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SCDC briefing no. 2/15

The Community Empowerment (Scotland) Act

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About this briefing

The Community Empowerment (Scotland) Act received Royal Assent on 24 July

2015.¹ See the final version at:

<http://www.legislation.gov.uk/asp/2015/6/section/1/enacted>

This SCDC briefing aims to explain the provisions of the Community Empowerment (Scotland) Act and to set out some of the implications and opportunities they have for community development, community organisations and community planning. The briefing is primarily for those involved in community development, whether as community organisations, practitioners or public agencies. SCDC will publish further briefings over the coming months as the various provisions of the Act come into force, and will review in more detail the opportunities and challenges for all those involved. The three major elements of the Act that communities should be aware of are:

- the strengthening of community planning to give communities more of a say in how public services are to be planned and provided

¹ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/77926.aspx>

- new rights enabling communities to identify needs and issues and request action to be taken on these, and
- the extension of the community right to buy or otherwise have greater control over assets.

Underpinning all these provisions is a welcome intention to focus attention on disadvantage and inequality.

“This bill is a momentous step in our drive to decentralise decisions and give people a stronger voice in their communities”

(Marco Biagi MSP, Minister for Local Government and Community Empowerment)

Overview

SCDC welcomes the Community Empowerment (Scotland) Act as a significant step towards communities having greater influence or control over things that matter to them. In particular we welcome the emphasis on addressing disadvantage and inequality enshrined in the Act. The Act as a whole is highly ambitious and appears to commit government and public services to engage with, listen to and respond to communities, easing the way towards communities having greater influence over how land and buildings are managed and used. Its detailed provisions set out many opportunities for communities, offering consultation on programmes and priorities, involvement in local outcomes improvement processes, reporting on progress of various kinds and, importantly, making support available to communities.

With careful consideration of the links between the Act and forthcoming supporting guidance and regulations, the principles underpinning the Public Bodies (Joint Working) (Scotland) Act 2014² and the recent regulations for community learning and development³, there appear to be unprecedented opportunities to position community participation more sustainably in a very wide range of local initiatives and plans.

Many communities will already be able to fully utilise the new provisions outlined in the Act but many others will need good quality information, advice and support to enable them to be confident in taking up new opportunities to influence decision making processes and priorities at local and national level. These processes include the development of Scotland’s National Outcomes, the setting of community planning priorities, the content and performance of local outcomes improvement plans and the

² <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/63845.aspx>

³ <http://www.educationscotland.gov.uk/communitylearninganddevelopment/about/policy/regulations.asp>

smaller scale locality plans, land and asset transfer arrangements, the development of allotments and green spaces, and the use of common good resources.

SCDC greatly welcomes the recognition in the Act that some communities will need public agencies to offer information, advice and support to enable them to make best use of the legislation. We also welcome the requirement that such support is offered or provided by all community planning agencies and not just local authorities. However, this does pose serious questions about whether and how public agencies will be able to respond. The increase in opportunities for communities to participate has to be matched by appropriate resourcing, hence the importance of the provisions that place duties on public bodies to develop and resource appropriate support arrangements. Ways will need to be found to address the serious shortfall in the capacity of public bodies and others to support community empowerment at local and national level.

The Act will help communities develop their influence and mobilise assets towards more effectively focused local policies and priorities. However, transformative change depends crucially on addressing broader social and economic factors in community life and prospects. The Act reflects government priorities in promoting social justice and combating inequality, and could help stimulate work to engage in wider education for democracy. In turn, this will help to create the conditions for citizens to make more informed judgements about big issues. In this sense the Act is not a substitute for other forms of social organisation, but potentially an exciting pathway towards democratic renewal, in addition to having an instrumental value in planning and delivering better services and outcomes.

The explicit references to inequality in the Act, and how it is to be defined and addressed, have the potential to encourage a real and meaningful discussion in local planning. Although silent on how equalities issues might affect resourcing, the Act opens up opportunities for dialogue about fairness and potential actions to tackle equality issues.

Introducing the Act

Each Part of the Act is set out separately below. There is a lot of fine detail to each provision that we have not gone into at this stage. However, as the provisions are put into practice we will issue further notes and guidance on particular themes, and for specific audiences. The Scottish Government has stated that, even though Royal assent has been granted, there is still a lot of work to be done to prepare the orders, regulations and guidance that will be needed to implement the legislation. Different provisions of the Act will come into force at different times, but it is expected that most parts will be in place by the summer of 2016.

