Decentralisation and Localism Act - Local Authority Powers, Governance and Standards

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1. This paper considers the provisions contained in Chapters 1, 5, 6 ***&*** 7 of the Localism Act 2011 affecting local authority decision making. In particular I shall cover:

    (i) Local authority powers;

    (ii) Governance arrangements;

    (iii) Predetermination; and

    (iv) Standards;

2. The Localism Act 2011 has bold aims. According to Press Notice on the DCLG website announcing the Localism Bill, the legislation will:

    - "put an end to the hoarding of power within central government and top- down control of communities, allowing local people the freedom to run their lives and neighbourhoods in their own way."
    - "help build the Big Society by radically transforming the relationships between central government, local government, communities and individuals."
    - "herald a ground-breaking shift in power to councils and communities overturning decades of central government control and starting a new era of people power"

3. The reality is somewhat different. First, the new general power of competence for local authorities is largely negated by existing restrictions on local authority powers that expressly remain in place. Secondly, the provisions concerning predetermination are not revolutionary -they merely return us to the position that prevailed at common law before Richards LJ 'developed' the law in ***R (Georghiou) v Enfield BC*** [2004] LGR 497 and ***R (on the application of Condron) v National Assembly for Wales*** [2006] EWCA Civ 1573; and probably merely put in statutory form the effect of ***R(Lewis) v Redcar and Cleveland BC*** 2009 1 WLR 83.

General Power of Competence

4. Section 1 of the Act provides what on its face is an extraordinarily broad general power of competence for local authorities, enabling them to do anything which an individual of full capacity could do. It provides that:

> **1 Local authority's general power of competence**
> (1) A local authority has power to do anything that individuals generally may do.
> (2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—
> (a) unlike anything the authority may do apart from subsection (1), or
> (b) unlike anything that other public bodies may do.
> (3) In this section "individual" means an individual with full capacity.
> (4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) 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.
> (5) The generality of the power conferred by subsection (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.
> (6) Any such other power is not limited by the existence of the general power (but see section 5(2)).
> (7) Schedule 1 (consequential amendments) has effect.

5. The effect of s.1 is that:
   (i) Local authorities are prima facie able to do anything that an individual of full capacity may do;
   (ii) That is so <u>even</u> if what the authority proposes to do is unlike anything that it can ordinarily do and unlike anything that other public bodies may do;
   (iii) The general power of competence has no geographical limitation -it may be exercised anywhere within the UK or "elsewhere" (an expression apparently wide enough to cover space exploration!);
   (iv) The general power may be used for commercial purposes or otherwise with or without charge;
   (v) If other powers overlap with the general power of competence then the general power is unaffected.

6. However, section 2 of the Act cuts down the scope of the general power of

competence in several important respects. It provides that:

2 Boundaries of the general power

(1) If exercise of a pre-commencement power 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.

(2) The general power does not enable a local authority to do—

(a) anything which the authority is unable to do by virtue of a precommencement limitation, or

(b) anything which the authority is unable to do by virtue of a postcommencement limitation 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.

(3) The general power does not confer power to—

(a) make or alter arrangements of a kind which may be made under Part 6 of the Local Government Act 1972 (arrangements for discharge of authority's functions by committees, joint committees, officers etc);

(b) make or alter arrangements of a kind which are made, or may be made, by or under Part 1A of the Local Government Act 2000 (arrangements for local authority governance in England);

(c) make or alter any contracting-out arrangements, or other arrangements within neither of paragraphs (a) and (b), that authorise a person to exercise a function of a local authority.

(4) In this section—

"post-commencement limitation" means 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 this Act is passed, or

(b) is contained in an instrument made under an Act and comes

into force on or after the commencement of section 1;

"pre-commencement limitation" means a prohibition, restriction or other limitation expressly imposed by a statutory provision that—

(a) is contained in this Act, or in any other Act passed no later than the end of the Session in which this Act is passed, or

(b) is contained in an instrument made under an Act and comes into force before the commencement of section 1;

"pre-commencement power" means power conferred by a statutory provision that—

(a) is contained in this Act, or in any other Act passed no later than the end of the Session in which this Act is passed, or

(b) is contained in an instrument made under an Act

7. This section appears to severely restrict, if not take away, almost all of the power conferred by s.1. In summary, s.2 means that:

(i) Local authorities are essentially still subject to the same limitations as they were previously because any existing statutory limitation on their powers will continue to apply and will limit the general power of competence where there is an overlap;

(ii) The general power of competence does not enable an authority to alter its governance arrangements -Parts 6 of the Local Government Act 1972 and Part 1A of the Local Government Act 2000 must still be used to effect such changes;

(iii) The general power of competence is capable of being limited by future legislation, but only if that legislation: expressly imposes a limitation on the general power of competence; expressly applies a limitation to all of the authority's powers; or expressly applies a limitation to all of the authority's powers excepting powers other than the general power of competence.

