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**APPENDIX 2**

**Response by the Society of Local Authority Lawyers and**

**Administrators in Scotland (SOLAR)**

**Empowering Councils - The Case for the Power of General Competence**

1. **Introduction**
	1. Section 20 of the Local Government in Scotland Act 2003 introduced a Power of Wellbeing. That power has been little used by local authorities and its scope has been steadily eroded by Court decisions, to the extent that it is now of little real value.
	2. Since 2003 the policy landscape has radically changed. Financial pressures mean that radical service transformation is now required. Increasingly the themes summarised by the Christie Commission of empowering communities, local services providers working together, outcomes tailored to community needs and of prevention and reducing inequality require new ways of working. Local authorities are increasingly looking to innovative means of delivering more efficient public services and promoting inclusive growth in their local area.
	3. In 2011 the UK Government, recognising that there were similar problems with the Power of Wellbeing contained into the Local Government Act 2000 passed the Localism Act 2011, giving a Power of General Competence to Local Authorities in England. Arguably the need for a Power of General Competence is even more pressing in Scotland than it is in England. Its absence restricts the ability of local authorities to achieve efficiencies through transformational change, restricts their ability to enter into partnerships with other bodies, restricts their ability to empower communities and restricts their ability to make money to fund core services.
2. **Background – Local Authority Powers**
	1. Historically local authorities in the UK were permitted only to do things that they had specific statutory powers to do. An action which was carried out in the absence of statutory powers would be deemed ultra vires - illegal and hence void. This has long been regarded as a limitation on the power of local authorities to act in the interest of the electorate. The Maud Committee on Management in Local Government in 1967 stated:

“Ultra vires as it operates at present has a deleterious effect on Local Government because of the narrowness of the legislation governing local authorities’ activities. The specific nature of the legislation discourages enterprise, handicaps development, robs the community of services which the local authority may render and encourages too rigorous oversight by Central Government. It contributes excessive concern over legalities”.

* 1. Section 69 of the Local Government (Scotland) Act 1973 gave local authorities the power to do anything which is calculated to facilitate or is conducive or incidental to the discharge of any of their functions. In using this power authorities needed to identify which of their functions an activity was ‘incidental to’. Case law limited the degree to which functions could be justified on the basis that they were incidental to activities that were themselves incidental to local authority function. For example McCarthy and Stone Developments vs. Richmond Upon Thames LBC 1992 2AC48 held that charging for pre-planning application advice to a developer was “incidental to the incidental and not incidental to the discharge of any functions” and therefore unlawful. Similar case law also raised questions as to whether Local Authorities could legitimately charge for property searches. In the case of SPH (Scotland) Limited v Edinburgh City Council 2003, the court held that where a local authority provided services which it was under no statutory duty to make available, in the absence of an express power to charge for that provision there would be no implied power so to do, and the charging of a fee would be beyond the powers of the authority.
	2. The Wellbeing Power – Section 20 of the Local Government Scotland Act 2003 introduced a Power of Wellbeing to give a local authority “power to do anything which it considered is likely to promote or improve the wellbeing of its area and/or persons within that area”. This followed the recommendations of the McIntosh Commission (Commission on Local Government and the Scottish Parliament), albeit McIntosh had recommended a Power of General Competence rather than a Power of Wellbeing. As detailed in ‘Renewing Local Democracy: The Next Steps’, the Scottish Government in 2002 stated:

“72 the Power of Wellbeing is a new power which is designed to allow local authorities to work in a more innovative and flexible way in the interests of their communities. It will provide clarity for Scotland’s local authorities and encourage a can-do approach in delivering customer focussed services. The Power of Wellbeing will reaffirm the Executive’s commitment to Councils’ strong community leadership role and enable joint working with communities and other agencies”.

