

Climate Change Issues for Local Authorities

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Scope of Paper

1. This brief paper discusses the principal powers available to local authorities in the context of 'tackling climate change', focussing on the well-being power. It avoids discussion of the treatment of climate change in the course of administration of authorities' regulatory powers (inc planning & public health). Written from a legal viewpoint (of course), it is written with a view to the reality that local authority input will for the foreseeable future be severely constrained.

Immediate Context

2. The general election and formation of a new government provide the immediate context for this Conference. Looking at the manifestos of the three major national parties, it will come as no surprise that all placed major emphasis on tackling climate change and promoting a lower carbon economy (maybe why so little was heard on this during the campaigns). All likewise expressed support for more local decision-making¹. The Conservative and Labour manifestos were most explicit in terms of the link between tackling climate change and local government.
3. The Conservatives confirmed their aim to reduce carbon emissions by 80% by 2050, promising to lead from the front with a 10% cut in central government emissions within 12 months *'and by working with local authorities and others to deliver emissions reductions'*². Part of their *'make politics more local'* agenda includes giving *'democratically accountable local government much greater power to improve their citizens' lives by: giving local councils' a 'general power of competence', so that they have explicit authority to do what is necessary to improve their communities;...'*³.
4. The Labour party confirmed that local government is at the forefront of tackling climate change, and stated that *'we will give local government new powers to ... tackle climate change'*⁴.

Setting the Scene: a Narrative

5. The Local Government Act 2000, supplemented by Local Government & Public Involvement in Health Act 2007 and Sustainable Communities Act 2007, provides the principal statutory powers by means of which local authorities are currently engaged directly in helping to tackle climate change.

[1] 2000

¹ *'... so that services are shaped around the personal needs of citizens, not the silos of government departments'* (Labour p. 9:4)

² P. 91

³ P. 75

⁴ P. 9:4

Local Government Act 2000

6. The principal statutory power in this context is LGA 2000 Section 2, ie the power to *'do anything'* (except raise money) that a local authority considers is likely to achieve the promotion or improvement of the economic, social or environmental well-being of its area (the well-being power). Without prejudice to the generality of this power, a local authority may specifically (a) incur expenditure, (b) provide financial assistance to any person, (c) enter into arrangements or agreements with any person, (d) co-operate with, facilitate or co-ordinate the activities of any person, (e) exercise on behalf of any person any of his functions and (f) provide staff, goods, services or accommodation to any person. It may do anything in relation to or for the benefit of a person or area situated outside its area if it considers that doing is likely to achieve the promotion or improvement of economic, social or environmental well-being of its area.
7. In determining whether or how to exercise its wellbeing power, a local authority must have regard to its strategy under Section 4. Under that section, a local authority must prepare a community strategy for promoting or improving the economic, social and environmental well-being of its area and contributing to the achievement of sustainable development in the UK. It is required to consult as it considers appropriate and to have regard to any guidance for the time being issued by the Secretary of State.

Initial statutory guidance

8. The initial statutory guidance (*'Preparing Community Strategies: government guidance to local authorities'*, Dec 1999) included reference to sustainability and the environment, though it is fair to say that its emphasis was heavily on participation and engagement in the plan-making process. It did not refer to *'climate change'* at all.

[2] 2006

The Local Government White Paper

9. By the middle of the decade, government was about the business of changing the relationship between central and local government. The Local Government White Paper, *'Strong & Prosperous Communities'* October 2006, promised a mature relationship between central and local government. More specifically, it referred at length to local government's role in tackling climate change. It specifically identified (1) the well-being power as the statutory basis for local authority action on climate change and (2) the community strategy as the principal means of setting out and co-ordinating that action. So:

Environment and climate change

4.82 Our big cities are in the front line in the battle against climate change. It is in those places of dense population and concentrations of businesses that the biggest positive impact can be made: aligning spatial planning and transport strategies with strategic co-ordination of economic development activities, proactive management of housing

quality and demand, and promoting radical energy saving initiatives, to combat global warming.

4.83 The Government is committed to reducing carbon emissions by 60% by 2050. We announced in March 2006 our intention to publish a Planning Policy Statement on climate change. This will set out how the Government expects participants in the planning process, including local planning authorities, to work towards the reduction of carbon emissions in the location, siting and design of new development. Setting and implementing the right strategic framework, including at the city-region level, will be a key part of this.

