

Nuclear Free Local Authorities

legal briefing



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No.1

Subject: **Briefing on the legal power to promote the policies of Nuclear Free Local Authorities: Scotland**

Summary: Authorities should rely on part three of the Local Government in Scotland Act 2003 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 Evolution of the power to promote well-being

The McIntosh Commission¹ reported on the Benefits of a Power of General Competence finding, inter alia, that:

“it would be a way of expressing in statute the fundamental, but unspoken and unwritten purpose of a council - irrespective of the specific functions conferred on it by other statutes – namely to be the voice of its people and to promote their interests.”

The Scottish Executive supported this:

“... we are convinced that such a power - which might be better described as a power of community initiative - will stimulate new ideas and innovation in local government and will encourage joint working between local authorities and other bodies. It will help to provide a platform from which to develop a community leadership role for modern Scottish local government.”²

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>

As a result the Scottish Executive published “A Power of Community Initiative: Community Planning: Political Restrictions on council employees” in November 2001. Part II discussed “A Power of Community Initiative” which identified broad approval for the power of community well being introduced in England and Wales as a model for Scotland. It stated:

“9. The outcome of our consultation on the McIntosh recommendations suggested that much of local government’s frustration over its freedom of action arises from prohibitions and limitations which apply in current statute. If councils are to take full advantage of a power of community initiative it would appear that these constraints should be examined and, where appropriate, lifted or relaxed.”

It also recognised the need for local authorities to “take on a community leadership role” (para 25)

2. The Power to Promote Well-being

2.1 Understanding the Power

Part 3 of the Local Government in Scotland Act 2003 (sections 20 to 22) - headed “Power to advance well being” - 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 the Scottish Parliament are accompanied by Explanatory Notes intended to make the Act accessible to readers who are not legally qualified and who have no specialised knowledge of the matters dealt with. They are intended to allow the reader to grasp what the Act sets out to achieve and place its effect in context.

2.1.2 Statutory Guidance

Section 21(1) requires that:

“Before exercising the power under section 20 above, a local authority shall have regard to any guidance provided by the Scottish Ministers about the exercise of the power.”

The Scottish Executive has issued guidance “Local Government in Scotland Act 2003 : Power to Advance Well being Guidance”³

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 20 Power to advance well being:

“20 (1) A local authority has power to do anything (note 1) which it considers (note 2) is likely (note 3) to promote or improve the well being (note 4) of-
(a) its area and persons within that area; or
(b) either of those.”

Note 1: “anything” is by definition very broad.

Note 2: the words “which it considers” emphasise that there is a wide discretion in the exercise of the power, whose 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.

Note 4: “well being” is not defined by reference only to economic, social and environmental well being as is the case in equivalent legislation for Scotland. It is a very wide concept.

The statutory guidance states:

“What do we mean by “well being”

1.5 The “well being” of an area and the people within that area will be dependent on many factors. Some of these factors will be outwith the direct influence of the local authority or other public bodies, for example some national or global issues. Nevertheless, local authorities, working in partnership with others, are in an excellent position to make an assessment of what is needed to advance well being, and can provide a solid foundation for the overall well being of their area that responds directly to local, regional and national issues.

1.6 Key factors which contribute to promotion or improvement of well being may include:

- Economic factors ...*
- Social factors ...*
- Health related factors ...*
- Environmental factors such as ... the removal of objects considered hazardous to health, protecting communities against the threat of climate change...*

1.7 In discharging their functions, local authorities are now obliged to make arrangements which secure continuous improvement in performance. This is what the duty of Best Value means. Best Value also requires local authorities to secure Best Value in a way that contributes to the achievement of sustainable development. Sustainable development is usually seen to be development which secures a balance of social, economic, health and environmental well being in the impact of activities and decisions, and which seeks to meet the needs of the present without compromising the ability of future generations to meet their own needs. Since sustainable development is most often interpreted as the point where a balance between social, economic, health and environmental objectives is struck, there are obvious links between sustainable development and well being.

1.8 Different local authorities may have different views about the type of activity that will promote or improve the well being of their area, and the factors that constitute the well being of their area. The term “well being” is therefore not defined in the Act nor in this guidance, and the factors noted above are intended as examples rather than a definitive list. Plans, priorities and actions taken under the power should be informed by, and responsive to, the views of the people and communities in the area. That will help inform local authorities’ views of well being in their area.

1.11 The power to advance well being has been drafted in such a way that local authorities have considerable discretion in how they exercise it. They may use it to support their arrangements to secure Best Value and to help secure the objectives of Community Planning Partnerships they are involved in. They may also use it for other purposes which are unrelated to these objectives. But in anything they do to advance well being, the local authority must have regard to the duty of Best Value in pursuing continuous improvement in how it exercises the power.

