

The World Will Be Your Oyster?

Reflections on The Localism Act 2011

Chapter Five

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General Power of Competence: just what local
government always wanted and needed,
wor another damp legislative squib?
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Introduction

The 'general power of competence' has traditionally been something of a holy grail for all promoters and defenders of local government in the UK – be they parliamentarians, local councillors, officials, academics or think tankers.

What local government really needs, such people have argued, is a general power of competence such as that found in a number of other European countries – especially those that ascribe high value to the role of local government within society.

It is not therefore surprising that the Local Government Association almost immediately gave approval to the provision for a general power of competence when it appeared in the Localism Bill – 'We strongly support the Government's decision to set out in legislation a broad and clear general power of competence which we have lobbied for. The power means local councils and Fire and Rescue Authorities will be able to respond to local issues and priorities ambitiously, confident in their legal footing.'¹

What is a General Power of Competence?

The General Power of Competence (GPC) is set out in Chapter 1, sections 1 to 6 of the Act. The Government's declared aim is to give local authorities the legal reassurance and confidence to innovate, drive down costs and deliver more efficient services. The GPC gives local authorities the power to do anything that an individual could lawfully do, anywhere, with or without charge, for any purpose, anywhere in the UK or elsewhere. However, the bill also specifies some boundaries to the power which may be imposed by statute, statutory instrument or by an order made by the Secretary of State. Such an order may apply to some or all local authorities and would have to be consulted on before being laid before Parliament. Charging for statutory services and making a profit on charged for services will not be within the GPC and such commercial services will only be able to be provided through a

¹ LG Group On the Day Briefing, 13/12/2010

company. The GPC replaces the common law 'ultra vires' rule under which local authorities can only do those things which legislation allows.²

What is the purpose of a General Power of Competence?

Localism has been a consistent theme of the discourse on local government for many years and the GPC has been seen by local government as an important element of localism because it changes the balance of power between central and local government.³ Responses to the proposed new power when the Bill was published were mixed. Some have been positive. Alex Thompson of Localis⁴ welcomed the Localism Bill and the GPC as a 'seismic shift' in the relationship between local and central government. However, he also acknowledged that the GPC comes at a time when local authorities' ability to act is constrained by the recent financial settlement and also by the tendency for Whitehall to interfere or micromanage locally based initiatives such as Total Place⁵ and Community Budgets.

This conflict between the theoretical freedoms offered by the Act and the behavior and rhetoric of central government remains a consistent theme of the discourse about local government in 2012.

The GPC will enable local authorities to develop new services, such as estate agency, insurance or banking and to invest in new technologies. It will also strengthen the position of local authorities within the wider public sector and possibly encourage closer collaboration and pooling of budgets with partner agencies wishing to exploit the GPC to achieve their own objectives.⁶

The GPC does look promising. It cannot be dismissed without careful consideration. But – haven't we been here before? The 1999 Bill, and subsequently the 2000 Local Government Act, provided local councils (but not Fire and Rescue Authorities) with a 'Power of Well-being' 'to promote the economic, social and environmental well-being of their area'. Not quite a power of general competence, but something that was intended to be quite close to it.

The 2000 Act introduced a 'new' role for local government – that of 'Community Leadership'. This expansive role was intended to encourage local authorities to be more outward-looking and more involved in *all* the needs and concerns of the local area. Local authorities were no longer expected to be creatures of narrowly interpreted statute – they were expected to be concerned with all aspects of the social, economic and environmental wellbeing of the area and its people. The general concept of that role, although not very clearly defined, was taken up with enthusiasm by a number of local authorities who saw it as a welcome change from

² Chandler J.A. *Explaining Local Government: local government in Britain since 1800*, 2007.

³ *Going Nuclear? A General Power of Competence and what it could mean for local communities*, NLGN 2010.

⁴ www.localis.org

⁵ *Problem, purpose, power, knowledge, time and space: Total Place final research report*, Keith Grint Warwick Business School.

⁶ www.nlgn.org.uk The Decentralisation and Localism Bill Pre-publication Briefing 13th December 2010.

the painful recent reductions in the role and powers of local government. The new role, it was argued, needed a new general power – a Power of Well-being. It was linked to the new legislative duty, which implemented the role of community leadership, to prepare Community Strategies. These strategies, to be prepared with the direct involvement of partners and the community, were for the promotion and improvement of the social, economic and environmental well-being of their areas.

As in 2010, the 1999 provision of a broad, general power was given strong support from the world of local government. For example, even some of the normally cautious and reticent lawyers involved in local government were encouraged to describe the power as ‘Heavenly Freedom’. ‘For many years we have argued for a new power of general competence for councils so that they can implement innovative schemes without the constant fear of auditor intervention. Finally we have something along those lines’.⁷

The power was not utilised as effectively as it might have been for a number of reasons, including that; ‘... local government is so distracted [by the introduction of new structures, best value and other aspects of the modernisation agenda] that it is not using the well-being power, ...’.⁸ It became submerged by the importance attached to changing the political structures and decision-making processes and the implementation of Best Value. Best Value did not encourage local authorities to be adventurous and innovative in their approach. It did the opposite – encouraging local authorities to ‘play it safe’. The form of the legal power was of considerable complexity – being a combination of apparently wide discretion together with a list of exceptions and a power of veto by the Secretary of State, not unlike the GPC established by the Localism Act.

