

# Scottish Government A local authority General Power of Competence consultation – APSE Response

To: All Chief Executives, Main Contacts and APSE Contacts in Scotland. For information only to England, Northern Ireland and Wales

## 1 Executive summary

The Scottish Government released a consultation on a local authority General Power of Competence. A General Power of Competence is currently available to local authorities in England, Wales and Northern Ireland. However, Scottish Government note that “many local authorities continue to be reluctant to use that power to explore activity beyond those functions explicitly set out in statute, due to concerns as to potential legal challenge and interpretations by the courts of the limitations of the scope of this power”.

This consultation therefore was seeking to establish what functions, beyond those already conferred by statute, local authorities in Scotland may wish to pursue and whether new legislation or amendments to existing legislation would be required to deliver those additional functions.

## 2 APSE Response

APSE was pleased to be given the opportunity to respond to the consultation. APSE’s full response is outlined below:

### About APSE

APSE’s (Association for Public Service Excellence) aims and values are to support and promote the delivery of excellence in frontline local government services. APSE works with over 250 local authorities throughout the UK specialising in frontline service delivery issues. In responding to this consultation APSE has considered the views of our member councils in Scotland, including responses drawn from discussions with our Scottish Commercialisation network group. We have also drawn upon our extensive membership experiences from other parts of the UK. As a representative body of our member local councils, we have not endeavoured to answer every point raised in the consultation but to cover the main themes on behalf of our membership.

## **APSE would welcome the Introduction of a General Power of Competence**

APSE would welcome the introduction of the General Power of Competence (GPC), enabling local authorities to have additional, overarching powers with guiding principles to promote innovation and flexibility in the delivery of their services and in the best interests of local communities across Scotland.

We would draw your attention to the following specific points.

### **Current Limitations for APSE members in Scotland**

England, Wales and Northern Ireland all currently enjoy a General Power of Competence. Whilst there are some minor differences in the legislation the GPC generally allows local authorities to do anything that is not prohibited by law, subject to certain limitations. Typically, the powers allow Ministers to reserve powers to intervene, should the power be misused, and its application also typically reflects that pre-commencement prohibitions would continue.

Within Scotland 'The Local Authorities (Goods and Services) Act 1970' allows a local authority to enter into an agreement for:

- (a) the supply of any goods or materials;*
- (b) the provision of any services;*
- (c) the use of any property belonging to or facilities under the control of the authority and the services of any person employed in connection with the property or facility in question;*
- (d) the carrying out of maintenance in connection with land or buildings for which the body is responsible and the purchase and store of any associated goods or materials which may be required.*

*On such terms as the parties consider appropriate.*

However, the 1970 Act specifically excludes a local authority to:

- a) construct any buildings or works; or*
- b) to be supplied with any property or provided with any service except for the purposes of a local authority's statutory functions*

*4. The 1970 Act also includes a provision that prohibits a local authority from entering into an agreement under the trading operation provisions if the commercial services income accruing to it in any financial year will exceed the statutory limit without the prior consent of the Scottish Ministers. **No statutory limit has ever been set and therefore any such activity will require Ministerial consent (regardless of materiality).***

*5. Further, a local authority is required to have regard to whether entering into an agreement for the supply of goods or services will be likely to promote or improve the well-being of either or both their local area and persons within that area.*

Whilst elsewhere in the UK the Goods and Services Act has served councils well as a relatively broad power this is not the case with Scotland. This is because of the long-running confusion over Ministerial Consent, on commercial services income, which as the consultation document refers to suggests that in the absence of a statutory limit being set any such activity would currently require Ministerial Consent.

APSE does not necessarily subscribe to this interpretation as a counter interpretation has long been debated across Scottish Local Government, which is that in the absence of a set limit there is no limit. APSE does not wish to debate the merits or otherwise of these legal interpretations in this response. However, it would be fundamental in introducing a General Power of Competence that this conflicted area of policy is resolved. Our concern is that should a GPC be introduced but with pre-commencement limitations, this confusion would simply carry over to the new power. It is therefore crucial that any new GPC removes the requirement of a Minister to set a limit on trading or charging and that this is reflected in legislative changes. Otherwise, the introduction of GPC will not resolve the very issue which has led to many APSE councils in Scotland to support a General Power of Competence, which is otherwise available to their peers across the UK.

In this regard we would urge the Scottish Minister to instead consider the well-defined use of charging; essentially cost recovery but which supports the costs of providing services, and trading; which is arguably more commercial in nature though in the context of local authorities could be best described as 'profit for a purpose' since money is reinvested by the local councils into local services and local areas. These measures ought to allay any Ministerial or indeed public fears about the unabated use of new powers.

