

Local Government and Regeneration Committee

Submission Name: COSLA

Submission Number: 156



COSLA's response to the Local Government and Regeneration Committee's call for evidence on the Community Empowerment (Scotland) Bill.

Introduction

COSLA welcomes the opportunity to submit written evidence to the Local Government and Regeneration Committee on the Community Empowerment (Scotland) Bill. Please note that COSLA is submitting evidence to the Finance Committee on the resources issues created by the Bill separately.

Having worked closely with the Minister and the Scottish Government Bill team there was little surprise in the proposed legislation. COSLA is supportive of the Scottish Government's ambition to empower communities and as such welcomes the Bill. In this spirit, there are several areas in which the Bill could be strengthened and we have outlined these below.

General Remarks

COSLA's vision statement seeks to put the position of local self-government on a constitutional footing as soon as practical. The constitutional debate elicited by the forthcoming Referendum has already been identified as a key opportunity to strengthen local government and democracy, regardless of the outcome of the vote itself. COSLA welcomes the Scottish Government's willingness to enter into discussion on this matter.

COSLA strongly believes that the most practicable way to do this in the short term is by giving life to the European Charter of Local Self-Government through the enactment of domestic legislation. The Charter is a part of the binding Council of Europe treaty framework intended to protect human rights and democracy across the 47 members. It is a requirement for candidate members of the European Union to sign up to. The European Convention on Human Rights (ECHR) is another element of the same treaty framework. All existing members of the EU have signed and ratified the provisions. In the majority of cases the provisions are reflected in the member states' constitutions.

As is well known, the United Kingdom is unusual in not having a written constitution. The position of local government is defined in a myriad of pieces of legislation, and there is no right to local self-government in Scotland or the UK. We accept that there is evidence of both the UK and Scottish Parliaments being prepared to take forward legislation that enacts some elements of the Council of Europe treaty frameworks. For example, the ECHR provisions are embedded in UK legislation through the Human Rights Act 1998. It places obligations on public bodies to observe its provisions, and is binding on the legislation from the Scottish Parliament. However, the main issue here for COSLA is how local democracy is protected, and in particular how the European Charter on Local Self Government is made available through the Scottish domestic courts, as a means of fully enacting its various articles.

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We recognise that the Scottish Government has repeated its commitment to embed local democracy and the Charter's provisions in a constitution should there be independence. However, regardless of the outcome of the referendum, COSLA strongly argues that local government should be protected. Protection within a constitution would be our preferred method as we believe that a legislative approach could, theoretically, be eroded through later Parliamentary decisions. Nonetheless, the protection conferred through legislation is still significant and something that we firmly support. We recognise a willingness to take such action is hugely symbolic and the political cost to a party or coalition wanting to overturn rights to local democracy would be significant and in all likelihood make it deeply unpopular.

Consequently, COSLA's position has been, and remains, that the European Charter should be reflected in domestic legislation and that the natural place for this to happen is through the Community Empowerment (Scotland) Bill. Should there at some point in the future be a written Constitution for Scotland or the United Kingdom it would be our expectation that the Charter provisions would be reflected in such arrangements.

Meantime, placing the right to local self-government on a statutory footing in Scotland would give the whole of the Charter a formal legal status in Scotland, ahead of the rest of the UK. While this would fall short of the longer term constitutional embedding we would ultimately argue for, it would set an important precedent and demonstrably reflect the Scottish Parliament's commitment to local democracy. COSLA suggests including something like the following in the legislation as an intermediate step:

"Ministers of the Scottish Government while exercising their functions must observe and promote the principles and provisions of the European Charter of Local Self-Government (1985) - ETS 122"

This would be a simple way of giving effect to the Charter's provisions, allow steps to be taken incrementally to consolidate the right of local people to a greater degree of autonomy in the way our communities manage their own affairs, and ultimately allow the possibility of a legal challenge to be made, should the need ever arise. By placing a duty on Scottish Ministers that refers to external treaties / legislation, Scotland would be adopting a similar approach to that already used for the European Charter of Human Rights in UK legislation.

We acknowledge the work that may be required in this area and are keen to develop this in partnership with both the Scottish Parliament and Scottish Government. Furthermore, we are aware that the Commission for Strengthening Local Democracy have provided helpful recommendations in this area which will help inform debate.

Any part of the legislation proposing new duties on Local Authorities would require to be appropriately financed and resourced by National Government and cost neutral to local government.

Part 1 – National Outcomes

While in principle COSLA recognises the right of National Government to set outcomes for Scotland, we have a number of concerns around the proposed legislation.

COSLA very much welcomes the outcome focus approach taken in this part of the legislation. However, we are disappointed to note that while service delivery is undertaken by local government, this is not reflected in the legislation or policy memorandum. Local government

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remain committed to an outcome focused approach through Community Planning Partnerships and Single Outcome Agreements and already have a good strategic framework in place. COSLA would welcome explicit recognition of the importance of partnership working between national and local government when setting outcomes which affect locally delivered services.

