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# The General Power of Competence



## Summary

- 1 Local authorities: general powers
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## Summary

The general power of competence denotes the power to do “anything that individuals generally may do”. It is available to local authorities and some other types of body in England, local authorities in Wales, and local authorities in Northern Ireland.

The legislative provisions are in sections 1-8 of the [Localism Act 2011](#) (for England), sections 79-83 of the [Local Government \(Northern Ireland\) Act 2014](#) (for Northern Ireland), and sections 24-37 of the [Local Government and Elections \(Wales\) Act 2021](#) (for Wales). The power is not available in Scotland.

Prior to the introduction of the general power of competence, local authorities in England and Wales had a ‘well-being’ power, permitting them to do anything to promote economic, social or environmental well-being. This power was introduced in the [Local Government Act 2000](#), and it is also available to local authorities in Scotland via the [Local Government in Scotland Act 2003](#). Prior to these Acts, local authorities in the UK could only do things that they had specific legal power to do. Local authorities that took actions that they were not legally permitted to do could be found by a court to have acted ultra vires, and their decisions could be reversed.

This note provides an explanation of the general power of competence, the related ‘functional power of competence’, and the well-being power. It sets out some of the background to the introduction of the power, and notes some of the impacts of the use of the power.

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# 1 Local authorities: general powers

## 1.1 General Power of Competence

The ‘general power of competence’ available to local authorities and other public bodies is expressed as the power “to do anything that individuals generally may do”. This phrase is used in section 1 of the [Localism Act 2011](#) (applying to England); section 24 of the [Local Government and Elections \(Wales\) Act 2021](#); and section 79 of the [Local Government \(Northern Ireland\) Act 2014](#).

In England, the general power of competence is available to local authorities and eligible parish councils. It can also be applied to combined authorities: at the time of writing, the combined authorities in Cambridgeshire and Peterborough, West of England, and Sheffield City Region have the general power of competence.<sup>1</sup> In Wales, the power is available to Welsh local authorities; powers exist for the Welsh Ministers to extend it to eligible community councils via regulations. In Northern Ireland, the power is available to local authorities.

An ‘eligible’ parish council in England, and an ‘eligible’ community council in Wales, must resolve to exercise the general power of competence. In both countries, an eligible parish / community council is one in which at least two thirds of the members have been elected (i.e., not co-opted), and in which the clerk has completed one of a specified range of training courses.<sup>2</sup> In Wales, an eligible community council’s most recent two sets of accounts must have received an unqualified opinion from the auditor, and the most recent opinion must have been received in the twelve months preceding the council’s resolution that it is eligible. Welsh community councils must also pass a new resolution at each annual meeting to ‘renew’ their eligibility for the general power of competence.<sup>3</sup>

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<sup>1</sup> Section 10 of the [Cities and Local Government \(Devolution\) Act 2016](#) permits the general power to be conferred on these combined authorities in the Orders establishing them. A combined authority must consent to the conferral of the power.

<sup>2</sup> See the [Parish Councils \(General Power of Competence\) \(Prescribed Conditions\) Order 2012](#) (SI 2012/965).

<sup>3</sup> See the [Local Government and Elections \(Wales\) Act 2021](#), sections 30-31

The Government announced in March 2021 that it planned to consult on giving a general power of competence to Police and Crime Commissioners.<sup>4</sup> This was confirmed in a letter from Kit Malthouse, minister of policing, on 27 July 2021.<sup>5</sup>

## 1.2 The ‘functional power of competence’

A number of other types of authority in England hold powers in legislation that are more restricted than the general power of competence. This has been described as a ‘functional power of competence’. It is normally expressed in legislation as permitting a body to do “anything it considers appropriate for the purposes of the carrying-out of any of its functions”.

This form of general power is available to integrated transport authorities; passenger transport executives; all combined authorities; economic prosperity boards;<sup>6</sup> English national park authorities;<sup>7</sup> and some fire and rescue authorities.<sup>8</sup> It resembles the general power available to local authorities in the [Local Government Act 1972](#) (see section 2.1). The Greater London Authority has a general power to do anything in connection with its ‘principal purposes’: promoting economic development, social development or the protection of the environment.<sup>9</sup>

Each piece of legislation covering these classes of authority also includes a specific power for them to use it to do anything ‘incidental’ to their functions. This derives from judicial interpretations of the 1972 Act (see section 2.1).

