I. **Introduction**

1. This paper considers the origins of the general power of competence, analyses the statutory framework that both introduces and limits it, and then concludes with consideration of the potential opportunities for innovation that it affords local authorities.

II. **The traditional *vires* approach**

2. Historically an important distinction has been made between the lawful actions of a local authority and those of an individual. The public lawyer will be familiar with the need for a local authority, as a statutory animal, to point to an express power to justify the lawfulness of a particular action. The opposite is true of the individual: see *R v Somerset County Council, ex p Fewings* [1991] 1 All ER 513, Laws J at 524:

   “Public bodies and private persons are both subject to the rule of law...But the principles which govern their relationship with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit...But for public bodies the rule is opposite...It is that any action to be taken must be justified by positive law...[T]he body has no rights of its own and no axe to grind beyond its public responsibility: a responsibility which defines its purpose and justifies its existence”.

3. Modest expansion of the scope of lawful local authority activity came in the form of section 111(1) Local Government Act 1972:

   Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions (emphasis added).

4. However, the power to do “any thing” remained firmly incidental to identified functions: see *Hazell v Hammersmith LBC* [1992] 2 AC 1 (speculative transactions designed to take advantage of changing interest rates could not be said to be transactions which were ancillary to any of the council's functions, nor were they calculated to facilitate any
transactions incidental to the council's function of borrowing within the meaning of s.111(1)).

5. The language of *vires* remained very much the guiding principle for local authorities, so much so that *vires* was taken by an authority, in its defence to a commercial claim: *Credit Suisse v Allerdale BC* [1997] QB 306 CA.

**III. The “well being” power**

6. Section 2 of the Local Government Act 2000 (the 2000 Act) introduced the “well being” power giving local authorities the power to do:

   (1) anything which they consider is likely to achieve any one or more of the following objects—
   
   (a) the promotion or improvement of the economic well-being of their area,
   
   (b) the promotion or improvement of the social well-being of their area, and
   
   (c) the promotion or improvement of the environmental well-being of their area.

7. The well being power expressly included the power to: incur expenditure, give financial assistance to any person, enter into arrangements or agreements, co-operative with or facilitate the activities of any person, exercise on behalf of any person any functions of that person, and provide staff, goods, services and accommodation (s.2(4)).

8. Section 2 remains subject to limitations (set out in section 3); the well being power does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment. Nor does the well being power extend to raising money “by precept, borrowing or otherwise” (s.3(2)).

9. In practice, in some instances, section 2 became a way to plug the gap in alternative statutory schemes and secure a benefit for an individual: see *R(J) v Enfield LBC* [2002] EWHC 432 (Admin). An HIV positive Ghanian overstayer and her daughter were not eligible for assistance under the National Assistance Act 1948 s.21 or Children Act 1989 s.14. It was argued that if Article 8 of the ECHR required the local authority provide
support, then that could be achieved by exercising the well being power. Elias J accepted that argument.

10. In terms of a collective or community benefit, use of the well being power (or s.111 power) remained rather more tentative – and provoked less predictable responses from the courts. The efforts of a collection of London Boroughs to reduce insurance costs by establishing a mutual insurance company, the London Authorities Mutual Limited (LAML), met with judicial rebuff.

11. At first instance, Stanley Burnton J held that a local authority (relying upon s.111, LGA 1972) could obtain insurance incidental to its functions, but held that providing insurance went well beyond the powers established by s.111. As to the well being power, this could extend to the establishment of a mutual insurance scheme, but where the well being would have to go towards some identified well being: Risk Management Partners Ltd v Brent LBC: [2008] EWHC 1094 Admin, [2008] BLGR 331. The Court of Appeal upheld the decision approaching section 2 narrowly. Rather than interpreting section 2 as a power to do anything (subject to the limitations of section 3), the Court of Appeal required that the well being power be exercised with “some reasonably well-defined outcome”. Reducing costs per se was insufficient and this “complex and somewhat speculative attempt to save money” lay outside section 2 (Pill LJ at 119).

