



Briefing 09/11 March 2009

# Consultation on the trading and well-being powers

This briefing paper focuses on the 2 consultation papers issued by the Welsh Assembly Government on guidance on the power to trade and the well-being power. This applies to Wales only and is distributed to England, Scotland and Northern Ireland for information.

## Key issues

WAG has published revised guidance on:

The power for local authorities, fire and rescue authorities and national park authorities to trade in function related activities

The power to promote or improve economic, social and environmental well-being

This briefing paper outlines key differences in the new guidance.

The consultation deadline is 20 March 2009, please send all comments through to APSE on [djohns@apse.org.uk](mailto:djohns@apse.org.uk)

## 1. Introduction

The Welsh Assembly Government has issued revised statutory guidance on the general powers for local authorities, fire and rescue authorities and national park authorities to trade in function related activities. The Local Government Act 2003 contains powers for authorities to trade in function-related activities through a company. The Assembly conferred the power under the Local Government (Best Value Authorities) (Power to Trade) Wales Order 2006. Section 96(2) of the 2003 Act provides powers for Welsh Ministers to issue statutory guidance to which authorities are required to have regard. The full consultation paper is available by clicking on the following link:

<http://wales.gov.uk/consultations/localgovernment/trading/?lang=en>

The Assembly have also issued revised guidance on the power to promote or improve economic, social and environmental well-being. Section 2(1) of the Local Government Act 2000 provides local authorities with a discretionary power to do anything which they consider is likely to achieve the promotion or improvement of the economic, social and/or environmental well-being of their areas. The power was brought into effect in Wales in 2001. The new guidance issued also makes reference to authorities' power to trade in ordinary functions, a power conferred by Order in 2006, and not covered by previous iterations of the guidance. The draft guidance is a refinement of previous versions and does not alter how authorities may utilise the power to promote well-being. The intention of the Assembly is to acquaint the reader with the breadth of the power and to encourage the use of it. The full consultation paper is available by clicking on the following link:

<http://wales.gov.uk/consultations/localgovernment/wellbeing/?lang=en>

Both consultation's end on 20 March 2009 and APSE will be responding to the consultation. If you have any comments that you would like to feed into this, please email [djohns@apse.org.uk](mailto:djohns@apse.org.uk)

## **2. Revised statutory guidance on the general power to trade**

The guidance includes the definition of trading as follows:

In summary, the Trading Order:

- applies to local authorities, fire and rescue authorities and national park authorities

It provides that:

- An authority, as defined above, is authorised to do for a commercial purpose, anything which it is authorised (but not required) to do for the purpose of carrying on any of its ordinary functions. This in effect allows trading in all services other than those which the authority is obliged by law to provide.
- Before exercising the power, an authority is required to prepare and approve a business case in support of the proposed exercise of the power. For county and county borough councils, that requires approval by the full Council.
- Authorities are prohibited from subsidising their trading operations on a continuing basis: they must recover the costs of any accommodation, goods, services, staff or any other thing they supply to a company in pursuance of any agreement or arrangement to facilitate the exercise of the power.

The guidance explains that this power may be exercise in conjunction with an activity or service whose primary purpose is to achieve the promotion of well-being and therefore in conjunction with the Local Government Act 2000. In addition, existing public to public trading activities under the Local Authorities (Goods and Services) Act 1970 remain. The powers contained in the Trading Order are primarily concerned with public to private trading.

There have also been some changes to the legal framework brought about through the Local Government and Public Involvement in Health Act 2007, which means that community councils in Wales are no longer defined as 'best value' authorities. In addition, changes to the regime of propriety controls of local authority companies imposed by Part V of the Local Government and Housing Act 1989 have been repealed

although this repeal is not yet in force.

The guidance is a refinement of that issued previously and does not alter how authorities may utilise the power to trade. However, during the consultation on the making of the 2006 Order, some concern was expressed about the perceived detrimental effect on those small businesses whose local authorities had chosen to exercise the power. The new draft guidance makes it clear that in determining whether to use the power, authorities consult those who would be affected by the proposed trading activity before finalising the business case and in particular with:

- Potential customers and suppliers
- Staff and/or trade unions representing them
- Local representatives of business and the voluntary sector.

The outcome of these consultations must be reported within an authority's business case and this case must be approved by the authority and by full council in the case of county and county borough councils.

