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Encyclopedia of Local Government Law

Volume 1

Part 1 - General Principles of Local Government Law

Chapter 1.1 — The Legal Framework of Local Authorities

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In this chapter we deal with a number of basic factors that influence the legal framework of local government in England and Wales.

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Section A. The Constitutional Position

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A fundamental feature is that the United Kingdom is a unitary and not a federal state. Subject to overriding provisions of European Community law,¹ an Act of the United Kingdom Parliament is the supreme source of law. The existence and powers of elected local authorities depend on the provisions of Acts of Parliament. There is no compelling legal reason why the United Kingdom could not adopt a written constitution that divides powers between central and local or regional institutions and confers a measure of legal autonomy to the legislature at each level. Under such an arrangement, the existence and powers of elected local government institutions could be entrenched in the constitution, any change being a matter for constitutional amendment and not merely an Act of the central legislature.² However, this does not represent the current position and there has been little sign that it will change.³ We turn to consider developments in government policy towards local government from 1997 onwards.

Footnotes

¹ See *R. v Secretary of State for Transport Ex p. Factortame Ltd [1990] 2 A.C. 85*, per Lord Bridge at 140; *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission [1995] 1 A.C. 1*.

² See, e.g. Institute for Public Policy Research, *The Constitution of the United Kingdom* (1991), proposing a draft constitution in which legislative power is shared between Parliament and elected assemblies for Scotland, Wales, Northern Ireland and 12 English regions. Each Assembly would establish elected local authorities to perform such functions as the Assembly determines, but also with general competence to undertake measures for the benefit of all those within the authority's areas.

³ The Liberal Democrats have proposed the establishment of a constitutional convention to produce a written constitution (*For the People, By the People*, Policy Paper 83, August 2007); and that the powers of central government in respect of local government be limited by that written constitution (*The Power to be Different*, Policy Paper 79, June 2007); cf. *Liberal Democrat Manifesto 2010* and *Manifesto 2015, Stronger Economy, Fairer Society, Opportunity for Everyone* (maintaining the proposal for a written constitution). The Labour Party's 1997 General Election Manifesto proposed referenda on the establishment of a Scottish Parliament and a Welsh Assembly with devolved powers; the establishment of regional chambers (sc. of local authority members) to co-ordinate transport, planning, economic development, bids for European funding and land use planning; and, in time, referenda region by region on the establishment of directly-elected regional assemblies. There was no proposal for a written constitution (beyond incorporation of the European Convention on Human Rights): New Labour: *Because Britain Deserves Better* (1997). These were implemented (see below). The 2005 Labour Election Manifesto, *Britain forward not back*, did not contain proposals for major constitutional reform, but the change of Prime Minister in 2007 led to the announcement of the start of a national consultation to draw up a Bill of Rights and establish a written constitution (see Green Paper, *The Governance of Britain* (Cm.7170, 2007); www.governance.justice.gov.uk). The Labour Election Manifesto 2010, *Creative Britain: active and flourishing communities* included proposals for referenda for moving to the Alternative Vote for elections to the House of Commons and to a democratic and accountable second chamber; for an All Party Commission to chart a course to a Written Constitution; and to extend the powers of city-regions. The Labour Party Manifesto 2015, *Britain can be better*, proposed a Constitutional Convention to address the evolution of the Union, and again proposed the devolution of power to English city and county regions. The Conservative Party has generally opposed such constitutional reforms, although their 2005 Election Manifesto, *Are you thinking what we're thinking*, proposed that Scottish MPs should no longer vote on exclusively English matters and that there should be a "review" of the *Human Rights Act 1998*. The 2010 Conservative Manifesto, *Invitation to Join the Government of Britain*,

contained a proposal for a UK Bill of Rights to replace the [Human Rights Act 1998](#). The 2015 Manifesto, *Strong Leadership: a clear economic plan: a brighter, more secure future* reaffirmed this and contained plans for “English votes for English laws,” and the further devolution of powers to Scotland and Wales. The 2019 manifesto, Get Brexit Done: Unleash Britain’s Potential, stated that the Human Rights Act and administrative law would be “updated” “to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government” and that judicial review “is not abused to conduct politics by another means or to create needless delays.” A Constitution, Democracy & Rights Commission would be established to examine these issues in depth.

The Labour Government 1997–2010

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Section A. The Constitutional Position

The Labour Government 1997–2010

The Labour Government elected in 1997 instituted a programme of constitutional reforms, including incorporation of the European Convention on Human Rights,¹ the establishment of a Scottish Parliament and a Welsh Assembly,² the creation in each region of a Regional Development Agency to promote sustainable economic development and social and physical regeneration³ and the introduction of a [Freedom of Information Act](#).⁴

It was proposed that the Welsh Assembly would take over the responsibilities that the Secretary of State exercised in Wales. It would be expected to promote and foster local government in Wales in line with the European Charter on Local Self-Government⁵; be required regularly to review regularly with local government how effectively this commitment was being observed; be expected to bring public bodies and local authorities into closer partnership by appointing more local authority members to their Boards; be given power to transfer powers exercised by some Welsh public bodies to local government; and be expected to respect local government's powers. The Assembly would be responsible for funding local authorities in Wales.⁶

These constitutional proposals were carried into effect by the enactment of the [Scotland Act 1998](#), the [Government of Wales Act 1998](#) and the [Regional Development Agencies Act 1998](#).

The [Government of Wales Act 1998](#)⁷ provided for the transfer of functions from ministers to the National Assembly for Wales.⁸ The Assembly had power to transfer functions from certain specified Welsh public bodies to other specified public bodies, including a county, county borough and community council (or more than one such council) or to the Assembly itself.⁹ There was a Welsh Administration Ombudsman,¹⁰ subsequently replaced by the Public Services Ombudsman for Wales, with jurisdiction covering the Assembly, health and local government.¹¹ The Assembly had to make a local government scheme, setting out how it proposed, in the exercise of its functions, to sustain and promote local government in Wales. It had to establish and maintain a Partnership Council for Wales, or Cyngor Partneriaeth Cymru, comprising Assembly members and members of local authorities in Wales¹² to give advice and make representations to the Assembly and to give advice to those involved in local government in Wales.¹³ Many provisions of the [1998 Act](#)¹⁴ were replaced by provisions of the [Government of Wales Act 2006](#), immediately after the ordinary election to the Assembly in 2007. The main purposes of the Act are to separate the executive and legislative functions of the Assembly (with the formal establishment of a Welsh Assembly Government) and to extend the Assembly's legislative powers. Part 3 (ss.93–102) of the 2006 Act gave power to the Assembly to pass Assembly Measures, subject to the approval of the Privy Council. This was superseded, following a referendum, by Part 4 (ss.103–116) which empowers the Assembly itself to pass Acts of the National Assembly. Provision continues to be made for the Partnership Council and the local government scheme,¹⁵ the powers now being exercisable by the Welsh Ministers. The Welsh Ministers also now exercise the powers to transfer the functions of Welsh public bodies.¹⁶

The Labour Government also proposed the establishment in London of an elected authority, the Greater London Authority. Accordingly, the [Greater London Authority Act 1999](#) provides for the establishment of the Authority, comprising an elected Mayor and London Assembly. The [1999 Act](#) was amended by the [Greater London Authority Act 2007](#).

Major changes to the structure and powers of local government were made by the [Local Government Act 2000](#), with the introduction of general well-being powers and executive arrangements. Further changes were made by the [Local Government and Public Involvement in Health Act 2007](#). Pt 1 of this Act provided a structure for invitations or directions for proposals for changing particular areas from two tiers to a single tier of local government. There were also changes affecting electoral arrangements, executive arrangements, community governance reviews, partnership working, best value, the Commission for Local Administration in England, ethical standards and entities controlled by local authorities. More changes were made by the [Local Democracy, Economic Development and Construction Act 2009](#),¹⁷ which included provisions designed to promote democracy and involvement and arrangements for the audit of entities connected with local authorities, established a separate Local Government Boundary Commission for England, introduced a duty to prepare economic assessments, introduced new regional strategies and economic prosperity boards and provided a structure for multi-area agreements.

Footnotes

- 1 Human Rights Act 1998; White Paper, Rights Brought Home: The Human Rights Bill Cm. 3782 (1997).
- 2 White Papers, Scotland's Parliament Cm. 3658 (1997), A Voice for Wales, Cm. 3718 (1997), Scotland Bill 1997–98, Government of Wales Bill 1997–98. The proposals were approved by referendums held under the [Referendums \(Scotland and Wales\) Act 1997](#).
- 3 See para. [1.1-98](#), below.
- 4 White Paper, Your Right to Know, Cm. 3818 (1997). This applies to central government departments and their agencies, local authorities, public bodies, the NHS and private bodies carrying out statutory functions. See paras 4-45–4-52, below.
- 5 para. [1.1-94](#), below.
- 6 A Voice for Wales, Cm. 3718 (1977), pp. 15–16.
- 7 1998 Act s.22.
- 8 See the [National Assembly for Wales \(Transfer of Functions\) Order 1999 \(SI 1999/672\)](#). This Order transfers all the functions of a minister under the enactment specified in Sch.1, in so far as exercisable in relation to Wales, to the Assembly apart from some cases where functions are to be exercised concurrently by the minister and Assembly. The functions specified in Sch.2 are to be exercisable by a minister with Assembly agreement or consultation, as specified. For subsequent orders see [SI 2000/253](#), [1829](#), [1830](#), [SI 2001/3679](#), [SI 2004/3044](#), [SI 2005/1958](#), [SI 2006/1458](#), [3334](#).
- 9 1998 Act s.28 and Sch.4.
- 10 1998 Act s.111 and Sch.9.
- 11 Public Services Ombudsman (Wales) Act 2005.
- 12 i.e. county, county borough and community councils, National Park authorities, police authorities and combined fire authorities in Wales and authorities of any description specified by order made by the Assembly: [s.113\(7\)](#).
- 13 1998 Act s.113 and Sch.11.
- 14 Including [ss.111](#) and [113](#) and [Sch.11](#).
- 15 [ss.72](#), [73](#).
- 16 1998 Act s.28, as amended by the [2006 Act Sch.10](#) paras 41, 42.
- 17 Following the White Paper, Communities in control: real people real power (Cm.7427, 2008) and the report of the Councillors Commission, Representing the future (2007), Government Response (July 2008).

The Coalition Government 2010–15

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Section A. The Constitutional Position

The Coalition Government 2010–15

The Coalition Government that took office in 2010 included in its document *The Coalition: Our Programme for Government* a series of proposals for changes affecting local government. These include the radical devolution of power and greater financial autonomy for local government and community groups (including a general power of competence for local authorities); abolition of regional spatial strategies; reform of the planning system; the facility for local authorities to move back to a committee system; abolition of the Standards Board regime and Comprehensive Area Assessment; the introduction of elected police commissioners to oversee policing; and the replacement of Regional Development Agencies. These and many more detailed proposals were included in the [Localism Act 2011](#). The [Local Audit and Accountability Act 2014](#) introduces new arrangements for local audit.

The Coalition Government also took steps to establish “community budgets” in particular areas, initially as part of the Troubled Families programme for families with complex needs and subsequently to drive public service transformation.¹ One feature of these arrangements was the pooling of budgets between local authorities and other public bodies. In addition, the Treasury and the Deputy Prime Minister together developed arrangements for “City deals” between central government and individual local authorities or groups of authorities. These were “bespoke” arrangements for the devolution of responsibility for key policy areas to support economic growth. Eight “deals” were entered into in the first wave² and nineteen in the second.³ In 2014–15 further “devolution deals” were offered to Greater Manchester, Sheffield and West Yorkshire. This process has been taken forward by the Conservative Government in office from 2015.

Footnotes

¹ See M. Ward, City deals (HC Briefing Paper No. 7158, 22 November 2017), pp. 4-16.

² HMG, Unlocking growth in cities: city deals wave 1 (July 2012). Deals were entered with Bristol and West of England LEP (as to LEPs see para.1.1-99); Greater Birmingham and Solihull LEP; Greater Manchester LEP and Combined Authority; Leeds City Region LEP; Liverpool City Region LEP; North Eastern LEP; Nottingham (arrangements to be overseen by the Nottingham Economic Growth Board); and Sheffield City Region.

³ See Ward op. cit. pp 6-12. A deal has also been agreed with Cardiff Capital Region: p.14.

The Conservative Government (2015 –)

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The Conservative Government (2015 –)

The Conservative Government elected in 2015, and re-elected in 2017 and 2019, has continued the process that began towards the end of the period of office of the Coalition Government for the entering of “devolution deals” with groups of local authorities in England.¹ As at March 2020, twelve “deals” had been agreed. Three had collapsed; two had collapsed and then been partially revived. The content of each deal varies,² but they typically include control over funding in respect of aspects of further education and skills, transport (including bus franchising), business support, employment support and land and housing. The deal with Greater Manchester also includes provision for the integration of health and social care and for the combined authority’s Mayor to become the Police and Crime Commissioner and take over responsibility for the fire service. Four deals (Greater Manchester, the North East, Liverpool and Cornwall) provide for the combined authority or, in the case of Cornwall, the Council to become the intermediate body for the purposes of the distribution of EU structural funds, the final round of funding ending in April 2020.³ Some aspects of the arrangements did not need statutory changes; others are effected by orders under the Cities and Local Government Act 2016.⁴ Most of the deals have been with areas which had established or were proposing to establish a combined authority.⁵ The Government was, however, also willing to negotiate deals with one local authority or a group of local authorities. The Government has also insisted that a directly-elected mayor is required where substantial powers are to be devolved. Deals have been reported as under negotiation in a number of further areas.⁶ The Conservative 2019 Manifesto stated⁷ that the ambition was for “full devolution across England, building on the successful devolution of powers to city region mayors, Police and Crime Commissioners and others” and that there would be an English Devolution White Paper. This will provide further information on plans for levelling up powers between Mayoral Combined Authorities, increasing the number of mayors and doing more devolution deals.⁸

The Secretary of State is now under a duty to lay before Parliament an annual report on devolution agreements.⁹

Footnotes

1 M Sandford, Devolution to Local Government in England (HC Briefing Paper No. 07029, 26 March 2020).

2 See Sandford, op. cit. Ch.2.

3 Sandford, op. cit, p.12. It is not clear whether devolved areas will have a role in the proposed post-Brexit “Shared Prosperity Fund”: *ibid*.

4 See para. 1.1-103.

5 See para.1.1-103.

6 Sandford, op. cit. p 9.

7 Get Brexit Done: Unleash Britain’s Potential, p.29.

8 Queen’s Speech 2019 Briefing Notes p.91.

9 Cities and Local Government Devolution Act 2016 s.1.

The Welsh Assembly and the Welsh Government (2007 -)

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The Welsh Assembly and the Welsh Government (2007 -)

The [Government of Wales Act 2006 Sch.7 para.12](#) provided that “Local government” is one of the subjects within the legislative competence of the National Assembly for Wales:

This provides as follows:

Schedule 7:para12

”12. Local government

Constitution, structure and areas of local authorities. Electoral arrangements for local authorities. Powers and duties of local authorities and their members and officers. Local government finance.

“Local authorities” does not include police and crime commissioners.

Exceptions—

Local government franchise.

Electoral registration and administration.

Registration of births, marriages, civil partnerships and deaths.

Licensing of sale and supply of alcohol, provision of entertainment and late night refreshment.

Orders to protect people from behaviour that causes or is likely to cause harassment, alarm or distress.

Local land charges, apart from fees.

Sunday trading.

Provision of advice and assistance overseas by local authorities in connection with carrying on there of local government activities.”

¹

Other paragraphs of Sch.12 specified, subject to exceptions, substantive subjects that generally fell in whole or in part within the remit of local government, including: 2. Ancient monuments and historic buildings; 3. Culture; 4. Economic development; 5. Education and training; Environment; 6. Fire and rescue services and fire safety; 8. Food; 9. Health and health services; 10. Highways and transport; 11. Housing; 15. Social welfare; 16. Sport and recreation; 17. Tourism; 18. Town and country planning; 19. Water and flood defence.

Fresh provision for the devolution of powers in Wales has been made by the Wales Act 2017. Section 108A of the Government of Wales Act 2006² provides that a provision is only outside the Assembly’s (from May 2020 the Senedd’s) legislative competence to pass an Act of the Assembly (now Senedd) in specified circumstances, including that it relates to reserved matters (set out in Sch.7A)³ or breaches any of the restrictions in, without falling within exceptions also provided in, Sch.7B.

The Welsh Government from 2007 to 2011 was a Welsh Labour/Plaid Cymru coalition; from 2011 to 2016 there was a Welsh Labour administration; and from 2016 there has been a Labour led coalition with the Liberal Democrats and an Independent. Local government law in Wales has increasingly diverged from that applicable in England. Key legislation includes the Local Government (Wales) Measures 2007 and 2011, the [Local Government \(Democracy\) \(Wales\) Act 2013](#) and the [Local Government \(Wales\) Act 2015](#). A further, major, Local Government (Wales) Bill was to be considered in 2016. This would have reduced the number of principal local authorities in Wales to eight or nine. This proposal was subsequently withdrawn. Instead, the existing 22 local authorities would be retained, subject to any voluntary mergers; there would be renewed scope for voluntary mergers enabled by Welsh Government support; and there would be enhanced systematic and mandatory regional working, systematic meaning that functions would be organised on a consistent footprint and done at that level. There was a possibility that there might need to be more than one systematic footprint. In particular, there might be one based around the City Regions covering strategic transport, land-use planning and economic development; and the other,

probably the Health Board footprint, for areas like social services, education and public protection.⁴ In 2019/20 a major Local Government and Elections Bill is before the Senedd. This includes provision for: extending the voting franchise to 16 and 17 year olds and foreign citizens legally resident in Wales, changes to voter registration, and enabling a principal council to choose between the ‘first past the post’ or the ‘single transferable vote’ voting systems; a general power of competence for principal councils and eligible community councils; reforming public participation in local democracy; the leadership of principal councils, including to encourage greater diversity amongst executive members and establishing a statutory position of chief executive; the development of a framework and powers to facilitate more consistent and coherent regional working mechanisms; a new system for performance and governance based on self-assessment and peer review, including the consolidation of the Welsh Ministers’ support and intervention powers; powers to facilitate voluntary mergers of principal councils and restructuring a principal area; and local government finance including non-domestic rating and council tax.

Footnotes

- 1 Sch. 12 para.12, as amended by the [Police Reform and Social Responsibility Act 2011](#), Sch 16, Pt 3, paras 351, 353 and the [Anti-social Behaviour, Crime and Policing Act 2014](#), Sch 11, Pt 1, para 43.
- 2 Inserted by the [Wales Act 2017 s.3\(1\)](#), with effect from 1 April 2018 (by virtue of [SI 2017/1179 reg.2](#)).
- 3 Among the reserved matters in Sch.7A are “taxes”, but subject to the exception: “Local taxes to fund local authority expenditure (for example, council tax and non-domestic rates)”: Sch.7A para.15. Other reserved matters include: local government elections (Sch.7A paras 22–27); crime, public order and policing (Sch.7A paras 39–42); anti-social behaviour (Sch.7A paras 43, 44); entertainment and late night refreshment (Sch.7A para.57); alcohol (Sch.7A para.58); lieutenancies (Sch.7A para.62); consumer protection (Sch.7A paras 72–76); product safety and liability (Sch.7A para.79); product labelling (Sch.7A para.80); weights and measures (Sch.7A paras 81–82); Sunday trading (Sch.7A para.95); energy conservation (Sch.7A para.102); traffic regulation other than regulation relating to speed limits or traffic on special roads (Sch.7A para.109); compensation and other specified payments to public sector workers (Sch.7A paras 135–136); protection of personal data (Sch.7A para.170); public access to information held by a public authority (Sch.7A para.171); public sector information and records (Sch.7A paras 172–173); registration of births, deaths and places of worship (Sch.7A para.181); specified matters concerning development and buildings (Sch.7A paras 184–186). See also Sch.7A para.194 concerning devolved Welsh authorities (which include a county, county borough or community councils in Wales: 2006 Act Sch.9A).
- 4 Oral statement by the Cabinet Secretary for Finance and Local Government, Mark Drakeford, to the Welsh Assembly, 4 October 2016.

Local representative democracy

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Section A. The Constitutional Position

Local representative democracy

The key statute setting out the basic framework for local government in England and Wales is the [Local Government Act 1972](#). Its purpose has been described as follows¹:

”52.The [Local Government Act 1972](#) is ... the modern successor of a series of major statutes giving life and legitimacy to local government in England and Wales. The [1972 Act](#), with its satellite primary and delegated legislation, continues and develops a historical system of local representative democracy. Each of these three words needs to be given its proper value.

53.First, a representative democracy exchanges the Athenian ideal of direct participation for elected individuals through whom alone the electors have a voice in the institutions of government. Secondly, the system is local, not only in the sense that a county council is not a national body—but more relevantly—because a councillor is elected as the representative of a territorial unit within the county. Thirdly, every councillor’s voice and vote is equal. It follows that the proceedings and business of the Council cannot lawfully be arranged so that (however innocent the intent) particular councillors are unjustifiably silenced or otherwise disadvantaged in doing what they have been elected to do....”

Footnotes

¹ per Sedley L.J. in *R. v Flintshire CC Ex p. Armstrong-Braun [2001] EWCA Civ. 345; (2001) 3 L.G.L.R. 34.*

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Section B. The Framework Established by the Local Government Act 1972

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The [Local Government Act 1972](#) gave effect to the proposals contained in the White Paper “Local Government in England: Government Proposals for Reorganisation”¹ and in the consultative document “The Reform of Local Government in Wales”, published in 1971. It created new structures for local government and allocated functions among the new authorities. It recast the law, modified and in simpler form, with respect to the administrative working of local authorities. It replaced the [Local Government Act 1933](#), and it incorporated, with modification, the provisions of the [London Government Act 1963](#) relating to the constitution of authorities in Greater London. The structure of London government was not materially affected: fundamental reorganisation had taken place in 1965 following the [London Government Act 1963](#) under which the Greater London Council and the London borough councils had been established.²

Under the [Act of 1972](#) new areas and new authorities were created in England, outside Greater London, and in Wales.³ Each country was divided into counties and districts. In England, certain counties were metropolitan counties and the districts within them were metropolitan districts. In England many districts were divided into parishes and in Wales all districts were divided into communities.

Changes were effected in Greater London and in the metropolitan counties by the [Local Government Act 1985](#). That Act abolished, from April 1, 1986, the Greater London Council and the metropolitan county councils, giving effect to proposals contained in the White Paper, Streamlining the Cities.⁴ It provided for the transfer of their functions to other authorities—in the main, they were reallocated, respectively, to the London borough councils and the metropolitan district councils. [Part 3 of the Act](#) established the Inner London Education Authority, formerly a special committee of the Greater London Council, as a directly elected authority.⁵ [Part 4](#) provided for separate “joint authorities” to be established to act as (1) police, (2) fire and civil defence, and (3) passenger transport authorities in the metropolitan counties, and as the fire and civil defence authority for London.⁶ [Part 7](#) established a “residuary body” in each area to deal with residual matters concerning the abolished authorities.

The Inner London Education Authority was itself abolished, and its powers transferred to London borough councils and the Common Council of the City of London by the [Education Reform Act 1988](#), the change taking effect from April 1, 1990. The residuary bodies have been wound up, and provision made for the transfer of their property, functions, rights and liabilities, usually to designated district or London borough councils. “Pensions authorities” have been established for South Yorkshire and London to take over pensions functions from the respective residuary body for the area.

The [Norfolk and Suffolk Broads Act 1988](#) established a Broads Authority with the function of managing the Broads.

Police authorities were reconstituted as authorities in their own right by the [Police and Magistrates’ Courts Act 1994](#), amending the [Police Act 1964](#). The legislation was consolidated in the [Police Act 1996](#). Police authorities outside London have been replaced by police and crime commissioners.⁷

Substantial further changes to the structure of local government in the non-metropolitan counties in England were effected by orders made by the Secretary of State under the [Local Government Act 1992](#), following reports by the Local Government Commission for England. Unitary authorities were established for a number of the non-metropolitan counties. Two tiers of local government were retained in the others, although in some cases, large cities were given unitary status with the county and district councils retaining their responsibilities elsewhere.

In some areas where two tiers of local government were retained, steps have been taken to move to a single tier, under a framework established by [Pt 1 of the Local Government and Public Involvement in Health Act 2007](#).

1.1-04

In Wales, local government was completely restructured by the [Local Government \(Wales\) Act 1994](#), which replaced the eight county councils and 37 district councils by 22 new unitary authorities (11 counties and 11 county boroughs), with effect from April 1, 1996. The new authorities were elected on May 4, 1995, and acted as shadow authorities until April 1, 1996.⁸

In Greater London, an elected Mayor and London Assembly have taken responsibility for strategic matters under the [Greater London Authority Act 1999](#). The first elections took place in May 2000. The [1999 Act](#) was amended by the [Greater London Authority Act 2007](#). In 2019 and 2020, mergers of district councils resulted in the establishment of district councils for

Somerset West & Taunton, East Suffolk and West Suffolk; two unitary authorities were established for Dorset (Bournemouth, Christchurch and Poole and Dorset); one unitary authority was established for Buckinghamshire (elections due in 2021); and two for Northamptonshire (West Northamptonshire and North Northamptonshire (elections due in 2021).

The areas of non-metropolitan counties, districts and London boroughs, and in Wales, counties and county boroughs are called principal areas and their councils are called principal councils. Parishes and communities have parish and community meetings and may have parish and community councils. The areas of metropolitan counties continue as local government areas for certain purposes, for example as the areas under the control of joint authorities.

In Wales, the areas of the eight counties in existence before reorganisation under the [Local Government \(Wales\) Act 1994](#) continue as the areas of “preserved counties” for certain purposes.⁹ Orders under the [Local Government Act 1992](#) have established new counties for the areas of new unitary authorities.¹⁰

Many districts bear the style of borough and their councils are called borough councils; certain parishes and communities bear the style of town and their councils are called town councils. Some areas within districts which were formerly cities or boroughs have a body known as the charter trustees of the city or the charter trustees of the town as the case may be.

This, in briefest terms, is the formal structure of local government.

1.1-05

The term “local authority” is applied to county, district, London borough and parish councils in England and county, county borough and community councils in Wales.¹¹ Joint authorities and residuary bodies are treated as “local authorities” for specified purposes.¹² All these authorities are corporate bodies and have the characteristics of corporations. In addition, two other bodies have corporate status, namely, the parish trustees of a parish not having a parish council, and the charter trustees of a city or borough.

Footnotes

1 Cmnd. 4584 (1971).

2 Local government in Greater London is described in *Cross on Local Government Law* Appendix F.

3 [Local Government Act 1972](#) s.1.

4 Cmnd. 9063 (1983).

5 This authority was first established as the Inner London Interim Education Authority with effect from September 1, 1985.

6 These authorities were established with effect from September 15, 1985: see the [Local Government Act 1985 \(New Authorities\) \(Appointed Days\) Order 1985 \(SI 1985/1283\)](#). The metropolitan county fire and civil defence authorities were renamed metropolitan county fire and rescue authorities by the [Civil Contingencies Act 2004](#) Sch.2 para. 10, with effect from April 1, 2005, by virtue of SI 2005/772.

7 [Police Reform and Social Responsibility Act 2011](#).

8 See Sch.5 of the [Local Government Act 1972](#), as substituted by Sch.3 to the [Local Government \(Wales\) Act 1994](#), and the [Welsh Principal Councils \(Day of Election\) Order 1994 \(SI 1994/2843\)](#).

9 [Local Government Act 1972](#), s.20, as substituted by the [1994 Act](#), s.1.

10 See, e.g., the [Avon \(Structural Change\) Order 1995 \(SI 1995/493\)](#), establishing new counties of North West Somerset, Bath and North East Somerset, South Gloucestershire and the City of Bristol; the [Humberside \(Structural Change\) Order 1995 \(SI 1995/600\)](#), establishing new counties of the City of Kingston upon Hull, North Lincolnshire, North East Lincolnshire and the East Riding of Yorkshire; and the [Cleveland \(Further Provision\) Order 1995 \(SI 1995/1747\)](#), establishing new counties for Hartlepool, Middlesbrough, Redcar and Cleveland, and Stockton-on-Tees. The counties of Avon, Humberside and Cleveland were abolished. A new district and county of York was established

by the [North Yorkshire \(District of York\) \(Structural and Boundary Changes\) Order 1995 \(SI 1995/610\)](#), two tiers of local government being retained elsewhere in North Yorkshire.

- 11 Local Government Act 1972, s.270(1): definition of *local authority* , as amended by the [Local Government Act 1985](#), Sch.17, and the [Local Government \(Wales\) Act 1994](#), s.1.
- 12 Local Government Act 1985, Schs. 13, 14; Local Government Residuary Body (England) Order 1995 (SI 1995/401); Local Government (Wales) Act 1994, Sch.13.

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Section C. Corporate Status

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One feature common to local authorities is their corporate status. A study of the principles of local government law must therefore begin with an examination of the nature of corporate status and the legal consequences which flow from incorporation.

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1.1-07 Nature of a corporation

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Section C. Corporate Status

Nature of a corporation

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A corporation has been defined by a leading authority in the following terms¹:

A collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, of suing and being sued.

The “collection of many individuals” becomes by incorporation one individual, an artificial person, having rights and duties, capable of suing and being sued, of holding property and making contracts. A corporation is a wholly different and separate entity from the individuals who compose it. It is the corporation as such, not its constituent members, which is liable for its obligations and in whom its property vests. It is a legal persona. This is perhaps the most significant feature of corporate status: its importance is seen more clearly when an examination is later made of contractual and tortious liability.

1.1-08

There are other characteristics of an incorporated body. It must have a name, and all legal transactions must be effected in that name. Secondly, it has perpetual succession. Individual members who compose it may die or retire or be replaced by new corporators, but the corporation continues an unbroken existence. Obligations entered into whilst one group of persons makes up the membership bind the corporation even though the whole of the membership has changed. Finally, it has a seal. The acts and decisions of a corporation are authenticated by its seal, which in some respects is like the signature of a natural person. The corporate will is evidenced by the affixing of the seal to the document in which it is expressed. These characteristics are found in the common law rules as to corporations.

Footnotes

1 Kyd on Corporations (1793–94) Vol. 1, p.13.

1.1-09 Local authority corporations

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1.1-09

In the case of local authorities these rules are, for the most part, expressed in statute. [The Local Government Act 1972¹](#) provides that a principal council shall be a body corporate by the name of the county council or district council (in England) or county or county borough council (in Wales) as the case may be. Similarly worded provisions apply to parish and community councils,² and to joint authorities and residuary bodies.³ So far as parish and community councils are concerned it is expressly stated that notwithstanding anything in any rule of law a council need not have a common seal and where it has no seal any of its acts which are required to be signified under seal may be signed and sealed by two members of the council.⁴

Footnotes

1 1972 Act ss.2 (England) (as amended by the [Local Government Act 1985, Sch.16](#)), 21 (Wales) (as amended by the [Local Government \(Wales\) Act 1994, s.2](#)).

2 1972 Act ss.14 and 33 (as substituted by the [Local Government \(Wales\) Act 1994, s.13](#)). In the case of a parish not having a separate parish council the chairman of the parish meeting and the proper officer of the district council are incorporated as “the parish trustees”: [s.13](#).

3 [Local Government Act 1985, ss.26\(1\), 28\(1\), 57\(1\)](#); [Greater London Authority Act 1999, s.328\(2\)](#) (reconstitution of the London Fire and Civil Defence Authority established by [s.27\(1\)](#) of the [Local Government Act 1985](#) as the London Fire and Emergency Planning Authority).

4 [Local Government Act 1972, ss.13\(5\), 14\(3\), and 33\(4\)](#) (as substituted by the [Local Government \(Wales\) Act 1994, s.13](#)).

1.1-10 Modes of incorporation

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Modes of incorporation

1.1-10

Incorporation in modern times has been effected in one of two ways: by the granting of a charter of incorporation by the Sovereign or in pursuance of an Act of Parliament. Under earlier law all boroughs (except London boroughs) were charter corporations, created by the Sovereign in the exercise of the royal prerogative. Prior to 1964, the London metropolitan boroughs were statutory corporations, as were the former county councils, urban and rural district councils, parish councils and parish meetings and the Greater London Council. Under the [London Government Act 1963](#), London boroughs were incorporated under the royal prerogative, but also pursuant to the [1963 Act](#). In *Hazell v Hammersmith and Fulham LBC*¹ the House of Lords held that the borough was to be regarded as a statutory corporation.² It would have been possible for the Crown to have incorporated a London borough solely under the royal prerogative, in which case the borough corporation would have had the same capacity as a natural person, but that had not been done. A further point is that it is the *council* and not the *corporation* which is the “local authority” for the purposes of the [Local Government Act 1972](#),³ and “... the council cannot ignore their statutory constraints and lawfully exercise in the name of the borough a power which upon the true construction of the statutory powers of the council was not open to the council.”⁴

Authorities created under the [Act of 1972](#), whether boroughs or not, are statutory corporations.

Footnotes

1 [1992] 2 A.C. 1. See para.1.1-19.

2 per Lord Templeman at pp.39–43.

3 *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 776–779 CA. Unlike the House of Lords, the Court of Appeal had held that the *corporation* of the borough did have the powers of a natural legal person.

4 [1992] 2 A.C. 1, per Lord Templeman at 43.

1.1-10A Distinct capacities of local authority corporations

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Distinct capacities of local authority corporations

1.1-10A

In *Barlow v Wigan MBC*¹ it was held that the fact that a local authority is a single body corporate does not mean that it is indivisible for all purposes; for example, it may act in distinct capacities as “housing authority”, “planning authority” and “highways authority”. Accordingly, the reference in the [Highways Act 1980 s.36\(2\)\(a\)](#) to “a highway constructed by a highway authority” (and so a highway maintainable at the public expense) is to be construed as reference to a highway constructed by an authority in its capacity as a highway authority. The court disapproved dicta to the contrary by Sedley L.J in *Gulliksen v Pembrokeshire CC*.²

Footnotes

1 [2020] EWCA Civ 696.

2 [2002] EWCA Civ 968, [2003] Q.B. 123 at para.[18].

1.1-11

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Section D. The Doctrine of Ultra Vires

1.1-11

Perhaps the most important principle to be considered in relation to corporate status is the doctrine of ultra vires. The term ultra vires means “beyond the powers”. An act is ultra vires an authority if it is beyond its powers; the converse term is “intra vires”.

1.1-12

The doctrine as applied to statutory corporations is stated in Lord Watson’s speech in *Baroness Wenlock v River Dee Co*¹:
“Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.”

Unlike a natural person who can in general do whatever they please so long as what they do is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are ultra vires. There must in all cases be statutory authority for what is done, and that authority must either be expressly given or reasonably inferred from the language of an Act of Parliament.

Footnotes

1 (1885) 10 App.Cas. 354 at 362.

1.1-13 Application of the doctrine generally

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Application of the doctrine generally

1.1-13

This rule, if rigidly applied to statutory corporations, would greatly handicap their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The courts have therefore held that a corporation may do not only those things for which there is express or implied authority, but also whatever is reasonably *incidental* to the doing of those things. Lord Selborne said in *Att-Gen v Great Eastern Railway Co*¹:

"It appears to me to be important that the doctrine of ultra vires ... should be maintained. But I agree ... that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires."

1.1-14

This common law rule is given statutory force in s.111 of the Local Government Act 1972.²

The words "incidental to" are not equivalent to the words "in connection with". They have a narrower meaning. This point emerged in *Amalgamated Society of Railway Servants v Osborne*, where Lord Macnaghten said³:

"The learned counsel for the appellants did not, as I understand their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the legislature. They said it was a power 'incidental', 'ancillary' or 'conducive'If these rather loose expressions are meant to cover something beyond what may be found in the language which the legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use."

These dicta were relied on in *Att-Gen v Crayford Urban District Council*.⁴

1.1-15

In the application of the doctrine there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language of the statute; and, thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose.

In the many cases which have come before the courts the question has usually centred on implied powers and incidental powers. It must be rare for an authority to perform an act for which there is no statutory authority at all but it has frequently happened that a council has extended and enlarged a service to a point where it is alleged that its statutory powers have been exceeded, and it has then been contended on behalf of the council that authority can reasonably be implied from the language of the statute as a whole. In other cases a council has engaged in some activity for which there is no clear authority in statute, but it has been argued for the council that this activity has been undertaken for the better carrying into effect of a statutory power or duty—the council has relied on the rule as to incidental powers.

1.1-16

Several of the more important cases relating to this topic are now given. The first, the *Ashbury Railway Carriage* case, is of particular significance, since it is from this case that the rule in its modern application may be said to stem; *Att-Gen v Fulham Corp* and *Att-Gen v Manchester Corp* provide example of activities held to be ultra vires and *Att-Gen v Smethwick Corp* of an intra vires activity:

Ashbury Railway Carriage Co v Riche.⁵ The company was incorporated under the Companies Act 1862 to make, sell or lend on hire all kinds of railway plant. The company entered into a contract for the construction of a railway. *Held*, that the act of

the company in entering into the contract was ultra vires. The Lord Chancellor said⁶: “Now ... if that is the condition upon which the corporation is established (his Lordship was referring to the procedure of incorporation under the Companies Act) it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of the vitality and power which by law is given to the incorporation, and it states, if it were necessary to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified.”

*Att-Gen v Fulham Corp.*⁷ The metropolitan borough of Fulham was a statutory body created under the **London Government Act 1899**. The corporation, in common with many other authorities, provided facilities for residents to wash their own clothes in separate troughs under powers clearly conferred by the **Baths and Washhouses Acts 1846** and **1878**. In 1920, the corporation introduced a new scheme under which residents brought their washing to the wash-house, leaving it there to be laundered by employees of the council. A collection and delivery service was provided at a small additional charge. An action for a declaration that the scheme was illegal was brought by the Attorney-General at the relation of a ratepayer. It was argued for the corporation that what had been done was incidental to the use of its statutory powers; that it was not material that the washing was undertaken by council servants and not by the customers. Held, that the scheme was ultra vires the corporation, for there was no authority express or implied to enable the corporation to wash clothes for others as distinct from providing facilities enabling persons to come to the wash-house to wash their clothes.

*Att-Gen v Manchester Corp.*⁸ The corporation had power conferred under a private Act to use its tramways “for the purpose of conveying and delivering animals goods minerals and parcels”. The corporation proposed to establish a general parcels delivery service within and beyond the area covered by the tramways system, not confined to parcels and goods carried on their tramways. An action was brought by the Attorney-General at the relation of a ratepayer to restrain the corporation. The corporation contended that its acts were authorised by statute or if not fully authorised thereby were properly incidental or ancillary to the business for which statutory powers were available. (The corporation also argued that it was a common law corporation and could therefore act without statutory power—it failed on this point for reasons which no longer have relevance.) Held, the corporation had statutory power to carry on the business of common carriers upon their tramways and as ancillary to that business to do all things necessary for the collection and delivery of parcels or goods carried on the tramways; but the corporation had no power to carry on a general parcels delivery service apart from their tramways.

*Att-Gen v Smethwick Corp*⁹ The corporation passed a resolution providing for the establishment of a printing, bookbinding and stationery works for the purpose of executing work required by them. An action was brought by the Attorney-General at the relation of a ratepayer claiming a declaration that the proposal was ultra vires. Held, that the formation of a department to do the printing, bookbinding and stationery work of the corporation was incidental to or consequential upon the carrying out of the corporation’s statutory duties and was not therefore ultra vires. The Master of the Rolls quoted with approval the passage from Lord Selborne’s judgment in *Att-Gen v Great Eastern Ry.*¹⁰

Footnotes

1 (1880) 5 App.Cas. 473 at 478. For an application of the principle of this case in respect of implication of a power to vary a petroleum licence granted by the Crown see *Dean v Secretary of State for Business, Energy and Industrial Strategy [2017] EWHC 1998 (Admin)*, paras [123]–[138]

2 See para.1.1-17, below.

3 [1910] A.C. 87 at 97.

4 [1962] Ch. 575.

5 (1875) L.R. 7 H.L. 653. The rule in this case was expressly applied to the London County Council, as a statutory corporation, in *Att-Gen v London County Council [1902] A.C. 165*.

6 At 670.

7 [1921] 1 Ch. 440.

8 [1906] 1 Ch. 643.

9 [1932] 1 Ch. 562.

10 See para.1.1-13. For further examples of ultra vires actions, see *R. v Manchester City Council Ex p. King (1991) 89 L.G.R. 696* (council not entitled to use power to charge reasonable fees for grant or renewal of a street trading licence or consent as a general revenue-raising provision); *R. v Ealing LBC Ex p. Lewis (1992) 24 H.L.R. 484* (council not entitled to charge the whole of the cost of its homeless persons unit, its housing advisory service and the salaries of wardens employed in its sheltered housing service to its housing revenue account as these items did not fall entirely within the description of the “management of houses and other property”); *Morgan Grenfell and Co Ltd v Sutton LBC (1996) 95 L.G.R. 574* (express power to guarantee loan to registered housing association left no scope to imply such a power in respect of an unregistered housing association; lack of evidence of intent to evade local authority funding controls irrelevant); cf. *City Centre Leisure (Holdings) v Lord Mayor and Citizens of the City of Westminster (unreported, April 6, 1995)* (undertaking that, on determination of a contract with an independent leisure centre management company, the council would take over responsibility for bank loan made to the company held to be intra vires; undertaking authorised by s.111 of the Local Government Act 1972, there being no requirement that a power to give an indemnity be authorised by express words); *Western Power Distribution Investments Ltd v Cardiff CC [2011] EWHC 300 (Admin)* (designation of certain land as a Local Nature Reserve under s.21 of the National Parks and Access to the Countryside Act 1949 held unlawful, on the ground that the land was held by the council under s.164 of the Public Health Act 1875 “for the purpose of being used as public walks and pleasure grounds;” s.164 was regarded as imposing a “statutory trust over the land in favour of the public” and, on the facts, the designation under the 1949 Act would give rise to a conflict).

1.1-17 Application of s.111 of the Local Government Act 1972

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Application of s.111 of the Local Government Act 1972

1.1-17

Section 111 provides as follows:

Section 111

”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 authority¹ shall have power to do anything (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.
- (2) For the purposes of this section, transacting the business of a parish or community meeting or any other parish or community business shall be treated as a function of the parish or community council.
- (3) A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively....”