12. Confidence in the well being power as a way to innovate and act entrepreneurially was brought low.

IV. The Localism Act 2011

13. At the second reading of the bill (which became the Localism Act 2011) the Secretary of State for Communities and Local Government, Eric Pickles MP, said:

“The reason why the general power of competence is so important is that it turns the determination requirements on their head. All those fun-loving guys who are involved in offering legal advice to local authorities, who are basically conservative, will now have to err on the side of permissiveness. That is a substantial change....”

14. And so, in response to calls from (amongst others, the Local Government Association) and as part of the Conservatives’ local government agenda, on 15 November 2011 the Localism Act 2011 received Royal Assent. With it came the long called for shift of emphasis away from searching for a power which justifies a particular action to a “general power of competence”.

15. In England (but not Wales) chapter 1 now replaces the well being power. Section 1 provides:

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)).

16. The explanatory notes to the Localism Act 2011 describe the radical shift in approach as follows at paragraph 10:

“Section 1 provides a general power of competence for local authorities in England. It gives these authorities the same power to act that an individual generally has and provides that the power may be used in innovative ways, that is, in doing things that are unlike anything that a local authority – or any other public body – has done before, or may currently do. The section defines the meaning of an ‘individual’ so as to
avoid referring to the reduced powers exercised by for example a child. Subsections (4), (5) & (6) further define the extent of the power. Where the authority can do something under the power, the starting point is that there are to be no limits as to how the power can be exercised. For example, the power does not need to be exercised for the benefit of any particular place or group, and can be exercised anywhere and in any way. Subsection (7) gives effect to Schedule 1, which makes consequential amendments. The amendments to the Local Government Act 2000 mean that the well-being power provided in section 2 of that Act will no longer apply to English local authorities."

17. Important features of the power, distinguishing it from the power under the 2000 Act powers include the following: its lack of geographical restriction; the absence of a need to refer to the community strategy; the potential to use the power simply to improve the local authority’s financial position.

18. The limits of the new power are detailed in the explanatory notes\(^2\) to section 2, and these are considered in more detail later in the paper:

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11. Section 2 sets out the boundaries of the general power, requiring local authorities to act in accordance with statutory limitations or restrictions. Restrictions that apply to existing powers that are overlapped by the general power are applied to the general power. So for instance if an existing power requires a particular procedure to be followed, the same procedure will apply to the use of the general power to do the same thing. It also applies any express prohibitions, restrictions and limitations within primary or secondary legislation, to the use of the general power. A distinction is drawn between restrictions in precommencement legislation, and those in post-commencement legislation. Restrictions in post-commencement legislation will only apply to the general power where they are expressed to do so.

12. Subsection (3) provides that the general power does not give local authorities power to delegate or contract out of their functions, nor to alter governance arrangements. These matters remain subject to separate provision."
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V. **Bideford prayers**

19. Last minute haste defined the introduction of the general power of competence. The Secretary of State for Communities and Local Government, Eric Pickles MP, brought the

\(^2\) Paragraphs 11 and 12 of the Explanatory Note.
general power of competence into force earlier than planned. The Localism Act 2011 (Commencement No.3) Order 2012 was made on 17th February 2013 in response to the Bideford prayers case. The National Secular Society and a Bideford councillor (Mr Bone) brought a challenge, by way of judicial review, to the council’s practice of saying public Christian prayers in the formal part of the council’s meeting, to which all councillors were summoned. Ouseley J held in *R (National Secular Society and Bone) v Bideford Town Council* [2012] EWHC 175 (Admin); [2012] H.R.L.R. 12 that s.111 did not constitute a statutory power to permit the saying of prayers as part of the formal business of the council.

20. Mr Pickles was reported\(^3\) to be “surprised and disappointed” at the ruling and encouraged use of the general power of competence, when available, to reinstate the prayers. These sentiments were echoed by Sir Merrick Cockell, chairman of the Local Government Association (LGA) who said:

> “It is the LGA’s view that this ruling will be overridden by the General Power of Competence as soon as the legislation comes into force and that it remains the decision of local authorities if they wish to hold prayers during formal meetings”\(^4\).

21. On the face of it, to general power of competence would now appear to permit a local authority to say prayers as part of the exercise of its functions. Whether that power would be tempered by general public law principles or human rights/equality principles on the Bideford facts remains to be seen.

