

POLICY AND RESOURCES

CABINET BOARD

13th SEPTEMBER 2012

FINANCE AND CORPORATE SERVICES

REPORT OF THE HEAD OF LEGAL SERVICES

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PART 1 SECTION A
ITEM 1

RECOMMENDATION TO WELSH LOCAL GOVERNMENT ASSOCIATION TO ENTER INTO DISCUSSIONS WITH THE WELSH GOVERNMENT TO INTRODUCE A “GENERAL POWER OF COMPETENCE IN WALES

1. **Purpose of Report**

1.1. To consider a report of the Head of Legal Services seeking approval to contact the Welsh Local Government Association (“WLGA”) to request they enter into dialogue with the Welsh Government to introduce a similar legislative power to that which the Localism Act 2011 introduced in England, providing Local Authorities in England a “general power of competence”. This in turn would result in the replacement of the current “well being” power and aim to add to the existing statutory provision a broader definition of capacity for Local Authorities in Wales to act, giving them the same capacity to act as an individual generally has, which will enable them to do anything apart from that which is specifically prohibited. This will give the Authority more freedom and flexibility in delivery of services and in turn leading to perhaps greater efficiencies, improved services and partnership working and the ability to help communities that are now presently outside of its remit.

2. **Current Operations in Wales**

2.1 Whilst the Welsh Government has signalled that it is not at present in favour of further Local Authority reorganisation, it has made it clear through various reports (“the Simpson Report” and “the Vivian Thomas Report”) that there needs to be greater collaboration across boundaries to improve services and achieve efficiencies.

2.2 Various Local Authorities throughout Wales, including Neath Port Talbot have taken steps in the past to share services with other Local Authorities where there is an advantage in doing so.

- 2.3 However, when any attempts are proposed of joint working, which could potentially take various forms, i.e. secondment of staff, contractual, formal designation or merely an informal understanding, a statutory power has to be identified that would allow the Local Authority to undertake this approach. Members will undoubtedly be aware the Authority is unable to act unless given the power to do so by legislation.
- 2.4 In addition to the opportunity to work with neighbouring authorities, opportunities could also present itself for the Authority to undertake work, which although not necessary within its remit, could eventually lead to a number of benefits being brought back to the community. By way of example, the setting up of an entity to provide garden maintenance services to the general public.
- 2.5 The ability to generate income from external sources through joint working or extending the remit of the Local Authority could go a long way to not only paying for the particular service that will be provided but also subsidising the delivery of other front line services
- 2.6 The current legislation as it applies to Local Authorities is not as clear as the legislation open to our English counterparts.
- 2.7 In Wales, the most commonly utilised legislative options open to the Authority are as follows:

2.7.1 S111(1) Local Government Act 1972

S111(1) of the Local Government Act 1972 gives Local Authorities the power to do anything which is “calculated to facilities, or is conducive or incidental to, the discharge of any of their functions.

2.7.2 Section 1(1) Local Authorities Goods and Services Act 1970

All Local Authorities have power under Section 1(1) of the Local Authorities Goods and Services Act 1970 to enter into an agreement with a public body to supply goods or materials, provide administrative, professional or technical services, to use vehicles plant or apparatus (and employees) or to carry out maintenance on land or buildings. Any such agreement may contain such terms as to pay or otherwise as the parties consider appropriate. This power

effectively enables Local Authorities to trade with other Local Authorities and with other public bodies.

2.7.3 Section 2 Local Government Act 2000 – The Wellbeing Power

Section 2(1) of the Local Government Act 2000 enables an eligible Local Authority to use the power to promote well-being where it considers this will achieve any one or more of the following three objectives:

- a) the promotion or improvement of the economic well-being of its area
- b) the promotion or improvement of the social well-being of its area
- c) the promotion or improvement of the environmental well-being of its area

The power is drafted in this way in order to maximise its flexibility. Each of its three components can be used either separately or in combination.

The Welsh Government considers the term “promotion of economic, social or environmental well-being” to be sufficiently broad to encompass both cultural well-being and the promotion or improvement of the health of a Local Authority’s residents or visitors to the Local Authority’s area. It is for an eligible Local Authority itself to decide whether any particular action taken pursuant to the well-being power would promote or improve well-being, taking account of the local circumstances and the wishes and needs of the communities it serves. To this extent, the nature and appropriateness of the use of the well-being power will differ for each eligible Local Authority.

