


Going Nuclear?

A general power of competence and
what it could mean for local communities

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New Local Government Network (NLGN) is an independent think tank that seeks to transform public services, revitalise local political leadership and empower local communities. NLGN is publishing this report as part of its programme of research and innovative policy projects, which we hope will be of use to policy makers and practitioners. The views expressed are however those of the authors and not necessarily those of NLGN.

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Summary

The Coalition Government has set out a radical agenda for the decentralisation of power across England. This devolution represents the most significant political narrative in the domestic policy arena. Alongside other powers and freedoms on planning and business growth, the Decentralisation and Localism Bill proposes a ‘General Power of Competence’.

However, fundamental questions remain unanswered: what problems is the new power seeking to resolve? Are sceptics right in questioning whether it is actually needed given the other legal freedoms granted to councils over the last fifty years?

This research paper argues that current legislation suffers from significant shortfalls, stymies innovation and undermines true localist responses to the major financial, economic and societal challenges facing communities.

The new General Power of Competence could unlock a new stream of activities among local councils, but only if designed correctly. In the first place, the Government should not seek to define new freedoms but instead abolish the *ultra vires* principle and leave councils free aside from actions that are expressly forbidden by statute. In addition, councils should be able to flex and vary tax rates within the existing taxation regime. Finally, the Government should prioritise a systematic review of existing legislation and regulations that would otherwise limit the scope of local councils.

If designed in these ways, innovative responses could be forthcoming from local areas. These could include councils

- offering banking, insurance and credit to local businesses and residents;
- grouping together in innovative partnerships to drive efficiencies;
- engaging in new trading activities to sell products and expertise (such as recruitment services, energy provision, communication and business services) to the private sector as well as other public agencies;

- applying local charging rates on planning and licensing fees to reflect local costs;
- varying tax rates and reliefs to incentivise behaviour on recycling or ensuring that properties are not left vacant;
- playing key roles in establishing social and community enterprises.

1 *The power of general competence and the new government*

Many of us thought then [1980] that a general competence power should be given to local authorities-I still think that-but he [Jack Straw] came up with this stunning argument: if there were such a power, what would there be to prevent Islington from making an atom bomb? I do not know why he chose to use Islington in that absurd example, but if seriously intelligent and respected people such as he come out with absurd arguments such as that, there really is no argument against giving a general competence power to local authorities.

Graham Stringer MP in the House of Commons, 13 October 2009¹

Introduction

Calls for a General Power of Competence (GPC) have become increasingly widespread and strident in the last few years. Aside from the Coalition parties, other advocates include the NLGN, the LGC, the LGA, London Councils, Scottish Local Government, and the House of Commons Communities and Local Government Select Committee.² But amidst this apparent harmony is there agreement on what it should actually mean?

There have been accusations of mixed messages since the publication of the Conservative Party's localist manifesto *Control Shift* in 2009, with concern in response to a description by the previous Shadow CLG Secretary of State that the forthcoming power would allow councils to do anything "legal and reasonable".³ Sir Jeremy Beecham, Labour's Vice Chair of the LGA, has argued that national compulsion on specific issues such as the publication of expenditure and weekly bin collection runs counter to the philosophy of the GPC. He noted that the power 'won't mean much if councils are only free to do what the government wants.'⁴ Peter Hetherington described the power as

¹ Stringer was referring to a debate within the Labour Party in 1980. House of Commons debates, 13 October 2009. Hansard, col 202.

² Dan Drillsma-Milgrom, 'Three steps to boost local government', *LGC*, 1 October 2008.

³ Dan Drillsma-Milgrom, 'Doubts grow over competence powers', *LGC*, 4 February 2010.

⁴ 'Beecham questions coalition commitment to localism', *LGC*, 8 June 2010.

'threadbare' in the light of parallel restraints on local government.⁵ Will the new GPC empower local democracy as profoundly as it could?

Anxiety has also emerged in some corners that the new legislation would allow councils to opt out of core service provision altogether: 'we will get legislation which allows councils like Barnet, and West Lancashire, to get away with doing much less for them, and doing it much more inequitably.'⁶

On the other side of the political spectrum, fears have been expressed in other countries that such powers would create undue government intervention in the free market. There have even been suggestions in the past that such a power could see a council develop its own atom bomb. As Bob Neill MP retorted, 'the residents of Islington can sleep safely in the knowledge that the likes of the Radioactive Substances Act 1993 and the Nuclear Explosions (Prohibition and Inspections) Act 1998 would prevent their councillors using their newly granted powers to wage thermonuclear war.'⁷

As major reform emerges on the horizon, key questions must be answered. What exactly does the Government mean by a General Power of Competence? How necessary is such a change and how fundamental a reform would it be?

In what activities could local councils engage? Is the enactment of legislation sufficient in its own right? How should the government seek to reform legislation?

What wider implications would this change have for the relationship between local and central government?

⁵ Peter Hetherington, 'Tory pledge to local government doesn't add up', *Guardian*, 17 February 2010.

⁶ David Semple, 'A Dismal prospect for local government: the local, the logic, the legal, the left', *thoughcowardsflinch* blog, <http://thoughcowardsflinch.com/2009/09/04/a-dismal-prospect-for-local-government-the-local-the-logic-the-legal-the-left/>

⁷ Bob Neill comment on <http://www.lgcplus.com/finance-and-partnership/efficiency/it-chiefs-demand-broadband-upgrade/5011720.article>

What is a General Power of Competence?

The existing principle governing local authorities is that of *ultra vires*. Under this, councils are permitted to carry out specific activities granted to them through legislation. A GPC would invert this principle and allow councils to carry out any activities in their communities that are not prohibited explicitly. To take an analogy from criminal proceedings, it would imply that councils are no longer guilty until proven innocent. In short, it would shift the burden of proof.

In European countries, the GPC means that ‘the municipality may act in any matter, subject to its actions meeting a local interest, complying with the law and not impinging on the powers of another central or sub-national authority.’⁸

Internationally, the GPC has become the ‘gold standard’ of legal freedoms for councils across developed western democracies. As one New Zealand academic set out as his own country took steps towards the reform, enthusiasts of local democracy view GPC as ‘the holy grail, a symbolic “coming of age” whereby local authorities at last achieve the capacity to act as governments of their localities’. Conversely, radical proponents of smaller government have viewed GPC as “creeping collectivism”.⁹

The devolutionary ambitions of the new Government

Since May 2010, the Coalition Government has set out a determinedly decentralising dynamic. In its first months it has abolished the Comprehensive Area Assessment, it has moved to reduce ring-fenced funding and has handed decision-making on spatial planning to local authorities. Through its ‘Big Society’ narrative it has sought to shift power down from Whitehall and Westminster to local communities, neighbourhoods and citizens. Elements of business rates are to be localised to provide incentives for economic growth and enterprise.

At the heart of its localist narrative sits the General Power of Competence. In 2009, David Cameron argued that a GPC would mean that ‘councils can do

⁸ Study of the European Committee on Local and Regional Democracy, *Local Authority Competences in Europe* (2007), p.16.

⁹ Mike Reid, ‘Local Government Reform – its here but what does it mean?’, *Public Sector Journal*, June 2001.

literally whatever they like as long as it's legal.¹⁰ This was put forward in an opposition white paper from the Conservative Party and by the Government in its Coalition Agreement.