The guidance states that *"risks associated with trading activity....may or may not amount to risks falling to be assessed under the Wales Programme for Improvement (WPI)" p11*. That will depend on the prominence of the trading activity and its relevance to the local authority's strategic aims. Local authorities may wish to discuss this with their regulators before beginning to trade.

The guidance provides further guidance on trading through a company and in particular on the structure, accountability and governance, nominees to the board, conflicts of interest, personal liability, shareholding, staffing and personnel issues, procurement, state aid and competition law, transparency and exit strategy. Particular reference is also made to an authority's assistance to companies - *"In considering structures, the authority should ensure that it takes appropriate steps to avoid automatically assuming responsibility for any aspects of an unsuccessful company."* P19

### **3. Revised guidance on the power to promote or improve economic, social and environmental well-being**

The draft guidance is a refinement of previous versions and does not alter how authorities may utilise the power to promote well-being. The intention of the guidance is to acquaint the reader with the breadth of the power and to encourage innovative and imaginative use of it.

The guidance states that key factors which contribute to the promotion or improvement of well-being may include economic factors (such as high quality jobs), social factors (such as good quality and affordable housing), health related factors, environmental factors (such as the quality of the built environment) and the achievement of sustainable development. It is for the local authority to decide whether any particular action would be likely to promote or improve the well-being of its area and/or persons in it.

The guidance refers to duties such as WPI and local service boards and the need for more partnership working than in the past and that the well-being power can assist with this. In addition, the new Local Government (Wales) Measure, laid in 2008, will redefine the basic duty on local authorities to secure continuous improvement and that local well-being, sustainability and fairness are as valid as improving quantified service outputs or efficiency. It will also require local partners to be involved and co-operate in

the delivery of community planning outcomes and to engage with citizens.

The well-being power is wide ranging and the guidance states that uses might include enhancing service delivery, promoting sustainable development, improving community safety, improving the quality of the local environment, amongst other uses listed. The guidance also covers where you cannot use the power, such as where it is already prohibited by legislation or as a means of raising money. The Welsh Assembly Government has also called for local authorities to let them know of any limitations or restrictions as they continue to use the power.

A separate Annex provides a number of case studies of the use of the power by authorities in England including:

- Social housing in Wakefield – to purchase houses on an estate in rapid decline without going through a lengthy compulsory purchase process.
- Torbay council used the power to set up a public-private regeneration company.
- South Hams used the power as the basis of a district/county agreement to establish a waste transfer station.
- Nottinghamshire County Council used the power to set up a private not-for-profit company limited by guarantee to promote wood heat technology.
- Greenwich used the well-being power to establish an employment agency.
- North Tyneside and Newcastle used the power to enter into a joint PFI for street lighting.
- London Borough of Newham used the power to support involvement in new form of partnership arrangement with the Primary Care Trust.
- Royal Borough of Kensington and Chelsea used the power to provide additional Police Community Support Officers.
- The power gave additional legal comfort for a project in which Wychavon District Council was the developer of a community hospital and medical centre leased to the PCT and GP practise.

#### **4. APSE comment**

The context in which the guidance has been issued is a collaborative agenda for Wales, demonstrated through Making the Connections, as well as redefining the basic duty on local authorities to make arrangements to secure continuous improvement by broadening this to local well-being, sustainability and fairness via the Local Government (Wales) Measure. The Welsh Assembly Government have stated that both pieces of guidance are refinements of previous versions, with the well-being guidance stating the they want to encourage innovative and imaginative use of the power.

It is APSE's view as set out in briefing 05/33 that existing powers provide sufficient basis for local authorities to engage in trading activity, which includes the 1970 Local Authority (Goods and Services) Act, S111 of the Local Government Act 1972, and the power to charge for discretionary services under S93 of the Local Government Act 2003, amongst other legislation. The creation of a trading company can be a complex means of trading compared to the use of other powers and should only be used in exceptional circumstances as a specialised vehicle for trading.

APSE welcomes the Assembly's guidance on ensuring that any proposed use of the trading powers is consulted on, reporting the outcome of the consultations within a business case which must be approved by full council in the case of county and county

borough councils. In addition, we welcome an approach around rigorous business planning and risk assessment. APSE would welcome clear guidance from the Assembly in relation to the linkages that WPI has with any trading activities in relation to risk.

The consultation ends for both pieces of guidance on 20 March 2009. APSE will be responding to this on behalf of its membership. Please send any comments through to [djohns@apse.org.uk](mailto:djohns@apse.org.uk) or click here to discuss this on [APSE connect](#)

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