

# David Heald's response to General Power of Competence Consultation

## Power to Advance Wellbeing

### Question 1

What are the perceived barriers and risks to fully exploring the scope of the 'Power to Advance Wellbeing' contained in section 20 of the Local Government in Scotland Act 2003?

My overriding concern about the proposed General Power of Competence is that I do not understand which appropriate and legitimate local authority activities are presently thought vulnerable to legal challenge. The Note attached to this question makes the Section 20 power read as if it provides a legal basis for most such activities. I set out in my answer to Question 9 the basis for my concerns about problems which might develop if Scotland adopted a General Power of Competence for local authorities.

This consultation might generate substantive examples that illuminate what are the specific problems to be addressed.

The effect of the ultra vires rule is softened by the implied powers rule. The statutory version of the implied powers rule is contained in section 69 of the Local Government (Scotland) Act 1973:

***“69 Subsidiary powers of local authorities.***

*(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.*

*(2) A local authority shall not by virtue of this section raise money, whether by means of rates or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.*

*(3) Without prejudice to section 53 of the Countryside (Scotland) Act 1967 (contributions by or to local authorities), two or more local authorities may make arrangements for defraying any expenditure incurred by one of them in exercising any functions exercisable by both or all of them...”*

Local authorities are created by statute and are not subject to insolvency legislation in the same way as private companies or individuals. It requires legislation to abolish a local authority. However, any local authority-owned company (including a company limited by guarantee) can become insolvent in the normal way. So, a local authority would only be liable for the debts of the insolvent company to the extent of the original guarantee which is usually a nominal sum and of subsequent guarantees. Nevertheless, the reputational damage might lead the local authority or the wider public sector to make payments beyond legal liability.

Scottish local authority accounts now provide data for the parent and the group. Glasgow City Council's sale and leaseback transaction with its arms-length body City Property Glasgow Investments LLP to raise funds to meet its historic Equal Pay liability

illustrates the existing opportunities for financial engineering. This might have been the least-worst policy option but the threats to fiscal sustainability are self-evident.

**Note:** Section 20 of the Local Government in Scotland Act 2003 provides a broad power for a local authority to “do anything which it considers is likely to promote or improve the well-being of its area and/or persons within that area”.

## Question 2

What are the limitations of the Power to Advance Wellbeing and how do these limitations restrict the aspirations of local authorities, for example, to explore new and innovative ways of delivering public services?

I do not understand which restrictions local authorities believe are unreasonable. I have heard it suggested, but then contradicted, that the lack of powers makes it more difficult to operate shared services. My understanding is that this is not the case.

Section 56 of the Local Government (Scotland) Act 1973 states:

***“56 Arrangements for discharge of functions by local authorities***

*(1) Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions by a committee of the authority, a sub-committee, an officer of the authority or by any other local authority in Scotland...*

*(5) Two or more local authorities may discharge any of their functions jointly and, where arrangements are in force for them to do so,*

*(a) they may also arrange for the discharge of those functions by a joint committee of theirs or by an officer of one of them, and subsection (2) above shall apply in relation to those functions as it applies in relation to the functions of the individual authorities; and*

*(b) any enactment relating to those functions or the authorities by whom or the areas in respect of which they are to be discharged shall have effect subject to all necessary modifications in its application in relation to those functions and the authorities by whom and the areas in respect of which (whether in pursuance of the arrangements or otherwise) they are to be discharged.”*

There are only limited exceptions to these provisions. Section 56 therefore provides an adequate basis for the shared provision of most local authority services. The functions which may be discharged jointly would include the exercise of the well-being power in section 20 of the 2003 Act.

### Question 3

Would the removal of the restriction imposed by paragraph 7 of section 22 of the Local Government in Scotland Act 2003 (see note below) facilitate the aspirations of local authorities to increase local revenue generating powers.

Please provide examples.

I believe that decisions on conferring local taxation powers should be taken by the Scottish Parliament. Therefore, I do not think that paragraph 7 of section 22 of the Local Government in Scotland Act 2003 should be amended. The main taxation sources for local authorities will continue to be Council Tax and Non-Domestic Rates which have been badly managed since devolution. Policy efforts should be concentrated on these taxes. There will be specific instances where legislative powers can facilitate specific new measures, such as the Visitor Levy. However, preoccupation with small-yield additional taxes will create market distortions and huge amounts of political controversy.

**Note:** Paragraph 7 of section 22 of the Local Government in Scotland Act 2003 says expressly that the power under section 20 of the Act does not enable a local authority to do anything for the purposes of raising money, whether by levying or imposing any form of tax or charge, by borrowing or otherwise. Only the specific power in the 1970 Act can be relied upon to generate revenue through the supply of goods and services.

### Question 4

Are there any further existing legislative barriers to the delivery of public services and to a broader range of activity that local authorities would wish to undertake?