8. The Minister said at Committee stage in the Commons;

"We *believe, and are advised, that we have produced a fireproof Bill. I assure the right hon Gentleman that that is our intention. If the courst have any qualifications about what we have put in clause 1, I hope that my words today can be prayed in aid to confirm that it is intended to do exactly what it*

it says: to give every council a general power of competence on behalf of the residents who elected it."

[Andrew Stunnell, Parliamentary Under Secretary 1 February 2011]

9. But what does this mean in practical terms? The first point is that it is surprising that the extremely wide general power of competence survived the Committee stage, because it is extremely difficult to discern its legal effect (or actually intention) and has the potential to simply be a charter for lawyers. Taken on its own s.1 would enable local authorities to do virtually anything and it would overrule the House of Lords' decision in House of Lords in ***Hazell v Hammersmith & Fulham LBC*** [1992] 2 AC 1. Indeed, the think-tank the New Local Government Network, welcomed the new powers, arguing "we hope that the government will use the Localism Bill to abolish the concept of ultra vires and allow local authorities to act freely within the constraints of specific legislation".

10. Secondly, given that all the current statutory limitations on local authority powers will continue to apply, it is difficult to see what the government is seeking to achieve. As I set out below it is not clear what has happened to non-statutory limitations. In addition, the general power of competence only gives the power to do what an individual of full capacity may do. Individuals of full capacity cannot do many things which a local authority may desire to do e.g. compulsorily purchase property, therefore the 2011 Act will not extend the powers in respect of such purely public functions, although it may alter restrictions upon them.

11. Thirdly, it is unclear how the new general power of competence is meant to sit with the general principles of administrative law which bind local authorities. Do they still apply to the exercise of the general power? It is the central feature of the rule of law that the administrative decision makers must be able to justify their actions by reference to some legal authority whether it be statutory, common law or prerogative power; and that the exercise of that power is subject to judicial review on conventional grounds. Sir Thomas Bingham MR explained the principle in ***R v Somerset Council, exp Fewings*** [1995] 1 WLR 1037, when denying that a local authority had an unfettered discretion to determine how its land could be used (at p 1042):

> 'To the famous question asked by the owner of the vineyard ("Is it not lawful for me to do what I will with mine own?) St. Matthew, chapter 20, verse 15) the modern answer would be clear: "Yes, subject to such

> regulatory and other constraints as the law imposes." But if the same question were posed by a local authority the answer would be different. It would be: "No, it is not lawful for you to do anything save what the law expressly or impliedly authorises. You enjoy no unfettered discretions. There are legal limits to every power you have."'

12. On one reading of the 2011 Act, exercise of the general power of competence is not subject to these principles. First, s.1(1) says that local authorities may "do anything that individuals generally may do". Individuals may of course act unreasonably, unfairly or take into account irrelevant considerations. In short they are not amenable to judicial review. Secondly, s.1(2) adds that an authority may do anything that is unlike what it can do apart from s.1 and unlike anything that other public bodies may do. Thirdly, the pre-commencement limitations on the general power are those which according to s.2(4) were "expressly imposed by a statutory provision". The principles of judicial review either derive from the common law, or derive from Parliament's implied intention -either way they do not constitute a precommencement limitation. There are also of course the limitations imposed by the Human Rights Act 1998, which in many cases could now be used to impose controls similar to those in the common law. So if a local authority tried to exercise powers of compulsory purchase irrationally or for an improper purpose, which arguably now would be ok under the Localism Act, they would undoubtedly fall foul of the HRA, and Article 1 Protocol 1.

13. If the principles of judicial review are to apply to the exercise of the general power that must be because either (a) they are common law fundamentals which cannot be ousted by the language of s.1; or (b) s.1 must be read subject to the implied intention that the general power of competence is to be exercised in accordance with public law principles. What this means is that s.1 really says that a local authority can do anything an individual may do, *but in so doing it must abide by the principles of public law which do not fetter an individual's powers to do the same.* But

    it is problematic trying to apply the grounds for judicial review to a power such as s.1 which is defined by reference to the powers of a private individual. What, for example, are proper purposes for which the power can be exercised or the relevant considerations that must be considered?