It was stated in DoE Circular 121/72² that

”The [1972] Act includes a new provision (section 111) which puts beyond doubt that local authorities have power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions, even if they have no specific statutory power for that action. This proposition has long represented the law (see in particular *A.G. v Smethwick Corporation [1932] 1 Ch. 562*), but the section has been included for the avoidance of any doubt which might hamper local initiative.”

Key points in the interpretation and application of the section are as follows. First, the powers conferred by it must be ancillary to a function of a local authority conferred by some other provision. The term “function” was the subject of comment by Woolf L.J. in *Hazell v Hammersmith and Fulham LBC*³ as follows:

”What is a function for the purposes of the subsection is not expressly defined but in our view there can be little doubt that in this context *functions* refers to the multiplicity of specific statutory activities the council is expressly or impliedly under a duty to perform or has power to perform under the other provisions of the *Act of 1972* or other relevant legislation. The subsection does not of itself, independently of any other provision, authorise the performance of any activity. It only confers, as the sidenote to the section indicates, a subsidiary power. A subsidiary power which authorises an activity where some other statutory provision has vested a specific function or functions in the council and the performance of the activity will assist in some way in the discharge of that function or those functions.”

This was approved by the Court of Appeal and the House of Lords.⁴ The function in question must of course itself be intra vires: the test is not whether it is reasonable to have done what in fact was done.⁵ To rely on s.111(1), it is not necessary to

link the claimed ancillary power to another expressly conferred *power*, it is sufficient to link it to a *function* of the authority in question.⁶ It is, however, unclear whether the function must be expressly conferred by statute or can be *impliedly* conferred. The broader view, that s.111 can extend to support acts which an authority is impliedly authorised to perform, is supported by the passage just cited from Woolf L.J. in *Hazell's* case, and by Nourse L.J. in *R. v Eden DC Ex p. Moffatt*⁷ and Watkins L.J. in the Divisional Court in *Allsop v North Tyneside MBC*.⁸ However, in *R. v Richmond Upon Thames LBC Ex p. McCarthy & Stone (Developments) Ltd*⁹ the House of Lords held that the giving of pre-planning application advice facilitated and was conducive and incidental to the function of determining planning applications and was not itself a “function” of the council; charging could not be justified by reference to s.111 as that would be something “incidental to the incidental”. It was not argued that the giving of pre-application advice was an “implied function” of the local authority, and so the point as to whether there can be such functions must remain open. It is submitted that the broad approach of Nourse L.J. in *Ex p. Moffatt* is to be preferred. The enactment of s.111 does not appear to have been intended to narrow the powers of local authorities¹⁰ and acceptance of an argument that powers can only be conferred expressly or by reference to s.111 would have that effect.¹¹ The decision in *Ex p. McCarthy & Stone (Developments) Ltd*¹² can fully be justified by reference to the separate principle that a power for a public authority to charge for its services must be conferred expressly or by necessary implication, the courts being very reluctant to find an *implied* power to charge.¹³ It remains the case that where Parliament has made detailed provision as to how certain statutory powers are to be carried out, there is no scope for implying the existence of wholly additional powers outside the statutory code by reference to s.111.¹⁴ The existence of powers which are available by implication other than by reference to s.111(1) was recognised by the Court of Appeal in *R. (on the application of A) v Hertfordshire CC*.¹⁵

Secondly, the powers are conferred subject to any restriction or requirement imposed by the 1972 Act or any other enactment.¹⁶

1.1-18

Thirdly, it is unclear whether the common law doctrine of incidental powers as expressed in *Att-Gen v Great Eastern Railway Co*¹⁷ has been superseded by the enactment of s.111(1). In the Court of Appeal in *Ex p. McCarthy & Stone (Developments) Ltd*, Slade L.J. stated¹⁸ that the court was “disposed to think” that it was not open to a local authority to rely on the common law without reference to s.111(1). However, it has been suggested that “the common law rule is arguably wider … as it permits activities which are ‘consequential upon’ other activities and which may not be reflected in ‘calculated to facilitate, conducive or incidental to’.”¹⁹

1.1-19

The following cases illustrate the limits of s.111:

R. v Greater London Council and Another Exp. Westminster City Council.²⁰ It was held that the maintenance of good staff relations was a proper function of a local authority and a decision to release staff for that purpose was within s.111, subject to the *Wednesbury* test of reasonableness.²¹ But if the object, or a major object, of the decision was to conduct a political campaign in opposition to government policy that was an irrelevant consideration and the decision would be invalid. On that basis a decision by the Inner London Education Authority to release one member of staff to a joint committee or body of trade unions made in the interests of good industrial relations was valid but a decision of the GLC to release seven members of staff with pay to the same body in support of the GLC’s campaign against government policy was invalid.

*Hazell v Hammersmith and Fulham LBC*²² Between 1987 and 1989, the council, a London Borough incorporated by royal charter under s.1(2) of the London Government Act 1963, conducted substantial, speculative financial transactions (interest rate “swaps”, “swap options”, “caps”, “floors” and “collars”, forward rate agreements and gilt and cash options). An interest rate swap is usually an arrangement by which a borrower at, say, fixed interest contracts with a third party to pay or receive the difference between his interest liability on that basis and what it would have been at variable interest—or vice versa for a borrower at variable interest. The other transactions mentioned are variations on this theme. The transactions were entered into in order to make a profit, but profits were dependent upon interest rates falling: in fact, interest rates increased, and, if the transactions were enforceable, they would result in a loss in excess of £100m.

Between December 1983 and March 1987 only a few transactions were entered into, but from April 1987 there was a substantial increase. In July 1988, the Audit Commission expressed the view, based on counsel’s opinion, that many of the transactions appeared to be ultra vires. From August 1988 to February 23, 1989, an “interim strategy” was conducted whereby no new transactions were undertaken but existing positions were managed in order to reduce the extent of the council’s exposure to loss. On February 22, 1989, the council was advised that the transactions were unlawful, and only seven transactions were conducted thereafter, consequent on other parties exercising options. The transactions were conducted through a capital market fund.

The auditor applied under [s.19 of the Local Government Finance Act 1982](#) (now the [Audit Commission Act 1998 s.17](#)) for a declaration that the items of account appearing in the capital market fund for 1987–89 were contrary to law, and for an order for rectification of the accounts. The council did not dispute the application, but several of the banks involved in the transactions were joined as respondents. The Divisional Court allowed the application, holding:

(i)The council could not rely on its royal charter as giving it the capacity of a natural person to enter into contracts, as was the case with common law corporations, as this was not the intention of the [London Government Act 1963](#). Accordingly, it could only exercise such powers as were conferred expressly or impliedly by statute.

(ii)There was no express statutory power that authorised the transactions; in particular, they did not fall within [Sch.13 to the Local Government Act 1972](#).

(iii)The transactions were not authorised by [s.111\(1\) of the 1972 Act](#) (power to do anything calculated to facilitate, or conducive or incidental to, the discharge of any of the council's functions). They did not assist the council to borrow, although they might have been capable of assisting the council to alleviate the consequences of borrowing (i.e. the obligation to pay interest); accordingly, they did not facilitate the management of a function itself, but only the consequence of a function. Moreover, express provision was made in [Sch.13](#) for the raising and investment of money.

Although not strictly necessary for the judgment, the court expressed views on the other issues argued.

(iv)The undertaking of the transactions was outside the scope of the powers delegated to officers in standing orders or otherwise.

(v)The “capital market fund” was not a fund authorised by Sch.13 para.16 to the 1972 Act and had never been validly established.

(vi)The conduct of the dealings between April 1987 and August 1989 was unreasonable in the [Wednesbury](#) sense: no legal advice had been obtained and the officers engaged in the activity were not equipped by training or experience to operate within a highly technical, sophisticated and competitive market.

(vii)The decision to implement, and the actual implementation of, the interim strategy were not [Wednesbury](#) unreasonable. During the period of the interim strategy the activities were intended to minimise the risks to which the council might be exposed; the fact that the legality of the earlier transactions was in dispute did not negate the fact that it was prudent management to require that risk to be reduced if the transactions were enforceable; if (contrary to the holding in (iii) above) interest risk management was capable of falling within [s.111](#), each transaction would have to be examined on its own facts to decide whether it constituted interest risk management.

(viii)A declaration under [s.19 of the 1982 Act](#) concerned only whether an item of expenditure was contrary to law. It was not concerned with the enforceability of rights as between the council and third parties. The court left open the question whether, although a contract was contrary to law as a matter of public law, it might nevertheless not be void under private law, but capable of giving rise to rights enforceable by third parties as long as they did not know and ought not to have known of the facts that made it contrary to law.

The Court of Appeal allowed an appeal (in part): The court held:

(i)that although a borough incorporated by charter had the same capacity as a natural person to enter contracts, it was the council and not the corporation which was the “local authority” for the purposes of the [1972 Act](#). The general rate fund kept by the council under [s.148 of the 1972 Act](#) was applicable only for the purposes of meeting the council's liabilities under the [1972 Act](#) and other legislation. Accordingly, the council's ability to use its funds to defray obligations under the instruments in question depended on the existence of a statutory power, express or implied, authorising it to enter into those transactions;

(ii)that interest rate risk management was to be regarded as incidental to or consequential upon a local authority's powers of borrowing and investment, and its duty to take reasonable care to manage its borrowings and investments prudently in the best interests of the ratepayers;

(iii)that the detailed code in [Sch.13](#) and other statutory provisions regarding borrowing were not inconsistent with local authorities being able, in appropriate circumstances, to enter into swap transactions, with reference to particular debts, as part of interest rate risk management;

(iv)that, on the other hand, authorities were not empowered to enter into such transactions by way of carrying on a trade or business;

(v)that all the categories of swap transactions were capable of being lawfully entered into;

(vi)that all those transactions up to July 1988 were tainted with the improper purposes of trading, but those thereafter were not. After July 1988, the authority was taking defensive steps designed to protect its, and the ratepayers', financial interests;

(vii)that the authority's resolution of February 1988 to authorise transactions could not ratify what had gone before, and

was irrational;

(viii)that no capital markets fund was validly established by the council;

(ix)the court also left open the question whether any outstanding contract was enforceable.

The House of Lords restored the decision of the Divisional Court, holding:

(i)the word “functions” in [s.111](#) embraces all the powers and duties of a local authority;

(ii)the swap transactions were not incidental to the function of borrowing as they involved speculation in future interest trends with the object of making a profit;

(iii)[Schedule 13](#) established a comprehensive code which defined and limited the powers of a local authority with regard to borrowing; it was inconsistent with any incidental power to enter swap transactions;

(iv)if swap transactions were incidental to the function of borrowing, they could only be entered into by the authority, and not a committee or officer, by virtue of [s.101\(6\) of the 1972 Act](#); this restriction could not be avoided by arguing that the transactions were incidental to debt management as distinct from borrowing, as “debt management” was not itself a function.

(v)as local authorities had no power to enter into such transactions, the “interim strategy” was as unlawful as the earlier action.²³

*R. v Richmond Upon Thames LBC Ex p. McCarthy & Stone (Developments) Ltd.*²⁴ At first instance, Popplewell J.²⁵ held that [s.111\(1\)](#) gave a local authority power to raise money by charging an individual company for pre-planning application discussions. The words in brackets in subs.(1) were inclusive and not exclusive. The charges were calculated to facilitate, or conducive or incidental to the discharge of the authority’s functions. The wording of subs.(3) made it clear that the raising of money by rate, precept or borrowing was within the scope of subs.(1). The restrictions in subs.(3) that raising money had to be in accordance with enactments relating to those matters applied only to the methods of raising money specified, and did not restrict the power to raise money by charges. This was affirmed by the Court of Appeal but reversed by the House of Lords. The House of Lords held that [s.111\(1\)](#) could not be interpreted as authorising a local authority to charge for the performance of every function and that, in any event, a power to charge had to be authorised expressly or by necessary implication (*Att-Gen v Wilts United Dairies Ltd*²⁶). Furthermore, the giving of pre-application advice was not itself a function of the council, although it was incidental to the discharge of the council’s planning functions; that charging for such advice was accordingly “incidental to the incidental”; and that this was too remote to be permitted by [s.111\(1\)](#). The House rejected the council’s argument that a distinction was to be drawn between functions which a council has a *duty* to perform (in respect of which it was accepted that no charge could be made) and those which it had a *power* to perform, where a charge could be made. On the other hand, it also rejected the developers’ argument that charging under [s.111\(1\)](#) was prohibited by [s.111\(3\)](#), which provides that a local authority “shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.” The argument “would require the addition of the words ‘or otherwise’ after the word ‘borrowing’, to get off the ground and, even then, in the context of ‘rates, precepts or borrowing,’ to equate charging for a service with the raising of money appears to me to demand a very forced interpretation of language.”²⁷

*Allsop v North Tyneside MBC.*²⁸ The council’s enhanced voluntary severance scheme provided for payments substantially in excess of those for which the council was liable under the [Employment Protection \(Consolidation\) Act 1978](#), or specifically empowered to make under the [Local Government Superannuation Regulations 1986](#),²⁹ the [Local Government \(Compensation for Premature Retirement\) Regulations 1982](#)³⁰ and the [Local Government \(Compensation for Redundancy and Premature Retirement\) Regulations 1984](#).³¹ The council claimed that the power to make enhanced payments was incidental to the discharge of its functions within [s.111\(1\)](#) and/or [s.112 of the Local Government Act 1972](#), i.e. the functions of making and terminating contracts of employment, the delivery of services and the maintenance of good industrial relations. The Divisional Court³² held that these payments were unlawful, granting the auditor a declaration to that effect. The provisions of [s.111\(1\)](#) were expressly made “subject to the provisions of... any other enactment,” and this limitation included a reference to the delegated legislation; the council’s powers were accordingly restricted by reference to the regulations. Moreover, the scheme was no more than a device to promote the council’s policy of avoiding compulsory redundancies. The court ordered rectification of the accounts.

An appeal to the Court of Appeal was dismissed. The making of redundancy payments was not expressly authorised by [s.112](#), and power to do so had to be found, if it was to be found at all, in [s.111](#); this was then subject to the restrictions found in other enactments.

*Credit Suisse v Allerdale BC.*³³ The bank claimed payment under a guarantee given by the council for sums borrowed by a

company established by the council to carry out recreational development (the provision of a leisure pool to be paid for by a time share development) which the council itself was unable to carry out because of government limits on spending and borrowing. The company was now in liquidation. Colman J. held that the guarantee was ultra vires and void. Local authorities had implied powers to borrow in order to carry out their statutory functions, such as the provision of recreational facilities, but not to guarantee borrowing by distinct legal persons in order to acquire the use of borrowed money without borrowing it themselves. Even if there was such power, the decision to guarantee the loan was unlawful as the reason for it, to evade the spending and borrowing limits, was an irrelevant consideration.

An appeal to the Court of Appeal was dismissed. It was held that the development was not authorised by either (1) [s.19 of the Local Government \(Miscellaneous Provisions\) Act 1976](#) (power to provide recreational facilities, including power to provide buildings, equipment, supplies and assistance of any kind), or (2) by [s.111 of the Local Government Act 1972](#). As to (1), providing time share accommodation was not the provision of a recreational activity, and the provision of “assistance of any kind” covered assistance to users of the facilities and not to those who provided them. As to [s.111](#), as well as identifying the underlying statutory functions (here, [s.19\(1\) of the 1976 Act](#) and [s.2\(1\) of the Local Authorities \(Land\) Act 1963](#)) it was necessary to examine the context in which supposed implied powers were to be exercised. This included the basic principle that local authority finances were to be conducted on an annual basis; that the scheme involved incurring substantial financial obligations which could not be met out of the council’s ordinary income; that powers to spend and borrow were subject to statutory control, [Sch.13 to the 1972 Act](#) containing a comprehensive code defining and limiting borrowing powers. The implied powers in [s.111](#) did not provide an escape route from statutory controls.

Credit Suisse v Waltham Forest LBC.³⁴ The local authority gave a guarantee and indemnity for repayments of a loan made for the purpose of establishing a company to acquire properties which were then leased to the authority to provide housing for its homeless in discharge of its statutory duty under [s.65 of the Housing Act 1985](#). The authority subsequently argued that the guarantee and indemnity were ultra vires. Gatehouse J., held that they were authorised by the [Local Government Act 1972](#) [s.111](#), as calculated to facilitate, and conducive or incidental to the discharge of the authority’s functions. An appeal to the Court of Appeal was allowed. [Section 102 of the Local Government Act 1972](#) concerning arrangements for the discharge of functions did not entitle local authorities to discharge any of their functions by means of a partly-owned company. Neither that power nor power to give assistance in the form of a guarantee or indemnity to such a company could be implied by reference to [s.111 of the 1972 Act](#). Where Parliament has made detailed provisions as to how certain statutory functions are to be carried out there is no scope for implying the existence of wholly additional powers which lie outside the statutory code.

R. v Westminster City Council Ex p. Legg.³⁵ Harrison J. held that [s.111](#) authorised the grant of an indemnity to members or officers in respect of their legal costs incurred in responding to an objection made to the auditor. It was important for the proper discharge of the functions of a local authority that those seeking public office, whether by election as a member or by appointment as an officer, should not be deterred from doing so by concern over personal liability. Furthermore, such an indemnity could be retrospective in the sense that it could apply to future expenditure arising out of events occurring before the date of the indemnity. The council had been entitled to conclude, within the terms of the indemnity it had given, that the applicants had not been “culpable” with regards to the matters on which the auditor had reported (which had led to the decision of the House of Lords in *Porter v Magill*³⁶).

R. (on the application of Comninos) v Bedford BC.³⁷ Sullivan J. held that [s.111](#) authorised the council to provide an indemnity for the costs of libel proceedings brought by council officers in respect of statements in a local newspaper. These alleged incompetence in the performance of their duties in respect of the procedure following on from the discovery that some ballot papers in a local election had not been counted.³⁸ The indemnity could be justified as incidental to the engagement of officers, the preservation of good relations and maintaining an efficient administration. His Lordship rejected an argument that an indemnity could only be given in respect of proceedings that were “defensive in nature”.³⁹ None of the authorities supported such a distinction and there was no reason in principle why such a distinction should be drawn; it might well be arbitrary to attempt to distinguish between a “defensive” action, which might include a counterclaim, and an “offensive” action, which might well seek to remedy damage (including damage to reputation) which has occurred and will continue if not prevented. While the more “defensive” an action, the easier it might be for the council to resist arguments that its decision was an abuse of discretion, it was not now claimed that the council’s decision was open to challenge on that ground. Any attempt by a council to use this route as a means of suing for damage to its own reputation, barred by the decision of the House of Lords in *Derbyshire CC v Times Newspapers Ltd*,⁴⁰ would, however, be unlawful as it would have acted for an improper purpose and/or have taken irrelevant considerations into account.

*R. (on the application of Risk Management Partners Ltd) v Brent London Borough Council; Risk Management Partners Ltd v Brent London Borough Council and others.*⁴¹ Stanley Burnton J. held that s.111 did not enable Brent LBC to enter mutual insurance arrangements with other London authorities that involved the establishment of a new mutual insurance company, The London Authorities Mutual Ltd (“LAML”). While the council could obtain insurance cover, to do so by this mechanism was “incidental to the incidental” and so ultra vires. The Court of Appeal⁴² dismissed an appeal. Pill L.J.⁴³ held that while obtaining insurance for the authority’s substantive functions fell easily within s.111, the proposed venture involved setting up a company for the purpose of mutual insurance, including the provision of insurance for other local authorities. This could not be regarded as “incidental”. Entering a contract under [s.1 of the Local Government \(Contracts\) Act 1997](#) was not discharging a function within the meaning of s.111. Moore-Bick L.J.⁴⁴ came to the same conclusion. The *Credit Suisse* and *Morgan Grenfell* cases were not to be distinguished on the basis that the schemes involved an unlawful attempt to circumvent applicable statutory provisions.⁴⁵ The arrangements were not saved by reliance on the benefit of improved risk management.⁴⁶ Hughes L.J. agreed with both judgments.

The effect of this decision on its own facts as a matter of vires has been reversed by [ss.34 and 35 of the Local Democracy, Economic Development and Construction Act 2009](#). A further appeal was taken to the Supreme Court,⁴⁷ but not on this point in view of these provisions.

*R. (on the application of Millgate Developments Ltd) v Wokingham BC.*⁴⁸ Where there is a credit after moneys have been applied in accordance with the terms of an undertaking under [s.106\(1\) of the Town and Country Planning Act 1990](#), a refund may be made by virtue of [s.111\(1\) of the 1972 Act](#).

*Charles Terence Estates Ltd v Cornwall Council.*⁴⁹ Cranston J. held that leases granted by CTE to the council’s predecessors (two district councils, Penwith DC and Restormel BC) of properties then used to house people in need were void on the ground that the predecessor councils had in agreeing the rents payable to CTE failed to comply with their fiduciary duty. This duty required the councils to have regard to market rents, which had not been done. In addition, a loan of £350,000 to CTE by Penwith was unlawful as it fell outside the powers conferred by the *Regulatory Reform (Housing Assistance) (England and Wales) Order 2002*⁵⁰ arts 3 and 4. The consequences were that the councils had held the properties as tenants at will and had a *prima facie* claim for the restitution of the rents paid and the loan. However, that claim was defeated by CTE’s change of position. That left the loan to be repaid over time in accordance with its terms and conditions. Arguments that the leases were void as a matter of private law for common mistake and as a matter of public law for non-compliance with provision concerning housing revenue accounts were rejected.

However, this decision was reversed by the Court of Appeal.⁵¹ There was no element of “private profit, conflict of interest or off piste political judgment”. There were difficulties in identifying the particular market that would need to be considered; there was no evidence of “eccentric principles” or “flagrant violation” of the kind found in *Roberts v Hopwood*⁵²; it would rarely be appropriate to read into a statutory power a limitation defined by something such as a “reasonable price”.⁵³

*R (on the application of National Secular Society) v Bideford Town Council.*⁵⁴ It was the practice of Bideford Town Council to hold public prayers at full meetings of the council. This practice was challenged by the National Secular Society and Mr Clive Bone, a former councillor. The claimants raised grounds of challenge to the practice under the *Equality Act 2006* and the replacement public sector equality duty under the *Equality Act 2010*, and Arts 9 and 14 of the ECHR, and also argued that it was outside the powers conferred by [s.111 of the 1972 Act](#). The council’s position was that no councillor was made to attend that part of the meeting and the practice was justified as a fitting start to the council’s deliberations, one to which the members had democratically agreed. The applicants had no objection to the holding of prayers before commencement of the meeting. Ouseley J. held that the practice did require statutory authority but was not authorised by s.111. Even if an act could fall into a category outside s.111 but for which statutory authority was not otherwise required, saying prayers would not be one of them:

“it can be controversial, the importance attached by the Council to saying prayers as part of the meeting means that it cannot be treated as a trivial matter.”

⁵⁵

The majority votes to retain public prayers could “not give [the council] power to do what it has no power to do”.⁵⁶

"The language also requires an objective standard or test: it is not a question of whether the Council reasonably considers that a particular act could facilitate or be conducive to or incidental to the discharge of its functions. 'Calculated' does not mean 'thought likely by the Councillors', but requires an objective judgment of what is likely to facilitate the discharge of functions."

⁵⁷

While the reasoned view of elected councillors would often be very persuasive it was not so here. A key problem for the council's position was that it had made the prayers part of its formal business, and yet said that councillors summoned to the meeting were not obliged to be present. In effect the prayers were treated as being outside the scope of the meeting.

"I do not see that it can be calculated to facilitate the transaction of business or any other function if, for it to take place at all, it is necessary to give Councillors the choice not to attend."

⁵⁸

Further objections to the practice were, first, that it was "not for a court to rule on the likelihood of divine, and presumptively beneficial guidance being available or the effectiveness of Christian public prayer in obtaining it."⁵⁹ Secondly, the 1972 Act should not be interpreted as permitting the religious views of one group of councillors, however sincere or large in number, to exclude or, even to a modest extent, to impose burdens on or even to mark out those who do not share their views and do not wish to participate. They were all equally elected councillors.⁶⁰ (It is submitted that it is difficult to see how the latter consideration can apply if there is a unanimous vote). His Lordship went on to hold that the other grounds were not made out.

It is submitted, with respect, that the reasoning on the scope of s.111 is unsatisfactory, and constitutes yet another example of a judicial instinct to interpret the provision narrowly rather than broadly. The sole question on the application of s.111 is whether prayers objectively were incidental or conducive to the transaction of business. If there was a unanimous vote in favour then most of the particular objections relied on by the judge would fall away. His Lordship's point that it was not open to a court to rule on the connection between prayers and the better transaction of business is hard to follow and is in any event contradicted by his ultimate ruling that there was no such connection. (Given that the onus would lie on the claimant to establish their case, an argument that the court could not rule on the key point, in effect a ruling that the matter was non-justiciable, should have led to dismissal of the claim.)

On the facts, of course, there was not unanimity among the councillors, and the judge rightly identified concerns about the practical exclusion of members who felt uncomfortable from part of the council's business. However, the proper vehicle for a challenge on this basis would have been to the rationality of the decision not vires.

In response to this decision, the government advanced the commencement of the provisions of the Localism Act 2011 on the general power of competence, which it regarded as covering the freedom to pray.⁶¹ It is submitted that while that will solve the problem of vires it will not preclude a challenge based on irrationality or other abuse of discretion grounds.

*Champion v North Norfolk DC.*⁶² It was held that the council's development control committee had power to decide whether it was necessary to obtain an Environment Impact Assessment or a Habitats Appropriate Assessment, even though these functions were not specified in Sch.1 to the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (SI 2000/2853). The committee had express power under Sch.1 to determine applications for planning permission and the decisions in question here were "conducive or incidental to" the grant of planning permission, by virtue of the Local Government Act 2000 s.48(4).

Footnotes

¹ This term includes the Common Council: s.111(4). The section also applies to joint authorities. Local Government Act 1972 s.146A(1)(a), inserted by the Local Government Act 1985 Sch. 14, para. 16 (as amended); and to residuary bodies: 1985 Act Sch. 13 para. 12(a). It does not apply to a metropolitan county fire and rescue authority, the London

Fire Commissioner; an integrated transport authority; or an economic prosperity board or combined authority; but see respectively the [Fire and Rescue Services Act 2004 s.5A](#), the [Local Transport Act 2008 s.102B](#) and the [Local Democracy, Economic Development and Construction Act 2009 s.113A](#); 1972 Act s.146 (1ZC–1ZE), inserted by the [Localism Act 2011 ss.9, 14](#).

2 para.16.

3 [\[1990\] 2 Q.B. 697, 722–723](#).

4 [\[1990\] 2 Q.B. 697, 785; \[1992\] 2 A.C. 1, 29](#). The suggestion by Parker L.J. in [Attsop v North Tyneside MBC \(1992\) 90 L.G.R. 462, 486](#), that the term “functions” is “plainly referring to the functions set out in Part IX of the Act” is inconsistent with Woolf L.J.’s statement and cannot be supported. Most of the functions of local authorities are conferred by Acts other than the [1972 Act](#) and it is inconceivable that Parliament intended [s.111](#) to have such a narrow application; in any event, Pt IX dealt with the transfer of functions to the authorities established by the [1972 Act](#).

5 Watkins L.J. in [Allsop v North Tyneside MBC \(1992\) 90 L.G.R. 462, 472 DC](#), citing Lord Templeman in [Hazell v Hammersmith LBC \[1992\] 2 A.C. 1, 31](#).

6 [R. v Director of Public Prosecutions Ex p. Duckenfield \[2000\] 1 W.L.R. 55](#) (police authority had power under s.111(1) to fund the legal representation of officers in judicial review proceedings against the D.P.P. and in criminal proceedings against them, [s.111\(1\)](#) here supporting the general function of a police authority under the [Police Act 1996 s.6\(1\)](#), to “secure the maintenance of an efficient and effective police force for its area”).

7 [The Times, November 24, 1988, CA](#).

8 [\(1992\) 90 L.G.R. 462, 480–481](#). Thus, the Divisional Court held that the functions of the local authority included the maintenance of good staff relationships to avoid industrial strife, the provision of efficient services and making and terminating contracts of employment (although the enhanced voluntary severance scheme that was in issue was ultra vires as it was prohibited by other enactments). See further below, para.1.1-19. In the Court of Appeal, Parker L.J. expressed a preference for a narrower approach: see p.1211, fn. 4, above.

9 [\[1992\] 2 A.C. 48](#). See below, para.1.1-19.

10 See discussion of the relevant parliamentary materials by C. Crawford in C. Crawford and C. Grace (eds.), “Conducive or Incidental To?” Local Authority Discretionary Powers in the Modern Era (University of Birmingham, 1992), pp.5–6.

11 This view has been expressed in advice by the Audit Commission: see, e.g. Audit Commission Technical Release 28/91, Further Guidance on Section 111 of the Local Government Act 1972: Charging Powers, Meaning of “Functions”. One ground is that there is no discernible test to identify an implied function. The response is to question whether such a test is necessary: given that there is no “benchmark to determine what is a function anyway” the matter should be left to judicial policy: J. Bennett and S. Cirell, Municipal Trading (1992), pp.154–155.

12 [\[1992\] 2 A.C. 48](#).

13 [Att-Gen v Wilts United Dairies Ltd \(1921\) 37 T.L.R. 884 CA](#), affirmed (1922) 91 L.J.K.B. 897 HL; cited by Lord Lowry in [Ex p. McCarthy & Stone \(Developments\) Ltd \[1992\] 2 A.C. 48, 67–68, 74; R. v Manchester City Council Ex p. Stennett \[2002\] UKHL 34; \[2001\] Q.B. 370](#) (no power to charge in respect of after-care services provided to former mental patients pursuant to the duty imposed by the [Mental Health Act 1983 s.117](#)).

14 [Credit Suisse v Waltham Forest BC \[1997\] Q.B. 362; Credit Suisse v Allerdale BC \[1997\] Q.B. 302](#): see para.1.1-19. The point would apply even more strongly to any broader doctrine of implied powers.

- 15 [2001] EWHC Admin. 211 (power of social services department to communicate to education department and school governors the conclusion, after enquiries under [s.47 of the Children Act 1989](#), that a head teacher presents a risk of significant harm to children available by implication from the authorities' responsibilities for the welfare and protection of children).
- 16 This includes delegated legislation: [Allsop v North Tyneside MBC \(1992\) 90 L.G.R. 462](#), below, para.1.1-19.
- 17 (1880) 5 App. Cas. 473, above, para.1.1-13.
- 18 [1990] 2 All E.R. 852, 858.
- 19 J. Bennett and S. Cirell, Municipal Trading (1992), p.61.
- 20 *The Times*, December 27, 1984. Other cases on [s.111](#) include [R. v Eden DC Ex p. Moffat , The Times, November 24, 1988](#) (council entitled to establish a working party of councillors and officials to consider the council's structure and efficiency); [R. v Wirral MBC Ex p. Milstead \(1989\) 87 L.G.R. 611](#) ("factoring" agreement to sell for a current payment the right to receive the proceeds of future sales of land unlawful; disposal of the proceeds of sale could not be said to be incidental to the sale of the property); [City Centre Leisure \(Holdings\) v Lord Mayor and Citizens of the City of Westminster \(unreported, April 6, 1995\)](#), para.1-24, above; [R. v Brentwood BC Ex p. Peck , The Times, December 18, 1997](#), leave to appeal refused by [CA, \[1998\] E.M.L.R. 697](#) (incidental power to give to the media video recordings made pursuant to its power to provide CCTV systems under the [Criminal Justice and Public Order Act 1994](#), s.163); [Islington LBC v Camp \(1999\) \[2004\] B.L.G.R. 48](#) ([s.111\(1\)](#) authorises secondment of officer to joint committee); [Newbold v Leicester City Council \(1999\) 2 L.G.L.R. 303](#) ([s.111\(1\)](#) held to authorise contractual scheme to buy out additional payments to street cleansing drivers for emergency work by the payment of lump sums; [Allsop](#) (see below) distinguished as there the redundancy payments were higher than the local authority had been specifically empowered to make); [R. v Liverpool City Council Ex p. Baby Products Association \(2000\) 2 L.G.L.R. 689](#) ([s.111\(1\)](#) could not be used to circumvent clear statutory procedures for dealing with unsafe consumer products); [R. \(on the application of Lashley\) v Broadland DC \(2001\) 3 L.G.L.R. 474](#) (consideration by standards committee, set up prior to the [Local Government Act 2000](#), of the conduct of a councillor facilitated or was conducive or incidental to the council's functions of maintaining its administration and internal workings in a state of efficiency and maintaining and furthering the welfare of its employees) (see para.4-74); [R. v Liverpool City Council Exp. Barry \[2001\] EWCA Civ 384, \(2001\) 3 L.G.L.R. 832](#) (registration scheme for doormen at places licensed for public entertainment under the [Local Government \(Miscellaneous Provisions\) Act 1982](#) justified by [s.111\(1\)](#) as furthering the Act's purpose of ensuring activities at such places were safe and lawful; £50 fee ultra vires); [Grubb v Pricewaterhouse Coopers \(2000\) 3 L.G.L.R. 244](#) (payment to third parties to cover councillors' accommodation and subsistence at conferences and annual meetings in excess of prescribed rates under the 1972 Act ss.174, 175, lawful under [s.111\(1\)](#); ss.174 and 175 applied only to payments direct to councillors); [Akrumah v Hackney LBC \[2005\] UKHL 17](#) (power to regulate car parking on council estate inherent or otherwise conducive and incidental to local authority's power to manage, regulate and control its housing under [s.21\(1\) of the Housing Act 1985](#)); [Tower Hamlets LBC v Sherwood \[2002\] EWCA Civ 229](#) (grant of a tenancy over the surface of a highway cannot be regarded as calculated to facilitate, or as conducive or incidental to, the discharge of a local authority's functions as highway authority); [R. \(on the application of A\) v East Sussex CC \(No.1\) \[2002\] EWHC 2771](#), (provision by the council of care staff to support two severely disabled sisters by means of payments to a user independent trust (a company limited by guarantee, whose board members would comprise the sisters' mother and stepbrother, their advocate, and representatives of the local disability association and the council) authorised by [s.111](#); it was also held to be authorised by [s.30 of the National Assistance Act 1948](#) and [s.2 of the Local Government Act 2000](#)); [R. \(on the application of Comninos\) v Bedford BC \[2003\] EWHC 121 \(Admin\)](#) (para.1-36 below); [Re A Local Authority v \(Inquiry: Restraint on Publication\) \[2003\] EWHC 2746 \(Fam\), \[2004\] Fam. 96](#) ([ss.111](#) and 137 held to authorise the holding by the local authority of an inquiry into the management of a home for children and vulnerable adults); [R \(on the application of A\) v Oxfordshire CC \[2016\] EWHC 2419 \(Admin\)](#), per Langstaff J. at para. [8] (adoption by council of Medium Term Financial Plan, setting out an indicative future budget, within powers conferred by the 1972 Act [s.111](#) and the general power of competence under the [Localism Act 2011](#) s.1); [Hussain v Sandwell MBC \[2017\] EWHC 1641 \(Admin\)](#) ("pre-formal investigation" into allegations of misconduct against councillor authorised by the 1972 Act [s.111](#), in conjunction with the 1972 Act ss.123, 151, and the [Localism Act](#) ss.1, 27); [Beg v Luton BC \[2017\] EWHC 3435 \(Admin\)](#), at

para.[22] (s.111 authorises the signing of an enforcement notice by a subordinate, being “an administrative act which did not require to be the subject of a delegation” under the 1972 Act s.101; s.111 also underpinned the decision in *Provident Mutual* (see para.1.4-10)). *Qualter v Crown Court at Preston [2019] EWHC 2563 (Admin)* (power to investigate a criminal offence may be derived from the *Localism Act 2011* s.1 and the *Local Government Act 1972* s.111 or delegated by another local authority under the 1972 Act s.101); *R. (on the application of Williams) v Caerphilly CBC [2019] EWHC 1618 (Admin)* (adoption of a Sport and Active Recreation Strategy referable to s.111 rather than s.19 of the *Local Government (Miscellaneous Provisions) Act 1976* (point left open on appeal: [2020] EWCA Civ 296, see para.[48], the parties proceeding on the basis that the function being exercised was the power under s.19 of the 1976 Act to provide “such recreational facilities as [the authority] thinks fit”)).

21 As to the *Wednesbury* test, see para.1-147 et seq.

22 [1990] 2 Q.B. 697 DC; CA; [1992] 2 A.C. 1 HL.

23 There has been considerable litigation on other matters arising from these transactions. See *Statement: Interest Rate Swaps Litigation*, *The Times*, May 15, 1992; *Statement: Interest Rate Swap Litigation (No.2)*, *The Times*, July 16, 1992; *Morgan Grenfell & Co Ltd v Welwyn Hatfield District Council; Islington LBC (Third Party) [1995] 1 All E.R. 1* (swap deals not wagering contracts); *Kleinwort Benson Ltd v South Tyneside MBC [1994] 4 All E.R. 972*; *South Tyneside MBC v Svenska International plc [1995] 1 All E.R. 545* (no “change of position” by the bank to prevent the council recovering the full sum paid to the bank under a void agreement); *Kleinwort Benson Ltd v Birmingham City Council [1997] Q.B. 380* (no defence to claim for restitution that bank had or might have hedged the contract so as to suffer no loss); *Westdeutsche Landesbank Girozentrale v Islington BC [1996] A.C. 669* (bank entitled to recover simple and not compound interest from the date of accrual of the common law cause of action for money had and received); *Guinness Mahon & Co Ltd v Kensington and Chelsea RLBC [1998] 2 All E.R. 272* (fact that ultra vires swap contract had been fully performed no bar to action for recovery of net payment made by bank); *Kleinwort Benson Ltd v Lincoln City Council [1999] 2 A.C. 349* (rule that no action lay for recovery of money paid under a mistake of law no longer part of English law; no defence that payment was made under a settled understanding of the law or that the defendant honestly believed that he was entitled to retain the money; no principle that money paid under a void contract was not recoverable because the contract had been fully performed).

24 [1992] 2 A.C. 48; cf. *R. v Greater Manchester Police Authority Ex p. Century Motors (Farnworth) Ltd, The Times, May 31, 1996* (power to charge in respect of vehicle recovery scheme arose by necessary implication); *R. v Liverpool City Council Ex p. Barry [2001] EWCA Civ 384, (2001) 3 L.G.L.R. 40* (no power to charge fees for doormen registration scheme set up in conjunction with conditions attached to public entertainment licences requiring doormen to be registered as provision for recovering costs of the licensing regime was made by the legislation (*Local Government (Miscellaneous Provisions) Act 1982* Sch.1 para.7)).

25 (1989) 58 P. & C.R. 434.

26 (1921) 37 T.L.R. 884 CA; affirmed (1922) 91 L.J.K.B. 897 HL.

27 per Lord Lowry at 73.

28 (1992) 90 L.G.R. 462.

29 SI 1986/24.

30 SI 1982/1009.

31 SI 1984/740.

32 The Times, October 18, 1991.

33 [1995] 1 Lloyd's L.R. 315, Colman J.; [1997] Q.B. 302 CA.

- 34 *The Times*, November 8, 1994, *Gatehouse J.*, [1997] Q.B. 362 CA; cf. *R. v Greater Manchester Police Authority Ex p. Century Motors (Farnworth) Ltd*, *The Times*, May 31, 1996 (contract with company organising a vehicle recovery scheme was not an impermissible delegation of statutory powers); *Morgan Grenfell & Co Ltd v Sutton LBC* (1996) 93 L.G.R. 554 (guarantee for loan to non-registered housing association ultra vires in accordance with the *Waltham Forest* principles).
- 35 (2000) 2 L.G.L.R. 961.
- 36 See para.1-162.
- 37 [2003] EWHC 121 (Admin).
- 38 At the time of these proceedings, the libel proceedings had, in most respects, been dismissed by the trial judge; a subsequent appeal to the Court of Appeal was subsequently successful, the court accepting the view of election law that had been taken by the officers: see *Gough v Local Sunday Newspapers (North) Ltd* [2003] EWCA Civ 297, para.11-35, below.
- 39 As in *R. v Director of Public Prosecutions Ex p. Duckenfield* [2000] 1 W.L.R. 55 (para.1-25) and *R. v Westminster City Council Ex p. Legg* (2000) 2 L.G.L.R. 961, above.
- 40 [1993] A.C. 534
- 41 [2008] EWHC 692 (Admin).
- 42 [2009] EWCA Civ 490.
- 43 paras [120]–[124].
- 44 paras [159]–[173].
- 45 para.[164].
- 46 para.[172].
- 47 [2011] UKSC 7.
- 48 [2011] EWHC 6 (Admin).
- 49 [2011] EWHC 2542 (QB), [2011] L.G.R. 813.
- 50 SI 2001/1860.
- 51 [2012] EWCA Civ 1439.
- 52 [1925] A.C. 578.
- 53 See Maurice Kay L.J. at paras [19]–[24].
- 54 [2012] EWHC 175 (Admin).
- 55 para.[22].
- 56 para.[22].

57 para.[23].

58 para.[25].

59 para.[29].

60 para.[31].

61 See Letter from the Secretary of State, Rt Hon Eric Pickles MP, to council leaders, 20 February 2012.

62 *[2013] EWHC 1065 (Admin)*.

1.1-20 The ultra vires doctrine and human rights

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Chapter 1.1 — The Legal Framework of Local Authorities

Section D. The Doctrine of Ultra Vires

The ultra vires doctrine and human rights

1.1-20

As from October 2, 2000, when the [Human Rights Act¹](#) came into force, legislation has to be read and given effect to in a way which is compatible with specified rights under the European Convention on Human Rights.² A court or tribunal determining a question which has arisen in connection with a Convention right must take into account, *inter alia*, decisions of the European Court of Human Rights.³ Apart from the [1998 Act](#) an analogous although less developed principle applies at common law. In [Pierson v Secretary of State for the Home Department⁴](#) (a case concerning mandatory life sentence prisoners), Lord Browne-Wilkinson said⁵:

"A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

Lord Steyn⁶ analysed this principle as the "principle of legality":

"There is no ambiguity in the statutory language [of the provision under consideration]. The presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable. A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the court may approach legislation on this initial assumption. But this assumption only has *prima facie* force. It can be displaced by a clear and specific provision to the contrary."