Part 2 – Community Planning

COSLA welcomes the proposals to improve the Community Planning process by requiring all statutory partners to participate equally and fully in the process, through legislation. Given the joint working COSLA and the Scottish Government have undertaken, culminating in the Joint Statement of Ambition, we very much welcome and are supportive of the Scottish Government choosing this Bill as the route to deliver new duties.

COSLA continues to welcome the opportunity to level the playing field, recognise that Community Planning is a genuine joint endeavour that encompasses the whole of the public sector and believe that the democratic mandate of councillors underpins the lead role of local government in the arrangements.

COSLA welcomes the additional partners named in the legislation as statutory community planning partners. However, we still question whether the legislation includes all the relevant partners that should be at the Community Planning table. While we advocate that local Community Planning Partnerships would be best placed to make these decisions, we feel that other NDPBs, such as the Scottish Prison Service and Regional Colleges, should also be considered as statutory Community Planning Partners, wherever they are necessary to delivery of particular agreed outcomes in CPP areas. In particular, with reference to the forthcoming changes in the area of community justice, COSLA notes that under the lists of Relevant Authorities and Public Services Authorities, key justice partners are not explicitly listed.

Community Empowerment, in relation to improving justice within communities, will fall short without the critical input from partners within justice, in particular the Scottish Prison Service, the Crown Office and Procurator Fiscals Office and the Scottish Court Service. More generally, the duties regarding CPP Partners are welcome, including the encouragement to commit resources to the delivery of CPP outcomes, however, it is difficult to see how this can be effectively enforced.

Part 3 – Participation Requests

COSLA notes that some of the proposed provisions here concerning community engagement significantly reflect the content of the Protocol to the European Charter of Local Self-Government. The charter protocol seeks to increase the local accountability of government through the adoption of measures such as citizens' panels, community petitioning, and similar measures. In essence, while Scottish Ministers are extending the application of the protocol to all parts of the public sector a legitimate question is raised over whether it is right that Ministers should progress this area without protecting the services and representative democracy that the engagement is trying to influence.

Nonetheless, COSLA agrees that public bodies should consider requests, so long as they are reasonable, give reasons for their decisions, where granting those rights to state what

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conditions are attached to them, and, when declining to grant, stating reasons for not doing so.

It is difficult to predict what the implications of this new requirement on public bodies will be. At one extreme it could lead to large number of requests coming to councils. In particular, in areas of public service change where difficult decisions are being made by elected members such as opposition to the closure of local facilities or services which are a result of the financial pressures being experienced by councils. This could be similar to the current Freedom of Information process and we therefore have some concern over the potential administrative burden that these new duties could create. COSLA is clear that the cost emanating from these new duties require to be fully funded and cost neutral for councils. As indicated earlier in our submission, COSLA will be responding separately on the financial memorandum to this Bill directly to the Finance Committee, however, it is important to stress that we have concerns around being able to quantify the demand for this legislation and in turn the costs that will be incurred by Local Authorities.

Part 4 – Community Right to Buy Land

Part 5 – Asset Transfer Requests

The legislation is increasingly relevant and important to Local Authorities, in particular in the areas of culture and leisure. Given the current fiscal challenges presenting local government many Local Authorities are already working on the development of the Community Sports Hub model with sports clubs, teams and joint management arrangements. In addition to developing community empowerment in the sports sector, the culture sector have also started to consider these types of approach in looking at property rationalisation in terms of community halls, village facilities and cultural facilities, such as museums.

This work is highly reliant on council support and provision of community capacity building assistance, which can be resource intensive. Initial capital investment is also required to cover the cost of the standard lease arrangements required for asset transfer.

COSLA notes that under Part 5, section 53 (2)(b) of the Bill that on the winding up of the company and after the satisfaction of its liabilities, its property (including any land, and any rights in relation to land, acquired by it as a result of an asset transfer request under this Part) passes to either another community body, a charity, a community body approved by Scottish Ministers, a crofting community body, or should no such body exist, to the Scottish Ministers or a charity of choosing by Scottish Ministers. COSLA are very firm in the view that should the asset have been acquired from a Local Authority, then that Local Authority should have a first refusal option to have the asset returned to them. COSLA considers that this section precludes Local Authorities far too early in the process. After all, the Local Authority would be the continuing body with the experience, knowledge and skill around the management and ownership of the asset.

