House of Commons
Communities and Local Government Committee

General Power of Competence

Written evidence

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The Communities and Local Government Committee

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The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume.

Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Huw Yardley (Clerk), Judith Boyce (Second Clerk), Josephine Willows (Inquiry Manager), Kevin Maddison (Committee Specialist), Emily Gregory (Senior Committee Assistant), Mandy Sullivan (Committee Assistant), Stewart McIlvenna, (Committee Support Assistant) and Hannah Pearce (Media Officer).

Contacts

All correspondence should be addressed to the Clerk of the Communities and Local Government Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 1234; the Committee’s email address is clgcom@parliament.uk
General Power of Competence

Letter from Rt Hon Eric Pickles MP, Secretary of State for Communities and Local Government to the Chair

Localism Bill: Operation of the general power of competence

Thank you for your letter of 24 January enclosing some questions from your Committee about the principles and intended operation of the general power of competence for local authorities.

I understand that the Committee is keen to consider these issues before the Bill reaches report stage in the House of Commons and my response to your questions is therefore attached as an annex to this letter.

I hope that my comments will enable your Committee to better understand the principles and practice behind the operation of the general power of competence and provide some reassurance around the approach taken in drafting the power and the freedoms and safeguards that the provisions will operate under.

Rt Hon Eric Pickles MP
Secretary of State for Communities and Local Government
21 March 2011

General Power of Competence – CLG Select Committee Questions and Responses

1. The general power of competence is based on providing local authorities with the same powers as an individual. Why did the Government decide to take this approach rather than abolishing the ultra vires principle in respect of local authorities?

In particular, did the Government consider introducing an equivalent to section 39 of the Companies Act 2006 to protect the legality of actions performed by local authorities? If so, why was this option rejected?

Response
We consider that the power in clause 1 of the Bill will remove much of the doubt about the scope of local authority powers. Activities that individuals can undertake will no longer be able to be found to be ‘ultra vires’ because they are not expressly provided for in legislation, or are of a type that are not normally associated with a local authority, or other public body.

Section 39 of the Companies Act was considered in the development of our proposals. That section states that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s constitution. This approach was rejected for several reasons. Firstly, as local authorities...
do not have constitutions in the same way that companies do a direct analogy is not possible. Secondly, while section 39 provides protection for third parties in their dealings with companies, it does not prevent the action in question from being ultra vires (and so does not, for instance, protect the position of an officer or employee of the company in relation to the company). It was felt, therefore that such an approach would not go far enough to ensure that officers and members of local authorities can be confident that actions proposed are actually lawful, as opposed to simply being binding.

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. However this approach 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. And 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.

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. It is felt that the concept of the powers of an individual has the added advantage of being understandable by lay people and not just lawyers.

2. In what ways will the general power of competence:
   • enable local authorities to trade in new ways (such as providing banking, estate agency or insurance services to its local residents);
   • affect the ability of local authorities to raise revenue and vary rates of taxation (such as altering tax rates and discounts to incentivise citizen behaviour or small business development)?

Response
Local authorities already have wide powers to trade, including those provided by the Local Government (Best Value Authorities) (Power to Trade)(England) Order 2009, made under sections 95 and 96 of the Local Government Act 2003. This Order allows local authorities to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions.

Clause 4 of the Localism Bill places limits on the general power in relation to commercial activities, in line with the provisions of the 2003 Act. However, as the general power widens what a local authority in general may do, it necessarily also widens the scope of what it may do for a commercial purpose.

I understand that the New Local Government Network in their ‘Going Nuclear’ paper suggested that providing banking, estate agency or insurance services might be some of the ways in which councils may choose to use the new general power. However, it is not for Government to say how councils might use the power.
The Bill also contains provisions at Clause 36 that would give local authorities a wide power to grant business rate discounts at their discretion, thus enabling local authorities to respond to local circumstances by reducing business rates bills.

3. **What is the rationale for preventing local authorities from imposing charges that exceed the cost of provision year on year under clause 3(3)?** Given the desire to encourage creativity and innovation, would it be better to enable local authorities to cross-subsidise services or to maximise revenue opportunities subject to local democratic constraints?

