

## NATIONAL ASSEMBLY FOR WALES

### *General Power for Best Value Authorities in Wales to Charge for Discretionary Services – Guidance on the Power in the Local Government Act 2003*

1. The Local Government Act 2003 (the 2003 Act) received Royal Assent on 18 September last year. The Welsh Assembly Government worked closely with the Office of the Deputy Prime Minister to ensure that Welsh interests were adequately reflected in this Act. The 2003 Act includes a general power for Best Value Authorities in both England and in Wales to charge for discretionary services. Best value authorities are defined in section 1 of the Local Government Act 1999, and the term “best value” also refers to the Wales Programme for Improvement as it applies to Welsh local authorities. This power came into force two months after Royal Assent on 18 November 2003. The Local Government Act 2003 is available from The Stationary Office and can be found on The Stationary Office website:  
<http://www.hmso.gov.uk/acts/acts2003/20030026.pdf>.
2. This guidance is issued under the power at section 93(6) of the 2003 Act. Best Value Authorities must have regard to the advice it contains when charging for discretionary services under the power at section 93 of the 2003 Act. This guidance applies only to Wales. Separate guidance has been issued for England.
3. This guidance offers advice on:
  - The scope of the general power to charge for discretionary services;
  - Authorities having benefit of the power;
  - Discretionary services;
  - The limitation to cost recovery;
  - Calculating the costs and setting the charge;
  - The Competition Acts and the effect on local businesses; and
  - The use of the power to remove the power to charge and amend existing legislation.
4. This Guidance is available on the Assembly’s web site (web link: [www.Wales.Gov.UK](http://www.Wales.Gov.UK)). It applies only to the general power to charge for discretionary services contained in the 2003 Act. It does not apply to charges levied under other legislation through which an authority has a power to charge. Where an authority has benefit of a separate power to charge for a discretionary service (either now or in the future), that power will remain in force and the new general power to charge for discretionary services at section 93(1) of the 2003 Act will not be available (see section 93(2) of the 2003 Act).

5. Charges made under the power to charge at section 93 of the 2003 Act are limited to cost recovery. Any authorities wishing to engage in commercial activity with the private sector in their discretionary services will need to rely on other powers, such as the trading powers bestowed under section 95 of the 2003 Act.

#### Trading Powers in the 2003 Act

6. Section 95(1) of the 2003 Act provides the Welsh Assembly Government with a power to make an order enabling authorities under the Wales Programme for Improvement to trade in any of their ordinary functions. The intention is that the new power will be available to those Welsh authorities that have been assessed as eligible to trade via their performance under the Wales Programme for Improvement. The power to trade conferred by these provisions is only exercisable through a company within the meaning of Part 5 of the Local Government and Housing Act 1989 ("the 1989 Act") (companies in which local authorities have interests).
7. Section 96 of the 2003 Act provides an order-making power to impose conditions on the exercise of any trading power by a best value authority, including where the trading activity is undertaken through a company. Best value authorities are required to have regard to guidance issued about the exercise of their trading powers. Guidance on the trading powers contained in sections 95 and 96 of the 2003 Act will be issued separately.

#### Key Features of the Charging Power in the Local Government Act 2003

8. The general power to charge for discretionary services provided in the 2003 Act<sup>1</sup> (at sections 93-94 & 97-98) has a number of key features:
  - If authorities decide to charge for discretionary services, they will be under a duty (set out on the face of the Act) to secure that, taking one year with another (see paragraphs 21 and 24), the income from charges does not exceed the costs of provision.
  - Authorities must already have the power to provide the service. This includes discretionary services provided under well being powers in the Local Government Act 2000.
  - The recipient of the discretionary service must have agreed to its provision, and to pay for it.
  - The power does not apply to services that an authority is mandated or has a duty to provide.

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<sup>1</sup> The Local Government Act 2003 can be found on The Stationary Office website: <http://www.hmso.gov.uk/acts/acts2003/20030026.pdf>.

- The power does not override any existing or future provisions in primary or secondary legislation which:
  - Expressly prohibits an authority from charging for a discretionary service; or
  - Confers a power to charge for a discretionary service.
- Charges may be set differentially, so that different people are charged different amounts. Authorities are not required to charge for discretionary services. They may provide them for free if they so decide.
- A reserve power (section 94) to allow the Welsh Assembly Government to disapply the new charging power.
- Powers at sections 97-98 would allow the Welsh Assembly Government to modify or exclude the application of an enactment that confers power on an authority to charge for a discretionary service or that restricts their ability to charge for a discretionary service.