As it is a piece of legislation, the Act is written in legal terms. Some of these terms are defined within the Act, while others are open to interpretation. In particular, terms such as ‘reasonable grounds’ or ‘good reason (not to)’ leave what is, or is not, reasonable open to interpretation, ultimately by the Courts. Where possible we have tried to explain these terms, but we have also recognised that some of these terms are deliberately ‘open’ so they can work in different contexts. We have used inverted commas wherever language from the Act is quoted directly.

National Outcomes

Building on the Scotland Performs framework,⁴ this first Part of the Act places a duty on the Scottish Government to develop, consult on and publish a set of national outcomes for Scotland. Every five years (at least), the Government must initiate a nationwide consultation to ask the people of Scotland what they want to see achieved. It is then up to the government to revise national outcomes accordingly, which must be monitored and reported on.

When consulting on national outcomes, the government must consult “persons who represent communities when determining and reviewing the national outcomes.” This includes “communities based on common interest, identity or geography.” Statutory providers of services must have regard to the national outcomes in carrying out their work.

It is important to note that “in determining the national outcomes, the Scottish Ministers must have regard to the reduction of inequalities of outcome which result from socio-economic disadvantage.” This is a key statement of principle that is both welcome and significant.

Community planning

This Part of the Act formalises Community Planning Partnerships (CPPs), now requiring that they exist in every Scottish local authority and that they plan and deliver local outcomes and engage and involve communities at all stages.

⁴ <http://www.gov.scot/About/Performance/scotPerforms>

The purpose of community planning is defined by the Act as “improvement in the achievement of outcomes resulting from, or contributed to by, the provision of [public] services.” Public services are a key factor in the quality of life for many people so it is important for communities to think about how they can take advantage of the new legislation and engage with public services to highlight needs and issues, participate in developing plans and proposals and, where appropriate, play a part in providing services or projects.

Designated community planning partners must now include the whole range of public services that engage and work with communities. Partners include colleges, Police Scotland, health boards, enterprise agencies such as Scottish Enterprise and Highlands and Islands Enterprise, Historic Environment Scotland, health and social care integration joint boards, national park authorities, regional strategic bodies in further and higher education, Scottish Environment Protection Agency, the Scottish Fire and Rescue Service, Scottish Natural Heritage, Scottish Sports Council, Skills Development Scotland, regional transport partnerships and Visit Scotland.

It is now a legal requirement that local authorities and their partners participate in community planning partnerships, and they must also contribute resources (staff and funds) as required. CPPs must participate with any community bodies which the partnership considers likely to be able to contribute to community planning. There is a particular focus on involving organisations which represent disadvantaged groups, defined as “the interests of persons who experience inequalities of outcome which result from socio-economic disadvantage.” CPPs must “take such steps as are reasonable” to enable these community bodies to take part.

What are community bodies?

The Act uses a number of terms to define the community groups, networks, organisations and interests that will be entitled to benefit from, or be involved in its provisions. ‘Community bodies’ is the term most commonly used, but there are other definitions as well, including ‘community controlled body’ and ‘community participation body’. The Act is mostly concerned with how these bodies represent and benefit communities rather than with their legal status, although in the community right to buy provisions ‘community body’ is much more tightly defined.

Community planning partnerships will be required to develop, publish and report annually on a Local Outcomes Improvement Plan (LOIP), which replaces the former Single Outcome Agreement. The LOIP will form the key document for setting priorities for service delivery and development. As such, it is very important for

communities to be aware of the local outcomes improvement process so that they may inform and influence what is decided and what happens locally. LOIPs are expected to have a needs-led approach, that is, they should set out the 'needs and circumstances of persons residing in the area ... to which the plan relates', describe the outcomes expected, and provide both a description of proposed improvements and a timeline for delivery. The Act requires regular reviews and progress reports to be published, with an emphasis on specifying the participation of community bodies, and their contribution to the outcomes achieved.

What is a Local Outcomes Improvement Plan?

A Local Outcomes Improvement Plan (LOIP) is a plan setting out the local outcomes with greatest priority, forming the agenda for action. These proposed outcomes will be described, along with a statement on how it is proposed they will be achieved, when actions will be carried out, and how the plan responds to the needs and circumstances of people in the area. In preparing a local outcomes improvement plan, a community planning partnership must consult appropriate community bodies and must take account of any representations in this way.

Locality plans are also introduced in the Act. These are not the same as LOIPs, as they are for smaller areas where there are 'significantly poorer outcomes' than elsewhere in the local authority area, or in Scotland generally. The content and review arrangements are much the same as for the LOIPs.

