

LOCAL GOVERNMENT AND ELECTIONS (WALES) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: General Power Of Competence

Chapter 1: The General Power

Section 24 - Local authority's general power of competence

162. [Section 24](#) provides a general power of competence to qualifying local authorities in Wales. The term “general power” is used throughout these notes to refer to the general power of competence.
163. The general power gives all principal councils and certain community councils (see Chapter 2), referred to in this Part as “qualifying local authorities”, the same powers to act that an individual generally has, thus enabling them to do things that are unlike anything they, or any other public body, have done before. “Individual” is defined in subsection (5) so as to avoid any doubt that it means an individual with full powers and does not include individuals with reduced capacity; for example, a child.
164. Subsections (2) and (3) further define the extent of the power. It is not necessary for activities undertaken using the general power to benefit the qualifying local authority itself, its area or residents; however, there is no restriction on the activities doing so. In using the general power a qualifying local authority may undertake activities anywhere, including both in and outside of Wales.
165. The general power can be used by qualifying local authorities to, for example, act in their own financial interests with subsection (2)(b) stating that the general power may be used to do things for a commercial purpose, or for a charge.
166. The exercise of the general power is subject to the restrictions provided for in sections 25 (general boundaries of the power), 26 (limits on charging) and 27 (limits on doing things for a commercial purpose), and any regulations made by the Welsh Ministers under section 28(3) or (4).
167. Amendments to the 2000 Act, provided for in Schedule 3 to the Act, mean that the well-being power provided in section 2 of that Act will no longer apply to Welsh local authorities once the general power is commenced.

Section 25 – Boundaries of the general power

168. This section sets out the boundaries of the general power.
169. The general power does not provide qualifying local authorities with the ability to bypass existing prohibitions, limitations or restrictions in legislation passed by the Senedd or UK Parliament on, or before, the day on which this section comes into force.

170. Nor will the general power provide qualifying local authorities with the ability to bypass prohibitions, limitations or restrictions in legislation passed by the Senedd or UK Parliament after this section comes into force, if that legislation states that it applies to:
- the general power;
 - all of the qualifying local authority's powers; or
 - all of the qualifying local authority's powers except for certain powers, and the general power is not listed as one of the excepted powers.
171. Subsection (3) prevents a qualifying local authority from using the general power to delegate or contract out any of its functions or to alter its governance arrangements. These matters remain subject to separate statutory provision.

Section 26 – Limits on charging in exercise of general power

172. This section restricts the ability of a qualifying local authority to charge for providing a service to a person using the general power. It provides that where a qualifying local authority is using the general power to provide a service, it may only charge for that service if:
- that service is discretionary, i.e. not a service the authority is under a statutory duty to provide; and
 - the recipient has agreed to the provision of the service.
173. Subsection (4) prevents a qualifying local authority from making a profit in any financial year when using the general power to charge for a service, unless the service is provided for a commercial purpose. However, subject to that limitation of not making a profit, subsection (6) enables a qualifying local authority to set charges as it sees fit, including only charging some people for the service or charging different people, or groups of people, different amounts.
174. Section 93 of the Local Government Act 2003 deals with the powers of qualifying local authorities (and other bodies) to charge for things done other than in the exercise of the general power.

Section 27 – Limits on doing things for commercial purpose in exercise of general power

175. This section provides that a qualifying local authority may use the general power to carry out an activity for a commercial purpose only if the activity is one the authority could also rely on the general power to carry out for a non-commercial purpose.
176. The effect of subsection (3) is that a qualifying local authority cannot carry out an activity in respect of someone for a commercial purpose, if the authority is required by legislation to carry out that activity.
177. Also, if a qualifying local authority wishes to use the general power to do something for a commercial purpose, it must do so through a company, as defined in section 1(1) of the Companies Act 2006, or a registered society as defined in the Co-operative and Community Benefit Societies Act 2014, or registered under the Co-operative and Community Benefit Societies Act (Northern Ireland) 1969.
178. Subsection (5) imposes a duty on principal councils and eligible community councils to have regard to guidance issued by the Welsh Ministers about exercising the general power of competence to do anything for a commercial purpose.
179. Section 95 of the Local Government Act 2003 deals with the powers of qualifying local authorities (and other bodies) to do things for a commercial purpose other than in the exercise of the general power.

