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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

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STATUTORY GUIDANCE TO WELSH LOCAL AUTHORITIES

THE POWER TO PROMOTE OR IMPROVE ECONOMIC, SOCIAL OR ENVIRONMENTAL WELL-BEING UNDER THE LOCAL GOVERNMENT ACT 2000

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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 well-being 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 nor 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 well-being 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 well-being 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.

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 may encourage closer partnership working between local authorities, the private, voluntary, and third sectors 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. The well-being power allows a local authority for example to undertake the following actions as provided at section 2(4) of the Act. This includes, but is not limited to, incurring expenditure, providing staff, goods or services to any person, entering into partnership arrangement and carrying out the functions of other bodies.

ii) The breadth of the well-being 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 well-being 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. Accordingly, the well-being power cannot be used to circumvent prohibitions, restrictions or limitation set out in legislation nor can it be used to raise money. As such, if another legislative provision contained a financial limit the well-being power could not be used by a local authority to circumvent this existing legislative requirement.

iii) For example, section 137 of the Local Government Act 1972 which applies to community councils contains a financial limit on incurring expenditure (and therefore the provision of funding). This financial limit at section 137(4) would still apply if a community council sought to exercise the well-being power contained in the Local Government Act 2000.

iv) Local authorities will need to check that any use of the well-being 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.

v) 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 the well-being power need to be transparent and reflect good practice in assessing options. As with other statutory functions the use of the well-being 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.

vi) 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 well-being 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.

vii) Local authorities will also need to consider, in due course, the use of the well-being power in the context of any future legislation that is made.

vii) The Equality Act 2010 introduces a new equality duty on the public sector. In the exercise of its functions a public authority in Wales, namely a county council or county borough or community council (amongst others) 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.

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

iii) Section 95 of the Local Government Act 2003 (the “2003 Act”) provides the Welsh Ministers with a 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 tourism;
- promoting bilingualism;
- 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 pursuant to the well-being power. It provides;

“The power under subsection (1) includes a power for a local authority 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 types of activities that could be undertaken under the well-being power, and section 2(6) clearly stipulates 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 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. Section 2(1) of the Act contains 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. 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) Subparagraph (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 the carrying out of 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 national 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, travelers and people working in the area.

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 situated outside its area if it considers that doing so is likely to promote or improve the social, economic and environmental well-being of its area and/or any persons within it. This enables a local authority to use the well-being power in a way that affects areas outside the boundary of the local authority, if that action contributes to the well-being in the local authorities own area.

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 well-being 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.

iii) The well-being 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 seeking to ensure that where a local authority has to obtain funds before it can pursue well-being objectives, it can only do so through existing sources of income. The effect of this provision is to prevent local authorities from using the well-being power in section 2(1) primarily to raise money. Where local authorities use the well-being 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 local authority investment the enterprise subsequently becomes successful and the local 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). 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 statutory provisions in sections 2 or 3 which would enable local authorities to enforce any regulations made under the well-being power. This omission is deliberate. The Welsh Ministers believe that the well-being power should be used to take positive actions that promote community well-being. The well-being power could, of course, be used in tandem with existing regulatory provisions (many of which enable local authorities 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 byelaws 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 byelaws, notably the Local Government Byelaws (Wales) Act 2012.

3.3 Guidance

(i) 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.

(ii) The Welsh Government is unable to provide advice to local authorities as to whether any proposed use of this power complies with the legislation. A local authority should take their own legal advice and consider sharing their expertise or drawing upon the expertise of organisations such as One Voice Wales and the Welsh Local Government Association to provide support and assistance.

3.4 Examples of the use of the Power of Well-being

(i) 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.