognised this when drafting a measure that will give 'councils unprecedented freedom to work together to improve services and drive down costs' by setting the local government sector '...free to do anything - provided they do not break other laws'.

### **So how does it revolutionise the powers of local government?**

Section 1 of the 2011 Act illustrates the breadth of the general power of competence. Under the provision a local authority has power to do anything that individuals generally of full legal capacity may do. A local authority for these purposes means: an English county or district council, the Common Council of the City of London, the Council of the Isles of Scilly or an 'eligible parish council'. This is a parish council which meets conditions prescribed by statutory order. The power applies to things that an individual may do even though they are in nature, extent or otherwise unlike anything the authority may otherwise do, or unlike anything that other public bodies may do. It is evident that as individuals cannot impose new laws, regulatory regimes or taxes on others then neither can councils under the new competence power.

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<sup>2</sup> See *R (National Secular Society) v. Bideford Town Council* [2012] EWHC 175) where on 10 February 2012 Mr. Justice Ouseley found that, although lawfully based council prayers would not be inherently discriminatory and would similarly not contravene Convention rights, in the circumstances, section 111 of the Local Government Act 1972 (which enables authorities to do anything calculated to facilitate, incidental or conducive to the conduct of their functions) did not empower prayers as part of formal council business.

<sup>3</sup> [The Localism Act 2011 \(Commencement No. 3\) Order 2012 \(S.I. 2012 No. 411\)](#).

<sup>4</sup> The Department for Communities and Local Government indicated that the provisions do not apply to local authorities in Wales because '...the Welsh Assembly Government declined the offer of Coalition Government to include Welsh local authorities in the general power of competence. However, the Welsh Assembly does have the power to legislate in this area'. As to eligible parish councils, see the *Parish Councils (General Power of Competence) (Prescribed Conditions) Order 2012* (S.I. 2012 No. 965) which came into force on 28 March 2012.'

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If the power does apply, it enables the action in question to be carried out 'in any way whatever' including:

- Anywhere in the UK or elsewhere;
- For a commercial purpose or otherwise with or without charge;
- For or otherwise for the benefit of the authority, its area or those resident or present in the area.

The competence power has significantly redrawn the scope of charging and trading activities that councils can undertake both in terms of the types of activities and where they can be geographically undertaken. For example, the competence power is broadly expressed to enable 'anything that individuals generally may do,' and looks to allow authorities to charge on a cost recovery basis for new discretionary services where there is no pre-existing statutory authority other than that in the Local Government Act 2003. It frees authorities from having to link their commercial trading activities to a relevant statutory function (although they will still have to trade through a corporate medium) and instead allows authorities to extend what they may do in pursuit of profit, efficiencies and to provide greater local choice far beyond traditional functions. Meanwhile it wipes away existing council boundaries by allowing the power to be used to take action anywhere.

### **So what does this mean in terms of practical uses for the power?**

It is difficult to consider in a vacuum how the new power will be used given that this will inevitably flow from particular local needs in specific local circumstances and the Government has certainly been clear that it will not comment on how councils might use the power for fear of fettering that discretion. Nevertheless, it seems likely that things which authorities would like to do which were either impossible, difficult or legally hazardous, can now be embarked on with confidence, providing decisions are soundly and prudently taken in the light of a proper evaluation of all material facts and circumstances.

An authority might, for example, now choose (through a specified corporate vehicle) to offer commercial garden maintenance services or car servicing services. It may use the powers to provide a package of measures to encourage small businesses and/or help reinvigorate moribund high streets. Or it could facilitate community post office/shops, pubs or local neighbourhood self-help schemes and/or take other action to create stronger neighbourhood

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cohesions, for example by facilitating community transport projects. The competence power will also now enable local authorities to step in and facilitate the meeting of local needs where the market is unable because it is commercially unviable to do so.

None of these things will necessarily be entirely straightforward, and in an age of austerity resources will often be a critical restraint.<sup>5</sup> However, councils offer the democratic accountability and public trust to be able to offer strategic leadership and facilitation, even if they are unable to offer much in the way of direct financial support. In short, if there is a local issue which some intervention would assist or resolve, local authorities do at least now have the legal facility to enable creative solutions. The fact that the Act provides similarly broad powers for Fire and Rescue Authorities, Passenger Transport Executives, Integrated Transport Authorities and Economic Prosperity Boards and Combined Authorities, alongside extending the general power of competence to 'eligible' parish councils, also offers up opportunities for these solutions to be delivered through exciting new partnerships.

