



Law Society
of Scotland

Stage 3 Briefing

Islands (Scotland) Bill

May 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

This briefing paper is intended to inform MSPs of our comments on the Islands (Scotland) Bill. The Stage 3 Debate is scheduled to take place in the Scottish Parliament on 30 May 2018.

The Bill¹ was introduced into the Scottish Parliament by the Cabinet Secretary for Rural Economy and Connectivity, Fergus Ewing MSP, on 9 June 2017.

The Bill was allocated to the Scottish Parliament's Rural Economy and Connectivity. The Committee issued a call for written evidence and we provided a written submission to the Committee.² On 22 January 2018 the Committee produced a stage 1 Report.³ The stage 1 Debate took place in the Scottish Parliament on 8 February 2018 and the Scottish Parliament agreed to the general principles of the Bill. Amendments were made to the Bill at stage 2 and the Bill passed stage 2 on 28 March 2018.

If you would like to discuss this paper, or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General comments

The Islands (Scotland) Bill covers a disparate set of issues. We understand the Government's objective for the Bill as a whole is "ensuring that there is a sustained focus across Government and the public sector to meet the needs of island communities both now and in the future".

¹ [http://www.parliament.scot/Islands%20\(Scotland\)%20Bill/SPBill15S052017.pdf](http://www.parliament.scot/Islands%20(Scotland)%20Bill/SPBill15S052017.pdf)

² <https://www.lawscot.org.uk/media/10498/rur-mar-con-law-society-of-scotland-response-to-consultation-on-islands-scotland-bill.pdf>

³ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/REC/2018/1/22/Stage-1-Report-on-the-Islands--Scotland--Bill-1/RECS052018R2.pdf>

The Bill contains fairly high level provisions, with much detail to be set out in regulations. It is therefore difficult to determine how all of the changes envisaged would work in practice without sight of the implementing regulations.

We note that at a general level, many of the issues identified in the policy memorandum – “geographic remoteness, declining populations, transport and digital connections” – are also relevant to rural communities more generally.

Part 1- Key Definitions

We have previously identified a number of concerns with drafting⁴, in particular those set out in the key definitions in part 1 of the Bill.

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

We have previously highlighted that we consider the definition of island at section 1(1) requires further clarification. It is not clear if an area of land would fall within the category of “island” if it is surrounded on all sides by the sea only at high tide but a natural causeway connects it to the mainland at low tide.

The phrase “permanently inhabited” is used at section 1(2). This is not a concept which is recognised in Scots law and we consider it is likely to prove confusing and impractical, or possibly even unworkable. It suggests that someone must inhabit an island at all times to meet the requirements of the definition - island dwellers will likely wish to leave the island from time to time. The definition is unlikely to prove problematic on larger islands where it is almost inconceivable that all residents would leave at the same time, but could be a pertinent issue on a smaller island with only a handful of residents.

The idea of permanent habitation may also fail to take account of seasonal occupation, for example islands where conditions would be too harsh for human habitation over the winter months but where people live or could live during the summer months. Such islands may fall within the category which the objectives of the Bill would otherwise seem to encompass. We consider that such issues may merit further policy consideration. We have previously suggested that reference to the existing and widely recognised concept of “ordinary residence” could be used as an alternative.

Section 2 – Meaning of “island community”

We note that the idea of community rights is gaining increasing recognition in Scots law but caution that problems can be caused by multiple definitions of a single term.

⁴ <https://www.lawscot.org.uk/media/10498/rur-mar-con-law-society-of-scotland-response-to-consultation-on-islands-scotland-bill.pdf>

We note that the legislation considers that a community can be formed by “two or more persons”. It is difficult to see why two people living on an island should be given rights as “island community” but that a single person on an adjacent island would not merit those same rights.

The idea of permanent habitation is relevant to the requirements of constituting an “island community”. We note that difficulties may arise if a particular area were to fluctuate between one where an “island community” could be established and one where it could not. This may happen if one person was to leave and some time was to elapse before a new person arrived. Would the protections for that community cease until the new person was formally resident?

A question arises where a person does not fulfil the requirement of permanent habitation or even residence but has a clear interest in a particular piece of land by dint of ownership. For example, a person could own island property and live there for only part of the year. They might be regarded as a member of the community (in a general sense) by those living on the island on a year-round basis but even while owning land and contributing to the life of the community, may not be considered as part of the “island community” in terms of the Bill. There appears to be a disconnect here between the interest which is generally recognised as flowing from ownership of property and the interest recognised in the Bill. There could perhaps even be potential human rights implications under Protocol 1 of the European Convention on Human Rights (ECHR) if this leads to a situation where a person who owns an island or part of an island but is not permanently resident there, such that they cannot form part of an “island community”, is seen as having lesser or no rights.