More recently, Eric Pickles told a local government audience: *'I totally support [the general power of competence]. I think you need it. And I'll give it to you in the localism bill. Obviously, there have got to be limits. I'm not going to be the Secretary of State who let Passport to Pimlico happen on his watch. And I think it's reasonable that councils shouldn't use their new found freedom to saddle up the horses, arm their citizens and invade France. Apart from that, the world will be your oyster.'*¹¹

Coalition proposals for a 'power of general competence' prior to government

In 2009 the Conservative Party published its *Control Shift* paper on local devolution. The most radical proposal among its recommendations was for a 'general power of competence' to be given to local authorities to engage in activity that has generally been considered outside of their province. Specifically, the report indicated that a future Conservative government would introduce:

a new general power of competence which gives local authorities an explicit freedom to act in the best interests of their voters, unhindered by the absence of specific legislation supporting their actions. No action – except raising taxes, which requires specific parliamentary approval – will any longer be 'beyond the powers' of local government in England, unless the local authority is prevented from taking that action by the common law, specific legislation or statutory guidance.

We will give the general power of competence real meaning by allowing councils specifically to:

10 David Cameron: Speech to the LGA Conference, Thursday, 2 July 2009.

11 <http://www.communities.gov.uk/speeches/corporate/lgaoffer>

- *carry out any lawful activity;*
- *undertake any lawful works;*
- *operate any lawful business ; and*
- *enter into any lawful transaction.*

In addition, we will ensure that all these actions can be taken at the lowest possible level (i.e. by the councils nearest to the citizens) by including town and parish councils within the categories of local authority that are given the new power.¹²

Before the election, the Liberal Democrats were also moving to an acceptance of the need for a general power of competence.¹³ Subsequently, in its Coalition Agreement, the Government committed that *'We will give councils a general power of competence.'*¹⁴

Background to the proposed new power

Ultra vires was introduced through legislation in the middle of the nineteenth century, initially to railway bodies and then local authorities.¹⁵ Subsequently, consideration has been given as to how to liberate local authorities from the shackles of this imposed restriction.

Antecedents for the power

The proposed power builds on a number of devolutionary actions taken over the last forty years.

¹² Conservative Party, *Control Shift: returning power to local communities* (2009), p. 15.

¹³ Julia Goldsworthy, House of Commons debates, 13 October 2009. *Hansard*, col 200-01.

¹⁴ HM Government, *The Coalition: our programme for government* (2010), p.12.

¹⁵ J. A. Chandler, *Explaining Local Government: local government in Britain since 1800* (2007), p.63.

Key enabling legislation for local authorities

- Local Authority (Goods and Services) Act 1970
- Local Government Act 2000
- Local Government Act 2003
- Local Government and Public Involvement in Health Act 2007
- Sustainable Communities Act 2007

The concept of *ultra vires* has historically fostered an excessive concern with legality. In fact, dissatisfaction with the rigidity of *ultra vires* goes back as far as the 1920s and 1930s with suggestions that a general competence power should be introduced.¹⁶ Michael Foot's Labour Party moved towards the concept of a GPC, arguing in its 1983 election manifesto that, 'instead of local councillors never being completely sure what is permitted and what is *ultra vires*, we shall give a power of general competence to all local authorities to carry out whatever activities are not expressly forbidden by statute.'¹⁷ However, New Labour's public service improvement agenda and New Public Management approaches led to new freedoms but with major constraints on their use.¹⁸

Section 3 of the **Local Government Act 1999** put forward new powers under 'Best Value', enabling councils to improve efficiency and participate in joint venture companies.¹⁹ Further to this, Section 2 of the **Local Government Act 2000** introduced the potentially wide-ranging '**power of general well-being**' (PWB). This clause allows local authorities to undertake any activities that promote or improve the economic, social and environmental well-being of their areas. Specifically, it empowered councils to engage in conduct that would promote the needs of their community as defined through their Local Area Agreements and Sustainable Community Strategies.

¹⁶ Ian Leigh, *Law, Politics and Local Democracy* (Oxford, 2000), pp.52-3

¹⁷ Labour Party, *General Election Manifesto*, 1983.

¹⁸ J. A. Chandler, *Explaining Local Government: local government in Britain since 1800* (2007), p.282

¹⁹ Paul McDermott, 'Prudence with Powers', *LGC*, 18 June 2009.

This has had both philosophical and practical implications for the national-local relationship. Practically, in terms of service provision and efficiency, the PWB has resulted in a number of radical re-designs of service design and new activities undertaken at the local level. Examples of the types of action possible under the well-being powers include incurring expenditure; providing staff; providing goods or services; entering into partnership arrangements; and carrying out the functions of other bodies.²⁰

Practical use of the Well-being Power²¹

- Torbay Council used the WBP to develop a public-private regeneration vehicle established as a company limited by guarantee without share capital (Torbay Development Agency Ltd)
- A Waste Transfer Station – South Hams, where a contractual arrangement has been set up to ensure efficient fleet management across the organisation and allow relevant plots of land to be maximised.
- Nottinghamshire established RENU - Renewable Utilities Nottinghamshire (RENU) LTD – to help build a market for wood chips amongst local schools.
- The PWB was used in Wakefield to purchase houses on an estate that was in rapid decline to facilitate speedy clearance of the site and afford reasonable recompense to residents and owners. This meant that it could act without the need to go through a potentially lengthy compulsory purchase (CPO) process.

As in the example of Wakefield, the PWB has also been used as a ‘power of first resort’ to obviate the need to seek out other relevant enabling legislation or where clarity in other existing legislation is unconvincing.

Philosophically, the power admitted that nationally prescribed solutions were not always relevant, and that local mechanisms and solutions may be more efficient and effective. It questioned the crude presumption that actions which were not specifically permitted or authorised through statute were at

²⁰ CLG, *Power to promote or improve economic, social or environmental well-being* (2000), p.5.

²¹ CLG, *Practical use of the Well-Being Power* (2008), p.10.

risk of legal challenge with any associated expenditure considered unlawful. Therefore, the power encouraged councils to think outside of the scope of specific statutory powers.

The 'well-being power' also started to elevate local government from its 'Cinderella' status where it was forced to ask for permission before responding to the needs of its local residents. Local authorities have increasingly adopted a privileged role within the myriad of public agencies at the local level through Local Strategic Partnerships, Local Area Agreements, Sustainable Community Strategies and 'Total Place' methods. Reform has encouraged councils to broker agreements across administrative boundaries in the interest of their communities. The PWB has subsequently been extended to parish councils (through the Local Government and Public Involvement in Health Act 2007) and Integrated Transport Authorities (through the Local Transport Act 2008).

Supplementary legislation has complemented the 'well-being powers'. Section 93 of the **Local Government Act 2003** allows local authorities to trade on a commercial basis.²² It enables authorities to enter trading agreements or arrangements with any person for the provision of goods, materials, staff, accommodation or services on a commercial basis if the purpose is to promote well-being.²³

The final piece of relevant legislation is the **Sustainable Communities Act 2007**. This contained a provision for local authorities to request greater powers to promote the sustainability of their area. These proposals, once filtered and selected by the LGA, go on to the Secretary of State for approval. The number of responses and suggestions from councils indicates that many localities are keen to engage in new avenues and mechanisms to improve the quality of life for their local residents.²⁴ Although officially councils are restricted to a list of local policy objectives to which their proposals must relate, in practice there is significant freedom to design new policy approaches tailored to local challenges.²⁵

²² This adds to the freedom to trade with other public bodies as enacted through the Local Authority (Goods and Services) Act 1970.

²³ University of the West of England, *The Well-being Power: Practical Experiences and Perspectives* (2008), p.6.

²⁴ LGA, *The Sustainable Communities Act: shortlist of proposals made under round one* (2010)

²⁵ Anthony Brand, *Sustainable Communities Act: The key that finally unlocks real local potential* (NLGN, 2008), pp.10-12.

2 *Why is a new power needed?*

In the context of these reforms, is there a serious case for further freedoms? Do councils really need additional powers? What, if any, are the limitations of current enabling legislation?

