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Local Government Bill: Briefing by Northern
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councillors and former councillors, whereas, in England, Wales and Scotland, the remit extends to public bodies. In fact, in Wales, it also extends to council staff and, in Scotland, to Members of Parliament. In England, there is no commissioner for complaints similar to what is proposed in the Bill here. The Localism Act introduced a new standards regime that required local authorities to produce their own ethical code and to deal with standards complaints internally. In Wales, the complaints are dealt with by local government or the Public Services Ombudsman, which is similar to the Commissioner for Complaints here. Complaints will go to the authority's monitoring officer in an attempt to resolve them locally before going to the ombudsman. In Scotland, complaints are dealt with by the newly established Commissioner for Ethical Standards. Those are the main points that I wanted to highlight from that paper.

I will move to the call-in mechanism. In the Local Government Bill, there is the 15% trigger. In England, a study revealed that 35% of councils require at least three authorised signatories. How a call-in is instigated varies across all the local authorities. The paper lists some of the different variations that they use. That is basically because local authorities must establish a separate decision-making executive with overview and scrutiny committees that then may compel the executive or authority to reconsider a decision. Due to that, functions have been established in a variety of ways. Call-in under the Local Government Bill is based on two grounds. The first is that a decision has not been reached. That may be due to the failure of the policy process or a lack of following the policy framework. Again, that is similar to England. They have only one ground for call-in, which is based on this. In our Bill, the other ground is if a decision would disproportionately impact any section of the community. It is under that ground that a barrister or solicitor can be called in to validate the call-in. It is not necessarily to make a decision on the call-in itself; it is to say whether they feel that the call-in is worth looking into.

I looked at the general power of competence under the Localism Act and how it is applied and used by local authorities across England. The power under the Localism Act is similar to how it operates here in the Local Government Bill. Again, it is considered to be a wider and less restrictive power than the power of well-being. The general power gives councils the same freedom as any individual, provided that the act is within the law. That is stated in the Localism Act as well. There are boundaries under the Localism Act to the power. It may not be used to raise taxes, although it can be used to raise charges for discretionary service purely on a cost-recovery basis where no profit is made. It cannot be used to make by-laws or for any form of enforcement. In fact, it has been causing quite a bit of confusion in local authorities across England due to the lack of by-law making and enforcement under it.

The Local Government Association for England looked in detail at the use of the power by the councils. It found that they are using it in a number of ways to promote innovation in areas such as extending services and support into new areas. That gives councils the specific legal basis and confidence to extend their services beyond areas traditionally seen as their responsibilities. The example from Oxford City Council on page 2 of the briefing note demonstrates that.

Another area is in building greater economic resilience in local communities. A few examples show where local authorities have been offering loan finance to small businesses that have potential but that may not have been able to gain funding from banks. Another one is local authority-based mortgages for first-time buyers.

The final paper looks at the contribution of statutory bodies to community planning in Scotland. The Local Government Bill does not include the statutory community planning partners. That will come later in subordinate legislation. However, the Local Government in Scotland Act 2003 states such statutory bodies; for example, NHS boards, police, and fire and rescue services. Page 3 of that paper contains a list of the stated statutory bodies under that Act.

On the level of contribution and accountability of statutory bodies, neither piece of legislation places an actual duty. In October 2013, the Department of the Environment (DOE) published community planning guidance to councils. However, there is no direct detail on the contribution that is required from statutory bodies. It emphasises participation and engagement with communities and partners. However, it notes that there is no fixed approach to ensure engagement or participation and states that it will be up to councils to select an appropriate method.

Although I say that Scotland does not have a duty under its Act, it has used a number of methods to deal with the issues directly. That is done through the community planning partnerships, single outcome agreements (SOAs) and, more recently, a statement of ambition. The latter two require community planning partners to make more of a commitment. To explain how that might operate, I

can tell you that, in 2012, the Scottish Government and the Convention of Scottish Local Authorities (COSLA) published a statement of ambition to community planning partnerships, in which one of the core principles was to strengthen duties on individual partners. That is so that the Scottish Government and community planning partners ensure that health boards and other public bodies are held to account for their contribution to community planning. In fact, Scottish Ministers can hold appropriate individual partners to account for the effective discharge of their duties.

