

REPORT TO: POLICY AND RESOURCES COMMITTEE - 28 JANUARY 2002
REPORT ON: THE LOCAL GOVERNMENT BILL
REPORT BY: DIRECTOR OF CORPORATE PLANNING
REPORT NO: 89-2002

1 PURPOSE OF REPORT

To provide information on the Scottish Executive's proposals for the forthcoming Local Government Bill, and to recommend a response from the City Council.

2 RECOMMENDATIONS

It is recommended that Committee:

- a) broadly welcome the proposals for the Local Government Bill, but ask the Scottish Executive to develop the legislation on the basis of genuine partnership, with local government being trusted to act responsibly and deliver effective services
- b) make comments on specific proposals as set out in section 7 of this report

3 FINANCIAL IMPLICATIONS

None.

4 LOCAL AGENDA 21 IMPLICATIONS

The proposed Bill will give Councils a general power to promote and improve the well-being of their area, which could potentially affect a number of key Local Agenda 21 themes.

5 EQUAL OPPORTUNITIES IMPLICATIONS

Equalities issues are considered by the Scottish Executive to be a key 'horizontal' theme of the Local Government Bill. The Bill will specifically refer to the need to encourage equal opportunities and the observance of equal opportunities requirements. A specific reference to authorities having regard to equal opportunities in relation to the duty of Best Value will be included.

6 THE SCOTTISH EXECUTIVE'S PROPOSALS

6.1 Introduction

6.1.1 The Scottish Executive proposes to introduce a Local Government Bill to the Scottish Parliament in Spring 2002. An outline of the specific measures to be included in the Bill has been circulated in a consultation paper, with comments invited by 6 February 2002.

6.1.2 The Local Government Bill will:

- give Councils a general power to promote and improve the well-being of their area, and change the rules on commercial activity to fit

- provide a statutory underpinning for community planning through a duty on Councils and key community planning partners
- introduce a statutory duty of Best Value and update the existing audit and intervention framework to support this
- be used as a vehicle to progress a number of miscellaneous issues relating to the functions of local authorities

Details of all these proposals are set out below:

6.2 Power of Well-Being

6.2.1 Councils will be given a general power to promote and improve the well-being of their area. The intention is to encourage innovation, flexibility and joint working, allowing Councils to act in the interests of their area unless specifically restricted by legislation.

6.2.2 The 'power of well-being' will include power to:

- incur expenditure
- give financial assistance to any person, including grants, loans, guarantees and indemnities
- enter into arrangements or agreements with any person
- co-operate with, or facilitate or co-ordinate the activities of any person
- exercise on behalf of any person any functions of that person, and
- provide staff, goods, services or accommodation to any person

Councils will be allowed to exercise the power outwith their geographical area if they consider that doing so is likely to promote or improve the well-being of its citizens, and also to work together with other Councils across boundaries.

6.2.3 The power will not supersede existing statutory prohibitions, restrictions and express limitations already in place. However, the Scottish Executive acknowledge that some of these will be considered unnecessarily constraining once Councils start using the power of well-being to progress real issues, so the Bill will include a provision allowing Ministers to amend, repeal, revoke or disapply any enactment which hinders Councils in exercising the power. Two repeals identified so far are:

- existing provisions on powers of local authorities to incur expenditure, which will be incompatible with the Bill
- existing provisions on promotion by local authorities of economic development of its area, which the Executive say will be made redundant by the broader application of its former powers in this Bill. The consultation paper says that this change will not prevent Councils from continuing to pursue economic development matters as agreed within the Local Economic Forums

6.2.4 The new power will be subject to the following safeguards:

- the power will not enable a Council to do anything which current legislation or the rule of law is explicit in prohibiting, preventing, restricting or limiting the powers of a local authority
- the power will not be exercised in a way that unreasonably duplicates functions of other bodies, an example given being the Enterprise Networks.
- the power does not enable the Council 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 as at present, or from imposing reasonable charges for services provided. The Scottish Executive's intention is to allow Councils to charge for a facility or service as a means of recovering costs to re-invest in the maintenance or continued provision of that facility or service or related facilities/services, but not to allow Councils to set out wholly or mainly with the aim of raising money in itself
- a Council shall not promote economic development outside the United Kingdom without the prior consent of the Scottish Ministers. This restriction already exists in legislation and is intended to ensure the co-ordinated promotion of Scotland for Business

6.3 Community Planning

6.3.1 The key features of the proposed Bill in relation to Community Planning are:

- a duty on Councils to facilitate the Community Planning process, including a requirement to engage the local community and voluntary organisations along with a requirement to encourage other organisations to engage in the process
- a duty on other key public bodies (in particular NHS Boards, the Police and the Enterprise Networks) to engage in the process
- a power to Scottish Ministers to issue guidance to assist Community Planning partners and partnerships in delivering the benefits from the process

6.3.2 The statutory underpinning for Community Planning is designed to promote more effective joint working to deliver services and more effective engagement of communities in decisions that affect them, although it is acknowledged that legislation alone will not ensure the success of Community Planning. The intention will be to strike a balance between ensuring a genuine commitment to the process while ensuring that the means of doing so does not infringe upon the roles or accountability mechanisms of individual bodies. The precise means of applying the duty on agencies to engage in the process is being investigated.