## 1.3 Restrictions on the general power

The legislation for the general power of competence in England, Wales and Northern Ireland has a number of common restrictions across the three territories:

- Local authorities cannot use the general power to do anything that is specifically prohibited in legislation (a ‘pre-commencement limitation’), nor will it be possible to use it to circumvent any new legislation that prohibits specific actions (a ‘post-commencement limitation’);
- The power cannot be used to raise new taxes (as ‘individuals generally’ cannot raise taxes);

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<sup>4</sup> [HCWS849 2019-21](#), 16 Mar 2021

<sup>5</sup> Home Office, [Review into the role of police and crime commissioners: letter from Kit Malthouse MP to PCCs](#), 27 July 2021

<sup>6</sup> See the [Localism Act 2011](#), respectively section 11 (ITAs); section 12 (PTEs); section 13 (EPBs and CAs)

<sup>7</sup> See the [Cities and Local Government Devolution Act 2016](#), section 22

<sup>8</sup> See the [Fire and Rescue Services Act 2004](#), section 5A&ff

<sup>9</sup> [Greater London Authority Act 1999](#), section 30

- The power cannot be used to alter the political management structure of the authority (i.e. to a cabinet system or a committee system).
- Local authorities can use the general power to undertake commercial activities and to trade, but they must use a company to do so.<sup>10</sup> Authorities cannot use the general power to trade in services that they already have a statutory requirement to provide.

Questions have been raised about the availability of the power to trade – which must be done via a company – to parish and town councils:

The National Association of Local Councils – NALC – does not agree that the Localism Act 2011 gives effect to DCLG’s intention to extend the power to trade to town and parish councils. NALC recommends that town and parish councils wishing to pursue a trading activity seek independent legal advice.<sup>11</sup>

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<sup>10</sup> See [PQ HL8738 2017-19](#), 26 Jun 2018; and the Library briefing [Local government: alternative models of service delivery](#)

<sup>11</sup> LGA, [The General Power of Competence: empowering councils to make a difference](#), 2013, p.16



## 2 Background

### 2.1 Local authority powers

Historically, local authorities in the UK were permitted only to do things that they had specific statutory powers to do. If an authority did something that it had no specific statutory power to do, this would be deemed *ultra vires* – illegal, and hence void. This has long been regarded as a limitation on the powers of local authorities to act in the interests of their electorate. The idea of removing this limitation by introducing some form of ‘general power of competence’ for local authorities can be dated back at least to the report of the Maud Committee on Management in Local Government in 1967:

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 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 and fosters the ideas that the clerk should be a lawyer.<sup>12</sup>

Section 111 of the [Local Government Act 1972](#) 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 would need 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 authorities’ functions.<sup>13</sup>

### 2.2 The well-being power

A proposal for a general power of competence formed part of the 1983 Labour Party election manifesto:

... we will expand the scope for local democracy. Instead of local councillors never being completely sure what is permitted and what

<sup>12</sup> HMSO, Management of Local Government (Maud Committee), 1967, para 283.

<sup>13</sup> See [McCarthy & Stone \(Developments\) Ltd. v Richmond upon Thames LBC \[1992\] 2 AC 48](#), in which the judge held that charging for pre-planning application advice to a developer was “at best, incidental to the incidental and not incidental to the discharge of the functions” – and therefore unlawful.

is ultra vires, we shall give a power of general competence to all local authorities to carry out whatever activities are not expressly forbidden by statute.<sup>14</sup>

Part 1 of the [Local Government Act 2000](#) introduced a power for local authorities in England and Wales to promote the economic, social and environmental well-being of their area. A similar power was introduced in section 20 of the [Local Government in Scotland Act 2003](#). No well-being power was introduced for local authorities in Northern Ireland.

The well-being power was repealed in respect of England when the general power of competence was introduced. In Wales, it has been repealed in respect of local authorities, but it is still available to Welsh community councils.

The available evidence suggests that the well-being power was used only occasionally by local authorities. Some examples of the use made of the power are given in the 2008 DCLG report [Practical Use of the Well-being Power](#). An evaluation report for DCLG in 2008 said:

Use of the Well-Being Power remained limited over the life of the evaluation as local authorities had a tendency to use more specific powers to achieve their goals. Early uses of the Power tended to emphasise economic and environmental goals. Social uses emerged later. There was no evidence of local authorities balancing the economic, social and environmental impacts and outcomes of a decision to use of the Well-Being Power in line with sustainable development principles.<sup>15</sup>