An example of SOAs can be seen in Fife's community plan up to 2020, which sets out three high-level outcomes to which community planning partners must agree and sign up. The community plan details that the lead partnerships and groups will work together with people in communities in Fife to deliver the agreed objectives.

That is a quick overview of the main areas, but, if members wish, I am happy to go into more detail on any of the other areas, including STV.

The Chairperson: I have a couple of questions. The subcommittee met the Northern Ireland Local Government Association (NILGA) on Tuesday. NILGA made the point that it is concerned that the power of competence is too vague, is almost a free-for-all and may raise false expectations that lead to people coming to councils and asking for different things that councils do not have the resources or power to do. How can we address that? How can we tie this down?

It is great to hear about all the innovative ideas that are being put forward and are materialising in Scotland — first-time buyers and all of that. I do not know whether our councillors would want to dip into that sort of thing, but other precedents could be set that see people go to our local councils and be disappointed that they cannot do things.

Ms Cave: There are limitations to it, which I did not go into but that are in the paper on pages 5 and 6. So, you need to consider those as well.

Mr Weir: I want to touch on two issues in the paper. It is a very good paper. It deals with the issue of code of conduct and the like. You mentioned that, in England, the commissioner for complaints has a remit that covers all public bodies as opposed to simply councillors or ex-councillors. I appreciate that, from our discussions on Tuesday, there may be a particular issue that, as a Committee, we may want to look at a recommendation but we may not have the power to change the legislation on this basis. Would the remit covering public bodies cover the members of a public body irrespective of whether they were councillors or independents, for want of a better word? The point was made to us that we will get a number of bodies here that are mixed bodies. One particular example was PCSPs, where you have a mixture of elected representatives and independents who are appointed. One of the concerns that were raised was that you would have a situation in which the code of conduct, if you like, covered some people in a particular body but not others. I am looking for clarification that the Commissioner for Complaints would cover those independents or non-elected people as well.

Ms Cave: Yes, there is a list that it did cover. It was mainly councillors, public bodies and co-opted members. If I remember correctly, Wales seemed to have a wider remit compared with England and Scotland. The only limitation they gave was that investigations could not be made to individual employees of an authority.

Mr Weir: In the broadest sense, it is public bodies and representatives. The other issue that arose out of that may be outside the remit of what you are looking at, and, if it is not there, it may be useful to get some more information. That is the issue of complaints. In the legislation, there is a lack of or a very limited appeals mechanism. At the moment, the only thing that seems to be potentially envisaged by the Department is a judicial review type of appeal, and there seems to be a general feeling that that is maybe not adequate. Are you aware of any examples elsewhere of where appeals mechanisms are built into the situation where there has been a complaint? It might be useful if we were to look at what mechanisms those are, because, obviously, we are looking to see what we can put in place here and what the best way of doing it is to have some form of appeal for a councillor or whatever.

Ms Cave: In that paper, I did not go into that area, but I certainly can.

Mr Weir: I appreciate that I am maybe throwing something at you. Chair, maybe Suzie could take a look and see in other jurisdictions what appeals and what grounds there are and what the mechanism is by which an appeal is made. There does seem to be general concern that, at present, you have a

situation where somebody could suffer a particular verdict that has very major implications. It seems to be against natural justice not to have some level of appeal.

The Chairperson: Does Wales not have some kind of appeals mechanism? I am trying to remember from your paper. Did it mention an appeal system somewhere? It is a concern that has been highlighted in our submissions quite regularly.

Ms Cave: It is not something that I have gone into in any great detail, but I will take a look into that.

The Chairperson: OK.