4.84 By bringing together city-region wide strategic partnerships with those in the private and public sector, city-regions could stimulate markets for low and zero carbon technologies, promote sustainable alternatives to car use, and co-ordinate market and land use decisions so as to reduce the impact of everyday activities on the environment, for example through alignment of transport, planning, housing and economic approaches and strategies.

4.85 Local authorities already have the ability, via the wellbeing power contained in the 2000 Local Government Act, to work together and with other agencies to tackle climate change. Some are making good use of this, for instance by setting up Energy Services Companies (ESCOs), and we particularly encourage partners in our major cities to take up the challenge locally. DEFRA will explore the best way of encouraging the establishment of ESCOs with the core cities. (emphasis added)

10. Climate change is identified as one of a number of cross-cutting issues, and the Sustainable Community Strategy is envisaged to be the means by which local authorities will settle their approach to it, with all other local authority plans consistent with it.

Sustainable Community Strategy

5.31 The role of the Sustainable Community Strategy is to set out the strategic vision for a place. It provides a vehicle for considering and deciding how to address difficult cross-cutting issues such as the economic future of an area, social exclusion and climate change. Building these issues into the community's vision in an integrated way is at the heart of creating sustainable development at the local level.

5.32 Local authorities have the job of preparing the Sustainable Community Strategy. A vital part of that is to consult local citizens, communities and the voluntary, community and private sectors. The Strategy should also reflect: the views of other local partner agencies and the thematic partnerships. The Sustainable Community Strategy should aim to reflect the collective vision of the LSP; other key local and regional plans such as the local policing plan and the Regional Economic Strategy; and the Local Development Framework.

5.33 *These plans, in their turn, should have regard to the Sustainable Community Strategy. Our aim is for there to be complete coherence between the Sustainable Community Strategy and all the other plans for an area.* (emphasis added)

[3] 2007

Local Government & Public Involvement in Health Act 2007

11. The LGPIHA 2007 established a regime of responsible local authorities (principally, county councils, district and London borough councils) and partner authorities (eg a police authority, PCT, development agency ...) and provides for responsible local authorities to prepare statutory local area agreements including '*local improvement targets*' to be submitted to and approved by the Secretary of State. Local authorities are subject to a duty to have regard to those targets in the exercise of their functions generally. Section 4 of the LGA 2000 was amended to require responsible local authorities to consult partner authorities in the course of preparing their community strategies.

Sustainable Communities Act 2007

12. The SCA 2007 elides 'promoting the sustainability of local communities' with references to encouraging the improvement of the economic, social or economic well-being of an authority's area (or part of it); and it re-badges 'community strategies' as 'sustainable community strategies'. Substantively, it enables local authorities to make proposals to the Secretary of State that they consider could contribute to the sustainability of local communities, which the SoS may approve as part of an action plan⁵.

[4] 2008

Revised statutory guidance

13. In light of LGPIHA 2007, the initial guidance (see above) was superseded from July 2008 by '*Creating Strong, Safe & Prosperous Communities*', which also reflects the SCA 2007. This proclaims at the outset (para. 1.2) that:

To achieve positive outcomes for people and places there needs to be a broadening of local government's remit – responding to long-term challenges such as public health, climate change and demographic fluctuations, ensuring continued economic prosperity and environmental sustainability, and building strong societies in which people want to live and work. (emphasis added)

14. That part of the guidance that deals with Sustainable Community Strategies and supersedes the statutory guidance referred to above, starts out in these terms:

3.1 The purpose of a Sustainable Community Strategy is to set the overall strategic direction and long-term vision for the economic, social

⁵ Procedure revised by Sustainable Communities (Amendment) Act 2010.

and environmental wellbeing of a local area – typically 10-20 years – in a way that contributes to sustainable development in the UK. It tells the ‘story of the place’ – the distinctive vision and ambition of the area, backed by clear evidence and analysis. The Local Government White Paper, Strong and Prosperous Communities set out that the Sustainable Community Strategy will provide ‘a vehicle for considering and deciding how to address difficult and cross cutting issues such as the economic direction of an area, cohesion, social exclusion and climate change.

15. The shift to Sustainable Community Strategies is intended to emphasise, to a greater extent than previously, that sustainability should be at the heart of decisions taken on the content of the strategy (para. 3.10). The central importance of these strategies is plain:

How do Sustainable Community Strategies relate to other plans?

