

Nuclear Free Local Authorities

legal briefing



Date: December 2004

No. 1

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

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 UK 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 Welsh Assembly Government issued draft statutory guidance in May 2001 for consultation.¹ No final guidance has been issued yet. A further consultation on a revised draft is now anticipated in February or March 2005.² Local authorities in Wales are following the draft guidance as appropriate in the meantime and this note does likewise. A new version of this briefing will be issued after the Welsh Guidance is finally issued.

Where the draft 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.wales.gov.uk/subilocalgov/content/consultation/wellguide-e.pdf>

² For the latest position: Dr Ian Thomas 02910 823179 , Welsh Assembly Government

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 draft Guidance states:

5 ...In the past, innovative actions by local authorities have been discouraged by concerns over the scope of their powers, in particular over whether they have the required statutory authority to undertake particular actions. This contrasts with the situation in some other European countries where there is a power of general competence to act on behalf of the community, enabling local authorities to do anything which they are not statutorily prohibited from doing. Councils in the UK as a result have adopted a cautious approach to innovation and joint action, which has limited the contribution that they have been able to make to the improvement of their communities’ quality of life.

6. The Government’s purpose in introducing the well-being power is to remove the need for the traditional cautious approach and provide local authorities with the freedom to innovate and to work jointly with others to improve the quality of life of their communities. The purpose of this guidance is to set out the scope of the new power and encourage local authorities to make innovative and imaginative use of it. In particular, local authorities will want to consider how the power can promote the sustainable development of their areas by delivering the actions and improvements identified in their community strategies, which could include cross-cutting actions such as tackling social exclusion, reducing health inequalities, promoting economic regeneration and neighbourhood renewal and 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 combating climate change and encouraging the conservation of biodiversity ...”

7. The new power is wide-ranging. It effectively confers a new function on local authorities to promote or improve community well-being. This would enable local authorities to improve the quality of life and health of their local communities. The kinds of action that local authorities can take include [see section 2(4)]: 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 indicative and does not limit in any way how local authorities can use the new power.

12. The breadth of the power is such that councils can regard it as a ‘power of first resort’ to eliminate the need to discover a specific power elsewhere in statute in order to take a particular action. The questions that councils should ask themselves before deciding whether to use the power, include:

- Is the proposed action likely to promote or improve well-being in our area?*
- Is the primary purpose of the action to raise money?*
- Is the proposed action explicitly prohibited by any other legislation?*
- Are there any explicit limitations and restrictions in 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, that is, any restrictions or limitations that may apply by virtue of other legislation.

...

29. The National Assembly does not intend to define what actions would constitute the promotion of economic, social or environmental well-being, although it considers that these terms are sufficiently broad to encompass the provision of cultural facilities, the promotion and improvement of the health of councils’ residents or visitors to their areas. It is for the local authority itself to decide whether any particular action they intend to take would promote or improve well-being, taking account of their local circumstances, the wishes of their local partners and the needs and aspirations of their communities. In reaching a

decision on this matter a local authority would need to interpret these terms in accordance with the definition of 'reasonableness' set out in the ruling in the Wednesbury case".

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 draft guidance states:

"13. In determining how to use the new power, an authority ... must also have regard to the community strategy which it must 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 intended to encourage local authorities to consider the effect that any particular use of the power will have on the achievement of the objectives set out in the community strategy. Local authorities do not have to wait until their community strategies are in place before being able to exercise the power."

...

"28. 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 National Assembly would expect a council to ensure before using the power that its intentions did not run counter to the aims and objectives set out in its community strategy. Importantly, however, the need to take account of the community strategy does not mean that each and every use of the power must be cross-referenced to the strategy. It is important that the power is flexible to enable authorities to respond rapidly to unforeseen circumstances and events. ..."

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 for the purpose of promoting peace.

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 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 draft guidance states:

- “47. The power will enable local authorities to take actions that affect areas outside their own boundaries, if those actions contribute to the well-being of their own areas.*
- 48. It opens up the possibility of more collaborative working between local authorities and other bodies. The National Assembly wants local authorities to be able to act in the interests of their communities and to be certain of their legal right to do so. In order to address community concerns they will need to work closely with other bodies, including their strategic partners and neighbouring authorities, to take initiatives at the regional, cross-regional and sub-regional levels (such as the provision of sub-regional leisure facilities or employment sites), or to address issues which do not recognise administrative boundaries, such as the conservation of biodiversity or the prevention of flooding and pollution.*
- 49. This is a key power in relation to local authorities’ partnership working with the health sector, since most local authority areas are not coterminous with health authority areas. The power provides opportunities for joint working 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, travellers, 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 where these communities reside across authorities’ boundaries.*
- 50. Community strategies will provide the framework in which co-operation between neighbouring authorities can be identified and implemented. The guidance on the duty to prepare a community strategy emphasises the importance of neighbouring authorities working closely together to address common problems and needs. It is in this context that the National Assembly would expect authorities to determine whether to use their well-being powers outside their boundaries. Local authorities should establish whether they have similar priorities and aspirations to their neighbouring authorities and consider whether there is scope for them working together in a single strategic partnership, including producing a single community strategy.*
- 51. Councils will be expected to consult and take the views of their neighbouring authorities into account before 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 neighbouring authorities and their community strategy partners. Councils should avoid the use of the power in circumstances where the impacts are considered to be detrimental by the other areas.”*

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 draft guidance states:

“60. The phrase ‘contained in any enactment’ means a restriction explicitly included 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. For example, 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 that authorities can now use the well-being 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. 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.