2.1 Local authorities need to have the necessary statutory powers to enable them to be more responsive to the needs of the people they serve. Before the Act came into force, local authorities could do only those things that they were empowered to do by specific statutory powers, duties and functions. This created a degree of uncertainty over the extent of the ‘enabling’ powers which local authorities had. While this legal framework was sufficient to allow local authorities to deliver a range of services, it constrained them from developing a broader and more innovative role. Local authorities had to check whether legislation explicitly enabled them to engage in a particular activity.

2.2 The power to advance well being has been provided to encourage innovation and closer partnership working between local authorities and other bodies in better responding to the needs of communities. The new power is wide-ranging and enables local authorities to do anything that they consider is likely to promote or improve the well being of their area and/or persons in it.

2.3 The breadth of the power is such that local authorities should regard it as a “power of first resort” when they are in any doubt about whether existing powers would enable them to take a particular course of action or deliver a particular service. That is, rather than searching for a specific power elsewhere in statute in order to take a particular action, the Scottish Executive encourages local authorities to look to the new power in the first instance in taking forward measures likely to promote and improve well being.

2.4 Local authorities will however still need to check that what they intend to do under this power is in accordance with the law more generally. Relevant legal issues may include, for example:

- law of contract;
- relevant EU treaty obligations, directives and regulations which apply to procurement and state aided activity;
- current UK legislation that extends to Scotland, such as the Competition Act 1988, the Companies Acts, disability discrimination, human rights, data protection and employment legislation;
- vulnerability to judicial review;
- principles of natural justice; and
- other legislation relevant to local authorities.

2.7 It should be stressed that the following are illustrative examples and should not be read as limiting potential use of the power.

2.8 Local authorities will wish to consider how the power might be used to pursue activities that contribute to achieving Community Planning objectives, other crosscutting issues and shared priorities, national priorities, and overarching policies, which promote and improve well being. These might be policies and programmes that wholly or in part, will close gaps in opportunity or outcomes for disadvantaged groups of people or geographical areas.

Uses might include activities relating to:...

- Promoting sustainable development;
- Tackling climate change:...
- Protecting, enhancing and promoting biodiversity:...
- Improving Community Safety”.

2.3 Examples of how the power may be used

“20 (2) The power under subsection (1) above includes power 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, materials, facilities, services or property to any person.”

The Explanatory Notes to the Act⁴ state:

“Subsection (2) sets out potential activities that may be undertaken using the power to advance well being. This list is illustrative rather than limiting.” (para 56)”

The statutory guidance states:

“2.11 Items (a) and (b) make it clear that local authorities can regard the power to advance well being as including a broad spending power. When undertaking any activity in pursuit of promoting or improving well being, the power to advance well being enables local authorities to incur expenditure, and specifically identifies the provision of financial assistance (item (b)) as one means of doing so. Local authorities are able to fund the activities of different groups and bodies, if they consider that this expenditure is likely to promote or improve the well being of their area or persons in it. Such financial assistance may be given by any means local authorities consider appropriate, including by way of grants, loans, guarantees or indemnities as elements of financial packages, or contributions in cash or kind.

2.12 Items (c) and (d) provide local authorities with powers to make arrangements or agreements with any person and to allow them to co-operate with, or facilitate or co-ordinate the activities of any person. Again it is for local authorities to consider what such arrangements or agreements might be and whether they would be likely to advance well being, but an example might be the formation of or participation in companies or any other form of association or vehicle for joint working. ...

2.13 Item (e) makes clear that the power to advance well being enables local authorities to deliver services that fall within the responsibility of other service providers. This does not transfer statutory responsibility or accountability for that function, but gives greater scope for local authorities and their Community Planning partners to determine how best to discharge their functions in light of local needs and circumstances. For example, the Community Care and Health (Scotland) Act 2002 sets out specific arrangements for joint working, delegation of functions and pooled budgeting for joint working in community care. This power is obviously more extensive. Item (f) makes clear that, in addition to providing financial assistance, local authorities can also provide other forms of assistance including staff, goods, materials, facilities, services and property. In other words, they can make such a contribution ‘in kind’, although where such contributions relate to an agreement entered into in relation to a trading operation (as defined under proper accounting practice) the terms of the Local Authority (Goods and Services) Act 1970 apply.”

