

Papur 5 Cyfreithwyr ym maes Llywodraeth Leol
Paper 5 Lawyers in Local Government

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Your Ref/Eich Cyf

Our Ref/Ein Cyf

Date/Dyddiad

Ask for/Gofynner am

GO/TC

13th January 2020

Gareth Owens

Dear Catherine

Many thanks for inviting the Wales Branch of Lawyers in Local Government (LLG) to submit evidence to the Committee on the Local Government and Elections (Wales) Bill (“the Bill”).

I can confirm that I will attend the Committee to give evidence on behalf of LLG. I may also be accompanied by Davina Fiore, Monitoring Officer at Cardiff City Council.

Clearly the provisions within the Bill cover a wide range of issues and include proposals that have been suggested and developed over a number of years and, in some cases, iterations. It is welcome to see that some suggestions, e.g. re-organisation, have been amended to reflect concerns expressed by the local government community though important provisions, such as those relating to the general power of competence remain unchanged.

Inevitably, the Bill contains some provisions that execute substantial policy change and others that are more practical or technical corrections. In considering the Committee’s terms of reference on the need for the legislation, potential barriers and potential unintended consequences I have therefore addressed both the issues of principal and some of the practical issues within the current drafting.

I have addressed each part of the Bill in numerical order.

Part 1 Elections

- 1) LLG is aware of and broadly supports the representations by the WLGA in relation to the proposals to allow Councils to adopt different voting systems, namely that it will create inconsistency across Wales. In addition, that variation may itself give rise to perceptions that the system is being changed for perceived electoral advantage.
- 2) Of more concern and importance is the proposal that local authority employees can stand for election. LLG supports the position of ALACE whose representations clearly encapsulate the issues. The principle of enabling more people to stand for election is to be welcomed but this proposal

has potentially grave practical implications. Every local government employee agrees to a code of conduct that requires them to be politically impartial and to serve the council as a whole. Were an employee to stand as a candidate and lose then this could rightly call into question

- a. his/her impartiality in the eyes of their manager, all councillors and the successful candidate in particular; and
- b. his/her commitment to Council policies that s/he opposed whilst campaigning.

There is, thus, also real potential for political campaigning to damage the relationship between an employee, the successful candidate and their employer.

Part 2 – General Power of Competence (“GPOC”)

LLG welcomes the introduction of a power of general competence, and the inherent desire to move away from a default position of ultra vires to a starting point of vires being assumed. That said LLG has previously commented on how the currently drafted legislation failed to achieve its stated aims in England and proffered suggestion on how it might be improved to better achieve its intentions.

The proposed legislation mirrors the English drafting of this legislative power. LLG held a round table event in 2017 consisting of local authority representatives, representatives from national firms of solicitors working in the local government field (Anthony Collins, Bevan Brittan, Browne Jacobson and Eversheds Sutherland) who brought their experience of advising clients in England on the use of the legislation.

I have attached the detailed note and representations that were made following the round table session. In summary, the GPOC may only be used where no pre-commencement limitation exists. There are 42 UK wide acts with Local Government in the title, and a further 3 measures/acts applying only in Wales, each of which may contain a pre-commencement limitation. The complex interplay between the GPOC and so many other Acts creates multiple possible risks. Unless it is possible to satisfactorily mitigate or resolve those risks this has 2 principal consequences:

- 1) it would not be prudent for councils to proceed however valid the proposal under consideration might be. In short, possibly valid solutions might be lost as a result of concerns over vires; and
- 2) when dealing with the private sector/private funding those risks add both delay and cost if they do not preclude a project altogether.

The experience from the private practice solicitors was, therefore, that their clients did not turn to the GPOC as a first resort. Instead, if it was relied on at all, the power was typically cited as a belt and braces addition or last resort. This demonstrates the lack of confidence in the power that might not be readily visible but is the real life experience of those practising in the field who, it must be remembered, are likely to be engaged in some of the more complex or high profile matters where reassurance about vires is being sought from acknowledged experts in the field.

LLG made representations at the time about how the power might be remodelled to be of greater utility to local authorities, and indeed the private practice solicitors were willing to lend their aid in that endeavour. Initially, civil servants were receptive but subsequently rejected the offer. LLG was disappointed with the response at the time and remains disappointed to see that the English model is again being proposed. The offer remains open to work together to create a genuinely useful general power of competence (GPOC) with the assistance of leading, national firms of solicitors who operate in the local government sector.

Should WG wish to proceed with the currently proposed text then there are still improvements that could be achieved in terms of saving provisions as described towards the end of the attached note.