The limitations and failure of existing legislation

It has been a frequent criticism of councils, and was a well-rehearsed line of defence for the previous Labour Government, that councils under-utilise the PWB and that they should be making better use of existing powers, rather than asking for additional authority.²⁶ Expert lawyers have also disagreed about the necessity or wisdom of legislating for a new power.²⁷

The Power of Well-being

Evidence has suggested that, although a number of councils have used well-being provisions, there has been reluctance to push its boundaries.²⁸ Despite its innovative use by a minority of councils, the introduction of the well-being power has not catalysed major change across local government.²⁹ The underlying reasons have been manifold: the actual limitations of the power; the legal, conceptual and practical confusion around the power's exact scope; inhibition surrounding a perceived lack of local capacity for its use; and the negative effect of unsuccessful attempts to use it. The well-being power is heavily dependent upon the interpretations of council lawyers for its definition and use, most of whom remain cautious about how it can be employed.³⁰

²⁶ CLG Press Release: 'Healey - wellbeing power is forgotten tool in tough economic times', 17 November 2008. The Minister for Local Government, John Healey, criticized those local authorities calling for more powers; "By all means make the case for more power, more freedom, more innovation", he said. "But also make use of those you already have". *The Balance of Power: Central and Local Government Communities and Local Government Committee 2009* (p28)

²⁷ 'The law behind the wellbeing powers', *LGC*, 1 October 2009.

²⁸ CLG, *Evaluation of the take-up and use of the Well-Being Power* (November 2008), p. 1.

²⁹ CLG, *Evaluation of the take-up and use of the Well-Being Power: Research Summary*, (2008), p.1.

³⁰ *Ibid.*, p.4.

So what are the limitations of the current legislative provision?

In the first place, it is questionable how far the 2000 Act has fulfilled its purpose. The power of well-being aimed to address concerns about local authorities exceeding the limits of more specific powers, to allow them the flexibility to innovate through new activities, to become more commercial in spirit, to enable closer joint-working with their partners and to enhance their role as community leaders.³¹

However, there are major in-built restrictions to these goals. The power cannot be used to raise money or to levy a charge (despite not having any spending limits attached), nor can it be used to circumvent prohibitions, restrictions or limitations contained on the face of legislation. There have also been complaints that regulatory powers were excluded from the PWB.³² Any trading undertaken under the power must be motivated by civic purposes rather than income generation and must deliver 'well-being'. Therefore, any well-being activity needs to be supported by another statutory power which would permit the authority to charge for those services performed. When local authorities have undertaken activities for the economic, social, and environmental well-being of their citizens that indirectly generate income problems have sometimes arisen.

Second, it must be recognised that the powers were intended to be limited and fall short of a general power. The then Secretary of State for Local Government argued in 2000 that the rationale for a PWB rather than a GPC was that it could express *'what some have called the power of general competence, but in a way that makes the responsibilities of local government clear.'* She concluded tellingly, *'It is not local government's responsibility to engage in foreign policy or in issues that lie outside the scope of its public's concern about what can be effectively achieved locally. Local people do not want local government to take over the powers of central government; they want it to respond effectively to their wishes.'*³³

A third limiting factor is that, partly because the 2000 Act sought explicitly to define the scope of freedom, there has been much confusion around

³¹ John Bennet and Stephen Cirell, *Charging and Trading in Local Government* (2008), p.68.

³² See Sir Richard Leese's evidence to the House of Commons committee, p.28.

³³ Quoted in John Bennett and Stephen Cirell, *Charging and trading in local government* (2008), pp. 238-9.

the limitations of the power and a consequential reticence to act. Efforts to promote awareness of the well-being power have been hindered by its legal complexity. According to one leading lawyer, there is still ‘wide misunderstanding of what these [existing] powers are’.

It has been unclear what encompasses community ‘well-being’.

Trials and tribulations following the LAML judgement

Such inherent problems were exacerbated by the judicial rulings on London Authorities Mutual Limited (LAML). The judgements of the High Court and the Court of Appeal in 2008 and 2009 focused attention on the scope of local authorities to collect together in the financial interests of their communities. This judgement put the ‘power of well-being’ under the most consistent and voluble pressure that it had felt since its inception in 2000.³⁴

The Court ruled that the participation of local authorities in an insurance mutual was beyond their statutory powers and that Section 2 of the Local Government Act 2000, on which they relied, was insufficient. In addition, the court ruled that the incidental power provided for in s. 111 of the Local Government Act 1972 could not be relied on.³⁵ The court recorded that:³⁶

“While the setting up of a company may, subject to limitations, come within the wellbeing power, I doubt whether participation in an insurance company with a view to seeking cheaper insurance premiums, circumscribed as it would be by those limitations, does so ...”

As the Chief Executive of Harrow LBC noted, ‘our view is that a narrow interpretation of “wellbeing” powers scuppered an innovative attempt by councils such as mine to save our residents money’. As he went on to note, ‘Caught in the twin prongs of a historically low level of government funding and the prospect of more severe cuts to come, this debate is urgently needed.’³⁷ LAML was driven by the need for efficiencies of procurement among the capital’s public sector. As the LGA has argued recently, the LAML judgement

³⁴ See NLGN, LGC, MJ, LGA discussions in autumn 2009.

³⁵ ‘Brent and Harrow head to Supreme Court over LAML case’, *Local Government Lawyer*, 5 March 2010.

³⁶ APSE, *LAML – an assessment of the judgement* (July 2009), pp. 3-5.

³⁷ Michael Lockwood, ‘We need to use wellbeing power – now’, *LGC*, 1 July 2009.

left local government in a situation where 'up and down the country innovative councils are freezing plans to improve services, reviewing legal advice, or crossing their fingers'. The judgement has therefore introduced additional uncertainty and encouraged caution rather than innovation.

Although under significant pressure to rectify this problem, the Labour Government pulled up short of legislating for a comprehensive GPC. Instead, in its *Strengthening Local Democracy* consultation and in the subsequent amendment to the 'Well-being powers', it resolved specific barriers to mutual approaches to insurance. It is clear, however, that the implications of the judicial decisions were much wider than this specific activity. While the Labour Government's amendment to facilitate insurance pooling was welcome, it remedied a symptom not the underlying problem.

Limits of other enabling legislation

Other legislation suffers from its own limitations. Case law has defined limits for the use of s.111 of the 1972 Act. 'R v Richmond upon Thames ex parte McCafthy and Stone' in 1992 determined that a council 'cannot rely on these incidental powers to authorise transactions where it does not have a substantive statutory function'.³⁸ This may include the establishing of trading companies for back office services. Although the Local Government Act 2003 extended councils' financial powers (allowing councils to trade for commercial profit through a company), this power presented complex legal, financial and taxation issues for those councils looking to make a profit.³⁹

There are also strict parameters within which powers to charge can be exercised. These include the 'duty to secure that, taking one financial year with another, the income from charges under that subsection does not exceed the costs of provision.'⁴⁰ Such approaches must, therefore, be revenue neutral.

³⁸ Trowers and Hamblins, *LAML Case* (2008)

³⁹ House of Commons CLG Select Committee, *The Balance of Power: Central and Local Government* (2009), p.28.

⁴⁰ Local Government Act 2003, Part 8, Chapter 1.

http://www.opsi.gov.uk/Acts/acts2003/ukpga_20030026_en_1

Under the Local Government Act 2003, the legislative framework limits the charging approaches that councils can take:⁴¹

- A number of services are deemed by national government to be freely accessible;
- Charges cannot be used to raise surplus revenue (i.e. they can only cover the associated costs);
- Fees are set nationally for some services (for example charges for planning applications or licensing premises for alcohol). This means that some local authorities are unable to recover fully the costs of providing a planning service or local land charges register.