APSE would also comment that a further and unnecessary restriction that could be addressed in a GPC is the current geographic restrictions on well-being powers, which APSE suggests are unnecessary and unhelpful. This is because Best Value may be better achieved by advancing innovation beyond a local authority boundary, but which benefits local people and indeed persons outside of the local area. Again, as widely drafted and defined in the Localism Act 2011 within England, this very point addresses the flaws in the well-being powers which led to the dispute in the LAML case [Risk Management Partners v London Borough of Brent 2008]. Removing outdated and counterproductive restrictions in this way can only be viewed as helpful to APSE member councils.

## **Context and Use of a General Power of Competence**

Whilst some may view a GPC as essentially a commercial matter that is not the case. The availability of a GPC would potentially enhance the willingness of local authorities in Scotland to innovate in service delivery, policy and strategy and create meaningful interventions within and beyond their local areas, without fear of falling outside of existing powers. For example, uncertainty during the COVID pandemic as to what extent local authorities could undertake actions and interventions, in support of local communities, or in other areas such as developing green energy initiatives to address fuel poverty and decarbonisation.

It is also important to note that a GPC is not an unabated power. Clearly its introduction elsewhere has carried the caveat of pre-commencement restrictions. This has the effect of preventing, for example, the introduction of charges or fees in certain statutory services where existing restrictions apply, or for example the ability to raise general taxes. Nothing within a well drafted General Power of Competence would equally allow a local authority to stop doing something which it is otherwise obliged to do.

Moreover, and again within the drafting, the power is not 'absolute' and as such reserve powers to the relevant Minister is a common mechanism, whereby should the need arise or as a public interest issue emerges, the Minister can in effect, 'pull up the drawbridge' to prevent the power in future being used in an adverse or unacceptable way.

## **Other Limitations on the Power**

A General Power of Competence does not absolve a local authority from otherwise following pre-commencement or indeed post commencement, regulatory or statutory duties. Typically, for example, where a GPC may be used for a trading purpose the local authority must still have due regard to its own financial standing orders, accountancy codes of practice, financial due diligence and its overarching fiduciary duty.

There is also a democratic accountability to the actions of local authorities. Should decisions not be made through the prism of public interest or be recklessly applied, for example in terms of investment or commercial activity, as well as the clear legal consequences, there is also the need to account for those actions with the local electorate.

Thus, a GPC should not solely be viewed as enabling local authorities to pursue income generation, commercial or trading activities but a new power which would enable them to advance outcomes for the wider benefit of communities, including economic development and regeneration or supporting local businesses jobs and skills in the local economy. Other opportunities would include

collaboration and partnership working across sectors.

### **Income generation advantages**

This is not to say however that commercialisation is necessarily a bad thing. Local authorities are facing a number of increasing challenges in terms of resource and budget constraints. Therefore, looking at activities in which they can provide a charged for service to generate additional income helps to support local council balance sheets. Local authorities are prohibited from charging for statutory services and would not wish to do so but local authorities can add value to services that they already provide, having the skills and knowledge to enter markets both new and existing to bring added value to citizens and local economies. For example, providing a trusted handyperson service to private homeowners with vetted staff and a contribution to high-quality and safe support could be helpful to vulnerable residents. Equally councils should be mindful that in setting up commercial operations they are not squeezing out local suppliers or small businesses. However, consideration of such factors is easily specified within Ministerial guidance.

Furthermore, on a more commercial basis the local authority as a major actor in the local economy could give confidence to other investors or retailers by acting as an anchor developer or landlord in regeneration schemes or High Street renewal schemes. Hence GPC should provide local authorities with confidence in decision making and help encourage innovative practice, without unnecessary restrictions.

### **3 APSE Comment**

As outlined within the consultation response above, it is important to note APSE would welcome the introduction of the General Power of Competence (GPC), enabling local authorities to have additional, overarching powers with guiding principles to promote innovation and flexibility in the delivery of their services and in the best interests of local communities across Scotland. However as also keen to highlight:-

- Current Limitations for APSE members in Scotland
- Context and Use of a General Power of Competence
- Other Limitations on the Power
- Income generation advantages

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- Local Authority Commercialisation, Income and Trading Network
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- Parks, Horticulture and Grounds Maintenance
- Recovery and Renewal
- Renewables and Climate Change
- Roads, highways and street lighting
- Sports and Leisure Management
- Vehicle Maintenance and Transport
- Waste Management, Refuse Collection and Street Cleansing

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