



SCDC Policy Briefing

The Scottish Government's draft Community Empowerment (Scotland) Bill

November 2013

Introduction

On 6th November 2013, the Scottish Government launched its consultation on the Community Empowerment (Scotland) Bill. In its introduction, the draft Bill asserts that 'the Scottish Government strongly values community led action' and that the cornerstones on which the proposals for the Bill are based are 'empowering our communities and making the most of the talents that exist within our communities'. The Bill is based on '...supporting local democracy and local decision-making... focused on improving outcomes for individuals and communities across Scotland'.

SCDC welcomes many of the aspirations underpinning the draft legislation. We view a strong, active community sector, enhanced civic society and participatory democracy as key features of the cornerstone of an active, inclusive and just Scotland. The policy aims and support for local self-determination and community empowerment contained in this draft Bill are a welcome step toward realising those goals.

But what does this really mean for community empowerment for all of our communities across Scotland? What new opportunities will the legislation offer and how might the proposals be strengthened to support genuinely empowering processes which advance equality of opportunity?

1. The purpose of this briefing

This briefing is intended to raise awareness of the areas of community empowerment the draft Community Empowerment (Scotland) Bill seeks to address and to encourage those with an interest in advancing the opportunities for community led action to respond to the consultation process. The briefing is written from a community development perspective and through a social justice and equalities lens.

A large chunk of the draft Bill is concerned with technical processes for the transfer of assets to communities, the rights of communities to buy land and the provision of allotments. Other aspects of the proposed legislation include increasing transparency of common good, dealing with defective and dangerous buildings, and recovery of expenses. These are not areas of SCDC expertise so this briefing will touch only lightly on transfer of assets and community right to buy, highlighting the broad aspects which we feel need to be considered in opening up the opportunities offered by community ownership and control for communities operating at different levels of capacity.

The areas this briefing will focus most closely on are community engagement, termed in the Bill as a 'request to participate', and strengthening community planning. The briefing will provide a summary of the legislative proposals and raise a number of issues to help stimulate thinking on potential areas for response through the consultation process.

2. The consultation process

The content of the draft Bill responds to an earlier consultation on initial proposals for the draft legislation, which has resulted in this next stage of consultation. The new consultation covers the following three areas:

1. Draft legislative proposals.
2. Detailed policy questions which have not yet been drafted in legislative language.
3. New policy ideas on expressing ambitions for creating a successful Scotland.

The more developed legislative proposals on asset transfer, the right to buy land, the provision for allotments and the right to request participation, are clearly set out. Legislative processes are explained in detail and accompanied by an explanation of the definitions and terminology used. The proposals in the draft Bill that are not accompanied by the same level of detail on process and definition, for example, strengthening community planning, are more open to interpretation but, arguably, also more open to broader influence.

The call for consultation responses is framed in a set of key questions, some of which are broad enough to accommodate detailed feedback. SCDC is keen to provide concrete and tangible proposals that can be included in the Bill to go to Scottish Parliament.

The consultation period ends on the 24th January 2014. SCDC will be submitting a full response based on our own views and the views expressed by the organisations and individuals we work with in the advancement of community development outcomes. If you do not intend to make a submission independently and would like your views to be considered as part of SCDC's response, please complete the short survey we have developed by clicking on the link at the end of this document.

3. Community capacity building

One of the themes that will run through SCDC's response to the draft Bill is the need to provide community capacity building support for those communities which may not currently be at the stage where they can access the opportunities afforded by the new legislation.

For the purposes of clarity, we define community capacity building as 'the activities, resources and support that strengthen the skills, abilities and confidence of people and community groups to take effective action and leading roles in the development

of communities’¹. We define community engagement as ‘developing and sustaining a working relationship between one or more public body and one or more community group, to help them both to understand and act on the needs or issues the community experiences’².

We believe that community capacity building and community engagement are central to the success of achieving the Community Empowerment (Scotland) Bill’s policy aims and that significant capacity building support delivered at a community level, designed to assist communities to develop their skills, confidence, organisation and influence, is required to equip communities to participate fully. In the absence of such activities, we are concerned that the opportunities of the bill will not be enjoyed equitably and that some communities will benefit while others may not, particularly those communities which are most marginalised, fractured and impoverished.

This is recognised, in part, in the introduction to the consultation document where reference is made to the Strategic Guidance on Community Learning and Development and the Requirements for Community Learning and Development (Scotland) Regulations role in auditing local needs for Community Learning and Development Provision. Whilst the community capacity building support provided through Community Learning and Development is important, our view is that having recourse only to ‘*assessment of need for Community Learning and Development provision*’ does not adequately address the need for the availability of the kind of tailored community capacity building support which is required to enable communities across Scotland to access the opportunities offered by the new legislation.