As Professors George Jones and John Stewart have argued, there has also been ‘uncertainty about the extent to which charging powers can be varied according to need and to the income of those charged’.⁴²

A philosophy of trust, innovation and recognition of democratic legitimacy

Underlying the new GPC are broader arguments about the relationship between national and local government. Despite the devolutionary changes over the past decade, there remains a significant imbalance. In 2009, the House of Commons Communities and Local Government Committee report on the balance of power between local and central government found that in theory and practice councils were too constrained by central government interference. The Committee concluded that there were promising signs of local councils pursuing the power of well-being “more aggressively”, and urged local councils to test the strength of the Secretary of State’s assertion that “the power of well being is virtually a power of general competence”.⁴³ A number of local authorities have presented the case to be granted a general power of competence that transcends the additional powers currently

⁴¹ Audit Commission, *Positively Charged* (2008), pp.26-8.

⁴² Professors George Jones and John Stewart, *Evidence to the Balance of Power Enquiry* (2009)

⁴³ House of Commons CLG Select Committee, *The Balance of Power: Central and Local Government* (2009), p.29.

outlined in the well-being power.⁴⁴

It is clear that the pernicious impacts of *ultra vires* extend beyond the technical restrictions they impose. As one local authority Director of Finance recently argued to NLGN when exploring barriers to achieving major efficiency savings.

‘One is that local government is due to get general powers of competence and I wouldn’t want to underestimate that because the reality is that some of the time we get very nervous about doing stuff. All of us work under statute of what to do. And the worst thing you can say to us is, you don’t have vires, that’s career threatening, that really is. So a general power of competence will give us more confidence.’⁴⁵

Government is often criticised for its risk aversion and un-readiness to take risks. As one council has argued, ‘local government is still often bedevilled by a complexity of legislation that inhibits confidence in innovation’.⁴⁶

The mere existence of *ultra vires* acts as a disincentive to think innovatively or to push the boundaries of reform.

It is clear also that the addition of specific new powers has not encouraged local authorities to conceive their policy within the most ambitious context. Too often, additional legal powers are accessed as methods for enacting specific solutions that have already been identified. As one local authority head of policy has commented, ‘Legal powers can therefore tend to remain within the purview of lawyers’.⁴⁷ Policy is therefore rarely thought out in the widest context of ambition.

England: the exception that proves the rule

Many other European states and western democracies acknowledge a general power of competence for municipalities in either their constitution or legislation, although it possesses different meanings in different places.

⁴⁴ These include Birmingham City Council, Kent County Council, Warwickshire County Council, Manchester City Council and Westminster City Council. Communities and Local Government Committee, *The Balance of Power: Central and Local Government* (2009), pp. 26-27.

⁴⁵ Interview.

⁴⁶ Warwickshire County Council, Evidence to the Balance of Power Committee (2009).

⁴⁷ Draft Paper on General Competence.

Indeed, Article 4 ‘Scope of local self-government’ of the European Charter for Local Self Government states 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 other authority.*’⁴⁸

Germany

From a legal point of view, local authorities are regarded as part of the Länder (Federal States), and their powers are exercised within a regulatory framework established by federal parliament and Land Law. The Basic Law recognises and offers protections for local government which include guaranteeing the existence of elected councils for counties and municipalities, as well as guaranteeing municipalities “the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws.”⁴⁹ Local self-government presupposes a discretionary power in services and functions ‘whose performance is essential to the life of the local community’ which legislation cannot remove.⁵⁰

France

In France, a principle of general competence has existed in legislation since 1884 and successive French constitutions and laws have incorporated support for local self-government, although in practice this has often been hindered by the administrative weakness of localities in comparison to local government.⁵¹ The various tiers of French local authority, or “territorial units” (régions, départements, communes), may operate within their powers to take decisions in matters at local level, and the constitution states that “no territorial unit may exercise authority over another.”⁵² While all French local and regional authorities have general competence, municipalities with their own taxation are not local authorities and remain subject to the “speciality principle” - that they can only exercise the functions conferred on them by law or delegated to them by the member municipalities.⁵³

⁴⁸ *Local Authority Competences in Europe* Study of the European Committee on Local and Regional Democracy 2007 (p16)

⁴⁹ *Ibid.* (p11)

⁵⁰ *Ibid.* (p76)

Netherlands

The Dutch constitution also includes a power of general competence but offers fewer safeguards than the French or German constitutions. The modern constitution of the Netherlands from 1887 outlined a state structure in which the municipalities and provinces were the components of the kingdom and free to deal with their own internal affairs, yet were to co-operate with the state in the kingdom's administration, this was covered by the term "co-governance". The Dutch constitution does include both a power of general competence for municipalities and a role in implementing national legislation at local level, both of which provide a practical foundation for establishing the role of local government and its relationship with the centre. There are then, two areas of local government responsibility, one in which the provinces and municipalities act freely in the local interest within their territorial remit, and another, that of co-governance, in which they act in compliance with the law and with the obligations imposed on them. ⁵⁴

The changing landscape and the need for new powers

In the years ahead, local authorities face challenges which make it more important than ever that they can break free of the current legislative straightjacket.

Financial pressures faced by local authorities and communities

Local authorities are confronting unprecedented budget reductions over the lifetime of the next parliament. The restriction of medium to long-term public finances has brought into sharp relief the tools at the disposal of local government for generating income to support vital services and promote necessary infrastructure development. Recent research from NLGN has

51 Ibid. (p11)

52 Ibid. (p12)

53 *Local Authority Competences in Europe* Study of the European Committee on Local and Regional Democracy 2007 (p82-83)

54 *Local Authority Competences in Europe* Study of the European Committee on Local and Regional Democracy 2007 (p103)

indicated that local authorities are likely to face cuts of 16.5 percent over the life of the current parliament.⁵⁵ It is vital that the ambitions of local government are fostered and released.

Through the period of low economic growth and difficult employment prospects, local government will need to play an increasingly entrepreneurial role in the local economy – through promoting enterprise, through public sector procurement, through joint vehicles, and through trading. Local authorities are being encouraged to come together across areas and with business to lead Local Enterprise Partnerships. Previous NLGN research has indicated how councils can work proactively with the private sector and new employers to catalyse employment markets.⁵⁶ On the other hand, councils will require greater flexibility to consider how they can adapt their role and activities and enable civil society to step in to provide service solutions where possible.

With capital investment set to halve over the next parliament, new sources of funding and new revenue streams will be needed to provide securities on which the next generation of infrastructure can be built.⁵⁷

Supporting society through the period of low growth, employment churn and reductions in public sector budgets has become increasingly fundamental to the role of councils as democratic leaders in their locality. The recession produced a range of innovative policy responses including mortgage relief, local authority loans and mortgages, and support to those in danger of repossession.⁵⁸ Councils will have to continue proactive support for those affected by the economic uncertainties.

Changing nature of public services

At the same time, both the budget reductions and new policy shifts are catalysing bold new methods of driving public service reform. New shared service approaches are being countenanced across the public and private sectors. Collaboration across the public sector through Area-Based or

⁵⁵ Nick Hope, James Kirkland and David Chapman, *Scanning Financial Horizons* (NLGN, 2010).

⁵⁶ Nick Hope and Anna Turley, *We can work it out* (NLGN, 2010)

⁵⁷ Tom Symons and Chris Leslie, *Capital Contingencies - Local capital finance in an era of high public debt* (2009)

⁵⁸ Chris Leslie, *Circling the Loan Sharks* (2009); Nigel Keohane, *Forestalling Foreclosure* (2008);

Community Budgets is likely to lead to greater integration and pooled arrangements for investment cycles, funding, activities and trading. Mergers with other public sector bodies may be on the horizon.