Section 28 – Power to make supplementary provision

180. **Section 28(1)** provides the Welsh Ministers with a power to make regulations removing or changing statutory provisions that they think prevent qualifying local authorities from using the general power, or obstruct them when using the general power.
181. Subsection (2) enables the Welsh Ministers to make regulations removing overlaps between the general power and other powers (although the effect of subsection (9)(a) is that they cannot achieve this by revising or cutting back the general power itself).
182. Subsections (3) and (4) allow the Welsh Ministers to make regulations restricting what a qualifying local authority may do under the general power, or making its use subject to conditions.
183. The Welsh Ministers may make regulations under this section in respect of all qualifying local authorities, specific qualifying local authorities, or a type of qualifying local authority.
184. The effect of subsections (7) and (8) is that before exercising any of these powers, the Welsh Ministers must consult with whichever qualifying local authorities they consider appropriate, any representatives of principal councils and community councils they consider appropriate, and any other persons they consider appropriate.
185. The duty to consult does not apply in respect of any regulations which merely amend earlier regulations so as to:
- extend their application to a specific authority or group of authorities;
 - reduce their application so they stop applying to a specific authority or group of authorities.

Section 29 and Part 1 of Schedule 3 – Amendments relating to Chapter 1 of Part 2: the general power

186. **Schedule 3** provides for consequential amendments in relation to the general power of competence (also see the notes in respect of section 37).
187. The Schedule is divided into two parts to accommodate a phased commencement of the general power of competence. This phased commencement recognises the need to make regulations specifying a qualified clerk and also to prepare and issue guidance under Chapter 2.
188. **Part 1** makes provision related to the creation of the general power in its application to principal councils whilst Part 2 makes provision in relation to the application of the general power to eligible community councils.
189. **Part 1** of Schedule 3 makes amendments to this Act and other legislation relating to this Chapter, including removing the well-being power for principal councils.
190. Generally speaking, the amendments in this Part of the Schedule relate to the creation of the general power of competence for:
- all qualifying local authorities, or
 - in its application to principal councils

Chapter 2: Eligible community councils

Section 30 - Becoming an eligible community council

191. **Section 30** sets out the criteria a community council must meet, and the procedure it must follow, in order to become an “eligible community council”. Becoming an eligible community council enables a council to exercise the general power of competence

provided for in Chapter 1 of this Part (because “eligible community councils” fall within the definition of “qualifying local authorities”).

192. Subsection (1) provides that in order to become an eligible community council a council must pass a resolution that it meets all of the eligibility conditions set out in subsections (2) to (4) and that it is an eligible community council.
193. The first eligibility condition is that at least two-thirds of the members of the community council must have been declared elected. This means that they must have stood for election at an ordinary election or by-election, even if they stood unopposed, rather than having been co-opted.
194. The second eligibility condition is that the council’s clerk must hold one of the qualifications specified by the Welsh Ministers in regulations made under subsection (5). An example of a qualification that may be specified is CiLCA (Certificate in Local Council Administration), a Level 3 qualification in the National Qualifications Framework.
195. The final eligibility condition relates to the annual audit of the accounts of a community council. For a council to be able to resolve that it is an eligible community council it must have received two unqualified auditor’s opinions for two consecutive financial years, the latest of which must have been received during the 12 month period ending on the day on which the council’s resolution is passed.
196. A community council’s accounts are audited annually by, or on behalf of, the Auditor General, who provides an opinion on the accounts under section 23 of the Public Audit (Wales) Act 2004 (“the 2004 Act”).
197. For an Auditor General opinion to be unqualified, the Auditor General must be satisfied as to the matters set out in section 17 of the 2004 Act, including that:
 - the accounts have been prepared in accordance with regulations under section 39 of the 2004 Act;
 - they comply with the relevant statutory requirements (such as the date by which the accounts must be submitted and the information the accounts must contain); and
 - proper practices have been observed.

Section 31 - Continuing to be an eligible community council

198. Once a community council has resolved itself to be an eligible community council it will need to reaffirm on an annual basis that it continues to meet the eligibility criteria. A council will do so by passing a resolution at its annual meeting.
199. If a community council does not pass a resolution at an annual meeting that it is an eligible community council then it ceases to be one at the end of the day following the annual meeting in question.
200. A community council may determine not to pass a resolution that it continues to be an eligible community council because it no longer meets all of the eligibility conditions. Alternatively a council may decide that, despite meeting the conditions, it no longer wishes to be an eligible community council.

Section 32 - Ceasing to be an eligible community council

201. [Section 32](#) provides that an eligible community council may resolve at any time that it is no longer to be an eligible community council. Where such a resolution is made the council would cease to be an eligible community council at the end of the day following the meeting at which the resolution was passed.

202. The diagram below sets out the processes by which a community council becomes, and ceases to be, an eligible community council.

Section 33 - Community councils that cease to be eligible: exercise of the general power of competence

203. **Section 33** provides that a community council which ceases to be an eligible community council (and so loses the general power) can continue to rely on the general power in relation to things it has done in the exercise of that power while it was an eligible community council. This means, for example, that a contract entered into in the exercise of the general power may continue, and is not necessarily frustrated, despite the fact that the community council otherwise no longer has the power to enter into that contract.