2.4 For what area or groups may the power be used

“20(3) The power under subsection (1) above may be exercised in relation to, or for the benefit of-

- (a) the whole or any part of the area of the local authority;*
- (b) all or some of the persons within that area.”*

The Explanatory Notes state:

“Subsection (3) allows flexibility in the way the power may be used. The power may be used in relation to the whole local authority area or any part of that area, for example, to a council-wide project covering the whole council area or to a project for a particular community; a particular town; or a particular island within the area. Similarly, the power may be used in relation to all or some of the persons within a local authority area - for example, to benefit all residents, a particular group such as tourists to the area or commuters into the area.”(para 57)

2.5 Power may be used outside the area of creates benefits within the area

“20(4) The power under subsection (1) above includes power to do anything-

- (a) in relation to, or for the benefit of, any persons or place outwith the area of the local authority; or*
- (b) in any such place, if the authority considers that doing so is likely to achieve the purpose set out in that subsection.”*

The Explanatory Notes state:

“Subsection (4) enables a local authority to use the power outwith its geographical area if it considers doing so is likely to promote or improve the well being of its own area and/or persons within its area.” (para 57)

The statutory guidance states:

“2.19 In exercising the power outwith its area, the Scottish Ministers would expect a local authority to consult the local authority (or local authorities) and other relevant bodies in the area where they are proposing to take action under the power to advance well being, although there need not be disproportionate consultation in relation to minor matters.”

2.6 Potential to Extend the Meaning of Well-being

(5) The Scottish Ministers may, by order, extend the meaning of "well-being" for the purposes of this section.

The explanatory notes state:

“58. Subsection (5) enables the Scottish Ministers, by order, to extend the meaning of "well being". This power might be used if, for example, the common understanding of the phrase becomes narrower or changes significantly over time.”

2.7 Limits of the Power of Well-being

Section 22 Limits on power under section 20

“22(1) The power under section 20 above does not enable a local authority to do anything which it is, by virtue of a limiting provision, unable to do.

(2) In subsection (1) above, a "limiting provision" is one which-

- (a) prohibits or prevents the local authority from doing anything or limits its powers in that respect; and*
- (b) is expressed in an enactment (whenever passed or made).”*

The explanatory notes state:

“61. Subsections (1) and (2) establish that the power to advance well being does not enable a local authority to do anything that is expressly prohibited, prevented, restricted or limited by other legislation.”

“22 (3) The absence from any enactment of provision conferring any power does not of itself make that enactment a limiting provision.”

The explanatory notes state:

“62. Subsection (3) establishes that use of the power to advance well being is not limited by what may be deemed an implied, rather than an explicitly stated restriction, prohibition, prevention or limitation. “

The statutory guidance explains that the effect of sections 22(1) to (3) is:

“that while the power to advance well being is subject to limiting provisions expressed in legislation, it is not subject to limitations which are merely implied in existing legislation or where legislation is silent. An example of this is section 105 of the Housing (Scotland) Act 2001 which authorises specific works but with the clear overall purpose of improving

energy–efficiency and safety and should therefore not be read in the context of the power to advance well-being as limiting works to these specific categories.” (para 3.1)

“22(4) The power under section 20 above shall not be exercised in a way which unreasonably duplicates anything which may or must be done in pursuance of a function, under any enactment (whenever passed or made), of a person other than the local authority.

(5) Subsection (4) above does not prevent the exercise of the power under section 20 in a way which duplicates anything of the kind mentioned in that subsection if the person there mentioned consents to that exercise of the power.”

The Explanatory Notes state:

“Subsection (4) prevents the power being used in a way that unreasonably duplicates the statutory functions of another body or person. It is for the local authority to consider whether any proposed action is reasonable. Subsection 5 makes clear that such exercise of the power would not be considered unreasonable where the other person had consented.” (paragraph 63, italics our emphasis)

Note that the consent referred to is *not* a necessary precondition to the exercise of the power in section 20.

The statutory guidance states:

“The power shall not be exercised in a way that unreasonably duplicates the legislative functions of another body. While Community Planning will be an invaluable process in agreeing joint visions and joint or shared action, the Act guards against an unreasonable duplication of an activity by a local authority which falls within the statutory competence of another public body. The Act makes clear that exercise of the power in a way which duplicates the legislative functions of another body is not prevented where the person there mentioned consents to the exercise of the power.” (para 3.1)

2.8 Actions Outside Scotland

“22 (13) A local authority shall not, without the prior consent of the Scottish Ministers, do anything under section 20 above outside the United Kingdom for the purpose of promoting or improving the economic development of its area.”

Then explanatory notes state:

“66. Subsection (13) provides that the power may be used outside the United Kingdom for the purpose of promoting or improving economic development of the local authority's area but only with the prior consent of the Scottish Ministers.”

By implication section 20 makes it plain that the power allows an authority to do *any other thing* either

(i) outside Scotland but within the UK or

(ii) outside the UK.

if in either case that thing *otherwise* fulfils the criteria necessary for the exercise of the section 20 power.

3. Conclusion

The power to promote well-being provides an entirely appropriate power for Scottish 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.

Endnotes

¹Commission on Local Government and the Scottish Parliament (McIntosh Commission) Moving Forward Local Government and the Scottish Parliament, June 1999

² Ms Wendy Alexander (20 June 2000) for the Executive

³ see <http://www.scotland.gov.uk/library5/localgov/pawbg-00.asp>

⁴ <http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/en2003/2003en01.htm>