* 1. Nevertheless Section 22 of the 2003 Act contained considerable limitations on the use of the Power of Wellbeing. As noted in the annotations to the Act by Dr Kenneth Meechan of Glasgow City Council, the Local Government Committee heard extensive evidence to the effect that judicial trends in interpreting legalisation historically indicated a high likelihood that the new power would be interpreted in a narrow and restrictive way. As detailed later in this paper, this is exactly what happened.
	2. In 2004 the Government published guidance on the power to advance wellbeing. As detailed in paragraph 2.2:

“The powers to advance wellbeing has been provided to encourage innovation and closer partnership working between local authorities and other bodies and better responding to the needs of communities.”

The breadth of the power is such that Local Authorities should regard it as “Power of First Resort” when they are in any doubt about whether existing powers would enable them to take a particular course of action or deliver a particular service.”

In practice it has proved to be a power of last resort when no other power can be identified.

* 1. Examples of possible uses of the Power of Wellbeing were provided in paragraph 2.8 of the guidance, which included:
* Enhancing a local service delivery;
* Promoting sustainable development;
* Tackling climate change;
* Improving mental, social and physical health;
* Tackling poverty and deprivation;
* Promoting financial inclusion in disadvantaged communities;
* Reducing inequalities and promoting equalities;
* Encouraging participation and community capacity building;
* Improving and conserving the quality of the local environment;
* Promoting local culture and heritage;
* Protecting, enhancing and promoting biodiversity;
* Promoting economic development; or
* Improving community safety.

2.10 stated: -

“Specific examples of the kind of action that can be taken are set out in Section 20 (2) of the Act which states that the power to advance wellbeing includes power to: -

1. Incur expenditure;
2. Give financial assistance to any person;
3. Enter into arrangements or agreements with any person;
4. Cooperate with, or facilitate or coordinate the activities of, any person;
5. Exercise on behalf of any person any functions of that person; and
6. Provide staff, goods, materials, facilities, services or property to any person.”
	1. Clearly the Power of Wellbeing was intended to significantly broaden local authorities’ powers. As befitting an Act which also provided the legislative basis for community planning and best value, the aims of Section 20 as set out in the guidance are still relevant.
7. **The Power of Wellbeing and the Courts**
	1. As envisaged, the Courts have interpreted the power of wellbeing in a restrictive way. The underlying reason for this is the existence of the ultra vires doctrine. As long as the doctrine survives, local authorities can only do what they are specifically allowed to do. Unless a clear power can be identified, a Court is likely to hold that a local authority’s actions are ultra vires. Against the background of the ultra vires principle, the qualifications to the Power of Wellbeing contained in section 22 of the 2003 Act provide fertile ammunition for those attempting to challenge local authority actions. In this context it perhaps unsurprising that the Courts, applying the ultra vires principle have interpreted the Power of Wellbeing in a restrictive manner.
	2. The result is that actions in reliance on the Power of Wellbeing are increasingly unsafe. In turn it has been little used and Council and market confidence in the wellbeing power has been undermined. It is no longer a power, in reliance on which the markets would be confident in lending.
	3. The two main cases which dealt with the Power of Wellbeing are:-

R v Risk Management Partners Limited ex parte The Council of the London Borough of Brent and the London Authorities Mutual Limited and the Council of the London Borough of Harrow “the LAML case”.

This is a case where the English equivalent of the wellbeing power was challenged. A number of London authorities set up a mutual insurance company, which aimed to save considerable sums of money otherwise spent on insurance. The legal basis was that this was incidental to their functions and covered by the Power of Wellbeing. The Court held that there must a direct link between the wellbeing of citizens in an area and whether they could be said to benefit directly from the action taken under the wellbeing power. Delivering savings which could be used to fund front-line services was not a direct link to the wellbeing of citizens. It follows from this case that generating income to fund other services is not lawful, as again there is no direct link to wellbeing.

The case was appealed but the wellbeing power was not considered further as legislation was brought into force giving local authorities in England specific powers to enter into the arrangements in question. It is of note, however, that following LAML many English authorities favoured a cautious application of the wellbeing power, using it to support only primary purposes and not, as it was intended, as an innovative power of first resort.

