

ISLANDS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Islands (Scotland) Bill ("the Bill"). It describes the purpose of each of the delegated powers in the Bill and outlines the reasons for seeking the proposed powers to make subordinate legislation and to issue guidance. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by Parliament.

OUTLINE OF BILL PROVISIONS

3. The purpose of the Islands (Scotland) Bill is to make provision for a national islands plan, to impose a duty on certain public authorities to have regard to island communities, to make provision about the electoral representation of island communities and to establish a licensing scheme in respect of marine development adjacent to islands.

4. The Bill contains 6 Parts:

- Part 1 defines some key terms.
- Part 2 provides for a duty on the Scottish Ministers to prepare, lay before the Scottish Parliament and publish a national islands plan. A national islands plan is intended to set out the main objectives and strategy of the Scottish Ministers to improve outcomes for island communities across Scotland.
- Part 3 makes provision for relevant public bodies to consider the impact on islands communities when developing, delivering or redeveloping a policy, strategy or service, (and for Scottish Ministers when proposing making legislation). The relevant public bodies must prepare an 'islands communities impact assessment' when a policy or service is anticipated to have a significantly different impact on an island community than on other communities; and in the case of Ministers when proposed legislation is anticipated to have such an effect.
- Part 4 makes provision to give the Local Government Boundary Commission for Scotland the flexibility to recommend wards of 1 or 2 councillors to be created in respect of populated islands; and makes provision to give special status to the Scottish parliamentary constituency of Na h-Eileanan an Iar by protecting the boundary from variation.

- Part 5 provides for a regulation-making power for the Scottish Ministers to create a licensing scheme in relation to any works in or under the sea in the coastal waters surrounding islands for up to 12 nautical miles. Local authorities with inhabited islands will be able to apply to Ministers to exercise these new licensing powers.
- Part 6 sets out various final provisions.

RATIONALE FOR SUBORDINATE LEGISLATION

5. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time; and
- the need to anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of Parliamentary procedure has been considered appropriate.

DELEGATED POWERS

Section 7(3) – Duty to have regard to island communities

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

7. Section 7(3) provides that the Scottish Ministers may by regulations modify the schedule which lists the relevant authorities, i.e. the bodies, office-holders and other persons which are to be subject to the duty imposed by section 7(1) to have regard to island communities when exercising their functions. In addition, section 10 provides that relevant authorities must have regard to any guidance issued by the Scottish Ministers about the duty imposed by section 7(1) (see below).

Reason for taking power

8. The regulation-making power gives the flexibility to make prompt and efficient changes to the list of relevant authorities. For example, a change may be required if another body is created by statute which could, in theory, develop or deliver a policy, strategy or service which would have a significantly different effect on an island community from its effect on other communities in the same local area or in Scotland as a whole. Conversely, a person in the schedule might cease to exist, or have their functions altered in a way that makes the application

of the section 7 duty no longer relevant, and the power would allow them to be removed from the schedule without the need for primary legislation.

Choice of procedure

9. It is considered appropriate that this power should be subject to affirmative procedure in order to allow the Parliament a high level of scrutiny of the relevant authorities which may be added to or removed from the list in the schedule, because the question of whom the section 7(1) duty applies to is self-evidently critical to the operation of Part 3 of the Bill.

Section 10(1) – Guidance about section 7 duty

Power conferred on: the Scottish Ministers
Power exercisable by: guidance
Parliamentary procedure: not applicable

Provision

10. Section 10(1) gives the Scottish Ministers a power to issue guidance about the duty imposed by section 7 and places a corresponding obligation on relevant authorities to have regard to any such guidance in their decision-making.

Reason for taking power

11. The power to issue guidance will provide the flexibility to set out the island communities impact assessment process for relevant authorities in greater detail than is considered appropriate for primary legislation; and will also allow the Scottish Ministers increased scope to update how the process is intended to operate in practice. The guidance will help relevant authorities to decide how to meet the duty imposed by section 7. Guidance may be regularly amended to reflect how practice evolves so is a more responsive and flexible way of supporting relevant authorities rather than a power to make subordinate legislation.