I do not know which "existing legislative barriers to the delivery of public services and to a broader range of activity" are creating difficulties for local authorities.

## Question 5 Expansion of wellbeing powers

Would a broadening of the scope and meaning of 'wellbeing' contained in the 2003 Act (see note below) provide an effective alternative to a General Power of Competence?

Before agreeing to any broadening of the scope and meaning of 'wellbeing', I want to know which activities by local authorities are currently being frustrated. I think that the limitations imposed by the terms of section 20 of the 2003 Act as interpreted by the courts are being exaggerated.

Reference is made in the consultation to the cases, *Portobello Park Action Group Association v City of Edinburgh Council* 2013 SC 184 and *R v Risk Management Partners Ltd ex parte Brent LBC* [2008] EWHC 692 (Admin). In both cases purported exercises of the wellbeing power were held to be ultra vires. The Portobello case concerned an attempt to appropriate inalienable common good land for building a school, thereby taking away the right of the public to use the land. It was hardly surprising that this proposal was held to be unlawful given that it took away rights long enjoyed by the local public. The court's comment, that it was "far from self-evident the construction of a significant high school in a public park could be deemed a matter of 'well-being'", should be understood in this context.

The Brent case concerned an attempt to set up a mutual insurance scheme. It was decided primarily under section 111 of the Local Government Act 1972 (the implied powers provision for England) and the court decided that the local authority had not in fact used the general wellbeing power in section 2 of the Local Government Act 2000 as the basis for participation in the scheme. The judge went on to say that it might be possible for a local authority to use section 2 to enter into a scheme of this nature (paras 120-121 of Stanley Burton LJ's judgment).

Clearly, there are limits on the scope of the term 'wellbeing', but it remains a very broad term. The Court in the Portobello case also said when discussing the ways in which the principal power may be exercised that these "serve[s] to confirm the relatively limited ancillary nature of the primary power." Again, we should not read too much into this. Section 20 expressly authorises local authorities to "(a) incur expenditure, (b) give financial assistance to any person, (c) enter into arrangements or agreements with any person, (d) co-operate with, or facilitate or co-ordinate the activities of, any person, (e) exercise on behalf of any person any functions of that person, and (f) provide staff, goods, materials, facilities, services or property to any person." Those powers encompass most of the activities local authorities might want to engage in to advance a well-being objective.

**Note:** The Local Government in Scotland Act 2003 contains a provision that allows the Scottish Ministers to widen the definition of wellbeing and therefore the scope of the power of local authorities to advance wellbeing, under section 20 of the 2003 Act. Given the continued reluctance in England, Wales and Northern Ireland to rely on the general power due to concerns over legal challenge, it may be more effective to either broaden the scope and meaning of 'wellbeing' within the 2003 Act or to create

further specific statutory powers within the 2003 Act to explicitly permit the greater freedoms local authorities wish to have.

### Question 6 Expansion of wellbeing powers

Would the provision of specific greater powers within the 2003 Act (see note below) provide an effective alternative to a General Power of Competence?

If so, please provide examples of such specific powers and how they may be used.

No response, but please cross-refer to other answers.

**Note:** The Local Government in Scotland Act 2003 contains a provision that allows the Scottish Ministers to widen the definition of wellbeing and therefore the scope of the power of local authorities to advance wellbeing, under section 20 of the 2003 Act. Given the continued reluctance in England, Wales and Northern Ireland to rely on the general power due to concerns over legal challenge, it may be more effective to either broaden the scope and meaning of 'wellbeing' within the 2003 Act or to create further specific statutory powers within the 2003 Act to explicitly permit the greater freedoms local authorities wish to have.

## Duplication of Functions

### Question 7

Does the provision within the 2003 Act, which states that the Power to Advance Wellbeing cannot be used to unreasonably duplicate the functions of another person, restrict a local authority's pursuit of service transformation, other income generating activity or any other activity? Please provide examples.

I repeat the point that I wish to learn about which appropriate and legitimate activities of local authorities are presently being frustrated.

**Note:** Paragraph 4 of section 22 of the Local Government in Scotland Act 2003 prevents local authorities from unreasonably duplicating the functions of other bodies or people. The subsection states that local authorities must consider whether any proposed action is reasonable. The subsection also makes it clear that the exercise of power would not be considered unreasonable if the other person had consented.

## Question 8

Would the removal of the restriction on duplication of functions, contained within section 22 of the Local Government in Scotland Act, provide an effective alternative to a General Power of Competence?

If so, please explain.

I cannot form a view on this until I have learned which appropriate and legitimate activities are presently being frustrated by legal uncertainty.

## Powers to Trade

### Question 9

What **trading** activity would local authorities wish to pursue beyond the current power to provide goods and services, contained in the Local Authorities (Goods and Services) Act 1970?