Unless it is specifically restricted on the face of legislation, the power can also be used instead of existing, more specific powers. For example where an eligible Local Authority has a discretionary power to provide a specific service to a defined group of people, or make a grant to a defined type of organisation, the well-being power can be used instead and can also be used to extend the service to other groups or make a grant available to other organisations, where it will improve the well-being of individuals, groups or the community as a whole.

Section 3(1) states that “the power under section 2(1) does not enable eligible councils to do anything that they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made)”.

- 2.8 S111(1) of the Local Government Act 1972 and S1(1) Local Authorities Goods and Services Act do however have their flaws. Most obviously, their use are constrained by there being a relationship with a Local Authority’s functions and also they can only be exercised in furtherance of another statutory power.
- 2.9 Whilst many regard the wellbeing power as being the way in which to circumvent these flaws, the wellbeing power also has its weaknesses in its application.
- 2.10 The main weakness being that it can only be exercised in relation to or for the benefit of the whole of any part of a Local Authority’s area, or all or any persons resident in a Local Authority’s area. You can in limited circumstances exercise it outside of the area, but only if its is considered likely to achieve on the objectives listed in the Act (see above). In addition before exercising the power regard must be had to the Community Strategy.
- 2.11 A recent Court of Appeal judgement on mutual insurance arrangements by a number of London Councils (the Brent London Borough Council v Risk Management Partners [2009] EWCA Civ 490; [2010]PTSR 349) has put a caveat on the well being power being utilised.. In summary the principle that derived from the case is that the London Borough of Brent Council has not identified sufficiently how the action that they had taken would be likely to promote the well being of the area (as opposed to potentially benefitting the authority with the result that it would then have more money available to benefit the area if that is how it chose to spent the money). The decision therefore makes it clear that the Wellbeing power cannot be utilised to improve a local authority’s financial position.
- 2.12 In summary the principle that derived from the case is that the London Borough of Brent Council has not identified sufficiently how the action that they had taken would be likely to promote the well being of the area (as opposed to potentially benefitting the authority with the result that it would then have more money

available to benefit the area if that is how it chose to spend the money). As a result of the increased obligations that are now being placed on Local Authorities to ensure compliance with the above, authorities are now cautious of using the wellbeing power, out of the concern that there could be a possible challenge or judicial review made

- 2.13 All of the above difficulties have meant it now proves particularly complex to locate the legislative power that can be utilised by Local Authorities to provide services, whether to the community in general on a more wider basis. What would be helpful is a more general power that could be utilised in a wide variety of areas to allow Local Authorities to improve services and achieve efficiencies.

3 **Operations in England**

- 3.1 The Localism Act received royal assent on 15 November 2011. The Act brought about a number of fundamental changes in an attempt to identify the various problems in the legislative system that are detailed above
- 3.2 Section 1 of the Localism Act 2011 provides a general power of competence for Local Authorities in England. It gives Local Authorities the same power to act that an individual generally has and provides that the power may be used in an innovative way, Where the Authority can do something under the power, the starting point is that there are to be no limits as to how the power can be exercised. For example, the power does not need to be exercised for the benefit of any particular place or group and can be exercised anywhere in and in any way. This provision effectively replaces the well being power, thus the well being power will no longer apply to English Local Authorities.

4. **Proposal**

- 4.1 It is proposed that the Head of Legal Services be granted approval to contact the Welsh Local Government Association (“WLGA”) to request they enter into discussions with the Welsh Government to introduce a similar legislative power to that which the Localism Act 2011 introduced in England, providing Local Authorities in England a “general power of competence”.