Section 18(1) – Scottish island marine area development licence

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

12. Section 18(1) provides that Ministers may by regulations establish a scheme by virtue of which a person must not carry on a development activity within a part of the Scottish island marine area – i.e. up to 12 nautical miles from the low water mark of an island – which has been designated by the Scottish Ministers as a part in which development activity may not be carried on without a licence granted by the local authority (an “island licensing area”). Subsection (2) sets out two preconditions: that a local authority must apply for designation and that an area may not be designated as an area in which a licence is required unless Ministers are satisfied that the area includes an inhabited island.

13. Subsection (3) sets out an illustrative list of what the scheme, when made, might contain. The list includes provision about the scheme's coverage, the areas allocated to each authority, the procedure for a designation by Ministers, the procedure for an application to a local authority for a licence and a decision on an application, as well as enforcement, offences and penalties and provision about a public register. Subsections (4) to (6) contain limitations on the power: in particular on the amount of any fee charged, the maximum penalties for offences and the circumstances in which fixed monetary penalties may be charged.

Reason for taking power

14. The detailed nature of the provisions, including comprehensive procedural arrangements, the range of activities to be covered and the need to retain flexibility to update provisions in response to changing circumstances, make it appropriate that these matters are covered by secondary legislation. The application for designation mentioned in subsection (2) will be an administrative process which will take place prior to making the regulations. The regulations will enable a licensing scheme which will be broadly similar to the regime for marine licences set out in the Marine (Scotland) Act 2010 and permit a local authority to have control over developments in the sea around islands in its area.

15. Section 18(3) contains a non-exhaustive list of matters which may be included in the regulations under subsection (1). Some of those aspects of the scheme require particular processes. Subsection (3)(b) enables the definition of the extent and boundaries of those parts of the island marine area, particularly between different local authorities, something which will require discussion between the Scottish Ministers and the affected local authorities. Subsection (3)(c) enables the regulations to set out the procedure in relation to applications, including pre-application conditions, the procedure for grant, renewal and revocation, appeals against decisions, and inquiries. Subsection (3)(d) enables the regulations to provide for the effect of the grant of a licence on licences granted under the Marine (Scotland) Act 2010 or consents granted under the Electricity Act 1989. Subsections (3)(e) to (i) allow for provision for enforcement, remedial works, offences, and penalties, including fixed monetary penalties. Subsection (3)(j) allows for provision for local authorities to publish information relating to licences in public registers.

16. Given the importance of the provisions which can be made under this new power and the impact they may have on developments in the Scottish island marine area and local authorities in Scotland it is considered appropriate that the detail of the provisions are fully consulted on in order to inform regulations – and that the Scottish Parliament should fully scrutinise and debate any proposed regulations.

Choice of procedure

17. It is considered appropriate that this power should be subject to affirmative procedure to allow Parliament a high level of scrutiny of the scheme for the licensing of works. There is also likely to be a great deal of stakeholder interest, particularly as the licensing regime will provide for offences, penalties and fixed monetary penalties.

Section 22(1) – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

18. Section 22(1) provides the Scottish Ministers with the power to make, by regulations, such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate in connection with or for giving full effect to the Bill.

Reason for taking power

19. As with any new body of law the Bill may give rise to a need for a range of ancillary provisions. While the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed. For example, it might be necessary to amend the requirement to review the national islands plan to a period shorter than 5 years.

Choice of procedure

20. Regulations made under this section which contain a provision which adds to, replaces or omits any part of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type.

Section 23(2) – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: laid, no further procedure

Provision

21. Section 23(2) confers a power on the Scottish Ministers, by regulations, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. That section also provides that such regulations may include transitional, transitory or saving provision.

Reason for taking power

22. Some formal sections of the Act are commenced on the day of Royal Assent. The Scottish Ministers consider it appropriate for the substantive provisions of the Bill to be commenced at such a date as they appoint to be suitable. It is usual practice for such commencement provisions to be dealt with by subordinate legislation. Such provisions may require to make transitional or transitory provision, or the saving of repealed or amended provisions. For example, if, before Part 3 of the Bill is commenced, one of the relevant authorities were to transfer its functions to a new body which then required to be added to the list

in the schedule, it might require a transitional provision to ensure that the new body published information in the reporting period relating to island communities impact assessments carried out by its predecessor. It is usual to enable such provision in conjunction with a power to commence the provisions of a Bill.

Choice of procedure

23. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before Parliament as soon as practicable after being made.

This document relates to the Islands (Scotland) Bill (SP Bill 15 as introduced in the Scottish Parliament on 9 June 2017

ISLANDS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM