

## CONSULTATION DRAFT

### Local Government in Scotland Act 2003 – Power to Advance Well-being Guidance

1. The Local Government in Scotland Act 2003 gives local authorities a power to advance well-being. The Act makes provision for Ministers to issue guidance about exercise of the power.
2. Draft guidance has been prepared, in conjunction with a working group under the auspices of the Best Value Taskforce, for consultation. In due course, it will be amended in the light of responses received and re-issued on a statutory basis under section 21(1) of the Act which requires local authorities to have regard to any guidance provided by the Scottish Ministers about the exercise of the power.
3. Given the integrated nature of the Local Government in Scotland Act 2003 it is important that local authorities and other interests are aware of the other guidance on Best Value and Community Planning. Draft versions of these have also been prepared and issued for consultation at the same time. Copies of these are available from the Scottish Executive at the address below or from the Scottish Executive consultation website <http://www.scotland.gov.uk/views/views.asp>.
4. Comments on the draft guidance are sought by **20<sup>th</sup> June 2003**. Responses can either be e-mailed to [lgisactguidance@scotland.gsi.gov.uk](mailto:lgisactguidance@scotland.gsi.gov.uk) or sent in writing to :

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# **Local Government in Scotland Act 2003**

## **Guidance to local authorities relating to the power to advance well-being**

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## Chapter 1 – Introduction

### *Introduction*

1.1 Part 3 of the Local Government in Scotland Act 2003, referred to as “the Act” throughout this guidance, creates a new discretionary power which enables local authorities to do anything they consider is likely to promote or improve the well-being of their area and/or persons in it. The power came into force on [1 April 2003] and is referred to as “the power” throughout this guidance.

1.2 This guidance is issued by Scottish Ministers under Section 21 of the Act. It is intended to acquaint local authorities and other interested parties with the breadth of the new power and to encourage innovative and imaginative use of it. It has been prepared in consultation with a working group under the auspices of the Best Value Taskforce. The working group comprised members from Audit Scotland, Convention of Scottish Local Authorities, Scottish Chambers of Commerce, Scottish Consumer Council, Scottish Council for Voluntary Organisations, the Scottish Executive, Society of Local Authority Chief Executives, and the Society of Local Authority Lawyers and Administrators.

1.3 The Act provides a framework to enable the delivery of better, more responsive public services. The 3 core elements of the Bill are linked: the power to advance well-being is subject to the duty of Best Value and it is likely that some uses of the power to advance well-being will stem from the work of Community Planning Partnerships. Separate guidance has also been issued relating to the Best Value and Community Planning parts of the Act. [Insert links/references to other guidance]

1.4 The Act is an important part of the Scottish Executive’s local government modernisation agenda and its drive to see continuous improvement in public services. The Scottish Executive wants to ensure that services are delivered in ways that best meet the needs of communities and consumers and are delivered in joined-up ways that

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maximise effectiveness and minimise duplication. The Act:

- Provides a framework to enable the delivery of better, more responsive public services;
- Makes it easier for local authorities to do their jobs;
- Gives more flexibility and responsibility to local authorities to act within a sensible framework;
- Enables local authorities to work and deliver in partnership with other agencies and communities;
- Overcomes some of the obstacles in the way of continuous improvement in service delivery.

*What do we mean by “well-being”*

1.5 The “well-being” of an area, the people and communities within that area will be dependent on many factors. Some of these factors will be outwith the direct influence of the local authority or other public bodies, for example some national or global issues. Nevertheless, local authorities, working in partnership with others, are in an excellent position to make an assessment of what is needed to advance well-being, and can provide a solid foundation for the overall well-being of their area that directly responds to local, regional and national issues.

1.6 Key factors which contribute to promotion or improvement of well-being may include:

- **Economic factors** such as the availability of suitable and high quality jobs, efficient transport links, lifelong learning; and new information and communication technologies etc;

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- **Social factors** such as the promotion of good physical and mental health, good housing, safe communities; looking after the needs of children and young people; access to the arts or leisure facilities; access to education and opportunities for all etc;
- **Environmental factors** such as the availability of clean air, clean water, clean streets and access to parks and open spaces, the quality of the built environment, the removal of objects considered hazardous to health, protecting communities against the threat of climate change, freedom from a high risk of flooding, and removal of disfiguring or offensive graffiti from buildings etc.

