A GENERAL POWER OF COMPETENCE?

An opportunity for a revolution in local government income-raising?

Jamie Dunne, Legal Director, Brodies LLP 8 July 2025



ENLIGHTENED THINKING

TODAY'S SPEAKER



Jamie Dunne Legal Director 0131 656 0024 Jamie.dunne@brodies.com



OVERVIEW

- The challenges of raising revenue and the "Wellbeing Power"
- The proposed General Power of Competence
- Potential impact of general power in Scotland (and remaining challenges)

INTRODUCTION

One in four Scottish councils fear 'bankruptcy' - study

③ 13 December 2023 · ₱ Comments





Scottish councils face 'serious financial challenges' with funding cuts

by Justin Bowie





'Older people can be at a greater risk of falling for a scam than younger people. Someone who lives alone and who has limited social contact may not be able to discuss a letter or a phone call they have received with someone else to work out if it is real or not." Age Scotland.

Councils face 'existential crisis' without proper investment from next government

Local authorities need sustained funding if services and jobs are to be saved

Commenting on a new white paper from the Local Government Association that calculates councils in England face a £6.2bn funding shortfall over the next two years, UNISON head of local government Mike Short said today (Friday):

"Councils are facing an existential crisis because of years of severe government underfunding.

"Wave after wave of budget cuts to essential services has harmed communities immensely, with the worst off always the hardest hit

"Authorities have b Could a Scottish council run out of won't balance - an bankruptcy.

Latest news

money?

English councils are facing an "out-of-)30 September 2023 control" financial crisis <

7 June 2024

council funding local governmen

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Tagged

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A new report calls on the government to close the \pounds 4bn funding gap, or face a fresh wave of bankruptcies. March 10 2022, 12:00 arr





In 2018, Northamptonshire Council was the first local authority to issue a section 114 notice in 20 years. Photo by Jevanto Productions / Shutterstock



y Philip Sim BC Scotland political correspondent

lorth Lanarkshire is the latest Scottish council to deliver difficult news bout local services, with plans to close libraries, swimming pools and sports entres.





EXISTING STATUTORY FRAMEWORK IN SCOTLAND



CHARGING AND RAISING REVENUE

- Starting point is underlying power to undertake the activity being charged for
- Local Government in Scotland Act 2003
 - Section 22 wellbeing 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"
 - "does not enable a local authority to do anything which it is, by virtue of a limiting provision, unable to do" or which "unreasonably duplicates" another person's powers (s.22(1) and (4)
 - "does not enable the doing of anything which may be done under the Local Authorities (Goods and Services) Act 1970" (s.22(6))
 - "does not enable a local authority to do anything for the purposes of enabling the authority to raise money by levying or imposing any form of tax or charge, by borrowing or otherwise" (s.22(7))
 - BUT:
 - "Nothing in subsection (7) above prevents a local authority from—
 - (a) setting and determining amounts of council tax; or
 - (b) subject to subsection (9) below, imposing reasonable charges for anything done by the authority under section 20 above."

CHARGING AND RAISING REVENUE

- "a local authority [may not] impose charges in respect of anything done by it in pursuance of any of the following functions—
 - *(a) functions relating to education in schools;*
 - (b) functions relating to the provision of a public library service;
 - (d) functions relating to the registration of elections;
 - (e) functions relating to the conduct of elections;
 - (f) such other functions as may by order be prescribed for the purposes of this subsection by the Scottish Ministers."

CASE EXAMPLE

Portobello Park Action Group Association v the City of Edinburgh Council [2012] CSIH 69

Did the wellbeing power allow the City of Edinburgh Council to appropriate an area of inalienable common good land for the purposes of building a new school? The Inner House stated that the Wellbeing Power did not, in fact, allow a local authority to do "anything" which was likely to promote or improve wellbeing, as stated in the 2003 Act. It instead read in a number of implied restrictions upon the Wellbeing Power (beyond those already in the 2003 Act).

TRADING

Local Authorities (Goods and Services) Act 1970

Section 1(1) power to enter into an agreement to supply a person with goods or services But not where the likely result would be commercial services income exceeding the statutory limit (s.1(1A)) Currently no statutory limit set = statutory limit is £0 (s.1(1H)) But can obtain specific consent from the Scottish Ministers NB contracts with other local authorities and other public bodies are exempt from s.1(1A)



Scottish Ministers' consent

Supply of electricity Supply of renewable heat Supply of housing on commercial terms?



Duty to have regard to whether trading activity will "be likely to promote or improve the wellbeing" of the area or persons in it (s.1(1M))

Same as s.20 Local Government in Scotland Act 2003

INVESTMENT

- Local Government in Scotland Act 2003
 - Section 40(1) power to make investments
 - Must comply with regulations: Local Government Investments (Scotland) Regulations 2010
 - 2010 regulations permit local authorities to make investments subject to them gaining the consent of Scottish Ministers
 - General consent set out in Finance Circular 5/2010
- Scottish Ministers' consent
 - No need to obtain consent on a case by case basis
 - Requirement for local authority to determine permitted investments and investment strategy (including pre-determining acceptable level of risk)
 - Limitations on borrowing to invest
 - Must be for purposes of Council function or prudent management of Council finances
- Must also have regard (per reg 3) to two CIPFA publications:
 - Treasury Management in the Public Services: Code of Practice and Cross-sectoral Guidance Notes (2021 edition)'; and
 - 'The Prudential Code for Capital Finance in Local Authorities (2021 edition)'

A GENERAL POWER OF COMPETENCE

GENERAL POWER OF COMPETENCE



Generally categorised as the power to do "anything that individuals may generally do", unless specifically prohibited.



Changes the presumption that local authorities can only do things that they are given the specific power to do.



On 6 January 2025, the Scottish Government launched a public consultation to help established whether local authorities in Scotland should be granted this "General Power of Competence".



Local authorities in England, Wales and Northern Ireland already have this power, introduced into law in various statutes.

"1 LOCAL AUTHORITY'S GENERAL POWER OF COMPETENCE

(1) A local authority has power to do anything that individuals generally may do.

(2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—

(a) unlike anything the authority may do apart from subsection (1), or

(b) unlike anything that other public bodies may do.

Section 1, Localism Act 2011

POTENTIAL IMPACT ON SCOTLAND

- Generally, remove some of the administrative and legal barriers which inhibit innovation of local authorities, allow them to implement creative solutions and deliver effective public services.
- Designed as a "power of first resort"

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- Specifically, local authorities would have the freedom to pursue commercial activities, such as generating profit.
- For example, local authorities could in principle impose charges for services the local authority is not specifically empowered to charge for by other statutes, but where there is a policy objective to do so.



LIMITATIONS ON THE GENERAL POWER?

- Several rules limit the use of the general power which currently operates in England and Wales.
- Limitations might include restrictions on:
 - Charging for things that must be provided under statute, or which the authority has a power to charge for under a different provision
 - > Doing anything which is specifically prohibited in legislation
 - Using the power to raise new taxes
 - Exercising the power with the sole or primary purpose of raising money
 - Exercising the power outside the authority's area?



LIMITATIONS ON THE GENERAL POWER?

- The (English) General Power of Competence can only be used as a basis for charging for a discretionary service. The potential service user must be able to decline the service and avoid the charge.
- Also subject to the duty that on a yearly basis charges do not exceed the costs of the provision (section 3(3) of the Localism Act 2011).
- Applies on a service-by-service basis (section 3(4)) so no cross subsidy?

LIMITATIONS ON THE GENERAL POWER?





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