The Government's 'Big Society' portends radically new service delivery models, the delegation of functions to communities and new ventures being established. Public mutual spin offs, are like to muddy the waters between public, private and civil ownership. Mechanisms for community involvement are likely to be creative and question existing attitudes to risk, investment and asset ownership.

Need for innovation

The Government is clear that innovation must underpin the next wave of solutions in business and investment opportunities and future models of public services. At the same time, a fresh set of challenges for society and government are emerging that do not conform to traditional problems. Climate change and obesity will require government to experiment in new ways to shape behaviour.

What is becoming clear is that the current legislative framework cannot provide the flexibilities to achieve against these ambitions.

3 *How should the power be introduced?*

Defining the actual legislative framework is a sensitive procedure that must seek to balance a number of concerns from local authorities, national government and the business community.

Defining the scope of the new power

Concern has emanated in the past that a general power could see municipal government trampling roughshod over private markets. As one leading practitioner argued, a general power could allow councils to do whatever a business could do and in so doing would 'muddy the water between what is a local authority and what is a commercial activity'.⁵⁹ In short, councils could use their competitive advantage provided through taxpayer subsidy to be anti-competitive.

However, a number of points mitigate against this. In the first place, local authorities are taking an increasing role in driving their local economies and, through reforms to business rates, are set to benefit from increased business activity in their localities. It would therefore be against their interests to intervene in markets in a way that undermined business competitiveness. Second, international experience has not borne this out.⁶⁰ Third, there is an existing legislative framework which offers significant safeguards against anti-competitive activity.

Efforts have been made to set out new parameters within which councils could function. These seek to complement the provisions under the 2000 PWB. Appendix 4 sets out one version of provisions developed by Dr Mirza Ahmad, which have much merit and are very well articulated.⁶¹ At the same time, it is debatable whether they would go far enough to provide the practical and philosophical transformation to drive new solutions through the coming years and beyond. Innovation is by its nature unknown. Experts and practitioners may have an indication of the next wave of likely reforms in local public service provision and democracy. However, new lines of enquiry will develop beyond our current intellectual horizons.

⁵⁹ Interview.

⁶⁰ *Reviewing the Local Government Act 1974*, New Zealand Department of Internal Affairs (p7)

⁶¹ ACSeS, *Firing Up The Passion For Leadership*, vol. II (2010), p.3.

International examples suggest that the historical and cultural climate as well as the specific legal parameters can shape the nature of reform and the scope for local authorities to innovate. As the box below illustrates, New Zealand's power of competence introduced in 2002 provides some salutary lessons.⁶²

New Zealand and the general power of competence

The reform represented a major shift from an extremely prescriptive local-national relationship and provoked concern, particularly in business and farming communities, that local authorities would abuse their new powers.⁶³ As a result, a number of safeguards were introduced: use of the power must be consistent with a defined purpose for local government, councils must consult before using the power and the power is subject to specific limitations.⁷⁰ The consultation requirements are particularly onerous and compliance is costly, with the unsurprising result that many councils show great reluctance to take advantage of the power.⁷¹ In addition, there appears to be a cultural reluctance preventing councils from moving beyond their traditional spheres of competence. Analysis of the mission statements of regional authorities reveal that only a quarter recognised the broad "social, cultural and economic" wellbeing of their communities, which is their defined purpose per the 2002 Act.⁷²

The lessons from New Zealand are clear: that, unless crafted appropriately, a GPC alone will be insufficient to drive innovation, especially if internal and external forces also act as a brake. Analysis of Australia has suggested the same, with the power of competence given to State municipalities in the

⁶² Granting "full capacity to carry on or undertake any activity or business, or any act, or enter into any transaction", Local Government Act 2002, Section 12, Status and Powers, Parliament of New Zealand, 2002.

⁶³ One newspaper editorial was entitled "Local Government Law Will Shaft Business And Farming": Peter McKinlay, *Adapting to new powers of general competence: examining the implications of new freedoms and constraints under the new legislation* (February 2003), p. 1

⁶⁴ New Zealand Department of Internal Affairs, *Reviewing the Local Government Act 1974*, p.7.

⁶⁵ Peter McKinlay, *Adapting to new powers of general competence: examining the implications of new freedoms and constraints under the new legislation* (February 2003), p. 17

⁶⁶ Jeffrey McNeill, 'The Public Value of Regional Government: how New Zealand's regional councils manage the environment', PhD, Massey University (2008), p. 155, 238.

⁶⁷ Local Government Act 2002, Section 10, Purpose of Local Government, Parliament of New Zealand; Peter McKinlay, *Reaping the Benefits: Local Government Act 2002 in Practice* (February 2004), p. 3

decade leading up to 2001 making little change to the activities in which they engage, in part at least because the statutory and legal parameters have acted as checks on more radical action.⁶⁸

These examples reinforce the message from England's own experience through the well-being legislation, namely that the act of defining additional powers implicitly imposes limits, introduces additional confusion and complexity and likely leads to risk-aversion and inertia.

Finally, the LAML judgements shone a bright light on the conservatism of the judiciary and suggests a philosophical predisposition towards central direction. As Helen Randall a solicitor from Trowers and Hamblins has argued, *'the courts have tended to attack powers where judges think the local authority acted imprudently, however well meaning. A general competence power could equally become victim to a narrow-minded judiciary.'* This is an important lesson – that a general competence power cannot in itself obviate legality nor raise local public services from the complexity of the law. That said, a new power would offer less scope for narrow-minded judicial interpretations by broadening the remit of local authorities. The act of defining specific powers is likely to give additional room for contrary interpretations.

So, what would be the most constructive method to legislate?

The legal expert Judith Barnes from Eversheds has mooted that *'One way, perhaps, to give unlimited, unfettered discretion for local authorities to do absolutely anything would be to abolish the ultra vires rule altogether ... but [it] is unlikely to be acceptable to Parliament (despite the ultra vires rule now having been abolished for private limited companies under the Companies Acts 1989 and 2006).'*⁶⁹ NLGN argues that such an approach has significant merit.

Councils are already restricted as public bodies through legislation that protects the competition of the market, the rights of individuals and the reasonableness of action. The Human Rights Act provides an overarching protection for individual citizens against pernicious government action.

⁶⁸ Mike Reid, 'Local Government Reform – its here but what does it mean?', *Public Sector Journal*, June 2001.

⁶⁹ Judith Barnes, 'Power of general competence: a panacea?', *LGC*, 10 March 2010.

European procurement legislation, subsequently transposed into UK law, guards against protectionist buying policies. Alongside this, the Equalities Act ensures that government action is not discriminatory. The Office of Fair Trading provides a national oversight and regulation to promote open markets and competition through, among other legislation, the Competition Act 1998 and the Enterprise Act 2002. Furthermore, the Wednesbury Rules stipulate that that all public bodies must act ‘reasonably’. As defined in a legal judgement in 1948, “Discretion must be exercised reasonably. He must call his own attention to the matters which he is bound to consider, and exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he must truly be said, and often is said, to be acting unreasonably.”⁷⁰

Given these restrictions that protect citizens and commercial markets, which demand that any government action must be ‘reasonable’ in exercising its discretion, further limitations on the scope of the Act are unnecessary. Limitations would increase the scope for legal action and thus play to local government’s historically risk-averse nature; they would also continue to undermine the legitimacy of local authorities as democratic entities.

Attendant reform

As evidence from a number of other countries suggests, a general power of competence will only be as good as the flexibilities that additional statutory requirements allow. Councils are constrained legally by legislation and statutory guidance, and by regulation and other performance regimes. As one local authority argued, ‘simply enacting a new general power without a thorough review of existing constraints will not be sufficient.’