4. The draft legislation

4.1 Community Right to Request Rights in Relation to Property (ownership and control of assets such as buildings and land)

Section 3 of the draft Bill sets out provisions designed to give community bodies a more proactive role in identifying public sector land and buildings that they would be interested in owning and using for best public benefit. The provisions set out definitions of what constitutes a community body, which public bodies are covered by the legislation and terms surrounding timescales and the right to appeal a decision.

As the legislative proposals for this section of the Bill are at an advanced stage, the consultation questions in this section are confined to process and definition.

¹ Skinner, S. (2006) Strengthening Communities: A guide to capacity building for communities and the public sector, Community Development Foundation, p4

² Scottish Government (2005) *National Standards for Community Engagement*
<http://www.scotland.gov.uk/Resource/Doc/94257/0084550.pdf>

Our view is that this element of the proposed legislation is positive in that it enshrines in legislation a right for a community body to request the transfer or use of a public asset for wider community benefit. However, the legislation is weak in equalities terms as the proposals do not extend to provisions to offer any level of support to engage in the process of asset transfer, which may adversely affect the chances of those communities unable to comply with the processes or unable to raise finance to pay market value rates. In addition, marginalised, fractured and impoverished communities may have fewer assets or assets of lower quality in their areas, which could be harder to manage and maintain.

It is conceivable that a group or organisation which obtains a community asset could restrict use of this asset to particular sections of the community or for particular community interests. In this regard, we suggest that the definition of “community body” requires more scrutiny in order to ensure that any asset transfer benefits the widest set of community interests possible.

The proposals, as they stand, state that there is no right to appeal a decision not to transfer made by local authorities and Scottish Ministers as they are democratically accountable. We would argue that this does not reflect community empowerment principles.

4.2 Improve and extend community right to buy

This part of the draft legislation is concerned with extending the community right to buy land to all of Scotland, including urban areas and settlements with a population of 10,000 or more (currently excluded in legislation), whether there should be a compulsory right to buy, streamlining the legislation and improving the processes of the community right to buy in order to remove barriers and increase opportunities. SCDC welcomes the proposals to extend the right to buy to urban communities as, in the right circumstances ownership and control of land by communities can lead to better, more sustainable and more innovative use of local resources for wider community benefit.

The legislative proposals in the draft Bill for the extension of the community right to buy are heavily technical. This is, arguably, borne of necessity for the need to balance the interests of both communities and landowners. The proposals include guidance on many technical aspects associated with the purchase of land, which include what constitutes registrable land, timescales and balloting arrangements.

In the section of the draft legislation on communities responding where land unexpectedly comes on the market, the statement is made that ‘the underlying policy of the community right to buy is that community bodies should prepare themselves for the community ownership of land. Communities should therefore be proactive in identifying land and land assets that can contribute to their sustainable development.’

This statement is justified; in order to ensure land is used and maintained in a sustainable and ethical manner and is used in ways that promote wider community benefit, communities wishing to own the land must be confident, skilled and able to evidence that they will use the land to meet local need.

Many communities in Scotland have bodies and processes in place that should enable them to make positive use of this aspect of the legislation, but the complexity and rigour attached to the legislative proposals reinforces our earlier point about the need for tailored support designed to allow communities without capacity and processes in place to be able to access the opportunity to own their own land and reap the potential benefits to be derived from this.

4.3 Community right to request to participate in processes to improve outcomes of service delivery (or, in short, ‘request to participate’)

The request to participate part of the draft legislation is the area which was previously described as community engagement. The proposals are designed to support participatory democratic processes in the recognition that ‘evidence shows that involving people more regularly and more effectively in the decisions that affect them leads to better outcomes and a greater sense of control for communities.’

This part of the Bill aims to support the empowerment of communities by ensuring that they have a say in what matters to them, by improving transparency in public sector decision making, by providing opportunities to make the most of the knowledge and talent that lies in communities and by fostering positive relationships between community bodies and the public sector.

The draft Bill sets out what is defined as a community body and a public service authority, the procedures by which a participation request should be made, criteria for agreeing to or rejecting the request and how decisions will be made. The Bill sets out what the requirements are for the public sector authority in establishing an outcomes improvement process, what their reporting duties are and information on timescales for decisions.