1.7 In discharging their functions, local authorities are now obliged to make arrangements which secure continuous improvement in performance. This is what the duty of Best Value means. Best Value also requires local authorities to secure Best Value in a way that contributes to the achievement of sustainable development. Since sustainable development is most often interpreted as the point where a balance between social, economic and environmental objectives is struck, there are obvious links between sustainable development and well-being.

1.8 Plans, priorities and actions taken under the power need to be informed by, and responsive to, the views of the people and communities in the area. This goes wider than acknowledging the contribution of consultation exercises. A wider range of stakeholders such as the business community, the voluntary and independent sectors and locally active interest groups need to have genuine opportunities to raise their views and concerns. In addition a wider range of mechanisms for participation should be considered such as including electronic feedback and participation forums and continuous improvement survey cycles.

1.9 Different local authorities may have different views about the type of activity that will promote or improve the well-being of their area, and the factors that constitute the well-being of their area. The term 'well-being' is therefore not defined in the Act nor in this guidance, and the factors noted above are intended as examples rather than a

definitive list.

*Extending the meaning of “well-being”*

1.10 The Act makes provision for the Scottish Ministers to *extend* the meaning of well-being by order. This is intended to provide a mechanism to allow well-being to be defined in legislation if considered necessary and updated if appropriate. For example, this provision might be used if the common understanding of the term becomes narrower or changes significantly over time, or is narrowed by case law.

*Links with Community Planning and Best Value*

1.11 The 3 core elements of the Act – power to advance well-being, Community Planning, and Best Value should be seen as inter-related.

1.12 The power to advance well-being has been drafted in such a way that local authorities have considerable discretion in how they act upon it. They may use it to support their arrangements to secure Best Value and to help secure the objectives of their local Community Planning Partnership. They may use it for other purposes which are unrelated to these objectives. But in anything they do to advance well-being the local authority must have regard to the duty of Best Value in pursuing continuous improvement in how it exercises the power.

1.13 In exercising the power to advance well-being local authorities should also have regard to Community Planning. Following consultation, the Scottish Ministers have now issued guidance on Community Planning and the 2 sets of guidance can be read in conjunction. *This does not mean that any potential use of the power must first have featured in a Community Plan nor that every exercise of the power has to have a Community Planning basis, but where it impacts on or raises expectations of Community Planning partners, we would expect local authorities to engage them appropriately.*

**Chapter 2. Power to advance well-being – how does it work?**

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2.1 If local authorities are to be more responsive to the needs of the people they serve, they need to have the necessary statutory powers to enable that. Before the Act came into force, local authorities could do only those things that they were empowered to do by specific statutory powers, duties and functions. This created a degree of uncertainty over the extent of the ‘enabling’ powers which local authorities had. While this legal framework was sufficient to allow local authorities to deliver a range of services, it constrained them from developing a broader and more innovative role. Local authorities had to check whether legislation explicitly enabled them to engage in a particular activity. This often resulted in a necessarily cautious approach to new ways of working and partnership working and therefore could limit a local authority’s contribution to the well-being of their area.

2.2 The power to advance well-being has been provided to encourage innovation and closer partnership working between local authorities and other bodies in better responding to the needs of communities. The new 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.