The provisions relating to LOIPs and locality planning appear to mark a return to an area-based focus on disadvantage. This is an opportunity for community groups and organisations in such areas to play a part in identifying the key needs and issues in the community, to be involved in defining relevant outcomes and to propose ways in which the community can draw on its local knowledge, organisation and people to shape and benefit from the process. It is also a challenge for community bodies, who will need to familiarise themselves with the process of setting up locality plans. As with national outcomes, the Act states that CPPs 'must act with a view to reducing inequalities of outcome', but adds 'unless the partnership considers that it would be inappropriate to do so.'

There are important provisions in the Act for all community planning partners to facilitate the process of ensuring that the following functions are carried out; of

cooperating with others; contributing funds, staff and other resources to secure the participation of community bodies; providing information, and taking the LOIP into account in carrying out its functions.

At an early stage CPPs will need to prepare for meeting the Act's requirements on community planning. Such preparation is likely to entail:

- conducting a membership review of the CPP to ensure that all bodies (public agencies and community bodies) are brought into the community planning process
- exploring what resources partners can and should contribute, and
- assessing what support community groups might need, particularly in disadvantaged areas, to ensure they can effectively engage in community planning and take advantage of other provisions in the Act.

Participation requests

This section of the Act is potentially of great value for communities that have identified a need, issue or opportunity to tackle inequality, to contribute to regeneration or economic development, or to improve health or wellbeing. This is because it gives communities the power to set the agenda and the way needs, issues or opportunities are understood. It also sets out a process whereby a community body can request that a service is improved, or to help improve a service, if it believes this is needed. The Act is clear that the public sector body that provides the service “must agree to the request unless there are reasonable grounds for refusing it.”

In order to request to improve a service, a community organisation does not have to be a legally constituted group, but it must be community-led and most of the members must be from the community. Membership must be open to the whole community and the work of the group (including any profits generated by the group or organisation) must be for the benefit the community. Community Councils are included.

Where can participation requests be directed?

Public service providers including local authorities, colleges and universities, health boards, Scottish Enterprise, HIE, the police, the fire service, Scottish Natural Heritage, regional transport partnerships, national parks, and the Scottish Environment Protection Agency. Arms-length external organisations (ALEOs) such as Glasgow Life are not included at present, although this may change.

Community participation requests will work as follows:

1. When a community body (or more than one body jointly) believes it can improve the outcome of a public service, it can make a participation request to the body (or bodies) that run that service.
2. In doing so, the community body will need to set out the outcomes it expects to achieve and its experience of the public service. It also needs to set out the reasons why it considers it should participate, and provide details of any relevant knowledge expertise and experience it has.
3. The authority must agree to the request unless there are reasonable grounds not to do so. In reaching a decision the authority must take into account whether the request would improve any or all of: economic development, regeneration, public health, social wellbeing or environmental wellbeing; whether it would reduce inequalities of outcome; whether it would lead to an increase in participation in the outcome improvement process by people experiencing disadvantage; and it must encourage equal opportunities.
4. Following a decision agreeing to the request, the public service authority must issue a decision notice outlining how the outcome improvement process will work. The community body will then have 28 days to make written representations contributing to the process.
5. On completion of the process, the public service authority must, in consultation with the community bodies involved, publish a report on the process, what improvements have been achieved and how the community bodies were involved.⁵
6. The appeal process for community bodies whose request is denied is not yet clear. The Act gives Scottish ministers the power to make future regulations about appeals or reviews of decisions. The Scottish Government will keep this Part of the Act under review and bring forward an appeals mechanism if it is considered necessary.⁶

In addition, all public service authorities must report annually on the participation requests they have received, how these have progressed, what outcomes have been achieved and how participation requests have been promoted and supported. Every

⁵ Adapted from Scottish Parliament (2014) *SPICe Briefing: Community Empowerment (Scotland) Bill* http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-58_.pdf p12

⁶ <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10020&i=91980>

three years the Scottish Government will be required to produce a report on the operation of participation requests.

Provisions have been made in the Act for further regulations to cover participation requests, including “types of communities that may need additional support in order to form community participation bodies, make participation requests and participate in outcome improvement processes.”

Our view is that participation requests should not be viewed as a replacement for engagement and participation processes where they already function well, but as a framework for initiating dialogue where communities find it difficult to be recognised or heard. As such, we expect they will become especially significant in helping create a better environment for co-production or, in other words, communities and agencies working together to achieve better outcomes for people. With these rights, and with the provisions for reporting and scrutiny, it is likely that powerful institutions will find it much more difficult to ignore community ambitions or representations. It is a highly significant advance in the ways in which public bodies will now be expected to work constructively with communities.

