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Consultation Document

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

Date of issue: 22 August 2012
Responses by 23 November 2012

Overview

We are consulting on new statutory guidance under Section 3(6) of the Local Government Act 2000 on the discretionary power available to unitary authorities and community councils to promote or improve the economic, social or environmental well-being of their area.

This guidance provides an explanation of the wellbeing powers and what they mean to local authorities. We would like to receive any comments or questions on the guidance and views as to whether it is clear and useful.

How to respond

Please submit your comments using the online response form or e-mail them to wellbeingconsultation@wales.gsi.gov.uk

You may also send your comments to the postal address below.

Further information and related documents

Large print, Braille and alternate language versions of this document are available on request.

Consultation web address:
www.wales.gov.uk/consultations

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Data protection

How the views and information you give us will be used

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

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Chapter 1: Introduction

1.1 Introduction

i) This guidance is issued by the Welsh Ministers under Section 3(5) of Part 1 of the Local Government Act 2000, referred to as "the Act" throughout this guidance. This statutory guidance applies to local authorities in Wales, namely county councils and county borough councils, which had this power conferred on them by the Act, and community councils which had this power conferred on them by the Local Government (Wales) Measure 2011.

ii) The Act created a discretionary power referred to in this guidance as "the power" which enables local authorities to do anything that they consider is likely to promote or improve the economic, social or environmental well-being of their area and/or persons in it, provided that they are not restricted from doing so by other legislation. The power came into force in Wales on 9 April 2011. This guidance is intended to acquaint local authorities and other interested parties with the breadth of the power and to encourage the use of it.

iii) Local authorities are statutory bodies which operate within a statutory framework. Before the power to promote well-being came into force, local authorities could only do those things that they were empowered to do by specific statutory powers, duties and functions. This often created uncertainty regarding the extent of the 'enabling' power which local authorities had. Therefore the introduction of the well-being power enables local authorities to have a wide discretionary power to further develop their community leadership role and the delivery of better and more responsive services.

1.2 What is meant by "well-being"

i) Individual local authorities may determine the types of activities that will promote or improve the well-being of their area. The term "well-being" is not directly defined in the Act or in this guidance as different local authorities may have different views about the types of activities that will promote or improve the well-being of their area. Actions taken under the power should be informed by, and be responsive to, the views of the people and communities in the area.

ii) The well-being of an area and the people within the area will depend on many factors. Often these factors will not be under the direct control or influence of the local authority or other public bodies, for example, some national or global issues. Local authorities are best placed to make an assessment of what is needed to promote well-being, and can provide a solid foundation for the overall well-being of their area that responds directly to local, regional and national issues.

iii) Key factors which contribute to the promotion or improvement of well-being may include:

- Economic factors such as the availability of suitable and high quality jobs, measures to encourage local small businesses, efficient and effective transport links, lifelong learning, training and skills development, the

provision of infrastructure and new information and communication technologies etc.

- Social factors such as the promotion of good quality and affordable housing; safe communities; the encouragement of the voluntary sector; looking after the needs of children and young people, particularly the most vulnerable; access to the arts or leisure opportunities; access to education etc.
- Health related factors such as the promotion of good physical, social and mental health and developing and promoting policies which have a positive impact on health outcomes, especially on health inequalities.
- Environmental factors such as the availability of clean air, clean water, clean streets, the quality of the built environment, the removal of objects considered hazardous to health, removal of disfiguring or offensive graffiti from buildings, protecting communities against the threat of climate change, freedom from a high risk of flooding, improving and promoting biodiversity and accessibility to nature; and
- Promoting sustainable development; which the Welsh Government has defined as enhancing the economic, social and environmental wellbeing of people and communities, achieving a better quality of life for our own and future generations in ways which:
 - promote social justice and equality of opportunity; and
 - enhance the natural and cultural environment and respect its limits-using only our fair share of the earth's resources and sustaining our cultural legacy.

Examples of the use of the power by local authorities are contained in the Annex to this guidance.