2.3 The breadth of the power is such that local authorities should regard it as a ‘power of first resort’ when they are in any doubt about whether existing powers would enable them to take a particular course of action or deliver a particular service. That is, rather than searching for a specific power elsewhere in statute in order to take a particular action, the Scottish Executive encourages local authorities to look to the new power in the first instance in taking forward measures likely to promote and improve well-being. Local authorities will however still need to check that what they intend to do under this power is not expressly prevented, expressly limited or expressly prohibited by existing enactments as well as the limitations provided in the Act. This includes both primary and subordinate legislation. In addition, local authorities will have to consider any other relevant legal issues, for example, procurement will remain subject to the relevant EU treaty obligations, directives and regulations which apply to state aided activity. Furthermore commercial activity will still be covered by current UK

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legislation that extends to Scotland, such as the Competition Act 1988, the Companies Acts, disability discrimination, human rights, and employment legislation. These remain in effect as does an authority's vulnerability to judicial review. Local authorities must still comply with the rules of natural justice and the principles of Wednesbury reasonableness and other common law principles.

2.4 There is a continuing need for councils to be openly accountable for their stewardship of public funds and this is accentuated by the relaxation in the statutory restrictions on their ability to incur expenditure which the power represents. Decisions to commit funds under this power need to be transparent and need to reflect good practice in assessing options. As with other statutory functions the use of the power will be subject to audit by local authority auditors appointed by the Accounts Commission. If the Controller of Audit finds that there has been a contravention of the law, or a loss due to negligence or misconduct, he may make a report to the Accounts Commission who may apply sanctions to officers or members who are responsible.

2.5 Councils will wish to take account of other guidance when appropriate. For example, when deciding to fund arms-length bodies they should follow the Code on Following the Public Pound issued jointly by the Accounts Commission and CoSLA.

### *Possible uses*

2.6 *It should be stressed that the following are illustrative examples and should not be read as limiting potential use of the power.*

2.7 Local authorities will wish to consider how the power might be used to pursue activities that contribute to the realisation of Community Planning 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, including those relating to:

- Enhancing local service delivery

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- Promoting sustainable development
- Tackling climate change
- Improving mental and physical health
- Tackling social exclusion
- Promoting financial inclusion in disadvantaged communities
- Reducing inequalities
- Encouraging participation and community capacity building
- Improving and conserving the quality of the local environment
- Promoting local culture and heritage
- Promoting biodiversity
- Promoting economic development
- Improving Community Safety

### *What the Act does*

2.8 Section 20(1) of the Act gives local authorities a power to do anything that it considers is likely to promote or improve the well-being of its 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 promote or improve the well-being of its area and/or persons in it, and other legal obligations such as the duty to secure Best Value.

2.9 Specific examples of the kind of action that can be taken are set out in section 20(2) of the Act which states that the power to advance well-being includes power 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.

2.10 Items (a) and (b) make it clear that local authorities can regard the power to advance well-being as including a broad spending power. When undertaking any

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activity in pursuit of promoting or improving well-being, the power to advance well-being enables local authorities to incur expenditure, and specifically identifies the provision of financial assistance (item (b)) as one means of doing so. 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 by way of grants, loans, guarantees or indemnities as elements of financial packages; or contributions in cash or kind, provided they are compatible with EU regulations and frameworks on State Aid.

2.11 The power does not exempt the authority from the internal financial management disciplines required by the duty of Best Value. It should also be remembered that in making any decisions about the use of the power the authority will need to consider whether they are compatible with its other obligations both under domestic and international law.

2.12 Items (c) and (d) provide councils with powers 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. Again it is for local authorities to consider what such arrangements or agreements might be and whether they would be likely to advance well-being, but an example might be the formation of or participation in companies or any other form of association or vehicle for joint working. There may be different solutions for different issues and different arrangements across Community Planning Partnerships. These provisions, and this example, complement the Community Planning provisions in the Act. The power to advance well-being is designed to support local authorities' efforts in working with Community Planning partners to provide better, more joined-up services to their communities. It is anticipated that other Community Planning partners will respond positively to these flexibilities within the scope afforded to them and to identify any residual legislative barriers to achieving joint objectives and Best Value. Guidance relating to the Community Planning elements of the Act provides more detail relating to local authorities' role in Community Planning.