The guidance on this element of the draft Bill cross references to new proposals in relation to engaging communities in Community Planning, the detail of which is laid out in the Strengthening Community Planning section of the consultation document.

Our strong view is that this cross reference is vitally important in ensuring that the request to participate does not stand alone. This view is based on the grounds that, if this were to be the only legislative duty set out in the Bill, there is a danger that engagement with community views could be interpreted as the responsibility of communities only and that there is therefore no requirement or ‘duty’ on behalf of public sector authorities to initiate participatory processes of community engagement. Another interpretation might be that public sector authorities are only required to have an outcomes improvement process in place *if* there is a participation request from a community body or bodies.

While there are dangers inherent in not linking the request to participate to duties for public sector authorities to initiate an outcomes improvement process and associated community engagement plan, the proposal for a request to participate should be welcomed as it gives communities the opportunity to request their involvement and places their right to be heard firmly in a legislative context.

We believe that this part of the draft legislation, although positive in broad terms, raises many issues for consideration when responding to the consultation. These issues are highlighted below;

1. The processes set out for requesting a right to participate are fairly complex. As highlighted earlier under the proposals for assets transfer and community right to buy sections, this could affect equality of access in the pursuance of the right to be heard. Without proper supports being made available to marginalised communities, this complexity could turn what should be a creative and sensible dialogue between communities and public sector agencies into a legalistic process which, by its nature, will favour the most powerful voices.
2. In the absence of other mechanisms for public sector authorities to implement a planned approach to engaging communities, this legislation could potentially be used mainly to initiate a challenge or appeal when something is not delivered by public sector authorities or when something goes wrong. This could undermine the development of positive relationships between communities and public sector partners with the legislation being used in an atmosphere of animosity.
3. The proposals ask community bodies requesting a right to participate to promote what part they will play in delivering change and to provide details of what knowledge, expertise and experience they have in relation to a specified outcome. There are potential tensions here as, in many cases, communities may not have the resources to deliver improvement interventions. On the contrary, they may seek to use engagement processes to generate resources for this very purpose – to co-deliver or deliver independently.

We believe that this area of the legislative proposals should be substantially strengthened to ensure that barriers to participation are reduced for community bodies. Community bodies, made up of community members, are the most significant stakeholders in services. There should be explicit acknowledgment that they have the knowledge, expertise and experience necessary to be able to contribute to improving services that affect them.

4. In reaching a decision on whether or not a participation request will be granted, the public service authority will review the evidence submitted by the community body, or bodies (joint requests can be made) to assess if there is enough evidence that agreeing to the request can promote or improve outcomes

associated with economic development, regeneration, public health, social wellbeing or environmental wellbeing. This is a subjective area. What constitutes robust evidence is often open to wide interpretation and the kind of evidence generated by and accessible to communities (often referred to as 'grey' evidence) could be dismissed if it is not viewed as research based. Added to this are definitional problems on what constitutes an outcome.

5. In the draft legislative processes it is stated that 'the authority must agree to the request unless there are reasonable grounds for refusing it'. The question here is what is reasonable and what is unreasonable? Would the Wednesbury test of unreasonableness found in common law and used in judicial review proceedings apply? Here, an unreasonable decision is defined as: "a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it"; and as "beyond the range of responses open to a reasonable decision-maker".³

These principles require a decision maker to take into account correct considerations and information when coming to a decision, but they may impose too high a bar for a decision by a public authority to be found unreasonable.

4.4 Strengthening community planning

The section in the guidance section of the draft Bill on strengthening community planning is not yet supported by detailed legislative proposals. Instead it constitutes a background and description of community planning arrangements, setting out a case for change which builds on the recommendations of the report of Christie Commission.

In broad terms the proposals in this section are concerned with a legislative framework for effective community planning which places increased emphasis on the planning and delivery of outcomes, puts Community Planning Partnerships and their key responsibilities on a statutory basis, places new duties on partner bodies so that the Community Planning Partnership can fulfil its responsibilities and ensures greater external scrutiny.

The terms duties and principles are used interchangeably in this section and this lends a lack of clarity to what is actually being proposed in legislative terms.

The aspect of this part of the draft Bill of most interest in community development terms is the engagement of communities in community planning processes. Some of the concrete suggestions contained within the pre-draft Bill consultation have been stripped out, for example, compulsory use of the National Standards for Community

³ For more information: <http://www.scotland.gov.uk/Publications/2010/02/23134246/7>

Engagement and the requirement to publish and implement a community engagement plan.