**Response**

Clause 3 restricts the ability of a local authority to charge for providing a service to a person using the general power, or where they are using an overlapped power. Local authorities can charge up to full cost recovery for discretionary services - that is those that they are not required by legislation to provide, unless specific charging powers exist. This is in line with the charging powers in section 93 of the Local Government Act 2003. Charging above cost recovery means making a profit - which will, in effect, be acting for a commercial purpose. In this case the restrictions in clause 4 and not clause 3 apply and such activity must be carried on through a company. The rationale for this requirement is explained in the answer to question 5.

4. **Can a local authority that is entitled to exercise the powers of an individual decide, for example, to gamble, make political donations or purchase stands at party political conferences? In other words, does the general power of competence increase the risk of public funds being abused?**

**Response**

Clause 2 will require local authorities to act in accordance with statutory limitations or restrictions. These include strict rules on using public money for political purposes, for instance those surrounding political publicity set out in the Local Government Act 1986 and the restrictions set out in the Political Parties, Elections and Referendums Act 2000. In addition, the general legal framework in which local authorities operate, coupled with the range of safeguards in place concerning the financial control systems of local authorities, should provide adequate assurance that councils will act both lawfully and with due regard to the proper use of public money. The Secretary of State will also have powers to set conditions around use of the power or to prevent authorities acting in specified circumstances, should this prove necessary.

5. **What is the rationale for requiring local authorities to pursue commercial activities through a company under clause 4(2), rather than allowing local authorities to decide which type of commercial vehicle to use? Does this also undermine creativity and innovation?**

**Response**
The requirement in clause 4(2) of the Localism Bill that local authorities must pursue commercial activities through a company is consistent with the trading provisions in section 95 of the Local Government Act 2003 and reflect government policy that local authorities should not be able to use their public status to gain commercial advantage over the private sector. We do not consider that this will prevent local authorities from acting creatively and innovatively.

6. **Is there any merit in the Localism Bill including a statutory mechanism providing local authorities (or others) with a channel to ask central government to take action (under clause 5) on the powers available to local authorities, similar to the mechanism contained in the Sustainable Communities Act 2007?**

**Response**
We have made such a channel available without the need to include provisions in the Localism Bill. Councils have been invited to submit ideas via a dedicated ‘barrier busting’ website (http://barrierbusting.communities.gov.uk/) and they will be able to follow the progress of their suggestions online. Users of the service are given a unique tracking number to monitor requests and a named ‘barrier buster’ is assigned to each case. Anyone can use this route to highlight a barrier, and councils can use it to champion proposals inspired from local peoples’ ideas under the Sustainable Communities Act. Anyone who uses the Act to highlight barriers will have the opportunity to benefit from the services of the ‘selector’ – we will be consulting shortly on this.

7. **Should local authorities have access to some kind of guidance or prior-authorisation mechanism to provide reassurance that any novel uses of the general power are considered lawful and therefore unlikely to be the subject of successful legal challenge once significant resources have been invested?**

**Response**
No. We are keen to reduce the culture of local government dependency on central government. 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. A pre-authorisation mechanism would totally undermine this approach. In response to local government sector views and our policy on localism, we wish to keep guidance to a minimum.

8. **Has the Government set a timetable for reviewing existing legislation to ensure that current statutory powers and restrictions are both satisfactory and coherent in light of the proposed general power of competence, including in particular the provisions of the Local Government Act 2003? How long would you expect this process to take?**

**Response**
We are intending to review existing restrictions and limitations to see whether they can be removed to encourage this devolutionary, cultural shift. We want councils to be able to act confidently, using the power as their primary tool. We hope that councils will use the barrier busting website mentioned above to bring obvious candidates to our attention at an early stage. We will be considering the scope and timetable for any such review shortly.

9. **Under what circumstances would the Government consider limiting the general power of competence under clause 5? Have any types of activity already been identified as potential targets for action under clause 5?**

**Response**
We feel very strongly that the general power of competence should not be subject to unnecessary conditions or restrictions. However the ability to set conditions around the use of the power and restrict its use is a necessary safeguard to protect ratepayers and the Exchequer. This is not intended to be a power that is used lightly - it will require full consultation, and scrutiny by Parliament before approval. Currently there are no plans to use these powers.

