



Date: December 2004

No. 1

Subject: Briefing on the Legal Power to Promote the Policies of Nuclear Free Local Authorities: England

Summary: Authorities should rely on part one of the Local Government Act 2000 for their work in promoting the policies of the Nuclear Free Local Authorities.

1. Background

1.1 European Charter of Local Self-Government

The European Charter of Local Self-Government, established in 1985, confirms that local government has substantial freedom within the limits of the law. Article 4(2) of the Charter provides that:

“Local authorities, shall within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any authority.”

Following the election of the Labour Government in 1997, the UK signed and ratified the Charter.

1.2 Origin of the Power to Promote Well-Being

In the White Paper “Modern Local Government: In Touch with the People” the Government proposed granting local authorities a new discretionary power to take steps which in their view promote the economic, social and environmental well-being of their areas.

Chapter 8 addressed these new proposals under the heading “Promoting the well-being of communities,” stating, inter alia:

“Community leadership

8.1 Community leadership is at the heart of the role of modern local government.

Councils are the organisations best place to take a comprehensive overview of the needs and priorities of their local areas and communities and lead the work to meet those needs and priorities in the round ...

THE LOCAL GOVERNMENT VOICE ON NUCLEAR ISSUES



Manchester City Council, Town Hall, Manchester, M60 3NY

Tel: 0161 234 3244

Fax: 0161 234 3379

E-Mail: office@nuclearpolicy.info

Website: <http://www.nuclearpolicy.info>

A new duty to promote economic, social and environmental well-being:

8.8 The Government intends to introduce legislation to place on councils a duty to promote the economic, social and environmental well-being of their areas and to strengthen councils' powers to enter into partnerships.

8.9 This new duty will provide an overarching framework for local government. It will enshrine in law the role of the council as the elected leader of their local community with a responsibility for the well-being and sustainable development of its area.

*8.10 It will ensure that councils must, at all times, consider the long-term well-being of their area. It will put sustainable development at the heart of council decision-making and will provide an overall framework within which councils must perform all their existing functions.
...”*

2. The Power to Promote Well-Being

2.1 Understanding the Power

Part I of the Local Government Act 2000 came into force on April 1 2003.

Assistance in understanding the power can be obtained from two sources.

2.1.1 Explanatory Notes

Acts of Parliament are accompanied by Explanatory Notes to assist the reader in understanding the Act.

2.1.2 Statutory Guidance

Section 3(5) requires that:

“Before exercising the power under section 2(1), a local authority must have regard to any guidance for the time being issued by the Secretary of State about the exercise of that power.”

The DETR, as it then was, issued statutory guidance in March 2001 for English authorities under section 2(1).¹

Where statutory guidance is particularly relevant to the work of the Nuclear Free Local Authorities, it is underlined in what follows.

2.2 The Power

Section 2 (1) Promotion of well-being:

*“2. - (1) Every local authority are to have power to do anything (note 1) which they consider (note 2) is likely to (note 3) achieve any one or more of the following objects-
(a) the promotion or improvement of the economic well-being of their area,
(b) the promotion or improvement of the social well-being of their area, and
(c) the promotion or improvement of the environmental well-being of their area.”*

Note 1: “anything” is by definition very broad

Note 2: the words “which *they* consider” emphasise that there is a wide discretion in the exercise of the power. Its exercise ought to be difficult to question provided that the belief that leads to its deployment is supported by rational argument.

Note 3: certainty regarding the outcome is not required.

¹ http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/pdf/odpm_locgov_pdf_605709.pdf

The Explanatory Notes state vis-à-vis sections 2 and 3:

“The intention is to broaden the scope for local authority action while reducing the scope for challenge on the grounds that local authorities lack specific powers.” (para 15)

The DETR Guidance states:

“The power of well-being

5. ... For many years, innovative actions by local authorities have been stifled by concerns over the scope of their powers. While some legislation contains deliberate and specific constraints on local authority activities, there has been considerable uncertainty over the extent of the enabling powers that have been conferred on councils. The result has been a necessarily cautious approach to innovation and joint action, and a concomitant limitation of councils’ contribution to the improvement of their communities’ quality of life.

