

LG 43

Bil Llywodraeth Leol ac Etholiadau (Cymru)

Local Government and Elections (Wales) Bill

Ymateb gan: Cymdeithas Llywodraeth Leol

Response from: Local Government Association

Local Government Association submission to the Equality, Local Government and Communities Committee inquiry into the General Power of Competence

10 January 2020

1. About the Local Government Association

- 1.1. The Local Government Association (LGA) works with councils to support, promote and improve local government. We are a politically-led, cross party organisation which works on behalf of councils to ensure local government has a strong, credible voice with national government.
- 1.2. We aim to influence and set the political agenda on the issues that matter to councils so they are able to deliver local solutions to national problems.
- 1.3. We welcome the opportunity to submit evidence to the Equality, Local Government and Communities Committee on the General Power of Competence (GPC). This submission has been informed by a written statement provided to the LGA by Lawyers in Local Government.ⁱ

2. What have been the benefits and impact of the GPC to councils and communities in England? Has the power instigated change/innovation/risk aversion? Has the introduction of GPC had the intended impact?

- 2.1. The GPC was introduced as part of the Localism Act 2011 and came into force for principal authorities in England in February 2012. An objective of the GPC is to give councils increased confidence to undertake creative and innovative measures to support their communities and build local economies. Through this legislation, a council is able to lend or invest money, set up a company or co-operative society to trade and engage in commercial activity (in line with conditions set by the Local Government Act 2003), or run a community shop or post office.
- 2.2. The GPC replaced the well-being powers conferred on councils by the Local Government Act (2000) and removed the need to link the exercise of the power to the social, economic or environmental wellbeing of the area. This link had been interpreted restrictively by the courts as evidenced by the London Authorities Mutual Ltd (LAML) case in 2009, in which the courts took a narrow view of the scope of wellbeing and found that these powers did not enable councils to enter into a mutual insurance company arrangement across several councils.ⁱⁱ
- 2.3. The GPC was also available to parish and town councils and the National Association of Local Councils and Society of Council Clerks will have insight into its effectiveness.
- 2.4. The LGA supported the introduction of the GPC and was instrumental in its development. At the time, we outlined that legislating to create a power of general competence for local government would contribute to councils' confidence in using their powers in new ways to tackle the challenges that their communities faced. It recognises local government's unique position

as locally elected organisations and leaders of their communities, their track record of delivering efficiencies, innovation and providing value for money.

2.5. A review conducted by the LGA two years after the implementation of the GPC found that a number of councils were using the power as a legal foundation for doing things differently.ⁱⁱⁱ

2.6. Examples cited at the time were:

- **Better services for residents.** Several councils used the GPC to promote energy switching schemes, taking advantage of the buying power presented by bringing together residents from within their area.
- **Delivering greater value for money.** Several councils cited the broad definition of the GPC as providing a legal basis for entering new arrangements such as shared services.
- **Other innovative uses** include developing a local authority holding company for a green energy company and introducing a living wage for council contractors.

2.7. The LGA later undertook another, more limited, review of the GPC which demonstrated that whilst it has assisted in providing councils greater confidence in some areas of activity and led to less legal resource being spent on considering whether an action is *vires* (within their authority), it has not made a radical change for councils to date.

2.8. This is owing to specific constraints within the legislation and the reductions in local government's core funding. The constraints within the Act itself are significant. Where there are relevant restrictions in other pieces of legislation, they also restrict the GPC. The GPC therefore cannot be used to override any existing restriction or limitation on the use of another power.

2.9. The Act places restrictions on charging, particularly through the requirement that income does not exceed costs, and this limits councils' ability to raise money. Commercial purposes are also restricted and where they are allowed, they must be exercised through a company. In the case of trading there are specific requirements as to what delivery vehicle can be used and only reasonable costs can be recovered when charging for discretionary services.

2.10. The constraints appear to be driven by two purposes: the first is to ensure that local authorities do not charge for services which they have a duty to provide; the second is to stop local authorities competing commercially with the private sector.

2.11. It should also be noted that councils have faced funding reduction since the Localism Act came into force and have therefore often focused their priorities on meeting core, statutory duties. Local government has had less resource and, as a consequence, fewer opportunities to use the GPC as fully as they might have in different financial conditions. This financial environment is further complicated by the restrictions within the Localism Act on raising money.

2.12. In future, as councils increasingly adopt a more commercial and risk aware approach in order to generate income, it may be that there will be an increased take up of the GPC which provides a layer of reassurance to those attempting to adopt a more commercial approach.