3.11 In any given local authority area, the Sustainable Community Strategy is the overarching plan for promoting and improving the wellbeing of the area. The Local Government White Paper emphasised the need for Sustainable Community Strategies and other local and (sub) regional plans to take account of each other, as they are prepared. The following paragraphs set this out in more detail. (emphasis as original)

16. The Sustainable Community Strategy sits at the centre of a web of plans, including the LDF (*‘Local authorities should so far as possible align the Core Strategy of the LDF with the unitary, district or county-wide (if merged) Sustainable Community Strategy’*: para. 3.13), housing and homelessness strategies, regional & sub-regional (inc. London mayoral) plans and local & neighbourhood plans. Other statutory plans to be considered in the context of the Sustainable Community Strategy are shown on Figure 2: Joint Strategic Needs Assessment for Health and Social Care; Partners’ corporate and operational plans; Children and Young People’s Plan; National Park Management Plan; Crime and Disorder Reduction Strategy; Local Transport Plan; Municipal Waste Strategy; and Licensing policy.

Cutting through the Green Tape

17. In the absence of other specific advice on the topic, the LGA (with Nabarro) produced *Cutting through the Green Tape* (August 2008) as a guide to the statutory powers available. LGA 2000 Sections 2 & 4 (as amended) are identified as the statutory bedrock upon which local authorities must build their programmes for contributing to tackling climate change.
18. Those contributions might sensibly be grouped under two headings:

Policy & direct action

- Community Strategy
- Leading by example (Beacon/Local Innovation Awards schemes)

- Procurement
 - Estate management
 - Staff management
- Use of well-being powers - specific schemes inc.
 - Climate Change Fund (Islington)
 - Assistance with loft & wall insulation (Woking)

Regulation

- Planning
- Transport powers
- Building Control
- Environmental controls

DCLG publications November 2008

19. DCLG published *Practical Use of the Well-Being Power*, which reported that use of the power was ‘at best patchy’ and aimed to raise awareness of it by giving practical examples of how the power had been successfully used. It was said that understanding of the power rarely seemed to go beyond lawyers, senior officials and the corporate centre:

Evidence suggests that lawyers are recognising that the well-being power provides the opportunity to emerge from a regime driven by concern not to overstep more specific powers. However, there is often little expectation that others should know about the power – an expectation that could form part of the explanation for the relatively low level of understanding uncovered across local authorities

There again:

While the key point to remember is that the well-being power may give the opportunity for more creative ways of solving problems than were available under pre-existing legislation, there are still legal limits to the power and those with an interest in using them will wish to make sure that they have good advice from lawyers about what is possible.

20. One of the nine case studies referred to involved Nottinghamshire County Council’s involvement in a scheme to reduce carbon dioxide emissions by burning wood, though it has to be said that the documents reference to climate change at all is very low-profile. A missed opportunity in this context.
21. Evaluation of the take-up and use of the well-being power echoed these themes of low levels of knowledge and use of the power, referring to its complexity (considerable discretion alongside a list of exceptions) and referring to the role of lawyers in these terms:

Lawyers play a critical role in encouraging and discouraging use of the well-being power. Informed and experienced lawyers may be positive about the use of the power, but the majority of lawyers were cautious about its use.

22. The authors made a number of recommendations for local authorities, and those for government included:

'Referring to the relevance and potential of the power in policy documents and procedures'

[5] 2009

Select Committee Report

23. The Communities & Local Government Select Committee report *'The Balance of Power: Central & Local Government'* (May 2009) considered whether local government needs new powers. It reported that:

57. A number of local authorities have made the case for additional powers of a nonfinancial nature during the course of our inquiry. Birmingham City Council argued that the current "well-being" powers do not go far enough. It wants local authorities to be granted a "power of general competence", to enable councils to do anything to advance service delivery and local democracy within their area, so long as it is not explicitly prohibited, describing this as "the reverse of the current 'ultra vires' approach which prohibits councils from doing things they are not specifically empowered to do through legislation".... Warwickshire County Council argued that "a general power of competence would put local authorities on a firm footing for moving forward in partnership with others, [and] provide confidence in its ability to respond and deal with local issues. It would also remove the need for some of the tortuous legislation that currently exist". Other councils—Manchester City Council and Westminster City Council, for example— covered similar ground in their submissions.