6. The Government’s purpose in introducing the well-being power is to reverse that traditionally cautious approach, and to encourage innovation and closer joint working between local authorities and their partners to improve communities’ quality of life. The purpose of this guidance is therefore to acquaint local authorities with the breadth of the new power, and to encourage innovative and imaginative use of it. In particular, each local authority will want to consider how the power can promote the sustainable development of its area by delivering the actions and improvements identified in its community strategy, which could include ... improving local environmental quality. Authorities will also wish to consider how the new power can help them to contribute locally to shared national priorities, such as action to combat climate change and encourage the conservation of biodiversity, and biodiversity ...

7. The new power is wide-ranging, and enables local authorities to improve the quality of life, opportunity, and health of their local communities. Further information is set out in chapter 2. Specific examples of the kind of action that can be taken are set out in section 2(4) of the Act. These include incurring expenditure, providing staff, goods or services to any person, entering into partnership arrangements and carrying out the functions of other bodies. This list is for illustrative purposes only, and does not in any way limit how local authorities can use the new power.

...

10. The breadth of the power is such that councils can regard it as a ‘power of first resort’. Rather than searching for a specific power elsewhere in statute in order to take a particular action, councils can instead look to the well-being power in the first instance and ask themselves:

- Is the proposed action likely to promote or improve the well-being in our area?*
 - Is the primary purpose of the action to raise money?*
 - Is it explicitly prohibited on the face of other legislation?*
 - Are there any explicit limitations and restrictions on the face of other legislation?*
- If the answer to the first question is ‘Yes’ and to the next two questions ‘No’, then a council can proceed with the proposed action, subject to the answer to the fourth question, i.e. any restrictions or limitations that may apply by virtue of being spelt out on the face of other legislation.*

...

27. The Government does not intend to define what actions would constitute the promotion of economic, social or environmental well-being, although it should be made clear that it considers these terms to be sufficiently broad to encompass both cultural well-being and the promotion or improvement of the health of a council’s residents or visitors to the area. It is for the local authority itself to decide whether any particular action would promote or improve well-being, taking account of their local circumstances and the wishes and needs of their communities. A local authority would, of course, need to interpret these terms in accordance with the general principle of “Wednesbury reasonableness”¹³.

2.3 For What Area or Groups May the Power be Used?

Section 2(2) makes it clear that the power may be used for all or merely some part of the authority's area or population:

“(2) The power under subsection (1) may be exercised in relation to or for the benefit of-
(a) the whole or any part of a local authority's area, or
(b) all or any persons resident or present (note 1) in a local authority's area.”

Note 1: this emphasises that the power can be exercised for those who merely visit or work in the area, although not residents.

2.4. Requirement to Consider Community Strategy

“(3) In determining whether or how to exercise the power under subsection (1), a local authority must have regard to their strategy under section 4.”

The Explanatory Notes state:

“... section 2(3) means local authorities must consider the objectives and priorities contained in their community strategy before they take action under the power in section 2(1). This is in no way meant to limit the scope of the power in section 2(1). Rather it is designed to encourage authorities to think about the broad goals and objectives contained in the community strategy, before deciding how best to use their well-being power.”
(Paragraph 16, our emphasis.)

The statutory guidance states:

“ 11. In determining how to use the new power, an authority ... must also have regard to its community strategy, which it has a duty to prepare under section 4 of the Act. This requirement is not intended to limit the scope of the well-being power, nor to encourage a 'checklist' approach to its use; it is rather intended to encourage local authorities to consider the effect that any particular use of the power will have on the achievement of the goals and objectives contained in their community strategy ... Local authorities do not have to wait until their community strategies are in place before being able to exercise the power.