1.1-21

This principle lies behind the applicability of the common law principles of procedural fairness⁷ but also the protection of substantive basic or fundamental rights such as the right of access to the courts⁸ and the rule of law, which "enforces minimum standards of fairness, both substantive and procedural".⁹ This principle has been applied in a number of contexts, including local government. For example, in [R. v Secretary of State for the Home Department Ex p. Simms¹⁰](#) the House of Lords held that general powers conferred by the Prison Rules authorising governors to refuse visits to inmates by journalists or to exercise control over such visits when permitted exceptionally, were to be interpreted so as not to interfere with the fundamental or basic rights of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner. In [R. v Lord Chancellor Ex p. Witham,¹¹](#) the Divisional Court held that the Lord Chancellor's general power to fix court fees did not enable him to set such high levels that would effectively bar the poor from access to the courts (distinguished in [R. v Lord Chancellor Ex p. Lightfoot,¹²](#) upholding the validity of a requirement that a deposit of £250 be paid by a debtor who wished to petition for her own bankruptcy as this did not interfere with the right of access to the court). In [R. \(on the application of Anufrijeva\) v Secretary of State for the Home Department¹³](#) the House of Lords held that the rule that an asylum seeker's entitlement to income support ended on the date on which the claim for asylum was recorded as determined did not apply so that the determination had effect for this purpose before it was communicated to the applicant. The principle that a decision takes effect only upon communication represented elementary fairness, and a fundamental right that could only be overridden by Parliament expressly or by necessary implication. The [Simms](#) principle applied to fundamental rights beyond the four corners of the ECHR.¹⁴ This approach is applicable in principle in the context of local government law. For example it would seem to lie behind the decision of Moses J. in [R. v Brent LBC Ex p. D.,¹⁵](#) where his Lordship held that while Parliament could not normally have intended an illegal immigrant to claim assistance under the [National Assistance Act 1948](#), the public policy that a person may not take advantage of his or her own wrongdoing was overridden by "the law of humanity": the

applicant's right to life and, at least, a minimum standard of health. This decision was, however, overruled by the Court of Appeal in *R. v Wandsworth LBC Exp. O*¹⁶ where it was held that the applicant's status as an illegal immigrant was not a bar to a claim under s.21(1) of the 1948 Act; accordingly, on the facts of *Ex p. D* and the present case, there was no need to rely on the law of humanity.

Footnotes

1 See annotations to the Human Rights Act 1998 in Part 3, below.

2 1988 Act ss.1, 3.

3 s.2.

4 [1997] 3 All E.R. 577.

5 At 592.

6 At 603–607.

7 *Cooper v Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180 at 194; *R. v Secretary of State for the Home Department Ex p. Doody* [1994] 1 A.C. 531.

8 *Raymond v Honey* [1983] 1 A.C. 1.

9 per Lord Steyn in *Pierson*, above at pp.603–607.

10 [2000] 2 A.C. 115.

11 [1998] Q.B. 575.

12 [1999] 4 All E.R. 583.

13 [2003] UKHL 36, [2004] 1 A.C. 604.

14 per Lord Steyn at para.[27].

15 (1997) 31 H.L.R. 10; cf. *R. v Secretary of State for Social Security Exp. Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275.

16 [2000] 4 All E.R. 590.

1.1-22 Application of ultra vires doctrine to procedural requirements

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Application of ultra vires doctrine to procedural requirements

1.1-22

Parliament frequently prescribes the procedure which should be followed in the making of a particular order or decision. This may be done in considerable detail in the relevant statute (or schedule). Alternatively, a Minister may be empowered to lay down procedural rules in a statutory instrument. The traditional position has been that even where there is a duty to observe a procedural step, non-observance will render the ultimate decision ultra vires only if it is a *mandatory* or *imperative* requirement. Failure to observe a *directory* requirement does not have that effect. There are many cases illustrating the distinction,¹ but the courts have been unable to formulate clear guidelines as to which steps are mandatory and which directory. Parliament very occasionally indicates the consequences which follow from the non-observance of particular requirements. An example of such an indication, in [s.82\(1\) of the Local Government Act 1972](#),² reads:

"The acts and proceedings of any person elected to an office under this Act or elected or appointed to an office under [Part \[...\] 4 of the Local Government Act 1985](#) or elected as elected mayor or executive leader and acting in that office shall, notwithstanding his disqualification or want of qualification, be as valid and effectual as if he had been qualified."

1.1-23

A court is likely to hold a requirement to be mandatory where, for example, it relates to the exercise of a right or a power rather than the performance of a duty,³ or it provides an important safeguard to individual interests, such as a requirement to give prior notice of a decision or to hold a hearing,⁴ or to give notice of rights of appeal,⁵ or rights to make objections,⁶ or to give the prescribed period of notice of the implementation of a licensing scheme by council resolution,⁷ or to consult appropriate bodies.⁸ Similarly a requirement is likely to be mandatory where it reflects the need for justice to be seen to be done⁹ or where the procedure leads to the imposition of a financial burden on a member of the public.¹⁰ In *Howard v Bodington*,¹¹ Lord Penzance stated¹²:

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

1.1-24

Bradbury v Enfield LBC.¹³ The reorganisation of Enfield's schools on comprehensive lines involved changes which in the case of eight schools did not in the council's view amount to "ceasing to maintain" them. Accordingly, the requirements of [s.13\(1\), \(3\) and \(4\) of the Education Act 1944](#) were not observed. These were that where a local education authority intended to "establish" a county school or "cease to maintain" a county or voluntary school, it was to submit proposals to the Minister, and give public notice so that objections could be made to the Minister. The Court of Appeal held that changes in the age group or sex of the pupils did amount here to "ceasing to maintain" the existing schools. The requirements of [s.13\(1\), \(3\) and \(4\)](#) were applicable, and were mandatory. In addition, and in relation to all Enfield's secondary schools, the council had failed to comply with [s.13\(6\) and \(7\) of the 1944 Act](#), which provided that after the general proposals were approved, the authority had to submit specifications and plans of the school premises to the Minister. The Minister would approve them if they were in conformity with prescribed standards. The court held these requirements to be directory. The only remedy was to complain to the Minister under [s.99 of the 1944 Act](#) (now [s.497 of the Education Act 1996](#)). The court granted an injunction to restrain

the council from implementing the changes only in relation to the group of eight schools.

1.1-25

Howard v Secretary of State for the Environment.¹⁴ By s.16(2) of the Town and Country Planning Act 1968 (see now s.174 of the 1990 Act), an appeal against an enforcement notice “shall be made by notice in writing to the Minister, which shall indicate the grounds of appeal and state the facts on which it is based.” The plaintiff gave notice of appeal within the 42-day period specified in the enforcement notice, but indicated the “grounds” and “facts” concerned after that period had expired. The Court of Appeal held that the section was mandatory as to the giving of notice in writing within the specified time, but directory only as to the contents of the notice of appeal. Accordingly, the Minister had jurisdiction to entertain the plaintiff’s appeal.

1.1-26

There is some authority to the effect that failure to comply with a directory requirement will only be excused where there has been “substantial compliance”.

Cullimore v Lyme Regis Corporation.¹⁵ The borough council prepared a works scheme under the Coast Protection Act 1949, whereby charges were to be levied for certain coast protection works. The scheme required the council within six months of completion of the work to determine the interests in the land benefited by reference to which charges were to be levied, and the amount of such charges. The council determined these matters almost two years after completion. Edmund Davies J. held that the charges were ultra vires and void on the grounds that either (1) the six-month time limit was a mandatory requirement, or (2) even if it were a directory requirement, there had been nothing approaching substantial compliance.

1.1-27

It is not clear, however, whether *substantial compliance* means substantial compliance with the particular procedural requirement that has not been observed or substantial compliance with the procedural code as a whole. In *London & Clydeside Estates Ltd v Aberdeen District Council*,¹⁶ Lord Hailsham L.C. stated, obiter, that “a total failure to comply with a significant part of a requirement cannot in any circumstances be regarded as ‘substantial compliance’ with the total requirement...”

A more flexible approach to the effect of failure to comply with procedural requirements was suggested by Lord Hailsham L.C. in the *London & Clydeside case*¹⁷:

“When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like ‘mandatory’, ‘directory’, ‘void’, ‘voidable’, ‘nullity’ and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories ...”

1.1-28

Lord Hailsham’s observations have been applied in a number of cases in the High Court and the Court of Appeal,¹⁸ although references to the distinction between “mandatory” and “directory” requirements are still found.¹⁹ Under the more flexible approach, questions as to the effect of non-compliance with a procedural requirement are to be determined not so much as matters of substantive law but more as matters for the court’s discretion, taking account of such considerations as the

objective of the procedural requirement, whether the applicant has been prejudiced, timing and the public interest. It remains to be seen whether this will entirely take the place of the traditional approach. Note, however, the criticism expressed by Sedley J. in *R. v London Borough of Tower Hamlets Ex p. Tower Hamlets Combined Traders Association*.²⁰ His Lordship held that the ratio decidendi of the *London & Clydeside* case was to be found in the speech of Lord Keith, and included the proposition that the question whether non-compliance with a procedural requirement rendered a decision invalid was a question of judgment according to legal criteria and not discretion, and depended on the general significance of the requirement and not the effect of its omission on the particular applicant. It was also clear that the court retained a discretion to refuse to grant a remedy even in respect of a breach of a requirement of fundamental importance. His Lordship had difficulty with Lord Hailsham's speech insofar as it could be interpreted as conflating these separate points. Furthermore, the adoption of Lord Hailsham's remarks by the Court of Appeal in *Main v Swansea City Council*²¹ and *R. v London Borough of Lambeth Ex p. Sharp*,²² was to be regarded as relating to the exercise of discretion whether to grant a remedy and not to the prior question of the legal effect of the failure to comply with a procedural requirement.

1.1-29

The correct approach to be adopted was reconsidered by the Court of Appeal in *R. v Immigration Appeal Tribunal Ex p. Jeyeanthan*.²³ Here, the Secretary of State failed substantially to comply with the rules governing applications for leave to appeal from a special adjudicator to the immigration appeal tribunal in an asylum case, in that the application omitted a declaration of truth. Lord Woolf M.R. stated that the question whether the requirement in question was mandatory or directory was only, at most, a first step. Concentration on this matter distracted attention from the more important question of what the legislator should be judged to have intended to be the consequence of non-compliance. That had to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In most cases, there were further questions to be asked beyond the mandatory/directory test. Three questions were likely to arise:

- (1) Was the statutory requirement fulfilled if there had been substantial compliance with the requirement and, if so, had there been substantial compliance even though there had not been strict compliance? (The substantial compliance question).
- (2) Was the non-compliance capable of being waived in that particular case? (The discretionary question).
- (3) If it was not capable of being waived or was not waived then what was the consequence of the non-compliance? (The consequences question.).

1.1-30

On the facts here, omission of the declaration of truth did not constitute substantial compliance, the answer to this question being the same for the asylum seeker as for the Secretary of State. However, the applicants here had not been in any way affected by the omission and so the discretion and consequences questions should be answered in the Secretary of State's favour.

1.1-31

It is submitted that the view of the Court of Appeal in this case that the effect of disregard of a procedural requirement should not be judged solely by an analysis of the *requirement*, without regard to the *factual context* in which the breach takes place is to be welcomed. Given that procedural requirements quite naturally vary in their significance in the order of things, and given that the consequences for the other party of non-compliance will also vary, the court of necessity must adopt a balancing approach. Such an exercise can and should still be seen as the exercise of judgment on legal criteria and not a very broad discretion.

A differently-constituted Court of Appeal gave judgment shortly afterwards in *Haringey LBC v Awaritefe*.²⁴ Here, the county court judge set aside an order that A. should repay overpaid housing benefit, on the ground that the council had failed to comply fully with the requirements of Pt I of Sch.6 to the Housing Benefit (General) Regulations 1987.²⁵ In particular, the council had failed to notify A. of the right to request a further review as required by Sch.6, para.5. The Court of Appeal restored the repayment order. A. had had the opportunity of seeking a review by a review board had she wished to do so because she had been told that she could appeal by writing to the council within six weeks. The court held (1) that there had been substantial compliance with the procedural steps required by the regulations and (2) there had been no possibility of any injustice having been suffered by the defendant.

Whether the applicant has been prejudiced may be relevant to the question of the effect of failure to comply with a procedural requirement; however, in appropriate cases an act or decision may be quashed even though the applicant has not been prejudiced.²⁶

1.1-32

In areas where ordinary procedures for judicial review are ousted by a "statutory ultra vires" or "time-limit" clause²⁷ the statute generally provides that a person substantially prejudiced by failure to comply with any requirement may apply to the

High Court within six weeks for the ultimate order or decision to be quashed.

Breach of a directory requirement will not render the ultimate decision void, and may not even amount to an intra vires error of law which may be challenged on an appeal or on an application for a quashing order in respect of an error of law on the face of the record.²⁸ However, if they are in time, a person aggrieved may be able to obtain a mandatory order to compel observance of the requirement.

1.1-33

*Brayhead (Ascot) Ltd v Berkshire CC.*²⁹ The Town and Country Planning General Development Order requires that reasons be given by a local planning authority where it refuses planning permission or attaches conditions to a permission. Winn J. held that failure to give reasons did not render a condition void, but that a court would normally grant mandamus to compel the reasons to be divulged.

1.1-34

In some cases, Parliament expressly allows defects to be corrected. For example, s.176(1) of the Town and Country Planning Act 1990 provides that on an appeal against an enforcement notice, the Secretary of State may correct any defect, error or misdescription in the notice, or vary its terms, if the Secretary of State is satisfied that the correction or variation will not cause injustice to the appellant or to the local planning authority. Section 176(5) provides that the Secretary of State may disregard the fact that a person entitled to be served with the notice has not been so served if neither that person nor the appellant has been substantially prejudiced by the failure.

Footnotes

1 See Craies on Statute Law (7th ed.), pp.260–263; Maxwell on the Interpretation of Statutes (12th ed.), pp.314–322.

2 As amended by the Local Government Act 1985, Sch.14, para.4, (for England) SI 2001/2237, art.6 and (for Wales) SI 2002/808 (W89), art.6.

3 *Montreal Street Railway Co v Normandin [1917] A.C. 170; Cullimore v Lyme Regis Corp [1962] 1 Q.B. 718.* The reasoning here is explained as follows in Maxwell on the Interpretation of Statutes (11th ed., 1962), p.364: “A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power (*Caldow v Pixell (1877) 2 C.P.D. 562*, per Denman J.). Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.” (This paragraph was omitted from the 12th ed.)

4 *Bradbury v Enfield LBC [1967] 1 W.L.R. 1311*, below.

5 *Rayner v Stepney Corp [1911] 2 Ch. 312; London & Clydeside Estates Limited v Aberdeen DC [1980] 1 W.L.R. 182.*

6 *R. v Lambeth LBC Ex p. Sharp (1988) 55 P. & C.R. 232.*

7 *R. v Chester City Council Exp. Quietlynn Ltd*, *The Times*, October 19, 1983; *R. v Birmingham City Council Ex p. Quietlynn Ltd (1985) 83 L.G.R. 461* at 471–479, 512–514.

8 *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd [1972] 1 W.L.R. 190; R. v Secretary of State for Social Services Ex p. Association of Metropolitan Authorities [1986] 1 W.L.R. 1; R. v Secretary of State for Social Services Ex p. Association of Metropolitan Authorities (1992) 25 H.L.R. 131; R. v Secretary of State for Education and Employment Ex p. National Union of Teachers [2000] Ed.C.R. 603.*

9 *Noble v Inner London Education Authority* (1983) 83 L.G.R. 291.

10 per Scarman L.J. in *Sheffield City Council v Graingers Wines Ltd* (1977) 75 L.G.R. 743 at 748–749.

11 (1877) 2 P.D. 203.

12 *ibid.*, at 211.

13 [1967] 1 W.L.R. 1311. See also *Lee v Enfield LBC* (1967) 66 L.G.R. 195; *Lee v Department of Education and Science* (1967) 66 L.G.R. 211.

14 [1975] Q.B. 235.

15 [1962] 1 Q.B. 718.

16 [1980] 1 W.L.R. 182.

17 *ibid.* 189–190.

18 *R. v Chester City Council Ex p. Quietlynn Ltd* *The Times*, October 19, 1983, Woolf J.; *R. v Secretary of State for the Environment Ex p. Leicester City Council* (1985) 25 R.V.R. 31, Woolf J.; *Main v Swansea City Council* (1985) 49 P. & C.R. 26, CA; *R. v Lambeth London Borough Council Ex p. Sharp* (1986) 55 P. & C.R. 232; *R. v Doncaster Metropolitan District Council Ex p. British Railways Board* [1987] J.P.L. 444, Schiemann J.; *Porritt v Secretary of State for the Environment and Bromley London Borough* [1988] J.P.L. 414, M. T. Pill Q.C.; cf. *R. v Birmingham City Council Ex p. Quietlynn Ltd* (1985) 83 L.G.R. 461 at 471–479, where Forbes J. regarded Lord Hailsham's observations as applicable only to directory requirements.

19 *Inverclyde District Council v Lord Advocate* [1982] J.P.L. 313, 314, HL.

20 [1994] C.O.D. 325.

21 (1985) 49 P. & C.R. 26.

22 (1986) 55 P. & C.R. 232.

23 [2000] 1 W.L.R. 354.

24 *The Times*, June 3, 1999.

25 SI 1987/1971.

26 [1980] 1 W.L.R. 182 at 183, per Lord Hailsham L.C: compare the position in respect of failure to comply with natural justice: below para.1-160.18. Failure to comply with a mandatory procedural requirement is normally fatal even where there is no prejudice: *R. v Birmingham City Council Ex p. Quietlynn Ltd and other cases* (1985) 83 L.G.R. 461 at 471–479. However, the court may retain a discretion to decline to quash an act or decision even where there has been a breach of a mandatory requirement: *Main v Swansea City Council* (1984) 49 P. & C.R. 26; *Porritt v Secretary of State for the Environment* [1988] J.P.L. 414; *Mayes v Secretary of State for the Environment, The Independent*, January 26, 1989; *R. (on the application of Pridmore) v Salisbury DC* [2004] EWHC 2511 (Admin).

27 See below at paras 1-190–1-198 and 1-205.

28 See *Mountview Court Properties Ltd v Devlin* (1970) 21 P. & C.R. 689; *South Glamorgan CC v L and M* [1996] E.L.R. 400; *R. v Northamptonshire CC Ex p. Marshall* [1998] Ed.C.R. 262 (failure to provide adequate reasons not a freestanding ground of appeal for error of law).

29 [1964] 2 Q.B. 303.

1.1-35 Other aspects of the ultra vires doctrine

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Other aspects of the ultra vires doctrine

1.1-35

Many of the cases on the application of the ultra vires doctrine to local authorities have concerned issues as to whether a particular project could lawfully be undertaken. However, the ultra vires doctrine may also be invoked to control the *methods* by which decisions are reached. Accordingly, in *Anisminic Ltd v Foreign Compensation Commission*¹ the House of Lords came near to holding that any error of law in the course of decision making will infringe the ultra vires doctrine. The courts have also held that powers are exceeded if exercised in bad faith, for improper purposes, where a legally relevant consideration has been ignored, where a legally irrelevant consideration has been taken into account, or where the decision is so unreasonable that no reasonable authority could act in such a manner. A discretion may not be fettered improperly by any contract or undertaking, by the creation of an estoppel, or by any rigid policy rule. Local authorities must not act under the dictation of any other body in the exercise of functions in the absence of express or implied statutory authority. Finally, the courts may hold that there is an obligation to observe natural justice or to act fairly. These are limitations which the courts, in the appropriate context, deem Parliament to have intended to impose, in the absence of express provision to the contrary. These aspects of the ultra vires doctrine are considered in Ch.1.3.

Footnotes

1 [1969] 2 A.C. 147.

1.1-36 Legal consequences of a breach of the ultra vires rules

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Legal consequences of a breach of the ultra vires rules

1.1-36

There are two important consequences which may follow from a breach of the ultra vires rule. First, legal proceedings may be commenced in the High Court. A person aggrieved seek for “judicial review” of a local authority’s decision under [Pt 54 of the Civil Procedure Rules](#). The court may in an appropriate case grant one or more of a number of remedies, some of which are peculiar to public law (quashing, prohibiting and mandatory orders, formerly the prerogative orders of certiorari, prohibition and mandamus), and the other ordinary remedies also applicable in the private law context (injunction, declaration and damages). The former group may only be sought under [Pt 54](#); the latter may also be sought in ordinary High Court proceedings. Thus, a remedy may be available to quash an ultra vires decision that has been made (quashing order), to prohibit ultra vires action which is about to take place (prohibiting order, injunction), to compel performance of a public duty (mandatory order, injunction), or simply to make the legal position clear (declaration). These remedies are considered in [Ch.10](#).

1.1-37

Where unlawful expenditure is concerned, the traditional procedure was for an action to be commenced in the High Court for a declaration or for a declaration coupled with an injunction. This is what happened in [Att-Gen v Fulham Corp](#),¹ discussed earlier. In a similar way a ratepayer in Birmingham obtained a declaration that the council had acted ultra vires in granting free bus travel to old-age pensioners,² and in Cardiff tenants of council houses unsuccessfully sought a declaration that a differential rent scheme was ultra vires, arguing that a charge based on ability to pay was not within the Housing Act 1936.³ Such proceedings would now normally be brought by way of a claim for judicial review.

An action in the High Court is costly, and in relation to local authorities an alternative procedure has been available exercised through statutory audit.⁴ Where it appeared to the auditor that any item of account was contrary to law the auditor could apply to the court for a declaration to that effect, unless the expenditure had been sanctioned by the Secretary of State. Where the court made the declaration asked for, it could order repayment by the person concerned and the rectification of accounts, and in some cases disqualification from membership of the local authority followed. While the system of audit and the power to seek a declaration remain, the powers to order repayment and disqualification, and the Secretary of State’s power to sanction expenditure, have been repealed by [s.90 of the Local Government Act 2000](#).⁵

1.1-38

Any person interested may inspect documents of account and any local government elector may question the auditor about them and may raise an objection to an account.⁶ These matters are considered in more detail in Ch.13.

1.1-39

There is the further practical point that an authority cannot engage in a major scheme or project without involving in some way, and generally at an early stage, one of the central government departments, and departments always must be satisfied, before giving any consent required of them, that adequate statutory authority exists for what is proposed. When a local authority needs to acquire land compulsorily it must always rely on a clearly applicable statutory power. In initiating larger schemes, therefore, an authority is in any event unlikely to engage or be able to engage in activities which are ultra vires.

Footnotes

1 [1921] 1 Ch.440.

2 *Prescott v Birmingham Corp [1955] Ch.210.*

3 *Smith v Cardiff Corp (No.2) [1955] Ch.159.*

4 Audit Commission Act 1998 Pt 2.

5 This repeal was implemented in respect of authorities in England and police authorities in Wales with effect from July 27, 2002, by the Local Government Act 2000 (Commencement No.8) Order 2002 (SI 2002/1728).

6 *ibid.* ss.14, 15.

1.1-40

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Sub-section (a) The conferment of general powers: overview

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Parliament has given several widely-drawn powers to local authorities, powers which enable them to act for the good of their areas in ways not specified by statute. These general powers do not negate the ultra vires rule but they do soften its application. [Section 6 of the Local Government \(Financial Provisions\) Act 1963](#) enabled a local authority to incur expenditure up to a 0.4p rate for any purpose which in its opinion was in the interests of the area or its inhabitants, provided such activity was not subject to other statutory provision. This provision was important because of its novelty. It was re-enacted in [s.137 of the Local Government Act 1972](#) in somewhat wider terms. An amount up to a prescribed limit¹ may be spent for the benefit of the area or a part of it or for the benefit of all or some of the inhabitants. [Section 139](#) gives a power to local authorities to spend money on gifts donated for the benefit of the inhabitants of the area, and a gift may be unrelated to any statutory purpose. [Section 137\(3\)²](#) also gives local authorities³ power to contribute to certain charitable funds and appeals related to the United Kingdom, and [s.138](#) authorises expenditure in dealing with actual or imminent or apprehended disasters and emergencies affecting an area or its inhabitants. [Sections 120 and 124](#) enable local authorities to purchase land for the benefit, improvement or development of their areas; and [s.2 of the Local Authorities \(Land\) Act 1963](#) empowers local authorities, for the benefit or improvement of their areas, to erect buildings or to construct or carry out works on land. Here again is the concept of benefit to the area generally.

1.1-41

But there has been a converse tendency as well, a tendency to particularise, and to particularise in such a way that generally implied or incidental powers are curtailed, not only in the field in which the restriction takes place, but at large, since it can be argued that if a particular power is required by statute in one field, it is required in another. There is, in fact, one example of this in the section which extends the scope and activity of local authorities in a generalised way and the two tendencies are seen within one provision. Where an authority develops land for the benefit of the area under [s.2 of the Local Authorities \(Land\) Act 1963](#), it has power to repair, maintain and insure the buildings or works and generally deal with such buildings or works in the proper course of management. This is not a new kind of provision. It is found in [s.235\(1\)\(b\) of the Town and Country Planning Act 1990](#) (a provision originally derived from the 1944 Planning Act). But it can be argued that if an authority has power to put up a building it can, under the doctrine of implied and incidental powers, or under the subsidiary powers conferred by [s.111 of the Local Government Act 1972⁴](#), deal with it in the proper course of management, and indeed one would have thought that there would have been a bounden duty on the authority to do this and to keep the building in repair. There are other statutory provisions enabling authorities to erect buildings and there is no reference in them to insurance. Is it to be assumed in those cases that to effect insurance is ultra vires? This particular enabling power is perhaps more restrictive than enabling. In any event, this kind of question is much less likely to arise in England, where there is a general power of competence.⁵

1.1-42

The Royal Commission on Local Government in England⁶ took the view that all of the main authorities which it proposed should have a general power to spend money for the benefit of their areas and inhabitants, additional to their expenditure on services for which they would have statutory responsibility. The Commission referred to the precedent under [s.6 of the Local Government \(Financial Provisions\) Act 1963](#). They suggested that the only limit on the use of new power should be the wishes of the electors and such restrictions as have to be placed on local government expenditure in the interests of national economic and financial policy. The White Paper “Reform of Local Government in England”⁷ stated that the Government of the day were sympathetic in principle to this proposal.⁸ But practical difficulties were noted; for example, unconditional powers, not restricted by any financial limit, might lead to wasteful duplication or to local action which could conflict with national objectives in important fields of policy. In the event, only the “free 2p”, and the subsidiary powers referred to above, emerged as law. The Widdicombe Committee on the Conduct of Local Authority Business was not in favour of a general power without a fixed financial ceiling, and this position was endorsed by the Government.⁹ The Labour Party’s General Election Manifesto in 1997 contained a proposal for the introduction of a new duty for a local authority to

promote the economic, social and environmental well-being of its area, together with powers to develop partnerships with local people, business and voluntary organisations.¹⁰

1.1-43

The [Local Government \(Contracts\) Act 1997](#)¹¹ clarified the powers of local authorities to enter contracts and provided that certain (“certified”) contracts should be presumed to be legal for private law purposes, subject to public law challenge by judicial review or audit. The intention was to facilitate the policy of encouraging partnerships with the private sector under the Private Finance Initiative.

The Labour government also proposed a package of measures for the reform and modernisation of local government in England.¹² Legislation would be introduced establishing a new framework intended to provide opportunities and incentives for councils to modernise. A scheme would be established to select “beacon councils” to serve as pace-setters and centres of excellences.¹³ Beacon status might apply to particular services or the council as a whole and would lead to increased scope for the council to act for the benefit of its local community. New models of political management for councils would be provided, including a directly elected executive mayor with a cabinet, a cabinet with a leader and a directly elected mayor with a council manager.¹⁴ There would be powers to hold local referendums and arrangements for local elections would be reviewed. There would be a new ethical framework for councillors and council employees. A Best Value regime had replaced CCT. Councils would have a duty to promote the economic, social and environmental well-being of their area. The capital finance system would be simplified. Councils would be given power to vary the local business rate. The introduction of Best Value and changes to the capping regime in respect of recurrent expenditure were effected by the [Local Government Act 1999](#). The [Local Government Act 2000](#) addressed the issues of general powers to promote community well-being¹⁵; executive arrangements¹⁶; conduct¹⁷; elections¹⁸; and a range of other particular matters. The [Local Government Act 2003](#) reformed arrangements for capital finance and introduced further general powers.

The Coalition Government elected in 2010 introduced further substantial changes to local government law in England, removing or modifying elements of the structure created by the previous government and introducing a general power of competence. These steps were effected by the [Localism Act 2011](#).

Footnotes

- 1 A prescribed sum multiplied by the population of the area. The limit was formerly the product of a 2p rate. Following enactment by the [Local Government Act 2000](#) of the well-being powers available to most local authorities, the general s.137 powers have been confined to parish and community councils, for which the appropriate sum was £5.00: [Local Authorities \(Discretionary Expenditure Limits\) \(Wales\) Order 2000](#) (SI 2000/990); [Local Authorities \(Discretionary Expenditure Limits\) \(England\) Order 2002](#) (SI 2002/2878). The formula for determining the appropriate sum is now set out in Sch.12B to the 1972 Act, inserted by the [Local Government Act 2003](#) s.118. See para.1-60D. Section 137 has been amended again to apply only to parish councils in England that are not eligible to exercise the well-being powers (now the general power of competence) and to community councils: see the [1972 Act](#) s.137(9), as amended by the [Local Government and Public Involvement in Health Act 2007](#) Sch.5 para.7, and the [Localism Act 2011](#) Sch.1 para.1.
- 2 As amended by the [Local Government Act 2003](#) Sch.7 para.4.
- 3 i.e. county, district, London borough and parish councils and the Common Council in England, county, county borough and community councils in Wales: s.137(10), inserted by the [2000 Act](#) s.8.
- 4 See para.1.1-17.
- 5 See para.1.1-68.
- 6 Vol.I, para.323.
- 7 Cmnd. 4276 (1970).
- 8 Cmnd. 4276 (1970) para.69.

9 Cmnd. 9797 (1986) at pp.180–181; Government Response, Cm. 433 (1988) at pp.36–40.

10 New Labour: Because Britain Deserves Better (1997).

11 See further, para.[3-999.1045](#)

12 Modern Local Government: In Touch with the People (Cm. 4014, 1998). This followed the publication of a series of Green Papers, including Modernising local government: Local democracy and community leadership (1998) (see *C. Crawford [1998] J.L.G.L. 31*); Improving local services through best value (1998) (see *S. Cirell and J. Bennett [1998] J.L.G.L. 59*); A New Ethical Framework (1998) On the White Paper, see *T. Child in B Schwehr [1998] J.L.G.L. 71* (powers and duties); *A. Forge [1998] J.L.G.L. 74* (new political structures); *J. Bennett and S. Cirell [1998] J.L.G.L. 78* (best value); *J. Howell [1998] J.L.G.L. 81* (new ethical framework). A separate White Paper was published in Wales: Local Voices: Modernising Local Government in Wales (Cm. 4028, 1998).

13 See DETR, The Beacon Council Scheme: Prospectus (1999).

14 See DETR, Local Leadership, Local Choice (1999).

15 Part 1: below.

16 Part 2.

17 Part 3.

18 Part 4. See also the [Representation of the People Act 2000](#) and the [Political Parties, Elections and Referendums Act 2000](#).

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The current position as regards the powers under the general powers conferred by s.137 of the Local Government Act 1972 is as follows.

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1.1-45 General power

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A local authority¹ may, subject to the provisions of [s.137](#), incur expenditure² which in its opinion is in the interests of, and will bring direct benefit to, its area or any part of it or all or some of its inhabitants. However, a local authority cannot, by virtue of [s.137\(1\)](#), incur any expenditure

- a)for a purpose for which it is, either unconditionally or subject to any limitation or to the satisfaction of any condition, authorised or required to make any payment by or by virtue of any other enactment; nor
- b)unless the direct benefit accruing to its area or any part of it or to all or some of the inhabitants of their area will be commensurate with the expenditure to be incurred.³

In any case where by virtue of [s.137\(1\)\(a\)](#), a local authority is prohibited from incurring expenditure for a particular purpose, and the power or duty of the authority to incur expenditure for that purpose is in any respect limited or conditional (whether by being restricted to a particular group of persons or in any other way), that prohibition extends to all expenditure to which that power or duty would apply if it were not subject to any limitation or condition.⁴ A local authority may incur expenditure under [s.137\(1\)](#) on publicity⁵ only by way of assistance to a public body or voluntary organisation⁶ where the publicity is incidental to the main purpose for which the assistance is given; but the provisions of the [1972 Act s.137\(2D\)-\(10\)](#) apply to expenditure incurred by a local authority under the [1972 Act s.142](#) on information as to the services provided by them under [s.137](#), or otherwise relating to their functions under [s.137](#), as they apply to expenditure incurred under [s.137](#).⁷

Footnotes

¹ i.e. a parish council which is not an eligible parish council for the purposes of [Ch.1 of Pt 1 of the Localism Act 2011](#) (general power of competence) or a community council: [1972 Act s.137\(9\)](#) as substituted by the [Local Government Act 2000 s.8](#), and amended by the [Local Government and Public Involvement in Health Act 2007 Sch. 5 paras 1, 7](#) and the [Localism Act 2011 Sch.1 para.1](#).

² This includes power to do so by contributing towards the defraying of expenditure by another local authority in or in connection with the exercise of that other authority's functions: [1972 Act s.137\(2\)](#).

³ [1972 Act s.137\(1\)](#), as amended by the [Local Government and Housing Act 1989 s.36](#).

⁴ [1972 Act s.137\(1A\)](#), inserted by the [Local Government and Housing Act 1989 s.36](#).

⁵ i.e. any communication, in whatever form, addressed to the public at large or to a section of the public: [1972 Act s.137\(2D\)](#), inserted by the [Local Government Act 1986 s.3\(3\)](#).

⁶ i.e. a body which is not a public body but whose activities are carried on otherwise than for profit: [1972 Act s.137\(2D\)](#), inserted by the [Local Government Act 1986, s.3\(3\)](#).

⁷ [1972 Act s.137\(2C\)](#), inserted by the [Local Government Act 1986 s.3\(3\)](#) and amended by the [Local Government and Housing Act 1989 ss.36, 194\(2\), Sch.12 Pt II](#).

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1.1-46 Charitable contributions

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Charitable contributions

1.1-46

A local authority¹ may, subject, in the case of a parish or community council, to the following provisions of [s.137](#), incur expenditure on contributions to any of the following funds:

- 1)the funds of any charitable body in furtherance of its work in the United Kingdom; or
- 2)the funds of any body which provides any public service (whether to the public at large or to any section of it) in the United Kingdom otherwise than for the purposes of gain; or
- 3)any fund which is raised in connection with a particular event directly affecting persons resident in the United Kingdom on behalf of whom a public appeal for contributions has been made by the Lord Mayor of London or the chairman of a principal council or by a committee of which such a person is a member or by such a person or body as is referred to in [s.83\(3\)\(c\) of the Local Government \(Scotland\) Act 1973](#).²

Footnotes

- 1 i.e. in relation to England, a county, district or London borough council, the Common Council or a parish council and in relation to Wales, a county or county borough council or a community council: [1972 Act s.137\(10\)](#), as substituted by the [Local Government Act 2000 s.8](#).
- 2 [1972 Act s.137\(3\)](#), as amended by the [Local Government and Housing Act 1989 s.36](#) and the [Local Government Act 2003 Sch.7 para.4](#). The [1973 Act s.83\(3\)\(c\)](#) refers to a convener of a local authority, a convener of a community council, a lord-lieutenant or a body of which any of these persons is a member.

1.1-47 Expenditure limits and accounts

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Expenditure limits and accounts

1.1-47

The expenditure of a local authority¹ under [s.137](#) in any financial year must not exceed the amount produced by multiplying (a) such sum as is for the time being appropriate to the authority under the [1972 Act Sch.12B](#),² by (b) the relevant population of the authority's area.³ The "relevant population" is to be determined in accordance with regulations made by the Secretary of State or the Welsh Ministers.⁴ For the purpose of determining whether an authority have exceeded this limit, its expenditure in any financial year under [s.137](#) is to be taken to be the difference between their gross expenditure under [s.137](#) for that year and the aggregate of the amounts specified in [s.137\(4B\)](#).⁵ These amounts include expenditure for [s.137](#) purposes covered by government or EU (ERDF or Social Fund) grants, loan repayments, the expenditure of amounts raised by public subscription and amounts specified by the Secretary of State or the Welsh Ministers by order.⁶ The accounts of a local authority by whom expenditure is incurred under [s.137](#) must include a separate account of that expenditure.⁷

Footnotes

1 As defined in [s.137\(9\)](#).

2 [Sch.12B](#), inserted by the [2003 Act s.118\(2\)](#) specified £5 plus annual RPI increases. The Secretary of State or the Welsh Ministers may by order specify a different appropriate sum. An order by the Secretary of State is subject to annulment by either House of Parliament: [1972 Act Sch.12B para.7](#). The [Local Authorities \(Discretionary Expenditure Limits\) \(England\) Order 2005 \(SI 2005/419\)](#) specifies the sum of £5.30 as the sum appropriate to a local authority in England for the financial year beginning on April 1, 2005. The outcome of application of the indexation formula is notified annually by the CLG in England or the Welsh Government in Wales.

In Wales, the appropriate sum for community and town councils for 2016/17 is £7.42: WG letter to clerks of Community and Town Councils, 18 January 2016 (see <http://gov.wales>). The same sum applies in England for 2016/17.

3 [1972 Act s.137\(4\)](#), as amended by the [1989 Act s.36](#) and the [2003 Act s.118\(1\)](#).

4 [1972 Act s.137\(4AB\)](#), inserted by the [Local Government and Housing Act 1989 s.36](#). See the [Local Authorities \(Discretionary Expenditure\) \(Relevant Population\) Regulations 1993 \(SI 1993/40\)](#).

5 [1972 Act s.137\(4A\)](#), inserted by the [Local Government \(Miscellaneous Provisions\) Act 1982 s.44](#).

6 [1972 Act s.137\(4B\)](#), inserted by the [1982 Act s.44](#) and amended by the [Local Government and Housing Act 1989 s.36](#). See the [Local Authorities \(Expenditure Powers\) Order 1984 \(SI 1984/197\)](#), as amended by [SI 2001/3686 reg.7\(1\), \(7\)](#), and the [Local Authorities \(Expenditure Powers\) Order 1995 \(SI 1995/3304\)](#).

7 [1972 Act s.137\(7\)](#) as amended by the [Public Audit \(Wales\) Act 2004 Sch.2 para.1\(1\), \(2\), Sch.4](#).

1.1-48 Financial assistance to be conditional on provision of information

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Financial assistance to be conditional on provision of information

1.1-48

If in any financial year a local authority¹ provides financial assistance² to a voluntary organisation, as defined the [1972 Act s.137\(2D\)](#) or to a body or fund falling within [s.127\(3\)](#), and the total amount so provided to that organisation, body or fund in that year equals or exceeds the relevant minimum,³ then, as a condition of the assistance, the authority must require the organisation, body or fund, within twelve months beginning on the date when the assistance is provided, to furnish to the authority a statement in writing of the use to which that amount has been put.⁴ It is sufficient to provide an annual report or accounts which contain the information required to be in the statement.

Footnotes

1 i.e. a county, district or London borough or parish council or in Wales a county, county borough or community council: [1972 Act s.270\(1\)](#); in addition this term includes the Common Council: [1972 Act s.137\(6\)](#).

2 Defined in the [1972 Act s.137A\(2\)](#).

3 i.e. £2,000 or such higher sum as the Secretary of State or the Welsh Ministers may by order specify: [1972 Act s.137A\(3\)](#). The [Local Authorities \(Discretionary Expenditure Limits\) \(Wales\) Order 2000 \(SI 2000/990\)](#) specifies the sum of £5000 as the relevant minimum for financial assistance provided by a local authority in Wales.

4 [1972 Act s.137A\(1\)](#). Section 137A was inserted by the [Local Government and Housing Act 1989 s.37](#).

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Sub-section (c) Community well-being

1.1-49

The Labour Government ultimately did not favour a power of general competence, taking the view that there were matters, such as foreign policy, that were not relevant to local government.¹ Nevertheless, it was desirable for local authorities to develop a community leadership role and the existing general powers were too restrictive.² Section 137 of the Local Government Act³ was no longer thought of in practice as a vehicle for undertaking new or innovative activities, following the enactment of specific powers for economic development.⁴ Particular constraints were the capping of total expenditure, the limits on s.137 expenditure and the possibility of legal challenge.⁵ The economic development powers themselves⁶ “are heavily constrained by the restrictions placed on their use”.⁷ Accordingly, ss.2–5 of the Local Government Act 2000 introduced new general powers for a local authority in England and Wales to do anything likely to promote well-being in its area. These powers were confined to local authorities in Wales by the Localism Act 2011, with effect from April 4, 2012.⁸ The legislative provisions in force after that change are as follows.

Footnotes

1 Hilary Armstrong, Standing Committee A, May 9, 2000, col. 34.

2 Explanatory Notes to Local Government Act 2000, paras 6–13.

3 See para.1.1-44.

4 Local Authority Activity Under Section 137, DETR (1999).

5 ibid.; and C. Crawford et al., Law Relating to Local Government, Research Report, DETR (2000), pp.35–37. Note that s.137 cannot be used where there is authority in other legislation or to overcome any limitations, prohibitions or conditions in other legislation; uncertainty over the ambit of s.111(1) accordingly makes use of s.137 more problematic.