INLOGOV, together with the Cities Research Centre, University of West of England, were commissioned by the government (DETR) to undertake an evaluation of the take-up and implementation of the Power of Well-being. We found that awareness and understanding of the Power was extremely variable in local authorities but that it had increased over the four years of the research. However, awareness and understanding amongst partners and in the community remained very low. We also found only a slight broadening in the use of the Power (starting from a relatively low base) although there was evidence of more widespread consideration of the use of the Power.⁹

We may conclude that the Power of Wellbeing was nowhere near as significant as had been initially anticipated. Not quite a damp squib but certainly a piece of legislation in a minor key – only obtaining a major key in a small number of locations where it was used extensively.

Like the wellbeing power, the ‘Central Local Concordat 2007’¹⁰, which was intended to establish better rules of engagement between central and local government, did

⁷ LGC, 17/12/1999, p14.

⁸ *How the Local Government Act is Working. Report of the Transport, Government and the Regions.*

⁹ *Formative Evaluation of the take-up and Implementation of the Well Being Power, 2003 – 2007.* Final Report 2007.

¹⁰ www.lga.gov.uk

not deliver as much as was hoped. There is no evidence that it was ever taken seriously by central government. In the same year, 'Strong and Prosperous Communities' and the Local Government and Public Involvement in Health Act both also ostensibly heralded a new relationship between central and local government. The reality, as experienced by local government was target driven centralism. The 'freedoms and flexibilities' offered to better performing councils have not always been delivered because the underlying relationship between central and local government has remained one of control and dependence. LAAs may have helped achieve better outcomes and made it easier for local government to work effectively with partners but the relationship between central and local government remained very top down and controlling. For example, the standard central government response to local delivery failures has been to intervene.

If the Power of Well-being, the Concordat and other previous efforts to reframe the relationship between central and local government and to give local authorities more freedom to act have failed to live up to their early promise, might that not also happen to a General Power of Competence, unless the underlying relationship between central and local government changes significantly? That relationship has a complex history characterised by unfulfilled expectations and frustration on both sides which have led to deep mistrust on the part of local government. George Jones¹¹, in his evidence to the Political and Constitutional Reform Committee commented that we 'can't rely on the present culture, attitudes and laws for protecting what should be the proper relationship between central and local government.'

The relationships between central and local government operate in a number of domains; financial, political and inter-personal. The financial relationship is characterised by dependency because of centralisation and the fact that three quarters of local government funding is from central government and only a quarter is raised locally. The political relationships are complex because although national party policies influence local policy in councils led by the same party they are resisted (to some extent – if only in rhetoric) by councils of opposing parties. The political and inter-personal meet in the relationships between ministers, MPs and councillors as well as in the relationships between chief officers and senior civil servants. The habit of the current Secretary of State and his ministers of issuing critical pronouncements, for example, about the salaries of local government chief executives, which have been set by councils, most of which are led by Conservatives or Liberal Democrats, shows how complex and difficult these relationships can become.

The relationship and the balance of power between central and local government has exercised local authorities, academics and other commentators, for many years. Jones and Travers¹² argued 'ministers and civil servants have, in effect, played God with British local government', citing 150 Acts passed since 1979 which had significant implications for local government. They also commented on the attitudes

¹¹ Oral evidence to Political and Constitutional Reform Committee.
www.parliament.gov.uk/committees

¹² Jones G and Travers T (1996) Central government perceptions of local government. In Pratchett and Wilson eds. *Local Democracy and Local Government*, Basingstoke: Macmillan.

of civil servants to local government: 'the mundane nature of many local services appears to encourage (at least some) civil servants to believe that they possess Rolls Royce minds, while local government officers have motor cyclists' minds'. Politicians currently reflect that lack of understanding of the nature and complexity of senior local government officer roles by numerous derogatory comments and the unsuccessful attempt by central government to combine the function of the new city mayors with those of chief executives.¹³

The Lyons Enquiry¹⁴ argued for a 'rebalancing of responsibilities between individual and family, local community and national government with a stronger 'place-shaping' role for local authorities, working closely with partners'. When the Bill was published, Sir Michael Lyons posed the question - is what the Bill is offering really localism? His test for localism includes even-handedness between what is expected of locally run and centrally run services.¹⁵ It could be argued that even-handedness is necessary for local authorities to make the best use of the GPC but recent experience, for example the disparity in the proportion of cuts in public spending experienced by local government and the NHS, suggests that even-handedness does not prevail.

Professor George Jones, in his evidence to the Political and Constitutional Reform Committee, remarked that 'the Secretary of State says 'localism, localism, localism' at the same time he seems to think he knows best what the level of council tax should be. He will know whether it is excessive or not, and then insist on a referendum. He seems to know how local authorities should conduct refuse collection. He seems to know about how they should inform their citizens about their activities'.

