

Islands (Scotland) Bill

Explanatory notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Islands (Scotland) Bill ("the Bill") introduced in the Scottish Parliament on 9 June 2017.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 15–FM);
 - a Policy Memorandum (SP Bill 15–PM);
 - statements on legislative competence by the Presiding Officer and by the Cabinet Secretary for the Rural Economy and Connectivity, Fergus Ewing MSP (SP Bill 15–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

Overview of the Bill

5. The Bill seeks to put in place a framework of measures reflecting the unique challenges faced by Scotland's island communities. The Bill is intended to give effect to a range of policy changes to improve outcomes

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for island communities in Scotland. A more detailed explanation of the Bill's purpose and the policy intentions that underpin it can be found in the Policy Memorandum.

6. The Bill contains 24 sections, arranged into six Parts, as follows:

- **Part 1** – Key definitions. This Part sets out for the purposes of the Bill the definition of an “island”, “inhabited island” and “island community”.
- **Part 2** – National islands plan. This Part places a duty on the Scottish Ministers to prepare, lay before the Scottish Parliament and publish a national islands plan. The plan will set out the overarching objectives and strategy of the Scottish Ministers for improving the outcomes of island communities across Scotland.
- **Part 3** – Duties in relation to island communities. This Part requires certain Scottish public authorities, including the Scottish Ministers, to have regard to island communities when exercising their functions and to prepare impact assessments in relation to island communities in certain circumstances.
- **Part 4** – Representation of island communities. This Part provides for the protection of the Scottish Parliamentary constituency boundary of Na h-Eileanan an Iar from variation. It also allows for an exception to be made, in respect of areas with inhabited islands, to the usual three or four member ward rule for local government electoral wards.
- **Part 5** – Development in the Scottish island marine area. This Part provides 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.
- **Part 6** – Final provisions. This Part makes provision about regulations made under the Bill, about the Bill's commencement, and about its short title.

7. The Bill also contains a schedule listing the relevant public authorities to whom the Part 3 duties in relation to island communities apply.

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Commentary on sections

Part 1 – key definitions

Section 1 – Meaning of “island” and of “inhabited island”

8. This section defines “island” and “inhabited island” for the purposes of the Bill. All islands in Scotland which are enclosed by the sea fall within the definition of “island” – ignoring man-made structures such as bridges, so that the Isle of Skye, for instance, is included. The effect of subsection (1)(b) is to include tidal islands also, such as Oronsay (off Colonsay).

Section 2 – Meaning of “island community”

9. This section defines “island community” for the purposes of the Bill. This has a broad meaning, which includes communities resident on a single island, communities which span a group of islands and communities of common interest – so long as all of their members permanently inhabit an island (as defined by section 1).

Part 2 – national islands plan

Duty to prepare national islands plan

Section 3 – National islands plan

10. This section places a duty on the Scottish Ministers to prepare a national islands plan. This is to set out Ministers’ main objectives for improving public sector-derived outcomes for island communities – and Ministers’ strategy for how to do so.

Section 4 – Preparation and scrutiny of plan

11. This section sets out the various duties that the Scottish Ministers must adhere to for the purposes of the preparation, consultation and scrutiny of the plan.

12. Subsection (1) obliges the Scottish Ministers, when preparing the plan, to consult persons representing the interests of island communities and those likely to be affected by any proposals contained in the plan. The distinctive characteristics of island communities must be taken into account when developing the plan (e.g. the Gaelic cultural traditions of the Hebrides and the Scandinavian heritage of Orkney and Shetland).

13. Subsection (2) requires Ministers to lay the first proposed plan before the Scottish Parliament within a year of this section coming into force, and

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thereafter whenever the plan is reviewed. After a period for parliamentary consideration the plan must then be finalised, as per subsection (3), and published, as per subsection (4).

Reporting on and review of plan

Section 5 – Report on plan

14. This section places a duty on the Scottish Ministers to prepare and publish an annual progress report providing information on the improvement of outcomes for island communities that has occurred over the previous year, and on how Ministers themselves have complied with the duties in relation to island communities imposed by Part 3 of the Bill. As with the plan itself such reports must be laid before the Parliament and published, as per subsection (3).