6 Local Government and Housing Act 1989 ss.33–35.

7 Explanatory Notes to Local Government Act 2000 para.10.

8 Sch.1 paras 3 and 4.

1.1-50 Well-being powers

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Sub-section (c) Community well-being

Well-being powers

1.1-50

Section 2 of the Local Government Act 2000 now provides that every local authority in Wales¹ is to have power² to do anything which it considers is likely to achieve any one or more of the following objects—

- (a)the promotion or improvement of the economic well-being of its area;
- (b)the promotion or improvement of the social well-being of its area;
- (c)the promotion or improvement of the environmental well-being of its area.³

This power may be exercised in relation to or for the benefit of:

- (a)the whole or any part of the authority's area; or
- (b)all or any persons resident or present in its area.⁴

In determining whether or how to exercise this power, the authority must have regard to the local well-being plans for its area published under ss 39 or 44(5) of the Well-being of Future Generations (Wales) Act 2015.⁵ The local well-being plan for the area of a community is the plan referred to in subs.(3B) that is published by the public services board that includes as a member the county or county borough council for the area.⁶ The power includes power to:

- (a)incur expenditure,⁷
- (b)give financial assistance⁸ to any person,
- (c)enter into arrangements or agreements with any person,
- (d)co-operate with, or facilitate or co-ordinate the activities of, any person,⁹
- (e)exercise on behalf of any person the functions of that person; and¹⁰
- (f)provide staff, goods, services or accommodation to any person.¹¹

It also includes power 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 any one or more of the objects in s.2(1).¹² The power is subject to the general duty in relation to improvement.¹³

1.1-51

Limitations to the s.2(1) power are set out in s.3. Accordingly, it does not enable an authority to do anything it is unable to do by virtue of any prohibition, restriction or limitation of its powers which is contained in any enactment, including one comprised in subordinate legislation (whenever passed or made).¹⁴ Note, however, that the mere existence of another power under which an activity could be undertaken is not a bar to the use of s.2(1).¹⁵ Furthermore, the s.2(1) power does not enable an authority to raise money (whether by precepts, borrowing or otherwise).¹⁶ This is intended to exclude charging by virtue of s.2(1),¹⁷ although charges could be imposed should regulations be made under s.150 of the Local Government and Housing Act 1989¹⁸ or where there is otherwise express statutory authority.¹⁹ It is not, however, intended to preclude the incidental receipt of income.²⁰

The Welsh Ministers may, after consultation, by order make provision preventing local authorities from doing, by virtue of s.2(1), anything specified on a description specified in the order.²¹ This power may be exercised in relation to all local authorities, particular local authorities, or particular descriptions of local authority.²² The Government is of the view that the s.2(1) power cannot be used to make a byelaw for the regulation of conduct as express words would be needed for that.²³

1.1-52

Before exercising the s.2(1) power, an authority must have regard to any guidance for the time being issued, after consultation, by the Welsh Ministers (formerly the National Assembly).²⁴ Guidance has been issued.²⁵

1.1-53

The breadth of the new power was emphasised in *R. (on the application of J) v Enfield LBC*.²⁶ The question was whether the local authority had power to provide accommodation or financial assistance that would enable accommodation to be secured to the claimant. The claimant had overstayed the period permitted on her visa to remain in the UK; she was seeking leave to remain but not asylum. She was HIV positive and gave birth to a daughter while awaiting the outcome of her application. She would have been entitled to accommodation as a homeless person under Pt 7 of the Housing Act 1996, apart from her immigration status. Elias J. held that (1) there was power for accommodation to be provided under s.21 of the National Assistance Act 1948 provided the authority was satisfied that the claimant was in imminent need as the result of her health; (2) s.17 of the Children Act did not confer power to provide financial assistance for accommodation to the claimant's child (and therefore the claimant)²⁷ except that such a power could be read into the section via s.3 of the Human Rights Act 1998 where necessary to give effect to a claimant's rights under that Act; (3) there was power to provide financial assistance to the claimant and her child under s.2 of the Local Government Act 2000. On the third point, s.2(4)(b) expressly covered the provision of financial assistance and such provision would be capable of promoting the social well-being of the area by benefiting two persons resident there. The question was then whether there was any "prohibition, restriction or limitation". There were such restrictions preventing the provision of accommodation itself, given the claimant's status as an overstayer,²⁸ but not to the provision of financial assistance.²⁹ Elias J. said³⁰:

1.1-54

"[Section 2] is drafted in very broad terms³¹ which provide a source of power enabling authorities to do many things which they could not hitherto have done. In my view, a 'prohibition, restriction or limitation' is one which will almost always be found in an express legislative provision. I do not discount the possibility that such might arise by necessary implication, but I would have thought that would be very rare. (I note that the Guidance....assumes that any restriction, prohibition or limitation must be expressly spelt out in the legislation: see paras 62 and 63. However, Mr Sales did not adopt that position, and I doubt whether it must always do so as a matter of construction of section 3.) Of course, where Parliament has conferred a positive power to do X, it will by implication have denied the right for that power to be exercised to do Y, but that is merely saying the Parliament has defined a clear boundary for marking out the scope of the power. In my view it would be inapt to describe the area where no power has been conferred as constituting a prohibition, restriction or limitation on the power which is contained in an enactment."

1.1-55

It had been accepted that providing accommodation for the child by taking her into care in these circumstances would constitute a breach of the claimant's rights under art.8 ECHR³²; there was no justification for separating mother (a "good mother") and child. Accordingly,

"If the refusal to exercise the section 2 powers would infringe the rights of the claimant or her daughter under Article 8, then of course the authority would be under an obligation to exercise the power in her favour. To that extent, the broad discretion conferred upon the authority under section 2 will be limited by the obligation imposed upon them properly to give effect to human rights."³³

1.1-56

The confirmation that a broad approach is to be adopted to s.2 is welcome; it would be unfortunate if the excessively narrow approach adopted in some of the cases on the general application of the ultra vires doctrine were simply replaced by an overbroad interpretation of the "prohibition, restriction or limitation" exception. However, the combination of s.2 and the Human Rights Act 1998 is potentially formidable. It cannot be the case that any local resident whose human rights are in jeopardy (for whatever reason) can call upon the local authority to provide financial assistance so as to meet the threat and, indeed, claim that the authority is now under a duty to provide that assistance by virtue of the Human Rights Act 1998. It is submitted that this could only be the case where the authority's failure to provide assistance is itself in breach of the Human Rights Act 1998 apart from any consideration of the s.2 power.

1.1-57

Elias J.'s general approach has subsequently been endorsed by the Court of Appeal.³⁴ It is accepted that:

"The definition of the scope of a power by reference to particular criteria does not involve the imposition of a prohibition, restriction or limitation on the doing of an act in respect of person outside the scope of the criteria. Rather, the fact that the authority cannot do the act in such circumstances reflects the fact that it has not been given the power to act, and not that it has been prohibited from doing so, or subjected to any limitation or restriction."³⁵

1.1-58

On the other hand, where statute expressly prohibits the use of a power to do a particular thing, or prohibits the use of a power in respect of certain persons or in certain situations, that can constitute a prohibition, restriction or limitation within s.3(1). However, such a provision may be interpreted nevertheless as intended merely to prevent the power being exercised under the particular legislation in question, and not as a bar to its exercise at all.³⁶ This possibility was addressed in *R. (on the application of Khan) v Oxfordshire CC*,³⁷ where it was held that the prohibition in s.21(1A) of the National Assistance Act 1948³⁸ had a broad effect, not limited to the operation of the 1948 Act itself, and constituted a prohibition for the purposes of s.3 of the 2000 Act in respect of both the provision of accommodation under s.2(4)(f) of the 2000 Act and the making of payments for accommodation under s.2(4)(b). Payments for things other than accommodation were not, however, within the prohibition. If the narrow interpretation were to be adopted,

"it would seem that no statutory prohibition would trump s.2 of the Local Government Act 2000 unless it stated expressly that it was a prohibition of the purposes of s.3 of the Act."³⁹

This could not have been Parliament's intention, given that such a statement could not appear in pre-2000 Act legislation (other than by subsequent amendment), and that s.3(1) itself referred to any prohibition, etc. contained in any enactment whenever passed. It was clear that Parliament "did not intend to override legislative schemes that already existed."⁴⁰

A further example of a statutory bar is the decision in *R (on the application of Houghton and Wyton Parish Council v Huntingdonshire District Council*⁴¹, where it was held that s.2 of the 2000 Act and s.111 of the Local Government Act 1972 could not authorise the issue of a non statutory guidance document (the St Ives West "Urban Design Framework") that in fact contained policies. This was barred by s.17(3) of the Planning and Compulsory Purchase Act 2004, which provided that the local planning authority's Local Development Documents (of which the UDF was not one) "must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area."

A local authority cannot rely on this power if in fact it has not considered whether an exercise would be likely to promote well-being of their area; it is not sufficient that it would promote the well-being of the authority itself: *R. (on the application of Risk Management Partners Ltd) v Brent London Borough Council; Risk Management Partners Ltd v Brent London Borough Council and others*.⁴² Here, Stanley Burnton L.J. held that s.2 did not enable Brent LBC to enter mutual insurance arrangements with other London authorities that involved the establishment of a new mutual insurance company, The London Authorities Mutual Ltd ("LAML"). However, it did not follow that no local authority had power to participate in LAML. A local authority could rely on its well-being power to enter into a contract with a company for the provision of risk management services:

"If so, it could enter into a contract with a mutual insurance company under which such services and insurance would be provided; and for that purpose it could provide guarantees and otherwise provide financial assistance to the company pursuant to s.2(4). The local authority would have to consider seriously whether its agreement with the company would be likely to achieve one or more of the statutory objects and decide that it would do so: in a case in which the effect of a transaction on well-being of the local authority's area is not obvious (where the primary object of the transaction is insurance of the liabilities of the local authority itself) a vague and unspecific assumption, such as that referred to in the reports prepared for Brent, may be insufficient."⁴³

Furthermore, the s.2 power was not restricted by the principle of local authority finance that it should be conducted on an annual basis.⁴⁴

The Court of Appeal⁴⁵ dismissed appeals by Brent LBC in this and an associated cases arising out of the same facts based on alleged breaches of the Public Contracts Regulations 2006. The decisions on the vires aspects were reached on a different basis than that adopted by Stanley Burnton L.J. at first instance. Pill L.J. noted arguments by counsel for Brent LBC that s.2(1) was drafted in the broadest terms and extended to anything that saves costs; that construed in the light of the Guidance issued by the Secretary of State, it enabled local authorities to form or participate in companies⁴⁶ and to receive income, provided the receipt was incidental to and not the primary purpose of the use of the power⁴⁷; that it was accepted that by virtue of s.3(2), s.2(1) could not be used to raise money by setting out to make a profit through trading; that the Guidance was persuasive in demonstrating the breadth of the well-being power; that the existence of the powers in s.3(3) was a powerful indication that there was no justification for reading into the well-being power any limitation that did not appear on its face; and that participation in LAML made possible better risk management, "a function plainly within the section 2 power".⁴⁸ Counsel for the respondents argued that the well-being power was a power to do things and not a power to improve the local authority's financial position, even if money saved could be used for improvement of the area. There was no express power in s.2(4) to save money or to engage in business for that purpose. The Explanatory Notes and Guidance did not relieve the court of the duty to construe the statute. Pill LJ accepted that it was for the court to determine the meaning of the expression "well-being". The Explanatory Notes and Guidance "may assist in deciding the parameters within which local authorities

may operate" but guidance contrary to the court's construction "is to be ignored".⁴⁹ In using the expression "well-being": "Parliament may have been making a step change but it was not such a change as to make redundant the approach of the courts to the assessment of statutory powers granted to local authorities."⁵⁰

Pill L.J. accepted that the expression "promote the well-being":

"[...] is a general one. Well-being is defined in the Shorter Oxford Dictionary as a 'happy, healthy or prosperous condition; moral or physical welfare' [T]he words have, and were intended to have, a broad meaning and were intended to prevent an over-technical approach to the definition of powers."

However, promotion of well-being:

"[...] is not an expression one would normally associate with a somewhat complex arrangement to save money, such as the LAML arrangement, rather than with action directly to promote, or improve a healthy or prosperous condition."

The Explanatory Notes and Guidance included a number of examples of such positive actions, but made no reference to cost-saving projects or to enterprises such as a mutual insurance company. His Lordship would have expected the power now claimed:

"[...] to have been conferred either specifically or by the use of an expression other than and more directed to the subject matter than the expression 'promote the well-being'. "⁵¹

The case law on the construction of [s.111 of the Local Government Act 1972](#) such as *Hazell v Hammersmith and Fulham LBC*⁵² and *Credit Suisse v Waltham Forest LBC*⁵³ retained a relevance:

"Powers which have been held not to be incidental to functions of the authority, such as giving guarantees to companies, do not readily obtain sanction by the use of a general expression, the wording of which does not easily bear upon such activities. In this statutory context, I do not consider that Parliament was giving a carte blanche to make arrangements subject only to [section 3 of the 2000 Act](#) and to the identification of some advantage, or potential advantage, to the Local Authority's financial position."⁵⁴

Furthermore, it did not necessarily follow that [s.2](#) was a power to do anything not specifically excluded by [s.3](#). Analysis of the expression "promote the well-being" is still required to decide what the limits to [s.2](#) are.

While the setting up of a company might, subject to limitations, come within [s.2](#), his Lordship doubted whether participation in an insurance company with a view to seeking cheaper premiums, circumscribed as it would be by those limitations, did so. In any event, he was not persuaded:

"[...] that participation in an insurance company which involves giving guarantees to the company and assuming what could be very substantial liabilities to other local authorities comes within the well-being power. That power does not extend to power to enter into the complex and somewhat speculative attempt to save money which is the mainspring of the LAML arrangement."⁵⁵

Moore-Bick L.J. similarly did not accept that [s.2\(1\)](#) meant that a local authority can lawfully embark on any scheme that is expected to reduce its costs.⁵⁶ The power did extend to actions that promote well-being indirectly, but there had to be "some degree of connection between the authority's actions and the promotion or improvement of the area's well-being to enable the authority to conclude that the action it proposes to take is likely to have that effect".⁵⁷ The fact that the power could not be used to raise money ([s.3\(2\)](#)) meant that any action taken under it had to be financed out of the authority's existing resources and that taking steps to improve the authority's general financial position was not to be treated as something that will of itself promote or improve the well-being of its area.⁵⁸ Accordingly,

"In my view [section 2](#) gives a local authority power to take steps that have as their object, direct or indirect, some reasonably well defined outcome which it considers will promote or improve the well-being of its area. In other words, it gives authorities the power to do things themselves, or to procure or enable others to do things, that directly affect the well being of their areas."⁵⁹

Action to reduce costs which did not have as its object the use of the money saved for an identified purpose to promote or improve well-being did not fall within the section. It was difficult to accept that [s.2\(1\)](#) was directed to the same end as the duty to secure continuous improvement in the way functions were exercised imposed by the [Local Government Act 1999](#) s.3. The Explanatory Notes and Guidance were of some assistance in helping the court understand the context in which the [2000 Act](#) was passed and to identify the mischief it was intended to remedy; apart from that they were not a proper aid to its

interpretation.⁶⁰ In any event, they did not shed any real light on the question before the court. Moore-Bick L.J. (with whom Pill L.J. agreed on this point) was, however, satisfied that if there had been power to act under s.2(1), the local authority's executive had satisfied the statutory conditions for invoking the power.⁶¹ Hughes L.J. agreed with both judgments.

It is submitted that the approach of the Court of Appeal is an unfortunate step back towards the restrictive approach adopted under the pre-[2000 Act](#) law. It is curious that the court had regard to the previous restrictive case law in construing the new provisions expressly designed to introduce a new general power. A preferable approach would have been to leave it to the local authority to determine whether in its view a project would promote well-being, such a view being challengeable only if irrational. It is not obvious that it makes sense that a money-saving project might be lawful if the resources released can be identified as supporting another particular project that will promote well-being, but not otherwise. It is notorious that a local authority would have many ways of spending released money for such purposes. It is also unhelpful that weight seems to have been attached to whether a project promotes well-being directly or indirectly, and the fact that the present project was "speculative". It is submitted that these factors would relate to an issue of rationality as distinct from the interpretation of s.2. One final point is that the council was advised that insuring against liability did not itself promote or further well-being.⁶² It is submitted that this is questionable. Given that many of the council's liabilities may be to people in its areas, the existence of insurance to cover such liability presumably would be in their interests as well those of the council. This would certainly be true in the case of the liabilities of private sector organisations; the impossibility of insolvency proceedings against a local authority (absent fresh legislation enabling local authority debts to be limited or avoid) should not make a decisive difference. The effect of this decision on its own facts as a matter of vires has been reversed by [s.34 of the Local Democracy, Economic Development and Construction Act 2009](#), clearly making the issue now one of rationality. However, this leaves the decision as an authority on the general approach, that is one of particularising powers, which is contrary to the whole thrust of the well-being power.

Footnotes

- 1 i.e. a county or county borough council in Wales: s.1(1)(b). The powers were extended to community councils by the [Local Government \(Wales\) Measure 2011](#) s.126(1).
- 2 The Government's original proposal had been for a *duty*.
- 3 [2000 Act](#) s.2(1), as amended by the [Localism Act 2011](#) Sch 1 paras 2, 3.
- 4 [2000 Act](#) s.2(2). *Person* includes "a body of persons corporate or unincorporate": [Interpretation Act 1978](#) Sch.1. Persons "present" in the area would include tourists, commuters, travellers and people working in the area: Welsh Guidance (see para.1.1-52), para.2.5.
- 5 [2000 Act](#) s.2(3B), inserted by the [Local Government \(Wales\) Measure 2009](#) Sch.2 paras 1, 2(b) and amended by the 2015 Act Sch.4 para.3.
- 6 [2000 Act](#) s.2(3C), inserted by the [Local Government \(Wales\) Measure 2011](#) s.126(2), and substituted by the 2015 Act Sch.4 para.4.
- 7 There are no spending limits, except that community councils are subject to the financial limit in the [Local Government Act 1972](#) s.137(4): Welsh Guidance para.2.1.
- 8 e.g. by grants, loans, the provision of guarantees or indemnities as elements of financial packages, or contributions in cash or kind: Welsh Guidance para 2.4.
- 9 An example might be the formation of or participation in companies or any other form of association or vehicle for joint working with other partners in the public, private or third sectors: Welsh Guidance para 2.4
- 10 This would include functions that fall within the responsibility of other service providers: Welsh Guidance para.2.4.
- 11 [2000 Act](#) s.2(4).

- 12 2000 Act s.2(5). Nothing in subss.(4) and (5) affects the generality of the power under subs.(1): subs.(6).
- 13 Local Government (Wales) Measure 2009 s.2(1).
- 14 2000 Act s.3(1), (8). The Welsh Guidance para 3.1 states that while the well-being power “is subject to such other powers that exist in primary or secondary legislation, it is not subject to limitations which might be implied or inferred from the way in which those powers have been drafted in existing legislation.” Furthermore, “care should be taken to prevent an unreasonable duplication of an activity that falls within the statutory competence of another public body.” The former English Guidance para.63 stated that this means prohibitions, etc. spelt out explicitly in the face of the “legislation”, but it was not so interpreted by the courts: see para.1.1-54
- 15 cf. s.137 of the 1972 Act.
- 16 2000 Act s.3(2).
- 17 Baroness Farrington, H.L. Deb. Vol.608, col. 1467, January 25, 2000; Welsh Guidance, para.3.1.
- 18 See para.3-999.291.
- 19 e.g. under the Local Authorities (Goods and Services) Act 1970: see para.3-12.31. For an argument that the words “or otherwise” might be read narrowly by reference to the ejusdem generis rule so as not to exclude charging, see Current Law Statutes Annotated 2000, pp.22–29. It is, however, difficult to see what the “genus” would be.
- 20 e.g. a dividend from shares bought in order to support a struggling local enterprise: Welsh Guidance, para.3.1. Other examples include lending money and charging interest; jointly obtaining sponsorship for a partnership project; receiving an indemnity from an organisation to cover costs incurred; and receiving revenue income from a trust; ibid. the receipt of voluntary contributions from partner organisations is not raising money: para.3.1.
- 21 2000 Act s.3(3), (4), as amended by the Localism Act 2011 Sch.1 paras 2, 4.
- 22 2000 Act s.3(3A), inserted by the Local Government Act 2003 s.100 Sch.3 para.12(2). The duty to consult does not apply to orders made only to extend or remove any provisions of an earlier order to or from a particular authority or authorities of a particular description: ibid. s.3(4A), inserted by the 2003 Act Sch.3 para.12(4).
- 23 Guidance, para.72.
- 24 2000 Act s.3(5), (6), as amended by the Localism Act 2011 Sch.1 paras 2, 4.
- 25 In England, guidance was issued by the Secretary of State for local authorities in England: DETR, Power to promote or improve economic, social or environmental well-being: Guidance to local authorities from the DETR, March, 2001; see also LGA, Leading Communities: using the new power to promote well-being (December, 2000). For Wales see National Assembly, The power to promote or improve economic, social or environmental well-being: Guidance to local authorities from the National Assembly for Wales, 2001. This has been replaced by Statutory Guidance to Welsh Local Authorities on the Power to promote or improve Economic, Social or Environmental Well-Being under the Local Government Act 2000 (WG, April 2013).
- 26 [2002] EWHC 432 (Admin). See also *R. (on the application of Theophilus) v Lewisham LBC [2002] EWHC 1371 (Admin)*, where the court held that the power under s.2 could be used to provide student support in respect of a course outside the UK, in accordance with the applicant’s legitimate expectation arising from information given by the council, notwithstanding that the relevant regulations provided for support in respect of courses in the UK only. In *R. (on the application of A) v East Sussex CC (No.1) [2002] EWHC 2771 (Admin)*, Munby J. held that there was no prohibition, restriction or limitation preventing the council entering by virtue of s.2 an arrangement to provide care staff for disabled persons through a user independent trust. In *R. (on the application of Grant) v Lambeth LBC [2004] EWCA Civ 1711, [2005] 1 F.C.R. 1*, the Court of Appeal held that the fact that regulations made specific provision for

a local authority to make travel arrangements to go abroad in relation to certain categories of persons (a person with refugee status abroad or who is an EEA national) did not mean it could not rely on s.2 to make travel arrangements in relation to others. In *R. (on the application of Hill) v Bedfordshire CC [2008] EWCA Civ 661* it was held that s.2 authorised the funding of the education of a boy with special educational needs at a particular residential further education college. Compare *R. (on the application of Khan) v Oxfordshire CC [2002] EWHC 2211 (Admin)* where Moses J. held that s.21(1A) of the National Assistance Act 1948 did constitute a prohibition for the purpose of s.3. This provides that a person to whom s.115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be provided with residential accommodation under s.21(1A) if his need for care and attention has arisen solely because he is destitute or because of the physical effects, or anticipated physical effects, of his being destitute. Moses J.'s decision on this point was affirmed by the Court of Appeal: [2004] EWCA Civ 309. See also *R (on the application of Barnsley MBC) v Secretary of State for Communities and Local Government [2012] EWHC 1366 (Admin)* (s.2 may not be relied upon to avoid the restriction on the power of compulsory purchase under the Local Government Act 1972 s.121(2)(a)).

- 27 Following *R. (on the application of A) v Lambeth LBC [2001] EWCA Civ 1624; [2001] 3 F.C.R. 673*.
- 28 Housing Act 1996 ss.159–161, 185; Immigration and Asylum Act 1999 s.118.
- 29 The Court of Appeal in *R. (on application of W) v Lambeth LBC [2002] EWCA Civ 613* confirmed, obiter, that ss.190(3) and 185 of the Housing Act 1996 did not constitute a “prohibition, restriction or limitation” under s.31 of the 2000 Act, and in any event did not apply to social service authorities. Section 185 placed an express limit to assistance under that Part of the Housing Act 1996; s.190(3) provided for the provision to advice and assistance to homeless persons not in priority need. However, s.122(5) of the Immigration and Asylum Act 1999 did provide such a limit: this provided that “No local authority may provide assistance under any of the child welfare provisions in respect of a dependant under the age of 18, or any member of his family, at any time when [certain conditions are satisfied].”
- 30 para. [57].
- 31 The availability of s.2 of the 2000 Act was argued by Philip Sales, counsel for the Secretary of State, who had been joined as a party. Elias J. held that it was legitimate to refer to the *Explanatory Note* in concluding that s.2 conferred broad and general powers.
- 32 See below, para.3-999.1373.
- 33 para.[58].
- 34 *R. (on the application of W) v Lambeth LBC [2002] EWCA Civ 613; [2002] 2 All E.R.901; R. (on the application of Khan) v Oxfordshire CC [2004] EWCA Civ 309*.
- 35 per Dyson L.J. in *Khan* at para. [30].
- 36 per Elias J., in J at para.[53], accepted by Dyson L.J. in *Khan* at paras [31] and [32].
- 37 [2004] EWCA Civ 309.
- 38 See above, para.1.1-53, n.10.
- 39 per Dyson L.J. in *Khan* at para.[41].
- 40 per Dyson L.J. in *Khan* at paras [41]–[43].
- 41 [2013] EWHC 1476 (Admin).

- 42 [2008] EWHC 692 (Admin) [2008] L.G.R. 331. Similarly, in *R. (on the application of Comninos) v Bedford BC* [2002] EWHC 121 (Admin) at para.[32] Sullivan J. held that the council could not rely on the 2000 Act s.2 as giving power to indemnify an officer: “s.2 did not come into force until 18 October 2000 [the relevant decision was made in June], and at no stage in the council’s decision-making process thereafter did it consider, or purport to consider, the exercise of any power under s.2. It is not merely that the section was never mentioned by the council, the council never considered the substance of the discretions conferred by s.2 after they came into force....” Comninos has been distinguished on this point in a case concerning the general power of competence under s.1 of the Localism Act 2011 (see para.1.1-68): *Hussain v Sandwell MBC* [2017] EWHC 1641 (Admin).
- 43 para.[120].
- 44 para.[121].
- 45 [2009] EWCA Civ 490.
- 46 Guidance, para.42.
- 47 Guidance, paras 66, 67.
- 48 para.[32].
- 49 para.[111].
- 50 para.[112].
- 51 para.[116].
- 52 [1992] 2 A.C. 1.
- 53 [1997] Q.B. 362.
- 54 para.[117].
- 55 para.[119].
- 56 para.[178].
- 57 para.[178].
- 58 para.[179].
- 59 para.[180].
- 60 paras [181], [227].
- 61 paras [183]–[193].
- 62 See Moore-Bick L.J. at para.[186].

1.1-59 Community strategies

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Section F. General Powers and Duties

Sub-section (c) Community well-being

Community strategies

1.1-59

Every local authority in England¹ was formerly required to prepare a sustainable community strategy for promoting or improving the economic, social and environmental well-being of its area and contributing to the achievements of sustainable development² in the United Kingdom. In doing so, it was required to consult and seek the participation of such persons as it considered appropriate and have regard to specified matters relating to child poverty³ and any guidance for the time being issued, after consultation, by the Secretary of State.⁴

This duty was repealed by the [Deregulation Act 2015](#).⁵

Footnotes

1 Except an eligible parish council: [2000 Act s.4A\(1\)](#), inserted by the [Local Government and Public Involvement in Health Act 2007 s.78\(1\), \(3\)](#). An “eligible parish council” is one that meets the conditions prescribed by the Secretary of State for the purposes of the [2000 Act s.1: 2000 Act s.1\(2\)](#), inserted by the [2007 Act s.77\(1\), \(4\)](#). See the [Parish Councils \(Power to Promote well-being\) \(Prescribed Conditions\) Order 2008 \(SI 2008/3095\)](#).

2 cf. White Paper, A Better Quality of Life—a Strategy for Sustainable Development for the U.K. (May, 1999).

3 Arrangements for co-operation to reduce child poverty, any local child poverty needs assessment or joint child poverty strategy under the Child Poverty Act 2010 ss.21–23: [2000 Act s.4\(3\)\(aa\)](#), inserted by the 2010 Act s.24.

4 [2000 Act s.4](#), as amended by the [Sustainable Communities Act 2007 s.7](#), the [Local Government and Public Involvement in Health Act 2007 s.114](#) and the [Local Government \(Wales\) Measure 2009 Sch.2 paras 1, 3](#) (excluding local authorities in Wales from duty under [s.4](#)). The Secretary of State issued guidance under this section on Preparing Community Strategies (2001) and non-statutory guidance on the formation of “local strategic partnerships”. These were replaced by HMG, Creating Strong, Safe and Prosperous Communities Statutory Guidance (July 2008), paras 2.2–2.9 (non-statutory guidance—except as it relates to the preparation of a draft LAA—replacing Local Strategic Partnerships); and paras 3.1–3.26 (statutory guidance under [s.4](#), replacing Community Strategies: Government Guidance to Local Authorities). In Wales, requirements to produce and review a community strategy are now found in the [Local Government \(Wales\) Measure 2009 ss.39–43](#). See Collaborative Community Planning (WG, June 2010).

5 [2015 Act s.115\(3\)\(k\)](#), with effect from May 26, 2015.

1.1-60 Powers to amend or repeal enactments

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Powers to amend or repeal enactments

1.1-60

The Welsh Ministers are given a general (“Henry VIII”) power to amend or repeal enactments. If they think that an enactment, including an enactment comprised in subordinate legislation (whenever passed or made), prevents or obstructs local authorities¹ from exercising their s.2(1) power, they may by order amend, repeal, revoke or disapply that enactment. This power may be exercised in relation to all local authorities, particular local authorities or particular descriptions of local authority. An enactment may be amended or disapplied for a particular period. A draft of an instrument containing an order must be laid before and approved by a resolution of the National Assembly for Wales, except that specified instruments are to be subject to annulment.² There is similar power to amend, etc. any enactment which requires a local authority in England to prepare, produce or publish any plan or strategy relating to any particular matter.³ This could, for example, be used “in relation to particular local authorities. This is a deregulatory power; it might, for example, be used to remove requirements for statutory plans which no longer served a useful purpose, or to amend the requirements on specific authorities so that they could work more efficiently with local partners to plan how they would meet common priorities.”⁴ The Welsh Ministers have a similar power to modify specified enactments concerning plans.⁵ They also have power to modify enactments preventing or obstructing a community council from exercising its well-being power.⁶

Footnotes

1 The reference to local authorities does not include community councils: 2000 Act s.5(7), inserted by the Local Government (Wales) Measure 2011 s.126(3).

2 2000 Act s.5, as amended by the Local Government and Public Involvement in Health Act 2007 s.115(3), (4), Local Government (Wales) Measure 2011 s.126(3) and the Welsh Ministers (Transfer of Functions) Order 2018 (SI 2018/644) art.37(1), (2). cf. the Local Government Act 1999 s.16.

3 2000 Act s.6, as amended by the 2007 Act s.115(5). The procedure for orders under is set out in s.9, as amended by the Local Government Act 2003 Sch.3 para.13, 2007 Act s.115(8) and SI 2018/644, art.37(3), (4). An affirmative resolution of each House is necessary except in specified cases: s.105(6), as amended by the Local Government Act 2003 Sch.3 para.14. This power has been exercised for England to disapply obligations on local authorities relating to the preparation, etc. of community care plans: Community Care Plans (Disapplication) (England) Order 2003 (SI 2003/1716). See also the Local Authorities’ Plans and Strategies (Disapplication) (England) Order 2005 (SI 2005/157), as amended by SI 2009/714, disapplying a number of requirements to publish plans and strategies in respect of authorities categorised as “excellent” by an order under s.99(4) of the Local Government Act 2003. These are homelessness strategies, home energy conservation reports, youth justice plans, rights of way improvement plans, local transport plans and plans in relation to air quality. The relevant primary legislation is also amended.

4 Explanatory Notes to Local Government Act 2000, para.22.

5 2000 Act s.7, as amended by the 2007 Act s.115(6), (7), SI 2011/1011 art.6(1), (2) and the Wales Act 2017 Sch.6 para.57. The procedure for orders under ss.5 or 7 is set out in the 2000 Act s.9A, inserted by the 2007 Act s.115(9)

and amended by SI 2018/644, art.37(5).

6 Local Government (Wales) Measure 2011 s.127.

1.1-61 Effect on the Local Government Act 1972 s.137

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Effect on the Local Government Act 1972 s.137

1.1-61

Section 137 of the 1972 Act was amended so as only to apply to parish and community councils.¹ It has been amended again to apply only to parish councils in England that are not eligible to exercise the well-being powers² or, now, the general power of competence,³ and to community councils.⁴ Sections 33–35 of the Local Government and Housing Act 1989⁵ have been repealed.⁶

Footnotes

1 2000 Act s.8. Section 137(3), conferring a power to make charitable donations, continues in effect for all principal councils.

2 See para.1.1-50.

3 See para.1.1-68.

4 See the 1972 Act s.137(9), as amended by the Local Government and Public Involvement in Health Act 2007 Sch.5 para.7, and the Localism Act 2011 Sch.1 para.1.

5 These conferred specific powers to promote economic development.

6 2000 Act Sch.6; ss.34 and 35 were repealed with effect from October 18, 2000 (Local Government Act 2000 (Commencement No.3) Order 2000 (SI 2000/2836)); s.33 with effect from July 28, 2001.

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Sub-section (d) Further general powers under the Local Government Act 2003

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A number of further general powers were introduced by [Ch.1 of Pt 8 of the Local Government Act 2003](#).

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1.1-63 Power to charge for discretionary services

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Power to charge for discretionary services

1.1-63

Section 93(1) of the 2003 Act provides that a relevant authority¹ may charge a person for providing a service to them if (a) the authority is authorised, but not required by an enactment² to provide the service to them, and (b) they have agreed to its provision. This power is accordingly not available where there is a duty to provide the service. Furthermore, the power does not apply if the authority (a) has power apart from this provision to charge for the provision of the service or (b) is expressly prohibited from charging for the provision of the service.³ The power under [s.93\(1\)](#) is subject to a duty to secure that, taking one financial year with another, the income from charges under that subsection does not exceed the costs of provision,⁴ this duty applying separately in relation to each kind of service.⁵ Within the framework set by subss.(3) and (4), the authority may set charges as it thinks fit and may, in particular, charge only some persons for providing a service, and charge different persons different amounts for the provision of a service.⁶ In carrying out functions under [s.93](#), a relevant authority must have regard to such guidance as the Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) may issue.⁷ **Section 93(2)(a)** will clearly apply where there is an express power to charge for a service, as for example by virtue of regulations made under the **Local Government and Housing Act 1989 s.150**.⁸ It would also appear to apply in those exceptional circumstances where there is an implied or incidental power to charge.⁹ Accordingly, these cases would not be subject to the constraints set out in this section. It is, however, probable that in practice the courts will be less likely to accept that there is an implied or incidental power to charge now that express provision has been made. Three specified provisions are to be disregarded for the purpose of [s.93\(2\)\(b\)](#): the **Local Government Act 1972 s.111(3)** (subsidiary powers of local authorities not to include power to raise money); the **Greater London Authority Act 1999 s.34(2)** (corresponding provision for the Greater London Authority); and the **Local Government Act 2000 s.3(2)** (well-being powers not to include powers to raise money). **Section 14(2) of the Localism Act 2011** added four further provisions that are not to count as prohibitions: the **Transport Act 1968 s.10B(4)** (PTEs), the **Local Transport Act 2008 s.100(2)** (well-being powers of ITAs and combined authorities) and **s.102C(4)** (ITAs), and the **Local Democracy, Economic Development and Construction Act 2009 s.113B(4)** (EPBs and combined authorities).

The Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) may, by order, disapply [s.93\(1\)\(a\)](#) in relation to particular descriptions of relevant authority or particular relevant authorities; or (b) in relation to the provision of a particular kind of service by (i) all relevant authorities; (ii) particular relevant authorities; or (iii) particular descriptions of relevant authority.¹⁰ This power may be exercised for a particular period.¹¹

Footnotes

¹ i.e. a best value authority, a Welsh improvement authority, a parish or community council and a parish meeting: **2003 Act s.93(9)**, inserted by the **Local Government and Public Involvement in Health Act 2007 Sch.7 para.3(3)(b)** and amended by the **Local Government (Wales) Measure 2009 Sch.1 paras 23, 27** and the **Localism Act 2011 s.12(4)**, adding a reference to the Passenger Transport Executive of an integrated transport area in England.

² Including subordinate legislation: [s.93\(8\)](#).

³ **2003 Act s.93(2)**.

4 2003 Act s.93(3).

5 2003 Act s.93(4).

6 2003 Act s.93(5).

7 2003 Act ss.93(6), 124; ODPM, General Power for Best Value Authorities to Charge for Discretionary Services—Guidance on the Power in the Local Government Act 2003 (November 2003); National Assembly for Wales, General Power for Best Value Authorities in Wales to charge for Discretionary Services—Guidance on the Power in the Local Government Act 2003 (February 2004).

8 See para.3-999.291.

9 See further paras 1.1-17, 1.1-19

10 2003 Act s.94(1), as amended by the Local Government and Public Involvement in Health Act 2007 Sch.7 para.3(4). See the Local Authorities (England) (Charges for Property Searches) (Disapplication) Order 2008 (SI 2008/2909), the Local Authorities (Charges for Property Searches) (Disapplication) (Wales) Order 2009 (SI 2009/55), and the Local Government (Prohibition of Charges at Household Waste Recycling Centres) (England) Order 2015 (SI 2015/619).

11 2003 Act s.94(2).

1.1-64 Power to trade in function-related activities through a company

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1.1-64

The Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) may by order:

- (a)authorise relevant authorities¹ to do for a commercial purpose (i.e. to trade in) anything which they are authorised to do for the purpose of carrying on any of their “ordinary functions”, and
- (b)make provision about the persons in relation to whom authority under para.(1) is exercisable.²

No such order may authorise a relevant authority:

- (a)to do in relation to a person anything which it is required to do in relation to them under its “ordinary functions”, or
- (b)to do in relation to a person anything which it is authorised, apart from this section, to do in relation to them for a commercial purpose.³

Ordinary functions , in relation to a relevant authority, means functions of the authority which are not functions under [s.95](#).⁴

1.1-65

An order may be made in relation to all or particular relevant authorities or particular descriptions of relevant authority; and in relation to all things authorised to be done for the purpose of carrying on a particular function, particular things authorised to be done for that purpose on particular descriptions of thing authorised to be so done.⁵ Powers conferred by an order under [s.95](#) are only to be exercisable through a company within the meaning of [Pt 5 of the Local Government and Housing Act 1989](#)⁶; a relevant authority on which power is conferred by an order under [s.95](#) is to be treated as a local authority for the purpose of [Pt 5 of the 1989 Act](#) if it would not otherwise be such an authority, but only in relation to a body corporate through which it exercises, or proposes to exercise, the power conferred by the order.⁷ In its application by virtue of [s.95\(5\)](#), [s.70\(1\) of the 1989 Act](#) is only to apply in relation to the doing for a commercial purpose of the thing to which the order under [s.95](#) relates.⁸

[Section 96](#) confers general powers on the Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) to regulate trading powers. Accordingly, the Secretary of State or the Welsh Ministers may by order impose conditions in relation to the exercise by a relevant authority or of (a) a power to do anything for a commercial purpose or (b) a power to do anything for such a purpose through a company.⁹ This is not limited to powers conferred by orders under [s.95](#). In exercising such a power a relevant authority must have regard to such guidance as the Secretary of State or the Welsh Ministers may issue.¹⁰ An order may be made in relation to all or particular relevant authorities or particular descriptions of authority.¹¹

Footnotes

¹ *Relevant authority* means a best value authority other than the Common Council as police authority, a Welsh improvement authority, Passenger Transport Executive of an integrated transport area in England, a fire and rescue authority created by an order under [s.4A of the Fire and Rescue Services Act 2004](#), and a parish council, parish meeting or community council: [2003 Act s.95\(7\)](#), as amended by the [2007 Act Sch.7 para.3\(5\)](#), the [Local Government \(Wales\) Measure 2009 Sch.1 para.28](#), and the [Localism Act 2011 s.12\(5\)](#), adding a reference to the Passenger Transport Executive of an integrated transport area in England, and the [Police Reform and Social Responsibility Act 2011 Sch.16 para.320](#).

- 2 2003 Act s.95(1), as amended by the [2007 Act Sch.7 para.3\(5\)](#). See the [Local Government \(Best Value Authorities\) \(Power to Trade\) \(England\) Order 2009 \(SI 2009/2393\)](#), revoking previous orders. This enables all best value authorities in England and fire and rescue authorities in England to do for a commercial purpose anything which it is authorised to do for the purpose of carrying on any of its ordinary functions. (Previously, trading powers were confined to higher performing authorities.) See also ODPM, General Power for Local Authorities to Trade in Function Related Activities Through a Company: Guidance on the Power in the Local Government Act 2003 (July 2004). Paras 1–30 of this Guidance were replaced in 2007 (CLG, April 2007). For Wales, see General power for local authorities, fire and rescue authorities and National Park authorities to trade in function related activities (WG, January 2009). In Wales, all best value authorities which are county or county borough councils, National Park authorities and fire and rescue authorities were given a general power to trade in function-related activities: [Local Government \(Best Value Authorities\) \(Power to Trade\) \(Wales\) Order 2006 \(SI 2006/979 \(W.102\)\)](#). Both in England and in Wales, a business case must be prepared and approved by the authority, and the costs of any accommodation, goods, services, staff or any other thing it supplies to a company under an agreement to facilitate exercise of the power to trade must be recovered.
- 3 2003 Act s.95(2), as amended by the [2007 Act Sch.7 para.3\(5\)](#).
- 4 2003 Act s.95(7), as amended by the [2007 Act Sch.7 para.3\(5\)](#).
- 5 2003 Act s.95(3), as amended by the [2007 Act Sch.7 para.3\(5\)](#).
- 6 2003 Act s.95(4); see paras 4-174 to 4-182. [Section 95\(4\)](#) is to be amended and [s.95\(5\), \(6\)](#), substituted by the [Local Government and Public Involvement in Health Act 2007 Sch.14](#) to substitute provisions in respect of entities controlled by local authorities.
- 7 2003 Act s.95(5), as amended by the [2007 Act Sch.7 para.3\(5\)](#).
- 8 2003 Act s.95(6).
- 9 2003 Act s.96(1), (4), as amended by the [Local Government and Public Involvement in Health Act 2007 Sch.7 para.3\(6\)](#).
- 10 2003 Act s.96(2), as amended by the [Local Government and Public Involvement in Health Act 2007 Sch.7 para.3\(6\)](#).
- 11 2003 Act s.96(3), as amended by the [Local Government and Public Involvement in Health Act 2007 Sch.7 para.3\(6\)](#).