### **So to what extent are their boundaries on the new power?**

Within the Localism Act section 2 marks out the general boundaries, whilst sections 3 and 4 respectively chart particular limitations on the use of the competence power for charging and trading. As the accompanying Explanatory Notes indicate:

'Restrictions that apply to existing powers that are overlapped by the general power are applied to the general power. So for instance if an existing power requires a particular procedure to be followed, the same procedure will apply to the use of the general power to do the same thing. It also applies any express prohibitions, restrictions and limitations within primary or secondary legislation, to the use of the general power. A distinction is drawn between restrictions in pre-commencement legislation, and those in post-commencement legislation. Restrictions in post-commencement legislation will only apply to the general power where they are expressed to do so.'

Section 2(3) explicitly prevents authorities from using the competence power to arrange for discharge of functions in the manner covered by Part VI of the Local Government Act 1972 (arrangements for discharge of authority's functions by committees, joint committees, officers,

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<sup>5</sup> As Councillor Stephen Houghton (leader of Barnsley MBC) has observed: 'I have never particularly had a huge problem with powers. Very often it has been a lack of resources with which we have struggled to get things done.' See the Report of the Communities and Local Government Committee on Localism, published 7 June 2011.

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etc) or under Part 1A of the Local Government Act 2000 (arrangements for local authority governance in England). Neither can authorities make or alter any contracting-out or other arrangements that authorise a person to exercise a local authority function, as covered by Part II of the Deregulation and Contracting Out Act 1994.

The specific limitations on charging and trading activities meanwhile are similar to those placed on existing powers in the Local Government Act 2003. For example, charging must continue to be on a full cost recovery basis only, trading activities using the competence power must be done through a 'company' i.e. a specified corporate vehicle<sup>6</sup>, and both trading and charging are prohibited where councils have a statutory duty to provide that service.

Across all these limitations councils will naturally to be particularly concerned about 'pre-commencement' limitations and mindful of identifying existing prohibitions, restrictions or other limitations that are expressly imposed by a subsequent statutory provision. These could be contained within the Localism Act, other legislation passed no later than the end of the same parliamentary session as the Localism Act, or another instrument, like regulations, that came into force before the competence power. Yet given the pace of change in local government, and Parliament's ambitions for the competence power, it is not surprising that the 2011 Act also makes provision to prevent things not seen on the legislative radar as the statute was framed from scuppering the new power. Therefore, significantly, Section 5(1) enables the Secretary of State by order to amend, repeal, revoke or disapply any statutory provision which s/he thinks prevents or restricts local authorities from exercising the competence power. To ensure the reasonable and proportionate exercise of this legislative power, the Secretary of State must be satisfied before making an order under section 5(1) that:

- (i) the effect of the provision is proportionate to the policy objective intended to be secured by the provision;
- (ii) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- (iii) the provision does not remove any necessary protection;
- (iv) 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;
- (v) the provision is not of constitutional significance.

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<sup>6</sup> Section 4(2). Section 4(4) defines 'company' for these purposes as: '(a) a company within the meaning given by section 1(1) of the Companies Act 2006, or (b) a society registered or deemed to be registered under the Co-operative and Community Benefit Societies and Credit Unions Act 1965 or the Industrial and Provident Societies Act (Northern Ireland) 1969.'

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Conversely, the Secretary of State may also by order prevent local authorities from doing under the competence power anything specified or of a description specified in the order or impose conditions on the exercise of the power 'whether generally or in relation to doing anything specified, or of a description specified in the order'. Whilst the courts on a judicial review have power to strike down unreasonable or improper use of statutory discretion, politically the Secretary of State will no doubt wish to have the capacity to be seen if necessary to be taking action against any unforeseen use of the competence power which s/he at any time considers to be against the public interest.

Public law principles (developed by the courts over many years) are therefore applicable to the exercise of the competence power. The new powers described above are intentionally broad and are, as mentioned, designed to increase the confidence of local and other relevant authorities to act creatively in the discharge of their functions. Nevertheless, in summary local authorities must act reasonably and within the proper ambit of statutory discretion, fairly, consistently with their fiduciary duty (i.e. to manage public resources in the manner of a trustee) and conformably with any relevant statutory purpose. At the same time councils must continue to comply with any statutory or other procedural requirements and act compatibly with rights under the European Convention on Human Rights as detailed in the Human Rights Act 1998, and demonstrate compliance with the extensive and demanding requirements of the public sector equality duty in section 149(1) of the Equality Act 2010.