Section 6 – Review of plan

15. This section provides for the timescales and review of the plan once it has been prepared and published under section 4. Subsection (1) requires the Scottish Ministers to review the plan before the end of five years from when the plan was last published. Ministers may also review the plan at another time should they see fit.

16. Subsection (2) allows Ministers to revise the plan as they consider appropriate following a review. Subsection (3) applies the same duties set out in section 4 for the original plan – of consultation, of laying before the Scottish Parliament, and of publication – to any review of the plan.

Part 3 – duties in relation to island communities

Duty of certain authorities in respect of policies and services

Section 7 – Duty to have regard to island communities

17. This section places a duty on the Scottish Ministers and other public authorities, listed in the schedule and referred to as “relevant authorities” in the Bill, to have regard to island communities in carrying out their functions. See section 9 on compliance with this duty.

18. Subsection (3) provides a power for the Scottish Ministers to amend the list of relevant authorities in the schedule by regulations. Such regulations are subject to the affirmative parliamentary procedure (see section 21(2) of the Bill).

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Section 8 – Island communities impact assessment

19. This section places a duty on relevant authorities to undertake an impact assessment when developing, redeveloping and delivering a policy, a strategy or a service, if it is anticipated to have a significantly different effect on an island community compared with other communities in Scotland (including other island communities as well as non-island communities).

20. The question of which other communities differential impact is measured against will depend on whether the authority operates locally or nationally. Where the relevant authority's scope is limited geographically (for example a Health Board) then the assessment of differential impact would only include other communities in the same geographical area; whereas national bodies must consider the impact on communities across the whole of Scotland.

21. Subsection (3) sets out the information that an island communities impact assessment must contain: a description of the differential effect which is anticipated; and the authority's assessment of the extent to which development or delivery can be carried out in such a way as to improve or (in the case of potentially adverse effect) mitigate the outcomes for island communities resulting from the policy, strategy or service in question.

22. The intention is that island communities impact assessments will become a normal procedural step in public authorities' decision-making processes, in the manner of the equality impact assessment, used in relation to the duties contained in the Equality Act 2010.

Section 9 – Compliance with section 7 duty

23. This section sets out how a relevant authority may fulfil the duty to have regard to island communities imposed by section 7. Where the mandatory criteria under section 8(1) apply, triggering the requirement to prepare an island communities impact assessment, compliance will be demonstrated by preparing that assessment. But where those criteria do not apply, relevant authorities are left with a residual discretion on what action to take: other ways of demonstrating compliance might be, for example, through notification of the intended redevelopment of an authority's policy to potentially affected persons in the islands; or through consultation with groups representing island communities during the delivery of a particular service.

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Guidance and reporting

Section 10 – Guidance about section 7 duty

24. Subsection (1) of this section 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.

25. Subsection (2) requires the Scottish Ministers to consult the persons specified before issuing any such guidance. The consultation requirements here mirror those in section 4(1) of the Bill for the preparation of the national islands plan.

Section 11 – Reporting regarding section 7 duty

26. Subsections (1) and (2) of this section require relevant authorities to include information about how they have complied with the section 7 duty to have regard to island communities, where that duty has applied to them in their chosen reporting period of up to a year: that is information about the island communities impact assessments which they have carried out, and information about any other steps which they have taken to comply with the section 7 duty (see the explanation of section 9 at paragraph 22 above).

27. Subsection (3) leaves it to an individual relevant authority to determine how it publishes this information. It is envisaged that in most cases publication will be in an authority's annual report, and so that is mentioned here as an illustrative example.

28. Subsection (4) provides that, as the Scottish Ministers will report on the duty imposed by section 7 (and also the duty imposed by section 12) as part of their report on the national islands plan under section 5, there is no requirement for them to report separately under this section.

Duty of the Scottish Ministers in respect of legislation

Section 12 – Preparation of island communities impact assessment by Ministers

29. This section places a particular duty on the Scottish Ministers to undertake an impact assessment in relation to proposed legislation – both primary and secondary – which it is anticipated will have a significantly different effect on an island community from its effect on other communities in Scotland.