*...
26. The new power provides a strong basis on which to deliver many of the priorities identified by local communities and embodied in community strategies. ... the need to take account of the community strategy does not mean that each and every use of the power must be referenced in the strategy.”*

Commentary: This means, for example, that if the power is exercised to support the policies of the Nuclear Free Local Authorities, before exercising that power an authority must consider their community strategy. It does *not* mean that such a policy must be stated within the strategy as a legal prerequisite to exercising the power.

2.5 Examples of how the power may be used

Section 2(4) illustrates the great width of the power:

“2(4) The power under subsection (1) includes (note 1) power for a local authority to-
(a) incur expenditure,
(b) give financial assistance to any person,
(c) enter into arrangements or agreements with any person,
(d) co-operate with, or facilitate or co-ordinate the activities of, any person,
(e) exercise on behalf of any person any functions of that person, and
(f) provide staff, goods, services or accommodation to any person.”

Note 1: this list is merely *illustrative*: it is not exhaustive.

2.6 The power may be used outside the area if creates benefits within the area

“2(5) The power under subsection (1) includes (Note 1) power for a local authority to do anything in relation to, or for the benefit of, any person or area situated outside their area if they consider that it is likely to achieve any one or more of the objects in that subsection.”

Note 1: again this is illustrative and not exhaustive.

The statutory guidance states:

“51... this subsection ... enables local authorities to use the power in a way that affects areas outside their own boundaries, if that action contributes to well-being in their own area. The Government wants local authorities to be able to act in the interests of communities and to be certain of their legal right to do so. To address community concerns they will need to work closely with other bodies that provide local services and with other tiers of local government.

52. This subsection will open up the scope for:

- more collaborative working within local authorities and local strategic partnerships;*
- co-operation between neighbouring local authorities and local strategic partnerships;*
- initiatives at the regional, cross-regional and sub-regional level (... [for example]to address issues which do not recognise administrative boundaries, such as the prevention of pollution and the conservation of biodiversity).*

53. This is a key power in relation to local authorities' partnership working with the health sector, since most local authorities are not coterminous with health authorities. The power provides opportunities for action between neighbouring health and local authorities and other sub-regional agencies or services where the health and well-being of certain groups cut across traditional service boundaries: for example, travelling communities, people that live and work/study in different authorities, people in a local authority using health services in another area and so on. It also enables joint action to protect the well-being and health of communities at risk from environmental pollution, crime, economic decline or health hazards when these communities reside across authorities' boundaries.

...

56. This subsection opens up the possibility that councils will use the powers in ways that are perceived as detrimental by other local authority tiers or neighbouring areas. Use of the power in this way should be avoided. Councils will be expected to consult and take the views of the other authority into account prior to exercising the power outside their own boundaries. Any council planning to use the well-being power in a way that has a major impact beyond its boundaries should assess these impacts, in consultation with the relevant authorities. Similarly, county and district councils should seek to ensure that each are consulted on, and support, the action that they are proposing to take under the power.”

Commentary: this provides clear legitimacy for activity focused on (a) activities or sites or actors outside an authority's area (including where appropriate outside national boundaries) that threaten the well-being of the area or (b) activity supporting actors or areas outside their area which may ward off such threats.

2.7 Limits on the power of well-being

“ 3. - (1) The power under section 2(1) does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made).”

The statutory guidance states:

“63. ‘Contained in any enactment’ means spelt out explicitly on the face of the legislation. It does not apply to any limits to local authority powers, which might be implied or inferred from the way in which those powers have been drafted. So, for instance, section 93 of the Transport Act 1985 (as amended by Schedule 11 of the Transport Act 2000) confers a

power on councils to establish public transport travel concession schemes for certain groups of people. If this provision stated on the face of the Act that authorities could not establish such schemes for any other group of people, then that prohibition would also constrain the use of the well-being power. However, the 1985 Act contains no such prohibition: so authorities can now use the wellbeing power to establish concessionary fare schemes for any person or group of people, if they consider it appropriate after taking their own legal advice.”

3. Community Strategies

“Strategies for promoting well-being.”