We are supportive of the differentiated approach between Local Authorities and other public bodies outlined in the legislation. COSLA are firmly of the view that as local government is democratically accountable to the electorate there is no need for the requirement to have their decisions appealed, where community requests are declined, via an appeals process involving Scottish Ministers. However, Part 5 Section 56(7)(b) suggests that Scottish Ministers could still override the decision of a Local Authority should a Local Authority and community body be unable to agree a timescale between themselves regarding agreement to an asset transfer

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request. This would appear to go against the intention of section 58(2)(b) and on this basis, therefore, we would welcome changes in the wording of this section of the legislation which is reflective of the Bill's intention.

It is clear that there is a currently unquantifiable administrative and financial impact on councils with this part of the legislation. However, it is imperative that these new duties on Local Authorities are appropriately financed and resourced by Scottish Government and cost neutral to local government.

Part 6 – Common Good Property

In line with current accounting good practice guidelines, Local Authorities should already hold a register of their common good assets therefore COSLA do not consider that this aspect of the legislation should be overly onerous for councils. However, COSLA repeats the point made in regard to other legislative proposals in the Bill, whereby the administrative burden around the consultation with Community Councils and Community Groups in the establishment of the register and any disposal or any change in use of common good property is unknown and we seek assurances that the cost of this would not fall on the shoulders of the Local Authority.

Given that the Bill has a section dedicated to the issue of Common Good, it would appear to be an oversight that the legislation does not seek to address what is commonly referred to as the "Portobello School" issue. As the Committee will be aware, in the case of Portobello the Court decided that where land is identified as inalienable common good land a Local Authority cannot appropriate it for another function. In this specific case the proposal was to convert the use from a park to a school site. This contrasts with the position on the sale of common good land where councils are able to dispose of common good land with the approval of the court. To enable the land in Portobello to be used for a new High School it has involved an Act of Parliament, which seems somewhat disproportionate and time consuming.

COSLA therefore supports SOLAR's view that a very straightforward change to existing legislation (Section 75 of the Local Government (Scotland) Act 1973) would enable the use of common good land to be approved by the courts in the same way as a sale can be. The change to section 75 of the 1973 Act would require an additional provision being included in Part 6 of the Bill. To achieve the change would actually involve minimal amendments. All that would be required would be the words "appropriate or" to be inserted at four locations in section 75(2) and in one location in section 75(3) of the 1973 Act.

While COSLA appreciates that the Minister may be wary about being seen to make it easier for councils to change the way common good land is being used, all the above suggestion does in practice is to bring change of use into line with the existing provisions for disposal.

Part 7 – Allotments

COSLA are firm in the view that individual Local Authorities are best placed to respond to the detailed legislation proposed in the Bill. In assessing the legislation, consideration needs to be given to the very great range of circumstances, including geography, of Scottish Local Authority areas. We recognise that Scotland is a diverse country made up of Islands, urban, rural, and city areas. Demand for allotments and potential availability of land therefore differs significantly between Local Authority areas. On this basis COSLA feels strongly that the

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trigger point requiring Local Authorities to take reasonable steps to provide further allotments is arbitrary and not practical for all Local Authorities.

Furthermore, while a trigger point for the creation of more allotments is specified within the legislation we feel it is important to stress that any proposed new allotments would be subject to the normal, rigorous planning process. Therefore, it is important to note that the provision of additional allotments is not determined by the trigger point specified in the Bill alone.

The Bill proposes that allotment users will be able to sell on surplus produce. COSLA considers that, on this basis, the cost of remediation of contamination should be an explicit ground for refusing a request for land to be given over for allotment use. We have significant concerns around the potential legal implications this could cause Local Authorities.

We note the duty on Local Authorities to produce an annual allotments report. While COSLA does not disagree with this measure, we consider the level of detail set-out within the legislation to be too prescriptive and micro-management.

We again stress that caution should be exercised around the proposed new duties which place an additional administrative burden on councils. COSLA is clear that the proposed duties require to be adequately resourced by the Scottish Government.

Part 8 – Non-Domestic Rates

We note that this section of the Bill contains proposals outlined in the recent consultation on business rates reform “Supporting Business, Promoting Growth”, which includes a new power for local reliefs. COSLA continues to welcome this, as it is very much in line with COSLA’s vision for increased local flexibility on funding and local taxation powers.

Conclusion

Overall, COSLA’s main concerns focus on the lack of opportunities provided by the Bill to secure the statutory protection of local democracy and local government.

Scottish Local Government is also concerned that all the proposals are properly funded and cost neutral for councils. It is imperative that any new duties on local government be fully funded by national government. Furthermore, COSLA continues to stress the importance of ensuring that a reasonable time period be set aside for changes and transition to take place.

The Bill makes repeated reference to numerous regulations and guidelines and COSLA welcomes the opportunity for officers to work closely and constructively with Scottish Government officers around the detail and production of these. We look forward to participating in the ongoing debate and discussion in an active and constructive manner and recognise that it is in all of our interests that we get this legislation right.