Part 3 – Promoting Access to Local Government

- 1) The duty under Clause 46(3) (a) to develop a scheme for increased participation within community councils and national park authorities appears to be an interference with the sovereignty of those bodies. It is also a duty that the principal authority would have no means to enforce because there is no corresponding responsibility on those bodies to undertake such a task or even co-operate. The clause should either be amended to make principal councils set out how their responsibilities sit alongside those of connected authorities or there should be a clear legislative duty on those connected authorities to co-operate.
- 2) LLG has drafted a bi-lingual model constitution that is clearer and more transparent than the model originally prepared when the duty to publish a constitution came in to effect. That bi-lingual model has been adopted by a high proportion of Councils within Wales. Clearly the model will need to be updated in parts to reflect those proposals within the Bill which become law. LLG, in conjunction with the WLGA, would be willing to help prepare a national bi-lingual plain language guide to the Constitution should clause 52 be enacted.
- 3) The proposal to require every meeting to be webcast would introduce significant extra cost for purchase/hire of equipment and in the accessibility of the transmissions.
 - a. At my own authority it would require the installation of cameras in all of the meeting rooms (where currently they are only in the council chamber) and would result in an expected cost increase of £44,600 per year (from £16,000 to £60,600) not to mention the cost of employees to operate/oversee the equipment. In addition to this there would be the as yet uncalculated cost of providing mobile cameras for meetings that take place away from County Council offices;
 - b. The interplay between this duty and other existing legislative responsibilities such as the Public Sector Equality Duty needs to be carefully considered. When webcasting meetings councils will need to consider possible detriment to those with audio/visual impairments as well as providing translation via the webcast even where this is not provided within the meeting itself.
- 4) The potential problems outlined above might have the unintended consequence of reducing attempts by local authorities to make themselves

more accessible, if every meeting must be webcast then this will disincentivise calling meetings at buildings other than council offices with established webcasting provision, and would place a barrier to area committees, peripatetic meetings at schools or other venues etc. The duty should therefore be expressed as an obligation to webcast meetings where “reasonably practical”.

- 5) Clause 50 is a welcome relaxation of the obligation to publish members’ home address, which is increasingly a cause for concern around personal security whilst at the same time becoming increasingly irrelevant in an age of electronic communication. The aim of this clause, however, could be undermined by the requirement to publish details of any interest in land, which is typically only a councillor’s home address, as part of the member’s register of interests. Although it is open to a monitoring officer to agree to redact personal data on the register in the event that it creates, or is likely to create, a risk that the member (or a person living with them) may be subjected to violence or intimidation, the starting point is that such information will be routinely published, thereby revealing the data which Clause 50 is seeking to protect. The relaxation should therefore be extended to the obligation under the Councillors’ Code of Conduct as well, which could be achieved by amending the duty under the code to register interests in land other than the Councillor’s home address.
- 6) It is welcome to see that local authority attendance and voting at meetings is to be modernised. However, doing so simply through the mechanism of electronic remote attendance seems to artificially narrow the range of options. It has long been possible for company directors to meet virtually using both telephone and email, and it should be possible, subject to the imposition of some simple safeguards, to draft legislation that would permit councillors to do the same
- 7) Clause 53(6) contains a “saving” provision to ensure the validity of proceedings in the event of web casting failing during a meeting. For some reason, a saving provision was not included within the 2011 Measure’s proposals for remote attendance. Given that remote attendance will probably depend on the very same technology as webcasting, and in any event could be subject to disruption, an equivalent provision ensuring the validity of proceedings where remote attendance is not available should also be inserted.
- 8) The duty on group leaders to help promote good ethical behaviour is welcome and reflects current practice in many authorities. The drafting leaves sufficient flexibility for local authorities to make the duty work in harmony with their existing culture and democratic structures

Part 5 – Collaborative Working by Principal Councils

Lawyers in Local Government supports in principle the introduction of CJsCs, which would be welcome as an additional collaborative vehicle that authorities could choose to adopt as a local solution. There is an acknowledged need for local government to be able to work with stakeholders as equal partners, and for it to be able to establish arrangements where, for example, non local authority bodies can have equal voting rights. Some form of new legal vehicle appears to be required in order to achieve that though, as always, finding the right model is the key.

As currently drafted the proposals do raise a lot of complexity that will need to be resolved before they can be satisfactorily implemented. One of the issues that has been identified is what general local government legislation will apply and which parts. For example, will the 6 month rule (s.85 Local Government Act 1972) or the power to trade (s.95 Local Government Act 2003) or the GPOC apply?

In addition, there are other issues that need to be resolved such as whether these bodies will work alongside or supplant existing regional bodies such as the regional school improvement bodies or regional economic growth partnerships. If those bodies become sub-committees of a Corporate Joint Committee then the constituent councils will need to look at the impact of the new arrangements on the existing inter-authority agreements.