1.1-66 Power of the Secretary of State or the Welsh Ministers to modify enactments

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1.1-66

The Secretary of State or the Welsh Ministers are also given a general power to modify enactments in connection with charging or trading. If it appears to him or them that an enactment (including subordinate legislation and whenever passed or made), other than [ss.93\(2\)](#) or [95\(2\)](#), prevents or obstructs relevant authorities:¹

- (a)charging by agreement for the provision of a discretionary service, or
- (b)doing for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions,

he or they may by order amend, repeal, revoke or disapply the enactment.² Furthermore, the Secretary of State or the Welsh Ministers may by order amend, repeal, revoke or disapply an enactment (including subordinate legislation and whenever passed or made), other than [s.93](#), which makes in relation to a relevant authority provision for, or in connection with, power to charge for the provision of a discretionary service (i.e. a service which the authority is authorised, but not required, to provide).³ The power under subss.(1) or (2) includes power to amend or disapply an enactment for a particular period.⁴ An order under [s.97](#) may be made in relation to all or particular relevant authorities or particular descriptions of authority.⁵ An order under [s.97\(1\)\(b\)](#) may be made in relation to all or particular things authorised to be done for the purpose of carrying on a particular function or particular descriptions of thing,⁶ but may not be used to authorise a relevant authority to do in relation to a person anything which it is required to do in relation to them under its ordinary functions (i.e. functions or the authority which are not functions under [s.95](#)).⁷ Orders by the Secretary of State under [s.97](#) require an affirmative resolutions of each House of Parliament, except that any order that only changes the range of authorities covered by an order is subject to annulment by either House.⁸ Before making an order under [s.97](#), the Secretary of State must consult affected authorities and other persons as appear to him to be representative of interests likely to be affected, and lay a document before each House which explains his proposals, sets them out as a draft order and given details of the consultation.⁹ No draft order can itself be laid before Parliament until after the expiry to 60 days beginning with the day the document was laid.¹⁰ In preparing a draft order, the Secretary of State must consider any representations made during the 60-day period and a draft order must be accompanied by detail of such representations considered and any changes to be made to the original proposals.¹¹ Nothing in [s.98](#) applies to an order that does not require an affirmative resolution.¹² A draft of an order made by the Welsh Ministers must be laid before and approved by the National Assembly, except that any order that only changes the range of authorities covered by an order is subject to annulment.¹³ The procedure for the making of an order under [s.97](#) by the Welsh Ministers is governed by the [2003 Act s.98A](#).¹⁴

Footnotes

¹ i.e. a best value authority in England, a Welsh improvement authority, a fire and rescue authority created by an order under [s.4A of the Fire and Rescue Services Act 2004](#), a parish or community council or a parish meeting: [2003 Act s.97\(11\)](#), definition substituted by [SI 2018/644 art.40](#).

² [2003 Act s.97\(1\)](#), as amended by the [Local Government and Public Involvement in Health Act 2007 Sch.7 para.3\(7\)](#) and the [Welsh Ministers \(Transfer of Functions\) Order 2018 \(SI 2018/644\) art.40](#).

- 3 2003 Act s.97(2), (11), as amended by the Local Government and Public Involvement in Health Act 2007 Sch.7 para.3(7), and SI 2018/644 art.40.
- 4 2003 Act s.97(3).
- 5 2003 Act s.97(4), as amended by the Local Government and Public Involvement in Health Act 2007 Sch.7 para.3(7).
- 6 2003 Act s.97(5).
- 7 2003 Act s.97(6), (11), as amended by the Local Government and Public Involvement in Health Act 2007 Sch.7 para.3(7).
- 8 2003 Act s.97(10).
- 9 2003 Act s.98(1), (2), as amended by the Local Government and Public Involvement in Health Act 2007 Sch.7 para.3(8), and SI 2018/644 art.40.
- 10 2003 Act s.98(3), (4).
- 11 2003 Act s.98(5), (6).
- 12 2003 Act s.98(7).
- 13 2003 Act s.97(10A), (10B), inserted by SI 2018/644 art.40.
- 14 2003 Act s.98A, inserted by SI 2018/644 art.40.

1.1-67 Power to conduct local polls

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Section 116 of the Local Government Act 2003 provides that a local authority¹ may conduct a poll to ascertain the views of those polled about any matter relating to services provided in pursuance of the authority's functions or the authority's expenditure on such services, or any other matter if it relates to the authority's well-being power under s.2 of the Local Government Act 2000. It is for the local authority to decide who is to be polled and how the poll is to be conducted. In conducting a poll under s.116, a local authority must have regard to any guidance issued by the Secretary of State or the Welsh Ministers on facilitating participation in a poll under s.116 by disabled people. This power is without prejudice to the powers of a local authority exercisable other than under s.116. Where a poll is to be conducted in the period beginning with 16 March 2020 and ending with 5 May 2021 the poll is instead to be conducted on the ordinary day of election in 2021, except that this does not apply in relation to a poll that has been held, pursuant to s.116, on a day beginning with 16 March 2020 and ending with 6 April 2020.²

Footnotes

1 i.e. in England, a county, district or London borough council, the Greater London Authority, the Common Council in its capacity as a local authority and the Council of the Isles of Scilly; and in Wales a county or county borough council.

2 Local Government and Police and Crime Commissioner (Coronavirus) (Postponement of Elections and Referendums) (England and Wales) Regulations 2020 (SI 2020/395), reg.11.

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Sub-section (e) General power of competence

1.1-68

Part 1 Ch 1 of the Localism Act 2011 introduces with effect from February 18, 2012¹ a new general power of competence for local authorities in England, the well-being powers² being confined to local authorities in Wales. The core starting proposition is that a local authority³ “has power to do anything that individuals⁴ generally may do.”⁵ This applies to things that an individual may do even though they are in nature, extent or otherwise unlike anything the authority may do apart from subs. (1), or unlike anything that other public bodies may do.⁶ Where subs.(1) confers power on the authority to do something, it confers power (subject to sections 2 to 4⁷) to do it in any way whatever, including—

- (a) power to do it anywhere in the United Kingdom or elsewhere,
- (b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and
- (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.⁸

The generality of the power under subs.(1) (the “general power”) is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.⁹ Conversely, any such other power is not limited by the existence of the general power.¹⁰ A local authority may rely on this power even if it does not address its mind to the relevant provisions.¹¹

Section 2 of the 2011 Act then sets boundaries of the general power. First, if exercise of a pre-commencement power¹² of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power.¹³ Secondly, the general power does not enable a local authority to do (a) anything which the authority is unable to do by virtue of a pre-commencement limitation,¹⁴ or (b) anything which the authority is unable to do by virtue of a post-commencement limitation¹⁵ which is expressed to apply (i) to the general power, (ii) to all of the authority’s powers, or (iii) to all of the authority’s powers but with exceptions that do not include the general power.¹⁶ It will be noted that these limitations have to be “expressly” imposed; this may be compared with the position as regards the well-being powers, which were regarded as subject to limitations imposed by necessary implication as well as expressly.¹⁷ Furthermore, a post-commencement limitation to bar the general power of competence must additionally refer expressly to that power or all the authority’s powers (with any exceptions not including that power). Thirdly, the general power does not confer power to make or alter arrangements of a kind (a) which may be made under Part 6 of the Local Government Act 1972¹⁸ or (b) which are made, or may be made, by or under Part 1A of the Local Government Act 2000;¹⁹ or (c) to make or alter any contracting-out arrangements, or other arrangements within neither (a) nor (b), that authorise a person to exercise a function of a local authority.²⁰

1.1-69

Section 3 sets out limits on charging in the exercise of the general power. First, where a local authority provides a service to a person otherwise than for a commercial purpose, and this is done, or could be done, in exercise of the general power, the general power confers power to charge the person for providing the service to them only if (a) the service is not one that a statutory provision²¹ requires the authority to provide to the person, (b) the person has agreed to its being provided, and (c) ignoring this section and section 93 of the Local Government Act 2003,²² the authority does not have power to charge for providing the service.²³ Secondly, the general power is subject to a duty to secure that, taking one financial year with another, the income from charges allowed by s.3(2) does not exceed the costs of provision, and this duty applies separately in relation to each kind of service.²⁴

Section 4 sets out limits on doing things for a commercial purpose in exercise of the general power. First, the general power confers power on a local authority to do things for a commercial purpose only if they are things which the authority may, in exercise of the general power, do otherwise than for a commercial purpose.²⁵ Secondly, where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company.²⁶ Thirdly, a local authority may not, in exercise of the general power, do things for a commercial purpose in relation to a person if a statutory provision requires the authority to do those things in relation to the person.²⁷

The question whether a council was doing “things” “for a commercial purpose” arose in Peters v Haringey LBC.²⁸ Here, the

claimant was a member of a coalition of groups of Haringey residents opposed to the Haringey Development Vehicle (HDV). The purpose of the HDV was to create a partnership between the council and the private sector to bring private sector finance, experience and expertise to the task of developing the council's land for its better use and so achieving the council's strategic aims in housing, affordable housing and employment. The decision challenged was to confirm Landlease Europe Holding Ltd as the successful bidder to become the council's partner in the HDV, and related legal documents. The HDV was a Limited Liability Partnership, not a company. The council relied on the GPC. Ouseley J. held:

(1) That s.4(2) was not to be read as imposing a requirement in respect of existing powers (as distinct from the GPC) that could be exercised other than through a company that in future they were now subject to this restriction; s.4(2) only applied things that could only be done in reliance on the GPC.

(2) That it was the council's purpose in entering the HDV LLP that was to be considered, not Landlease's purpose or the "purpose of the HDV".

(3) What has to be established was the purpose of the council and not whether a purpose was commercial:

"[137]. It would require clear statutory language, rather than reading 'a' with emphasis, for a separate but minor, or lesser and incidental purpose or the inevitable accompaniments to the dominant purpose, to require the use of a company when the dominant overall purpose did not."

On the facts neither "the" nor "the dominant" purpose was commercial. Any commercial component was "merely incidental or ancillary, and not a separate purpose".²⁹

(4) The mere fact that a profit might be made which could be used for the Council's proper policy objectives or to reduce Council tax did not of itself show that the activities had any commercial purpose at all, because of the objectives of financial prudence.³⁰ It "may be acting in a commercial manner... but it is not acting for a commercial purpose".³¹

Section 5 enables the Secretary of State to make supplemental provision by order, after consultation.³² If the Secretary of State thinks that a statutory provision (whenever passed or made) prevents or restricts local authorities from exercising the general power, the Secretary of State may by order amend, repeal, revoke or disapply that provision.³³ If the Secretary of State thinks that the general power is overlapped (to any extent) by another power then, for the purpose of removing or reducing that overlap, the Secretary of State may by order amend, repeal, revoke or disapply any statutory provision (whenever passed or made).³⁴ Conversely, the Secretary of State may by order make provision preventing local authorities from doing, in exercise of the general power, anything which is specified, or is of a description specified, in the order³⁵ or provide for the exercise of the general power by local authorities to be subject to conditions, whether generally or in relation to doing anything specified, or of a description specified, in the order.³⁶ These powers may be exercised in relation to all, or particular, or particular descriptions of local authorities.³⁷ The power to amend or disapply a statutory provision includes power to do so for a particular period.³⁸

1.1-70

Section 6 sets limits to the exercise of powers under [s.5\(3\)](#) to amend, repeal, revoke or disapply a statutory provision. The Secretary of State may not make provision under [s.5\(1\)](#) unless the Secretary of State considers that specified conditions, where relevant, are satisfied in relation to that provision.³⁹ These are that:

- (a) the effect of the provision is proportionate to the policy objective intended to be secured by the provision;
- (b) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- (c) the provision does not remove any necessary protection;⁴⁰
- (d) the provision does not prevent any person from continuing to exercise any right or freedom⁴¹ which that person might reasonably expect to continue to exercise;
- (e) the provision is not of constitutional significance.⁴²

It will be noted that these principles contain a number of broad expressions (eg "person might reasonably expect" and "proportionate") or expressions without a settled meaning (e.g. constitutional significance). However, they are simply matters on which the Secretary of State has to be satisfied, the decision on the point being challengeable on conventional judicial review grounds.

Further limitations are that an order under [s.5\(1\)](#) may not make provision for the delegation or transfer of any function of legislating⁴³ or to abolish or vary any tax.⁴⁴

1.1-71

Section 7 contains further provisions as to the procedure for making orders under [s.5](#). Orders must be laid before Parliament and are dealt with in a manner similar to orders under the [Legislative and Regulatory Reform Act 2006](#).

Further general powers, in slightly different terms to the general powers of competence of local authorities, are conferred on fire and rescue authorities,⁴⁵ integrated transport authorities,⁴⁶ passenger transport executives⁴⁷ and economic prosperity boards and combined authorities.⁴⁸

Footnotes

- 1 Localism Act 2011 (Commencement No.3) Order 2012 (SI 2012/411).
- 2 See paras 1.1-49–1.1-61.
- 3 i.e. a county council in England, a district or London borough council, the Common Council in its capacity as a local authority, the Council of the Isles of Scilly and an eligible parish council: [2011 Act s.8\(1\)](#). A parish council is “eligible” if it meets the conditions prescribed by order of the Secretary of State: [2011 Act s.8\(2\)](#). See the [Parish Councils \(General Power of Competence\) \(Prescribed Conditions\) Order 2012 \(SI 2012/965\)](#). The conditions of eligibility are that the council passes a resolution (subsequently confirmed at each annual meeting) that it meets the prescribed conditions; that at least two thirds of the council’s members are elected members; and that the clerk to the council has one of a number of prescribed qualifications and has completed training.
- 4 An individual is an “individual with full capacity”: [2011 Act s.1\(3\)](#).
- 5 [2011 Act s.1\(1\)](#). For examples of reliance on the general power of competence see *R (on the application of A) v Oxfordshire CC [2016] EWHC 2419 (Admin)*, per Langstaff J. at para. [8] (adoption by council of Medium Term Financial Plan, setting out an indicative future budget) within powers conferred by the general power of competence and the [Local Government Act 1972 s.111](#); *Hussain v Sandwell MBC [2017] EWHC 1641 (Admin)* (“pre-formal investigation” into allegations of misconduct against councillor authorised by the 2011 Act ss.1, 27 and the 1972 Act s.111 in conjunction with the 1972 Act ss.123 and 151). *Qualter v Crown Court at Preston [2019] EWHC 2563 (Admin)* (power to investigate a criminal offence may be derived from the [Localism Act 2011 s.1](#) and the [Local Government Act 1972 s.111](#) or delegated by another local authority under the [1972 Act s.101](#)).
- 6 [2011 Act s.1\(2\)](#).
- 7 See below.
- 8 [2011 Act s.1\(4\)](#).
- 9 [2011 Act s.1\(5\)](#).
- 10 [2011 Act s.1\(6\)](#). But see [s.5\(2\)](#).
- 11 *Hussain v Sandwell MBC [2017] EWHC 1641 (Admin)*, paras [200] – [206]. Green J. distinguished the position from that applicable in respect of the wellbeing powers (*R (on the application of Comninos) v Bedford BC [2003] EWHC 121 (Admin)*: see para.1.1-58).
- 12 i.e. power conferred by a statutory provision that (a) is contained in the [Localism Act 2011](#), or in any other Act passed no later than the end of the Session in which that Act is passed, or (b) is contained in an instrument made under an Act and comes into force before the commencement of [s. 1: s.2\(4\)](#).
- 13 [2011 Act s.2\(1\)](#).
- 14 i.e. a prohibition, restriction or other limitation expressly imposed by a statutory provision that (a)is contained in the [Localism Act 2011](#), or in any other Act passed no later than the end of the Session in which that Act was passed, or (b) is contained in an instrument made under an Act and comes into force before the commencement of [s. 1: s.2\(4\)](#). It has been noted that this definition is identical to the limitation previously imposed on the well-being power: see Judge Bidder QC in *R (on the application of MK) v Barking and Dagenham LBC [2013] EWHC 3486 (Admin)* at para.[76], referring to Dyson L.J. in *R (on the application of Khan) v Oxfordshire CC [2004] EWCA Civ 309* at para.[30]. It was held that the council did not have power under the [2011 Act s.1](#) to provide accommodation and subsistence to the claimant, a person illegally in the UK. The provision of such support was barred by [s.17\(3\)](#) of the [Children Act 1989](#),

which provided that services provided under s.17 had to be “provided with a view to safeguarding or promoting the child’s welfare;” these constituted a “pre-commencement limitation,” not satisfied on the facts of the present case. Similarly, application of the council’s duties under Pt 7 of the Housing Act 1996 was barred by s.185 of that Act. In *R (on the application of JP (by his father and litigation friend)) v NHS Croydon Clinical Commissioning Group [2020] EWHC 1470 (Admin)*, paras [45]–[48], Mostyn J held that the 2011 Act s.1 did not empower the local authority to provide medical care; s.75 of the National Health Service Act 2006 and the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 (SI 2000/617) clearly delineated the boundaries between the NHS and local authorities as to what can be provided by whom and constituted an express pre-commencement limitation.

- 15 i.e. a prohibition, restriction or other limitation expressly imposed by a statutory provision that (a) is contained in an Act passed after the end of the Session in which the Localism Act 2011 was passed, or (b) is contained in an instrument made under an Act and comes into force on or after the commencement of s.1:s.2(4). In *R (on the application of GS) v Camden LBC [2016] EWHC 1762 (Admin)*, it was held that the council did have power under the 2011 Act s.1 to meet the need for accommodation of an adult Swiss national who suffered from physical and mental health problems, notwithstanding that she had been assessed under the Care Act 2014 as not having a need for care and support. No post-commencement limitation had been expressed in the 2014 Act. Furthermore, a duty to exercise the power arose because of the impact on the claimant’s Convention rights, by virtue of the Human Rights Act 1998 s.6 and Sch.3 of the Nationality, Immigration and Asylum Act 2002.
- 16 2011 Act s.2(2).
- 17 See Elias J. in *R (on the application of J) v Enfield LBC [2002] EWHC 432 (Admin)*, at [57]: see para 1-66.
- 18 i.e. arrangements for discharge of authority’s functions by committees, joint committees, officers etc.
- 19 i.e. arrangements for local authority governance in England.
- 20 2011 Act s.2(3).
- 21 i.e. a provision of an Act or of an instrument made under an Act: 2011 Act s.8(1).
- 22 This confers powers to charge: see para.1.1-63.
- 23 2011 Act s.3(1),(2). In *R. (on the application of the Durham Company Ltd (trading as Max Recycle)) v Revenue and Customs Commissioners [2016] UKUT 417 (TCC)*, Warren J. stated (at para.[58]) that the provision of a commercial waste collection service other than for a commercial purpose fell within s.3(1) and was thus subject to s.3(2); such a service was required by s.45(1)(b) of the Environmental Protection Act 1990. Accordingly there was no power to charge by virtue of the GPC unless the service was provided for a commercial purpose (para.[59]). But, by virtue of s.4(3) of the Act (see below), it was doubtful whether the GPC was available to local authorities to provide commercial waste services in their area (para.[61]). However, in *R (on the application of AR) v Hammersmith and Fulham LBC [2018] EWHC 3453 (Admin)*, it was held that GS was wrongly decided on this point, on the ground that s.185 of the of the Housing Act 1996, which provides that a person is not eligible for assistance under Pt 7 of that Act if they are a person from abroad who is ineligible for housing assistance, was a pre-commencement limitation within s.2(2)(a) of the 2011 Act. It imposed a prohibition on the provision of accommodation under any enactment and not merely under the 1996 Act. This point had not been taken in GS. The question whether the local authority could lawfully provide funds to enable the claimant to secure accommodation was left open (see para.[30]).
- 24 2011 Act s.3(3),(4).
- 25 2011 Act s.4(1).
- 26 2011 Act s.4(2). *Company* means (a) a company within the meaning given by s.1(1) of the Companies Act 2006, or (b) a registered society within the meaning of the Co-operative and Community Benefit Societies Act 2014 or a society registered or deemed to be registered under the Industrial and Provident Societies Act (Northern Ireland)

1969:s.4(4), as amended by the 2014 Act Sch.4 Pt.2 paras 174, 175. This requirement only applies to those areas where the power to undertake the activity has not previously existed: Ouseley J. in *Peters v Haringey LBC [2018] EWHC 192 (Admin)*, at [117] (or sc. where the power does not otherwise exist). If the requirement applies, it will be unlawful to conduct the activity through a Limited Liability Partnership: *ibid.* at para.[131].

- 27 [2011 Act s.4\(3\)](#). In *R (on the application of O'Neill) v Lambeth LBC [2016] EWHC 2551 (Admin)* Lang J. (at paras [35] – [41] held that the council's decision to vary a lease to allow the Garden Bridge project, which was recreational in nature, to proceed in accordance with a grant of planning permission, was not done for a commercial purpose. While the council intended to seek a mechanism to share income generated for the community groups concerned, that was not sufficient to mean that it was a commercial activity by the council. In any event, the council would have been entitled to rely on the incidental power conferred by the [Local Government Act 1972 s.111](#), which is not subject to the limitation set out in the [2011 Act s.4](#).
- 28 [2018] EWHC 192 (Admin).
- 29 para.[139].
- 30 para.[143].
- 31 para.[148].
- 32 Consultation requirements are set out in [s.5\(7\),\(8\)](#).
- 33 [2011 Act s.5\(1\)](#). This power (and the powers in the [2011 Act s.5\(4\),\(5\)\(b\)](#) and [\(6\)](#)) were relied on to make the [Harrogate Stray Act 1985 \(Tour de France\) Order 2014 \(SI 2014/1190\)](#). This disapplied specified provisions of the 1985 Act concerning management of the area known as the Stray to enable Harrogate BC to host the 2014 Tour de France.
- 34 [2011 Act s.5\(2\)](#).
- 35 [2011 Act s.5\(3\)](#). See the [Local Authorities \(Prohibition of Charging Residents to Deposit Household Waste\) Order 2015 \(SI 2015/973\)](#).
- 36 [2011 Act s.5\(4\)](#).
- 37 [2011 Act s.5\(5\)](#).
- 38 [2011 Act s.5\(6\)](#).
- 39 [2011 Act s.6\(1\)](#).
- 40 The *Explanatory Notes* to the 2011 Act, para.17, give as examples protections in the areas of civil liberties, health and safety, the environment or national heritage.
- 41 The *Explanatory Notes* to the 2011 Act, para.17, give as examples rights conferred by the European Convention on Human Rights.
- 42 [2011 Act s.6\(2\)](#). The *Explanatory Notes* to the 2011 Act, para.17, state that para.(e) allows orders to amend enactments which are considered to be constitutionally significant, but only if the amendments are not themselves constitutionally significant.
- 43 [2011 Act s.6\(3\)](#). A “function of legislating” is a function of legislating by order, rules, regulations or other subordinate instrument: [2011 Act s.6\(4\)](#).

- 44 2011 Act s.6(5).
- 45 2011 Act s.9, inserting ss.5A–5L in the Fire and Rescue Services Act 2004. Fresh charging powers are conferred by the 2011 Act s.10, inserting ss.18A–18C in the 2004 Act.
- 46 2011 Act s.11, inserting ss.102B–102D in the Local Transport Act 2008.
- 47 2011 Act s.12, inserting ss.10A–10C in the Transport Act 1968.
- 48 2011 Act s.13, inserting ss.113A–113C in the Local Democracy, Economic Development and Construction Act 2009.

1.1-72

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Sub-section (f) The sustainability of local communities

1.1-72

The [Sustainable Communities Act 2007](#) is designed to promote the sustainability of local communities in England. References to this concept, in relation to a local authority, are references to encouraging the improvement of the economic, social or environmental well-being of the authority's area, or part of its area. *Social well-being* includes participation in civic and political activity. It is the duty of the Secretary of State to assist local authorities in promoting the sustainability of local communities in the ways specified in the Act.² The Secretary of State must invite local authorities to make proposals which they consider would contribute to promoting the sustainability of local communities. Such proposals may include, after consultation with those involved, a request for a transfer of functions from one person to another. A local authority must have regard to the matters specified in the Schedule before making a proposal. The first invitation must be issued within a year of the passing of the Act.³ Before issuing invitations, the Secretary of State must appoint a "selector" to consider the proposals and, in co-operation with the Secretary of State, draw up a short-list in accordance with regulations. The selector must be a person who represents the interests of local authorities. It is for the Secretary of State to decide in relation to each of the short-listed proposals, whether it should be implemented, and if so, in whole or in part, although the Secretary of State must first consult the selector and try to reach agreement.⁴ The Secretary of State must publish the decision and reasons for it, and an action plan, which is a statement of the action the Secretary of State proposes to take with a view to the implementation of any proposal. The Secretary of State must report annually to Parliament on progress.⁴ The Secretary of State must make procedural regulations and issue guidance.⁵ For the purpose of assisting in the promoting the sustainability of local communities, the Secretary of State must make arrangements for the production, by the Secretary of State or another person, of local spending reports. Such a report is a report on expenditure by such authorities,⁶ in such area,⁷ and over such period,⁸ as are determined in accordance with the regulations. The expenditure to be included in relation to any authority, area or period is to be determined in accordance with the regulations.⁹

Footnotes

1 2007 Act s.1.

2 2007 Act s.2.

3 2007 Act s.3, as amended by the [Sustainable Communities Act 2007 \(Amendment\) Act 2010](#) s.1.

4 2007 Act s.4.

5 2007 Act s.5. See the [Sustainable Communities Regulations 2008 \(SI 2008/2694\)](#); HMG, *Creating Strong, Safe and Prosperous Communities Statutory Guidance* (July 2008), Annex (statutory guidance); CLG, *The Sustainable Communities Act: A Guide*. As to subsequent invitations, see ss.5A–5D, inserted by the [2010 Act s.2](#). Parish councils are now able to submit proposals: [Sustainable Communities \(Parish Councils\) Order 2013 \(SI 2013/2275\)](#).

6 i.e. a local authority, government department or any other person exercising public functions. *Local authority* means a county council in England, a district or London borough council, the Common Council and the Council of the Isles of Scilly: [2007 Act s.8](#).

7 i.e. one or more local authority areas, one or more parts of a local authority area, or any combination of these.

8 Which may be or include a future period.

9 2007 Act s.6.

1.1-73

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Sub-section (g) General duties of local authorities

1.1-73

The various general powers of local authorities are complemented by a range of general duties, usually to achieve some general purpose or take a particular matter into consideration when performing functions. We set out a number here.

End of Document

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1.1-74 National Parks and Access to the Countryside Act 1949

s.11A

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National Parks and Access to the Countryside Act 1949 s.11A

1.1-74

In exercising or performing any functions in relation to, or so as to affect, land in any National Park, a relevant authority¹ shall have regard to the purposes specified in [s.5\(1\) of the 1949 Act](#),² and if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park.³

Footnotes

- 1 This term includes a local authority, joint board or joint committee: [1949 Act s.11A\(4\)](#). *Local authority* means in relation to England, a county council, district council or parish council; and in relation to Wales, means a county council, county borough council, or community council: [1949 Act s.11A\(6\)](#).
- 2 Substituted by the [Environment Act 1995 s.61](#). This provides that the provisions of [Pt 2 of the 1949 Act](#) shall have effect for the purpose (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.
- 3 [1949 Act s.11A\(2\)](#), inserted by the [Environment Act 1995 s.62\(1\)](#).

1.1-75 Wildlife and Countryside Act 1981 s.28G

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Wildlife and Countryside Act 1981 s.28G

1.1-75

An authority to which this section applies (which includes a local authority) is to have the following duty in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest. The duty is to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation¹ and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.²

Footnotes

1 On the meaning of “conservation” see Sullivan LJ in *R (on the application of Boggis) v Natural England [2009] EWCA Civ 1061* at para.[18]: (“conservation” not necessarily the same as “preservation”, although in some, perhaps many, circumstances preservation may be the best way to conserve, that being a matter for the professional judgment of the person under the duty to conserve). See also *Western Power Distribution Investments Ltd v Cardiff City Council [2013] EWHC 1407 (Admin)* (decision to appropriate land to use as allotments quashed on the ground that members were given incorrect and inadequate information, with the consequence, inter alia, that they were given no opportunity to comply with their obligations under the 1981 Act s.28G); *R (on the application of Friends of the Earth England Wales and Northern Ireland Ltd) v Welsh Ministers [2015] EWHC 776 (Admin)*, paras [125]–[138] (the 1981 Act s.28G does not give rise to a presumption against any plan that would lead to harm to a SSSI); *R (on the application of Langton) v Secretary of State for Environment, Food and Rural Affairs [2019] EWHC 597 (Admin)* (the 1981 Act s.28G gives a guide to what are relevant considerations, being the special features that lead to notification of a SSSI rather than the actual interest of the site (see Sir Ross Cranston at paras [59]–[62])).

2 1981 Act s.28G(1), (2), substituted by the Countryside and Rights of Way Act 2000 s.75(1) Sch.9 para.1.

1.1-76 Crime and Disorder Act 1998 s.17

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Crime and Disorder Act 1998 s.17

1.1-76

Without prejudice to any other obligation imposed on it, it is the duty of each specified authority¹ to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment); and the misuse of drugs, alcohol and other substances in its area.²

Footnotes

1 i.e. a local authority as defined in [s.270\(1\) of the Local Government Act 1972](#); the Common Council; a joint authority; a combined authority; the London Fire Commissioner; a fire and rescue authority constituted by a scheme under the [Fire and Rescue Services Act 2004 s.2](#) or [s.4](#) or an order under the 2004 Act s.4A; a metropolitan county fire authority; a local policing body; a National Park authority; the Broads Authority; the Greater London Authority; Transport for London; [1998 Act s.17\(2\)](#), as amended.

2 1998 Act s.17, as amended by the [Police and Justice Act 2006 Sch.9 para.4](#) and [SI 2008/78](#).

1.1-76A Children Act 2004 s.11

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Children Act 2004 s.11

1.1-76A

A local authority in England, a district council which is not such an authority and other specified bodies¹ must make arrangements for ensuring that:

- (a)their functions are discharged having regard to the need to safeguard and promote the welfare of children; and
- (b)any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.²

In the case of a local authority in England, the reference in subs.(2) to functions of the authority does not include functions to which section 175 of the Education Act 2002 applies.³ Each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State.⁴

Footnotes

¹ Including NHS bodies and the local policing body and chief officer of police for a police area in England.

² 2004 Act s.11(1), (2), as amended. The s.11 duty applies to both the setting of policies and their implementation in particular cases: *Nzolameso v Westminster City Council [2015] UKSC 22*. See *R (on the application of KE) v Bristol City Council [2018] EWHC 2103 (Admin)*, paras [126]–[130] where a decision to reduce the council's budget for those with special educational needs by £5M was quashed on the ground, inter alia, that there was no evidence that the council had any regard to this duty.

³ 2004 Act s.11(3).

⁴ 2004 Act s.11(4).

1.1-77 Natural Environment and Rural Communities Act 2006

s.40

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Natural Environment and Rural Communities Act 2006 s.40

1.1-77

Every public authority¹ must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.² Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat.³

Footnotes

1 This term includes a local authority and a local planning authority. *Local authority* means in relation to England, a county council, a district council, a parish council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly; [s.40\(5\)](#). For an analogous duty applicable to local authorities in Wales see the [Environment \(Wales\) Act 2016 s.6](#).

2 2006 Act s.40(1).

3 2006 Act s.40(3).

1.1-78 Childcare Act 2006 s.1

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Childcare Act 2006 s.1

1.1-78

An English local authority must (a) improve the well-being of young children in their area, and (b) reduce inequalities between young children in their area in relation to their well-being. *Well-being* in relation to children, means their well-being so far as relating to:(a)physical and mental health and emotional well-being;
(b)protection from harm and neglect;
(c)education, training and recreation;
(d)the contribution made by them to society;
(e)social and economic well-being.¹

The Secretary of State may, in accordance with regulations, set targets for (a) the improvement of the well-being of young children in the area of an English local authority²; and (b) the reduction of inequalities between young children in the area of an English local authority in relation to the specified matters.³ In exercising its functions, an English local authority must act in the manner that is best calculated to secure that any targets set by the Secretary of State (so far as relating to the area of the local authority) are met.⁴ In performing its duties under this section, an English local authority must have regard to any guidance given from time to time by the Secretary of State.⁵

Footnotes

1 2006 Act s.1(1), (2).

2 i.e. a county council in England; a metropolitan district council; a non-metropolitan district council for an area for which there is no county council; a London borough council; the Common Council of the City of London (in their capacity as a local authority);the Council of the Isles of Scilly: 2006 Act s.106.

3 2006 Act s.1(3). See the [Local Authority Targets \(Well-being of Young Children\) Regulations 2007 \(SI 2007/1415\)](#), as amended by SI 2008/1437. Targets are to be set no more frequently than once in a calendar year and are to be set by reference to one or more of the 13 assessment scales described in App.1 to the “Statutory Framework for the Early Years Foundation Stage” document published by the Department for Children, Schools and Families in May 2008.

4 2006 Act s.1(4).

5 2006 Act s.1(5).

1.1-80 Equality Act 2010 s.1: Public sector duty regarding socio-economic inequalities

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Equality Act 2010 s.1: Public sector duty regarding socio-economic inequalities

1.1-80

Section 1 of the Equality Act 2010 (in force from a day to be appointed) provides that specified authorities¹ must, when making decisions of a strategic nature about how to exercise their functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities² of outcome which result from socio-economic disadvantage. In deciding how to fulfil this duty, an authority must take into account any guidance issued by a Minister of the Crown.³ A failure in respect of a performance of this duty does not confer a cause of action at private law.⁴

Footnotes

1 These include a minister of the Crown; a government department other than the Security Service, the Secret Intelligence Service or the Government Communications Head-quarters; a county or district council in England; the Greater London Authority; a London borough council; the Common Council of the City of London in its capacity as a local authority; the Council of the Isles of Scilly; a police and crime commissioner established for an area in England: 2010 Act s.1(3), as amended; and an authority that is a partner authority (see the Local Government and Public Involvement in Health Act 2007 s.104) in relation to a responsible local authority (see the 2007 Act s.103) and does not fall within the 2010 Act s.1(3), but only in relation to its participation in the preparation or modification of a sustainable community strategy (see the Local Government Act 2000 s.4, para.1.1-59; 2010 Act s.1(4), (5)).

2 This does not include any inequalities experienced by a person as a result of being a person subject to immigration control within the meaning given by the Immigration and Asylum Act 1999 s.115(9): 2010 Act s.1(6).

3 2010 Act s.1(2).

4 2010 Act s.3.

1.1-81 Equality Act 2010 s.149: Public sector equality duty

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Sub-section (g) General duties of local authorities

Equality Act 2010 s.149: Public sector equality duty

1.1-81

A public authority¹ must, in the exercise of its functions, have due regard to the need to:

(1)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the [Equality Act 2010](#);

(2)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and

(3)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.²

A person who is not a public authority but who exercises public functions³ must, in the exercise of those functions, have due regard to these matters.⁴ The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.⁵ [Section 149\(1\)\(a\) of the 2010 Act](#) has effect only in relation to prohibited conduct under the Act; the broader duties contained in s.149 (1)(b) and (c) are wider free-standing duties.⁶

Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

(1)remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(2)take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; and

(3)encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.⁷

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.⁸ Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to (a) tackle prejudice, and (b) promote understanding.⁹ Compliance with these duties may involve treating some persons more favourably than others, but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.¹⁰

A failure in respect of a performance of a duty imposed by or under the [2010 Act Pt 11 Ch.1 \(ss.149–157\)](#) does not confer a cause of action at private law.¹¹

[Section 149 of the 2010 Act](#) replaced specific public sector equality duties under legislation that was superseded by the [2010 Act](#).¹² The duties under the previous legislation were [s.71 of the Race Relations Act 1976](#), [s.49A of the Disability Discrimination Act 1995](#) and [s.6A of the Sex Discrimination Act 1975](#).

Any decision made in the exercise of any function is potentially open to challenge if the duty under the [2010 Act s.149](#) (or equivalent earlier legislation) has been disregarded.¹³ However, a decision-taker subject to the duty is obliged to consider an equality issue only where there is some reason to believe that the measure in question may raise such an issue.¹⁴ The setting of a budget by a local authority at a high level may not engage the duty, but such an exercise may be sufficiently focused and rigid for it to do so.¹⁵ The PSED will not be triggered where, on analysis, there has been no change to an existing policy.¹⁶

In the case of a decision by a multi-member body such as a council, the duty applies to the council as a whole and not to each individual councillor personally. In determining whether there has been compliance in such a case, there is no need for each councillor to file a witness statement. Inferences can be drawn, in the normal way, from the materials placed before the body, from the terms of any resolution or report adopted by it and from the minutes of debate. Elected councillors can be expected to have a good understanding of cases affecting their area, in particular in respect of community relationships.¹⁷ The PSED

will not be triggered where, on analysis, there has been no change to an existing policy.¹⁸

There is a substantial body of case law in which the principles have been discussed and applied. The question whether there has been “due regard” has been paid to equality needs is for the court to determine; it is not limited to challenge on rationality grounds.¹⁹ In *Baker v Secretary of State for Communities and Local Government*,²⁰ the Court of Appeal held that the duty under s.71 of the Race Relations Act 1976 had not been breached by an inspector determining a planning appeal by gypsies. Dyson L.J. held: (1) that the inspector’s duty to observe s.71 arose whether or not the point had been raised by one of the parties to the appeal²¹; (2) that the duty was not a duty to achieve a result (the elimination of unlawful racial discrimination or the promotion of equality) but to have due regard to the need to achieve those goals;²² (3) a failure to make explicit reference to s.71 was not determinative,²³ although it was good practice to do so; and²⁴ (4) that an express reference to s.71 may not necessarily be sufficient to show that the duty has been performed.²⁵ Here, the inspector had not referred to s.71 but had stated that “gypsy status” had to be weighed in the balance. It was clear from the context that this was to be taken in the appellants’ favour. This analysis has commonly been cited. Then, in *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department*,²⁶ Sedley L.J.²⁷ emphasised “the importance of compliance with s.71, not as rearguard action following a concluded decision but as an essential preliminary to any such decision. Inattention to it is both unlawful and bad government.” In *R (on the application of Domb) v Hammersmith and Fulham LBC*,²⁸ the Court of Appeal held that the council had had regard in substance, not just in form, to its equality duties in deciding to introduce charges for non-residential home care services; it had carried out a substantial consultation and commissioned a careful impact assessment. Rix L.J. cited a number of authorities²⁹ and noted

“that there is no statutory duty to carry out a formal impact assessment; that the duty is to have due regard, not to achieve results or to refer in terms to the duty; that due regard does not exclude paying regard to countervailing factors, but is ‘the regard that is appropriate in all the circumstances’; that the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind; and that it is a non-delegable duty.”

In *Bracking v Secretary of State for Work and Pensions*,³⁰ McCombe LJ gave the following summary:

”[26] (1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293 at 274, [2006] I.R.L.R. 934, [2006] 1 W.L.R. 3213*, equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department [2006] EWCA Civ 1293, [2006] 1 WLR 3213* (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154* at 26-27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin)* at 23-24.

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), [2009] PTSR 1506*, as follows:

(i) The public authority decision maker must be aware of the duty to have “due regard” to the relevant matters;

(ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

(iii) The duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

(iv) The duty is non-delegable; and

(v) Is a continuing one.

(vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) “[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.” (per Davis J (as he then was) in *R (Meany) v Harlow DC [2009] EWHC 559 (Admin)* at 84, approved in this court in *R (Bailey) v Brent LBC [2011] EWCA Civ 1586* at 74-75.)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be “rigorous in both enquiring and reporting to them”: *R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941* at 79 per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin)* (Divisional Court) as follows:

(i) At paras 77-78:

”77 Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para 34) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

78 The concept of ‘due regard’ requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield’s submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.”

(ii) At paras 89-90:

”89 It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014* and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para 85):

... the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons’ disabilities in the context of the particular function under consideration.

90 I respectfully agree””

In *Hotak v Southwark LBC*³¹ Lord Neuberger (speaking for the majority of the Supreme Court) cited with approval passages from *Bracking, Baker*³² and a number of other cases.³³ His Lordship emphasised (1) that the equality duty is “not a duty to achieve a result” but a “duty to have due regard to the need” (*Baker*); (2) that “the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment”; (3) that while it is for the decision-maker to determine how much weight is to be given to the duty, the court has to be satisfied that there has been rigorous consideration (*Hurley & Moore*).

It has also been observed that “what is required by the s.149 duty will inevitably vary according to the circumstances of the case.”³⁴ Furthermore, the greater the overlap between the particular statutory duty under consideration and the PSED, the

more likely it is that in performing the statutory duty the authority will also have complied with the PSED even if it is not expressly mentioned.³⁵

Decisions in a wide range of contexts have been quashed where there has been a failure to pay any or any sufficient attention to the PSED obligation.³⁶ Depending on the circumstances, there may be an obligation to consult on proposals that may have an impact on equalities,³⁷ although this has been held to mount to “no more than the conventional *Tameside* duty of inquiry”.³⁸ The fact that the decision-maker asserts expressly that they have taken the PSED into account may not be sufficient to prevent the court concluding that, as a matter of substance, they had not.³⁹

Conversely, in many cases authorities are found on the facts to have paid “due regard” to the matters set out in s.149).⁴⁰ It has been observed that “what is required by the s.149 duty will inevitably vary according to the circumstances of the case.”⁴¹ A decision-taker subject to the duty is obliged to consider an equality issue only where there is some reason to believe that the measure in question may raise an equality issue.⁴² The undertaking of a formal Equality Impact Assessment is not mandated by the 2010 Act, but the production of an EIA in appropriate form in advance of the decision is usually convincing evidence that due regard has been had to the PSED.⁴³ Where a breach of the PSED is established, the court as a matter of discretion may decide not to quash the decision, but merely to grant a declaration that there has been non-compliance. This may be appropriate, for example, where a subsequent EIA has been conducted. The discretion to quash should not be used for disciplinary purposes.⁴⁴ Furthermore, the fact that there has been a breach of the PSED does not remove the obligations under the Supreme Court Act 1981 s.31(3)(c) and (d) for the court to consider whether the outcome would have been substantially different and to refuse leave to apply for judicial review if it appears to be highly likely that the outcome would not have been substantially different.⁴⁵ The Court of Appeal has confirmed that there is no general rule that any decision taken following a breach of the PSED has to be quashed or set aside, nor is there a rule that such a decision had to be quashed or set aside unless it fell within a narrow category of cases.⁴⁶

Footnotes

- 1 These are specified in Sch.19, as amended. In England, they include a county, district or parish council, a parish meeting, Charter trustees, the Greater London Authority, a London borough council, the Common Council of the City of London in its capacity as a local authority or port health authority, the Sub-Treasurer of the Inner Temple or the Under-Treasurer of the Middle Temple, in that person’s capacity as a local authority, the London Fire Commissioner, Transport for London, a Mayoral development corporation, the Council of the Isles of Scilly, the Broads Authority, a fire and rescue authority constituted under a scheme under the *Fire and Rescue Services Act 2004* s.2 or s.4 or created by an order under the 2004 Act s.4A, an internal drainage board, a National Park authority, a Passenger Transport Executive for an integrated transport area, a port health authority, a waste disposal authority, a joint authority established under Pt 4 of the *Local Government Act 1985*, a sub-national transport body, a body corporate established under an order under s.67 of the *Local Government Act 1985*, a joint committee constituted under with s.102(1)(b) of the *Local Government Act 1972*, a joint board continued by virtue of s.263(1) of the 1972 Act, a Local Commissioner in respect of specified functions, and a series of educational and policing bodies. In Wales, they include a county or county borough council, a fire and rescue authority, a National Park authority and other educational bodies.
- 2 2010 Act s.149(1). Section 149 came into force on 5 April 2011. The PSED does not apply to acts such as the making of regulations before that date or to decisions applying the regulations after that date: *A-K v Secretary of State for Work and Pensions [2017] UKUT 420 (AAL), [2018] 1 W.L.R. 2657* (in respect of regulations made on 22 June 2010 that came into effect on 11 April 2011).
- 3 A public function is a function that is a function of a public nature for the purposes of the *Human Rights Act 1998*: 2010 Act s.150(5). See para.3-999.1322.
- 4 2010 Act s.149(2). Where a council’s functions are contracted out to another person, the PSED will apply to that person by virtue of s.149(2): *Panayiotou v Waltham Forest LBC [2017] EWCA Civ.1624*.
- 5 2010 Act s.149(7). The protected characteristics are defined in detail in ss.5–12. Harassment and victimisation are defined in ss.26 and 27. It has been noted that impecuniosity is not a protected characteristic: *R (on the application of Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2019] EWHC 3536 (Admin), [2020] 1 WLR 1486*, para.[117].