Taking over assets

Extension of Community Right to Buy

This section of the Act extends the Land Reform (Scotland) Act 2003 so that urban as well as rural communities can now take advantage of the 'right to buy' land and buildings. This essentially means that if the owner of land, or a building, decides to sell it, they have to sell it to any community organisation which can afford to pay the market value, if Scottish Ministers agree.

The types of community organisation that can buy land and buildings are now more varied. Whereas in the past the right to buy was only applicable to companies limited by guarantee, now Scottish Charitable Incorporated Organisations (SCIO) and Community Benefit Societies (CBS) will be able to do so as well. The SCIO or CBS must have no fewer than ten members, three quarters of whom must be from the community. It must also exist for the benefit of the community and have proper financial management arrangements in place.

As was the case previously, such community bodies must demonstrate that they have sufficient support from the wider community to buy land or a building. However, now this is made easier by the relaxation of requirements in the Land Reform Act. No exact proportion of the community is now required to vote (the Land Reform Act previously specified at least half the population of a defined area) and the community body only has to show that a sufficient proportion of the community approves of the buyout. In addition, an adequate proportion of the community must be shown to have a "connection with the land" although the meaning of this phrase is not specifically defined.

Other changes are: the length of time communities have to purchase the land or building (up from six months to eight months); communities themselves being able to define their territory, replacing the previous specification that communities be defined by postcode; and changes to the "late application procedure", which means communities must demonstrate they had taken steps to register their interest before the deadline to do so had passed.

The basic Community Right to Buy process is as follows:

- The community body registers its interest in purchasing a piece of land or a building once the owner puts it up for sale. They will be required to show that community ownership is in the public interest and compatible with the achievement of sustainable development of the land.
- The Scottish Government appoints somebody external to conduct a ballot of the community in order to ascertain how much support there is for the purchase. The balloting is paid for by the Scottish Government.

- If the application is successful the owner will have to sell the land or building to the community body at market value.

Abandoned, neglected or detrimental land

An additional provision of the Act is that community bodies also have a right to buy “abandoned or neglected land”, which the owner of the land (or building) is unwilling to sell and that is being used in a way that causes direct or indirect harm to the environmental wellbeing of a community.

The process for buying abandoned, neglected or detrimental land is as follows:

- The community body must first go to efforts to solve the problem through other means. For instance, if regulators such as an environmental authority can make the owner improve the condition of the land/building, this course of action must be followed. Similarly, communities must show that it is unlikely that the harm caused by the use or management of the land or building will be “substantially removed” under its current ownership. We understand this to mean that there is no prospect of the owner making improvements in the foreseeable future.
- In addition, the community body is expected to have tried to buy the land or buildings with the consent of the landowner before involving the Scottish Government as arbitrator.
- If none of the above are possible, then the community body should submit an application to the Scottish Government to buy the land or building. They will be required to show that community ownership is in the public interest and compatible with the achievement of sustainable development of the land.
- The Scottish Government will then review the application. If the application is successful the owner will have to sell the land or building to the community body at market value.

Asset transfer requests

This section of the Act covers assets such as land and buildings that are owned by public bodies, not individuals or companies as in the community right to buy provisions outlined above. Community bodies can apply to buy, lease, manage or simply use land and buildings owned by public authorities. The request to do so must be granted unless the public authority has “reasonable grounds” not to. In addition, local authorities and other public authorities must publish and maintain a list of assets

which to the best of their knowledge is owned or leased by the authority and so can be subject to asset transfer requests.

To request ownership of an asset, a community body must be a company limited by guarantee or, alternatively, a SCIO or community benefit society with at least 20 members. However, if the body is seeking to lease, use or manage then they are simply required to be a community-controlled body.

What are community-controlled bodies?

Community-controlled bodies must have a written constitution that specifies the community to which the body relates; that the body is community-led; and that a majority of the members are from the community. Membership must be open to the whole community and the work of the group (including any profits generated by the group or organisation) must be for the benefit the community.

The process for asset transfer requests is as follows: ⁷

- The community body approaches the relevant authority requesting information about the property they are interested in, before making a formal request.
- Once an asset transfer request is made, the authority must assess the request, weighing up its economic, social and environmental benefits and any other relevant factors. Consideration must also be given to whether or not the transfer can contribute to reducing inequalities.
- The request must be granted unless the relevant authority has “reasonable grounds” not to do so.
- Where a local authority refuses a request or where a dispute exists over the terms of the agreement, the community body can seek a review of a decision by the local authority. They also have the further option of an appeal to Scottish Ministers. If the land is owned by another public authority or the Scottish Ministers, then the community body can ask for a review by Scottish Ministers of the initial decision.