14. Fourthly, it is unclear what the government wants local authorities to be able to do that

they cannot do already, given that s.2 applies the existing limitations on local authority powers. The examples which have been given by Ministers are not particularly illuminating. It is merely said that s.1 will enable local authorities to "set up banks, develop property, run new services and own assets".

Governance

15. Section 21 gives effect to Schedule 2 of the Act and proposes amendments to Part 2 of the Local Government Act 2000, specifying three forms of local authority governance:
    (a) Executive arrangements (elected mayor and cabinet, or leader and cabinet);
    (b) Committee system; and
    (c) Arrangements prescribed by the Secretary of State.

16. Changes from one system of governance will generally require a local referendum.

Predetermination

17. Decision making by elected politicians raises a key tension: on the one hand administrative decisions ought to be made fairly by decision makers with open minds, but on the other hand politicians often have strong views on local issues, such as the acceptability of particular forms of development, and the electorate are entitled to expect that politicians make their views known when they stand for office.

18. Section 25 of the 2011 Act seeks to protect local politicians by providing that prior indications of views on a matter does not amount to predetermination:

> "(1) Subsection (2) applies if—
> (a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority, and
> (b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, had or appeared to have had a closed mind (to any extent) when making the decision.
>
> (2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because—
> (a) the decision-maker had previously done anything that directly or indirectly

> indicated what view the decision-maker took, or would or might take, in relation to a matter, and
> (b) the matter was relevant to the decision."

19. To understand what this is seeking to achieve it is important to appreciate the way in which the common law has developed. In the past this tension was resolved by the courts only quashing a decision if the politician had a completely closed mind. A good example of this approach is the highly pragmatic decision of Woolf J in ***R v Amber Valley DC, exp Jackson*** [1985] 1 WLR 298

> "My conclusion as to what the evidence shows in this case is that it indicates that the majority of the district council can only be said to be "biased" in the sense that they are as the respondents' counsel contends "politically pre-disposed" in favour of the development in respect of which planning permission is sought. It has become the Labour group's policy to support the development. It is therefore likely that any Labour members of the planning committee will be more ready to grant planning permission than he would be if the Labour group had remained adverse to the development. But does this have the effect if disqualifying the Labour majority from considering the planning application? It would be a surprising result if it did since in the case of a development of this sort, I would have thought that it was almost inevitable, now that party politics play so large a part in local government, that the majority group on a council would decide on the party line in respect of the proposal. If this was to be regarded as disqualifying the district council from dealing with the planning application, then if that disqualification is to be avoided, the members of the planning committee at any rate will have to adopt standards of conduct which I suspect will be almost impossible to achieve in practice."

20. The reality of local politics means that it is inevitable that parties will adopt policies in the case of at least some applications for planning permission. Woolf J therefore considered that a distinction should be drawn between a disqualifying personal interest and a predetermined closed mind. Accordingly, councillors who had prestated policy views would not be disqualified by virtue of those pre-stated views; instead they would only be precluded from determining planning applications if they approached the matter with a closed mind, unwilling to consider the merits of the competing arguments.

21. Two decisions of Richards LJ signalled a shift away from the pragmatism of ***Amber Valley***. ***Condron*** instituted an approach to predetermination which more readily disqualified elected decision makers who publicly stated their opposition or support for proposals. In ***Georghiou v Enfield BC*** [2004] EWHC 779, Richards J (as he then was) elided the questions of predetermination and apparent bias:

> "30 It seems to me, however, that a different approach is required in the light of Porter v Magill. The relevant question in that case was whether what had been said and done by the district auditor in relation to the publication of his provisional conclusions suggested that he had a closed mind and would not act impartially in *390 reaching his final decision: see, *e.g.* the background set out by Lord Hope at 491-492 paras [96]-[98]. Thus it was a case of alleged predetermination rather than one in which the district auditor

was alleged to have a disqualifying interest. Yet it was considered within the context of apparent bias and the decision was based on the application of the test as to apparent bias which I have already set out. There is nothing particularly surprising about this. I have mentioned Sedley J.'s observation in Kirkstall Valley, as quoted in Cummins, that predetermination can legitimately be regarded as a form of bias. Cases in which judicial remarks or interventions in the course of the evidence or submissions have been alleged to evidence a closed mind on the part of the court or tribunal have also been considered in terms of bias: see, *e.g.* Southwark LBC v Jiminez [2003] EWCA Civ 502 at para.[25] of the judgment, where the test in Porter v Magill was accepted as common ground and was then applied.

