



## **Response from the Faculty of Advocates**

**to**

### ***A Consultation on a Local Authority General Power of Competence***

#### Introduction

The Faculty of Advocates welcomes this opportunity to respond to the consultation on a general power of competence for local authorities. We do not take a position on the policy aims of any proposed change. However, within our membership we have significant expertise in local government law, and in pursuing and defending challenges to decisions made by public bodies. We therefore offer the benefit of our experience as it relates to the questions below.

#### Summary

Many of the questions in this consultation are matters of policy on which we take no position, and we therefore offer no answer to the majority of the questions posed.

In terms of our observations on the legal consequences of a general power of competence for local authorities, we offer a summary as follows. We understand that the position in England and Wales is that the introduction of a general power of competence has led to a reduction in challenges to decisions on the ground that they are *ultra vires*. While we fully accept, and indeed champion the notion, that interested parties ought to be able to seek review of decisions that are said to be unlawful, we also note that legal certainty and finality in public decisions would be seen by many to be a desirable outcome. A general power of competence seems likely to lead to such an outcome.

#### Questions to which we offer a direct response

Q3 –We would presume that the Scottish Parliament would, even if Paragraph 7 of Section 22 was effectively repealed, decide to fix *some* limit on how far the power under Section 20 extends. If that is right, then we would advise that such a limitation ought to be made very clear in the statute. We reflect that the Inner House of the Court of Session has affirmed that the power in Section 20 is itself limited. A council cannot, for example,

use the power to do “*anything*” to breach established third party rights (*Portobello Park Action Group Association v City of Edinburgh Council* 2013 S.C. 184). We consider that a clearly defined limit on the power within the statutory scheme would promote legal certainty and finality in respect of decisions taken under Section 20.

Q8 – Our view is that removal of the restriction on duplication of functions would not achieve the same level of legal certainty and finality as a general power of competence. In our experience, and in respect of our observations on the situation in England and Wales, the attraction of a general power of competence is its simplicity. This has tended to reduce the number of legal challenges in those jurisdictions which have given their local authorities such a competence. We would anticipate that simply removing the restriction on duplication of function would leave a range of decisions open to challenge and would not serve to materially clarify a local authority’s competence.