2.13 Item (e) makes clear that the power to advance well-being enables local

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authorities to deliver services that fall within the responsibility of other service providers. This does not transfer statutory responsibility or accountability for that function, but gives greater scope for local authorities and their Community Planning partners to determine how best to discharge their functions in light of local needs and circumstances. For example, the Community Care and Health (Scotland) Act 2002 sets out specific arrangements for joint working, delegation of functions and pooled budgeting for joint working in community care. But this power is obviously more extensive. Item (f) makes clear that, in addition to providing financial assistance, local authorities can also provide other forms of assistance including staff, goods and services and accommodation. In other words, they can make such a contribution ‘in kind’, although where such contributions are made under an agreement as provided by the Local Authority (Goods and Services) Act 1970, the terms of that Act will apply. Equally the support must comply with EU regulations and frameworks on State Aid. [Insert cross-reference to BV guidance]

2.14 “Person” in the context of items (b) to (f) means any legal person and would include bodies corporate and unincorporated associations – for example, voluntary organisations. The term “person” is defined as such in Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379).

### *Who should benefit*

2.15 Section 20(3) 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 area;
- all or some of the persons within that area.

2.16 The Act has been drafted in this way to provide flexibility. The power may be exercised in relation to particular groups of people within a community – for example, minority ethnic communities, women, older people, young people and children, and

people with a physical disability or with mental health needs, the business community etc. ‘Persons within that area’ may include persons resident in that area or who are otherwise present in the area, for example tourists and commuters.

2.17 In considering the needs of such groups, local authorities will need to consider their obligation under Section 59 of the Act to discharge the power to advance well-being in a manner which encourages equal opportunities and, in particular, observance of the equal opportunities requirements.

2.18 Section 20(4) allows local authorities to use the power to advance well-being outwith their area if it considers that doing so is likely to promote or improve the well-being of its area and persons within it.

2.19 In exercising the power outwith its area, the Scottish Ministers would expect a local authority to consult the local authority (or local authorities) and other relevant bodies in the area where they are proposing to take action under the power to advance well-being, although there need not be disproportionate consultation in relation to minor matters.

2.20 As for any other function discharged by a local authority, local authorities must try to secure Best Value in the way the power is exercised. This means maintaining a focus on priorities identified as important both to stakeholders and the authority.

### **Chapter 3. Safeguards**

#### ***Limits on power to advance well-being***

3.1 Use of the power is subject to certain safeguards. Section 22 of the Act clearly sets out a framework of safeguards around the use of the power to advance well being. In particular:

- The power to advance well-being does not enable a local authority to do anything

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which it is, by virtue of a limiting provision, unable to do. A ‘limiting provision’ is one which explicitly prohibits or explicitly prevents the local authority from doing anything or explicitly limits its powers in that respect, and is expressed in any enactment. That means the while the power to advance well-being is subject to limiting provisions expressed in legislation, it is not subject to limitations which are merely implied in existing legislation or where legislation is silent. An example of this is section 105 of the Housing (Scotland) Act 2001 which authorises specific works but with the clear overall purpose of improving energy–efficiency and safety and should therefore not be read in the context of the power to advance well-being as limiting works to these specific categories.

- The power shall not be exercised in a way that unreasonably duplicates the legislative functions of another body. While Community Planning will be an invaluable process in agreeing joint visions and joint or shared action, the Act guards against a clear duplication of an activity by a local authority which falls within the statutory competence of another public body. The Acts makes clear that exercise of the power in a way which duplicates the legislative functions of another body is *not* prevented where the person there mentioned consents to the exercise of the power.
- The power does not enable a local authority to do anything which may be done under the Local Authorities (Goods and Services) Act 1970. This means entering into an agreement with another person to provide services, goods and materials, property or facilities in relation to a trading operation for which, in accordance with proper accounting practices, the authority keeps trading accounts.
- The power does not enable a local authority to raise money by levying any form of tax or charge. This does not however prevent a local authority from setting and determining amounts of council tax or from imposing reasonable charges for services provided where the activity does not constitute a trading operation according to proper accounting practice. Section 22(ii) provides that where any charge is imposed, the local authority should publish its reason for doing so and an explanation of the amount of the charge. These explanations need only be brief. In terms of what may be deemed reasonable in this context, it is the Scottish Ministers

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intention that local authorities should be allowed the flexibility to recover costs from use of the power to advance well-being but that where they trade to raise money – i.e. for profit – the Local Authorities (Goods and Services) Act 1970 should apply.