6.4 Best Value and Performance Management

6.4.1 The Bill will place a statutory duty of Best Value on local authorities. Key features of the proposals include:

- a statutory duty of Best Value to pursue continuous improvement in performance, in a way that maintains an appropriate balance between quality and cost, and has regard to good employment practice and equal opportunities
- guidance to be issued to support stewardship and performance management arrangements under Best Value

- enhanced accountability to stakeholders and citizens through effective public performance reporting
 - amended audit arrangements to reflect the duty of Best Value
 - changes to restrictions on trading activities. These will incorporate the repeal of Compulsory Competitive Tendering. They will allow the procurement and provision of goods and services in a commercial environment when this is directly related to the delivery of core services, and is undertaken in a transparent and fiscally responsible manner
 - streamlined intervention arrangements to deal with failures in the Power of Well-being, Community Planning and Best Value
- 6.4.2 The Executive intends Best Value to continue to allow local authorities to focus on the quality and impact of services as well as on the cost. While cost will remain a factor, it is recognised that cheaper is not always better. Equally, delivering quality services is not a once and for all matter, it is about looking for improvements to services year in, year out. The Executive also recognises that Best Value should reflect the needs of those delivering the services as well as the needs of those to whom services are delivered. Those under the duty of Best Value will be expected to have regard to equal opportunities requirements and follow good employment practice when deciding how to deliver services.
- 6.4.3 The consultation paper acknowledges that Best Value in local government has been working well, and says the Executive is keen to extend the philosophy and practice of Best Value more widely across the public sector, but it will not be done through the mechanism of this Bill.
- 6.4.4 The Bill will require Councils to put in place a Public Performance Reporting framework to help stakeholders reach an informed judgement about the effectiveness of local services. The Executive proposes to:
- oblige local authorities to publish an annual description of their performance reporting arrangements alongside their annual accounts. This should also include a summary of what is being done to pursue improvement
 - revise the duty on local authorities to publish Statutory Performance Indicators annually. This will allow authorities some latitude in how and where they choose to publish their SPI returns so as to maximise coverage and impact, but will continue to ask for this publication within an annual deadline
 - extend the Accounts Commission's powers to require performance on cross-cutting issues allied to the Community Planning process. This will allow an assessment of the effectiveness of a local authority and its partners as they work to achieve their shared Community Planning objectives
- 6.4.5 Proposals on scrutiny and audit largely focus on the statutory basis on which the Accounts Commission engages in Best Value scrutiny. Key features include updating the audit duty to accommodate Best Value performance audit; revising the collection of Statutory Performance Indicators and the production of 'value for money' reports; and giving the Accounts Commission power to prescribe performance indicators on cross-cutting issues to underpin the Community Planning process. A procedure will also be

put in place to deal with any concerns raised as a consequence of the scrutiny of Best Value:

- existing audit reporting arrangements will be extended to include reporting on Best Value
- the Controller of Audit's powers to raise a public interest report will be extended to accommodate failures in Best Value
- the Accounts Commission's hearing process will be updated (so that the procedure for considering public interest reports is similar to that for special reports provided by the Ethical Standards in Public Life etc (Scotland) Act 2000)
- the Accounts Commission's power to make findings, to make recommendations and to hold public hearings will be extended to accommodate a failure to pursue Best Value or fulfil Community Planning obligations

6.5 Commercial and Trading Activity

6.5.1 The Executive believes that the legislative framework which underpins local authority commercial activity needs to be updated to reflect new ways in which Councils are delivering services. However, they are anxious to emphasise that local authorities should not abuse their economic dominance over many private sector and 'not for profit' service providers in pursuit of extra income. Their intention is to repeal the Compulsory Competitive Tendering regime and also to substantially revise the Local Authority Goods and Services Act 1970. They will also repeal section 88 of the Transport Act 1985 to remove the requirement to tender for supported bus services.