* 1. In England, in response to this restraint on effective use of the wellbeing power, as well as concerns as over the impact on the Government’s Localism agenda, there was wide support for a General Power of Competence. The General Power of Competence came into effect in England in February 2012 under the Localism Act 2011.
	2. In Scotland, following the LAML case, the Power of Wellbeing was the subject of informal discussions between Glasgow City Council, Burness Solicitors and the Scottish Government in the context of legislative impediments to shared services. At that time, the Scottish Government felt that the powers within section 57 of the Local Government (Scotland) Act 2003 in relation to Best Value could be used to amend legislation that impedes the ability to create shared service provision. Their view was that measures to cut costs and improve service delivery, such as those in the LAML case do not in themselves promote the wellbeing of a local authority's area. The justification for them is more likely to lie in the promotion of Best Value, which section1 of the 2003 Act gives local authorities a duty to secure. That duty, and the related power to amend legislation, would be useful if the powers given by section 69 of the 1973 Act are insufficient. The problem with this approach is that it leaves the ultra vires principle intact. The Courts are equally likely to take a restrictive approach to any attempt to use section 57. The need for Ministers to promote an order in advance of any proposal would also result in time delays which in turn could restrict the use of the power in fast moving or innovative circumstances. These discussions also took place before the following case
	3. *Portobello Action Group Association v The City of Edinburgh Council*

Unlike the previous example the Portobello case did not consider the wellbeing power in relation to shared services. The question in point was whether the wellbeing power afforded Edinburgh City Council a mechanism through which to appropriate an area of inalienable common good land for the site of a new school. Similarly, there was no question that the proposed appropriation was directly linked to the wellbeing of the area and its citizens. What the case has provided, however, is a clear opinion from the Court on the applicable scope of the power.

The Court narrowed the scope of the wellbeing power by ruling that that the reference to “anything” within section 20 of the 2003 Act does not, in fact, mean anything, and that there are further restrictions upon a local authority’s power to advance wellbeing other than the limiting provisions stated at section 22 of the Act. In particular, the Court ruled that the wellbeing power does not permit a local authority to act in breach of a contractual, trust or title obligation, nor to the detriment of established third party rights. Furthermore, it was held that the wellbeing power does not provide local authorities with a blanket entitlement to disregard planning or other administrative constraints or the general provisions of domestic or European Law. Consequently, the Court held that the wellbeing power did not provide the Council with a mechanism through which to appropriate inalienable common good land.

* 1. The narrow interpretation adopted by the Courts has created a power which is far removed and far narrower in its scope than the power described within the Scottish Government guidance to the 2003 Act. Considerable time and resources now has to be employed by authorities before they are satisfied that it is safe to proceed with a particular course of action under the wellbeing power. Such a process does not provide a power of first resort, nor does it promote innovation and efficiency amongst local authorities.
	2. Like the LAML case, a solution to the Portobello case was sought through specific legislation. While this was an expedient course of action in the circumstances, it did not address the underlying problem which still remains.
1. **The General Power of Competence in England**
	1. The 2009 report from the Communities and Local Government Committee recommended the introduction of a General Power of Competence if local authorities could show that they were unable to effectively use the wellbeing powers contained in Local Government Act 2000. Following the LAML case, the Conservative Party’s 2009 paper on Local Government ‘Control Shift: Returning Power to Local Communities’ included a commitment to introduce a General Power of Competence. This stated that:

*“We will…. introduce a new general power of competence which gives local authorities an explicit freedom to act in the best interests of their voters, unhindered by the absence of specific legislation supporting their actions. No action – except raising taxes, which require specific parliamentary approval – will any longer be ‘beyond the powers’ of Local Government in England, unless the local authority is prevented from taking that action by the common law, specific legislation or statutory guidance.*

*We will give the General Power of Competence real meaning by allowing Councils specifically to: -*

* *Carry out any lawful activity;*
* *Undertake any lawful works;*
* *Operate any lawful business; and*
* *Enter into any lawful transaction.”*
	1. This commitment was included in the Coalition’s programme for government in 2010 and formed part one of the Localism Act 2011. This was passed with support from all sides of House of Commons and came into effect on 18 February 2012.
	2. Section 1 (1) of the Act provides that a local authority has power to do anything the individuals generally may do.