- The power does not allow local authorities to promote economic development outside the United Kingdom without the prior consent of the Scottish Ministers. This safeguard is intended to help ensure that the promotion and improvement of economic development of all parts of Scotland is properly co-ordinated at a national level. It is also worth noting that the Act does not enable any activity which contradicts a local authority's obligations under reserved legislation or international law.

3.2 Where councils have powers in existing legislation to take action for certain purposes (e.g. the power to borrow for specific purposes in schedule 3 to the Local Government (Scotland) Act 1975) that power cannot be extended by the power to advance well-being to purposes other than those explicitly contained in the original statute.

### *Guidance*

3.3 Section 21(1) requires local authorities to have regard to any guidance issued by the Scottish Ministers about the use of the power. This document represents such guidance. In accordance with section 21(2) it has been subject to extensive consultation before being published.

## **Chapter 4. Additional information**

### **Repeals, potential repeals and modification of enactments**

4.1 A power designed to encourage innovation has the potential to be used in new and unforeseen ways. The Scottish Executive acknowledges that it is not possible to envisage every way in which local authorities might choose to exercise the power. There are a number of restrictions in legislation which limit the scope of specific functional powers granted to local authorities. The Scottish Executive accepts that such

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restrictions and limitations might unnecessarily limit the use of the new power. It is likely that such legislation will only be identified once local authorities start to use the new power to develop innovative approaches to promoting and improving well-being.

4.2 Local authorities may therefore wish to be aware that the power under section 57 of the Act allows Scottish Ministers to seek to amend, repeal or revoke or disapply any enactment that prevents or hinders use of the power. This provides a means by which the Scottish Executive and Scottish Parliament can consider legislation identified as hindering the use of the power of well-being and, if appropriate, take action without needing to wait for an opportunity through primary legislation. Local authorities are best placed to identify such limitations and restrictions as they begin to use the new power and the Scottish Executive would encourage local authorities to bring them to its attention.

4.3 Similarly, the Act empowers Ministers to amend, repeal, revoke or disapply any enactment which requires local authorities to prepare, produce or publish any plan or strategy. This measure provides an opportunity to reduce unnecessary bureaucracy as the Community Planning process develops and local authorities start to use the power to advance well-being.

4.4 The powers mentioned in paragraphs 4.2 and 4.3 may be exercised in relation to all local authorities; a class or classes of local authority; or a particular local authority or particular local authorities and includes power to amend or disapply an enactment for a particular period. An order under this section will be made by statutory instrument.

4.5 The power to advance well-being is a general discretionary power of wide application. But where there is any doubt whether local authority actions could be said to contribute directly to the well-being of the area, rather than indirectly via direct benefit to the local authority itself, the Act makes specific provision. One example is the power to invest treasury balances under section 40. Another is the power to enter into agreements for construction of buildings under section 9.

4.6 Section 60(1) repeals sections 83 and 171A, 171B and 171C of the Local

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Government (Scotland) Act 1973. Section 83 (general power of local authorities to incur expenditure) is incompatible with the provisions in this Act. Section 171A (promotion by local authorities of economic development of its area) is made redundant by the broader application of its former powers in this Act.

### **Chapter 5. Power of intervention**

5.1 Section 26 makes provision for the Scottish Ministers to intervene when the powers and obligations provided in the Act are abused or ignored. This power allows the Scottish Ministers to intervene after assessing the validity of concerns that the action taken (or proposed) under the power to advance well-being would result in one or more of the following:

- A significant risk to the wider public interest or to public funds'
- A serious misuse of the power of well-being;
- A clear and serious failure to have regard to statutory guidance;
- The clear duplication of the roles or functions of other bodies without their agreement.

5.2 Local authorities have the right to make representations to the Scottish Ministers in response to any such intervention.