Section 20's power to "do anything which it considers is likely to promote or improve the well-being of its area and/or persons within that area" seems to be a reasonable formulation.

I will use my answer to Question 9 to set out considerations which inform my responses to other questions.

I vividly remember 'Localism plus Austerity' which characterised UK Government policy towards English local authorities in the 2010s. They were positively encouraged to react to the drastic reduction of central government grants by finding new sources of revenue. This encouragement was an important factor in the financial disasters that have befallen a number of English local authorities. I do not know to what extent those English local authorities which have not attracted national publicity have engaged in similar activities on a lesser scale. Fortunately, in part because of the continued roles of the Accounts Commission and Audit Scotland, Scotland has avoided such disasters.

My objections to 'entrepreneurial activities' to generate income can be summarised in the following way:

- (1) Local authorities do not have the commercial expertise to manage major businesses and would not be able to pay sufficient salaries to recruit managers of the same calibre as employed in the private sector.
- (2) Local authorities are unlikely to achieve the level of diversification available to private sector corporates. I have sympathy with why councils wish to renovate their town centres but they are at much greater risk than private corporates because they are geographically undiversified. Therefore such activities should be governed by specific powers.
- (3) Local authorities can borrow from the Public Works Loans Board, essentially part of the Treasury. If such borrowing, which reflects the creditworthiness of the UK

Government, is used in competitive sectors this represents unfair competition against the private sector. Why English councils such as Woking Council were allowed to borrow so much money from the PWLB is a mystery.

- (4) Local authorities as statutory bodies cannot go bankrupt in the private sector sense that third parties lose their money. Discussion of the quasi-bankruptcy of some English local councils is misleading. The debts of councils such as Woking will stay in the public sector, whether at Woking, some successor council(s) or the UK Government. This lack of a bankruptcy exit route means that public sector organisations have to be particularly careful about financially risky activities.
- (5) If there is to be public subsidy to protect employment, that should be done at Scottish or UK Government level for both financial (e.g. greater access to expertise) and legal reasons (e.g. avoiding challenges in relation to state aids or the UK internal market).
- (6) There is a specific issue that concerns Scotland and the other devolved nations. There are market constraints on UK Government taxation and borrowing but no legal constraints. In contrast, the Scottish Government operates on the basis of what is essentially a fixed budget as the capacity to generate more income from devolved taxes is limited and its borrowing is tightly constrained by the Fiscal Framework. Whereas the UK Government could bail out a large English local authority the Scottish Government could only do so at great damage to other spending programmes. Such considerations also relate to welfare payments to individuals. If there is abatement in Scotland of UK policies on social security entitlements that should be done by the Scottish Government with approval from the Scottish Parliament, not on the initiative of individual local authorities. The Scottish Budget is very vulnerable to demand-led expenditures.

Cumulatively, the above considerations urge caution. It might be the case that Scottish local authorities presently have no desire to take on unsustainable risks but that is not a guarantee that unconstrained powers would not in future lead to outcomes that were disastrous for the citizens of a local authority and for the Scottish Government.

## Question 10

Would the removal of the requirement to gain Ministerial consent to pursue income through the supply of goods and services deliver the aspirations of local authorities?

Please cross-refer to my answer to Question 9. This question wording implies that such supply of goods and services is to generate revenue to cross-subsidise other services. I do not understand why the last sentence of the note does not answer any concern in relation to shared services.

Please provide examples of how the removal of this limitation would be utilised and the benefit that would be envisaged such as value for money, better allocation of resources, transformation of public services, better local outcomes etc

**Note:** The provisions contained within section 1A of the Local Authorities (Goods and Services) Act 1970 requires that a local authority must gain Ministerial consent to pursue income through the supply of goods and services. However, this restriction does not apply in respect of an agreement entered into by a local authority with either another local authority, a public body; or with a person providing functions of a public nature.

## Goods and Services

### Question 11

What further activity would local authorities wish to undertake, beyond providing goods and services to the local area and/or persons within that area?

Please cross-refer to my answer to Question 9.

## Question 12

Should the introduction of greater local authority legislative powers continue to constrain the types of goods and services a local authority can provide? If so, please provide examples.

For the reasons set out in my answer to Question 9, I believe that there should be constraints.

## Commercial Ventures

### Question 13

What type of commercial activity would local authorities wish to pursue, utilising a General Power of Competence? Please provide examples.

I look forward to learning which commercial activities, not presently allowed, that Scottish local authorities would wish to undertake. Please cross-refer to my response to Question 9.

**Question 14**

Should greater legislative powers continue to constrain the types of commercial activity that a local authority can undertake? Please provide reasons.

For the reasons expounded in my answer to Question 9, I believe that local authority commercial activity should continue to be constrained.