Sir Jeremy Beacham also highlighted the dissonance between the proposed GPC and the continuing micromanagement commentary from CLG, for example, on frequency of bin collection and local authority management arrangements.¹⁶

Chris Leslie argues¹⁷ that local government has improved in terms of efficiency and overall performance over the last 10 years but is not being rewarded. Instead he describes a 'tragedy of dashed expectations'. He identifies central government's ability to resist tabloid pressure to intervene when things go wrong as a vital sign of localism. He highlights six key yardsticks for measuring the extent to which localism is a reality, including; the extent of ministerial control, the same standards for Whitehall and local government and the extent of local authorities' forward planning capability. Given that the Secretary of State can still over-ride the GPC and also the contrast between the duty on local authorities to publish expenditure over £500 and on central government departments, with the exception of CLG, over £25000, and that the current method of allocating resources to local authorities undermines their forward planning capabilities, it could be argued that the Localism Act fails those tests.

¹³ LGC, 13th January 2011.

¹⁴ *National Prosperity, Local Choice and Civic Engagement*, CLG 2006.

¹⁵ LGCPlus.com/5023316.

¹⁶ LGC 8th June 2010.

¹⁷ www.lga.gov.uk LGA Knowledge December 2010.

Some actions taken by the Coalition are seen as helpful by local government, for example, the abolition of Comprehensive Area Assessments, a reduction in the amount of money which is ring fenced and the transfer of power over spatial planning from Regional Development Agencies to local authorities. However, swapping control by targetry for control through financial constraint and relentless micro-management will not result in local authorities feeling more empowered and it may undermine the aims of the GPC. The Act does move some powers to local authorities but also directly to citizens and communities so we are now seeing a confusing mixture of 'old localism' (devolution of power by central government to local government) and 'new localism' (devolution of power by central and local government to citizens and communities).¹⁸

What difference will the General Power of Competence make?

The GPC will give local authorities more power to act than they currently have. However, as the experience of the wellbeing power shows, local authorities' own perceptions of and their confidence in their freedom to act and the way in which the legislation is interpreted are as important as the provisions of the legislation itself. Those perceptions are shaped by past experiences and current relationships between central and local government. Shifting the 'burden of proof' in favour of local government's freedom to act will be widely welcomed, although much depends on how the legislation is interpreted both by local authorities and by the courts. The LAML experience highlighted the risk that local authorities may embark on new ventures under the GPC and then find, when their actions are tested in court, that the power is interpreted narrowly.¹⁹

What will help and hinder success?

The GPC has major implications for relationship between central and local government. If GPC is perceived by councils as a mechanism which will support flexibility and creativity to increase revenue or deliver better services and outcomes it may improve the relationship between central and local government. However, if it is understood to mean 'you can do what you like as long as we agree' then local government may disengage and the use of the power in order to innovate will be limited.

The GPC may also be used by local authorities in their roles as community leaders and place shapers to reduce the costs of public services by harnessing local creativity and energy to tackle, collectively and cooperatively, the endemic problems which fuel demand for and dependency on services. The Total Place pilots gave us some useful and varied examples of how positive change could be achieved.²⁰ However, learning from the pilots and parallel projects also highlighted the barrier which central control of budgets poses to the ability of local partners to tackle complex and expensive social and service issues.²¹

¹⁸ *Local government in the United Kingdom* Wilson W and Game C, 2006 Palgrave Macmillan.

¹⁹ APSE LAML- as assessment of the judgement 2009.

²⁰ Total Place: a whole area approach to public services HM Treasury 2010.

²¹ *Problem, purpose, power, knowledge, time and space: Total Place final research report*, Keith Grint Warwick Business School 2010.

The financial settlement for 2011/12 has created major challenges for local government which may well impact on their ability to make best use of the GPC. However, at a time when local authority funding is being significantly reduced, the GPC gives an important message about the ability of councils to do what is right locally, including – promoting enterprise, establishing joint vehicles and trading. Income generation is an obvious way of mitigating the impact of the cuts but the restriction on making a profit, notwithstanding the current freedom for councils to generate income from new sources, for example, by charging for MOTs, will cause some problems.

We also need to learn lessons from the past to avoid creating similar circumstances as those which led to lack of effective use of the wellbeing power. Legislation can have both an instrumental and a symbolic importance. Our research found this to be the case with the wellbeing power. There was narrow interpretation of that power, as a legal instrument for achieving local aspirations in the absence of other more specific powers – its instrumental value. And there was a wider, symbolic value. The symbolic value was derived from the way in which the wellbeing power, together with a variety of other contextual factors, contributed to a culture of empowerment and innovation in support of the community leadership role. We must now ask whether the current government is developing, or intends to develop, a culture of empowerment as part of a wider policy and legislative context within which the General Power of Competence will be perceived as having both instrumental and symbolic importance. At the moment, the answer is probably ‘no’.

The Political and Constitutional Reform Committee is currently exploring the case for the codification of relationships between central and local government and consulting on a draft model code. Their recommendations may help to shape a more balanced relationship for the future, which may, in turn, help to support effective use of the GPC.

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