



**APSE Briefing 21-11**

**February 2021**

## **Local Government and Elections (Wales) Act 2021**

### **1. Introduction**

The Local Government and Elections (Wales Act) 2021 received Royal Assent and came into force on 20 January 2021 though many provisions have later commencement dates. This briefing provides a summary of the Act but provides a specific focus on the General Power of Competence.

### **2. Summary of the main provisions of the Act**

The Act contains a number of provisions long discussed within Wales, and indeed across local government throughout the UK. Whilst some of the matters reflect existing provisions within England, Scotland and Northern Ireland the new Act encompasses some 'firsts' for local government; not least the extension of voting rights to 16 and 17-year-olds.

In brief the Act introduces the following: -

- Reforms to improve electoral arrangements for local government, which includes extending the vote to 16 and 17-year-olds. It also extends voting rights to foreign citizens who are legally resident in Wales. There are further measures to improve voter registration and a new enabling power for Principal Councils to choose between the 'first past the post' voting system or to introduce the 'single transferable vote' voting system.
- Reforms to increase public participation in local democracy, and improve transparency such access to meeting and online participation
- Provision relating to the leadership of principal councils, including encouraging greater diversity amongst executive members and establishing a statutory position of chief executive – there is a particular focus on measures to improve equality and diversity
- The development of a framework and powers to facilitate more consistent and coherent regional working mechanisms – with a strong focus on collaboration
- A new system for improving performance and governance based on self-assessment and peer review, including the consolidation of the Welsh Ministers' support and intervention powers – this places a strong focus on councils having a good grasp on their own performance and improvements including use of peer reviews as part of assessment panels. This provision in APSE's view highlights the importance of performance data as supported by benchmarking such as [APSE Performance Networks data](#). The provisions also cover the requirement to arrange for assessments of whether they are meeting the performance requirements to be undertaken by panels appointed by the council **at least once** in every election cycle.

- Powers to facilitate voluntary mergers of principal councils and restructuring a principal area
- Provisions relating to local government finance including non-domestic ratings and council tax
- Miscellaneous provisions relating to information sharing between regulators, community polls, fire and rescue authorities, the Local Democracy and Boundary Commission for Wales and Public Service Boards
- A general power of competence for principal councils and eligible community councils – there provisions covered in Part II Chapter 1 and Chapter 2 are explored in more detail below.

### **3. The General Power of Competence**

Within England a General Power of Competence was conferred by the Localism Act 2011 following the London Authorities' Mutual Limited (LAML) case which was widely regarded to expose prohibitions to council powers, alongside short comings in well-being powers. Within Northern Ireland a General Power of Competence was conferred by the Local Government Act (Northern Ireland) 2014. No such equivalent power exists currently within Scotland.

The passage of the Local Government and Elections (Wales) Act 2021 now brings Welsh Local Councils into a very similar position to Councils within England and Northern Ireland.

The following is extracted from the Act as it relates to the General Power of Competence

#### **24.The General Power of Competence**

(1) A qualifying local authority has power to do anything that individuals generally may do, even if that thing is, in nature or extent or otherwise—

(a) unlike anything a qualifying local authority may do apart from this section;

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

(2) Where subsection (1) confers power on an authority to do something, it confers power to do it in any way whatsoever, including—

(a) power to do it anywhere in Wales or elsewhere;

(b) power to do it for a commercial purpose or otherwise for a charge, or without charge;

(c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.

(3) The generality of the power conferred by subsection (1) on a qualifying local authority is not limited by the existence of any other power of the authority; and any other power of the authority is not limited by the existence of the general power.

(4) For the purposes of this Chapter, each of the following is a qualifying local authority—

(a) a principal council;

(b) an eligible community council (as to which see Chapter 2).

(5) In this section, “individual” means an individual with full capacity.

(6) References in this Part to the general power are to the power conferred by subsection (1).

(7) This section is subject to sections 25 to 27 and to any provision made under section 28(3) or (4).

## **25 Boundaries of the general power**

(1) The general power does not enable a qualifying local authority to do anything that the authority is unable to do by virtue of a pre-commencement limitation.