We welcome the amendments made to section 2 at stage 2 to include uninhabited islands within an “island community”.

Part 2 - National islands plan

Section 3 – National islands plan

We do not take a view on the necessity or otherwise of creating a national islands plan per se. We note that some of the issues identified in relation to island communities would also apply to other remote communities.

For a law to be meaningful it must also be enforceable and therefore certain. We therefore welcome the amendments made to the Bill at stage 2 to clarify the concept of “improving outcomes”.

It will be important that any islands plan is aligned with other plans such as the National Planning Framework, Local Development Plans, Scotland’s Marine Plan and the Land Use Strategy, and Regional Marine Plans.

Section 6 – Review of the plan

We support the requirement to consult on the review of the plan and lay it before the Scottish Parliament and agree that the revised plan must be published. We do note that the review period of five years differs from the timeframe for reviewing plans proposed under the Planning (Scotland) Bill.

Part 3 – Duties in relation to island communities

Section 7 – Duty to have regard to island communities

Section 7 provides that certain authorities (as listed in the Schedule) must have regard to island communities in carrying out its functions. We note that the relevant authorities listed under the Scottish Administration part of the schedules tie in with references to office-holders in the Scottish Administration under s.126(7) and (8) of the Scotland Act 1998 (as amended).

Section 7(3) provides that Scottish Ministers may by regulations amend the schedule by adding an entry, varying the description of an entry, or removing an entry. We consider that there would be merit in certain other authorities being included in the list to ensure it is as wide ranging as necessary and appropriate, for example, we suggest that the Crown Office and Procurator Fiscal Service, The Office of the Scottish Charity Regulator, and The Scottish Fiscal Commission be included in the list. These authorities are included in the list found in part 2 of Schedule 1 of the Freedom of Information (Scotland) Act 2002.

Section 8 – Island Impact Assessments

We understand that the objective of “island proofing” is to address concerns around a “one-size-fits-all” approach to legislation leading to a significantly detrimental effect on islands and island communities. We have no evidence as to whether or not this presents a problem at present and therefore do not take a view on the necessity or otherwise of carrying out such assessments. We welcome the addition at stage 2 of a requirement so that those local authorities who do not prepare an island communities impact assessment must publish an explanation of reasons for not doing so.

Part 4 – Representation of island communities

Section 13 – Protection of the constituency boundary of Na h-Eileanan an Iar (the Western Isles)

We do not take a view as to whether or not the constituency boundary should be protected. However, we note that there is precedent for this kind of protection with respect to both Orkney and Shetland. The protection would only apply in the context of Scottish Parliamentary constituency boundaries.

Sections 14 and 15 – Variations of number of councilors in wards with inhabited islands

The Bill makes an exception to the rules for local government electoral wards in order to allow areas with inhabited islands to return one or two members (instead of the usual three or four). If the electoral wards are to be varied in this way, we agree with the proposed list of local government areas to be reviewed.

Part 5 – Development in the Scottish Island Marine Area

We consider that it is important that any changes resulting from the introduction of legislation relating to the islands does not interfere with the current coherent approach to management of Scotland's waters.

Marine licences in Scotland are currently issued by Marine Scotland through the Marine Scotland Licensing Operations Team (MSLOT). This provides a single port of call for all marine licence applications relating to Scottish waters. Having a single licensing authority allows the body to coordinate licences in the issuing process and maintain an overall picture of the spread of marine licences in Scotland. Introducing separate schemes to be administered by individual local authorities could create fragmentation and from a licensee perspective, would negate the simplicity of application to a single body. This may be particularly significant where a licence applies to an area falling into more than one local authority district.

Section 18 - Scottish island marine area licence

Much of the detail in respect of this section is to follow in regulations. We therefore cannot comment on the workability of the scheme at this time. We note that careful consideration will require to be given to the detail of any such regulations, in particular in relation to marine areas which could be 'claimed' by more than one local authority as an island marine area, and also to marine areas which fall within 12 nautical miles of both an island (so could be designated a "Scottish island marine area" with a licence to be granted by the local authority) and within 12 nautical miles of the mainland (with the power to grant a licence ordinarily granted by Marine Scotland).

Part 6 – Final Provisions

We have no comment to make on this Part.

For further information, please contact:

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

AlisonMcNab@lawscot.org.uk