4. - (1) Every local authority must prepare a strategy (referred to in this section as a community strategy) for promoting or improving the economic, social and environmental well-being of their area (Note 1) and contributing to the achievement of sustainable development in the United Kingdom.(Note 2)

Note 1: The reference to “promoting or improving the ... well-being of their area” is a direct reference to the power contained in section 2.

Note 2: The local strategy is intended to contribute locally to a national goal.

Separate DETR Guidance, “Preparing community strategies: government guidance to local authorities”, has been issued to local authorities²: relevant portions of this read as follows:

“Context

6. The Local Government Act 2000 is part of a local authority reform programme, linked to the Government’s programme for the reform of public services. These programmes aim to ensure that the activities of the various bodies who provide services to the public:

...

take account of the needs of future generations.

...

Aims and objectives

9. A community strategy should aim to enhance the quality of life of local communities and contribute to the achievement of sustainable development in the UK through action to improve the economic, social and environmental well-being of the area and its inhabitants.

10. If this aim is to be realised, a community strategy will have to meet four objectives. It must:

...

contribute to the achievement of sustainable development both locally and more widely, with local goals and priorities relating, where appropriate, to regional, national and even global aims.

...

14. Only by promoting and improving the economic, social and environmental well-being of their communities will community strategies contribute to the achievement of sustainable development in the UK. ... A community strategy should cover all three [aspects of well-being] in an integrated way. In developing their strategies, local authorities and their partners should have regard to the Government’s sustainable development strategy - which provides a national framework for integrating economic, social and environmental concerns - and work on regional sustainable development frameworks (see paragraph 44). They should also take account of the ways in which national and global concerns - such as the mitigation of climate change and the protection of biodiversity - can be addressed through local action.

...

² http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/pdf/odpm_locgov_pdf_605670.pdf

Action outside an authority's boundaries:

63. *While the duty to prepare community strategies refers specifically to each authority's area, this does not preclude strategies from covering issues or actions outside the authority's own administrative boundaries. For example, in areas where health and local authorities are not coterminous, local authorities will be working with neighbouring authorities in order to contribute to the Health Improvement Programme, and health authorities will need to work together in relation to community strategies which cross their boundaries. Some of the issues that concern local communities will be best tackled by action at a regional, cross-regional, or sub-regional level. This might mean that such action will depend on the involvement of a particular regional or sub-regional body, and/or a number of authorities working together to take action in one area that benefits each of their communities. ...*

64. *When such issues are first identified, authorities will need to consider whether effective action demands joint working with neighbouring authorities. Where it is decided that community concerns and aspirations are best addressed by joint action, authorities and their partners will need to explore the scope for linking elements of their community strategy with those being prepared for other areas.*

65. *In such cases, authorities will also need to consider whether they need to involve regional and sub-regional bodies. Depending on the nature of the activity, this might also include the ... the Mayor and Assembly in London."*

Long term goals are clearly envisaged:

"Establishing a vision

70. *Having set up a broad local strategic partnership, the first stage in developing a community strategy will be to establish a long-term vision for the area, taking into account wider regional and national visions for better quality of life ...Where there are effective LA 21 strategies in place, they should provide a good basis on which to inform the public of the sorts of things to be considered in a long-term sustainable vision for the area. ... The timeframe is something that can only be decided in the light of local circumstances and following the articulation of communities' aspirations. In the key area(s) of ... the environment, it is likely that aspirations will only be realised in the long term. However, to ensure that the long-term vision is more than a set of aspirational statements, the local strategic partnership will need to ensure that it includes some explicit outcome targets."*

Commentary: the effect of this is that a community strategy could very appropriately refer to the policy objectives of Nuclear Free Local Authorities

4. Conclusion

The power to promote well-being provides an entirely appropriate power for English authorities to promote Nuclear Free Local Authority policies. Although nuclear issues are not referred to in the statutory guidance, another global threat to the future, climate change, is. The same logic that underpins the use of the power to confront one global peril, clearly applies to others.