(2) Nor does the general power enable a qualifying local authority to do anything that the authority is unable to do by virtue of a post-commencement limitation that is expressed to apply—

(a) to the general power,

(b) to all of the authority’s powers, or

(c) to all of the authority’s powers but with exceptions that do not include the general power.

(3) The general power does not confer power to make or alter—

(a) arrangements of a kind that are made, or may be made, by or under Part 6 of the 1972 Act (discharge of functions by local authorities);

(b) arrangements of a kind that are made, or may be made, by or under Part 2 of the 2000 Act (arrangements with respect to executives etc.);

(c) contracting out arrangements, or any other arrangements that are not arrangements within paragraph (a) or (b), that authorise a person to exercise a function of a qualifying local authority.

(4) In this section—

“post-commencement limitation” (“cyfyngiad ar ôl cychwyn”) means a prohibition, restriction or other limitation expressly imposed by a provision of—

(a) an Act of Senedd Cymru or an Act of Parliament passed after the day on which this Act was passed;

(b) an instrument—

(i) made under primary legislation (including this Act), and

(ii) which comes into force on or after the day on which section 24 comes into force in relation to principal councils;

“pre-commencement limitation” (“cyfyngiad cyn cychwyn”) means a prohibition, restriction or other limitation expressly imposed by a provision of—

(a) this Act;

(b) any other primary legislation passed before, or on the same day as, the day on which this Act was passed;

(c) an instrument—

- (i) made under primary legislation (including this Act), and
  - (ii) which comes into force before the day on which section 24 comes into force in relation to principal councils.
- (5 )For the purposes of subsection (1), section 111(3) of the 1972 Act (subsidiary powers of local authorities not to include power to raise money) is to be disregarded.

## **26 Limits on charging in exercise of general power**

- (1) The general power confers power on a qualifying local authority to charge for providing a service to a person only if the following conditions are met.
- (2) The first condition is that the service is not one that any enactment requires the authority to provide to the person.
- (3) The second condition is that the person has agreed to the service being provided.
- (4) Except in relation to a service provided for a commercial purpose, to the extent that the general power confers a power on a qualifying local authority to charge for the provision of a service, the power is subject to a duty to secure that, taking one financial year with another, the income from charges imposed under it does not exceed the costs of provision.
- (5) The duty under subsection (4) applies separately in relation to each kind of service.
- (6) Subject to the duty under subsection (4), in exercising the power conferred by the general power to charge for providing a service, a qualifying local authority may set its charges as it considers appropriate, and may among other things—
- (a) charge only some persons for providing a service;
  - (b) charge different persons, or different descriptions of persons, different amounts for the provision of a service.

## **27 Limits on doing things for commercial purpose in exercise of general power**

- (1) The general power confers power on a qualifying local authority to do things for a commercial purpose only if they are things that the authority may, in exercise of the general power, do otherwise than for a commercial purpose.
- (2) Where, in exercise of the general power, a qualifying local authority does things for a commercial purpose, the authority must do them through a company.
- (3) A qualifying local authority may not, in exercise of the general power, do things for a commercial purpose in relation to a person if any enactment requires the authority to do those things in relation to the person.
- (4) In this section, “company” means—
- (a) a company within the meaning of section 1(1) of the Companies Act 2006 (c. 46), or
  - (b) a registered society within the meaning of the Co-operative and Community Benefit Societies Act 2014 (c. 14) or the Co-operative and Community Benefit Societies Act (Northern Ireland) 1969 (c. 24 (NI)).
- (5) A qualifying local authority must have regard to any guidance issued by the Welsh Ministers about doing things, in the exercise of the general power, for a commercial purpose.

## **28 Powers to make supplementary provision**

(1) If the Welsh Ministers consider that an enactment prevents qualifying local authorities from exercising the general power, or obstructs them in exercising the general power, the Welsh Ministers may by regulations amend, modify, repeal, revoke or disapply that enactment.

(2) If the Welsh Ministers consider that any other power overlaps (to any extent) the general power, then, for the purpose of reducing or removing that overlap, the Welsh Ministers may by regulations amend, modify, repeal, revoke or disapply any enactment.

(3) The Welsh Ministers may by regulations make provision preventing qualifying local authorities from doing, in exercise of the general power, anything that is specified, or is of a description specified, in the regulations.