Chapter 2: Power to promote well-being

2.1 How it works

i) Local authorities need to be equipped with the necessary statutory powers to enable them to respond fully to the needs of the communities which they serve. The well-being power allows local authorities to develop a broader and more innovative role and encourages closer partnership working between local authorities in better responding to the needs of their community. It must be noted that the well-being power is wide ranging and enables local authorities to do anything that they consider is likely to promote or improve the well-being of their area and/or persons in it.

ii) The breadth of the power is such that local authorities can regard it as a "power of first resort" if they are in any doubt about whether existing powers would enable them to take a particular course of action or deliver a particular service. Instead of searching for a specific power elsewhere in statute in order to take a particular action, local authorities are encouraged to look to the power in the first

instance in taking forward measures likely to promote and improve well-being. However, local authorities need to ensure that existing legislation does not impose limitations on the use of the well-being power.

iii) Local authorities will need to check that any use of this power accords with the law more generally. Relevant legal issues may include, for example:

- law of contract;
- relevant EU treaty obligations, directives and regulations which apply to procurement and state aided activity;
- human rights law;
- current UK legislation;
- vulnerability to judicial review;
- principles of natural justice; and
- other legislation relevant to local authorities.

Nb: This list is not exhaustive.

iv) Local authorities are openly accountable for their stewardship of public funds. The well-being power highlights the relaxation in the statutory restrictions on the ability of a local authority to incur expenditure. Decisions to commit funds under this power need to be transparent and reflect good practice in assessing options. As with other statutory functions the use of the power will be subject to audit by local authority auditors appointed by the Wales Audit Office. If the Auditor General for Wales finds that there has been a contravention of the law, or a loss due to negligence or misconduct, he/she may choose to issue a public interest report, which may lead to sanctions against officers or members who are responsible.

v) In exercising the power to promote well-being, local authorities should have regard to the community strategy for their area, which should form part of their single integrated plans, and the associated guidance “Shared Purpose – Shared Delivery”, issued in 2012. This does not mean that any potential use of the power has to have a basis within such a strategy, but where it impacts on or raises expectations of single integrated plan partners, local authorities should engage with them.

vi) Local authorities will also need to consider, in due course, the use of this power in the context of any future legislation that is made in respect of sustainable development.

vii) The Equality Act 2010 introduces a new equality duty on the public sector. In the exercise of its functions a public authority, namely a county council or county borough council must have due regard to the need to eliminate discrimination, harassment, victimisation (and any other conduct that is prohibited under the Act), advance equality of opportunity and also foster good relations between persons who share protected characteristics.

2.2 Who can use the power?

i) Section 1(b) of the Act provides that the power to promote well-being applies in Wales to county councils, county borough councils and community councils. Community councils were conferred with this power by section 126(1) of the Local Government (Wales) Measure 2011.

iii) The power is not available to other public authorities such as police, fire and rescue and National Parks.

iv) Section 95 of the Local Government Act 2003 (the “2003 Act”) provides the Welsh Ministers with power to make an order enabling county and county borough councils to trade in any of their ordinary functions through a company. In accordance with Section 95, the Local Government (Best Value Authorities) (Power to Trade)(Wales) Order 2006 (SI 2006/979) was made. For the purposes of the power to trade the well being power is an ordinary function of a county or county borough council (now known as ‘improvement authorities’ rather than ‘best value authorities’). The power to trade is not exercisable by a community council.

2.3 For what purposes can the power be used?

i) Section 2(1) of the Act gives a local authority a wide ranging discretionary power to do anything that it considers is likely to promote or improve the environmental, economic and social well-being of their area and persons within that area, or either of those. It is for the local authority to decide whether any particular action would be likely to achieve this.

ii) Local authorities may consider how the power might be used to pursue activities that contribute to achieving community strategy objectives, other cross-cutting issues and shared priorities, national priorities, and overarching policies, which promote and improve well-being. These might be policies and programmes that wholly or in part will close gaps in opportunity or outcomes for disadvantaged groups of people or geographical areas. Uses might include activities relating to:

- Enhancing local service delivery.
- Promoting sustainable development.
- Tackling climate change.
- Improving mental, social and physical health.
- Tackling poverty and deprivation.
- Promoting financial inclusion in disadvantaged communities.
- Reducing inequalities and promoting equalities.
- Encouraging participation and community capacity building.
- Improving and conserving the quality of the local environment.
- Promoting local culture and heritage.