Regulation

The Government has indicated its desire to remove unnecessary regulation. The Comprehensive Area Assessment has recently been abolished and national indicators are to be significantly reduced.⁷¹ As part of the process of reform, the legislation should include a provision for a fundamental review of the regulations and statutory guidance that impede the freedom of local

⁷⁰ CLG, *Power to promote well-being of the area: Statutory guidance for local councils* (2009), p. 14.

⁷¹ Olivier Roth, *Through the Looking Glass* (NLGN, 2010)

authorities. Recent reports from the Lifting the Burdens Taskforce and the Total Place pilots have highlighted many of the barriers. Any new regulatory directions to local government – such as on bin collection – would be anathema to the spirit of the new law.

Legislation

The Bill should include a legislative commitment to review and amend primary and secondary legislation to remove any prescriptions that are incompatible with the new power.⁷² This should include repealing the current well-being legislation which would be redundant under a general power. This should be taken to apply to the spirit as well as the letter of the new power and include revoking the nationally-set rates for charges for determining planning services and licensing premises.

Freedoms across other parts of the public sector are also likely to be necessary to facilitate early intervention approaches where budgets and resources are pooled. ‘Community budgets’ drawing on lessons from the ‘Total Place’ programmes would allow major savings and service improvements.⁷³ However, restrictions on the actions of other public bodies such as health agencies limits their scope to adopt collaborative approaches. Where they are engaging in joint provision, and where their activities are endorsed by a local authority, they should be allowed additional freedoms.

Restrictions on taxation powers

It is questionable whether the restriction on tax raising powers as proposed by the new Government leaves the framework too prescriptive. While Parliament may be unready to allow councils to activate new tax regimes, greater scope within the existing framework should be explored. As will be detailed in the next chapter, greater ability to flex and vary the rates of taxes would allow local areas to respond to particular circumstances and drive economic growth and community self-sufficiency. Effective safeguards could be imposed against unreasonable taxation policies. Therefore, NLGN would propose a system whereby tax rates could be flexed as long as the income received remained revenue neutral or where councils could raise revenue

⁷² LGA, *Draft Local Government (Power of General Competence) Bill* (March 2010)

⁷³ Nigel Keohane and Geraldine Smith, *Greater than the Sum of its Parts* (NLGN, 2010).

through existing tax regimes. As will be seen below, this would facilitate some new levers to benefit local communities.

NLGN's preferred description of the law

NLGN endorses the initial clause of the LGA's draft Bill and its proposal to provide that

(1) A local authority shall have power to do anything which it considers is likely to be of benefit (whether directly or indirectly) to—
(a) the whole or any part of its area, or
(b) all or any persons resident or present in its area.⁷⁴

Given the shifting nature of service provision and the importance of proximity to the citizen this power should apply, as the Conservative Party has suggested, to all local councils including parish, town, district and upper tier authorities.

However, NLGN proposes that additional freedoms be granted to local authorities to vary rates and reliefs within the existing taxation regime and charging.

⁷⁴ LGA, *Draft Local Government (Power of General Competence) Bill* (March 2010).

4 *What the new power could mean*

Within this uninhibited legal landscape, in what new activities could local authorities engage? Below we set out five broad areas within which we foresee creative opportunities for local authorities under a GPC. The new power has the scope to provide local government with the necessary powers to become an entrepreneurial catalyst at the local level. This may mean developing markets for new industries to serve the purposes of wider community needs or strategic objectives. Greater exposure to the market is likely to drive innovation and entrepreneurship from government.

New service and welfare provision

Within the new environment where councils can provide a fuller range and suite of services to their local populations, councils may wish to offer additional services, charge for a new range of services on which they possess an expertise and capability, charge for services they currently offer as free or look to implement differential charging models.

Councils, in partnership with private providers, could start to offer fully-fledged banking facilities to both local businesses and residents.

Banking on Essex has been an innovative scheme to open up credit to small businesses within the county. Essex County Council has entered into a partnership with Santander to offer a lending framework providing secured or unsecured loans and overdraft facilities of up to £100,000 to eligible businesses in Essex.⁷⁵ This has been welcomed by the Federation of Small Businesses.⁷⁶ However, legal as well as financial and political considerations encouraged Birmingham City Council to limit the scope of their new banking facility,⁷⁷ with question marks over whether provision of financial services to residents would be incidental to the purposes of the authority. Lessons could be borrowed from New Zealand where a scheme is under way in which local authorities acting in partnership with communities and private

⁷⁵ <http://www.bankingonessex.com/about-banking-on-essex/about-banking-on-essex/>

⁷⁶ Chris Leslie, *Councils and Community Banking* (2010).

⁷⁷ <http://www.birminghampost.net/news/politics-news/2009/08/04/plans-for-a-birmingham-council-owned-bank-are-shelved-65233-24307655/>

banks, perhaps sharing premises, in order to bring local financial services to residents who might not otherwise be able to access them.⁷⁸

In other areas, councils may seek to exploit the expertise and capacity they already possess to offer additional new services to residents. In partnership with private insurers, **councils may decide to provide car insurance to drivers offering discounted rates to those that step out of their cars and use public transport.** This could provide both an income stream and a mechanism to shape travel behaviours.

With their background in planning and housing, local authorities have acquired the expertise and facility to widen their offer to their local communities, businesses and constructors. Councils already fulfil the role of agent for those seeking social housing. **With their knowledge of local areas, councils may look to discharge their estate agency role across the commercial housing sector as well.**

The recession has already encouraged councils to offer a new suite of services that can bolster the economic resilience of their communities. This could include local authorities stepping in to protect vulnerable people in their local community by offering a range of support including **introducing and supporting more Credit Unions**, mapping predatory lending and enhancing enforcement against loan sharks. Local authorities are positioned favourably to support vulnerable people exposed to lending from loan sharks. They have prime local knowledge, multi-functional capabilities and strong credit ratings. Lack of clarity around the law has prevented some authorities coming together where there is no 'co-terminosity' between the authority boundary and the 'field membership' of the Credit Union common bond. Some local authorities have reportedly been advised against investing in Credit Unions on the grounds that it may be *ultra vires* and outside the scope of their permitted powers to provide potential help to residents who live outside their council borders.⁷⁹ This could also spill into other non-traditional activities such as state-coordinated or supported door-step lending to offer a more responsible alternative to loan sharks.

⁷⁸ Peter McKinlay, 'New directions in New Zealand local government', *Commonwealth Journal of Local Governance*, March 2010, p. 172

⁷⁹ Chris Leslie and Alex Hood, *Circling the Loan Sharks* (NLGN, 2009), p. 34.

In cases where there was a shortage of local champions, councils could look to **establish, promote and run social enterprises directly such as broadband provision, post offices, pubs or shops**. Shareholder models and buy-outs could be developed where co-ownership was shared between the council and social entrepreneurs.

Rates discounts, postponement and incentives

Taxation and charges offer novel mechanisms to shift behaviour and shape local communities for the better. For instance, Lewes District Council has proposed that it should be allowed to **reduce the discount offered to second home owners on their council tax bills**. Under existing legislation, the discount can vary between 10 and 50 percent. However, the Council has suggested that this provides an insufficient disincentive to leave the property empty for significant parts of the year and requests flexibility to vary this. Such an approach could be revenue neutral if these increases were offset by decreases for other homeowners.⁸⁰

Currently, the Well-being Power cannot be used to offer discounts on council tax to those who recycle.⁸¹ Where appropriate, **councils could use new charging powers or council tax discounts or reliefs to encourage recycling on a ward by ward basis**. Local authorities could return a proportion of any charges, as well as Landfill Tax and EU fine savings to those wards that perform best and allow it to be spent however that locality sees fit.⁸²

Such approaches could also be applied potentially to **early intervention, preventative and social investment approaches**. One council argued that as local authorities accept greater responsibility for public health from 2012 onwards, the extent to which funding can be diverted to preventative approaches will become increasingly pressing.