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30. Currently, the Standing Orders of the Scottish Parliament already require that a Government Bill must be accompanied by a Policy Memorandum setting out, among other things, “an assessment of the effects, if any, of the Bill on island communities” (Rule 9.3 on accompanying documents for Public Bills). However this only covers proposed primary legislation, whereas subsection (2) of this section defines “legislation” as including subordinate legislation as well as any proposed Bill for an Act of the Scottish Parliament.

31. “Subordinate legislation” here takes the default meaning given by schedule 1 of the Interpretation and Legislative Reform Act 2010: that is “an instrument made or to be made by virtue of an Act of Parliament or an Act of the Scottish Parliament.” Therefore the duty imposed by this section covers subordinate legislation under both UK and Scottish statutes, so long as it is made by the Scottish Ministers, and so long as it is subject to negative or affirmative Scottish Parliamentary procedure. However Acts of Sederunt and other court rules, statutory codes of practice, directions and guidance are not included here.

32. Subsection (3) sets out the information that an island communities impact assessment must contain: this is the same as in section 8(3) of the Bill.

Part 4 – representation of island communities

Elections to the Scottish Parliament

Section 13 – Constituency of Na h-Eileanan an Iar

33. This section secures special status for the existing Scottish Parliamentary constituency of Na h-Eileanan an Iar by adding it into schedule 1 of the Scotland Act 1998 (“the 1998 Act”) as a constituency protected from variation following a boundary review by the Local Government Boundary Commission for Scotland. Orkney and Shetland are already listed in the 1998 Act as constituencies which are protected in this manner. The geographical area of the Na h-Eileanan an Iar constituency is the same as the council area of Comhairle nan Eilean Siar.

34. Subsection (1) of this section also alters the rules by which the Local Government Boundary Commission for Scotland determines the average size of the electorate for the remaining constituencies not protected from variation: in consequence of giving Na h-Eileanan an Iar excepted status it is removed from both the definition of the “total electorate” and the method

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of calculating the “electoral quota” in paragraph 12 of schedule 1 of the 1998 Act.

35. All Scottish Parliamentary constituencies with the current exception of Orkney and Shetland are provided for by the Scottish Parliament (Constituencies and Regions) Order 2014 (S.I. 2014/501) (“the 2014 Order”), made under paragraph 6 of schedule 1 of the 1998 Act. Subsection (2) of this section removes the 2014 Order’s provision for Na h-Eileanan an Iar, again in consequence of protecting it from variation in the 1998 Act.

36. A separate Order in Council – the Scottish Parliament (Elections etc.) Order 2015 (S.S.I. 2015/425) (“the 2015 Order”) – deals with the conduct of elections to the Scottish Parliament, and contains different expense rules for “burgh” and “county” constituencies (reflecting previous local government law). Na h-Eileanan an Iar is deemed to be a county constituency under the 2014 Order: therefore, after its removal from the 2014 Order by subsection (2) of this section, subsection (3) amends article 42 of the 2015 Order to ensure that Na h-Eileanan an Iar is still treated as a county constituency for the conduct of elections – with the result that the maximum level of expenses in the 2015 Order for a county constituency will continue to apply.

Local government elections

Section 14 – Number of councillors in wards with inhabited islands

37. The Local Government Boundary Commission for Scotland and the Scottish Ministers are obliged, under section 28(2) of the Local Government (Scotland) Act 1973 (“the 1973 Act”), to implement electoral arrangements in accordance with section 1 of the Local Governance (Scotland) Act 2004 (“the 2004 Act”). Currently this includes the requirement for there to be three or four councillors returned per electoral ward in Scotland.

38. This section of the Bill amends the 2004 Act to provide an exception to the usual three or four member rule for electoral wards in relation to wards which consist either wholly or mainly of one or more inhabited islands. In these circumstances the Local Government Boundary Commission for Scotland will have the flexibility to propose wards of one or two members.