- Protecting, enhancing and promoting biodiversity.
- Promoting economic development; or
- Improving community safety.

2.4 Possible uses of the power – Section 2(4)

i) Section 2(4) sets out specific examples of the kind of action that can be taken. It provides;

“The power under subsection (1) includes a power for local authorities to:

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

This is not an exhaustive list of the activities that could be undertaken under the well-being power, and section 2(6) states explicitly that “nothing in subsection (4) or (5) affects the generality of the power under subsection (1)”.

ii) Subparagraphs 2(4)(a) and (b) enable local authorities to regard the power to promote well-being as including a broad spending power. When undertaking any activity in pursuit of promoting or improving well-being, the power to promote well-being enables local authorities to incur expenditure, and specifically identifies the provision of financial assistance (subparagraph (b)) as one means of doing so. There is no restriction or limitation on the amount of money a local authority can spend. Local authorities are able to fund the activities of different groups and bodies, as well as invest in such activities, if they consider that this expenditure is likely to promote or improve the well-being of their area or persons in it. Such financial assistance may be given by any means local authorities consider appropriate, including grants, loans, guarantees or indemnities as elements of financial packages, or contributions in cash or kind.

iii) Subparagraphs (c) and (d) allow local authorities the power to make arrangements or agreements with any person and to allow them to co-operate with, or facilitate or co-ordinate the activities of any person for the purposes of well-being. Local authorities can consider what such arrangements or agreements might be and whether they would be likely to promote well-being, but an example might be the formation of or participation in companies or any other forms of association or vehicle for joint working with other partners in the public, private, or third sectors.

iv) Sub paragraph (e) makes clear that the power to promote well-being enables local authorities to deliver services that fall within the responsibility of other service

providers. This does not transfer statutory responsibility or accountability for that function, but gives greater scope for local authorities and their community strategy partners to determine how best to discharge their functions in light of local needs and circumstances. Subparagraph (f) makes clear that, in addition to providing financial assistance, local authorities can also provide other forms of assistance including staff, goods, services and accommodation. In other words, they can make such a contribution 'in kind'.

2.5 Who should benefit from the use of the power? – Section 2(2)

i) Section 2(2) provides that the power of well-being may be exercised in relation to, or for the benefit of:

- The whole or any part of a local authority's area; or
- All or any persons resident or present in a local authority's area.

The provisions have been drafted to provide maximum flexibility. The Interpretation Act 1978 makes it clear that the term 'person' includes 'a body of persons corporate or un-incorporate'. It therefore includes local authorities, police, health and parks authorities, businesses, voluntary groups and other local organisations that are themselves separate legal entities. It also encompasses all individuals and particular groups of people within a community (including faith, black and minority ethnic communities, women, older people, young people and children, and disabled people). 'Persons present' in an area includes groups such as tourists, commuters and travelers.

ii) Section 2(5) also allows a local authority to use the power in relation to, or for the benefit of any person or area, outside its area if it considers that doing so is likely to promote or improve the well-being of its area and/or any persons within it.

iii) In exercising the power outside its area, a local authority should consult the local authority and any other relevant bodies in the area(s) where it is proposing to take action under the power, although there need not be disproportionate consultation in relation to minor matters.