Mr Boylan: Thanks very much for the presentation. I welcome the question by Peter about the commissioner, because we are looking at whether we should expand the role of the Commissioner for Complaints. Maybe we will see some examples from the Welsh model and what exactly his role is. I have two points, and one relates to the general power of competence. Say, for example, some council area decides to do something for the betterment of its community and some other council decides not to do it, and a member of the public says that such a council is doing this and the other council decides not to do it, can a member of the public hold the council to account for not doing it? I do not know how that stands legally. There would be an expectation on a council, because if one council is doing it, the public in another council area would maybe like it done too. How would that stack up if a council were challenged as to why it did not undertake to do something that another council was doing?

Secondly, I welcome the new statement of ambition, which is in the Scottish model. Does that sit in statute, is it a regulation, or is it just a signed agreement? I ask that because there are genuine concerns about whether the statutory agencies will participate properly in the likes of community planning and everything else. There are general concerns about that level. I wonder how we can tie it down in our legislation to ensure that those people do participate properly, that the engagement is meaningful and that they attend the meetings and participate in community planning. I would like a wee bit of information on that, please.

The Chairperson: Also, more so as to whether they are going to put their resources into the community plan or align those actions to their own department's policies. That is very important.

Mr A Maginness: With regard to call-in, the context in which England is operating seems to be the context of cabinet-style administration at local government level. The call-in seems to be based on an apparent lack of proper procedure rather than a substantive issue. Is that a correct reading of the situation in England?

Ms Cave: It is hard for me to say. From the evidence that has been given so far, there seems to be such a wide variation in how it is applied that it is hard to come up with a common understanding of it. The research has been looking into it to try to assess how it has been operating across all the different local authorities. However, there are such variations in how it is instigated. Some local authorities allow members of the public to instigate a call-in, whereas others do not. It is left to their own discretion.

Mr A Maginness: Have there been examples of where the call-in has operated that you might think would be useful to us here? Maybe you have not explored that in great detail.

Ms Cave: I looked at it in general, but I could do that. I could go into more specific examples —

Mr A Maginness: It might be interesting to have a few examples of where it has been effectively used and the circumstances in which that happened. I think that concrete examples are more helpful than the overall procedures and theory. With regard to legal opinion, I know that, under our legislation, we are talking in terms of a solicitor or a barrister. Is that the position in England, or is it just a matter of procedure?

Ms Cave: There is no provision for that use of a solicitor or barrister in England. With the Local Government Bill, one of the two areas that call-in can be used for is the disproportionate impact on a section of the community. Again, I tried to get clarity on the idea of "section of the community", but they seemed to say that it was going to be defined as part of the community that has a specific description. Again, that is when the solicitor or barrister can be used. In England, the call-in is only

used on the process — so, for failure to reach a decision — and therefore the solicitor or barrister element is not written into the Bill.

Mr A Maginness: So, really, we are dealing with fairly novel territory here. The English experience is a little bit different from our own.

Ms Cave: Yes, it is more limited towards the process and the failure to reach a decision, whereas the Local Government Bill has now introduced the element of disproportionate impact on the community.

Mr A Maginness: Thank you very much. That is very helpful.

The Chairperson: Actually, Alban, at the discussions on Tuesday, the Northern Ireland Local Government Association (NILGA) suggested that there should be a panel of solicitors, stressing that different solicitors may give different views.

Mr A Maginness: Yes, I am sorry that I was not here on Tuesday. I apologise for that.

The Chairperson: In order to keep consistency across different councils, there may perhaps be a panel of solicitors to adjudicate on requests.

Mr A Maginness: Yes, that might be a better idea.

Ms Cave: Yes, to keep more of a standardised approach.

The Chairperson: We will talk to the Department about that.

Mr Elliott: Thanks, Suzie, for the presentation. Regarding the call-in again, is there any indication of the criteria that will be used? I know that at the bottom of your report, regarding barristers and solicitors, it states that the Department plans to develop some form of consistent criteria, and I know, as the Chair said, that NILGA indicated that it would like a panel or pool; but is there any indication that the Department will put that criteria into legislation, either secondary or otherwise, or will it be just guidance?