⁷ Adapted from Scottish Parliament (2014) *SPICe Briefing: Community Empowerment (Scotland) Bill* http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-58_.pdf p22

Common good property

Common good property is land, buildings, art and other items that have been given to, or inherited by, local councils in the past. Local authorities will have to create and maintain a publically available list of all their common good property and make sure that people in the community are told about any changes to any common good property. They will have to consult community councils and community groups before they sell or change the use of any common good property.

Other provisions

Participation in Public Decision-Making

This part of the Act gives the Scottish Government future powers to legislate for participatory approaches, including participatory budgeting. This is of great interest to those involved in community development, and potentially of great importance depending on how it develops. Advocates⁸ of participatory budgeting recommend that, in line with international best practice, it should move beyond its predominant model of allocating small pots of money to voluntary and community groups, towards consistently distributing mainstream public budgets. It is potentially a key and effective tool for addressing inequalities in service provision and resource allocation, engaging and empowering citizens in discussions on public budgets, and stimulating co-production and mutual responsibility between citizens and the state.

Allotments

The Act updates and simplifies the law regarding allotments. Local authorities will have to manage waiting lists for allotments and take reasonable steps to address high demand. For instance, people on a waiting list may be provided with a smaller plot, but they can choose to turn this offer down and wait until the standard size of plot becomes available. Councils will also have to seek permission from Scottish Ministers before they sell off land used for allotments or use it for something else. Finally, they will have to report on their allotment provision every year and specify rules for what people can and can't do on their allotments.

Delegation of Forestry Commission Functions

Here, the Act makes a change to the Forestry Act of 1967 so that community bodies can take part in forestry leasing. The National Forest Land Scheme⁹ will have to be revised before any new opportunities can be taken advantage of. This will happen after the Asset Transfer Requests provisions come into force.

Supporter Involvement in Football Clubs

Although quite highly publicised, this provision only commits to preparing later provision or regulation, which may lead towards local ownership of football clubs and control in certain circumstances by certain people, but only after further consultation.

Non-Domestic Rates

Local authorities will be able to create and fund their own localised business rate relief schemes to better reflect local needs and support communities.

⁸ <http://pbnetwork.org.uk/about/>

⁹ <http://scotland.forestry.gov.uk/images/corporate/pdf/fcfc102.pdf>

What happens next?

As we said at the beginning of this briefing, different parts of the Act are likely to come into force at different times. For some parts of the Act secondary legislation, where orders and regulations are agreed by the Scottish Parliament, will be needed. For other parts, guidance will have to be developed setting out more information about what is meant in the Act and what should be put in place. The Scottish Government is committed to involving people affected by the legislation in developing appropriate guidance and will seek the views of public agencies, non-government organisations and representatives from community organisations.

There is no timetable at the moment for the development of further regulations and guidance, but there should be plenty of opportunities to be involved in, and contribute to, the process over the next year. SCDC will provide any updates on our website and through future briefings and some of the links provided below should also be helpful. As a rough estimate, we expect most parts of the Act to come into effect by summer 2016.

What will SCDC do now?

This briefing is intended to be the first in a series produced by SCDC over the next few months. Each of these briefings will focus on different sections of the Act as it goes through its various stages of implementation, and will explore the opportunities and challenges for communities, community organisations and community planning partnerships in greater detail.

SCDC aims to take part in the development of future guidance and will work to ensure that any processes for making participation requests are open, clear, and as simple as possible. We will continue to advocate that support is given to community organisations to make participation requests and take part in improvement processes. Furthermore, we aim to make sure that community organisations can play a meaningful part in community planning and are fully supported to take part. Finally, SCDC will seek to ensure that equality principles continue to be at the core of the supporting guidance on all aspects of the legislation.

Further information and other useful links

- Read the Act at <http://www.legislation.gov.uk/asp/2015/6/section/21/enacted>.
- Scottish Government frequently asked questions on the Act <http://www.gov.scot/Topics/People/engage/CommunityEmpowermentBillFAQs>
- SCDC's website's [Opinion and Debate](#) section contains more briefings and responses to the Act at its various stages of development.

- [Communities Channel Scotland](#) has a page dedicated to the Community Empowerment Act, containing a brief background to the Act and further links.
- [Community Development Alliance Scotland](#) (CDAS) regularly produces updates on the Act on its website and in its monthly newsletter.
- [Development Trusts Association Scotland \(DTAS\)](#) and its [Community Ownership Support Service](#) are helpful sources of information on asset transfer and ownership.
- [Scottish Council for Voluntary Organisations \(SCVO\)](#) is another source of information on the Act and its implications for the third sector.

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