VI. **Statutory limits on the general power**

22. Balancing the broad sweep of the general power is a substantial set of limits.

*Section 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 only 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 pre-commencement limitation\(^5\), or

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3 Local Government Lawyer, 10th February 2012
4 Local Government Lawyer, 10th February 2012
5 Defined by section 2(4) as “a prohibition, restriction or other limitation expressly imposed by a statutory provision”. 
(b) anything which the authority is unable to do by virtue of a post-commencement 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 (emphasis added).

23. This provision may helpfully be compared with section 3 of the 2000 Act. The definition of a “limitation” (see footnote 5 below) states that it must be “expressly imposed”: it is not clear whether the absence of the same prohibition in section 3(1) of the 2000 Act includes a similar implied restriction, or whether the restriction in the 2011 Act is deliberately narrower.

24. Section 2(3) provides:

(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) or (b), that authorise a person to exercise a function of a local authority.

25. There is no direct equivalent of section 3(2) of the 2000 Act which prevents the use of the section 2 power “to raise money (whether by way of precepts, borrowing or otherwise)”. Nor is there a specific requirement to have regard to the guidance of the Secretary of State before exercising the power, compared with section 3(5) of the 2000 Act. Nor yet is there a requirement to produce a strategy in relation to the new power, compared with section 4 of the 2000 Act.

26. Section 3 provides:
Section 3 Limits on charging in exercise of general power

(1) Subsection (2) applies where –

(a) a local authority provides a service to a person otherwise than for a commercial purpose, and

(b) its providing the service to the person is done, or could be done, in exercise of the general power.

(2) The general power confers power to charge the person for providing the service to the person only if –

(a) the service is not one that a statutory provision requires the authority to provide to the person,

(b) the person has agreed to its being provided, and

(c) ignoring this section and section 93 of the Local Government Act 2003, the authority does not have power to charge for providing the service.

(3) The general power is subject to a duty to secure that, taking one financial year with another, the income from charges allowed by subsection (2) does not exceed the costs of provision.

27. Principally, this section functions to prevent a local authority from introducing charging for services which it is required by legislation to provide without charge. Importantly, the revenue from charging must not exceed the cost on a year on year basis. It is therefore not a power for income-generation, as some might have anticipated.

28. This provision seems to differ from section 93 of the Local Government Act 2003 (the 2003 Act) in the following ways. Section 93(1) only gives a power to charge for the provision of a service where a relevant authority is authorised, but not required, by an enactment to provide that service. However, the power to charge in reliance on the general power of competence is not expressly limited to charging for the provision of a service which an authority is authorised by an enactment to provide, although section 1 does provide that authority. Also it might be said that the section 93 charging power applies to any service provided under section 1, since section 1 is an enactment which authorises the provision of a service. Once again, there is no requirement to have regard to guidance of the Secretary of State.

29. There is one conundrum. A local authority which wants to recover a charge for the provision of a service under the general power of competence would exercise the power in
a new way which is “overlapped by” the provisions in section 93 of the 2003 Act. So it might be said that the exercise of the power to charge in reliance on the new power would be subject to restrictions set out in section 93.

30. Section 4 provides:

Section 4  Limits on doing things for commercial purpose in exercise of general power

(1) The general power confers power on a local authority to do things for a commercial purpose only if they are things which the authority may, in exercise of the general power, do otherwise than for a commercial purpose.

31. “Commercial purpose” is not defined. It might be synonymous with “trading” in section 95 of the 2003 Act, but that does not take things much further forward. If commercial purpose means “in order to make a profit” then it might still encompass things that are not initially or even ultimately profitable, provided that that is still the purpose.

32. There is an echo of LAML here in that the power to do things for a commercial purpose does not go beyond the limits of the general power to do things non-commercially.

33. Subsection (2) provides:

(2) Where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company.

34. The requirement that things are done through a company attracts the governance and accounting requirements of legislation made under the Local Government and Housing Act 1989 – Local Authorities (Companies) Order 1995 (as amended by Local Authorities (Capital Finance) (Consequential, Transition and Saving Provisions) Order 2004).

35. Subsection (3) provides:

(3) A local authority may not, in exercise of the general power, do things for a commercial purpose in relation to a person if a statutory provision requires the authority to do those things in relation to the person.