Section 34 - Common community councils established after this Act is passed

204. Under sections 27E and 27F of the 1972 Act community meetings have the power to apply for an order grouping their communities together under a common community council.
205. When such a common community council is formed it is effectively a new council; even if it is comprised in full or in part of communities which previously had separate community councils (and this section of the Act only applies where at least half of the communities in question had separate community councils).
206. Although a new common community council may be able to meet the eligibility conditions relating to the proportion of elected members (since the order made by the principal council would make provision for an election) and could have a qualified clerk from the offset, it would be unable to satisfy the third eligibility condition of having two unqualified Auditor General audit opinions.
207. This could mean, for example, that the new council, despite being constituted of councils which had previously been able to resolve themselves to be eligible community councils, would not be able to do so for at least two years.
208. To ensure there is no disincentive to forming a common council where communities feel it would best serve the interests of their community, subsection (2) disapplies the eligibility condition set out in section 30(4) for a fixed period for certain common community councils.
209. A common community council in which at least half of the communities had separate community councils that, immediately before the order grouping them met the third eligibility condition, will not have to meet the third eligibility condition until it has received two Auditor General audit opinions (but if the first opinion is qualified, it will be treated as no longer meeting the eligibility conditions).
210. This section only applies to common community councils formed since the Act was passed. Any common community councils in place before the Act was passed have been in place for sufficient time to build up an audit record in their own right (though section 35(3) provides a more general power, not specific to new community councils, to modify or disapply eligibility conditions during the first two years after the Chapter comes into force).

Section 35 - Power to amend or modify this Chapter

211. This section gives power to the Welsh Ministers to make regulations (following consultation with any bodies representing community councils they think appropriate) to amend the Chapter. They may add a new eligibility condition, remove an eligibility condition or change any of the eligibility conditions.

212. The Welsh Ministers may also make regulations to specify circumstances, other than those specified in section 30, in which a community council will stop being an eligible community council if any of the conditions are not met. For example if a significant problem was identified by the Public Services Ombudsman for Wales.

Section 36 - Guidance on exercise of functions under this Chapter

213. Community councils must have regard to any guidance issued by the Welsh Ministers about how to exercise functions under this Chapter. For example, the Welsh Ministers might issue guidance about the actions a council might consider taking if it found it no longer met one of the eligibility conditions or matters a community council should consider if it continued to exercise the general power after having ceased to be an eligible community council.

Section 37 and Part 2 of Schedule 3 - Amendments relating to this Chapter 2 of Part 2: eligible community councils

214. **Section 37** introduces Part 2 of Schedule 3 which makes amendments, relating to this Chapter, to Part 1 of Schedule 3 and other legislation, including fully repealing the well-being power in section 2 of the 2000 Act.
215. This will mean the well-being power ceases to apply to all community councils, regardless of whether or not they are eligible to exercise the general power, in addition to principal councils (as provided for in Part 1 of the Schedule).
216. The well-being power is being repealed in full, even though community councils which have not resolved themselves eligible will not be able to use the general power. This is on the grounds that having both the general power of competence and the well-being, in addition to section 137 of the 1972 Act, could add to existing confusion reported by the community council sector about the powers available to them.
217. Retaining the well-being power would also reduce the incentive for community councils to meet the eligibility criteria in order to access the general power.
218. These criteria require a community council to demonstrate consistent sound financial management, to receive guidance and input from a clerk with particular qualifications, and to publicly keep under review whether it meets the criteria, and whether it should become or remain an eligible community council.
219. **Part 2** of Schedule 3 amends the 1972 Act to as to restrict the power of local authorities to incur expenditure for certain purposes not otherwise authorised to community councils that are not eligible community councils. This amendment is made as eligible community councils will be able to rely on the (wider) general power to incur expenditure that would otherwise be incurred under this power.
220. The Schedule also repeals the power the Welsh Ministers have under Chapter 9 of Part 7 of the Local Government (Wales) Measure 2011 (“the 2011 Measure”) to provide for a scheme under which the Welsh Ministers may grant accreditation to a community council if the criteria set out in the regulations are met.
221. This power has not been used, on the ground that it would be preferable to have a situation where the local government sector retains control of determining ‘quality’ rather than being dependent on the Welsh Ministers for the conferral of that status. Instead, the criteria for accreditation of quality in community government envisaged in the 2011 Measure form the basis of the criteria for eligibility to use the general power of competence. The need for councils to resolve themselves to be eligible by reference to an objective set of criteria will provide a means of assuring the quality of community councils and incentivising councils to improve.

*These notes refer to the Local Government and Elections (Wales)
Act 2021 (c.1) which received Royal Assent on 20 January 2021*

222. The Schedule also adds references to the general power of competence to legislation which had previously referred to the well-being power, and makes other consequential amendments.