The report also noted that “lawyers played a critical role in encouraging or discouraging use” of the power,<sup>16</sup> and the general concern shown by many local authorities on the use of the power was highlighted by the then Minister, John Healey, who felt that local government was not making full use of the powers that it had.<sup>17</sup>

A 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 use the available well-being powers effectively:

We have considerable sympathy with the case for local government to be given a power of general competence, to provide greater recognition of the local leadership role that central government is asking it to play, and which we support. If local government is able

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<sup>14</sup> [The new hope for Britain](#), Labour Party Manifesto, 1983,

<sup>15</sup> Department for Communities and Local Government, [Evaluation of the take-up and use of the well-being power](#); 2008, p. 1

<sup>16</sup> *Ibid.*, p. 2

<sup>17</sup> Communities and Local Government Committee - Sixth Report, [The Balance of Power: Central and Local Government](#), HC 33, 2008-09

to accumulate evidence that the well-being powers are falling short of a power of general competence to the extent that they are impeding its local leadership role, then we recommend that the Government should introduce a power of general competence for local government.<sup>18</sup>

## 2.3 The LAML case

The outcome of the 2008 case of [R \(ex parte Risk Management Partners Limited\) v LB Brent](#) ('the LAML case')<sup>19</sup> was a significant catalyst of demand to replace the well-being power with a more clearly-drawn general power of competence.

Brent, Harrow and other London boroughs used the well-being power to establish a mutual insurance company (London Authorities Mutual Limited - LAML). A judicial review of this decision was brought by Risk Management Partners, a potential alternative insurance supplier. The judge held that the boroughs could not use the well-being power to enter into this kind of joint arrangement. Although sections 34-35 of the [Local Democracy, Economic Development and Construction Act 2009](#) subsequently brought in a specific power to establish mutual insurance companies, thus remedying the specific point at issue, the case had a discouraging effect on use of the well-being power:

At a time of recession and public spending pressures, where it is vital councils have the confidence to innovate, the LAML judgment seriously undermined council confidence in the well being power as a wide, general power of first resort.

....

Although the well being power has encouraged some councils to introduce new activities, there has been uncertainty about its exact scope. This concern has been very much amplified by the recent judgement. This has increased interest in the idea of a power of general competence for local government, which would be broader and create greater certainty.<sup>20</sup>

The impact assessment for the general power of competence, in 2011, stated:

Although there is a lack of recent information on precise take up, the message from local authority representative groups is that there has been a loss of confidence in the existing well-being provisions

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<sup>18</sup> Communities and Local Government Committee - Sixth Report, [The Balance of Power: Central and Local Government](#), HC 33, 2008-09, p30

<sup>19</sup> 2008 EWHC 692 (Admin). A number of additional facets of the case were addressed in subsequent judgments.

<sup>20</sup> "Arming local government", [Local Government Lawyer](#), 30 March 2010

following the London Authorities Mutual Ltd case. It was this loss in confidence that has prompted calls for a general power of competence by the Local Government Association among others.<sup>21</sup>

## 2.4

# Proposals for a general power of competence

The Conservative Party's 2009 paper on local government, [Control shift: returning power to local communities](#),<sup>22</sup> included a commitment to introduce a general power of competence:

...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 requires 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.

In addition, we will ensure that all these actions can be taken at the lowest possible level (i.e. by the councils nearest to the citizens) by including town and parish councils within the categories of local authority that are given the new power.<sup>23</sup>

The commitment was included in the Coalition's programme for government in 2010.<sup>24</sup>

The 2010 New Local Government Network report [Going Nuclear? A Power of General Competence](#) suggested that the concept of ultra vires could be

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<sup>21</sup> DCLG, [Localism Bill: general power of competence for local authorities Impact assessment](#), January 2011, p.13

<sup>22</sup> Conservative Party, [Control Shift: returning power to local communities](#), 2009, p.13

<sup>23</sup> Ibid., pp.13-14

<sup>24</sup> [The Coalition: our programme for Government](#), HM Government, May 2010, p.12

abolished altogether.<sup>25</sup> It includes a number of suggested uses for a general power of competence, and a set of proposed provisions.