Such issues are not insurmountable but do need to be identified and the necessary time and effort devoted to making sure that they are resolved.

LLG is a member of the Local Government Reform – Officer Task and Finish Group, and is appreciative of its involvement in the early stages of formulation and drafting of the legislation. It is also appreciative of civil servant attendance at meetings of the LLG Monitoring Officers Group to discuss formulation of the legislation. Both of which would be suitable mechanisms for the resolution of these issues.

I look forward to being able to expand upon these points at the Committee.

Yours sincerely



Gareth Owens
Chair of the Wales LLG Monitoring Officers Group
For and on behalf of LLG Wales



**ROUND TABLE DISCUSSION ON
THE GENERAL POWER OF COMPETENCE**

Friday, 2 June 2017

NOTES AND OUTCOME

Those present were:

Welsh Government: Frank Cuthbert

LLG Corporate Partners: Alex Lawrence (Anthony Collins), Bethan Evans (Bevan Brittan), Laura Hughes (Browne Jacobson), Sean Jamieson (Eversheds Sutherland)

LLG Members: Andrew Jolley (Bridgend County Borough Council), Linda Rees-Jones (Carmarthenshire County Council), Delyth Jones (Conwy County Borough Council), Gareth Owens (Flintshire County Council), Trevor Coxon (Wrexham County Borough Council)

Discussion

Frank Cuthbert opened the discussion by outlining Welsh Government's intention to work collaboratively with local government and to give councils the powers to deliver for their residents. Over many years councils had requested that the general power of competence should be introduced and the Cabinet Secretary had agreed that it should be included within the forthcoming Local Government Bill as a means of enabling councils to innovate in service delivery, income generation and the realisation of efficiencies.

The local authority representatives then spoke about their experiences of managing vices without the general power of competence, their hopes and aspirations for the power and their concerns about how it might work in practice. In summary, it was agreed that

- Authorities were generally good at finding powers amongst existing legislation and they were equally adept at adapting proposals to ensure that they were authorised by existing powers
- That there were few examples of proposals that had stalled for want of a lack of vires/the general power of competence (though it was accepted that ideas dismissed are generally more difficult to remember)
- The general power of competence may give greater confidence to councils that they had the power to act and that the power would reduce the risk of successful legal challenge
- There was concern that some court cases had resulted in the power being interpreted as a duty on councils to act in cases where but for the general power of competence they would have had no specific power or duty to act
- The general power of competence might, by boosting confidence, help to change the culture of councils making them bolder and more innovative (again accepting that there are some things under the principles of public law that councils rightly could not and should not do such as acting irrationally or unfairly etc)
- There was concern about the limits on the general power of competence referred to in the legislation as “pre commencement limitations”, and how it could be more difficult to prove that no such limitation existed than to find a power that was broad enough to cover a proposed course of action. It was suggested that some degree of indemnity might be considered in the legislation if after reasonable investigation a power could not be found even if later it was proved to exist.

The Corporate Partners, as firms of solicitors operating in the local government field, then shared their experience of operating the general power of competence in England. In summary the following points were made:

- The general power of competence was not as extensively used as might have been expected and the cases where it had been relied on exclusively tended to be limited in nature, usually around income generation or giving of financial assistance
- Whilst the general power of competence had been intended to form a power of first resort it had in practice turned into a power of last resort where no other specific power could be found or as additional validation
- The drafting on pre commencement limitations created a barrier to it being more widely used or being used as a power of first choice

As a group we then considered options for improving on the flaws that had been noted in the English legislation. The following were agreed:

1. That local government was rightly subject to the following limitations which were derived from public law principles or other legislation:
 - a. That councils must act reasonably e.g. acting on the basis of evidence, considering only relevant matters and dismissing the irrelevant
 - b. The rules of natural justice such as procedural fairness, treating like cases alike, consulting those affected by decisions etc
 - c. The public sector equality and consultation duties and public procurement regulations
 - d. The Human Rights Act

2. That any general power of competence should be limited by constitutional law/conventions including the following:
 - a. The power should not be used to raise taxes (tax raising powers needing to be expressly conferred by legislation)
 - b. The power should not authorise charging for the fulfilment of mandatory duties or the provision of mandatory services
 - c. The power should not be used to make by-laws, orders or other regulations
 - d. The power should not be used to change governance arrangements or the delegation of powers under the 1972 and 2000 Local Government Acts
3. A general power of competence subject only to the limitations set out in paragraphs 1 and 2 above would be a preferred and mature option. Despite this, it was contended that a power drafted in this way might be a step too far for Welsh Ministers
4. Hence, a general power of competence subject to the limitations set out in paragraphs 1 and 2 above PLUS a discretion on the part of Welsh Government to “call in uses” of the general power that would be akin to the process of calling in planning decisions might be an acceptable alternative;
5. A general power of competence subject to the limitations set out in paragraphs 1 and 2 above PLUS a requirement that it must be exercised having regard to, and was thus subject to, limitations contained within statutory guidance issued by Welsh Government