(4) The Welsh Ministers may by regulations provide for the exercise of the general power to be subject to conditions, either generally or in relation to doing anything that is specified, or is of a description specified, in the regulations.

(5) Regulations made under subsection (4) may, among other things, provide that the exercise of the general power by a qualifying local authority—

(a) to charge for providing a service to a person is to be subject to conditions in addition to the conditions set out in section 26;

(b) to do things for a commercial purpose is to be subject to conditions in addition to the conditions set out in section 27.

(6) The power under subsection (1), (2), (3) or (4) may be exercised in relation to—

(a) all qualifying local authorities;

(b) a particular authority that is a qualifying local authority;

(c) a particular description of local authority that is a qualifying local authority.

(7) Except as provided for in subsection (8), before making regulations under subsection (1), (2), (3) or (4) the Welsh Ministers must consult—

(a) such principal councils and community councils as they consider appropriate,

(b) such persons representing principal councils and community councils as they consider appropriate, and

(c) such other persons as they consider appropriate.

(8) The duty imposed by subsection (7) does not apply in the case of regulations made by the Welsh Ministers only for the purpose of amending earlier regulations—

(a) so as to extend the earlier regulations, or any provision of the earlier regulations, to a particular authority or authorities of a particular description, or

(b) so that the earlier regulations, or any provision of the earlier regulations, ceases to apply to a particular authority or to authorities of a particular description.

(9) This section does not confer power to make provision—

(a) that amends, repeals or disapplies a provision of this Act;

(b)for the delegation or transfer of any function of legislating by order, rules, regulations, or other subordinate instrument.

#### **4. Use of the General Power of Competence and its limitations**

The General Power of Competence in Wales will bring a welcome piece of clarity for local councils which, in attempting to develop innovative approaches to service delivery, collaboration and income generation opportunities, can be assured that, in following the parameters set out in the new legislation, their actions will not be considered ultra vires (acting beyond their legal powers). However, whilst some may refer to the power as a ‘Power of First Resort’ the experiences of its use in other administrative areas suggests that existing powers may in fact provide a more robust and less complex approach to resolving issues. For example, some useful historic powers such as the Civic Restaurants Act 1947 states councils (including England, Wales and Scotland) ‘*may establish and carry on restaurants and otherwise provide for the supply to the public of meals and refreshments...*’. This is just one example of many where existing powers have been relied upon for decades, particularly to enable councils to trade and charge for services.

The General Power of Competence in Wales comes with some limitations:

**First;** pre- and post-commencement limitations. So, if for example there is an existing prohibition on charging to collect domestic waste, this duty to collect domestic waste free of charge remains, and is unaltered by the new power. Similarly, although the power allows for charging and trading it does not allow charges to be imposed in areas where there is already a prohibition on raising a charge – in services where there is a statutory duty to provide that service free of any fees and charges.

**Second;** there are reserve powers to the Welsh Ministers to amend or limit the use of the new power where they see fit specifically in 28. (3), (4)

*(3) The Welsh Ministers may by regulations make provision preventing qualifying local authorities from doing, in exercise of the general power, anything that is specified, or is of a description specified, in the regulations.*

*(4) The Welsh Ministers may by regulations provide for the exercise of the general power to be subject to conditions, either generally or in relation to doing anything that is specified, or is of a description specified, in the regulations.*

This is clearly to enable a Minister to respond if there is a perceived misuse or unintentional use of the power. This again reflects the extensive reserve powers found in the Localism Act 2011

**Third;** the Act whilst permitting charging and trading for services, and removing the limitations for this to be within the local authority boundary (and need to demonstrate that it is for wellbeing purposes) the charging and trading provisions are not entirely unfettered. The charging provisions state: -

*‘the power is subject to a duty to secure that, taking one financial year with another, the income from charges imposed under it does not exceed the costs of provision’.*

However, this provision again mirrors the Localism Act, and local councils, using the power to charge, need to be mindful of how this is calculated, and not fall into the assumption that essentially reasonable recovery of costs ends up in the ‘trading’ territory and thus requires a company. The ‘costs of provision’ is more often than not understated by councils. It is important when assessing the costs that all costs are taken into account. For example, providing a building maintenance service to private residents it is reasonable to assume that, alongside the obvious labour and materials costs, the service would need to also recover back-office charges, such as HR and payroll services,

call centre operations, the cost of invoicing, the cost of fuel, vehicle hire or purchase and maintenance. It should not therefore be assumed that all such charges fall into a profit scenario and are therefore classed as trading through a company rather than a simple charging arrangement.