31 I therefore take the view that, in considering the question of apparent bias in accordance with the test in Porter v Magill, it is necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of its members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues. That is a question to be approached with appropriate caution, since it is important not to apply the test in a way that will render local authority decision-making impossible or unduly difficult. I do not consider, however, that the circumstances of local authority decision-making are such as to exclude the broader application of the test altogether."

22. The same approach can be seen in the decision of Richards LJ in ***R (on the application of Condron) v National Assembly for Wales*** [2006] EWCA Civ 1573, albeit the Court of Appeal held that the Assembly Member in question had not in fact predetermined the matter. In that case the chairman of the planning committee had said he was 'going to go with the Inspector's Report'. The Court of Appeal

    correctly treated the case as one of 'possible predetermination', but (relying on ***Georghiou)*** sought to apply the test of the fair-minded observer apprehending bias.

23. However, this line of cases largely developed by Richards LJ, has been much constrained by the decision of the Court of Appeal in ***R (Lewis) v Redcar and Cleveland*** 2009 1 WLR 83. There it was held that members were entitled to have a predisposition to a particular decision, so long as they approached the decision fairly and without a closed mind.

24. Section 25 of the 2011 Act clarifies the state of the law, but goes no further than **Lewis** in any event. The Richards LJ approach will no longer apply and the question of whether a local politician has closed his or her mind and slipped from predisposition to predetermination will be answered without the unnecessarily complicated step of asking what the fair-minded observer would think.

Standards

25. The 2011 Act gives effect to wholesale reform to the current standards regime. It abolishes the Standards Board for England, standards committees of local authorities, the jurisdiction of the First Tier Tribunal over standards of conduct and codes of conduct for councillors. In place of the existing regime the Act creates a general duty in s.27 to promote and maintain high standards of conduct by members and co-opted members of the authority. Section 27 provides:

> "(1)A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.
>
> (2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity."

26. Section 27(2) requires local authorities to adopt a code of conduct. This provision results from an amendment to the Bill in the House of Lords; originally the Bill provided that codes of conduct would be voluntary only.

27. Section 28(1) requires that the provisions of an authority's code of conduct must be consistent with the Nolan principles of public life:

> "(1)A relevant authority must secure that a code adopted by it under section 27(2) (a "code of conduct") is, when viewed as a whole, consistent with the following principles—
>
> (a) selflessness;
>
> (b) integrity;
>
> (c) objectivity;
>
> (d) accountability;
>
> (e) openness;
>
> (f) honesty;
>
> (g) leadership."

28. Section 29 requires an authority's monitoring officer to establish and maintain a register of members' interests:

"(1)The monitoring officer of a relevant authority must establish and maintain a register of interests of members and co-opted members of the authority.

(2) Subject to the provisions of this Chapter, it is for a relevant authority to determine what is to be entered in the authority's register."

29. Section 29 does not prescribe what ought to be included in the register of members' interest. The 2011 Act therefore will allow more local variation in the regime. It allows a register of interests to be compiled according to what the local authority wants, rather than a central rule. Some councils might choose not to change the existing register but others might want to limit those interests having to be registered.

30. Although the changes in respect of predetermination are not revolutionary when viewed in the light of the historic ***Amber Valley*** position at common law, the new provisions on members' interest will make a real difference to local authority decision making.

31. Anecdotally, and with no general criticism of monitoring officers or others, some officers have occasionally been known to use the code as a means of disqualifying certain members or restraining what might be considered fair comment or public criticism or legitimate argument. Local politicians clearly should not be emasculated by codes of conduct, but in some cases over zealous application of the current rules has led to disqualification of members in situations where their interests in the decision are benign, or even desirable. For example, in one case, the parish council member concerned was also treasurer of a local society which had promoted new signs in the village. It was held that he had a personal interest in the council's decision about road signs on the basis that his well-being was affected because he was a keen advocate of better signage.

32. Such cases prevent members from using their knowledge and expertise to advance the very causes that they were elected to promote, thereby undermining the principle of local democracy. It is likely that many authorities will use the freedom of s.29 and they will take a much narrower view of the sorts of interests that should disqualify a member or restrict his or her participation in matters relating to their interests. If so, this reform will be welcomed by many local politicians.

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