*Which authorities will be able to use the power to charge for discretionary services in the 2003 Act?*

9. The new powers for charging for discretionary services are available to all best value (Wales Programme for Improvement) authorities in Wales, which comprise:

Unitary authorities  
 Police<sup>2</sup>  
 Fire<sup>3</sup>  
 National Parks

*What are Discretionary Services?*

10. Discretionary services are those services that an authority has the power, but is not obliged, to provide. For example Authorities have the power under various statutes to offer a range of advisory services, such as trading standards and fire safety, but do not have a clear power to charge. The Local Government Act 2000 gave authorities a general power to promote the economic, social and environmental well being of local communities (see paragraph 14). This power gives authorities very broad discretion to provide additional services, but does not provide a clear

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<sup>2</sup>It should be noted that Police and Fire Authorities in Wales derive their status as best value authorities from the local government Act 1999, the operational requirements from this status are the responsibility of the Home Office and the Office of the Deputy Prime Minister respectively.

<sup>3</sup> The Fire and Rescue Bill currently before Parliament, provides for the transfer of responsibility for Welsh Fire Authorities from ODPM to the National Assembly for Wales.

power to charge. There are, therefore, a variety of services that an authority can provide. Through the new power to recover via a charge the costs to an authority of providing a service, the Welsh Assembly Government aims to encourage authorities to provide more wide-ranging and new and innovative services for their communities.

#### DISCRETIONARY SERVICES OFFERED BY AUTHORITIES

Local authorities are currently involved in a wide range of discretionary services that include discrete areas of activity and examples of extensions to statutory services.

Some of the discretionary services most frequently offered are large scale, well-established and are often regarded as part of the mainstream activities of the local authorities. For example, many authorities are major suppliers of leisure services, including sports, recreation and parks and countryside facilities, museums, galleries, theatres and concert halls.

Extensions to statutory services include a range of advisory services linked to planning and development control. These are not a statutory requirement, but can make an important contribution to the operation of the statutory services. Local authorities have chosen to enhance their Social Services support by offering assistance to vulnerable young people and their families in the home, and supporting elderly residents leaving hospital.

11. Services that an authority is mandated or has a duty to provide are not discretionary services and will not benefit from the new power at section 93 of the 2003 Act. However additions or enhancements to such mandatory services above the level or standard that an authority has a duty to provide may be discretionary services.
12. To be able to make use of the new power to charge for a discretionary service, authorities must have an existing power to provide that service. Under ordinary legal principles, an authority has power to do anything reasonably incidental to its express powers. In circumstances where an authority wishes to charge, for example, for works or supplies, the authority will need to satisfy itself that the enactment which authorises provision of a particular service would also permit the provision of anything reasonably incidental to that service. Where an authority is relying on subsidiary powers under section 111(1) of the Local Government Act 1972 to authorise the provision of a service to facilitate the discharge of a specific function, then the authority may charge under section 93(1) of the 2003 Act for that function related service by virtue of the dis-application at section 93(7)(a) of the 2003 Act.
13. Where a power to charge for a particular service is provided elsewhere in legislation (either currently or in the future) that power takes precedence and the new power to charge in the 2003 Act does not apply. Similarly

where there is an express prohibition in legislation that prevents authorities from making a charge for a service that prohibition will remain in force and the new power to charge will not be available.

### Well-being

14. Local Authorities<sup>4</sup> have wide powers to provide discretionary services including powers in the Local Government Act 2000 (section 2) to do anything they consider likely to achieve the promotion or improvement of the economic, social and environmental well-being of their areas. For the purposes of the new power to charge in the 2003 Act, the prohibition on raising money in relation to their power to promote well being is to be disregarded (see s3(2) of the 2000 Act and s93(7) of the 2003 Act). This dis-application of the prohibition on raising money fulfils the commitment to provide a general power to charge for services provided under well being powers.
15. Draft guidance on the well-being powers for Welsh local authorities was issued in May 2001 and is available via the Assembly's web-site. An updated version of this guidance, taking account of the provisions in the 2003 Act, will be issued for consultation in the near future.