These tangible proposals have been replaced by a proposition that the ‘core duties’ of each CPP should include ‘consulting and engaging with communities in identifying and prioritising the outcomes that are to be delivered and ensuring that community engagement is properly planned, resourced and integrated across partners’.

In our view, the requirement for community engagement and the treatment of community views in influencing and shaping, or co-producing services, should be central to the legislative proposals and is not explicit enough in the draft Bill. For example, there is no reference to the involvement of communities in decision making processes about service delivery or improvement planning.

This element of the consultation, because it is as yet unsupported by draft legislative processes but will potentially form part of the Bill when it is passed, requires detailed responses on reasserting the central role communities have in deciding how services should be designed and delivered in order to meet local need.

Some of the issues we believe should be considered in responses to the consultation are;

1. The question of whether the different functions of consultation and engagement should be separated with an explicit duty on resourcing the engagement of communities. It could be argued that the latter would be given greater attention or priority if it is made a function in its own right.
2. Although engagement in community planning should not be confined within representational structures, the Bill could make explicit the right of communities to be represented in, or to contribute to, the work of Community Planning Partnership boards and related sub structures.
3. As the proposals are currently written, the roles of each of the Community Planning Partners are clearly articulated but no such role for communities is described. An explicit description of the role of communities in community planning structures is something that could potentially improve the Bill.
4. Should there be a requirement for local authorities to resource and engage with local community representative bodies about neighbourhood, or place issues in their own right and as part of their “community leadership” function?
5. As it stands, the Bill does not require Community Planning Partner agencies – separately and jointly - to report annually on their community engagement activity. The Bill could be an opportunity to legislate to make Community Planning Partners account for their investment and spend on community engagement, and the outcomes the engagement has led to.

6. A related issue is whether or not there is merit in reintroducing mandatory use of the National Standards for Community Engagement into the Bill and whether this should be linked to the publication of a plan for community engagement.
7. As outlined earlier in this briefing, the proposed legislation on Community Planning Partnerships is in a separate section of the Bill to the request to participate section. A clear link could be established within the Bill providing the basis for a dual approach to community engagement which supports both community instigated participation and planned engagement processes instigated by public services authorities.
8. Lastly, the Bill is an opportunity to expand the core duties of Community Planning Partnerships to include the involvement of communities in decision making processes about service delivery or improvement planning and not confined only to identifying the outcomes to be achieved.

5. Equalities considerations

As referred to in the earlier section of this briefing in the section on community capacity building, our view is that, to make the aims of this legislation a reality, the Scottish Government should accompany it with a commitment to resource capacity building at community level.

Those resources should have a particular focus on deprived communities and build their ability to take ownership of community assets, participate in 'processes to improve outcomes of service delivery' and contribute to the priorities and work of Community Planning Partnerships. A failure to do so may result in this Bill further widening the gap between advantaged and deprived communities.

This consultation document is concerned with assessing the impact of the draft Bill on people with the nine protected characteristics defined in the Equality Act 2010 and on communities with different levels of advantage or deprivation.

We know that, for example, new migrant communities (which are largely made up of people from minority racial groups), disabled people and some women, are more likely to live in areas of deprivation. On launching the Scottish Government equality outcomes earlier this year, Shona Robison, the Minister responsible for Equality, said: "Our ambitions for economic success and social wellbeing in Scotland cannot be realised unless we address the prejudice, discrimination and disadvantage that hold people back."

A failure to accompany this policy with capacity building at a local level could increase the levels of inequality experienced by these communities and increase the risk of the Scottish Government and relevant local authorities failing to meet their General Equality Duties to 'Advance equality of opportunity between people who share a relevant protected characteristic and those who do not' and 'Foster good relations between people who share a protected characteristic and those who do not'. It is vital that this capacity building should promote best practice in involving all members of the community, including those with protected characteristics.

6. Making a response to the consultation on the draft legislation

We hope that you find this briefing useful. We strongly encourage anyone with an interest in advancing community empowerment in Scotland to respond to the consultation independently.

The consultation paper is available on the Scottish Government website at <http://www.scotland.gov.uk/Consultations/Current>. If you would like a printed copy, you can contact Community.Empowerment@scotland.gsi.gov.uk, or telephone 0131 244 0382. The closing date for responses is 24 January 2014.

If you do not intend to make an independent response but would like your views to be included within SCDC's response, please complete the short survey here: <https://www.surveymonkey.com/s/8ZX68Y7>

Suite 305
Baltic Chambers
50 Wellington Street
Glasgow G2 6HJ
t 0141 248 1924/1964
f 0141 248 4938
e info@scdc.org.uk
w www.scdc.org.uk



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