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39. This new power would form part of the existing framework of rules for the consideration of local electoral arrangements, set out in section 13 and schedule 6 of the 1973 Act, which require the Commission and Ministers to take into account:

- the interests of effective and convenient local government;
- that each councillor should as near as possible represent the same number of electors;
- the desirability of fixing boundaries that are easily identifiable;
- any local ties which would be broken by making a particular boundary; and
- special geographic considerations that may need different treatment.

Section 15 – Review of wards in certain local government areas

40. This section provides that as soon as practicable following commencement the Local Government Boundary Commission for Scotland must undertake a review of the electoral arrangements for each of the six local authority areas named in subsection (2) – these are the areas currently containing inhabited islands as defined by section 1 of the Bill.

41. Subsection (3) applies Part 2 of the 1973 Act, on the procedure for local government boundary reviews, to the review under subsection (1) – with the important modification that the Local Government Boundary Commission must submit its review findings to the Scottish Ministers by a date specified by Ministers, rather than according to the timescales set out in section 17(1) of the 1973 Act. Following this, Ministers will have the power under section 17(2) of the 1973 Act to make an order to implement the Commission’s proposals.

42. The effect of subsection (4) is that the specific review of island areas under subsection (1) will be discounted for the purposes of the general rolling 8-12 year timetable for the Commission’s reviews, prescribed under section 16(2) of the 1973 Act.

Part 5 – development in the Scottish island Marine area

Key definitions

Section 16 – Meaning of “development activity”

43. This section defines “development activity” for the purposes of Part 5 of the Bill, setting out the kinds of activity which are to be subject to the licensing scheme to be created by regulations under section 18.

44. Subsection (1) provides for sea-based construction, alteration and improvement works in general, and also for dredging, to be “development activities” and thus licensable under this Part. These are also licensable (along with numerous other activities) under the marine licensing regime created by Part 4 of the Marine (Scotland) Act 2010 (“the 2010 Act”).

45. Paragraphs (a) to (c) of subsection (2) explicitly exclude activities relating to the reserved areas of oil and gas, defence and pollution from the definition of “development activity”. Therefore these activities will not be subject to the requirement for a licence under regulations made under section 18. This makes equivalent provision to section 34 of the 2010 Act.

46. Paragraph (d) of subsection (2) also excludes fish farming from the definition of “development activity” – again, this will not be subject to the requirement for a licence under regulations made under section 18. This is because planning permission from a local authority is already required for fish farming. In this way the Bill is consistent with the Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007 (S.S.I. 2007/268), which provided amendments to a range of primary and secondary legislation to allow for the consideration of planning applications for new fish farms by planning authorities. This included amendments to the Orkney County Council Act 1974 and the Zetland County Council Act 1974 to disapply the provisions relating to works licences in respect of the placing or assembly of equipment in marine waters for the purposes of marine fish farming. The definition of fish farming itself is imported from section 26 of the Town and Country Planning (Scotland) Act 1997 – that is, “the breeding, rearing or keeping of fish or shellfish (which includes any kind of crustacean or mollusc).”

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Section 17 – Meaning of “Scottish island marine area”

47. This section defines the “Scottish island marine area” for the purposes of Part 5. This is the geographical area which the new licensing scheme created under this Part will cover.

48. The first limitation on “Scottish island marine area” is that it is part of the “Scottish marine area” as that term is defined in Part 1 of the 2010 Act. The “Scottish marine area” is itself within the seaward limits of the territorial sea of the United Kingdom and includes the bed and subsoil of the sea within that area. The boundaries between the parts of the territorial sea for Scotland and other parts of the United Kingdom are determined under an Order in Council made under section 126(2) of the Scotland Act 1998 – currently [the Scottish Adjacent Waters Boundaries Order 1999 \(S.I. 1999/1126\)](#). Within that, the “Scottish island marine area” is therefore further defined as that portion of Scotland’s territorial sea (the Scottish marine area) which is up to a radius of 12 nautical miles from an island, measured from the low water mark of the ordinary spring tide. Although section 18(2) qualifies the practical application of the licensing regime to areas that include an inhabited island, any island (whether inhabited or uninhabited) counts for the prior conceptual purpose of measuring the 12-mile radius, as there may be some variation in habitation over time.