### Limitation to cost recovery

16. By providing a power to charge for discretionary services the Welsh Assembly Government's aim is to encourage authorities to provide those sorts of services they would otherwise decide not to provide (or improve) at all because they cannot justify or afford to provide them for free or to improve them. The aim is not to provide a new source of income for authorities, but to allow them to cover their costs.
17. The 2003 Act therefore provides that for each discretionary service for which a charge is made using the new power, authorities should be under a duty to secure that, taking one year with another, the income from charges for that service does not exceed the costs of provision.
18. The requirement to take one year with another recognises the practical difficulties local authorities will face in estimating the charges. It establishes the idea of balancing the books over a period of time (which may be a number of years – see paragraphs 22-24) without having to have detailed prescription either on the face of the Act or in secondary legislation. Any over or under recovery that resulted in a surplus or deficit of income in relation to costs in one period should be addressed by an authority when setting its charges for future periods so that over time income equated to costs (see also paragraph 27).

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<sup>4</sup> Well-being powers are restricted to the principal authorities in Wales.

### Calculating the Costs of Provision and the Charge

19. Each Authority making use of the new power to charge will need to establish a robust methodology for assessing the costs to the authority of providing each discretionary service. Authorities are free to decide what methodology they wish to adopt. They may however find it helpful to draw on existing and familiar principles as set out in the CIPFA Best Value Accounting Code of Practice (the Code). One option would be to use the Code's definition of Total Cost. As an alternative, authorities may wish to consider adding to Total Cost an appropriate contribution for Corporate and Democratic Core (CDC) and Non-Distributed Costs (NDC), as those terms are defined in the Code, as a part of the costs of provision.
20. The Code offers guidance on practice authorities might adopt and is amended from time to time to take account of changes in requirements.
21. Any capital and investment costs necessary to establish a new service or to improve or extend an existing service are legitimate costs of providing the service. Consistent with standard local government accounting practice, to the extent that these costs are charged to revenue, they can be set against income in calculating whether the cost ceiling rule has been met.
22. Section 93(3) of the 2003 Act places authorities under a duty to secure that, taking one financial year with another, the income from charges does not exceed the costs of provision. The Assembly Government recognises that when establishing a new service, authorities may have limited information initially upon which to base their assessment of the costs they expect to incur and thus the charge that should be made for a particular service. This provision is intended to allow an authority flexibility in the setting of the charge for each kind of service so that over a period of time (which may be a number of years – see paragraphs 23-24) the charges made for that particular service do not exceed the costs incurred by an authority in providing that service.
23. Authorities will wish to establish a period over which it would be appropriate to gather information or make estimates to calculate the cost of providing a particular kind of service and therefore the charge that should be levied. This period may also be the period over which an authority would expect to compare income with costs for the purposes of complying with the duty at section 93(3) of the 2003 Act (see paragraph 17-18). The period adopted may differ both between services within an authority and between authorities. The 2003 Act does not specify a period over which charges should be calculated; this is left to authorities' discretion.
24. Initially Authorities may find it useful to consider assessing the cost of providing a service, the projected take-up of that service and thus the charge that should be made, over a period of not less than 1 year and no

more than 3 years. For services that require capital investment it may be appropriate to specify a longer period.

### Setting the Charge

25. The 2003 Act allows authorities to set the level of the charge for each discretionary service as they think fit within the restriction that the income from charges for each kind of service must not exceed the costs of its provision as described at paragraphs 19-24 above. By virtue of section 93(4) of the 2003 Act, authorities are to secure that for “each kind of service” the income from charges does not exceed the costs of provision. This provision allows authorities to compare the charges for and income from similar or related services together and so offers some flexibility to group services together when assessing compliance with the duty imposed by section 93(3) of the 2003 Act.
26. Should they so wish, Authorities may continue to provide a service for free. Equally they may decide not to make a charge at all for a new discretionary service or to charge different amounts to different groups of recipients. The general charging power recognises that in certain circumstances authorities may wish to offer certain services at a reduced charge or for free, for example to the disabled, the unemployed or those in receipt of benefit, while making a charge based on the cost of providing the service to other recipients. Differential charging for local authorities’ discretionary services is already well established, through, for example, discount cards for leisure services. These principles could be applied more widely for services where the general charging power applies.