### **So how can we use the General Power of Competence with confidence?**

It will be the responsibility of the local government sector, where it finds the competence power unreasonably constrained by other statutory provisions, to push Government to use its section 5(1) powers to ensure that the general power of competence has sufficient space to flourish. Similarly, the Secretary of State has been explicit that *'Giving local authorities the same powers as individual means that they have the power to do anything a natural person can do, so the capacity of the authority, in this sense, will not be open to challenge'*. Nevertheless, if that challenge should occur then councils will need to be on the front foot in defending not only their decisions but also in so doing also the express will of Parliament. However, they will of course in making their decisions firstly need to be certain that they have done so properly and lawfully. In other words, make sure all their public law ducks are straight in a line. It is an important principle of our unwritten constitution that this will, used here to create a power that is broad so that authorities can feel confident and empowered to use it, is respected. Some previous

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judgments have at times seemed to be reinventing the relevant intention of Parliament and the general power of competence shows Parliament aiming to be crystal clear as to its intentions.

To move forward with maximising the benefits of the competence power it is perhaps worth recapping just how far the Localism Act has moved us away from the old well-being power, and the LAML judgment that so fatally punctured confidence in it. Namely,

Creating a competence power that is expressly wide in its drafting and is unlimited by any requirement (as in LAML) to show connection between projected or actual outcomes and statutory ingredients, for instance, economic, social or environmental well-being;

Enabling an authority to conduct activities ‘even though they are in nature, extent or otherwise’ unlike anything the authority may otherwise do, or unlike anything that other public bodies may do. This opens the door to creative innovation’;

Unlike in LAML, expressly enabling an authority to conduct activities for its own benefit, to benefit its area or those resident or present there, as well as acting not only in the U.K. but also ‘elsewhere’.

Providing a primary and self-standing power, which doesn’t rely upon any other statutory power to be identified, unlike section 111 of the 1972 Act; and

Ensuring that whilst important public law principles remain applicable to authorities, the mere failure in the eyes of the courts to identify a power of sufficient strength and breadth will no longer be an inhibitor.<sup>7</sup>

As trustees of public resources, councils clearly need to continue acting with prudence and reasonableness in the sense of properly considered and rationally based decisions, for which they will be ultimately held accountable by their local electorate. This type of robust decision-making to minimise the likelihood of a successful challenge, before and in the course of taking competence power decisions, may involve:

1. Considering whether there is any relevant law or regulatory infrastructure surrounding the proposed activity<sup>8</sup> and ensure, so far as reasonably practicable, that either there are no

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<sup>7</sup> As Eric Pickles pointed out in his 21 March 2011 letter referred to in paragraphs and above: ‘. . .citizens will still be able to challenge the reasonableness of an authority’s decisions and whether proper procedures have been followed. Again it is right that this protection should remain.’ Mr. Pickles also pointed out that framing the new power on the basis of individual capability: ‘. . .means that the general power does not extend any new powers to interfere in the rights of others – for instance powers of coercion or taxation. It is right that such powers should continue to be expressly provided for where necessary’.

<sup>8</sup> For instance FSA (Financial Services Authority) requirements in relation to banking services.

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material legal restrictions, or any that may exist will be appropriately addressed or obviated;

2. Complying with all legal requirements relevant to the proposed project, including human right and equalities legislation;
3. Developing a sound business or project case which (amongst other things) may encompass: resources likely to be needed, cost, affordability and potential returns. Benefits to be accrued, risks and how these can be mitigated.
4. Ensuring that the decision has a rational base, is taken in the light of all relevant considerations, and is on an ongoing basis a prudent use of the authority's financial and other resources.
5. Ensuring that the legal bases for the decisions to be taken (including where appropriate use of the competence power) are specified in the decision report.

Ultimately, whatever process forms the basis of sound evidenced-base decisions within your authority, this important new power should aid officers and members alike to identify '*how* we can make this happen' rather than questioning '*if* we can make it happen'. The general power of competence should provide us all with the confidence to assume that useful and valuable things, which might previously have been thought to be entirely out of reach, can now happen locally - just as Parliament intended.

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