Licensing of development activities

Section 18 – Scottish island marine area licence

49. This section gives a regulation-making power to the Scottish Ministers to establish a licensing scheme in respect of development activities within the Scottish island marine area. Under the regulations a person will not be able lawfully to carry out a development activity in an area designated under regulations as an “island licensing area” without first obtaining a licence from a local authority; and if such a licence is granted, will have to carry out the activity in compliance with its terms.

50. Subsection (2) sets out two preconditions for an area to be designated as an “island licensing area”. First, a local authority would have to apply to Ministers for a designation to be made by scheme regulations; and secondly, before making those regulations, Ministers would have to be satisfied that the area which is to be designated included at least one inhabited island. If Ministers decided to make scheme regulations designating an area as an “island licensing area”, those regulations would either set out the detail of the scheme, or add the newly designated area to

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an existing scheme. In either case, before laying a draft of the regulations, Ministers are required under subsection (7) to consult the persons there mentioned.

51. Subsection (3) provides for particular aspects of the scheme that the regulations may make provision about. This list is not exhaustive.

52. Subsection (3)(a) provides that the regulations may set out the particular types of development activity covered by or exempted from the scheme.

53. Subsection (3)(b) provides that the regulations may further define the area and boundaries of the Scottish island marine area; allocate responsibility within it as between different local authorities; and also define island licensing areas.

54. Subsection (3)(c) provides that the regulations may set out the procedure in relation to applications for licences, including: any pre-application requirements; the procedure for the issue, renewal, variation, transfer, suspension and revocation of a licence; the procedure for an appeal of a decision in relation to a licence (e.g. the refusal of a licence); for fees to be charged by local authorities; and for the holding of an inquiry.

55. Subsection (3)(d) provides that the regulations may set out the effect of an application and of a grant of a Scottish island marine licence on an application for, or a grant of, a marine licence under Part 4 of the 2010 Act; and their effect on an application for, or a grant of, consent under section 36 of the Electricity Act 1989 in relation to the construction, extension or operation of electricity generating stations.

56. Subsection (3)(e) provides that the regulations may provide for their own enforcement, including by the issuing of compliance notices or remediation notices, as so defined.

57. Subsection (3)(f) provides that the regulations include a power for remedial works to be carried out where a development activity has been carried on otherwise than in accordance with a licence: that is either without a licence at all or in breach of the terms of a specific licence.

58. Subsection (3)(g) provides that the regulations may create offences and penalties both for the contravention of a general prohibition on a

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development activity within the Scottish island marine area (i.e. where it is carried on without a licence) and for the contravention of a restriction contained in the terms of a specific licence.

59. Subsection (3)(h) provides that the regulations may make provision for exceptions and defences to offences created by virtue of subsection (3)(g).

60. Subsection (3)(i) provides that the regulations may provide for the imposition of fixed monetary penalties in relation to a contravention of the regulations that is made a criminal offence by virtue of subsection (3)(g) and (h).

61. Subsection (3)(j) provides that the regulations may make provision about the publication of information relating to licences in public registers maintained by local authorities (including about the fees payable for access and the circumstances in which a person can request non-publication).

62. Subsection (4) provides that any fees to be charged by local authorities under regulations are to be for reasonable administrative costs in relation to deciding a licence application.

63. Subsection (5) prescribes the maximum penalties in both summary and solemn procedure if the regulations made under subsection (1) do create criminal offences.

64. Subsection (6) provides that where regulations made under subsection (1) do create fixed monetary penalties then such penalties are to be imposed only where the local authority concerned is satisfied to the criminal standard of proof that an offence has been committed; that such penalties are to be imposed only by notice; and also provides that such penalties cannot exceed £50,000 in respect of each contravention of the regulations.

65. Subsection (7) provides that before laying a draft of regulations under subsection (1) before the Scottish Parliament the Scottish Ministers must consult persons representing the interests of island communities and those likely to be affected by the regulations (mirroring the consultation requirements in sections 4(1) and 10(2) of the Bill). The regulations will also be subject to the affirmative procedure – see section 21(2) of the Bill.