4.2. **Reasons for the proposal**

- 4.2.1 The Localism Act's "general power of competence" does not apply to Welsh Local Authority's but by virtue to the powers open to it in the Government of Wales Act 2006 (the field of Local Government being one of the areas that Wales has legislative competence) the Welsh Government does have power to legislate in this area.
- 4.2.2 The Plain English Guide to the Localism Act published by the Department for Communities and Local Government in November 2011 emphasises that the introduction of a "general power of competence" would effectively give Local Authorities the legal capacity to do anything that an individual can do that is not specifically prohibited i.e. they will not be able to impose new taxes, as an individual has no power to tax.
- 4.2.3 This means that any new power would differ in several ways from the powers conferred by S111 of the Local Government Act 1972 and Section 2 of the Local Government Act 2000 in that its use would not be constrained either by any requirement for a link with a Local Authority's other functions.
- 4.2.4 It would replace the existing 'ultra vires' principle whereby Local Authorities can only do things they are specifically permitted to do, and the broadly defined power of well-being under the Local Government Act 2000. And as identified above, in any event some Local Authorities have now become reluctant to use the power in any event
- 4.2.5 The power would potentially include the ability to do something for a commercial purpose or otherwise with or without a charge. There would be limitations on the power to charge, for example, where the activity in question would be one required by a statutory provision. Although the general power would be intended to give Local Authorities more confidence in charging for and trading services, the power cannot be used to charge for services which statute requires a local authority to provide and any activities undertaken for a commercial purpose have to be carried out through a company as defined through existing legislation.

- 4.2.6 A broadly defined “general power of competence” could also potentially reduce the risk and cost associated with legal challenges to the Local Authority and could potentially change the way Local Authorities act, giving Local Authorities the same capacity to act as an individual generally has, which will enable them to do anything apart from that which is specifically prohibited.
- 4.2.7 The UK Government have envisaged that this will result in ‘greater innovation and a new, more confident and entrepreneurial approach which should, in turn, lead to greater efficiencies, improved partnership working and the ability to help their communities in ways previously outside their remit.

4.3. **Alternative option considered**

No recommendation could be made to the Welsh Local Government Association and the Authority could await to see whether it is a matter that they intend to consider. It would be feasible however that no action be taken and the current legislative system remains. The well being power and the existing statutory powers remain a broad power and are capable of being utilised, perhaps with increased guidance being made available on its usage. However, as identified above the London Authorities Mutual Limited court case and other recent challenges appear to have undermined the utilisation on the power and also demonstrated its many weaknesses. Nevertheless, the power is intended to be all-embracing and in practice, the three objectives of economic, social or environmental well-being have been interpreted by local authorities to encompass cultural well-being and the promotion or improvement of the health of residents and visitors (*Department for Communities and Local Government Guidance November 2008*).

5. **Implementation**

5.1 The process for implementation is as follows:

5.1.1 The Head of Legal Services will write to the WLGA accordingly with a request that they consider entering into dialogue with the Welsh Government to consider inclusion of a general power of competence. According to the Welsh Government White Paper – Promoting Local Democracy (Reference WF13987), the Welsh Government are presently consulting on amendments to the Local

Government (Wales) Measure 2011, and a request would be made as to whether the general power could be incorporated in the proposed amendments.

6. **Recommendations**

- 6.1 That the Head of Legal Services be authorised to undertake the actions referred to in paragraph 4.1 of this report.

7. **Reason for Proposed Decision**

As set out in paragraph 4.2 of this report.

8. **Background Papers**

Welsh Government White Paper – Promoting Local Democracy
(Reference WF13987)
Relevant Statutes and Case Law

9. **Officer Contact**

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10. **Wards Affected**

All

COMPLIANCE STATEMENT

1. RECOMMENDATION TO WELSH LOCAL GOVERNMENT ASSOCIATION TO ENTER INTO DISCUSSIONS WITH THE WELSH GOVERNMENT TO INTRODUCE A “GENERAL POWER OF COMPETENCE IN WALES

(a) Implementation of Decision

The decision is proposed for implementation after the three day call in period.

(b) Sustainability Appraisal

Community Plan Impacts

Economic Prosperity	-	positive
Education & Lifelong Learning	-	positive
Better Health & Well Being	-	positive
Environment & Transport	-	positive
Crime & Disorder	-	positive

Other Impacts

Welsh Language	-	positive
Sustainable Development	-	positive
Equalities	-	positive
Social Inclusion	-	positive

- (a) There has been no requirement under the Constitution for external consultation on this item.