

LOCALISM ACT 2011

EXPLANATORY NOTES

COMMENTARY

Part 1: Local Government

Chapter 1: General powers of authorities

Section 1: Local authority's general power of competence

10. **Section 1** provides a general power of competence for local authorities in England. It gives these authorities the same power to act that an individual generally has and provides that the power may be used in innovative ways, that is, in doing things that are unlike anything that a local authority - or any other public body - has done before, or may currently do. The section defines the meaning of an 'individual' so as to avoid referring to the reduced powers exercised by for example a child. *Subsections (4), (5) & (6)* further define the extent of the power. Where the authority can do something under the power, the starting point is that there are to be no limits as to how the power can be exercised. For example, the power does not need to be exercised for the benefit of any particular place or group, and can be exercised anywhere and in any way. *Subsection (7)* gives effect to Schedule 1, which makes consequential amendments. The amendments to the Local Government Act 2000 mean that the well-being power provided in section 2 of that Act will no longer apply to English local authorities.

Section 2: Boundaries of the general power

11. **Section 2** sets out the boundaries of the general power, requiring local authorities to act in accordance with statutory limitations or restrictions. Restrictions that apply to existing powers that are overlapped by the general power are applied to the general power. So for instance if an existing power requires a particular procedure to be followed, the same procedure will apply to the use of the general power to do the same thing. It also applies any express prohibitions, restrictions and limitations within primary or secondary legislation, to the use of the general power. A distinction is drawn between restrictions in pre-commencement legislation, and those in post-commencement legislation. Restrictions in post-commencement legislation will only apply to the general power where they are expressed to do so.
12. *Subsection (3)* provides that the general power does not give local authorities power to delegate or contract out of their functions, nor to alter governance arrangements. These matters remain subject to separate provision.

Section 3: Limits on charging in exercise of the general power

13. **Section 3** restricts the ability of a local authority to charge for providing a service to a person using the general power, or where they are using an overlapped power, for non-commercial purposes. If no specific charging power exists, local authorities can charge up to full cost recovery for discretionary services - that is those that they are not required to provide to a person, where that person has agreed to their being provided.

This is in line with the charging powers in section 93 of the Local Government Act 2003. Charging for commercial purposes is subject to the provisions of section 4.

Section 4: Limits on doing things for commercial purpose in exercise of the general power

14. **Section 4** restricts the ability of a local authority to do things for a commercial purpose using the general power. The power does not authorise authorities to trade in a service with a person to whom they are already statutorily obliged to provide it. They must also only trade commercially through a company. These provisions reflect the trading powers in section 95 of the Local Government Act 2003

Section 5: Powers to make supplemental provision

15. *Subsection (1)* provides the Secretary of State with powers to remove or change statutory provisions that prevent or restrict the legal capacity of local authorities to use the general power in section 1 to do things that an ordinary individual can do. *Subsection (2)* allows the Secretary of State to remove overlaps between the general power and existing powers. *Subsections (3) and (4)* allow the Secretary of State to restrict what a local authority may do under the general power or to make its use subject to conditions. *Subsection (7)* provides that the Secretary of State must consult before exercising any of these powers, which would usually include consultation with any person, or their representatives, substantially affected by the proposal. This duty to consult does not apply to orders made under section 5(3) or (4) that only amend an earlier order so as to apply it to further authorities or disapply it in relation to a particular authority or authorities – see section 7(5). *Subsection (8)* requires the Secretary of State to consult the Welsh Ministers if an order made under section 5(1) is to have effect in Wales.

Section 6: Limits on power under section 5(1)

16. *Subsection (1)* requires the Secretary of State to consider whether certain conditions set out in *subsection (2)* have been met before exercising the power to remove restrictions in section 5(1).
17. These conditions are: that the effect of the provision made by the order is proportionate to its policy objective, in other words that the minister considers that there is an appropriate relationship between the policy aim and the means chosen to achieve it; that the provision made by the order, taken as a whole, strikes a fair balance between the public interest and the interests of the persons adversely affected by the order, including any new or increased burdens; that the provision does not remove any necessary protection such as protections in the areas of civil liberties, health and safety, the environment or national heritage; the provision will not prevent any person from continuing to exercise any right or freedom which the person might reasonably expect to continue to exercise such as, for example, rights conferred by the European Convention on Human Rights; and that the provision is not constitutionally significant. This last condition would allow orders to amend enactments which are considered to be constitutionally significant, but only if the amendments are not themselves constitutionally significant.
18. *Subsections (3) and (4)* prevent any orders under section 5(1) from being used to delegate or transfer legislative powers. *Subsection (5)* prohibits an order made under section 5(1) from abolishing or varying any tax.
19. The Secretary of State is required to set out in the explanatory document, to be laid before Parliament under section 7(2), the reasons why the conditions are considered to be met.

Section 7: Procedure for orders under section 5

20. **Section 7** sets out the parliamentary procedure to be followed for orders made under section 5. The procedure for orders under section 5(1) is modelled on that set out in the Legislative and Regulatory Reform Act 2006 for a Legislative Reform Order. This means that the procedure to be followed (negative, affirmative or super-affirmative) is ultimately determined by Parliament.
21. **Subsection (4)** allows provision under sections 5(1) and 5(2) to be combined in the same order, and applies the section 7 procedure in these circumstances. Other orders under this section are subject to an “affirmative” procedure (see section 235), other than orders under section 5(2) which do not amend primary legislation and orders under section 5(3) and (4) that disapply provisions contained in existing orders and orders that impose conditions on doing things for a commercial purpose, which are subject to the “negative” parliamentary procedure.

Section 8: Interpretation of Chapter

22. **Section 8** defines local authorities for the purposes of the Chapter. These are the bodies that will have the new power. This list does not include local authorities in Wales. By restricting the definition to ‘eligible’ parish councils, the section provides power for the Secretary of State to set conditions by order (subject to the affirmative procedure) as to which to parish councils will have the general power.