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Section 19 – Exception from requirement for licence

66. This section makes saving provision in respect of the licensing scheme to be established by regulations under section 18. It provides that the licensing scheme does not apply to a person carrying out a development activity in an area designated under the regulations as an “island licensing area”, if before the relevant designation was made:

- the person was already carrying out a development activity;
- the person has a lease or an agreement to lease in order to carry out a development activity – in practice this would usually be granted by a Crown Estate body;
- the person has commenced the pre-application consultation for a marine licence required under sections 22 to 24 of the Marine (Scotland) Act 2010;
- the person has made an application for – or already been granted – a marine licence under Part 4 of that Act;
- the person has made an application for – or already been granted – a works licence under the Orkney County Council Act 1974 or the Zetland County Council Act 1974.

Section 20 – Crown application

67. By virtue of section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010, the Bill applies to the Crown in Scotland generally (including to Crown land). However, subsection (1) of this section provides that nothing in this Part of the Bill makes the Crown criminally liable: therefore, should it be in contravention of regulations made under section 18 on Scottish marine area licences, the Crown would be absolved of criminal liability. Instead, subsection (2) provides for the Court of Session, on an application by the Lord Advocate, to declare such an act to be unlawful.

68. Subsection (3) clarifies that, despite the effect of subsection (1) in relation to the Crown itself, it is still possible for persons in the service of the Crown to be criminally liable under this Part of the Bill.

Part 6 – final provisions

Regulations

Section 21 – Regulations

69. Subsection (1) of this section provides that the powers of the Scottish Ministers to make regulations under this Bill include additionally the power to make different provision for different purposes and to make incidental, supplementary, consequential, transitional, transitory or saving provision. Subsection (2) provides that regulations under sections 7(3) and 18(1) are subject to the affirmative parliamentary procedure.

70. However, subsection (3) provides that this section does not apply to ancillary regulations under section 22(1); or to commencement regulations under section 23(2). By virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, such commencement regulations will simply be laid before the Parliament as soon as practicable after being made, with no further procedure.

Section 22 – Ancillary provision

71. Subsection (1) of this section gives the Scottish Ministers a freestanding regulation-making power to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, or in connection with, giving full effect to the Bill. Subsection (2) allows such regulations to modify any enactment (including the Bill itself).

72. Subsection (3) provides that regulations under subsection (1) which amend the text of primary legislation will be subject to the affirmative parliamentary procedure. Otherwise they will be subject to the negative parliamentary procedure.

Commencement and short title

Section 23 – Commencement

73. Subsection (1) of this section provides that this section and sections 1, 2, 22, and 24 come into force on the day after Royal Assent. The remainder of the Bill, once enacted, comes into force on the day or days appointed by the Scottish Ministers in regulations made under subsection (2).

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74. Subsection (3)(a) provides that these commencement regulations may also include transitional, transitory or saving provision. It should be noted that these aspects are not substantive powers but are dependent on commencement. Subsection (3)(b) provides that the regulations may appoint different days for different purposes.

Section 24 – Short title

75. This section provides that the Bill, once enacted, will be referred to as the Islands (Scotland) Act 2018.

Schedule

76. The schedule is introduced by section 7(2). It lists the relevant authorities to whom Part 3 of the Bill applies and which must have regard to island communities in carrying out their functions. There are separate headings for the following:

- Office-holders in the Scottish Administration, including the Scottish Ministers;
- Scottish public authorities with mixed or devolved functions;
- NHS Health Boards and Special Health Boards (constituted under section 2 of the National Health Service (Scotland) Act 1978);
- Local authorities;
- Integration Joint Boards (established under section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014);
- Regional Colleges (designated under section 7A of the Further and Higher Education (Scotland) Act 2005);
- Regional Transport Partnerships (created under section 1 of the Transport (Scotland) Act 2005).

77. The duties imposed by sections 7 to 11 of the Bill apply to all the persons listed in the schedule (with the duty imposed by section 12 applying solely to the Scottish Ministers). The list of persons can be amended by regulations made by Ministers under section 7(3).

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