24. The government response to these submissions was that local government should make better use of its existing powers rather than ask for more, noting low levels of take-up of the well-being power. The report noted in that context, however, that:

61. Some witnesses, however, have argued that the additional powers are not as generous as they seem. Sir Richard Leese noted that regulatory powers were excluded from the power of general well-being, and observed that the Sustainable Communities Act "is a rather clumsy way of us being able to ask to do things that we ought to be able to decide in our own right to do".

The LGA did not join in the request for further powers, but asked for *'greater clarity with regard, for instance, to the well-being duty, "which sounds fine in*

theory but in fact, if you try to do anything major through it, would be an accountants' and solicitors' charter.'

25. The Committee concluded on these matters:

*65. We urge more councils to test the strength of the assertion by the Secretary of State that "the power of well being is virtually a power of general competence" and her commitment to "look very closely at the power that exists, how much it is being used, what it is stopping people from doing, and if it is stopping people from doing things which would be beneficial and are proper things for them to do then obviously I want to examine whether any changes would be necessary." **We have considerable sympathy with the case for local government to be given a power of general competence, to provide greater recognition of the local leadership role that central government is asking it to play, and which we support. If local government is able to accumulate evidence that the wellbeing powers are falling short of a power of general competence to the extent that they are impeding its local leadership role, then we recommend that the Government should introduce a power of general competence for local government (Recommendation 6).***

[6] 2010

Government's Final Response

26. The Government's Final Response to the Select Committee (February 2010) rejected this recommendation:

In relation to the Select Committee's comments on powers to enable local government to fulfil its local leadership role, responses received to the Strengthening Local Democracy consultation revealed that whilst there was an appetite amongst respondents for a power of general competence, the perceived benefits of this were seen to be around the broader relationship between central and local government. We do not consider that this issue should be addressed through the extension of powers, This is particularly as it is considered that action taken by local authorities that were held to be outside their powers in the recent court case on the development of insurance mutuals (the LAML case) such as the giving of guarantees, would not be rendered lawful by a general power of competence. In fact, government would question whether, once the inevitable prudential restrictions are applied, such a power would look very different to the current power of well-being.

Brief Discussion

27. Whilst climate change will influence to varying degrees the way in which local authorities discharge their regulatory functions, it is the well-being power that is principally available to enable them to take direct action on climate change. The purpose of this paper – which is, perhaps, of the nature of a 'health warning' - to

identify that there are a number of issues arising from this position, and to point to how it may be that they will be addressed in the near future.

28. The well-being power was plainly put on the statute book to enable local authorities to take steps to improve conditions within their area or part of it – extending to the ability to take steps elsewhere provided their effects are felt within their areas. Climate change is a global phenomenon, and does not at first sight appear to fit well with this local focus. It does not appear to me that the well-being power was intended to facilitate local authorities undertaking activities, the benefit of which is felt indiscriminately.
29. It is perhaps helpful to distinguish between mitigation and adaptation. Steps taken to help adapt the local environment to take account of the projected effects of climate change (viz works to avoid flooding due to rising sea levels) fall more comfortably within the scope of the well-being power than works to mitigate the prospect of climate change (eg insulation schemes), the benefit of which is – quite literally – felt globally. Adaptation is a local issue, but mitigation is less obviously so. It is not desirable that local authorities should be left to contemplate the investment of public money on statutory foundation that is less than clear.
30. Also remarkable is the lack of clear guidance from government about how it envisages that local government might invest public money most effectively/efficiently in mitigation or adaptation. There is a wealth of advice available to local authorities via, for example, the Nottingham Declaration website⁶; but one might reasonably expect a clearer steer from the centre on where local government should focus limited public resources on tackling climate change.
31. Legitimate concerns about the scope of the well-being power may, in light of the Select Committee's report and Conservative manifesto, be addressed by the introduction of a general power or competence, which will be a radical change to local government empowerment.
32. It may be that concerns about the gap in terms of co-ordinated advice on how local authorities might most effectively 'tackle climate change' will be plugged via Part 4 of the Climate Change Act 2008, Section 61 of which enables the Secretary of State to issue guidance to all persons or bodies with functions of a public nature ('reporting authorities') on (1) assessing the current and predicted impact of climate change in relation to the authorities' functions, (2) preparing policies and proposals for adapting to climate change in the exercise of their functions, and (3) co-operating with other 'reporting authorities for that purpose.

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⁶ www.nottinghamdeclaration.org.uk