Lessons from a New Zealand local authority demonstrate how the power could be used in partnership with central government to benefit vulnerable residents. In response to the low heat-efficiency and poor condition of many

⁸⁰ LGA, *The Sustainable Communities Act: shortlist of proposals made under round one* (2010), p.8.

⁸¹ CLG, *The Well-being Power and Sustainable Development* (2008), p.13.

⁸² Anthony Brand, *How can we refuse?* (NLGN, 2008)

houses occupied by elderly residents, the authority uses its general power to **postpone payment of local property taxes so that elderly residents can afford a retrofit** and take advantage of a central government scheme subsidising home insulation and heating upgrades. The scheme is an effective alternative to private sector home equity release schemes as it allows the use of individualised rates, provides finance to those who do not want to borrow from the private sector and has minimal set-up costs because local authorities already hold the information needed to collect local taxes.⁸³

Charging for services and behavioural change

Under the current legislation, local authorities are not allowed to make a surplus from charging. However, budget reductions are encouraging councils to offer a new suite of services that can bolster the economic resilience of their communities. The power is likely to see some councils seek to widen charging for services at the point of consumption.

The new powers would simplify the process of introducing new charges. As Gateshead Council has argued, authorities would be able to engage directly in trading activity without recourse necessarily to establishing partnership ventures.⁸⁴

Current legislation provides insufficient flexibility on differential charging across localities and on the basis of need. **A new power would enable local authorities to flex planning charges according to local circumstances.** It could also allow local authorities to vary rates of charges according to their civic contribution, with scope for councils to vary their planning laws and charges to incentivise shops, premises and businesses that contribute to the economic, environmental, social and cultural life of local communities.

New freedoms on charging could allow **councils to set locally-relevant licensing charges.** In so doing authorities would be able to ensure that they recouped the full associated costs such as policing, enforcement and cleansing.

Currently, the vast majority of charges are flat-rate. A number of authorities are interested in introducing **tiered charging arrangements for planning services within which applicants can pay a top-up-fee for fast-tracked**

⁸³ Ibid., p. 171

⁸⁴ Memorandum by Gateshead Council (BOP 12)

support and advice. Conversely, penalty fines could be imposed on those who put in retrospective planning applications.⁸⁵

The Total Place pilot in South of Tyne and Wear argued forcefully for the ability to introduce **a minimum pricing of alcohol at supermarkets.** This would not act as a tax-raising or charging function but would be a mechanism to reduce alcohol abuse in the area.⁸⁶

Horses for courses: new public, public-private and public-public trading vehicles

The new power would allow local authorities to develop trading functions where there is a market for a council's products or expertise without resorting to complicated joint ventures or partnerships. However, in many instances, for reasons of liability, investment and capability, local authorities may wish to take advantage of entering into innovative partnerships or arrangements with public or private bodies. Local authority trading companies which currently deal in such services as communications and public relations, energy supply and recruitment are likely to expand their markets beyond the public sector to private customers.

Shared services and joint ventures

At its basic level an effective power of general competence would unlock new opportunities for councils to **deliver efficiencies to their residents through shared services, mutual arrangements in insurance and finance.** Shared service approaches are gaining new ground in the era of budget cuts.

Joint Ventures

The complexity of the current legal structure around joint ventures has acted as an impediment to councils. New joint ventures that trade, invest and deliver are likely to be forthcoming. One proposal has been to **create arms length "Foundation Trusts" for services such as Children's Services of social care and public health.**

Joint ventures established as separate legal entities could **employ their own**

⁸⁵ <http://www.torridge.gov.uk/CHttpHandler.ashx?id=2891&p=0>

⁸⁶ *Total Place across Gateshead, South Tyneside and Sunderland – Final Report* (2010)

staff and help enforce cultural change across participating authorities

to ensure savings and develop new trading activities. They could also potentially operate across international borders.

While in the past councils have been able to rely on significant funding from RDAs and through the ERDF programme, local authorities are likely to welcome the legal clarity to establish innovative mechanisms to drive regeneration. This may include councils **working more closely as commercial developers through joint ventures**.

As Gateshead Council has argued, the current legislation does not provide for an authority to trade through a Limited Liability Partnership. This is a corporate vehicle, provided for by legislation, which may in some circumstances be the most appropriate vehicle.⁸⁷

Public sector partnership, budget pooling and local freedoms

The London Borough of Harrow argued that new powers are necessary to make Total Place solutions a success.⁸⁸ While the Local Authorities (Goods and Services) Act 1970 allows local authorities to do business with other public bodies in the interests of their communities, many relevant bodies are excluded from the list. Local areas therefore have to submit to the Minister for formal permission to go ahead which involves a time delay and red tape. The emerging era of 'Area-Based Budgets' (or 'Community Budgets') will require a whole range of holding companies, and mechanisms to pool funding and decision-making. This could include developing new governance arrangements for statutory decision-making to be pooled across a group of public bodies. For example, hospital trusts are only able to participate in joint companies for the purpose of income generation, not cost saving. This creates unnecessary barriers to area-based solutions.

New bodies could be created to facilitate budget and decision-making pooling between tiers where functions differ. Micro pooling of public funding, statutory responsibilities and financial responsibility could also be delegated down to the neighbourhood or street level to facilitate new service options, community engagement or purchasing on behalf of the local community.

⁸⁷ Memorandum by Gateshead Council (BOP 12)

⁸⁸ Hugh Peart, 'We are hopeful the law will be changed', *LGC*, 11 March 2010.

Business growth and support for enterprise

Councils could **offer discounted rates or rate relief to small businesses or those engaged in activities conducive to the local environment or entrepreneurship.**⁸⁹ This could include additional rate relief for small enterprises, for those businesses that source food locally or for those that adopt sustainable energy or transport policies. London Borough of Islington wishes to see a new requirement that landlords of empty shop premises consult with the council to discuss a change of usage.⁹⁰

Councils could start to take more proactive approaches to encourage, invest in and support venture capital funds to take a stake in local businesses, supporting new enterprises.

⁸⁹ Nigel Keohane and Matthew Clifton, *The Politics of Traffic* (NLGN, 2007) and James Hulme, *High Noon for the High Street* (NLGN, 2009).

⁹⁰ LGA, *The Sustainable Communities Act: shortlist of proposals made under round one* (2010), p.5

5 *Conclusions*

Underlying the current legislative architecture is a presumption in favour of central determination and local untrustworthiness. The philosophy of centralism has taken root culturally in Whitehall, Westminster and, recent legal judgements would suggest, within the judiciary. Rectifying this balance should be at the heart of the GPC.

Local authorities are faced with major challenges in terms of their resources and income, and the shape of public services and governance is set to transform radically in the years ahead. A new legal framework must facilitate new innovative solutions.

While the risk of legal challenge would not disappear with the advent of a new power, it could be significantly reduced. In parallel with the major reforms to free up councils from national performance management and funding restrictions, a general power would create a new climate of aspiration, innovation and ambition where policy-makers can assess options for reform with open minds.

Ultimately, the success of the new power will rest on three fundamentals. In the first place, the new power and existing legislation must give sufficient latitude for local innovation. The temptation to define a series of additional powers should be resisted. As democratic entities, local authorities possess implicit legitimacy to pursue activities that meet the needs of their communities. The principle of *ultra vires* should go. Alongside this, the government should take a comprehensive and systematic look at existing legislation and regulation and question whether they conflict with both the letter and the spirit of the new law, and allow councils freedoms within the existing tax regime.

The second essential lies in the ambition of local authorities and their readiness to push the boundaries. Many of the new activities will open up a new range of risks in terms of commercial success and the consequences attached to any major innovation.

Finally, as one council argued, '[the Government will] have to accept that letting go means that sometimes things will happen that they don't like...'