6.5.2 Where authorities undertake activities for which there is genuine commercial competition, whether directly or via a complex of contractual relationships, the Executive thinks it incumbent on the local authority to be able to demonstrate why a certain means of delivery has been chosen and the financial implications of that decision. This means asking the authority to:

- keep accounts for the activities according to a sensible configuration; and
- provide an accurate account of the costs involved in accordance with recognised Best Value accounting codes of practice

The Executive also thinks that Scottish Ministers should have the power to set financial targets for such activities, to ensure that authorities do not adopt pricing or resourcing strategies which lead to market distortion. In addition they want to ensure that:

- when a contract for goods and services is entered into by a local authority with any other body, the overall purpose of the transaction should be wholly or mainly to support or improve the provision of goods and services to the authority or, in turn, its own provision of goods and services to other local authorities or its Community Planning partners
- local authorities should be permitted to procure goods and services to support the kinds of contractual agreements mentioned above
- although they should be free to provide goods and services for any purpose to other local authorities and their community planning partners, when they are in genuine

competition for the supply of the work or service the disciplines mentioned above should apply

- the current legislative restrictions on the non-commercial issues that can be considered in contractual negotiations will be amended to allow workforce matters and the conduct of both employers and employees in industrial disputes to be considered

6.5.3 The Executive continues to think that local authorities should be prohibited from new build construction works.

6.6 Powers of Intervention

6.6.1 The Executive intends to establish a streamlined and integrated process to allow Ministers to act where they believe the powers and obligations provided in the Bill are being abused or ignored. Ministers will have power to intervene after assessing concerns that the action taken (or proposed) would result in:

- a significant risk to wider public interest or to public funds
- a persistent and significant failure to fulfil the duty of Best Value or the duty of Community Planning; or a serious abuse of the Power of Well-being
- a failure to have regard to statutory obligations
- the clear duplication of the roles or functions of other bodies

6.6.2 In addition, Ministers will retain the right to intervene (on the recommendation of the Accounts Commission) to ensure that local authority's accounts are rectified as necessary. Local authorities will be given the opportunity to make representations in response to any intervention.

6.7 Miscellaneous Provisions

6.7.1 The Bill will also be used as a vehicle for progressing a number of miscellaneous provisions that relate to the activities of local authorities. The relevant parts of the Scottish Executive will consult separately on these where required.

6.7.2 The miscellaneous provisions include:

- a local authority duty to prepare **integrated waste management** plans rather than the current recycling plan.
- amendment of the Housing (Scotland) Act 1987 to remove **references to the district valuer** as valuer in order to achieve better value for money and compliance with procurement legislation
- amendment to **section 94 controls on local authority capital expenditure** to replace current arrangements with a more flexible system
- amendments to the Transport Act 1985 and Transport (Scotland) Act 2001 to equalise **age eligibility for concessionary fares**, at the pension age for women

- amendment to the Transport Act 1985 **to remove the requirement to tender for supported bus services** and replace it with a duty to ensure Best Value in the procurement of these services
- amendment of section 20(3) of the Civic Government (Scotland) Act 1982 relating to the making of regulations for taxi and private hire cars and their drivers. This is purely a technical amendment to close the anomaly of differing Parliamentary procedures for Statutory Instruments introduced under sections 20(1) and 20(2) respectively
- **extension of rural rates relief scheme** to include pubs, garages and petrol stations, automatic teller machines, and small food shops
- **joint collection of rent and council tax.** This has arisen from a recommendation of the joint Scottish Executive/COSLA report on improving council tax collection and is designed to simplify collection

7 DUNDEE CITY COUNCIL'S RESPONSE

7.1 General

- 7.1.1 It is recommended that, in general, the proposals to be included in the Bill should be broadly welcomed . However, the proposals do give rise to a number of concerns and it is recommended that the issues in paragraphs 7.2 to 7.7 below be highlighted in the Council's response to the Scottish Executive.
- 7.1.2 In addition, the consultation paper issued is only an outline of proposals for the forthcoming Bill. The Council will wish to make further detailed comments as part of a full consultation process on the legislation and associated guidance.

7.2 Power of Well-Being

- 7.2.1 It is clear that the doctrine of 'ultra vires' will continue and that it will still be necessary for Councils to have ready access to legal advice because all of the specific powers which are to be given to Councils are already subject to prohibitions, restrictions and limitations and it is not the intention of the Executive that these should be removed (although some will be amended by the Bill).