The Act also provides for any commercial activity to be restricted to exercising that power through a company

*‘Where, in exercise of the general power, a qualifying local authority does things for a commercial purpose, the authority must do them through a company’.*

Again, with the value of hindsight from the experiences of others, using the company approach, it is important to be aware of the pitfalls. Companies can take time to establish, need clear business cases before they are established, and a thorough market assessment. The local authority offering may be of itself provide a market USP, given the reputation and trust in public services generally, however many have failed due to market conditions and risks associated with commercial activities. Moreover, the complexity of company arrangements can undermine the governance and accountability aspects of activity to elected councillors and residents.

Company models can take many different forms so it is also important to note that, even after much deliberation, if a company is agreed to be the way forward it need not be a fully staffed, fully operating entity. Many councils have used a shell company approach to both fulfil the commercial trading requirements and indeed to test the commercial viability of the chosen model. It is therefore important to remember that the company model is not a panacea and much can in fact be achieved through simpler and effective charging arrangements.

## **5. General Power of Competence and Community Councils**

It should be noted that subject to specific voting requirements and meeting conditions laid down in the legislation Community Councils can become an ‘eligible community council’ for the purposes of the power. Should an eligible Community Council cease to meet the conditions for eligibility or vote not to continue as an eligible community council the Act provides for the following: -

*‘A community council that ceases to be an eligible community council may continue to exercise the general power of competence in relation to anything done while it was an eligible community council.’*

## **6. Conclusions**

The Local Government and Elections (Wales) Act 2021 provides a range of new, and in a UK wide context, innovative developments. For example, the voting age measures and the commitments to ensuring greater public participation and more inclusive decision-making mechanisms and appointments, will be carefully watched as other UK administrations grapple with similar issues.

The new performance management arrangements will also be of interest beyond Wales. APSE has long argued that performance management is not just be about arbitrary target setting by central governments but should be nuanced, reflecting performance against the outcomes set by elected local councillors. However, to inform this approach, access to high quality data, and being able to measure performance amongst peers is critical to proving economy, efficiency and effectiveness. APSE has also argued that performance management should not stop at data results but should encompass learning from others to truly understand performance outcomes. [APSE performance networks](#) established over 20 years ago, remains the UK’s largest voluntary data benchmarking network in local government. With many Welsh councils already participating in the network it will, in the coming months, host working groups on the new performance measures with Welsh councils to establish if there is a need for further bespoke support and reporting formats to maximise the use of APSE

performance networks in the new performance arrangements. Contact Debbie Johns on [Djohns@apse.org.uk](mailto:Djohns@apse.org.uk)

With the new General Power of Competence and undoubtedly ambitions to develop charging and trading arrangements business support, and having a clear corporate strategy for use of the new powers, will be vital. [APSE Solutions](#) has supported council trading and charging arrangements for over two decades and is able to assist APSE member councils as part of its ethical not-for-profit consultancy services. For details contact Andy Mudd on [amudd@apse.org.uk](mailto:amudd@apse.org.uk).

Finally, all APSE members in Wales can access APSE's commercialisation network. You can sign up to the network [using this link](#). Please note that this network is only available to APSE member councils. For more details contact Mo Baines on [mbaines@apse.org.uk](mailto:mbaines@apse.org.uk) If your council is not an APSE member in Wales please contact Rob Bailey on [rbailey@apse.org.uk](mailto:rbailey@apse.org.uk) who is APSE's lead advisor for Wales.

APSE will be hosting a special two-hour strategic forum on the new General Power of Competence online on the 17 March 2021 between 2.00 PM and 4.00PM. This is a **FREE** event for APSE members in Wales. [To register for this event please use this link](#). You will then be sent joining instructions to access the event online using MS Teams.

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**This briefing does not constitute formal legal advice and any council wishing to rely upon the Local Government and Elections (Wales) Act 2021 should always seek competent and appropriate legal advice.**