- 6 *R (on the application of MBT) v Secretary of State for the Home Department (restricted leave; ILR; disability discrimination) [2020] UKUT 414 (IAC)*, para.[164].
- 7 2010 Act s.149(3).
- 8 2010 Act s.149(4).
- 9 2010 Act s.149(5).
- 10 2010 Act s.149(6), (8).
- 11 2010 Act s.156.
- 12 With effect from April 5, 2011, by virtue of the Equality Act 2010 (Commencement No 6) Order 2011 (SI 2011/1066).
- 13 This includes a resolution of the council “insofar as legal considerations allow, to boycott any produce originating from illegal Israeli settlements in the West Bank”; it did not matter that the resolution would not have practical impact so far as the practical conduct of the council’s affairs were concerned although that could bear on the content of the duty in the circumstances: *R. (on the application of Jewish Rights Watch Ltd) v Leicester City Council [2018] EWCA Civ 1551*, per Sales L.J. at [27] (no breach of duty on the facts).
- 14 *R (on the application of Hurley) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin)*, per Elias LJ at para.[95], cited by Underhill J. in *R (on the application of Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWHC 233 (Admin)* at para.[37].
- 15 *R (on the application of KE) v Bristol City Council [2018] EWHC 2103 (Admin)* (breach of PSED in decision to set a schools’ budget which included a reduction in expenditure of approximately £5 million in the high needs block budget; there should have been a consultation). KE was distinguished in *R (on the application of Hollow) v Surrey CC [2019] EWHC 618 (Admin)*, [2019] PTSR 1871, DC, at [83], where it was held that it was not irrational not consult on a decision when setting the budget to identify “areas of focus” for cuts; the decision was not “a decision to cut spending or services, let alone to make a global and indiscriminate ‘cut’ to the provision of services to children with special educational needs and disabilities” (para.[12]).
- 16 *Miyanji v Secretary of State for the Home Department [2017] EWHC 1939 (QB)*.
- 17 Sales L.J. in *Jewish Rights Watch* at para. [34]. cf. *R. (on the application of Logan) v Havering LBC [2015] EWHC 3193 (Admin)* (insufficient evidence that councillors had read EIA).
- 18 *Miyanji v Secretary of State for the Home Department [2017] EWHC 1939 (QB)*.
- 19 Wilkie J. in *R (on the application of Williams) v Surrey CC [2012] EWHC 867 (QB)*, at para.[24]; followed by Upperstone J. in *R (on the application of West) v Rhondda Cynon Taff CBC [2014] EWHC 2134 (Admin)*.
- 20 [2008] EWCA Civ 141, [2008] L.G.R. 239.
- 21 para.[29].
- 22 para.[31].
- 23 para.[36].
- 24 para.[38].

25 para.[38].

26 [2007] EWCA Civ 1139.

27 At para.[3].

28 [2009] EWCA Civ 941, [2009] L.G.R. 843.

29 *R (on the application of Elias) v Secretary of State for Defence* [2005] EWHC 1435 (Admin), [2005] IRLR 788 (Elias J), [2006] EWCA Civ 1293, [2006] 1 WLR 3213; *R (on the application of Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin), 100 B.M.L.R. 27 (HHJ Mackie QC); *Baker v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2008] L.G.R. 239; *R (on the application of Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); and *R (on the application Meany, Glynn and Sanders) v Harlow DC* [2009] EWHC 559 (Admin) (Davis J). Rix L.J. found the greatest help in the summaries of Dyson L.J. in *Baker* (dealing with the RRA) at [30]ff and of Scott Baker L.J. in *Brown* (dealing with the DDA) at [89]–[96].

30 [2013] EWCA Civ 1345. This summary is often cited.

31 [2015] UKSC 30, [2016] A.C.811 at [73]-[75]. For a subsequent summary of the principles see Briggs L.J. in *Hackney LBC v Haque* [2017] EWCA Civ 4 at [21]-[23].

32 [2008] EWCA Civ 141.

33 *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, per Wilson L.J.; McCombe L.J. in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, para.[26] and Elias L.J. in *R. (on the application of Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), paras [77]-[78] and [89].

34 Underhill J. in *R (on the application of Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions* [2013] EWHC 233 (Admin) at para.[26].

35 *R (on the application of McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, [2011] P.T.S.R. 1266, per Lord Brown at para.[24].

36 *R (on the application of C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] Q.B. 657 (new rules broadening the range of situations where the use of physical restraints on young persons detained at Secure Training Centres was permitted were quashed; no Race Equality Impact Assessment had been carried out even though there were significant numbers of black and ethnic minority trainees at STCs); *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWHC 1865 (Admin), [2008] 3 F.C.R. 203 (school in refusing exemption from uniform policy in respect of the wearing of a kara had failed to appreciate its obligation under s.71, to which there had been no reference at all in the decision-making process); *R (on the application of Kaur and Shah) v Ealing LBC* [2008] EWHC 2062 (Admin) (decision to cease funding of organisation that supported Asian and Afro-Caribbean women without full racial equality impact assessment quashed); *R (on the application of JL) v Islington LBC* [2009] EWHC 458 (Admin), [2009] 2 F.L.R. 515 (assessment of needs of disabled child quashed, inter alia, on the ground that the council had failed to have due regard to the matters contained in s.49A of the Disability Discrimination Act 1995); *R (on the application of Meany, Glynn and Sanders) v Harlow DC* [2009] EWHC 559 (Admin) (cuts to budget for welfare rights and advice services quashed); *R (on the application of Boyejo and others) v Barnet LBC*; *R (on the application of Smith) v Portsmouth City Council* [2009] EWHC 3261 (Admin) (decision to terminate contracts for on-site warden based services for persons living in sheltered accommodation and developing a peripatetic support service quashed); *R (on the application of Hajrula) v London Councils* [2011] EWHC 448 (Admin) (decision to cut funding for the Roma Support Group quashed); *R (on the application of Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin) (new government's decision to cancel Building Schools for the Future school building projects quashed inter alia on the ground of non-compliance with equality duties); *R (on the application of Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin) (decision to terminate funding for legal advice services pending new commissioning arrangements quashed on the ground of a breach of the council's

equality duties); *R (on the application of W) v Birmingham City Council; R (on the application of M) v Birmingham City Council [2011] EWHC 1147 (Admin)* (decision that individual budgets for disabled persons would in future be funded only to meet needs which were assessed to be “critical” and not merely “substantial” quashed); *R (on the application of Green) v Gloucestershire CC; R (on the application of Rowe) v Somerset CC [2011] EWHC 2687 (Admin)* (decisions to change library services held to have been taken without due regard to public sector equality duties; the information gathering exercise and analysis were insufficient); *R (on the application of JM) v Isle of Wight Council [2011] EWHC 2911 (Admin)* (breach of PSED in respect of budget reduction for community care); *R (on the application of Williams) v Surrey CC [2012] EWHC 867 (QB)* (breach of PSED in decision to change library provision in 10 areas to a community partnership model in that inadequate attention was paid to equality training issues); *R (on the application of South West Care Homes Ltd) v Devon CC [2012] EWHC 2967 (Admin)* (breach of PSED in setting fee rates for care homes for the elderly); *R (on the application of South Tyneside Care Home Owners Association) v South Tyneside Council [2013] EWHC 1827 (Admin)* (breach of PSED established where EIA failed to recognise relevant risks in introduction of new fee structure for care homes); *R (on the application of Hunt) v North Somerset Council [2013] EWCA Civ 1320*, [2014] L.G.R.1 (breach of PSED established where the Court of Appeal held that the judge had not been entitled to find that all councillors would have read a detailed EIA concerning cuts to youth services budgets, referred to but not included in the papers for the meeting; no relief granted); *R. (on the application of Rotherham MBC) v Secretary of State for Business, Innovation and Skills) [2014] EWHC 232 (Admin)* (breach of PSED in BIS decision as to the allocation of EU Structural Funds; decision would not be saved by EIA carried out “after the event”); *Blake v Waltham Forest LBC [2014] EWHC 1027 (Admin)* (breach of PSED in decision to revoke licence to a charity to operate a soup kitchen at a council-owned car park; the equality analysis failed to address the very real prospect that the soup kitchen would close altogether, given that the charity had rejected the alternative site proposed by the council as unsuitable); *R. (on the application of Winder) v Sandwell MBC [2014] EWHC 2617 (Admin)* (breach of PSED where no EIA was conducted in respect of the introduction of a residence requirement into the council’s Council Tax Reduction Scheme); *R. (on the application of Cushnie) v Secretary of State for Health [2014] EWHC 3626 (Admin)* (breach of PSED in process leading to the making of regulations concerning NHS charges in respect of former asylum seekers); *R. (on the application of Moore) v Secretary of State for Communities and Local Government [2015] EWHC 44 (Admin)* (no regard to PSED in introduction of policy recovering appeals relating to travellers’ pitches in the Green Belt); *R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin), [2015] L.G.R.283* (clear breach of PSED where policy on discretionary housing payments was affected by changes to housing benefit but no further EIA was conducted); *West Berkshire DC v Department for Communities and Local Government [2015] EWHC 2222 (Admin)* (breach of PSED in respect of changes to national policy in respect of planning obligations for affordable houses and social infrastructure contributions; subsequent EIA flawed; reversed by the Court of Appeal on the ground that the EIA was not flawed: [2016] EWCA Civ 441); *R. (on the application of Logan) v Havering LBC [2015] EWHC 3193 (Admin)* (breach of PSED where EIA had not been circulated to all councillors). *LDRA Ltd v Secretary of State for Communities and Local Government [2016] EWHC 950 (Admin)* (breach of PSED by planning inspector in failing to consider impact of project in preventing disabled access to the riverside); *R. (on the application of DAT) v West Berkshire’ Council [2016] EWHC 1876 (Admin)* (breach of PSED in decision to cut funding for voluntary sector organisation where officers’ report did not enable councillors to ask the right questions); *Ealing LBC v H [2017] EWCA Civ 1127* (breach of PSED in adoption of working household priority schemes); *R. (on the application of Buckley) v Bath and North East Somerset Council [2018] EWHC 1551 (Admin)* (breach of PSED in granting outline planning permission for demolition of up to 542 dwellings and the provision of up to 700, where there was no due regard to the impact on the elderly and disabled of the loss of their home); *R. (on the application of Law Centres Federation) v Lord Chancellor [2018] EWHC 1588 (Admin)* (breach of PSED where decision to reduce number of Housing Possession Court Duty Schemes funded by legal aid was taken in ignorance of effects on persons with protected characteristics); *Lomax v Gosport BC [2018] EWCA Civ 1846, [2019] PTSR 167* (breach of PSED where a decision that it was reasonable for a severely disabled applicant for housing to continue to occupy her accommodation was made without a “sharp focus” on her disabilities, including a recognition that the claimant might need to be treated more favourably than others without her disabilities); *Kannan v Newham LBC [2019] EWCA Civ 57* (decision that accommodation provided was “suitable” for a disabled applicant misunderstood the medical assessment and downplayed the disability); *R (on the application of Ward) v Hillingdon LBC [2019] EWCA Civ 692* (breach of PSED in failing to consider needs of non UK-nationals in determining its housing allocation policy); *R (on the application of Williams) v Caerphilly CBC [2019] EWHC 1618 (Admin)* (breach of PSED in decision to close leisure centre; no evidence of effect of closure on older or disabled persons); *Bromley LBC v Persons unknown (London Gypsies and Travellers and others intervening)*

[2020] EWCA Civ 12 (breach of PSED in decision to seek boroughwide injunction prohibiting encampment and entry/occupation in relation to all accessible public spaces in the borough (except cemeteries and highways) directed at the Gypsy and Traveller community; there had been no proper engagement with that community at all); *R (on the application of Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058 (breach of PSED in the use of live automated facial recognition technology (AFR) by the South Wales Police in an ongoing trial of AFR by the South Wales Police); *Gathercole v Suffolk CC* [2020] EWCA Civ 1179 (breach of PSED in decision to site new village school near an air base through failure to have regard to the effect of aircraft noise in the outdoor areas on children with protected characteristics; no remedy granted).

37 See eg *R (on the application of KE) v Bristol City Council* [2018] EWHC 2103 (Admin).

38 Sharp LJ for the Divisional Court in *R (on the application of Hollow) v Surrey CC* [2019] EWHC 618 (Admin), [2019] PTSR 1871, at [83]. The Tameside duty arises where it would be irrational (see para.[83]) not to take particular steps to acquaint itself with the information necessary to enable it properly to perform the relevant function. See further para.10-35.

39 See eg *Lomax v Gosport BC* [2018] EWCA Civ 1846, [2019] PTSR 167; *Kannan v Newham LBC* [2019] EWCA Civ 57 (“The mere recitation of Lord Neuberger’s formula [in Hotak] in paragraph 28 of the decision letter is no substitute for actually doing the job” per Lewison LJ at para.[24]).

40 *R. (on the application of Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) (Secretaries of State for Work and Pensions and for Business, Enterprise and Regulatory Reform had not breached equality duties in course of programme for closure of post offices); *R. (on the application of McCarthy) v Basildon DC* [2009] EWCA Civ 13, [2009] L.G.R. 1013 (no breach of equality duties in decision to act under s.178 of the Town and Country Planning Act 1990 to enter land and take steps required by an enforcement notice that had been disregarded in respect of a caravan site occupied by travellers and gypsies); *R. (on the application of Harris) v Haringey LBC* [2009] EWHC 2329 (Admin) (no breach of equality duties in grant of planning permission for development that would affect black and minority ethnic businesses); *R. (on the application of Bailey) v Brent LBC* [2011] EWHC 2572 (Admin) (no breach of PSED in decisions to close libraries; courts must not “micro-manage” equality impact assessment); *R. (on the application of the Sefton Care Association) v Sefton Council* [2011] EWHC 2676 (Admin) (no breach of PSED but decision not to increase fees payable to care homes quashed on other grounds); *R. (on the application of D) v Manchester City Council* [2012] EWHC 17 (Admin) (no breach of PSED in decision to make budget cuts affecting adult social care provision); *R. (on the application of Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496 (no breach of PSED in decision to cease funding a law centre); *R. (on the application of Coleman) v Barnet LBC* [2012] EWHC 3725 (Admin) (no breach of PSED in granting planning permission for development of site formerly occupied by a garden centre used by the disabled and the elderly); *B v Sheffield City Council* [2013] EWHC 512 (Admin) (no breach of PSED in respect of introduction of council tax reduction scheme that meant that many poorer residents would now have to pay 23% of their liability); *R. (on the application of D) v Worcestershire CC* [2013] EWHC 2490 (Admin), [2013] L.G.R. 741 (no breach of PSED in respect of decisions limiting funding for adult community care services); *R. (on the application of T) v Sheffield City Council* [2013] EWHC 2953 (Admin) (no breach of PSED as regards decisions to stop payment of subsidies to nurseries (criticisms raised concentrated on too fine a level of detail of analysis)); *R. (on the application of LH CCM) v Shropshire Council* [2013] EWHC 4222 (Admin) (no breach of PSED in decisions to close day centre for adults with a learning disability) (appeal allowed on other grounds: [2014] EWCA Civ 404); *R. (on the application of Islington LBC) v Mayor of London* [2013] EWHC 4142 (Admin) (no breach of PSED in respect of decision to close fire stations and reduce the number of fire appliances in London); *Hamnett v Essex CC* [2014] EWHC 246 (Admin) (no breach of PSED in respect of experimental traffic regulation orders affecting disabled parking spaces); *R (on the application of MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13 (no breach of PSED in respect of the so-called “bedroom tax” in the context of housing benefit); *R. (on the application of West) v Rhondda Cynon Taff LBC* [2014] EWHC 2134 (Admin) (no breach of PSED notwithstanding some deficiencies in the EIA); *R. (on the application of Draper) v Lincolnshire CC* [2014] EWHC 2388 (Admin) (no breach of PSED in decision to reduce library services); *R. (on the application of Sumpter) v Secretary of State for Work and Pensions* [2014] EWHC 2434 (Admin) (no breach of PSED in replacement of Disability Living Allowances by a new benefit); *R. (on the application of Karia) v Leicester City Council* [2014] EWHC 3105 (Admin), [2014] 141 B.M.L.R. 163 (no breach of PSED in decision to

withdraw direct residential home care for the elderly); *R. (on the application of Robson) v Salford City Council [2014] EWHC 3481 (Admin) (appeal dismissed: [2015] EWCA Civ 6, [2015] L.G.R. 150)* (no breach of PSED in withdrawal of transport services notwithstanding deficiencies in aspects of the EIA); *R. (on the application of P) v East Sussex CC [2014] EWHC 4634 (Admin)* (no breach of PSED in respect of changes to travel arrangements for girl with special educational needs and medical problems); *R. (on the application of Bracking) v Secretary of State for Work and Pensions [2014] EWHC 4134 (Admin)* (no breach of PSED in respect of decision to close Independent Living Fund); *R. (on the application of A) v Secretary of State for Work and Pensions [2015] EWHC 159 (Admin)* (no breach of PSED in respect of the so-called “bedroom tax” in the context of housing benefit); *R. (on the application of Hall) v Leicestershire CC [2015] EWHC 2985 (Admin)* (no breach of PSED in decision to close museum). *R. (on the application of Tilley) v The Vale of Glamorgan Council [2016] EWHC 2272 (Admin)* (no breach of PSED in decision to establish five community libraries); *Hackney LBC v Haque [2017] EWCA Civ 4* (no breach of PSED in decision that accommodation was suitable for homeless person with disabilities); *R. (on the application of Peters) v Haringey Council [2018] EWHC 192 (Admin)* (no breach of PSED in making decision to establish the Haringey Development Vehicle, a partnership between the council and the private sector to develop the council’s land); *R. (on the application of Jewish Rights Watch Ltd) v Leicester City Council [2018] EWCA Civ 1551* (no breach of PSED in passing resolution supporting boycott of produce from illegal Israeli settlements); *Powell v Dacorum BC [2019] EWCA Civ 23* (no breach of PSED in claiming possession of the claimant tenant’s property; health problems properly taken into account); *R (on the application of Hackney LBC) v Secretary of State for Housing, Communities and Local Government [2019] EWHC 1438 (Admin)* (no breach of PSED where Secretary of State made directions under s.4A of the Local Government Act 1986 prohibiting local authority from publishing its newsletter more frequently than quarterly); *Anand v Kensington and Chelsea RLBC [2019] EWHC 2964 (Admin)* (no breach of PSED in making traffic management order imposing parking restrictions affecting elderly members of the congregation of a nearby Sikh Temple); *McMahon v Watford BC; Kiefer v Hertsmere BC [2020] EWCA Civ 497* (no breach of PSED in decision under the homelessness legislation; trial judges had taken too strict a view of the review decisions); *R (on the application of Fisher) v Durham CC [2020] EWHC 1277 (Admin)* (no breach of PSED in service of noise abatement notice in respect of person with a neurological disorder which caused her to make involuntary sounds and noises).

- 41 Underhill J. in *R. (on the application of Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWHC 233 (Admin)* at para.[26].
- 42 *R. (on the application of Hurley) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin)*, per Elias LJ at para.[95], cited by Underhill J. in *R. (on the application of Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWHC 233 (Admin)* at para.[37].
- 43 Wyn Williams J. in *R. (on the application of Diocese of Menevia) v City and County of Swansea Council [2015] EWHC 1436 (Admin)* at [98], cited by Mostyn J. in *R. (on the application of Juttlia) v Hertfordshire Valleys Clinical Commissioning Group [2018] EWHC 267 (Admin)* at para.[39].
- 44 *West Berkshire DC v Secretary of State for Communities and Local Government [2016] EWCA Civ 441, [86]-[88]; R. (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWCA Civ 438, [2016] 1 W.L.R. 3791.*
- 45 *R (on the application of Oleg Khala) v Crown Court At Kingston Upon Thames [2019] EWHC 1105 (Admin); Gathercole v Suffolk CC [2020] EWCA Civ 1179; Powell v Dacorum BC [2019] EWCA Civ 23; London and Quadrant Housing Trust v Patrick [2019] EWHC 1263 (QB)*. For an example of a case where the court was satisfied there would be compliance in the future see *Barnsley MBC v Norton [2011] EWCA Civ 834, [2012] PTSR 56.*
- 46 *Aldwyck Housing Group Ltd v Forward [2019] EWCA Civ 1334, [2020] 1 W.L.R. 584* (rejecting the argument in respect of the latter point that the discretion to refuse relief should only be exercised in two categories of case: (a) cases in which there had been a subsequent compliance with the duty in that particular case; (b) cases in which it was clear that future compliance would compensate for the prior non-compliance). See also *Luton Community Housing Ltd v Durdana [2020] EWCA Civ 445.*

1.1-81.1

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Well-being of Future Generations (Wales) Act 2015

1.1-81.1

Local authorities¹ are “public bodies” for the purposes of the [Well-being of Future Generations \(Wales\) Act 2015](#).² Each public body³ must carry out sustainable development,⁴ and its actions must include (a) setting and publishing “well-being objectives” that are designed to maximise its contribution to achieving each of the well-being goals;⁵ and (b) taking all reasonable steps (in exercising its functions) to meet those objectives.⁶ Each public body must also publish a statement about its well-being objectives, setting out, *inter alia*, the steps it proposes to take to meet its objectives.⁷ The Welsh Ministers must publish national indicators to measure progress towards the achievement of the goals, an annual well-being report,⁸ and, within 12 months after a general election, a “future trends report”.⁹ Each public body must publish an annual report.¹⁰ The Welsh Ministers may issue guidance.¹¹ The Auditor General for Wales may (and must periodically) carry out examinations of public bodies for the purpose of assessing the extent to which a body has acted in accordance with the sustainable development principle when setting objective and taking steps to meet them.¹² The Welsh Ministers must appoint a Future Generations Commissioner for Wales to promote the sustainable development principle and monitor and assess the extent to which objectives are being met.¹³

There is to be a public services board for each local authority area in Wales, its members comprising the local authority; the Local Health Board and the Welsh fire and rescue authority for an area any part of which falls within the local authority area; and the Natural Resources Body for Wales. A function of the board is a function of each member of the board that may only be exercised jointly with the other members.¹⁴ A board must invite specified persons, including the chief constable and the police and crime commissioner, and may invite any other person who exercises functions of a public nature, to participate in the activity of the board as an “invited participant.”¹⁵ A board must seek advice from its “other partners”¹⁶ and otherwise involve them in such manner and to such extent as it considers appropriate.¹⁷ The local authority’s overview and scrutiny functions apply in respect of the board for the area.¹⁸ Each board is under a duty to improve the economic, social, environmental and cultural well-being of its area by contributing to the achievement of the well-being goals. This contribution must include assessing the state of well-being in its area, setting “local objectives” designed to maximise its contribution and the taking of all reasonable steps by members of the board (in exercising their functions) to meet those objectives.¹⁹ Each board must prepare and publish a “local well-being plan” setting out its local objectives and the steps it proposes to take to meet them.²⁰ It must publish annual progress reports.²¹ Two or more boards may agree to merge or to collaborate.²² The Welsh Ministers may by regulations set performance indicators and standards for boards,²³ and may issue guidance.²⁴

In *R (on the application of Williams) v Caerphilly CBC*,²⁵ Swift J rejected the council’s argument that the enactment of the 2015 Act had caused Pt 1 of the Local Government (Wales) Measure 2009 (concerning improvement duties) to fall into desuetude. No such principle formed any part of the law of England and Wales. Furthermore, the suggestion of disuse was at odds with the guidance issued by the Auditor General for Wales in January 2019 “A Guide to Welsh Public Audit Legislation”. This guidance rested on the premise that the obligations in Pt 1 of the 2009 Measure remained relevant and were to be complied with. Any contention that enactment of the 2015 Act had resulted in an implied repeal of the obligations in Pt 1 of the 2009 Measure could not succeed because there was no inconsistency between the obligations under the respective statutes. Considerations of sustainability were an aspect of the improvement duty under s.2 of the 2009 Measure; the improvement duty extended significantly beyond considerations of sustainability and well-being.

Footnotes

¹ ie county and county borough councils in Wales: [2015 Act s.55\(1\)](#).

² Fully in force from 1 April 2016.

- 3 Defined in the [2015 Act s.6](#). The Welsh Ministers may by regulations amend [s.6: 2015 Act s.52](#).
- 4 ie the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, “in accordance with the sustainable development principle”, aimed at achieving the well-being goals: [2015 Act s.2](#). Acting “in accordance with the sustainable development principle” means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs; in order to do so the body must take account of five specified things: [2015 Act s.5](#).
- 5 The [2015 Act s.4](#) lists seven goals related to a Wales that is “prosperous”, “resilient”, “healthier”, “more equal”, “of adhesive communities”, “of vibrant culture and thriving Welsh language” and “globally responsible”.
- 6 [2015 Act s.3](#).
- 7 [2015 Act ss.7, 9](#).
- 8 [2015 Act s.10](#).
- 9 [2015 Act s.11](#).
- 10 [2015 Act s.13, Sch.1](#).
- 11 [2015 Act s.14](#).
- 12 [2015 Act s.15](#).
- 13 [2015 Act ss.17 – 28, Sch.2](#).
- 14 [2015 Act s.29](#).
- 15 [2015 Act ss 30, 31](#).
- 16 Listed in the [2015 Act s.32 \(1\)](#). They include a community council or National Park authority for any part of the area, any further or higher education institutions situated in the area, a Community Health Council for any part of the area and a number of national Welsh bodies.
- 17 [2015 Act s.32 \(2\), \(3\)](#). As to meetings of boards see the [2015 Act s.34, Sch.3](#).
- 18 [2015 Act s.35](#).
- 19 [2015 Act s.36](#). On assessments of local well-being, see [ss.37, 38](#); they must include assessments of each “community area” in its area.
- 20 [2015 Act ss.39 – 44](#).
- 21 [2015 Act s.45](#).
- 22 [2015 Act ss.47, 48](#). The Welsh Ministers may direct merger or collaboration: [2015 Act s.49](#).
- 23 [2015 Act s.50](#).
- 24 [2015 Act s.51](#).
- 25 [2019] EWHC 1618 (Admin), paras [28]-[30].

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1.1-82 Exercise of regulatory functions

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Exercise of regulatory functions

1.1-82

Under Pt. 2 (ss.21-24) of the [Legislative and Regulatory Reform Act 2006](#) any person exercising regulatory functions to which the 2006 Act s.21 applies¹ must have regard to these principles in the exercise of the function:

1. that regulatory functions should be carried out in a way which is transparent, accountable, proportionate and consistent;
2. that regulatory functions should be targeted only at cases in which action is needed.²

This duty is subject to any other requirement affecting the exercise of the regulatory function.³ A Minister of the Crown may issue a code of practice to which regulators have regard.⁴

A further duty has been introduced by [ss 108-111 of the Deregulation Act 2015](#). Accordingly, a person exercising a regulatory function⁵ to which s.108 applies must, in the exercise of the function, have regard to the desirability of promoting economic growth.⁶ In performing this duty, the person must, in particular, consider the importance for the promotion of economic growth of exercising the regulatory function in a way which ensures that (a) regulatory action is taken only when it is needed, and (b) any action taken is proportionate.⁷ A Minister of the Crown may by order specify the regulatory functions to which s.108 applies,⁸ and may from time to time issue guidance as to the performance of the duty under section 108(1).⁹

Footnotes

1 These are specified in the [Legislative and Reform \(Regulatory Functions\) Order 2007 \(SI 2007/3544\)](#), as amended by SI 2009/2981, SI 2010/3028 and SI 2014/860, made under the 2006 Act s.24, as amended by SI 2007/1388 Sch. 1 para. 148 and the [Postal Services Act 2011 Sch. 12 para. 174](#). This does not apply to any regulatory function exercisable by Order in Council, order, rules, regulations, scheme, warrant, byelaw or other subordinate instrument under a public general Act or local Act or any regulatory function exercisable only in or as regards Wales: SI 2007/3544 arts 2, 3. SI 2007/3544, Sch.Pt.3 lists regulatory functions exercised by local authorities.

2 2006 Act s.21(1), (2).

3 2006 Act s.21(3).

4 2006 Act ss 22, 23. The Regulators' Compliance Code came into force on April 6, 2008, by virtue of the [Legislative and Regulatory Reform Code of Practice \(Appointed Day\) Order 2007 \(SI 2007/3548\)](#). It was replaced by the Regulators' Code from April 6, 2014, by virtue of the [Legislative and Regulatory Reform Code of Practice \(Appointed Day\) Order 2014 \(SI 2014/929\)](#). A regulator subject to the 2006 Act s.22, other than a local authority, is to be required to produce reports on the effect of the performance of the s.22 duties: [2006 Act s.23A](#), to be inserted by the [Enterprise Act 2016 s.15](#).

5 ie (a) a function under or by virtue of an Act or subordinate legislation of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to an activity, or (b) a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which, under or by virtue of an Act or subordinate legislation, relate to an activity: [2015 Act s.111\(1\)](#). The references

to a function (a) include a function exercisable by or on behalf of the Crown; (b) do not include (i) a function of instituting or conducting criminal proceedings; (ii) a function of conducting civil proceedings: [2015 Act s.111\(2\)](#). The references to an activity include (a) providing goods and services, and (b) employing or offering employment to a person: [2015 Act s.111\(3\)](#).

- 6 [2015 Act s.108\(1\)](#).
- 7 [2015 Act s.108\(2\)](#).
- 8 [2015 Act s.109](#), to be amended by the [Wales Act 2017 Sch.6, Pt 3, para 105](#). See the [Economic Growth \(Regulatory Functions\) Order 2017 \(SI 2017/267\)](#). This applies the duty to specified regulators (who do not include local authorities) and Minister of the Crown acting under specified Acts.
- 9 [2015 Act s.110](#). See the [Deregulation Act 2015 \(Growth Duty Guidance\) Order 2017 \(SI 2017/268\)](#), bringing into force DBEIS, Growth Duty: Statutory Guidance (March 2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/603743/growth-duty-statutory-guidance.pdf

1.1-83 Co-ordination

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Co-ordination

1.1-83

The [Regulatory Enforcement and Sanctions Act 2008](#) introduces a range of measures for the co-ordination of regulatory enforcement by local authorities; for the creation of civil sanctions in relation to regulatory offences; and for the reduction and removal of regulatory burdens.

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1.1-84 The Local Better Regulation Office; the Better Regulation Delivery Office

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The Local Better Regulation Office; the Better Regulation Delivery Office

1.1-84

The [2008 Act](#) placed on a statutory footing the Local Better Regulation Office (LBRO), previously a company limited by guarantee, with functions of giving guidance and advice. However, in 2012 the LBRO was abolished¹ and its functions transferred to the Secretary of State or Welsh Ministers. They were then exercised across the UK by the Better Regulation Delivery Office, an independent unit within the Department for Business, Innovation and Skills.² From 1 April 2016, the BRDO was brought together with the National Measurement and Regulation Office to form Regulatory Delivery, a directorate of BIS. From 14 July 2016 BIS became the Department for Business, Energy and Industrial Strategy.³ Under the legislation, as amended,⁴ in exercising their functions under [ss.6–10](#), the Secretary of State and Welsh Ministers have the objective of securing that local authorities⁵ in England and Wales exercise their relevant functions:

- (a)effectively,
- (b)in a way which does not give rise to unnecessary burdens, and
- (c)in a way which conforms with the principles that—
 - (i)regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent;
 - (ii)regulatory activities should be targeted only at cases in which action is needed.⁶

Relevant function , in relation to a local authority in England or Wales, means:(a)a function under a relevant enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity, or
(b)a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of a relevant enactment relate to any activity.⁷

However, references to a function do not include a function of conducting criminal or civil proceedings; and references to an activity include providing goods and services and employing or offering employment to any person.⁸

Relevant enactment means (a) one of a large number specified in [Sch.3⁹](#) or an enactment made under such an enactment, or (b) an enactment made under [s.2\(2\) of the European Communities Act 1972](#) with respect to any of the following matters:(i)agricultural produce (quality standards and labelling);
(ii)animal health and welfare;
(iii)animal feed;
(iv)consumer protection;
(v)environmental protection;
(vi)food hygiene and standards;
(vii)public health and safety;
(viii)weights and measures (including measuring instruments).¹⁰

Under the [2008 Act s.6](#),¹¹ the Secretary of State and Welsh Ministers have the function of giving guidance to local authorities in England and Wales as to how to exercise their relevant functions, and such an authority must have regard to any guidance given to it under that section. Before giving guidance, the person giving it must consult (a) the persons whose activities are regulated by the exercise of the function, or their representatives, (b) such local authorities in England and Wales, or their representatives, as the person giving the guidance considers appropriate, and (c) such other persons as the person giving guidance considers appropriate. They must publish any guidance given by it under [s.6](#) and may vary or revoke any guidance

given by further guidance under the section.

The Secretary of State may also provide advice and make proposals to the Welsh Ministers.¹²

Secretary of State and Welsh Ministers must prepare and (after consultation) publish lists specifying those matters to which a local authority in England or in Wales (respectively) should give priority when allocating resources to its relevant functions, and a local authority must have regard to the appropriate list when allocating resources to its relevant functions.¹³ Before publishing its list, the Welsh Ministers must consult the Secretary of State.¹⁴ The Secretary of State must enter memoranda of understanding as to how they will work together with the Environment Agency, the Food Standards Agency, the Gambling Commission, the Health and Safety Executive, and the Competition and Markets Authority.¹⁵

The Welsh Ministers may give the Secretary of State guidance as to the exercise in relation to Wales of any of the Secretary of State's functions under the Act so far as they relate to a devolved Welsh matter.¹⁶

Footnotes

1 By the Local Better Regulation Office (Dissolution and Transfer of Functions, Etc) Order 2012 (SI 2012/246).

2 See www.bis.gov.uk/brdo.

3 See <https://www.gov.uk/government/organisations/regulatory-delivery>.

4 By SI 2012/246.

5 i.e. in England: (a) a county or district council in England; (b) a London borough council; (c) the Common Council of the City of London; (d) the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple; (e) the Council of the Isles of Scilly; (f) a fire and rescue authority; (g) a port health authority; (h) waste disposal authorities for Greater London and metropolitan counties); and in Wales (a) a county or county borough council; (b) a fire and rescue authority; (c) a port health authority: 2008 Act s.3.

6 2008 Act s.5, as amended by SI 2012/246 Sch.1 Pt 1 paras 2, 3.

7 2008 Act s.4(1).

8 2008 Act s.4(9).

9 As amended by SI 2013/2215.

10 2008 Act s.4(2), (3).

11 As amended by SI 2012/246 Sch.1 Pt 1 paras 2, 4. The Secretary of State may give guidance to local authorities in England and/or in Wales, except that guidance as to the exercise of functions relating to devolved Welsh matters is to be given by the Welsh Ministers. A “*devolved Welsh matter*” is a matter within the legislative competence of the National Assembly or in respect of which functions are exercisable by the Welsh Ministers: 2008 Act s.74, as amended by the Enterprise Act 2016 s.21(1),(4).

12 2008 Act s.10, as amended by SI 2012/246 Sch.1 Pt 1 paras 2, 5.

13 2008 Act s.11(1), (1A), (2), as amended or inserted by SI 2012/246 Sch.1 Pt 1 paras 2, 6.

14 2008 Act s.11(5), substituted by *ibid*.

15 2008 Act s.12, as amended by SI 2012/246 Sch.1 Pt 1 paras 2, 7.

16 2008 Act s.16, as amended by SI 2012/246 Sch.1 Pt 1 paras 1, 2, 8, and the Enterprise Act 2016 ss.21(1),(2)(e).

1.1-85 2008 Act Pt 2 as originally enacted

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Sub-section (h) General powers and duties concerning regulation

Co-ordination of better regulatory enforcement

2008 Act Pt 2 as originally enacted

1.1-85

Part 2 of the Regulatory Enforcement and Sanctions Act 2008 (Co-ordination of Regulatory Enforcement) applies where the Secretary of State is satisfied (a) a person carries on an activity in the area of two or more local authorities,¹ and (b) each of those authorities has the same relevant function² in relation to that activity. Part 2 also applies where the Secretary of State is satisfied (a) that a person (P) carries on an activity in relation to which a local authority exercises a relevant function; and (b) that the effect of arrangements made by P with any organisation or other person is that P's approach to compliance, in respect of the relevant function, is shared with another person (Q) who carries on the activity; and (c) that either at least one of P and Q comes on the activity in the area of two or more local authorities or Q, or Q carries on the activity in the area of a local authority in which P does not carry on the activity. The Secretary of State may publish guidance on (b). This person is referred to as "the regulated person".³ For the purposes of Pt 2, the Secretary of State may nominate a local authority to be the "primary authority" for the exercise of the relevant function in relation to the regulated person.⁴ The authority and the regulated person must agree in writing to the nomination, or the regulated person must have requested the Secretary of State to make a nomination and the Secretary of State must consider the authority suitable for nomination (and consult the authority and the regulated person). Where the Secretary of State has been satisfied that the regulated person is within the 2008 Act s.22(1), the Secretary of State may in particular consider as suitable for nomination (a) the local authority in whose area the regulated person principally carries out the activity in relation to which the relevant function is exercised; (b) the local authority in whose area the regulated person administers the carrying out of that activity.⁵ The Secretary of State may revoke a nomination and must maintain a register of nominations.⁶

The primary authority has the function of (a) giving advice and guidance to the regulated person in relation to the relevant function; and (b) giving advice and guidance to other local authorities with the relevant function as to how they should exercise it in relation to the regulated person. It may make arrangements with the regulated person as to how it will discharge this function.⁷ A local authority other than the primary authority ("the enforcing authority") must notify the primary authority before taking any enforcement action⁸ against the regulated person pursuant to the relevant function. If the primary authority determines within a specified period ("the relevant period"—normally five working days) that the proposed enforcement action is inconsistent with advice or guidance⁹ previously given by the primary authority (generally or specifically), it may within that period direct the enforcing authority not to take the enforcement action. If the enforcing authority is not so directed and continues to propose to take the enforcement action, it must inform the regulated person. The enforcing authority may not take the proposed enforcement action (a) at any time during the relevant period; or at any time after the end of that period, if it is so directed.¹⁰ Questions arising under this provision may be referred to the Secretary of State.¹¹ On a reference, the Secretary of State must confirm the direction if satisfied that (a) the proposed enforcement action is inconsistent with advice or guidance previously given by the primary authority (generally or specifically); (b) the advice or guidance was correct¹²; and (c) it was properly given.¹³ The decision of the Secretary of State is open to challenges on judicial review.¹⁴ Where an enactment limits the period within which the enforcing authority may take the proposed enforcement action, any time during which the authority is prohibited from taking the action is to be disregarded in calculating that period.¹⁵ The Secretary of State must by order with the consent of the Welsh Ministers prescribe circumstances in which s.28(1)–(4) shall not apply.¹⁶

Where a relevant function consists of or includes a function of inspection, the primary authority may make an inspection plan containing recommendations as to how a local authority with the function of inspection should exercise it in relation to the regulated person. Such a local authority can only depart from the plan with the consent of the primary authority.¹⁷ The primary authority may charge the regulated person such fees as it considers to represent the costs reasonably incurred by it in the exercise of its functions under this Part in relation to the regulated person.¹⁸ The Secretary of State may give guidance about the operation of Pt 2.¹⁹

2008 Pt 2 as substituted

1.1-85A

A new Pt 2 (Regulatory Enforcement) of the Regulatory Enforcement and Standards Act 2008 (ss.22A–30D and Sch.4A) is substituted by the Enterprise Act s.20, from a date to be appointed. This extends the primary authority system to include regulators other than local authorities.

