

Response from the Community Empowerment Unit, Scottish Government

On 23 October 2014, the Clerks wrote:

We have had a few queries regarding the position of certain organisations and the potential impact for them in using the legislation.

One such query concerned community councils and other similar unincorporated organisations' ability to make use of the provisions in the Bill, particularly in acquiring assets and delivering services, although submission 56 from Fife community Safety Partnership make a similar point. It considered there is a danger that members of such organisations may be sued if something goes wrong and incur personal liability as not all activities can be fully covered through insurance. The correspondence also pointed to a report by the Scottish Law Commission a few years ago which covered the issue:

<http://www.scotlawcom.gov.uk/law-reform-projects/completed-projects/unincorporated-associations/>

Some other written submissions have also raised points as to the status/treatment of various organisations i.e. Industrial & Provident Societies (see submission 94) and Community Interest Companies by their exclusion from the Bill's provisions unlike SCIOs.

It would be helpful if you could clarify the position in the Bill regarding the treatment of unincorporated organisations and other legal entities

On 24 October 2014, the Scottish Government responded:

The only points in the Bill which stipulate that a community body must have a certain corporate structure are where the body is seeking to take ownership of a property, either under asset transfer (section 53) or under the Land Reform (Scotland) Act 2003 (section 34 of that Act, amended by section 28 of the Bill, and new section 97D of that Act, inserted by section 48 of the Bill). In these cases the community body must be incorporated as a company or a SCIO. There is no requirement for the community body to be incorporated to make any other type of asset transfer request, or to make a participation request.

The issue raised about members of unincorporated associations being at risk of incurring personal liability is an important one, and a key reason for requiring a community body to be a company or a SCIO if it is seeking to take ownership of an asset. These structures also ensure the body has proper governance and financial management, regulated either by Companies House or by OSCR. There are many resources and model articles of association etc available, and becoming incorporated is not overly onerous in the context of the other responsibilities of owning land or buildings.

We do recognise that Community Councils are not corporate bodies. They can in some cases own property, but this is normally vested individually in the Chair, Secretary and Treasurer, in line with the Model Constitution provided by the Scottish Government, raising the issue of personal liability again. One solution is for the

community to establish a development trust or similar incorporated body alongside the Community Council, where they want to take on property ownership. I know some communities have done this and the two bodies work closely together.

If an asset transfer request is made for lease, management or use of a property, it will be up to the relevant authority to satisfy itself that the community body has an appropriate structure to take on the responsibilities involved. For a 25 year lease it may be appropriate to require the body to be a company or SCIO; for a short lease or use agreement, an unincorporated association may be fine.

A participation request is simply a request for dialogue about how to improve an outcome, and therefore the legal structure of the body making the request should not be relevant. If it is decided that the way to improve the outcome is for the community participation body to take on or contribute to delivery of a service, again it would be for the public service authority to consider whether that body is appropriately constituted to meet the relevant responsibilities, as it would when placing any contract.

In relation to Industrial and Provident Societies, the legislation establishing these has recently been updated by the UK Government, in the Co-operative and Community Benefit Societies Act 2014, and we are considering how to respond to those changes in the Bill. As a general principle, we would normally expect community bodies to reinvest any profits to the benefit of the community rather than distributing them, so this would exclude co-operatives and Community Interest Companies, but it might be possible to include Community Benefit Companies (BenComs). It may, of course, be possible for other organisations to be designated as community transfer bodies for ownership if Ministers consider it appropriate.

It might be helpful in this context if I also mention the requirement for community-controlled bodies to have a written constitution, under section 14 of the Bill. Section 14 sets out a number of requirements to ensure that a body is truly controlled by the community it represents and has aims which include promoting a benefit for that community. A written constitution is simply necessary to record that the body meets those requirements and to help its members be aware of the body's aims, rules and decision-making procedures. Again, there are many model constitutions available and this is not an onerous requirement.