**Question 15**

Should greater legislative powers continue to constrain a local authority from engaging in commercial activity or any other activity beyond the local area. Please provide reasons.

As I have emphasised in answers to other questions, I am sympathetic to proposals which would improve the functioning of local authorities but opposed to proposals that might be seen to encourage the kind of reckless behaviour of a minority of English local councils, often motivated to find a source of cross subsidy to support statutory services. Regrettably, such activities were encouraged by the UK Department for Communities and Local Government in the early 2010s as part of its localism agenda of reducing audit and regulation but drastically cutting central government grants.

Inter-authority collaboration is a frequent occurrence in continental Europe where local authorities are often smaller than Scottish local authorities. I would not wish to discourage such practices in Scotland if they are seen as a route to better services and/or cost reduction. I have heard conflicting arguments about whether existing statutory restrictions impede such collaboration. If this does exist then specific Scottish Parliament legislation should be used to facilitate inter-authority collaboration.

## Borrowing and Investment Powers

### Question 16

What greater financial controls or limitations, particularly in relation to borrowing and investments, should accompany a General Power of Competence in Scotland to ensure such actions cannot be repeated or their impact limited to protect core services?

I do not understand the question. To what does “ensure such actions cannot be repeated” refer? Other answers set out why I oppose a General Power of Competence.

### Question 17

What further investment powers do local authorities envisage requiring beyond those already conferred by statute and statutory guidance? Please provide examples of how such powers would be utilised to benefit the local area and people living within the local area.

My view is that local authority powers should be conferred by statute and statutory guidance. If more powers are required in relation to specific issues, these should be conferred by the Scottish Parliament.

### Question 18

Should there be greater reporting/disclosure requirements to ensure transparency in the use of public funds for borrowing and investment purposes and how these activities directly benefit the local area? Please explain.

I strongly support transparency in the use of public funds but do not understand to what this specifically refers.

## General Power of Competence

### Question 19

How would a General Power of Competence be used to improve the delivery of public services, ensure greater efficiency in the use of available resources and maximise outcomes for the local area and persons within the local area. Please provide examples.

I do not believe that a General Power of Competence should be conferred on Scottish local authorities. However, if there are specific constraints on local authority activities, what these are should be specified and there should be a discussion of how, where appropriate, these constraints could be relaxed. I cross-refer to my answer to Question 9 where I carefully explain why I believe local authorities should continue to be subject to ultra vires constraints. I am not convinced by rhetoric about 'local empowerment'. Nor am I convinced by the view that Scottish local authorities would never undertake the kind of risky commercial activities that some English local authorities have engaged in under the umbrella of 'localism'.

### Question 20

How could we better articulate a General Power of Competence in Scotland to mitigate concerns and provide greater assurance both for local authorities and those they engage with? Please explain.

Please cross-refer to my answers to Questions 9 and 19.

### Question 21

Since the General Power was introduced in England, Wales and Northern Ireland how has this been used to benefit the local area? Please provide examples of use of the power and the resulting benefits.

I would be interested in learning of positive examples of how such powers have been exercised in England, Wales and Northern Ireland. The cases which have dominated the media in relation to English councils have been commercial investments which have gone spectacularly wrong. A number of English councils have become famous for the wrong reasons, but I do not know to what extent other councils have undertaken failed developments on a scale which has not thus far attracted wider attention.

**Note:** This question specifically relates to the general powers in operation in England, Wales and Northern Ireland. You may wish to refer to Annex B of the consultation document which sets out the relevant legislative provisions for England, Wales and Northern Ireland in detail.

## Question 22

What are the perceived barriers and/or limitations of the General Power of Competence in place in England, Wales and Northern Ireland? Please explain.

No answer.

**Note:** This question specifically relates to the general powers in operation in England, Wales and Northern Ireland. You may wish to refer to Annex B of the consultation document which sets out the relevant legislative provisions for England, Wales and Northern Ireland in detail.

## Question 23

Should a local authority's use of a General Power of Competence be required to align to local regeneration or other demonstrable local area well-being enhancement?

I am opposed to the granting of a General Power of Competence. If such were to exist, it would require tight constraints to avoid local authorities facing financial problems that in the end passed to the Scottish Government or other local authorities, for example after an enforced merger. Therefore, "a local authority's use of a General Power of Competence [should] be required to align to local regeneration or other demonstrable local area well-being enhancement." My direct answer to this question is 'Yes'.

## Islands (Scotland) Act 2018 - Devolution of functions/additional powers

### Question 24

Would similar provisions for mainland authorities to those provided for island councils by the Island (Scotland) Act 2018 provide sufficient or greater scope for local authorities to explore further envisaged activity? Please explain.

Similar provisions should apply to the island councils except where the Scottish Parliament decides to confer powers not conferred on mainland councils.

Glasgow, 1 April 2025