Definitions

A person is a *regulated person* for the purposes of Pt 2 if the Secretary of State is satisfied that: (a) the person carries on, or proposes to carry on, an activity, and (b) a qualifying regulator has a relevant function²⁰ which is, or would be, exercisable in relation to the person in respect of the activity.²¹ A group of persons is a *regulated group* for these purposes if the Secretary of State is satisfied that: (a) a member of the group carries on, or proposes to carry on, an activity and (b) a qualifying regulator has a relevant function which is, or would be, exercisable in relation to the member in respect of the activity.²²

“Qualifying regulator” means: (a) a local authority in England, Wales, Scotland or Northern Ireland,²³ or (b) a specified regulator.²⁴ “Specified regulator” means a person (other than a local authority) who (a) has regulatory functions, and (b) is specified for the purposes of Pt 2 by regulations made by the Secretary of State.²⁵

Primary authorities and “partnership functions”

1.1-85B

For the purposes of Pt.2, the Secretary of State:

- (a)may nominate, in relation to a regulated person, a qualifying regulator to be the “primary authority” for the exercise of the partnership functions in relation to that person (a “direct primary authority”);
- (b)may nominate, in relation to a regulated group, a qualifying regulator to be the “primary authority” for the exercise of the partnership functions in relation to the members of the group (a “co-ordinated primary authority”).²⁶

The “partnership functions” are the functions specified by the nomination as covered by it.²⁷ A function may be so specified only if condition A or B is met.²⁸ Condition A is that the function: (a) is a relevant function of the primary authority, and (b) is, or (in the case of an activity proposed to be carried on) would be, exercisable by the primary authority in relation to the regulated person or a member of the regulated group.²⁹ Condition B is that the function: (a) is a relevant function of a qualifying regulator other than the primary authority, (b) is, or (in the case of an activity proposed to be carried on) would be, exercisable by that other regulator in relation to the regulated person or a member of the regulated group, and (c) is equivalent to a relevant function of the primary authority.³⁰

The Secretary of State may from time to time revise the specification of partnership functions included in a nomination if the requirements of s.23A(3) to (5) are met in relation to the revised specification, with the agreement in writing of the regulated person or the co-ordinator of the regulated group.³¹

The Secretary of State may only nominate a qualifying regulator as a direct primary authority if the regulator and the regulated person have agreed in writing to the nomination³²; and as a co-ordinated primary authority if (a) there is a co-ordinator of the regulated group,³³ and (b) the regulator and the co-ordinator have agreed in writing to the nomination.³⁴

The Secretary of State may at any time revoke a nomination³⁵ and must maintain, or cause to be maintained, a register of nominations and make the register available for inspection free of charge.³⁶

Functions of primary authorities

1.1-85C

Sections 24A to 28B of the 2008 Act apply in each case where a qualifying regulator has been nominated under section 23A(1) as a primary authority.³⁷ Sections 29A to 29D apply in relation to cases where more than one qualifying regulator has been nominated as the primary authority for the exercise of the same function in relation to the same person.³⁸

Advice and guidance

1.1-85D

Accordingly, the primary authority, if it is a direct primary authority, has the function of: (a) giving advice and guidance to the regulated person in relation to each partnership function; (b) with the consent of the Secretary of State, giving advice and guidance, in relation to each partnership function, to other qualifying regulators as to how they should exercise it in relation to the regulated person.³⁹ If it is a co-ordinated primary authority, it has the function of: (a) giving advice and guidance to the co-ordinator of the regulated group in relation to each partnership function⁴⁰; (b) with the consent of the Secretary of State, giving advice and guidance, in relation to each partnership function, to other qualifying regulators as to how they should exercise it in relation to a member of the group.⁴¹ The primary authority may make arrangements with the regulated person or the co-ordinator of the regulated group as to how the authority will discharge its functions under s.24A(1) or (2).⁴²

Enforcement action

1.1-85E

In Pt 2, “enforcement action” means:(a)action which relates to securing compliance with a restriction, requirement or condition in the event of breach (or putative breach) of a restriction, requirement or condition;
(b)action taken with a view to, or in connection with, the imposition of a sanction (criminal or otherwise) in respect of an act or omission;
(c)action taken in connection with the pursuit of a remedy conferred by an enactment in respect of an act or omission.⁴³

The Secretary of State may by regulations, with the consent of the Welsh Ministers, specify action which is or is not to be regarded as enforcement action for the purposes of this Part or any provision of Pt.2 specified in the regulations.⁴⁴

Enforcement action by primary authority

1.1-85F

If the primary authority proposes to take enforcement action against the regulated person or a member of the regulated group (known to be such a member) pursuant to a relevant function of the primary authority which is a partnership function, and,⁴⁵ the primary authority (a) must notify the regulated person or the member in writing before taking the proposed enforcement action, and (b) may not take the action during the “referral period”⁴⁶ unless notified in writing by the regulated person or the member that no such reference is to be made.⁴⁷ Where another enactment limits the period within which the primary authority may take the proposed enforcement action, any time during which it is prohibited under the 2008 Act s.25B or Sch.4A para.5(7) from taking the action is to be disregarded in calculating that period.⁴⁸

Enforcement action other than by primary authority

1.1-85G

Where a qualifying regulator other than the primary authority proposes to take enforcement action in the same circumstances as in s.25B, the qualifying regulator (the “enforcing authority”) (a) must notify the primary authority in writing before taking the proposed enforcement action, and (b) may not take the action during the “relevant period”.⁴⁹ If (a) the enforcing authority fails to notify the primary authority under s.25C(2)(a) of the proposed enforcement action, but (b) the primary authority is notified of it by the regulated person or the member or the co-ordinator of the regulated group, the primary authority must notify the enforcing authority in writing that the enforcing authority is prohibited by subsection (2)(b) from taking the action during the “relevant period”.⁵⁰

If the primary authority determines, within the relevant period, that the proposed enforcement action is inconsistent with advice or guidance previously given by it (generally or specifically), it may direct the enforcing authority in writing not to take the action.⁵¹ Any such direction must be given as soon as is reasonably practicable, and in any event within the relevant period.⁵² If the enforcing authority is not so directed, and continues to propose to take the action (a) it must inform the regulated person or the member, and (b) it may not take the action during the “referral period” (mentioned above) unless notified in writing by the regulated person or the member that no such reference is to be made.⁵³ Questions arising under the 2008 Act s.25C may be referred to the Secretary of State.⁵⁴ Where another enactment limits the period within which the enforcing authority may take the proposed enforcement action, any time during which it is prohibited under the 2008 Act s.25C or Sch.4A para.5(7) from taking the action is to be disregarded in calculating the period.⁵⁵

Enforcement action: exceptions

1.1-85H

The Secretary of State must by regulations, with the consent of the Welsh Ministers, prescribe circumstances in which ss.25B and 25C and Sch.4A so far as relating to cases within those sections, do not apply.⁵⁶ In particular, this power must be exercised to secure that those provisions do not apply (a) where the enforcement action is required urgently to avoid a significant risk of serious harm to human health, the environment (including the health of animals or plants), or the financial interests of consumers; or where the application of those provisions would be wholly disproportionate.⁵⁷ Where a qualifying regulator other than the primary authority takes enforcement action against the regulated person or a member of the regulated group in circumstances prescribed under s.25D(1)(b), the qualifying regulator must inform the primary authority of the action as soon as it reasonably can.⁵⁸

Inspection plans

1.1-85I

Where a partnership function consists of or includes a function of inspection (an “inspection function”), the primary authority may make an inspection plan containing recommendations as to how the inspection function should be exercised by an “inspecting regulator”⁵⁹ in relation to the regulated person or a member of the regulated group.⁶⁰ Where the Secretary of State has consented to the plan, the primary authority must have regard to the plan when it exercises the inspection function in relation to (a) the regulated person, or (b) a member of the regulated group whose name is included in a list provided to the primary authority.⁶¹ If an inspection plan of the primary authority is notified to an inspecting regulator,⁶² the inspecting regulator may not exercise the inspection function in relation to the regulated person or a member of the regulated group otherwise than in accordance with the plan, unless the primary authority consents or, in the case of a regulated group, the member’s name is not included in the list notified to the inspecting regulator under the 2008 Act s.26A(10).⁶³ An inspection plan may be revoked or revised.⁶⁴

Primary authority’s costs

1.1-85J

The primary authority may charge a regulated person or group such fees as the authority considers to represent the costs reasonably incurred by it in the exercise of its functions under Pt.2 in relation to the person or group (including the

co-ordinator or a member).⁶⁵

Other regulators

1.1-85K

Provision is made for the support of a primary authority by other regulators. Where such a regulator is specified as a “supporting regulator” by the Secretary of State by regulations and exercises a “designated function”⁶⁶ which is, or is relevant to the exercise of, a partnership function (and is not a relevant function of that person), the supporting regulator may do anything which it considers appropriate for the purpose of supporting the primary authority in the preparation of advice or guidance under the [2008 Act s.24A](#) or an inspection plan in relation to the partnership function.⁶⁷ If it provides support, it must, in the exercise of the designated function in relation to the regulated person or a member of the regulated group (known to be such a member), act consistently⁶⁸ with any advice or guidance under the [2008 Act s.24A](#), or any inspection plan (a) which is subsequently given or made in relation to the partnership function, and (b) to which the supporting regulator has consented.⁶⁹ If the supporting regulator provides support and the regulated person or the co-ordinator of the regulated group has agreed in writing to the provision of that support, the supporting regulator may charge the regulated person or co-ordinator such fees as it considers to represent the costs reasonably incurred by it in providing that support.⁷⁰

Where a person who has regulatory functions is specified as a “complementary regulator” by the Secretary of State by regulations, and has a function which is not a relevant function of the person, but which (i) is a designated function⁷¹ of the person, (ii) is, or is equivalent to, a partnership function, and (iii) is exercisable by the person in relation to the regulated person or a group member, the complementary regulator must act consistently⁷² with primary authority advice and guidance in the exercise of the designated function in relation to the regulated person or group member (known to be such a member).⁷³ “Primary authority advice and guidance” means: (a) advice and guidance given by the primary authority under [s.24A](#) to the regulated person or co-ordinator in relation to the partnership function, (b) or to qualifying regulators as to how they should exercise the partnership function in relation to the regulated person or a member of the regulated group, and (c) an inspection plan made by the primary authority in respect of the exercise of the partnership function in relation to the regulated person or group member.⁷⁴

Cases with more than one primary authority

1.1-85L

If a direct or co-ordinated primary authority in relation to a person notifies the person, under [s.25B\(2\)\(a\)](#), of enforcement action that it proposes to take against the person and, within the referral period mentioned in [Sch.4A para.5\(2\)](#), the person notifies the primary authority that the person considers the action to be inconsistent with advice or guidance previously given (generally or specifically) by another qualifying regulator nominated as the primary authority for the exercise of the function in relation to the person, the [2008 Act s.25C](#) applies instead of [s.25B](#) in relation to the proposed enforcement action as if the primary authority were an enforcing authority.⁷⁵

Enforcement action notified to a primary authority inconsistent with another authority’s advice

1.1-85M

If a primary authority for the exercise of a function in relation to a person (“PA1”) is notified under [s.25C\(2\)\(a\)](#) of enforcement action that an enforcing authority proposes to take against the person pursuant to the function, and PA1 decides not to give a direction under [s.25C\(4\)](#) directing the enforcing authority not to take the enforcement action, and does not refer the action to the Secretary of State under [Sch.4A para.4\(1\)](#), PA1 must, within the relevant period,⁷⁶ take reasonable steps to find out if another primary authority (“PA2”) for the exercise of the function in relation to the person has previously given advice or guidance (generally or specifically), and if the person considers the proposed enforcement action to be inconsistent with that advice or guidance.⁷⁷ If PA1 is of the view that such advice or guidance has previously

been given and that the person considers the proposed enforcement action to be inconsistent with it, PA1 must refer the action to PA2, and notify the enforcing authority and the person that it has done so.⁷⁸ PA2 becomes the primary authority for the purposes of the 2008 Act s.25C.⁷⁹

Guidance and directions

1.1-85N

The Secretary of State may give guidance to any one or more qualifying regulators, supporting regulators, complementary regulators or co-ordinators about the operation of this Pt.2, and may give directions to a qualifying regulator.⁸⁰

Footnotes

- 1 Defined in the same way as in Pt 1: s.23.
- 2 Defined in the same way as in Pt 1: s.24, as amended by the Enterprise and Regulatory Reform Act 2013 s.67(1)–(5).
- 3 2008 Act s.22, as amended by the Enterprise and Regulatory Reform Act 2013, s.67(6).
- 4 2008 Act s.25, as amended by SI 2012/246 Sch.1 Pt 1 paras 9, 10. For separate, longer-standing, non-statutory arrangements for “Home Authority Partnerships”, see *Cross on Local Government Law* para.25-40. See BRDO, Primary Authority Handbook (June 2014).
- 5 2008 Act s.26(1)–(3), as amended by SI 2012/246 Sch.1 Pt 1 paras 9, 11.
- 6 2008 Act s.26(5), (6), as amended by SI 2012/246 Sch.1 Pt 1 paras 9, 11.
- 7 2008 Act s.27.
- 8 Defined in the 2008 Act s.28(5).
- 9 Advice and guidance may be given as to the exercise of discretionary powers, including suggestions as to the weight to be given to particular factors; it must be followed unless there is good reason not to do so; however, the ultimate discretionary power remains with the enforcing authority: *R (on the application of Kingston upon Hull City Council) v Secretary of State for Business, Innovation and Skills [2016] EWHC 1064 (Admin)*.
- 10 2008 Act s.28(1)-(4). Under the 2008 Act s.28(6) the Secretary of State, with the consent of the Welsh Ministers, may specify action which is or is not to be regarded as enforcement action for the purpose of the 2008 Act Pt 2.
- 11 2008 Act Sch.4. See the Co-ordination of Regulatory Enforcement (Procedure for References to LBRO) Order 2009 (SI 2009/670).
- 12 There can only be one “correct” interpretation of a statutory provision: *R (on the application of Kingston upon Hull City Council) v Secretary of State for Business, Innovations and Skills [2016] EWHC 1064 (Admin)* (rejecting the Secretary of State’s argument that an interpretation was to be regarded as “correct” if it represented an “informed and considered professional view of the law”, even if a court were to take a different view).
- 13 2008 Act Sch.4 para.1.
- 14 *R (on the application of Kingston upon Hull City Council v Secretary of State for Business, Innovation and Skills [2016] EWHC 1064 (Admin)* (Kerr J held that the view of Newcastle City Council (as primary authority for Greggs’) and the BDRO that the power of a local authority to require the provision of sanitary appliances at “a place...

normally used for ...the sale of food or drink to members of the public for consumption at the place” ([Local Authority \(Miscellaneous Provisions\) Act 1976 s.20](#), see para.19-188) did not apply to a place (Greggs’) where the majority of sales were takeaway and no more than 10 seats were provided was clearly wrong in law).

- 15 2008 Act s.28, as amended by [SI 2012/246 Sch.1 Pt 1 paras 9, 12](#).
- 16 2008 Act s.29. See the [Co-ordination of Regulatory Enforcement \(Enforcement Action\) Order 2009 \(SI 2009/665\)](#), as amended by [SI 2013/2286](#) and [SI 2014/573](#) and 3070 (made under the [2008 Act ss.28\(6\) and 29\(1\)](#)).
- 17 2008 Act s.30, as amended by [SI 2012/246 Sch.1 Pt 1 paras 9, 13](#) and the [Enterprise and Regulatory Reform Act 2013 s.68](#).
- 18 2008 Act s.31.
- 19 2008 Act s.33, as amended by [SI 2012/246 Sch.1 Pt 1 paras 9, 14](#). See BRDO, Primary Authority Statutory Guidance (September 2013).
- 20 *Relevant function* in relation to a local authority in England or Wales, has the same meaning as in Pt 1 (see para.1-79I); in relation specified regulators this expression is to be defined in regulations made by the Secretary of State but must be equivalent to “relevant function” as defined in Pt 1: [2008 Act s.22C](#). Regulations in respect of specified regulators require the consent of the Welsh Ministers to specify a regulatory function, so far as exercisable in relation to Wales, which relates to a devolved Welsh matter.
- 21 2008 Act s.22A(1).
- 22 2008 Act s.22A(2).
- 23 References to a local authority in England or Wales have the same meaning as in Pt 1 (see para.1-79I): [2008 Act s.22B\(3\)](#).
- 24 2008 Act s.22B(1),(2).
- 25 2008 Act s.22B(4). Regulations require the consent of the Welsh Ministers to specify a regulator whose functions relate only to devolved Welsh matters: [2008 Act s.22B\(5\)](#).
- 26 2008 Act s.23A(1).
- 27 2008 Act s.23A(2).
- 28 2008 Act s.23A(3).
- 29 2008 Act s.23A(4).
- 30 2008 Act s.23A(5).
- 31 2008 Act s.23A(6),(7).
- 32 2008 Act s.23B(1).
- 33 The co-ordinator is nominated, with their agreement, by the Secretary of State: [2008 Act s.23C](#). The co-ordinator must maintain a list of members of the regulated group: [2008 Act s.23D](#).
- 34 2008 Act s.23B(2).

- 35 2008 Act s.23B(3).
- 36 2008 Act s.23B(4).
- 37 2008 Act s.23E(1).
- 38 2008 Act s.23E(3).
- 39 2008 Act s.24A(1),(5). (b) does not require advice and guidance to be given to a qualifying regulator in relation to a partnership function if it is not a relevant function of that regulator: 2008 Act s.24A(6).
- 40 The co-ordinator must notify any advice or guidance given to the co-ordinator to those members of the group to whom the co-ordinator considers it may be relevant: 2008 Act s.24A(4).
- 41 2008 Act s.24A(2),(5); (b) does not require advice and guidance to be given to a qualifying regulator in relation to a partnership function if it is not a relevant function of that regulator: 2008 Act s.24A(6).
- 42 2008 Act s.24A(3).
- 43 2008 Act s.25A(1).
- 44 2008 Act s.25A(2),(3).
- 45 This is subject to s.25D, which imposes a duty to prescribe circumstances in which s.25B does not apply).
- 46 ie the period mentioned in the 2008 Act Sch.4A para.5(2) in which the regulated person or the member may refer the action to the Secretary of State. Sch.4A Pts 1 and 3 contain provision for questions arising under this section to be referred to the Secretary of State: 2008 Act s.25B(3). The question for the Secretary of State under Pt.1 is whether (a) the proposed enforcement action is inconsistent with advice or guidance previously given by the primary authority (generally or specifically), and (b) the advice or guidance was correct and properly given: 2008 Act Sch.4A para.1(3). If so, satisfied, the Secretary of State must direct the enforcing authority not to take the proposed enforcement action, but may direct the enforcing authority to take some other enforcement action: 2008 Act Sch.4A para.1(2),(4).
- 47 2008 Act s.25B(1),(2).
- 48 2008 Act s.25B(4).
- 49 2008 Act s.25C(1),(2). The “relevant period” is normally five working days: see the 2008 Act s.25C(9).
- 50 2008 Act s.25C(3).
- 51 2008 Act s.25C(4).
- 52 2008 Act s.25C(5).
- 53 2008 Act s.25C(6).
- 54 2008 Act s.25C(7). See Sch.4A Pts 2 and 3.
- 55 2008 Act s.25C(8).
- 56 2008 Act s.25D(1).
- 57 2008 Act s.25D(2).

- 58 2008 Act s.25D(3).
- 59 A person is an “*inspecting regulator*” if (a) the person is a qualifying regulator, and (b) the inspection function is a relevant function of the person: 2008 Act s.26A(3).
- 60 2008 Act s.26A.
- 61 2008 Act s.26B(1). The list is provided under the 2008 Act s.26A(9)(d).
- 62 Under the 2008 Act s.26A(8)(b).
- 63 2008 Act s.26B(2). Consent is deemed to have been given if the primary authority does not respond within five working days to a notification by the inspecting regulator of intention to depart from the plan: 2008 Act s.26B(4).
- 64 2008 Act s.26C. As to overlapping inspection plans see the 2008 Act s.29D.
- 65 2008 Act s.27A.
- 66 ie a regulatory function exercised by that regulator and specified by the Secretary of State by regulations: 2008 Act s.28A(10)–(12).
- 67 2008 Act s.28A(1),(2).
- 68 So far as it is possible for the supporting regulator to do so in accordance with its other functions: 2008 Act s.28A(5).
- 69 2008 Act s.28A(3),(4).
- 70 2008 Act s.28A(6).
- 71 ie a regulatory function exercised by that regulator and specified for the purposes of this section by the Secretary of State by regulations: 2008 Act s.28B(9)–(12).
- 72 So far as it is possible for the complementary regulator to do so in accordance with its other functions: 2008 Act s.28B(4).
- 73 2008 Act s.28B(1),(2),(3).
- 74 2008 Act s.28B(5).
- 75 2008 Act s.29A. On s.25C see para.1-79JG. The 2008 Act s.29B modifies notification requirements under s.25C where there is more than one primary authority: where there is a direct primary authority that authority must be notified; where there is more than one co-ordinated primary authority, one of them must be notified.
- 76 As defined in s.25C(9): 2008 Act s.29C(5).
- 77 2008 Act s.29C(1),(2).
- 78 2008 Act s.29C(3).
- 79 2008 Act s.29C(4).
- 80 2008 Act s.30A.

1.1-86 Civil sanctions

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Sub-section (h) General powers and duties concerning regulation

Civil sanctions

1.1-86

Under [Pt 3 of the 2008 Act](#), a minister of the Crown or Welsh Ministers may make orders providing for civil sanctions in respect of specified regulatory offences. Accordingly, powers may be conferred on regulators¹ in respect of the imposition of fixed monetary penalties; the imposition of discretionary requirements; the service of stop notices; and the acceptance of enforcement undertakings.² The regulator must publish guidance about its use of the sanction and as to the enforcement of relevant offences, and publish reports about the use of civil sanctions.³ Ministers may not make any provision conferring power on a regulator to impose a civil sanction in relation to an offence unless the authority is satisfied that the regulator will act in accordance with the principles referred to in [s.5\(2\)](#) in exercising that power.⁴ They also have powers to suspend the imposition or further pursuit of a civil sanction where the regulator has failed to comply with specified requirements.⁵

Footnotes

1 “Designated regulators” specified in [Sch.5](#), and other persons who have an enforcement function in respect of an offence specified in [Sch.6: 2008 Act s.37](#). Powers can be conferred in respect of any offences subject to enforcement by a designated regulator.

2 2008 Act ss.36–62. See the [Environmental Civil Sanctions \(England\) Order 2010 \(SI 2010/1157\)](#) and [\(Wales\) Order 2010 \(SI 2010/1821 \(W.178\)\)](#); the [Environmental Civil Sanctions \(Miscellaneous Amendments\) \(England\) Regulations 2010 \(SI 2010/1159\)](#) and [\(Wales\) Regulations 2010 \(SI 2010/1820 \(W.77\)\)](#).

3 2008 Act ss.63, 64, 65.

4 2008 Act s.66.

5 2008 Act s.68.

1.1-87 Regulatory burdens

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Sub-section (h) General powers and duties concerning regulation

Regulatory burdens

1.1-87

Any person exercising a regulatory function to which this section applies¹ must keep that function under review and secure that in exercising the function the person does not (a) impose burdens which that person considers to be unnecessary, or (b) maintain burdens which that person considers to have become unnecessary. However, this does not require the removal of a burden which has become unnecessary where its removal would, having regard to all the circumstances, be impracticable or disproportionate.² Where this section applies to a regulatory function, the person exercising the function must from time to time publish a statement setting out:

- (a)what the person proposes to do pursuant to subs.(1) in relation to the function in the period to which the statement relates,
- (b)what the person has done pursuant to subs.(1) in relation to the function since the previous statement published by that person under this section, and
- (c)where a burden relating to the exercise of the function which has become unnecessary is maintained pursuant to subs.(2), the reasons why removal of the burden would, having regard to all the circumstances, be impracticable or disproportionate.

The statement must relate to a 12-month period beginning with its publication. A person exercising a function to which subs.(1) applies must, in exercising the function during a period for which a statement is in force, have regard to that statement.³

Footnotes

¹ As to which, see [s.73](#). They include regulatory functions specified by ministers.

² 2008 Act s.72(1), (2).

³ 2008 Act s.72(3)–(7).

1.1-88 Provision of Services Regulations 2009

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Sub-section (h) General powers and duties concerning regulation

Provision of Services Regulations 2009

1.1-88

The [Provision of Services Regulations 2009](#),¹ implementing Directive 2006/123/EC on services in the internal market, impose obligations on “service providers” and “competent authorities”. “Service” means any self-employed economic activity normally provided for remuneration, subject to exceptions, including healthcare services, activities connected with the exercise of official authority (as set out in Art.51 of the EU Treaty) and social services relating to social housing, childcare and support of families and persons in need provided by the state, providers mandated by the state or charities recognised as such by the state.² A “competent authority” is a body or authority having supervisory or regulatory functions in the UK in relation to service activities, including a professional body, association or organisation that regulates access to, or the exercise of, a service activity.³ There are a number of general exclusions and savings⁴ and requirements imposed by earlier directly applicable EU Law take precedence.⁵ [Part 3 \(regs 13-22\)](#) imposes duties on competent authorities, (which may include a local authority, for example in the exercise of licensing functions) in relation to the provision of a service in the UK.⁶

A competent authority must not make access to, or the exercise of, a service activity subject to an authorisation scheme⁷ unless the scheme does not discriminate against service providers, the need for the scheme is justified by an overriding reason relating to the public interest and the objective pursued cannot be achieved by a less restrictive measure.⁸ A scheme must be based on criteria which preclude the competent authority from exercising its power of assessment in an arbitrary manner.⁹ Provision is made for the duration of authorisations, selection among several candidates, general requirements for schemes, the time for dealing with an application, other requirements for authorisation procedures and requirements which are prohibited or subject to evaluation.¹⁰

A competent authority may not impose on the recipient of a service any requirements which restrict the use of the service as supplied from another EEA state by a provider established in that state,¹¹ and may not impose on such recipients who are individuals discriminatory requirements based on their nationality or place of residence.¹² Duties are imposed on competent authorities as regards certificates and other documents, electronic procedures, insurance, commercial communications by regulated professions and multi-disciplinary activities.¹³

Footnotes

1 SI 2009/2999.

2 SI 2009/2999 reg.2.

3 SI 2009/2999 reg.3.

4 SI 2009/2999 reg.5.

5 SI 2009/2999 reg.6.

6 SI 2009/2999 reg.13(1). However, Pt.3 does not apply in respect of the exercise of the freedom of the provider of a service who is established in another EEA state to provide the service in the UK from that state: [SI 2009/2999, reg.13](#)

- (2). Pt.4 (regs 23-29) applies instead.
- 7 i.e. any arrangement which in effect requires the provider or recipient of a service to obtain the authorisation of, or to notify, a competent authority in order to have access to, or to exercise, a service activity: [SI 2009/2999 reg.4](#).
- 8 [SI 2009/2999 reg.14\(1\), \(2\)](#).
- 9 [SI 2009/2999 reg.15\(1\)](#). Further details are set out in [reg.15\(2\), \(3\)](#). Any decision relating to authorisation (apart from the grant of authorisation) must be fully reasoned: [SI 2009/2999 reg.15 \(8\)](#).
- 10 [SI 2009/2999 regs 16-22](#). Reg 18(4) provides that charges for authorisation schemes must not exceed the cost of authorisation procedures or formalities. The Court of Appeal held that, accordingly, the costs of proceedings against unlicensed operators could not be recovered through such charges: *R (on the application of Hemming (t/a Simply Pleasure Ltd)) v Westminster City Council [2013] EWCA Civ 591*. However, this was reversed by the Supreme Court, which held that the restriction applied only to fees in respect of the authorisation procedure and formalities at the stage where a person was seeking permission to assess or exercise a service activity: [\[2015\] UKSC 25, \[2015\] A.C.1600](#); the Supreme Court referred to the ECJ the question whether a requirement to accompany a licence application with a payment refundable if the application failed involved a “charge” for these purposes.
- 11 [SI 2009/2999 reg.29](#).
- 12 [SI 2009/2999 reg.30](#).
- 13 [SI 2009/2999 regs 31-35](#).

1.1-89

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Section F. General Powers and Duties

Sub-section (i) Duties to promote understanding of democracy and involvement

1.1-89

Part 1 of the Local Democracy, Economic Development and Construction Act 2009 contained a range of provisions concerning democracy and involvement. Chapter 1 (ss.1-9) imposed a number of duties on local authorities to promote understanding of the authority's functions and its democratic arrangements and how members of the public could take part in those arrangements. These provisions were not implemented and were repealed by s.45 of the Localism Act 2011.

1.1-90

Chapter 3 (ss.23–24) imposes a duty on a range of public authorities, the Common Council as police authority, a chief officer of police for a police force in England, a local probation board for an area in England or a probation trust (other than a Welsh probation trust), and a youth offending team for an area in England, to secure involvement. Where one of these authorities considers it appropriate for representatives¹ of interested persons² (or of interested persons of a particular description) to be involved in the exercise of any of its relevant functions³ by being:

- (a)provided with information about the exercise of the function,
- (b)consulted about the exercise of the function, or
- (c)involved in another way,

it must take such steps as it considers appropriate to secure that such representatives are involved in the exercise of the function in that way.

However, this does not require an authority to take a step:

- (a)if the authority does not have the power to take the step apart from this section, or
- (b)if the step would be incompatible with any duty imposed on the authority apart from this section.⁴

Furthermore, the duty does not apply in such cases as the Secretary of State may by order made by statutory instrument specify.⁵

The Secretary of State may give guidance, after consulting the authorities to which it applies, to which they must have regard in deciding how to fulfil their duties under s.23.⁶

Footnotes

¹ i.e. in relation to interested persons or a description of interested person, a person who appears to the authority to be representative of the interested persons: s.23(7).

² i.e. in relation to a relevant function, persons who are likely to be affected by, or otherwise interested in, the exercise of the function: s.23(7).

³ i.e. all the functions of the authority except in so far as those functions are not exercisable in or in relation to England: s.23(3)(a).

⁴ 2009 Act s.23(1),(2), subs.(2) as amended by the Public Bodies Act 2011 s.38(3) and the Police Reform and Social Responsibility Act 2011 s.99 Sch.16 Pt 3 paras 373, 375.

⁵ 2009 Act s.23(5),(6).

⁶ 2009 Act s.24.

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Section G. Local Authorities and European Community Law

1.1-91

Local authorities have been significantly affected by developments in European Community Law.¹ Areas of substantive law concerning the powers and duties of local authorities may be remodelled by EC legislation in pursuit of the process of European integration. Examples include the law applicable to public procurement,² waste management,³ and food safety,⁴ where directives have been implemented by subordinate legislation. An unimplemented EC directive that is directly effective according to EC law principles can be relied on in domestic proceedings against a Member State, and a local authority is regarded as an “emanation of the state” for this purpose.⁵ Moreover, under EC law a decentralised body such as a local authority is obliged to apply the terms of an unimplemented but directly effective directive in preference to national law.⁶ On the other hand, the fundamental principles of EC law, such as equal treatment and non-discrimination, have no application to an action or decision taken by a member state under domestic law unless under powers or duties conferred or imposed by EC law.⁷

A Member State may under certain conditions be liable to compensate individuals for damage caused to them by the State's breach of the Community obligations, such as failure to implement a directive within the prescribed period.⁸ It has been argued that in appropriate circumstances this principle could render a local authority liable in damages.⁹

1.1-92

The argument that a private person may enforce the terms of an unimplemented directive against another private person has been rejected by the European Court.¹⁰ Prior to that decision, it was advanced unsuccessfully by the council in *Wychavon DC v Secretary of State for the Environment*.¹¹ Here, the council sought to quash the decision of an inspector allowing an appeal against the council's refusal of planning permission to Velcourt Ltd for the erection of poultry houses and related agricultural dwellings. The council argued that as respondent to the planning appeal and now in bringing an application to quash it was acting, as an “individual”, for the promotion of the interests of the inhabitants of the area under [s.222 of the Local Government Act 1972](#).¹² As such it was entitled to enforce Directive 85/337/ EEC (the Environmental Impact Directive) against Velcourt Ltd, the matter arising in advance of implementation of the Directive by the [Town and Country Planning \(Assessment of Environmental Effect\) Regulations](#).¹³ Turner J. rejected these arguments. On the matter of direct effect, his Lordship reasserted the orthodox position as stated in the *Marshall* case.¹⁴ Furthermore, the council could not be regarded as an “individual” for these purposes.¹⁵

In *R (on the application of Rotherham MBC) v Secretary of State for Business, Innovation and Skills*,¹⁶ the Supreme Court by 4-3¹⁷ rejected claims by local authorities comprising the Local Economic Partnerships for Merseyside and South Yorkshire that the Secretary of State's decision to allocate EU structural funds for 2014-2020 in a way that protected regions within the devolved administrations, and adversely affected the claimant authorities by comparison with other English regions,¹⁸ did not breach the EU principles of proportionality and equal treatment and/or domestic public law principles. The area was one of high level policy and economic, social and political judgment, involving the distribution of finite resources, where the decision-maker enjoyed a wide margin of judgement in respect of both principles and the decision was well within that margin.

Lord Neuberger noted that the test applied by the European Court of Justice in determining a challenge to the lawfulness of such a decision was whether it was “manifestly wrong”.¹⁹ His Lordship commented:²⁰ “I'm not so sure that I get much assistance from the test of “manifestly wrong” (although I acknowledge that it is used by the Court of Justice), unless the expression means that no reasonable government could have taken the decision”.

The minority held that the Secretary of State had given priority to irrelevant considerations (the maintenance of similar funding (-5%) for each UK territory where re-categorisation of eligible regions made that inappropriate) and had failed to treat like situations alike, Merseyside and South Yorkshire being treated quite differently from Northern Ireland and the Highlands & Islands region of Scotland, the funding of Merseyside and South Yorkshire not being based on needs.²¹ The opinions of the majority tended to focus on the rationality of the methodology; those of the minority tended to focus on the outcomes.

Footnotes

- 1 See generally, *B Hessel and K. Mortelmans*, “Decentralised Government and Community Law: conflicting institutional developments?” (1993) 30 *C.M.L.Rev.* 905.
- 2 See *Cross on Local Government Law* para.7-33 et seq.
- 3 See *Cross on Local Government Law* para.19-62 et seq.
- 4 See *Cross on Local Government Law* para.25-11.
- 5 *Marshall v Southampton and South West Hampshire Area Health Authority (No.1) Case 152/84, [1986] Q.B. 401* (art.5(1) of Directive 76/207 EEC, the “Equal Treatment Directive,” directly effective against health authority in its capacity as employer); *R. v London Boroughs Transport Committee Ex p. Freight Transport Association Ltd [1990] 1 C.M.L.R. 229* (Committee held to be an “emanation of the State”).
- 6 *Fratelli Constanzo SpA v Comune di Milano Case 103/88, [1989] E.C.R. 1861.*
- 7 *R. v Ministry of Agriculture, Fisheries and Food Ex p. First City Trading [1997] 1 C.M.L.R. 250.*
- 8 *Francovich & Bonifaci v Italy Cases 6 and 9/90, [1991] E.C.R. I-5357; Brasserie du Pêcheur SA v Germany; R. v Secretary of State for Transport Ex p. Factortame (No.4) Cases C-46/93 and C-48/93, [1996] Q.B. 404.*
- 9 R. Gordon and C. Miskin, Local Authority Law, 4/94, p.8.
- 10 *P. Faccini Dori v Recreb Srl Case C-91/92, [1994] E.C.R. I-3325.*
- 11 *The Times, January 7, 1994.*
- 12 See para.2-526.
- 13 SI 1988/1199.
- 14 *Marshall v Southampton and South West Hampshire Area Health Authority (No.1) Case 152/84, [1986] Q.B. 401.*
- 15 This view was also taken by Maurice Kay J. in *R. (on the application of the Mayor and Citizens of the City of Westminster) v Mayor of London [2002] EWHC 2440 (Admin)*, at paras [39]–[430]. His Lordship rejected the argument that s.222 of the Local Government Act 1972 was sufficient to confer standing for these purposes. He also held that a local authority could not be a “non governmental association” for the purposes of art.34 ECHR and s.7 of the Human Rights Act 1998: paras. [52]–[54].
- 16 *[2015] UKSC 6.*
- 17 Lords Sumption, Neuberger, Clarke and Hodge, Lords Mance and Carswell and Baroness Hale dissenting.
- 18 The Secretary of State decided, first, that each of England, Wales, Northern Ireland and Scotland should for 2014-2020 receive 5% less than in 2013; and, second, that within England the distribution of funds among the nine English regions eligible for funding should be calculated by reference to funding in 2013 rather than the average of funding for the previous funding period (2007-2013). The latter decision treated Merseyside and South Yorkshire unfavourably by comparison with the other eligible regions in England, as earlier in that period they had received additional transitional funding.
- 19 See the discussion by Arden L.J. in the Court of Appeal in *R. (on the application of Sinclair Collis Ltd) v Secretary of*

State for Health [2011] EWCA Civ 437, [2012] Q.B. 394, at paras [115]–[147], cited by the Court of Appeal in the present case: *[2014] EWCA Civ 1080*, paras [56]–[57]. In *Sinclair Collis* the majority of the Court of Appeal (Lord Neuberger M.R. and Arden L.J.) held that a ban on the sale of tobacco from automatic vending machines was lawful. Arden L.J. noted that in *R v Ministry of Agriculture, Fisheries and Food Ex p. FEDESA Case 331/88, [1990] ECR I-4023*, the Court of Justice stated (at para.14) that in respect of challenges to discretionary decisions of the Community Legislature concerning the Community Agricultural Policy a measure should only be held to be disproportionate if it was “manifestly inappropriate” having regard to its objective. This test was applicable wherever EU or national institutions had a wide margin of appreciation. Lord Neuberger M.R. (paras [195]–[209]) regarded the relevant test here as being whether the decision was “manifestly wrong”, which he equated (para. [255]) to a decision that no reasonable Secretary of State could have made.

- 20 *[2015] UKSC 6* at para.[63]) reaffirming the view he expressed in *Sinclair Collis* (above). Lord Carnwath (at para. [169] stated that it was not necessary to analyse the differences of emphasis in the judgments in *Sinclair Collis*, but did agree with Lord Neuberger’s point (at para.[200]) that the breadth of the margin of appreciation depends on the circumstances of the case. This was an area where the decision-maker had a “wide area of policy choice”. Cf. Lord Mance at para.[142].

- 21 See Lord Mance at para.[162] and Lord Carnwath at para.[187].

1.1-93 EU financial sanctions

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EU financial sanctions

1.1-93

Part 2 (ss.48–57) of the [Localism Act 2011¹](#) introduces new arrangements under which a minister may require a public authority to make a payment in respect of an EU financial sanction.

Footnotes

- 1 The Welsh Ministers have similar powers in respect of Welsh public authorities under the 2011 Act Pt.3 (ss.58–67), s.61 as amended by the [Wales Act 2017 Sch.6 para.90](#).

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Exit from the EU

1.1-93A

Following the result of the Referendum held in the UK on 23 June 2016, where the majority voted in favour of leaving the EU, the UK gave notice of withdrawal from the EU under Art.50, TEU, which was due to take effect on 29 March 2019. Parliament passed the [European Union \(Withdrawal\) Act 2018](#), which repealed the [European Communities Act 1972](#) with effect from “exit day”.¹ It also “ends the supremacy of European Union (EU) law in UK law, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Act also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal”.² A large number of statutory instruments have been made to enable retained EU to operate effectively, some relevant to local government.³ Withdrawal took effect on 31 January 2020, subject to an implementation period, which expired on 31 December 2020. The European Communities Act 1972 and EU-derived domestic legislation continued in effect, with modifications, for this period.⁴ EU-derived domestic legislation,⁵ as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day⁶; and direct EU legislation, so far as operative immediately before IP completion day, forms part of domestic law on and after IP completion day.⁷ It will then as domestic law be subject to repeal or modification in the ordinary way.

Footnotes

1 “Exit day” means 31 January 2020 at 11.00 pm: 2018 Act s.20(1). Postponed from 31 March 2019 by virtue of the [European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) Regulations 2019 \(SI 2019/718\)](#), then the [European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) \(No. 2\) Regulations 2019 \(SI 2019/859\)](#) and then the [European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) \(No 3\) Regulations 2019 \(SI 2019/1423\)](#).

2 Explanatory Notes para.2.

3 See eg the [Environmental Assessments and Miscellaneous Planning \(Amendment\) \(EU Exit\) Regulations 2018 \(SI 2018/1232\)](#), the [Planning \(Hazardous Substances and Miscellaneous Amendments\) \(EU Exit\) Regulations 2018 \(SI 2018/1234\)](#), the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) and the [Local Government \(Miscellaneous Amendments\) \(EU Exit\) Regulations 2018 \(SI 2018/1386\)](#).

4 2018 Act ss.1A, 1B, inserted by the [European Union \(Withdrawal Agreement\) Act 2020](#), ss.1, 2.

5 In s.2 “EU-derived domestic legislation” means any enactment so far as: (a) made under s.2(2) of, or para.1A of Sch.2 to, the European Communities Act 1972, (b) passed or made, or operating, for a purpose mentioned in s.2(2)(a) or (b) of that Act, (c) relating to anything: (i) which falls within para.(a) or (b), or (ii) to which s.3(1) or 4(1) applies, or (d) relating otherwise to the EU or the EEA, but does not include any enactment contained in the European Communities Act 1972: 2018 Act s.2(2), as amended.

- 6 2018 Act s.2, to beas amended by the 2020 Act s.25(1). “IP completion day” (and related expressions) have the same meaning as in the European Union (Withdrawal Agreement) Act 2020 (see s.39(1) to (5) of that Act); 2018 Act s.1A(6). The 2020 Act s.39(1) provides that “IP completion day” means 31 December 2020 at 11.00 p.m (and see subss (2) to (5)).
- 7 2018 Act s.23, to beas amended by the 2020 Act s.25(2). The expression “direct EU legislation” is defined in the 2018 Act s.3(2) and, subject to exceptions, includes the English-language version of any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before IP completion day.

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Section G. The European Charter of Local Self-Government

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In 1985, the Council of Europe promulgated the European Chapter of Local Self-Government.¹ It has been signed by 45 other European Countries, inside and outside the European Union, the UK being for a long time one of a small number of Western European countries not to have done so. Each signatory binds itself to accept at least 20 paragraphs of Pt I of the Charter. The principles underlying the Charter involve recognition that local authorities are one of the main foundations of any democratic state; that the right of citizens to participate in public affairs is a shared democratic principle that can be most directly exercised at a local level; that the existence of local authorities with real responsibilities can provide an administration that is effective and close to the citizen; that the safeguarding and reinforcement of local self-government is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power; and that this entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which they are exercised and the resources required for their fulfilment.²

1.1-95

The substantive provisions of the Charter cover the following matters—art.2: Constitutional and legal foundation for local self-government; art.3: Concept of local self-government; art.4: Scope of local self-government; art.5: Protection of local authority boundaries; art.6: Appropriate administrative structures and resources for the tasks of local authorities; art.7: Conditions under which responsibilities at local level are exercised; art.8: Administrative supervision of local authorities' activities; art.9: Financial resources of local authorities; art.10: Local authorities' right to associate; art.11: Legal protection of local self-government.