Option 5 was also examined in more detail to explore how to increase confidence on the parts of law makers, practitioners and judges in such statutory guidance. The following were agreed:

1. There would need to be wide consultation with groups such as LLG, WLGA and SOLACE (who are all agreeable to the idea) on the wording of the statutory guidance to generate support amongst practitioners
2. The guidance could (as the general disposal consent does now for the sale of land) specify limits above which the express prior consent of Welsh Government would need to be obtained
3. the statutory guidance could be subject to the affirmative approval process in the Senedd so that it possessed highest possible level of democratic legitimacy

There was also discussion about how to ensure that certainty existed for any third parties who might be entering into commercial or contractual arrangements with local councils where the council was relying upon the general power of competence. The Local Government (Contracts) Act 1997 is a legislative precedent for how third parties can be protected against any want of vires on the part of a council entering into a contract. Similar protection could be given to third parties so that they would have the confidence to enter into arrangements with councils based on the general power of competence.

If the current English drafting of the legislation were to be preferred then local authorities seeking to rely upon the general power of competence would also benefit from certainty if, having used the general power of competence in good faith, a pre commencement limitation were subsequently found to apply. Legislative precedents exist where

councils are protected from findings of ultra vires notwithstanding a failure to comply with legislation. See for example:

- Paragraph 4(4) Schedule 12 Local Government Act 1972 (want of service of a summons to a meeting does not invalidate that meeting); and
- s.16(3) Local Government and Housing Act 1989 (a defect in the application of the political balance rules to a body would not invalidate meetings of that body)

Lawyers in Local Government

October 2017

PUBLIC GENERAL ACTS WITH LOCAL GOVERNMENT IN THE TITLE

Title	Years and Numbers
1. Cities and Local Government Devolution Act 2016	2016 c. 1
2. Local Government (Religious etc. Observances) Act 2015	2015 c. 27
3. Local Government (Review of Decisions) Act 2015	2015 c. 22
4. Local Government Finance Act 2012	2012 c. 17
5. Local Government Act 2010	2010 c. 35
6. Local Government and Public Involvement in Health Act 2007	2007 c. 28
7. Local Government Act 2003	2003 c. 26
8. Local Government Act 2000	2000 c. 22
9. Local Government Act 1999	1999 c. 27
10. Local Government (Contracts) Act 1997	1997 c. 65
Local Government and Rating Act 1997	1997 c. 29
11. Local Government (Wales) Act 1994	1994 c. 19
12. Local Government (Amendment) Act 1993	1993 c. 27
13. Local Government (Overseas Assistance) Act 1993	1993 c. 25
14. Local Government Act 1992	1992 c. 19

Title	Years and Numbers
15. Local Government Finance Act 1992	1992 c. 14
16. Local Government and Housing Act 1989	1989 c. 42
17. Local Government Finance Act 1988	1988 c. 41
18. Local Government Act 1988	1988 c. 9
19. Local Government Act 1986	1986 c. 10
20. Local Government Act 1985	1985 c. 51
21. Local Government (Access to Information) Act 1985	1985 c. 43
22. Local Government Finance Act 1982	1982 c. 32
23. Local Government (Miscellaneous Provisions) Act 1982	1982 c. 30
24. Local Government and Planning (Amendment) Act 1981	1981 c. 41
25. Local Government, Planning and Land Act 1980	1980 c. 65
26. Local Government Act 1978	1978 c. 39
27. Local Government (Miscellaneous Provisions) Act 1976	1976 c. 57
28. Local Government Act 1974	1974 c. 7
29. Local Government Act 1972	1972 c. 70
30. Local Government Grants (Social Need) Act 1969	1969 c. 2
31. Local Government Act 1966	1966 c. 42
32. Local Government (Financial Provisions) Act 1963	1963 c. 46

Title	Years and Numbers
33. Local Government (Records) Act 1962	1962 c. 56
34. Local Government Act 1958	1958 c. 55
35. Local Government (Miscellaneous Provisions) Act 1953	1953 c. 26
36. Local Government Superannuation Act 1953	1953 c. 25
37. Local Government Act 1948	1948 c. 26
38. Local Government Act 1929	1929 c. 17
39. Local Government (Emergency Provisions) Act 1916	1916 c. 12
40. Local Government (Stock Transfer) Act 1895	1895 c. 32
41. Local Government Act 1894	1894 c. 73
42. Local Government Act 1888	1888 c. 41