The academics David Wilson and Chris Game, of De Montfort University, commented that giving the general power of competence to local authorities introduces into the UK a power that is available to local authorities in many other European countries:

Many countries do have something legitimately describable as local self-government, especially those formed historically by the coming together of several small communities, for mutual help and support – for example, Switzerland, the Netherlands, Italy and the Scandinavian countries. Local councils of municipalities in such countries have, on average much smaller populations than do UK local authorities. Yet they have something British councils historically have not had: a power of general competence.<sup>26</sup>

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<sup>25</sup> NLGN, [Going Nuclear? A Power of General Competence for local government](#). 2010, p26

<sup>26</sup> David Wilson and Chris Game, [Local Government in the United Kingdom](#), Palgrave Macmillan, 5<sup>th</sup> ed., 2011, pp31-2

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## 3 Use and impact

The general power of competence has generated comparatively little attention in England since its establishment in 2011.

### 3.1 Potential impacts

In July 2013, the LGA published a paper entitled [Empowering councils to make a difference](#), giving examples of the use of the general power of competence.<sup>27</sup> The paper suggested that the general power should simplify local government's concerns regarding whether actions are 'incidental to their functions':

The GPC is much simpler than the earlier powers under s137 of the Local Government Act 1972, which covered activities 'incidental to their functions'. This stated that 'councils may incur expenditure which, in their opinion, is in the interests of and will bring direct benefit to, their area or any part of it or all or some of its inhabitants'. Moreover, such expenditure 'had to be commensurate to the benefit arising'. For town and parish councils, there was a maximum amount for such spending which does not apply to the GPC.<sup>28</sup>

Tim Kerr QC suggested that the general power of competence would not override the general framework of public law within which local government operates:

But the usual public law constraints (rationality, relevant considerations, procedural fairness, disregard of irrelevant considerations) will surely be applied by the courts to exercise of the power of general competence, even though an "individual" in the private sphere is not subject to them. An individual may justify a decision not by appealing to reason but by reference to "the power of intuition, the supra-logic that cuts out all routine processes of thought and leaps straight from problem to answer". An individual may behave capriciously or fecklessly.

... Local authorities exercising the new general power would not be well advised to emulate such behaviour, nor to rely on intuition when

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<sup>27</sup> See LGA, [General Power of Competence: empowering councils to make a difference – case study annex](#), 2013

<sup>28</sup> LGA, [The General Power of Competence: empowering councils to make a difference](#), 2013, p.12

defending any judicial review challenges. The familiar public law constraints are now so firmly embedded in the law that express words would be needed to exclude them and the equation with an “individual” is not itself sufficient to do so: an individual is not invested with heavy statutory responsibilities including stewardship of public funds.<sup>29</sup>

## 3.2 Prayers at council meetings

On 10 February 2012 the High Court ruled that Bideford Town Council were acting unlawfully by allowing prayers to be said at the beginning of formal council meetings. The town council argued that it had authority to hold prayers under section 111 of the [Local Government Act 1972](#). The judge ruled that prayers were not a function or incidental to a function of the town council: “the saying of prayers as part of the formal meeting of a Council is not lawful under s111 of the Local Government Act 1972, and there is no statutory power permitting the practice to continue.”<sup>30</sup>

Following the judgment, the general power of competence was brought into force on 18 February 2012, having originally been expected to come into force in April 2012.<sup>31</sup> Sir Merrick Cockell, Chairman of the Local Government Association, said:

It is the LGA's view that this ruling will be overridden by the GPC as soon as the legislation comes into force and that it remains the decision of local authorities if they wish to hold prayers during formal meetings.<sup>32</sup>

The National Secular Society, which brought the original court case, said it was consulting its lawyers as to whether the power would apply. A news release said:

A number of senior lawyers have expressed doubt whether the Localism Act will, as Mr Pickles hopes, make prayers lawful, and the Act was clearly not passed with that express intention. His powers to pass legislation are not, as he implies, untrammelled. Council prayers increasingly look set to become a battle between the Government and the courts at ever higher levels.<sup>33</sup>

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<sup>29</sup> Tim Kerr QC, [The Localism Bill and the general power of competence](#), 2012, p.7-8

<sup>30</sup> See *R (ex parte National Secular Society + another) v Bideford Town Council*, 2012, EWHC175 (Admin). See BBC, [“Bideford Town Council prayers ruled unlawful”](#), 10 February 2012, for background to the story.

<sup>31</sup> See Local Government Lawyer, [“Pickles fast-tracks general power of competence in bid to overtake prayer ruling”](#), 20 February 2012

<sup>32</sup> LGA Media Release, [LGA statement on prayers at council meetings](#), 10 February 2012.

<sup>33</sup> National Secular Society News release, [Council prayers: doubts over Eric Pickles' “general power of competence”](#), 18 February 2012

The [Local Government \(Religious etc. Observances\) Act 2015](#) provided that local authorities may include in their business time for “prayers or religious observance” or “observance connected with a religious or philosophical belief”. Both the 2012 judgment and the 2015 Act apply to England and Wales.