For example:

- Councils' powers to incur expenditure are limited by the Local Government (Scotland) Act 1973 and the Local Government Act 1986
- Councils' powers to give financial assistance are limited by the Local Government (Development and Finance) (Scotland) Act 1964
- Councils' powers to enter into arrangements or agreements with or co-operate with or facilitate the activities of and exercise functions on behalf of another person and to provide staff, goods, services and accommodation to other persons are limited by the Local Authorities (Goods and Services) Act 1970

It is not clear that the power to give financial assistance which is to include the ability to give grants, loans, guarantees and indemnities goes further than Section 171A of the 1973 Act does at present, as is suggested in the consultation paper.

7.2.2 Particular areas of concern are:

- the Scottish Executive suggest that there needs to be a "safeguard" to ensure that the power is not exercised in any way that "unreasonably duplicates functions which may or must be done by other bodies". It is not clear in this context what would be regarded as unreasonable and what would be regarded as duplication and this must be clarified. Councils must have scope to work together with community planning partners to deliver the services which their local communities need.
- the Scottish Executive have indicated that Councils will require to have regard to guidance issued by Ministers about the use of the power of well-being. Presently, the Council's general powers, principally Section 69 of the 1973 Act (power to do anything which facilitates or is conducive or incidental to the discharge of functions), Section 83 of the 1973 Act (power to incur expenditure for purposes not otherwise authorised) and Section 171A of the 1973 Act (promotion of economic development) are subject to no such restriction. Clarification of what the Executive intend here is needed, as statutory guidance might lead to a more restrictive regime than exists at present. Guidance should not be used to limit the scope of the power of well-being.
- the reference to pursuance of economic development matters as agreed within Local Economic Forums also needs clarification. The Forums, which are unelected bodies, are recent creations with no clear remit. At present they have only been asked to look at services to businesses and economic development is clearly a much wider field than this. The Council would be concerned if the scope of local authorities' ability to pursue economic development was dependent upon agreement within the Forums, or if currently authorised activities were restricted in any way.

7.3 Community Planning

- 7.3.1 The Council will wish to comment in detail once proposals emerge on the precise way in which the duty on partner agencies to engage in the community planning process will be applied, and, in particular, on the implications for the funding and management of cross-cutting services.
- 7.3.2 In addition, while the consultation paper explains why the duty to engage in Community Planning is not being placed on Communities Scotland in this legislation, the Council feels it is essential that Communities Scotland are given the equivalent of this duty through a clear direction using the existing legislative powers in relation to partnership working.
- 7.3.3 If Community Planning is to be successful then it is essential that the Scottish Executive Departments also accept that they need to develop initiatives and policies that are consistent with the Community Planning structure and the outcomes identified in the Community Plan.

7.4 Best Value and Performance Management

- 7.4.1 The Council welcomes the abolition of CCT and the recognition that Best Value is about the quality and impact of services as well as the cost. In particular, it welcomes the fact that those under the duty of Best Value will be expected to have regard to equal opportunities and follow good employment practice. The Council agrees that authorities should be required to appraise options for service delivery (taking account of the recently published guidance Best Value : Making Choices) and be able to demonstrate why a particular option has been chosen. The Council acknowledges the importance of

clear accounting and financial targets. However, it is important that the legislation and guidance reflects the change of culture inherent in the move from CCT to Best Value.

- 7.4.2 In particular, the Council would be concerned if the guidance issued was to significantly widen the range of activities for which separate accounts have to be kept, or to require production of information which is still closely tied to the bureaucratic requirements of CCT. The Council also has concerns about Ministers' power to set financial targets for such activities. Targets should be set by local authorities in the light of their particular circumstances, and they should be able to compare the option of using of 'in-house' services with that of external providers without the imposition of a fixed 'rate of return'.
- 7.4.3 On performance management, the Council welcomes the fact that guidance is to be produced on effective arrangements and shares the commitment to effective public performance reporting. However, once the necessary framework has been put in place, the aim should be for Councils to become essentially self-regulatory in terms of performance management, and to avoid an onerous burden in terms of audit and inspection. The Council also has a concern that the Accounts Commission Improvement Rating criterion is too simplistic and is not an appropriate comparative gauge of Councils' performance.
- 7.4.4 While the proposal to give the Accounts Commission power to investigate Councils' failure to pursue Best Value may be seen as a natural extension of their present power to carry out value for money studies, it is less clear why the Executive think it appropriate for the Accounts Commission to intervene where a Council does not fulfil its Community Planning obligations, and further clarification of their role in this area is required.
- 7.4.5 It is essential that any potential cross-cutting performance indicators intended to assess the effectiveness of Community Planning are agreed with local authorities and COSLA. These will have to be carefully developed if they are to measure the effectiveness of the process in all areas, or sufficiently flexible to reflect the diverse agenda and variable local implementation which is probable across Scotland. New indicators should not fetter community planning partners in identifying the most important issues at a local level.
- 7.4.6 There is a concern that the costs of auditing local authorities has continued to increase, taking away financial resources from service delivery. The audit process needs to be refined so that the minimum audit work consistent with ensuring value for money and performance outcomes is undertaken. There is a tendency not to trust local authorities to deliver in partnership with the Scottish Executive, resulting in increased audit and inspection costs.
- 7.4.7 Finally, the Council believes that the principle and practice of Best Value should be extended across the public sector, and would welcome an indication from the Executive as to when and how this will be done if not through the mechanism of this Bill.