Particularly worthy of note is that:

"The principle of local self-government shall be recognised in domestic legislation and where practicable in the constitution."³

This principle:

"denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population."⁴

This right is to be exercised by freely elected councils or assemblies.⁵ Local authorities should, 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."⁶

1.1-96

Public responsibilities should generally be exercised, in preference, by those authorities closest to the citizen.⁷ Local authorities should be consulted, so far as possible, in due time in respect of all matters which concern them directly.⁸ Boundary changes should not be made without prior consultation of the local communities concerned, possibly by a referendum.⁹

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Local authorities should be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management. They should be able to recruit high quality staff, providing adequate training opportunities, remuneration and career prospects.¹⁰ Local elected representatives should enjoy conditions of service that provide for the free exercise of their functions, and be compensated for expenses and loss of earnings.¹¹ Administrative supervision of local authorities should only be exercised in accordance with the constitution or statute, should normally aim only at ensuring compliance with the law and constitutional principles, and should ensure that intervention of the controlling authority is kept in proportion to the importance of the interests it is intended to protect.¹²

Local authorities should be entitled, within national economic policy, to adequate financial resources of their own, which they may dispose of freely within their powers. These should be commensurate with their responsibilities. Part at least should derive from local taxes and charges at rates determined by the authorities. As far as possible, grants to local authorities should not be earmarked for specific projects.¹³

Local authorities should have the right to associate with other authorities.¹⁴ Finally:

"local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation."¹⁵

Many, although perhaps not all,¹⁶ of these principles appear to be reflected in the law and practice of local government in the United Kingdom.¹⁷ The Conservative Government, however, refused to sign the Charter, arguing that local government was a matter for national rather than international decision. Following the election of the Labour government in 1997, the UK signed the Charter on June 3, 1997, and the Charter has been ratified with effect from August 1, 1998.¹⁸

In 2009, the Council of Europe adopted an Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority.¹⁹ The States Parties are to secure this right²⁰ to everyone within their jurisdiction.²¹ The law must provide means of facilitating the exercise of this right.²² The right of nationals to participate as voters or candidates in the election of members of the council of the local authority in which they reside must be recognised by law.²³ The right of others so to participate must be recognised where the state so decides or where this accords with the state's international legal obligations.²⁴ Any formalities, conditions or restrictions to the exercise of the right to participate must be prescribed by law and be compatible with the state's international legal obligations.²⁵ Such formalities, etc. must be imposed as are necessary to ensure that the ethical integrity and transparency of the exercise of local authorities' powers and responsibilities are not jeopardised by the exercise of the right to participate.²⁶ Any other formalities, etc. must be necessary for the operation of an effective political democracy, for the maintenance of public safety in a democratic society, or for the state to comply with the requirements of its international legal obligations.²⁷ States must take all necessary measures to give effect to the right, including the establishment of procedures for consultation, access to official documents held by local authorities and complaints and suggestions.²⁸ The Protocol applies to all categories of local authorities existing within the territory of the state.²⁹ It is to enter into force three months after the eighth notification.³⁰ As at April 20, 2013, there had been ten ratifications. The UK signed the Protocol on November 16, 2009 but has not yet ratified.³¹

Footnotes

¹ Council of Europe, European Treaty Series No.122 (1985). See C. Crawford, "European influence on local self-government" (1992) 18 Local Government Studies 69; C. Himsworth, "Treaty making for standards of local government" University of Edinburgh School of Law Working Paper No.2011/24.

² Preamble to the Charter.

³ art.2.

⁴ art.3.1.

⁵ art.3.2.

⁶ art.4.2.

⁷ art.4.3.

⁸ art.4.6.

⁹ art.5.

¹⁰ art.6.1, 6.2.

¹¹ art.7.1, 7.2.

12 art.8.

13 art.9.

14 art.10.

15 art.11.

16 There might at least be debate on the questions of whether the extent of central government control reflects the principle of proportionality and whether financial resources are adequate, within national economic policy. See further, Chs 9 and 12.

17 The DoE told the Hunt Select Committee (see para. 1-82) that they agreed “pretty well with the whole of the content” of the Charter: p.29.

18 DETR Press Notice 155/ENV, March 2, 1998. A copy of the Charter has been published as a Command Paper (Cm. 3884).

19 Council of Europe Treaty Series No.207.

20 Further defined as “the right to seek to determine or to influence the exercise of a local authority’s powers and responsibilities”: art.1.2.

21 art.1.1.

22 art. 1.3.

23 art. 1.4.1.

24 art. 1.4.2.

25 art. 1.5.1.

26 art. 1.5.2.

27 art. 1.5.3.

28 art.2.

29 art.3.

30 art.5. It came into force on June 1, 2012.

31 Council of Europe website.

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Section H. Regional Bodies

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The Labour Government's White Paper, Building Partnerships for Prosperity¹ proposed the establishment by statute in each of nine regions in England² of a Regional Development Agency to promote sustainable economic development and social and physical regeneration and to coordinate the work of regional and local partners in areas such as training, investment, regeneration and business support. In addition, broad principles were to be proposed as to the composition of voluntary Regional Chambers, bringing together elected representatives from local authorities and other regional partners. These would consider issues of shared interest, such as transport and land-use planning, and economic development and regeneration. The RDAs would be required to take account of their views.³ Ten regional Government Offices combining the work of the Department for Education and Employment, the Department of Trade and Industry and the Department of the Environment, Transport and the Regions had already been established. Accordingly, Agencies were established with effect (outside London) from 1 April 1999 by the [Regional Development Agencies Act 1998](#).⁴

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In 2010, the Coalition Government announced that it proposed to replace the Regional Development Agencies by Local Enterprise Partnerships (LEPs) established by local councils and business bodies.⁵ The LEPs would be based on functional economic areas rather than the administrative regions.⁶ They would provide strategic leadership to drive sustainable private sector-led growth and job creation in their area.⁷ By January 2013, 30 LEPs had been announced.⁸ The Agencies were abolished on 31 March 2012, and most provisions of the [Regional Development Agencies Act 1998](#) repealed with effect from 1 July 2012.⁹ A further 9 LEPs were subsequently approved, covering all the remaining areas in England.¹⁰ They are non-statutory bodies, but must be chaired by a business person and at least half their members must be from the private sector.¹¹ They have responsibility for Enterprise Zones and were able to bid for funding from the first four rounds of the Regional Growth Fund.¹² They were awarded funding from the Growing Places Fund, designed to tackle immediate infrastructure investment constraints, with particular reference to housing and transport.¹³ They all submitted Strategic Economic Plans to negotiate "Growth Deals", which are funded by the Single Local Growth Fund, created in the 2013 Spending Review.¹⁴ LEPs have also been given responsibility for delivering part of the EU Structural and Investment Funds for 2014-2020.¹⁵

Footnotes

¹ Cm. 3814 (1997).

² North East; North West; Yorkshire and the Humber; West Midlands; East Midlands; Eastern Region; South West; South East; London: *ibid.* Ch. 13.

³ *ibid.* Ch.1.

⁴ s.1 and Sch.1.

⁵ The Coalition: Our programme for government (2010), p.10. This was confirmed in the 2010 Budget.

⁶ para.2.5.

⁷ White Paper, Local Growth: Realising Every Place's Potential (Cm 7961, October 2010), para.2.6. A range of possible roles was set out in para.2.7. These include co-ordinating proposals on bidding directly for the newly-established £1.4bn Regional Growth Fund (see Ch.4). On the winding-down of the RDAs, see paras 2.26–2.50.

8 See DCLG website.

9 [Public Bodies Act 2011 Sch.6](#).

10 M. Ward, Local Enterprise Partnerships (HC Library Briefing Paper No. 5651, 23 December 2015), p. 5.

11 Ibid. p. 6, referring to Lord Heseltine, No Stone Left Unturned (October 2012) p. 34.

12 See M. Ward, Regional Growth Fund (HC Library Standard Note: SN/EP/5874, 6 March 2015).

13 See M. Ward, Local Enterprise Partnerships, pp. 9-10.

14 Ibid. p. 11; M. Ward, Local Growth Deals (HC Library Briefing Paper No. 7120, 23 December 2015).

15 M. Ward, Local Enterprise Partnerships pp. 11-12.

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Section I. Economic prosperity boards, combined authorities and sub-national transport bodies

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Part 6 (ss.88–120) of the Local Democracy, Economic Development and Construction Act 2009, as amended by the Cities and Local Government Devolution Act 2016, makes provision for economic prosperity boards and combined authorities.

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Section I. Economic prosperity boards, combined authorities and sub-national transport bodies

Economic Prosperity Boards

The Secretary of State may by order establish an economic prosperity board (EPB) for an area, the board being a body corporate. The original conditions were (a) that the area consists of the whole of two or more local government areas (i.e. the area of a county or district council) in England; (b) that no part of the area is separated from the rest by one or more local government areas not within the area; (c) that there is no local government area that is surrounded by local government areas within the area but that is not itself within the area; (d) that no part of the area form part of the area of another EPB or a combined authority; and (e) that each local government area that forms part of the area was included in a scheme prepared under [s.98](#). The name of the EPB must be specified in the order.¹ Conditions (b) and (c) have now been removed.² Further requirements for an order under this section are set out in the [2009 Act s.99](#).³

EPBs and combined authorities⁴ are intended to “support improved strategic decision-making on economic issues, and better co-ordination and delivery of economic development interventions by local authorities”.⁵ They take account of the fact that functional economic market areas, illustrated by travel to work areas, are often much larger than the area of individual local authorities.⁶ The Secretary of State may make provision in relation to an EPB about its membership, the voting powers of EPB members and the EPB’s executive arrangements. An order may not provide for an EPB’s budget to be agreed otherwise than by the EPB.⁷

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An order under [s.89](#) with provision about the number and appointment of members must provide for a majority of EPB members to be appointed by the EPB’s constituent councils, from among their elected members, and for each representative council to appoint at least one of its elected members as an EPB member. A county council is a constituent council if the whole or part of its area is within the EPB’s area; a district council is a constituent council if its area is within the EPB’s area. “Representative councils” are (a) a county council, if the whole of its area coincides with or is included within the EPB’s area; (b) a unitary district council if its area is included in the EPB’s area; and (c) where the EPB’s area includes part of the area of a county council, the county council or each district council for an area within that part, as determined under the order.

If an order under [s.89](#) provides for members to be appointed otherwise than among the elected members of the constituent councils, the order must provide for them to be non-voting members. However, the voting members of an EPB may resolve that this restriction is not to apply in the case of the EPB.⁸

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The Secretary of State may by order provide for a function of a local authority (i.e. a county or district council) exercisable in relation to an area all or part of which is within an EPB area to be exercisable by the EPB in relation to the EPB’s area. This may be instead of by the local authority or concurrently or jointly. Functions exercisable by the EPB by virtue of this section must be exercised with a view to promoting the economic development and regeneration of its area.⁹ The Secretary of State may by order make provision for the costs of an EPB to be met by its constituent councils, and about the basis on which the amount payable by each council is to be determined.¹⁰ Each EPB must keep a general fund to which all receipts must be carried and liabilities discharged. Accounts must be kept of receipts and payments to and from the fund.¹¹ The Secretary of State may by order change the boundaries of an EPB’s area by adding or removing the area of a county or district council. The area to be created must meet conditions (a) and (d) in [s.88](#) and each council whose area (or, in the case of a county council, part of whose area) is to be added or removed must consent.¹² The Secretary of State may by order dissolve an EPB’s area and abolish the EPB for the area provided a majority of county and unitary district councils for the area consent.¹³

Any two or more county or district councils may undertake a review of the effectiveness and efficiency of arrangements to promote economic development and regeneration within the “review area”. Where the review is undertaken by a county council, the review area must include the areas of one or more district councils within the area of the county council or, if there are no such areas, the area of the county council. Where it is undertaken by a district council, the review area must include the area of that council. The review area may also include the area of any county or district council not undertaking the review.¹⁴ Where two or more authorities which have undertaken a review under [s.97](#) conclude that the establishment of an

EPB would be likely to improve the exercise of statutory functions relating to economic development and regeneration, and economic conditions in the area, they may prepare and publish a scheme for the establishment of an EPB for the area (the “scheme area”). The scheme area must (a) consist of or include the whole or any part of the review area; (b) may include one or more county or district council areas; and (c) must meet condition (a) in [s.88](#). A local government area cannot be included unless the district or county council for the area (or, in two-tier areas, both) either participates in the preparation of the scheme or consents to its inclusion.¹⁵

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The Secretary of State may make an order establishing an EPB for an area only if, having regard to a scheme prepared and published under [s.98](#), the Secretary of State considers that to do so is likely to improve the exercise of statutory functions relating to economic development and regeneration, and economic conditions, in the area. The Secretary of State must consult each county and district council for the area for which the EPB is to be established, and such other persons (if any) as the Secretary of State considers appropriate. The Secretary of State must have regard to the need to reflect the identities and interests of local communities and to secure effective and convenient local government.¹⁶ Similar provision is made for the review of specified matters in respect of an existing EPB.¹⁷

Footnotes

1 Local Democracy, Economic Development and Construction Act 2009 [s.88](#). An EPB may change its name by a resolution passed by a two-thirds majority of members voting: 2009 Act [s.94](#).

2 2009 Act [s.88\(3\)](#) and [\(4\)](#) were repealed by the 2016 Act [s.11\(1\), \(2\)](#).

3 As amended by the 2016 Act [s.11\(5\)](#).

4 See [ss.103–113](#) and para.1-94.

5 CLG, Economic prosperity boards and combined authorities: Consultation on draft statutory guidance (February 2010), p.10.

6 CLG, Economic prosperity boards and combined authorities: Consultation on draft statutory guidance (February 2010), p.10.

7 2009 Act [s.89](#).

8 2009 Act [s.90](#).

9 2009 Act [s.91](#), as amended by the 2016 Act Sch.5, para.18

10 2009 Act [s.92](#).

11 2009 Act [s.93](#).

12 2009 Act [s.95](#), as amended by the 2016 Act [s.11\(3\)](#)

13 2009 Act [s.96](#).

14 2009 Act [s.97](#).

15 2009 Act [s.98](#), as amended by the 2016 Act [s.11\(4\)](#)

16 2009 Act [s.99](#).

17 2009 Act [ss.100–102](#), as amended and [s.101A](#) inserted by the 2016 Act [s.13](#)

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1.1-103A Establishment and powers

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Provision is also made enabling the Secretary of State to establish as a body corporate a combined authority for an area.¹ The conditions for determining that area are analogous to those for an EPB area.² The current conditions are: (1) that the area consists of the whole of two or more local government areas in England; and (2) that no part of the area forms part of: (a) the area of another combined authority, (b) the area of an EPB, or (c) an integrated transport area.³ The original purpose was to enable there to be an authority that could exercise the functions of both Integrated Transport Authority under the [Local Transport Act 2008](#) and an EPB. A number of combined authorities have been established. As at September 2020 there were ten.⁴ Combined authorities have assumed greater significance, as a vehicle for the devolution of powers and budgets to encourage economic growth in accordance with “devolution deals” entered with central government.⁵ Accordingly the amendments effected by the [Cities and Local Government Devolution Act 2016](#) enable local authority functions generally to be conferred on a combined authority without the restriction that they be exercisable only with a view to promoting the economic development and regeneration of the area.⁶ Furthermore, the Secretary of State may by order make provision for a function of a public authority⁷ exercisable in relation to a combined authority’s area to be a function of the combined authority; and for conferring on a combined authority a function corresponding to a function that a public authority has in relation to another area.⁸ The general power of competence under [Ch.1 Pt.1 of the Localism Act 2011](#) may be conferred.⁹ These powers may only be exercised with the consent of the relevant authorities.

Three mayoral combined authorities¹⁰ have been given, by order,¹¹ the power to exercise in their area the functions relating to spatial development strategies that were given to the Mayor of London by specified provisions of the Greater London Authority Act 1999.¹²

[Sections 113A–113C of the 2009 Act¹³](#) confer general powers on economic property boards and combined authorities, on the same model as applicable to fire and rescue authorities.¹⁴

The Secretary of State may give guidance, to which the specified authorities must have regard.¹⁵

Footnotes

1 2009 Act, ss 103–113D, as amended by the [Localism Act 2011 s.13\(1\)](#) (inserting ss 113A–113C) and the [Cities and Local Government Devolution Act 2016 ss 2–10, 12, 14](#) and Sch.5 paras 19–25. See M. Sandford, Combined Authorities (HC Briefing Paper No. 06649, 17 December 2019).

2 See the [2009 Act s.88](#).

3 2009 Act s.103(2), (5).

4 See the [Greater Manchester Combined Authority Order 2011 \(SI 2011/908\)](#) as amended by [SI 2015/960](#), [SI 2016/1267](#), [SI 2017/612](#), [SI 2018/444](#), art.3 and [SI 2019/793](#) arts 11, 12; the [Barnsley, Doncaster, Rotherham and Sheffield Combined Authority Order 2014 \(SI 2014/863\)](#), as amended by [SI 2020/806](#) regs 18, 19 (the Sheffield City Region CA); the [West Yorkshire Combined Authority Order 2014 \(SI 2014/864\)](#); the [Halton, Knowsley, Liverpool, St. Helens, Sefton and Wirral Combined Authority Order 2014 \(SI 2014/865\)](#) (the Liverpool City Region CA); the

Durham, Gateshead, South Tyneside and Sunderland Combined Authority Order 2014 (SI 2014/1012) and SI 2018/1133 Sch.5 (the North East CA); the Tees Valley Combined Authority Order 2016 (SI 2016/449); the West Midlands Combined Authority Order 2016 (SI 2016/653); the West of England Combined Authority Order 2017 (SI 2017/126); the Cambridgeshire and Peterborough Combined Authority Order 2017 (SI 2017/251); the Newcastle Upon Tyne, North Tyneside and Northumberland Combined Authority (Establishment and Functions) Order 2018 (SI 2018/1133) (the North of Tyne CA).

5 See para.1.1-02.

6 See the 2009 Act s.105, substituted by the 2016 Act s.6(2), as amended by SI 2017/430. See the Greater Manchester Combined Authority (Public Health Functions) Order 2017 (SI 2017/1180).

7 “Public authority” includes a Minister of the Crown or a government department but not a county or district council: 2009 Act s.105A(9).

8 See the 2009 Act ss 105A, 105B, inserted by the 2016 Act s.7. These may include specified health service functions: 2016 Act s.18 (see further below). See the Tees Valley Combined Authority (Functions) Order 2017 (SI 2017/250); the Liverpool City Region Combined Authority (Functions and Amendment) Order 2017 (SI 2017/430); the Tees Valley Combined Authority (Functions and Amendment) Order 2017 (SI 2017/431); the Greater Manchester Combined Authority (Fire and Rescue Functions) Order 2017 (SI 2017/469), as amended by SI 2020/641; the West Midlands Combined Authority (Functions and Amendment) Order 2017 (SI 2017/510); the Greater Manchester Combined Authority (Functions and Amendment) Order 2017 (SI 2017/612); the Cambridgeshire and Peterborough Combined Authority (Business Rate Supplements Functions) Order 2018 (SI 2018/877); the Liverpool City Region Combined Authority (Business Rate Supplements Functions) Order 2018 (SI 2018/878); the West of England Combined Authority (Business Rate Supplements Functions) Order 2018 (SI 2018/879); the West Midlands Combined Authority (Business Rate Supplements Functions) Order 2018 (SI 2018/880); the Newcastle Upon Tyne, North Tyneside and Northumberland Combined Authority (Establishment and Functions) Order 2018 (SI 2018/1133); the Greater Manchester Combined Authority (Adult Education Functions) Order 2018 (SI 2018/1141); the Liverpool City Region Combined Authority (Adult Education Functions) Order 2018 (SI 2018/1142); the West of England Combined Authority (Adult Education Functions) Order 2018 (SI 2018/1143); the West Midlands Combined Authority (Adult Education Functions) Order 2018 (SI 2018/1144); the Tees Valley Combined Authority (Adult Education Functions) Order 2018 (SI 2018/1145), the Cambridgeshire and Peterborough Combined Authority (Adult Education Functions) Order 2018 (SI 2018/1146); the Greater Manchester Combined Authority (Functions and Amendment) Order 2019 (SI 2019/793); the Newcastle Upon Tyne, North Tyneside and Northumberland Combined Authority (Adult Education Functions) Order 2019 (SI 2019/1457); the Barnsley, Doncaster, Rotherham and Sheffield Combined Authority (Functions and Amendment) Order 2020 (SI 2020/806).

9 2009 Act s.113D, inserted by the 2016 Act s.10. See the West of England Combined Authority Order 2017 (SI 2017/126), art.24; the Cambridgeshire and Peterborough Combined Authority Order 2017 (SI 2017/251), art.11. Other CAs may exercise the general power of competence for the purposes of economic development and regeneration: see eg; the West Yorkshire Combined Authority Order 2014 (SI 2014/864), art.10, Sch.2 para.1; the Newcastle Upon Tyne, North Tyneside and Northumberland Combined Authority (Establishment and Functions) Order 2018 (SI 2018/1133) art.13(1)(a).

10 Those for Greater Manchester, Liverpool City Region and the West of England.

11 SI 2016/1267, SI 2017/430 and SI 2017/126.

12 1999 Act ss.334–342, 346, 348. See the Combined Authorities (Spatial Development Strategy) Regulations 2018 (SI 2018/827), as amended by SI 2018/924.

13 Inserted by the Localism Act 2011 s.13(1).

14 See para.3-999.4269.1ff.

15 2009 Act ss.118.

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1.1-103B Constitution

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Constitution

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The constitutional arrangements are specified in the orders made by the Secretary of State setting up the authorities.¹ There are variations in the detail. For example, the Greater Manchester Combined Authority Order 2011² provides³ that each constituent council⁴ is to appoint one of its elected members to be a member of the GMCA and another to be a substitute member to act in the absence of the appointed member. It was originally provided that the GMCA was in each year to appoint a chair from among its members.⁵ Provision was subsequently made for a directly elected mayor as an additional member, and chair, of the Authority.⁶ Each authority has one or two members (and one or two substitute members) appointed by each constituent council specified in the order. Some have in addition a member (and substitute member) appointed by each of one or more non-constituent councils.⁷ Most have, in addition, a member (and substitute member) appointed by the Local Enterprise Partnership. Only the members appointed by constituent councils have voting rights although, in some cases,⁸ voting rights can be conferred on the non-constituent council or LEP members by a resolution of the authority. Special majorities are required for some resolutions of the authority.

Footnotes

¹ 2009 Act s.104(1)(a), applying the powers conferred by the 2009 Act s.84 in respect of the establishment of an Integrated Transport Authority.

² SI 2011/908.

³ Sch.1 paras 1, 2.

⁴ ie the metropolitan district councils for the local government areas of Bolton, Bury, Manchester, Oldham, Rochdale, Salford, Stockport, Tameside, Trafford, and Wigan: SI 2011/908 art.2.

⁵ SI 2011/908 Sch.1 para.2(1)(a).

⁶ See the [Greater Manchester Combined Authority \(Election of Mayor with Police and Crime Commissioner Functions\) Order 2016 \(SI 2016/448\)](#).

⁷ For example, Chesterfield BC and Bassetlaw, Bolsover, Derbyshire Dales and North East Derbyshire DCs are non-constituent members of the Sheffield City Region CA; City of York Council is a non-constituent member of the West Yorkshire CA.

⁸ The West Midlands CA and the North of Tyne CA.

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Provision has also been added for the Secretary of State by order to provide for a directly elected mayor for the area of a combined authority.¹ A mayor is by virtue of that office a member of, and the chair of, the combined authority. An order may be made if a proposal for there to be an elected mayor is made by the “appropriate authorities”;² or, without a proposal, if the appropriate authorities consent, or, in the case of an existing combined authority, there are one or more non-consenting constituent councils but the combined authority and at least two constituent councils consent.³ As at December 2020 there were mayors for nine of the ten combined authorities; the first election of a mayor for West Yorkshire is expected to take place on 6 May 2021.

Provision is also made for one of the members of a mayoral combined authority to be appointed by the mayor as deputy mayor.⁴ The Secretary of State may by order make provision for any function of a mayoral combined authority to be a function exercisable only by the mayor.⁵ The mayor may arrange for any “general function”⁶ to be exercisable by the deputy mayor or another member or officer of the combined authority or, so far as authorised by order of the Secretary of State, by the deputy mayor for policing and crime or a committee of the combined authority, consisting of members appointed by the mayor (whether or not members of the authority).⁷ An order may be made only with the consent of the appropriate authorities or, in the case of an order made in relation to an existing mayoral combined authority, the mayor.⁸ An order may also be made permitting arrangements under the [Local Government Act 1972 s.101\(5\)](#) for the joint exercise of general functions of a mayor;⁹ and for the mayor to exercise the functions of a police and crime commissioner in relation to that area.¹⁰ The Secretary of State may by order make provision in respect of the position where the mayor of a combined authority exercises both fire and rescue functions and the functions of a police and crime commissioner.¹¹ A mayoral combined authority is a precepting authority.¹² Combined authorities are to have overview and scrutiny committees and audit committees.¹³

Footnotes

1 2009 Act ss 107A, 107B, and Sch.5B, inserted by the Cities and Local Government Devolution Act 2016 s.2. See the Greater Manchester Combined Authority (Election of Mayor with Police and Crime Commissioner Functions) Order 2016 (SI 2016/448); the Halton, Knowsley, Liverpool, St Helens, Sefton and Wirral Combined Authority (Election of Mayor) Order 2016 (SI 2016/782); the Tees Valley Combined Authority (Election of Mayor) Order 2016 (SI 2016/783); the Barnsley, Doncaster, Rotherham and Sheffield Combined Authority (Election of Mayor) Order 2016 (SI 2016/800), as amended by SI 2017/432; the West Midlands Combined Authority (Election of Mayor) Order 2016 (SI 2016/933); the Combined Authorities (Mayors) (Filling of Vacancies) Order 2017 (SI 2017/69); the Combined Authorities (Mayoral Elections) Order 2017 (SI 2017/67), as amended by SI 2018/19 and SI 2019/350 (and see SI 2020/395 reg. 8 (postponement of by-elections for casual vacancies); the West of England Combined Authority Order 2017 (SI 2017/126), art.5; the Cambridgeshire and Peterborough Combined Authority Order 2017 (SI 2017/251), art.5; the Newcastle Upon Tyne, North Tyneside and Northumberland Combined Authority (Establishment and Functions) Order 2018 (SI 2018/1133), art.5.

2 ie. each county or district council for any part of the area of the combined authority and, in the case of an order in relation to an existing combined authority, the combined authority: [2009 Act s.107B\(5\)](#).

- 3 2009 Act s.107B(1)-(3). In the last situation, the Secretary of State must make an order under the 2009 Act s. 106 to remove the area of any non-consenting council from the area of the combined authority: 2009 Act s.107B(4).
- 4 2009 Act s.107C, inserted by the 2016 Act s.3.
- 5 2009 Act s.107D(1), inserted by the 2016 Act s.4(1). This is subject to the 2009 Act s.107D(3) (see below): 2009 Act s.107D(5).
- 6 ie. any functions exercisable by the mayor other than PCC functions: 2009 Act s.107D(2).
- 7 2009 Act s.107D(3). An order about committees may include specified provision: 2009 Act s.107D(4); and other specified provisions: 2009 Act s.107D(5)-(8), subs. (6) as amended by the Policing and Crime Act 2017 s.8(3).
- 8 2009 Act s.107D(9), (10).
- 9 2009 Act s.107E.
- 10 2009 Act s.107F, Sch.5C. See the Greater Manchester Combined Authority (Election of Mayor with Police and Crime Commissioner Functions) Order 2016 (SI 2016/448) providing for the mayor for the area of the combined authority to exercise functions of a police and crime commissioner (“PCC”) in relation to that area from 8 May 2017. See also the Greater Manchester Combined Authority (Transfer of Police and Crime Commissioner Functions to the Mayor) Order 2017 (SI 2017/470), as amended by SI 2018/444 art.4.
- 11 2009 Act ss 107EA–107EG, inserted by the Policing and Crime Act 2017 s.8(2), s.107EE, as amended by the Policing and Crime Act 2017 Sch.9 para.70.
- 12 Cities and Local Government Devolution Act 2016 s.5(1), (2). The Secretary of State may by order make provision in respect of financial matters: 2009 Act s.107G, inserted by the 2016 Act s.5(3). See the Combined Authorities (Finance) Order 2017 (SI 2017/611).
- 13 2009 Act s.104(9) and Sch.5A, inserted by the 2016 Act s.8. See the Combined Authorities (Overview and Scrutiny Committees, Access to Information and Audit Committees) Order 2017 (SI 2017/68). See MHCLG, Statutory Guidance on Overview and Scrutiny in Local and Combined Authorities (May 2019).

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Regulations

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The Secretary of State may make regulations about local authorities' electoral arrangements, governance arrangements, their constitution and meetings, and structural and boundary arrangements, with the consent of all the authorities concerned (only one in two-tier areas).¹ The intention is that these powers can be used to facilitate "devolution deals" in areas where it is not appropriate to establish a combined authority.² The Secretary of State also has power to make regulations providing for a function of a public authority³ exercisable in relation to the area of a county or district council in England to be a function of the local authority, or conferring on the local authority in relation to its area a function corresponding to a function that a public authority has in relation to another area; regulations may provide for such functions to be exercisable concurrently or jointly.⁴ Functions that may be transferred include health service functions, but not any of the Secretary of State's core duties in relation to the health service or health service regulatory functions vested in national bodies responsible for such functions.⁵

Footnotes

1 Cities and Local Government Devolution Act 2016 s.15.

2 *Explanatory Notes to the 2016 Act*, para.46.

3 This includes a Minister of the Crown or a government department: *2016 Act* s.16(9).

4 *2016 Act* ss 16, 17.

5 *2016 Act* s.18.

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Sub-national transport bodies

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Section 21 of the 2016 Act inserts a new Pt 5A (ss.102E–102U) in the Local Transport Act 2008, enabling the Secretary of State by regulations to establish a sub-national transport body for any area in England outside Greater London, where this would facilitate the development of transport strategies for the area and such strategies would further the objective of economic growth in the area.

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Section J. Powers to Transfer Local Public Functions

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Chapter 4 of Pt 1 (ss.15 to 20) of the [Localism Act 2011](#) enables the Secretary of State to transfer or delegate “local public functions” to “permitted authorities”: ie. a county council in England, a district council, an economic prosperity board or a combined authority.¹ The transfer powers have now been confined to transfers to economic prosperity boards, as provision as regards transfers to the other authorities is now made by the [Cities and Local Government Devolution Act 2016](#).² The delegation powers continue to apply to permitted authorities. A “public function” is a function of a public authority³ that does not consist of a power to make regulations or other instruments of a legislative character.⁴ A “local public function”, in relation to a permitted authority, is a public function in so far as it relates to (a) the permitted authority’s area, or (b) persons living, working or carrying on activities in that area.⁵

The Secretary of State may by order⁶ make provision (a) transferring a local public function from the public authority whose function it is to an EPB and (b) about the discharge of local public functions that are transferred to permitted authorities, including provision enabling the discharge of those functions to be delegated.⁷ An order may modify any enactment⁸ (whenever passed or made) for the purpose of making this provision.⁹

The Secretary of State may not make an order under [s.15](#) unless the Secretary of State considers that it is likely that making the order would (a) promote economic development or wealth creation, or (b) increase local accountability in relation to each local public function transferred by the order.¹⁰ the purposes of (b), in relation to a local public function, local accountability is increased if the exercise of the function becomes more accountable to persons living or working in the area of the EPB to which it is transferred.¹¹ In addition, the Secretary of State may not make an order unless the Secretary of State considers that the local public function transferred by it can appropriately be exercised by the EPB to which it is transferred¹² and unless the permitted authority has consented to the transfer.¹³ Before making an order, the Secretary of State must consult such persons as the Secretary of State considers appropriate.¹⁴

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A Minister of the Crown may, to such extent and subject to such conditions as that minister thinks fit, delegate to a permitted authority any of the minister’s eligible functions.¹⁵ A function is eligible for these purposes if it does not consist of a power to make regulations or other instruments of a legislative character or a power to fix fees or charges, and the minister considers that it can appropriately be exercised by the permitted authority.¹⁶ No such delegation, or variation of such a delegation, may be made without the agreement of the permitted authority.¹⁷ Before delegating a function under [s.16\(1\)](#), the minister must consult such persons as the Minister considers appropriate.¹⁸ A delegation may be revoked at any time by any minister.¹⁹ Schemes for the transfer of property, rights and liabilities may be made by the Secretary of State in respect of a transfer of functions under [s.15](#) or by a Minister of the Crown in respect of a delegation or variation or revocation of a delegation under [s.16](#).²⁰

If the Secretary of State receives a proposal from a permitted authority for the exercise of his powers under ss 15 and 17 in relation to the authority, the Secretary of State must consider the proposal, and notify the authority of what action, if any, the Secretary of State will take in relation to it.²¹ The Secretary of State may by regulations specify criteria to which the Secretary of State must have regard in considering such a proposal.²² The proposal must be accompanied by such information and evidence as the Secretary of State may specify by regulations.²³ Before making regulations, the Secretary of State must consult such persons as the Secretary of State considers appropriate.²⁴

Footnotes

¹ [2011 Act s.20](#).

² See para. 1.1-103.

- 3 This term includes a minister or government department: [2011 Act s.20](#).
- 4 [2011 Act s.20](#).
- 5 [2011 Act s.20](#).
- 6 The procedure for making an order is set out in the [2011 Act s.19](#).
- 7 [2011 Act s.15\(1\)](#).
- 8 This term includes an enactment contained in a local Act or comprised in subordinate legislation: [2011 Act s.20](#).
- 9 [2011 Act s.15\(2\)](#). This is a power to apply the enactment with or without modifications, to extend, disapply or amend it, or to repeal or revoke it with or without savings: [2011 Act s.15\(3\)](#).
- 10 [2011 Act s.15\(5\)](#).
- 11 [2011 Act s.15\(6\)](#).
- 12 [2011 Act s.15\(7\)](#).
- 13 [2011 Act s.15\(8\)](#).
- 14 [2011 Act s.15\(9\)](#).
- 15 [2011 Act s.16\(1\)](#).
- 16 [2011 Act s.16\(2\)](#).
- 17 [2011 Act s.16\(3\)](#).
- 18 [2011 Act s.16\(4\)](#).
- 19 [2011 Act s.16\(5\)](#).
- 20 [2011 Act s.17](#).
- 21 [2011 Act s.18\(1\),\(3\)](#).
- 22 [2011 Act s.18\(2\)](#).
- 23 [2011 Act s.18\(4\)](#).
- 24 [2011 Act s.18\(5\)](#).

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Section K. The Community Right to Challenge

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Chapter 2 (ss.81–85) of Part 5 of the Localism Act 2011 makes provision for the “community right to challenge” under which specified persons or voluntary or community bodies may express an interest in providing a service. Such an expression must be considered by the local authority. Accordingly, a relevant authority¹ must consider an expression of interest in accordance with Ch.2² if it is submitted to the authority by a “relevant body”, and it is made in writing and complies with such other requirements for expressions of interest as the Secretary of State may specify by regulations. This is subject to s.82 concerning the timing of expressions of interest.³ *Expression of interest*, in relation to a relevant authority, means an expression of interest in providing or assisting in providing a relevant service on behalf of the authority.⁴ *Relevant service*, in relation to a relevant authority, means a service provided by or on behalf of that authority in the exercise of any of its functions in relation to England, other than a service of a kind specified in regulations made by the Secretary of State.⁵ *Relevant body* means(a)a voluntary⁶ or community⁷ body,
 (b)a body of persons or a trust which is established for charitable purposes only,
 (c)a parish council,
 (d)in relation to a relevant authority, two or more employees of that authority, or
 (e)such other person or body as may be specified by the Secretary of State by regulations.⁸

In *R. (on the application of Hall) v Leicestershire CC [2015] EWHC 2985 (Admin)*, Cranston J. held that the council had not been entitled to reject an expression of interest in the operation of a museum by the Friends of Snibston on the ground that FOS not a “relevant body” under the 2011 Act s.81(6). The council’s reason was that the business plan submitted by FOS, an unincorporated association, provided for delivery of the service by a charitable trust, and the trust had not yet been established. Cranston J. said at para. [80]: “It seems to me that it is perfectly feasible for an expression of interest to be submitted that contains a timetable to progress the bid from an existing status of an organisation to move to charitable or other status, either by itself or with the assistance of another body, in order to provide the service.” However, the council had been entitled to reject the expression of interest on other grounds, namely that FOS was unsuitable to run the museum and the financial information was inadequate.

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The Secretary of State may by regulations amend or repeal any of s.81(6)(a) to (d) or any of s.81(7) to (9) and make consequential amendments.⁹

A relevant body may submit an expression of interest to a relevant authority at any time, subject to the power of an authority to specify periods during which expressions of interest, or expressions of interest in respect of a particular relevant service, may be submitted.¹⁰ The authority must publish details of any such specification in such manner as it thinks fit, which must include publication on its website.¹¹ It may refuse to consider an expression of interest submitted outside a specified period.¹² Where an expression of interest is made, the authority must accept it or reject it, subject to s.84(1), concerning the modification of an expression of interest.¹³ If the authority accepts it must carry out a procurement exercise relating to the provision on its behalf of the service to which the expression of interest relates.¹⁴ This exercise must be such as is appropriate having regard to the value and nature of the contract that may be awarded as a result of it.¹⁵ An authority must specify and publish (including on its website) minimum and maximum periods between the date of acceptance and the start of the procurement exercise and comply with that specification.¹⁶

A relevant authority must, in considering an expression of interest, consider whether acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of the authority’s area.¹⁷ Similarly, a relevant authority must, in carrying out the procurement exercise, consider how it might promote or improve the social, economic or environmental well-being of the authority’s area by means of that exercise, so far as that is consistent with the law applying to the awarding of contracts for the provision on behalf of the authority of the relevant service in question.¹⁸

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The authority may reject the expression of interest only on one or more grounds specified by the Secretary of State by regulations.¹⁹

A relevant authority that is considering an expression of interest may modify it, but only if the authority thinks that it would not otherwise be capable of acceptance, and the relevant body agrees to the modification.²⁰ It must specify and publish (including on its website) the maximum period between the date it receives an expression of interest and the date on which it will notify the relevant body of its decision.²¹

An authority that receives an expression of interest from a relevant body in accordance with Ch.2 must notify the relevant body in writing of the period within which it expects to notify the latter body of its decision.²² It then must notify the relevant body in writing of its decision within the period specified by it under s.84(3) and if the authority's decision is to modify or reject the expression of interest, give reasons for that decision in the notification.²³ The relevant authority must publish the notification in such manner as it thinks fit (including on its website).²⁴

A relevant body may withdraw an expression of interest after submitting it to a relevant authority, whether before or after a decision has been made.²⁵ The withdrawal of an expression of interest, or the refusal of a relevant body to agree to modification of an expression of interest, does not prevent the relevant authority from proceeding under s.83(2) if it thinks that it is appropriate to do so.²⁶

The Secretary of State may by regulations make further provision about the consideration by a relevant authority of an expression of interest submitted by a relevant body.²⁷ A relevant authority must, in exercising its functions under or by virtue of Ch.2, have regard to guidance issued by the Secretary of State.²⁸ The Secretary of State may give advice and assistance (including financial assistance) to relevant and other bodies.²⁹ In the case of relevant bodies, this may relate to the preparation and submission of an expression of interest, participation in a procurement exercise and the provision of a relevant service following such an exercise.

Footnotes

¹ i.e. a county council in England, a district council, a London borough council, or such other person or body carrying on functions of a public nature specified in regulations, including a minister or government department: 2011 Act s.81(2),(3). See the [Community Right to Challenge \(Fire and Rescue Authorities and Rejection of Expressions of Interest\) \(England\) Regulations 2012 \(SI 2012/1647\) reg.3](#), specifying a metropolitan county fire and rescue authority and the London Fire and Emergency Planning Authority.

² In *R (on the application of Draper) v Lincolnshire CC [2014] EWHC 2388 (Admin)*, Collins J. quashed the council's decision to adopt proposals to reduce the number of static libraries from 44 to 15, on the ground that an expression of interest from a charitable organisation, Greenwich Leisure Ltd, to take over provision of the council's library service should have been considered as an "expression of interest" under the 2011 Act s.81. The council had been wrong to exclude this expression of interest from the consultation exercise conducted in respect of the decision.

³ 2011 Act s.81(1). The requirements are specified in the [Community Right to Challenge \(Expressions of Interest and Excluded Services\) \(England\) Regulations 2012 \(SI 2012/1313\) reg.3](#) and Sch.1.

⁴ 2011 Act s.81(4).

⁵ 2011 Act s.81(5). See the [Community Right to Challenge \(Expressions of Interest and Excluded Services\) \(England\) Regulations 2012 \(SI 2012/1313\) reg.4](#) and Sch.2, as amended by [SI 2013/218 reg.19](#), specifying a number of services provided in conjunction with NHS bodies.

⁶ *Voluntary body* means a body, other than a public or local authority, the activities of which are not carried on for profit; the fact that a body's activities generate a surplus does not prevent it from being a voluntary body so long as that surplus is used for the purposes of those activities or invested in the community: 2011 Act s.81(7),(8).

⁷ *Community body* means a body, other than a public or local authority, that carries on activities primarily for the benefit of the community: 2011 Act s.81(9).

⁸ 2011 Act s.81(6). See the [Community Right to Challenge \(Business Improvement District\) Regulations 2015 \(SI 2015/582\)](#).

⁹ 2011 Act s.81(10).

- 10 2011 Act s.82(1),(2).
- 11 2011 Act s.82(3).
- 12 2100 Act s.82(4).
- 13 2011 Act s.83(1).
- 14 2011 Act s.83(2). The “relevant service” here is the service relevant to the authority because that is the service it requires, not necessarily the whole of the service provided at the time of the expression of interest or the subject of that expression of interest: *Draper v Lincolnshire CC [2015] EWHC 2964 (Admin)*.
- 15 2011 Act s.83(3).
- 16 2011 Act s.83(4)–(7).
- 17 2011 Act s.83(8).
- 18 2011 Act s.83(9)–(10).
- 19 2011 Act s.83(11). See the [Community Right to Challenge \(Fire and Rescue Authorities and Rejection of Expressions of Interest\) \(England\) Regulations 2012 \(SI 2012/1647\)](#) reg.4 Sch, setting out 10 grounds. These include non-compliance with requirements; provision by the relevant body of inadequate or inaccurate information; lack of suitability; a decision by the relevant authority has been made to stop providing the service; continued integration with a NHS service is critical; the relevant service is already the subject of a procurement exercise; the relevant authority and a third party have entered negotiations for provision of the service; the authority has published its intention to consider providing the service by a body that two or more specified employees propose to establish; the expression of interest is frivolous or vexatious; the authority considers that acceptance is likely to lead to a contravention of the law or breach of statutory duty.
- 20 2011 Act s.84(1),(2).
- 21 2011 Act s.84(3)–(5).
- 22 2011 Act s.84(6),(7).
- 23 2011 Act s.84(8).
- 24 2011 Act s.84(9).
- 25 2011 Act s.84(10).
- 26 2011 Act s.84(11).
- 27 2011 Act s.85(1).
- 28 2011 Act s.85(2).
- 29 2011 Act s.86.