### Use of estimates and later adjustments

27. Authorities should use the best available information about the expected cost for each service over the period (see paragraphs 21-23) adopted by the authority for assessing the cost of that particular service. There may, however, be circumstances where an authority inadvertently recovers more than its costs and thus generates a surplus. Where surpluses or deficits of income in relation to costs result from the use (particularly initially) of estimated income and expenditure information or from unexpectedly high or low uptake for a service, such surpluses or deficits should be taken into account when setting charges in the following period (see paragraph 18) so that taking one year with another income does not exceed costs and the authority complies with the duty.

### Obtaining the Recipients agreement

28. Under the new power, authorities will not be able to require a person to pay for discretionary services that they do not wish to receive or use. The new power will operate on the basis that the discretionary service is offered at a charge and that anyone who requires the service agrees to take it up on those terms.

### Preparing to Charge

29. When offering any new services at a charge or introducing a charge for existing services, authorities are advised to make appropriate administrative arrangements. These might include the following matters:
- Terms and conditions for the provision of the service;
  - Information about charges e.g. discounts; annual increases;
  - Billing/payment arrangements (including third parties).
30. Providing discretionary services, and in particular advisory services, may take authorities and their officers outside the coverage of their existing professional liability insurance. Authorities are therefore advised to review the cover provided by their professional liability insurers in connection with their duties on behalf of the authority and to ensure that they are properly insured in this respect for any new services they propose to offer. A proportion of any such insurance costs would be a legitimate element of the costs of the service in question.
31. When considering the introduction of charges for advisory services authorities will wish to take a view as to whether the charges will improve overall levels of regulatory compliance. Consultation with local businesses and other interested parties may inform their consideration.

### The Competition Acts and effect on local businesses

32. Authorities need to ensure that when using the general charging power conferred by the 2003 Act they fully comply with other complementary legislation such as the Competition Acts. Otherwise they risk being investigated and taken to court for non-compliance and may incur significant associated costs.
33. When considering whether to charge for services using the general charging power, authorities are advised to consider the likely impact on local businesses and may wish to consult with them and other interested parties.

### Use of power to remove the power to charge

34. The Welsh Assembly Government expects to use the power at section 94 to remove the power to charge for discretionary services from particular authorities or in respect of particular services only exceptionally. However this section means that the Welsh Assembly Government could take action, for example in the event of unfair competition.
35. The Welsh Assembly Government could remove the power to charge in circumstances where an authority was found to be making a commercial return on charges levied under section 93, where the authority otherwise had no power to trade on a commercial basis (i.e. the power in section 95 had not been extended to the authority in question – see paragraphs 6-7)).



36. The power might be dis-applied in respect of a particular service, where it might be deemed not in the public interest to charge for that service.
37. Any orders under section 94 of the 2003 Act to remove the power to charge would also contain transitional provisions (under section 123 of the 2003 Act) that would take into account any existing charging arrangements affected by the withdrawal of the power.

#### Use of powers to amend existing legislation

38. Once authorities begin to use the proposed new powers to charge, it may become clear that there is certain legislation in place that in some way restricts a best value authority's ability to charge for the provision of a discretionary service. The provisions at sections 97 and 98 will allow modification of any such enactment following rigorous scrutiny in both Houses of Parliament. These powers are similar to those in the Local Government Act 2000 in relation to the promotion of economic, social and environmental well being.

#### Other issues

39. The implications of the European Court of Justice's ruling in the case of *European Communities v Italian Republic*<sup>5</sup> are to be noted in the context of charging for services. The case relates to concessionary rates for access to local museums, monuments, galleries etc. In its judgement the Court held that the state is not permitted to grant concessionary rates for access to cultural sites for its own nationals only. Similar principles apply to sites controlled by local authorities (since the state is held responsible for its municipal and decentralised authorities) and to concessions based on residency rather than nationality which was held to be another way of favouring nationals over non-nationals.

National Assembly for Wales  
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<sup>5</sup> EC Court Judgement – 62001J0388 Judgement of the Court (Sixth Chamber) of 16<sup>th</sup> January 2003. *Commission of the European Communities v Italian Republic*.