7.5 Commercial and Trading Activity

- 7.5.1 The consultation paper says that local authorities should "not abuse their economic dominance over many private sector and 'not for profit' service providers in pursuit of extra income". It is not clear what evidence there is to support the suggestion that Councils would engage in this sort of behaviour and it would be helpful to know on what basis the Executive have therefore proceeded here.

- 7.5.2 Of particular concern is paragraph 6.15 of the consultation paper (summarised in paragraph 6.4.5 of this report) which talks about "activities for which there is genuine commercial competition for the supply of the work or service" and suggests that authorities will be required to keep accounts and meet financial targets set by Scottish Ministers, to ensure that authorities do not adopt pricing or resourcing strategies which lead to market distortion. There is a clear need to define what "genuine commercial competition for the supply of the work or service" means. Presumably it does not mean all Council activities which are replicated in the private and voluntary sector because, if it does, that would mean that the accounting requirements will have to be complied with for all the Council's activities and that all the Council's activities would require to achieve a "rate of return" (the "financial targets" which are mentioned) in the same way as the DLO does at the moment. It will also be crucial to clarify how 'market distortion' will be judged. A more restrictive regime than presently exists would be contrary to the whole underlying ethos of the Bill.
- 7.5.3 The proposals would allow workforce matters and the conduct of employers and employees to be considered in contract negotiations. The Council wishes to emphasise its belief in the importance of fair competition, on the basis of conditions of service which are at least at an equal level, and would hope that this principle is recognised in the Bill.
- 7.5.4 It will be very difficult to deliver efficient, joined up services in partnership with our Community Planning partners if local authorities are once again going to have to maintain artificial profit and loss accounts for all services where there might be an element of competition with the private sector. Local Authorities will only operate services where it is believed that public services would be enhanced and will in any case have to demonstrate Best Value. The Scottish Executive should demonstrate its trust in local authorities.
- 7.5.5 Once of the Council's most significant concerns is the proposal that local authorities should be prohibited from undertaking new build construction works. Dundee City Council's DLO and Architectural Services Division have demonstrated that they can compete with the private sector, but are not allowed to do so when the Council's Community Planning partners and other organisations ask for help to build new construction projects. It is appreciated that these projects have a high value and therefore potential for loss or profit. In the case of the DLO, it has always operated on the basis of commercial profit and loss accounting so that it can demonstrate that it has achieved a real profit. If there is going to be real change in the powers of local authorities to work with partners, PPP Companies, Housing Partnerships, Housing Companies and Housing Associations, this is a key issue that needs to be addressed.

7.6 Powers of Intervention

- 7.6.1 While Ministers already have certain powers of intervention whether general (for example, Section 211 of the 1973 Act) or particular (for example, Section 70 of the Education (Scotland) Act 1980) they only relate to failure to implement statutory duties. Three of the powers of intervention proposed here:

- A significant risk to wider public interest or to public funds
- A serious abuse of the power of well-being
- A clear duplication of the role or functions of other bodies

go much beyond that and it is a matter for consideration whether that is appropriate.

- 7.6.2 The consultation paper states that Councils will have the opportunity to make representations in response to any intervention. It needs to be clear that representations should be allowed before any intervention takes place. The Council supports COSLA's call for an 'intervention protocol' which would include the principle that intervention is a last resort after Councils have been given the opportunity to rectify any identified failures.

7.7 Miscellaneous Provisions

- 7.7.1 It is surprising that something as potentially significant as the proposed amendment to Section 94 controls on capital expenditure to replace the current arrangements with a more flexible system is simply included amongst the miscellaneous provisions at Annex A, although this is welcome in principle. These proposals will require to be considered in detail.

8 **CONSULTATIONS**

The Directors of Support Services and Finance have been consulted in the preparation of this report.

9 **BACKGROUND PAPERS**

Local Government Bill : Outline of Proposals

Consultation Paper from the Scottish Executive - December 2001 (copies available from group secretaries and in the members' lounge)

Director of Corporate Planning

Date