(4) In this section “company” means –

(a) a company within the meaning given by section 1(1) of the Companies Act 2006, or
(b) a society registered or deemed to be registered under the Co-operative and Community Benefit Societies and Credit Unions Act 1965 or the Industrial and Provident Societies Act (Northern Ireland) 1969.

36. The provision seems to be wider than sections 95 and 96 of the 2003 Act. The power conferred by section 95 depends on the making of delegated legislation, but there is no such requirement here. Again there is no requirement to have regard to the Secretary of State’s guidance.

37. Section 5 provides:

**Section 5 Powers to make supplemental provisions**

(1) If the Secretary of State thinks that a statutory provision (whenever passed or made) prevents or restricts local authorities from exercising the general power, the Secretary of State may be order amend, repeal, revoke or disapply that provision.

(2) If the Secretary of State thinks that the general power is overlapped (to any extent) by another power then, for the purpose of removing or reducing that overlap, the Secretary of State may by order, amend, repeal, revoke or disapply any statutory provision (whenever passed or made).

(3) The Secretary of State may by order make provision preventing local authorities from doing, in exercise of the general power, anything which is specified, or is of a description specified, in the order.

(4) The Secretary of State may be order provide for the exercise of the general power by local authorities to be subject to conditions, whether generally or in relation to doing anything specified, or of a description specified, in the order.

...

(7) Before making an order under subsection (1), (2), (3) or (4) the Secretary of State must consult ... such local authorities ... such representatives of local government, and ... such other persons (if any) as the Secretary of State considers appropriate.

38. This raises the prospect of a far-reaching break on the exercise of the general power if central government does not like what is going on. However, section 6 does provide a counter-vailing series of restrictions on the exercise of the section 5 power.
39. Section 6 provides:

Section 6 Limits on power under section 5(1)

(1) The Secretary of State may not make provision under section 5(1) unless the Secretary of State considers that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.

(2) Those conditions are that –

(a) the effect of the provision is proportionate to the policy objective intended to be secured by the provision;

(b) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;

(c) the provision does not remove any necessary protection;

(d) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;

(e) the provision is not of constitutional significance.

VII. Other limits on the general power

40. As LAML showed, the Courts have grown accustomed to the chains of vires. However, it would be hard to find a clearer statement of Parliament’s intent than the position in sections 1 and 2 of the 2011 Act. Nevertheless, that clear statement, does not, it is submitted, mean that the doctrine of vires has no place when considering the application of the sections.

41. An important aspect of vires is likely to be the need to ensure that there is no improper delegation of statutory decision-making functions, particularly since the “no difference” argument is unlikely to succeed in avoiding a quashing order where the wrong person has taken the decision (R (Carlton-Conway) v Harrow LBC [2002] JPL 1216, CA). These issues also tie in closely with the governance concerns that can arise when joint ventures and similar projects are contemplated under the general power.

42. The second key set of restrictions on the application the general power derives from the other principles of public law, such as irrationality, failure to take into account relevant information, failure to consult, legitimate expectation and procedural impropriety. This makes it vital that schemes devised under the 2011 Act are founded upon a clear, logical and transparent reasoning process that identifies the object of the activity, how what is
proposed will achieve it, and how potential costs and benefits have been quantified and
taken into account.

43. The third key set of restrictions derives from the requirements of legislation concerned with
equality (section 149 of the Equality Act 2010 specifically applies to the general power of
competence), human rights, best value, and EU, particularly procurement and State aid, law
(unless it can be established that a Teckal exemption applies).

VIII. Potential uses of the power

44. There has been significant activity in the development of projects in fulfilment of the
objectives of and opportunities afforded by the general power of competence, and there is
certainly scope for more.

45. Projects include public/private and public/public joint ventures, particularly those
concerned with service delivery.

46. The power also enables local authorities to engage in joint ventures requiring the levering
of private finance or the use of authority resources as seed corn funding.

47. For the more entrepreneurial authorities such projects are seen more as an evolution from
the frameworks that were already being developed under the broad heading of “social
enterprise”, but it nevertheless remains the case that the general power of competence
significantly expands the options available to those local authorities that seek to pursue
them.

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