There is little to lose and much to gain by implementing a more permissive legal framework where the onus is on councils to answer to their communities.

Appendix 1 LGA's Draft Local Government (Power of General Competence) Bill

1 The power of general competence

(1) A local authority shall have power to do anything which it considers is likely to be of benefit (whether directly or indirectly) to—

(a) the whole or any part of its area, or

(b) all or any persons resident or present in its area.

(2) The power shall be referred to as “the power of general competence”.

(3) The power does not enable a local authority to do anything which it is unable to do by virtue of any express prohibition, restriction or limitation on its powers which is contained in any enactment (whenever passed or made).

(4) The power does not include a power to make laws.

(5) The power does not enable a local authority to raise money by taxation or precepts.

(6) The power includes power for a local authority to do anything in relation to, or for the benefit of, any person or area situated outside its area if it considers that it is likely to achieve either or both of the objects in subsection (1).

(7) The power is an overarching power that may be exercised—

(a) together with other powers; or

(b) on its own.

Appendix 2 Proposed amendment to the Local Democracy, Economic Development and Construction Bill

New clause 16— Power of general competence —

‘(1) The Local Government Act 2000 (c. 29) is amended as follows.

(2) For subsection 2(1) substitute—

“2 (1) Every local authority has full powers and capacity to carry on or undertake any activity or business, do any act, or enter into any transaction with full rights, powers and privileges for so doing.”

(3) For subsection 2(2) substitute—

“(2) Subsection (1) applies subject to—

(a) this Act;

(b) any other enactment; and

(c) the general law.”

(4) For subsection 2(5) substitute—

“(5) The powers under subsection (1) may be exercised in relation to or for the benefit of—

(a) the whole or any part of the local authority area; or

(b) all or any persons resident or present in a local authority’s area; or

(c) any person or area situated outside the local authority’s area if they consider that it is likely to benefit their area or persons resident there.”

Appendix 3 Local Government Act 1972, Section 111

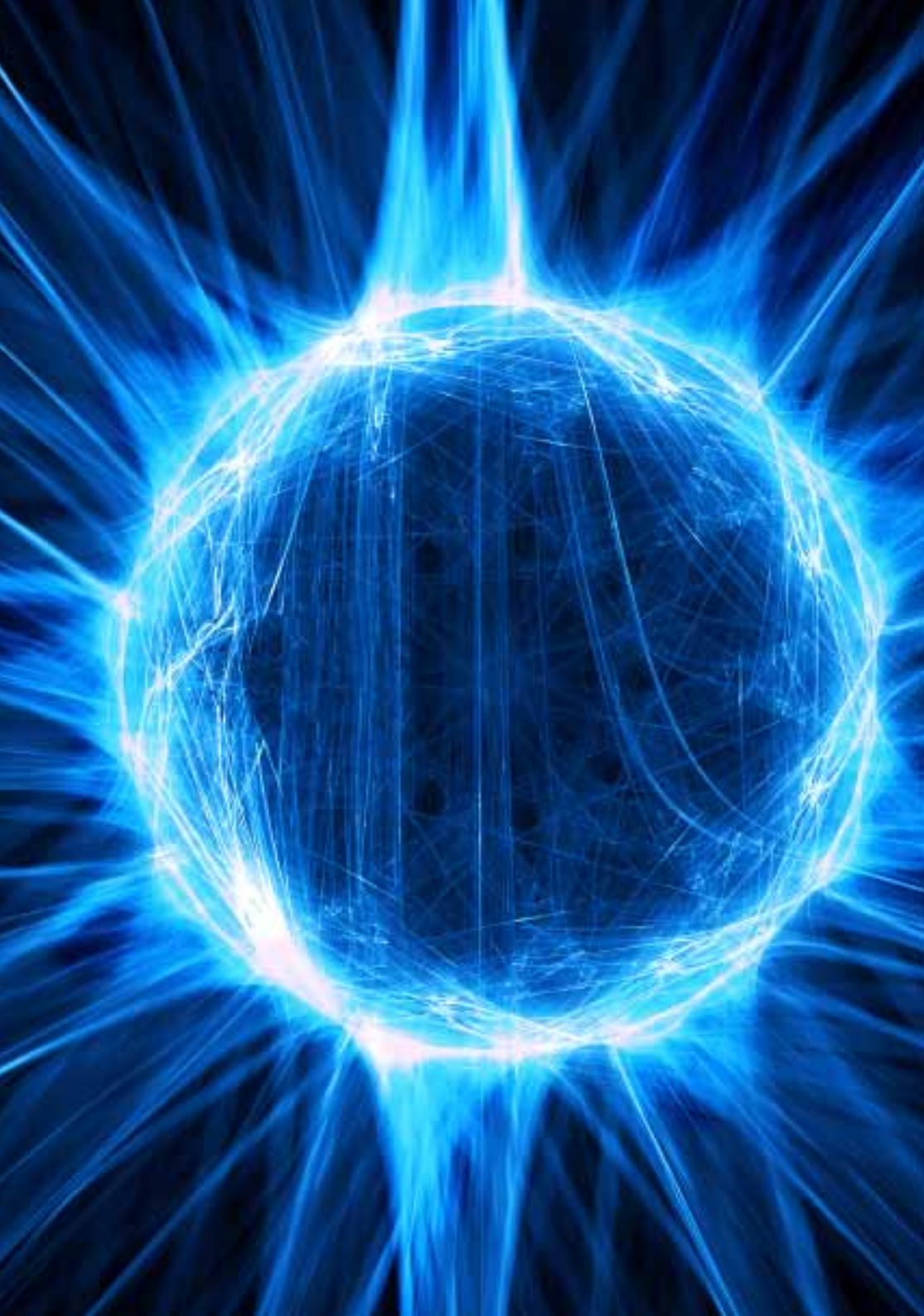
‘Subsidiary powers of local authorities.— (1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.’

Appendix 4 Proposed provisions of the new general power by Dr Mirza Ahmad

Provisions of a new GPC as suggested by Dr Mirza Ahmad, President of ACSeS⁹¹

- 1. Improve the economy, efficiency and effectiveness of local authorities (or a group of local authorities) – this is essential for achieving excellence in self-governance;*
- 2. Improve the economic, social environmental well-being of any local authority's administrative area or the surrounding areas - this is essential for achieving excellence in the governance of shared services;*
- 3. Improve the economy, efficiency and effectiveness of any public sector or third sector organisation (or a group of public sector or third sector organisations) in the local authority's administrative area or the surrounding areas - this is essential for achieving excellence in the governance of Total Place;*
- 4. Improve or provide political and/or managerial leadership to a region of the United Kingdom or relevant Core Cities - this is essential for achieving excellence in the governance of City Region and the other wider regional agendas; and*
- 5. Be ancillary to, conducive of, facilitative of, or otherwise, further the above powers and functions of the local authority (and permit it to charge for relevant services and/or to delegate such functions), to different public sector organisations (or a group of public sector organisations) in the local authority's administrative area or the surrounding area. - this is essential for achieving excellence in the governance of joint commissioning and Total Place.*

⁹¹ ACSeS, *Firing Up The Passion For Leadership*, vol. II (2010), p.3.





The Coalition Government has set out a radical agenda for the decentralisation of power across England. This devolution represents the most significant political narrative in the domestic policy arena. Alongside other powers and freedoms on planning and business growth, the Decentralisation and Localism Bill proposes a ‘General Power of Competence’.

However, fundamental questions remain unanswered: what problems is the new power seeking to resolve? Are sceptics right in questioning whether it is actually needed given the other legal freedoms granted to councils over the last fifty years?

This research paper argues that current legislation suffers from significant shortfalls, stymies innovation and undermines true localist responses to the major financial, economic and societal challenges facing communities.