3. Has an evaluation of the GPC been conducted?

3.1. The LGA conducted an evaluation of the GPC published in 2013.^{iv} We are not aware of an evaluation being conducted by national government or another organisation.

Appendix B

4. Statement by Lawyers in Local Government on the General Power of Competence

4.1. This statement has been prepared by Lawyers in Local Government (LLG) in consultation with its membership as credited below. It does not constitute legal advice and should not be relied upon in that capacity. This note sets out the position of LLG on the impact of introducing a General Power of Competence for local authorities in England.

Background

4.2. LLG is a membership organisation representing local authority legal departments and governance officers. We have over 350 individual local authority members with thousands of lawyers employed within them across England and Wales.

4.3. The LLG Monitoring Officers and Governance Group were contacted to seek views to inform this statement.

Statement

4.4. The general power of competence was introduced in February 2012 under provisions contained within the Localism Act 2011. In simple terms, it provides that a council (including eligible parish councils as so defined) can do anything an individual can do, provided that it is not prohibited by other legislation.

4.5. LLG are aware that the LGA has produced a useful paper on the use of the powers by local authorities but acknowledges that its use has been limited and that the powers are not the panacea they were initially hailed as being.

4.6. The powers replace the wellbeing powers and give more certainty as there is no longer the need to link the exercise of the power to the social, economic or environmental wellbeing of the area (which had been interpreted quite restrictively by the courts). Moreover, in the case of eligible parishes, they remove the section 137 restrictions on expenditure (s137 Local Government Act 1972). LLG do not know how many parish councils fall within the definition of an eligible parish but we suspect it is relatively few. LLG considers it would be prudent to seek a view from NALC or SLCC on the use of the GPC and its limitations within parish councils.

4.7. Overall the perception is that the GPC is a helpful addition to the powers of local authorities through such mechanisms as alternative service delivery vehicles for example. It certainly overcame the hurdle faced by the London Authorities Mutual Limited before the GPC came into effect (which the Court of Appeal found unlawful back in 2009); but it has not made a radical change to date. The GPC has assisted in providing confidence in some areas of activity but the limitations on the use of the power still make the process of establishing a correct and lawful power quite longwinded. It is not quite what it claims to be.

4.8. We consider there are three main reasons for this:

- The overall framework of rules which govern decision making and financial stewardship
- The constraints on the use of the power within the Localism Act itself

- The austerity period during the last decade
- 4.9. The overall framework means that local authorities have to demonstrate that their decisions are soundly based and financially prudent. This is a necessary constraint on the GPC
 - 4.10. The constraints within the Localism Act are significant. Where there are relevant restrictions in other pieces of legislation, they restrict the GPC. It cannot be used to override any existing restriction or limitation on the use of another power.
 - 4.11. The restrictions on charging limit the ability to raise money especially the requirement that income does not exceed costs. Commercial purposes are also restricted and where they are allowed, they must be exercised through a company. In the case of trading there are specific requirements as to what delivery vehicle can be used and only reasonable costs can be recovered when charging for discretionary services.
 - 4.12. The constraints appear to be driven by two purposes; the first is to ensure that local authorities do not charge for services which they have a duty to provide anyway; the second is to stop local authorities competing commercially with the private sector.
 - 4.13. Since the legislation came into force, local authorities have been operating within the context of a period of austerity. They have tended to be focussed on meeting their core duties. Arguably, they have not had the resources to use the GPC as fully as they might in other financial conditions particularly in view of the restrictions in the Localism Act on raising money under the GPC. Certainly, there is anecdotal evidence that smaller authorities have not relied upon the GPC.
 - 4.14. That said, as councils increasingly adopt a more commercial and risk aware approach in order to generate income it may be that there will be an increased take up of the power. It certainly does provide a layer of reassurance to those attempting to adopt a more commercial approach.
 - 4.15. LLG are unaware of any recent evaluation on the effect of the GPC although this would be welcomed.

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CEO, LLG

ⁱ The statement is appended to this submission. Please note that Lawyers in Local Government outline that the statement does not constitute legal advice and should not be relied upon in that capacity.

ⁱⁱ Brent LBC v Risk Management Partners Ltd and London Authorities Mutual Ltd and Harrow LBC as interested parties, Court of Appeal 2009 (which took a narrow view of the scope of wellbeing).

ⁱⁱⁱ <https://www.local.gov.uk/sites/default/files/documents/general-power-competence--0ac.pdf>

^{iv} <https://www.local.gov.uk/sites/default/files/documents/general-power-competence--0ac.pdf>