* 1. The power does not permit local authorities to do anything that is specifically prohibited in legislation, to raise taxes or to alter the political management of the authority. Under section 3 commercial activities may be undertaken but this must be done through a company. Authorities cannot trade in services that they have a statutory requirement to provide. Section 5 gives a broad power to the Secretary of State to remove or change any statutory provisions that prevent or restrict the use of the general power and to restrict what local authorities can do under the general power. The power does not allow local authorities to raise tax in order to expand authorities’ power or to make Bylaws.
	2. In July 2013 Local Government Association published ‘Empowering Councils to make a Difference’ giving examples of the use of the General Power of Competence. These included: -
* Oxford City undertook a school improvement support programme which was otherwise within the control of an upper tier Council;
* Energy switching schemes whereby Councils secure better energy deals for domestic users through working with specialist energy switching companies. Estimates suggest that savings of over £150 per household a year are possible;
* Hertfordshire County Council used it as the basis for its participation in the Local Authority Mortgage Scheme;
* Stoke-on-Trent used it to take forward the Green Energy Agenda through a Council owned holding company to promote regeneration, and access sustainable energy at predictable prices.
	1. The LGA paper also identified a number of constraints on the wider use of the General Power of Competence. Firstly there was the need to use company structures. This meant that community interest company structures could not be used. Presumably SCIOs would not be usable in Scotland. This constraint may have been imposed through a desire by the UK Government to encourage outsourcing of local authority services. There would appear no need to replicate this restriction in any Scottish legislation.
	2. Charging is only permitted for a discretionary service and on a cost recovery basis. In addition the potential service user must be able to decline this service and so avoid the charge. The GPC is subject to a duty that, taking one year with another, charges do not exceed the cost of provision. In other words, any charges should be set at a level which does not generate a profit or surplus, although it is recognised that more than one financial year may need to be taken into account. In light of the financial challenges and the increasing demands facing local authorities this again appears an unnecessary restriction. The English legislation does not enable the creation of Bylaws or enforcement activity which appears another unusual restriction.
1. **Recommendations**
	1. It is recommended that the Scottish Government repeal the Power of Wellbeing contained in the Local Government in Scotland Act 2003 and replace it by a Power of General Competence similar to the provision in the Localism Act 2011. It is recommended that a similar power is used to enable a consistent body of case law authority to be applied across the UK.

However it is recommended that the following restrictions contained in the Localism Act 2011 should not be imposed:-

* + To require the use of companies where income is generated. The political landscape in England is different to that in Scotland, and in England the justification for the company model may have lain in a desire to move such services to a private model;
	+ that charging should only be permitted for a discretionary service on a cost recovery basis;
	+ Local tax raising powers should be included as part of a Power of General Competence and
	+ No bar on the creation of by-laws or enforcement activity
	1. The political landscape in England is different to that in Scotland and the factors which give rise to these restrictions in the Localism Act 2011 are not present in Scotland. It is important that local authorities are able to use the new Power of General Competence in any way which supports the achievement of outcomes for communities.
	2. Section 57 of the Local Government in Scotland Act 2003 would also remain. This entitles Scottish Ministers by order to repeal, amend, revoke or disapply any enactment which prevents local authorities from discharging the Best Value duty. It would however be helpful to clarify the arrangements for use of this power, with a view to helping fast track its use.

**8. Conclusion**

8.1 The Power of Wellbeing contained in section 20 of the 2003 Act is effectively now dead. It did not live up to its early promise and has been little used. The case law has placed such significant restrictions and uncertainty on its use that it is unlikely that the markets would be prepared to lend on schemes which relied on it.

8.2 Local authorities need to be able to make efficiencies and to deliver real outcomes for their communities, free from out-dated legislative restrictions.