Ms Cave: I asked the Department that question, and it said that, at this stage the guidance will be developed whether it will be statutory or advisory.

Mr Elliott: So, we do not know.

Ms Cave: It did not clarify that.

The Chairperson: We had a bit of a discussion on Tuesday on whether it will be by guidance, which is really on a voluntary basis, or regulation.

Mr Elliott: I do not know whether NILGA came to a firm view on that either. My recollection is that it did not have a firm view on whether it should be statutory or just guidance.

Mr Weir: Chair, as we are getting a bit of clarification, NILGA was saying that it was getting a mixed understanding of the extent to which there would be guidance and how much would be in regulations.

The Chairperson: I think it is going to come back to us on that. There are a few issues that it will come back to us to clarify.

The Chairperson: OK. Are there any more questions for Suzie? Thank you very much, Suzie.

Members, is there any other information that you would like to seek? Those are all the issues that we want to look at again.

Mr Elliott: One issue that came up again on Tuesday was whether a council employee could become a councillor. There was quite a lot of debate on that. Peter indicated that it was based on a European judgement. I wonder whether there is any point in our getting a bit more information on that

judgement. I know that NILGA indicated that it was opposed to giving permission to or allowing people who are employees of councils to become councillors, and certainly not in their own council, I think was the key. I wonder whether we could get more information on that because it was the first issue that NILGA raised.

The Chairperson: NILGA was quite content for employees to become a councillor in another council but not to become one in the council for which they work.

Mr Elliott: I think that that was the compromise that they were suggesting in the end.

The Chairperson: I can understand that. It is just going to be so difficult.

Mr Weir: Let me take up that point. I think that it is a reasonable enough point to make that, if someone is an employee in a different area, it would seem to be slightly strange as to why that person would be excluded. It may be useful to find out precisely what the current legal position is.

The bit that slightly confused me, or at least suggested to me that we may previously have been given the facts but not the full facts, is the indication given by the Department. It may be the case that there is a wee bit of mixed information in it. Somewhere there has been a degree of miscommunication, perhaps even in the information that we got on Tuesday. The information that we got from the Department is that that position is changing because of a European Court ruling. I believe that a couple of employees in England who, I think, worked for a parish council took the court case. The impression that I got from the Department, when it raised the matter in Committee, was that this is a requirement that we have to bring in because of something that happened pretty recently. However, the NILGA representatives said that someone in the Department had mentioned a 1989 court case to them. Thus, the two do not seem to add up. One obvious thing, I would have thought, is that, if there was a European Court ruling in 1989 that said that you cannot put a bar on council employees, it seems that someone has massively fallen down on the job if our legislation remained unchanged for 24 years in contravention of European law. It may be that there has been another court case, and someone in the Department has not relayed that information to NILGA. I do not know. It may be worthwhile to find out what the position is. I agree with Tom's remark.

The Chairperson: My understanding is that it was a fairly recent case, not one from away back in 1989.

Mr Weir: That is certainly the impression that I got, but that may beg the question that, if that has been mentioned elsewhere by some other officials to someone in NILGA, referencing the 1989 case, does it mean that those officials are unaware of the more recent case? I think that we need to get a bit of clarity on this.

The Chairperson: We will look into that, too.

Mr McElduff: In support of Alban's point —

The Chairperson: Sorry. Let me remind members to move their tablet away from the microphone. Apparently, some members' tablets are obstructing the microphone.

Mr McElduff: I support Alban's point about call-in. We should try to get that fleshed out a bit more. Perhaps other jurisdictions, some of which might be described as divided societies, can provide guidance on the substantive issue of protection of minorities. Are there specific examples of that?

The Chairperson: I think that that part on adverse effects on sections of the community is quite specific to us in Northern Ireland. Is that right, Suzie?

Ms Cave: Yes.

The Chairperson: OK. Thank you very much, Suzie. We look forward to seeing you back again.