### 3.3 Local authority trading

Some local authorities have used the provisions within the 2011 Act to set up companies to trade for commercial purposes. Local authorities were already able to do this for certain statutory functions under the [Local Government Act 2003](#): a business case had to be approved by full council before this was done. Trading commercially implies local authorities competing on the open market with other commercial providers of services. This has generated some complaints of ‘unfair competition’ from small traders, reflected in a Parliamentary Answer on 9 February 2015:

We have recently received a number of letters from small business owners relating to the selling of memorials referring to the general power of competence.

The legislation only allows local authorities to provide and charge for discretionary services on a cost recovery basis and individuals must agree to that service being provided and choose to pay for it. Charging beyond cost recovery is trading. If a council is doing something for a commercial purpose (i.e. trading) it must be carried out through a company to ensure that the council does not have an unfair tax advantage over businesses. Furthermore a council cannot trade in services that they are required to provide, such as collecting household rubbish.

Local authorities are expected to make best use of resources by trading their expertise and ensuring that such action does not prevent growth of the private sector by distorting competition. Trading powers encourage councils to extend and improve the range of services offered, introduces new players into the market aiding competition, and helps increase the scope to provide business opportunities for the private sector.<sup>34</sup>

In general, local authorities are permitted to set up trading companies for a commercial purpose: there is no prohibition on them competing in the market in this way. They cannot use the general power to provide on a commercial basis statutory services that they are required to provide.

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<sup>34</sup> [PQ 221563](#), 2014-15



## 3.4

## Other uses of the general power

Unlike the well-being power, local authorities are not required to identify a specific benefit for their area when using the general power of competence. Moreover, when taking a decision, authorities may choose to act under the general power rather than under statutory powers. The potential effect of the latter was identified in the following example from the Government:

The Government is aware that some authorities may be using their general power of competence under the Localism Act 2011 to develop new social or affordable housing and accounting for that stock in its General Fund. Accounting for stock in this way is not in line with Government policy and if councils continue to develop social or affordable stock which they fail to account for within the Housing Revenue Account the Secretary of State will consider issuing a direction under section 74 of the Local Government and Housing Act 1989 to bring that stock into the Housing Revenue Account.<sup>35</sup>

The general power (and the well-being power) can be used to spend local authority funds on particular purposes, unless this is prevented by a pre-commencement limitation.<sup>36</sup>

The general power featured in a judicial review of the London Borough of Haringey in 2018. Haringey sought to create a limited liability partnership (LLP) called the Haringey Development Vehicle (HDV) in order to deliver a range of local authority services. The challenge claimed that the principal purpose of the HDV was commercial and therefore Haringey were obliged to use a company, as the HDV was being created using the general power. The judgment found that the commercial elements were peripheral to the HDV and the challenge therefore did not succeed.<sup>37</sup>

A 2014 case, *R (ex parte GS) v Camden*, examined the case of a foreign national who had been denied support under the [Care Act 2014](#) by LB Camden. The judgment found that Camden had correctly identified that they had no power to support the claimant under the 2014 Act. However, this caused a breach of the claimant's human rights. The judgment therefore found that Camden's decision not to make use of the General Power of Competence in order to support the claimant was unlawful.<sup>38</sup>

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<sup>35</sup> [HCWS441 2014-15](#), Housing update

<sup>36</sup> See *R v Oxfordshire County Council ex parte Khan [2004] EWCA Civ 309 [2004] BLGR 257*, a case in which a pre-commencement limitation prevented financial assistance from being given to an individual.

<sup>37</sup> See *Peters v Haringey (2018)* EWHC192 (Admin)

<sup>38</sup> See *R (GS) v Camden (2016)* EWHC1762 (Admin); see also a discussion of the case on [the website of Gowling WLG](#), 9 Nov 2016

## 3.5

### Disapplying legislation to facilitate use of the general power

The powers in the 2011 Act for the Secretary of State to disapply legislation that obstructs a reasonable use of the general power have been used. This was done in 2014 to allow the Tour de France to pass through a particular part of Harrogate Borough Council's area, the Harrogate Stray, the management of which is governed by private legislation. The [Harrogate Stray Act 1985 \(Tour de France\) Order 2014](#) (SI 2014/1190) disapplied the provisions of the Harrogate Stray Act 1985 for the period of the Tour.

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