Chapter 3: Safeguards

3.1 Limits on power to promote well-being

i) Use of the power is subject to certain safeguards. Section 3 of the Act sets out a framework of safeguards around the use of the power to promote well-being.

ii) The power to promote well-being does not enable a local authority to do anything which it is prevented from doing by other primary or secondary legislation. This means that while the power to promote well-being 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 or where legislation is silent. For example, section 93 of the Transport Act 1985 (as amended by Schedule 11 to the Transport Act 2000 and the Travel Concessions (Eligibility) Act 2002) confers a power on local authorities to establish public transport travel concession schemes for certain groups of people. If this provision stated on the face of the Act that authorities could not establish such

schemes for any other group of people, then that prohibition would also constrain the use of the well-being power. The 1985 Act contains no such prohibition so authorities can now use the well-being power to establish concessionary fare schemes for any person or group of people, if they consider it appropriate after taking their own legal advice.

iii) The power should not be exercised in a way that unreasonably duplicates the functions of another body, and care should be taken to prevent an unreasonable duplication of an activity that falls within the statutory competence of another public body.

iv) Section 3(2) of the Act places a general prohibition on local authorities using the well-being power as a means of raising money. This restriction protects local authorities and public funding from unreasonable exposure to financial risk. The effect of this provision is to prevent local authorities from using the power in section 2(1) primarily to raise money. Where authorities use the power for a different purpose, but incidentally receive income as a result, that does not, in the view of the Welsh Ministers, amount to raising money. Thus a local authority might give financial assistance to a struggling local enterprise by purchasing shares to provide it with capital. If, as a result of the authority's investment the enterprise subsequently becomes successful and the authority later receives income from its shares by way of dividend, this does not, in the Welsh Ministers' view, amount to 'raising money' within the meaning of section 3(2). Likewise, imposing reasonable charges for services provided such as the setting up of a café in a day centre to be run by the people attending the centre as part of their training, would not amount to raising money, if the primary purpose of the centre and the café was to provide training to those people using the day centre. Similarly, the following actions may not amount to 'raising money' if the receiving of income by the authority is incidental, and not the primary purpose of their use of the power in section 2(1):

- lending money and charging interest;
- jointly obtaining sponsorship for a partnership project;
- receiving an indemnity from an organisation for costs which may be incurred;
- receiving revenue income from a trust.

v) Although the well-being power does not itself permit charging, local authorities may receive contributions on a voluntary basis from partner organisations for initiatives that, for example, improve the environment, education, or training facilities in an area. Such voluntary contributions or cost recovery would not be considered to be 'raising money'.

vi) This is not meant to be an exclusive list. When local authorities consider the use of the well-being power, they must also have regard to their fiduciary duty to council tax payers.

3.2 Creation of regulations and bye-laws

i) The well-being power is an enabling, rather than a regulatory, power. There are no provisions in sections 2 or 3 which would enable local authorities to enforce any regulations made under the power. This omission is deliberate. The Welsh Ministers believe that the power should be used to take positive actions that promote community well-being. The power could, of course, be used in tandem with existing regulatory provisions (many of which enable councils to tackle social or environmental problems such as noise nuisance, anti-social behaviour and environmental health hazards).

ii) The well-being power cannot be used to create bye-laws for the regulation of conduct, since specific enabling provision is required for this. Local authorities should therefore continue to rely on their existing broad range of powers to create bye-laws. For example, the section 235 power provided by the Local Government Act 1972 enables county and county borough councils to create bye-laws for the 'good rule and government and for the suppression and prevention of nuisances' within the area of the local authority. (Note: at the time of drafting, this power is subsumed within the Local Government Byelaws (Wales) Bill which is undergoing scrutiny by the National Assembly for Wales.)

3.3 Guidance

Section 3(5) requires local authorities to have regard to any guidance issued by the Welsh Ministers about the use of the power before using the power. This document represents such guidance.

The Welsh Government is unable to provide advice to local authorities as to whether any proposed use of this power complies with the legislation.

3.4 Examples of the use of the Power of Wellbeing

Across Wales and England there are few explicit examples of the use of the power of well-being. The National Association of Local Councils has published some examples of the use of the power in their booklet 'Localism in Practice 3 (2011)' which can be viewed on their website via the following link:

http://www.nalc.gov.uk/Publications/Booklets_and_Resources.aspx