10. **What account will the Secretary of State take of local views on the powers which a local authority ought to have when exercising his powers under clause 5? Is there merit in providing a mechanism—such as a local referendum—to enable local control over the powers available locally?**

**Response**
Before making any order under clause 5, there must be consultation as described in that clause, which will enable the Secretary of State to be aware of and take account of local views, as appropriate. The only exception to the requirement for consultation is in the very limited circumstances where an order is only widening or limiting the local authorities to which an earlier order setting out restrictions or conditions applies.

It is for local authorities to decide how to exercise their powers – and to answer to their local communities about how they do this. The Localism Bill will empower local people, to instigate local referendums on any issue. Ultimately, through its democratic mandate, a local authority will be judged on its results and as such, councillors will be held to account through the ballot box.

11. **Is there a danger of local authorities discovering that their ability to work with other public bodies under the general power of competence (such as health bodies) is frustrated because the Localism Bill has failed to address whether other public bodies have adequate powers to work with local authorities? Should other public bodies also be given a general power of competence?**

**Response**
There is no ‘one size fits all’ general power. The powers which are appropriate for a body depend on its purpose and functions. The breadth of the general power of competence for local authorities recognises the breadth of their role and their electoral mandate. The fundamental questions to ask in each case is whether the body in question has all the powers necessary to meet its purpose, or ‘objects’ including effective joint working.

However, the feedback we have received so far is not that organisations lack the competence to engage with local government but that they may be unwilling or do not feel empowered to do so. The ring fencing of funding and performance regimes have pulled organisations towards central accountability regimes which has made it difficult for local innovation and engagement on cross cutting outcomes. Spending Review and Coalition Government changes are addressing this.

More specifically within DCLG, the original vanguard communities were identified as training grounds for the Big Society approach to decentralising power and identifying where bureaucratic barriers were stopping local people from taking the lead and shaping their local areas – as a result of this work we are removing unnecessary legislation, regulations or burdens in the way of community action that can be applied across the country – including outdated byelaws, data burdens and archaic rules. More recently, other councils have approached us with innovative proposals for their communities and we look forward to working with them to strengthen local partnerships and remove central barriers to help turn their ideas into reality.

In addition, the 16 first phase Community Budget areas are developing local solutions for families with multiple problems. The range of issues affecting such families requires the collaboration of a wide range of organisations - including the voluntary and community sector. Community Budgets support this by enabling areas to shape funding around such families delivering more effective outcomes and avoiding wasteful duplication of services. Government is committed to supporting places to tackle barriers to local innovation.

12. Should all public bodies be placed under a statutory duty to work collaboratively with local authorities and each other?

Response
This Government’s agenda for decentralisation means fewer Whitehall diktats and increasing autonomy for local institutions and people. In the current financial climate it makes good economic sense for all public bodies to work together collaboratively – and we hope that the general power of competence will give local government the confidence to enter into collaborative partnerships without wondering whether they have a specific power to do so or not. However there are examples where the Government requires co-operation between councils and other public bodies - for example clause 90 of the Localism Bill will place a duty on local planning authorities and public bodies to engage constructively, actively and on an ongoing basis in the planning process. It will be a key element of our proposals for strategic working once Regional
Strategies are abolished. The duty will promote a culture change and new spirit of partnership working by local authorities and public bodies. Working alongside the incentives that we’re implementing, such as the New Homes Bonus, it will act as a strong driver to change the behaviour of local authorities.

13. Does the proposal for a general power of competence that is based on the powers of an individual fail to take account of the unique constitutional role of local government as distinct from an individual? Has the Bill missed the opportunity to meet the broader challenge of reforming the constitutional role and status of local authorities in addition to their available powers?

Response
The Localism Bill is intended to bring about a shift of power from Westminster to local people via their local authority. A new constitutional framework for local government would be a complex matter requiring careful consideration alongside wider questions such as those around a written constitution. The Political and Constitutional Reform Select Committee is currently considering the potential codification of the relationship between Central and Local Government and it would be wrong to pre-empt this inquiry.