



Law Society
of Scotland

Consultation Response

Response to call for evidence on the Islands
(Scotland) Bill

September 2017



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.

The Society's Rural Affairs, Marine Law and Constitutional Law Sub-committees welcome the opportunity to consider and respond to the call for evidence from the Scottish Government's Rural Economy and Connectivity Committee on the *Islands (Scotland) Bill*.¹ The Sub-committees have the following comments to put forward for consideration.

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".

We note the policy justification for the Bill but it is difficult to determine how all of the changes envisaged would work in practice. It will only be possible to identify what those objectives are at a detailed level – and therefore the extent to which they are likely to be achieved - when the implementing regulations are available.

We also 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.

We have identified a number of concerns with drafting, in particular those set out in the key definitions at part 1 of the Bill which we consider merit further consideration to ensure that the Bill provides the clarity and certainty required to ensure that the legislation can be properly implemented.

¹ http://www.parliament.scot/S5_Rural/Islands_CFE.pdf

Part 1 Key Definitions

The definitions in the Bill as currently give rise to a number of concerns around practical workability and legal certainty. It is imperative that these are addressed and we make some suggestions for amendments below.

s.1 Meaning of “island” and “inhabited island”

s.1(1) The definition of island requires further clarification.

For example, would an area of land 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? If the intention is that a naturally formed area of land will be treated as an island if at mean high water tide it is both surrounded on all sides by the sea and above high water then the drafting could be clarified by drafting the provision as follows:

“s.1(1) In this Act “island” means a naturally formed area of land which is surrounded on all sides by the sea at the mean high water mark.”

We also recommend standardising the terms between s.1(1) and s.17(b) with reference to high/low water marks in the interests of consistency.

s.1(2) The phrase “permanently inhabited” is not recognised in Scots law and is likely to prove confusing and impractical, or possibly even unworkable. It suggests that someone must be inhabiting an island at all times to meet the requirements of the definition but island dwellers will probably want to have the option of leaving the island from time to time. While the definition might not prove problematic on larger islands where it almost inconceivable that all residents would leave at the same time, it could be a pertinent issue on a smaller island with only a handful of residents.

The idea of permanent habitation would 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. These islands could from time to time be inhabited and might be regarded as inhabited islands in the general sense but those inhabitants would not benefit from consideration or rights to consultation in the same way as those on islands with year-round residents. They might nonetheless fall within the category of persons which the objectives of the Bill would otherwise seem to encompass. We consider that issues such as this merit further policy consideration to allow the Bill to be drafted in a way which provides certainty and clarity and delivers the objectives of the legislation.

We consider that drafting could be improved by referring to the existing and widely recognised concept of “ordinary residence”.

s.2 Meaning of “island community”

This definition of “island community” also raises a large number of questions. We also 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.

We note that the legislation considers that a community can be formed from “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.

Furthermore, if a community has been identified but had only two people, what would happen if one person were 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? This could create practical problems if a particular island were to fluctuate between one where an “island community” could be established and one where it could not.

Again the idea of permanent habitation comes into play as the concept has an impact on how an “island community” may be constituted.

A further question therefore arises where with 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 – for example operating wildlife tours during the summer months but with a different occupation on another island or the mainland over the winter months. 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 could 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 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.

A further potentially anomalous example is St Kilda where the National Trust for Scotland, Scottish Natural Heritage and Ministry of Defence work in partnership to facilitate research and conservation. The three bodies do not meet the test set out for establishing an “island community” under section 2 and while under s.4(1)(a)(ii) it appears that there might be a duty to consult them in drawing up the islands plan, the lack of relevant island community would seem to negate the duty to have regard to the particular characteristics of St Kilda in preparing the national islands plan.

Response to questions

Question 1 - The Bill creates a duty to publish a national islands plan and lay it before the Scottish Parliament. What are your views on this provision?

s.3 National islands plan

We do not take a view on the necessity or otherwise of creating a national islands plan per se.

However, 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. However, we note that the concept of “improvement” is very subjective and therefore lacks that certainty.

If an Islands Plan is to be introduced this needs to be aligned with other plans such as the National Planning Framework, Scotland’s Marine Plan and the Land Use Strategy, Local Development Plans and Regional Marine Plans. The interrelationship between the Islands Plan and these other plans should be made clearer in the Bill.

s.4 Preparation and scrutiny of plan

The drafting of s.4(3) is difficult to understand. It might be simpler to state that the Scottish Ministers must allow the Scottish Parliament 40 [working] days, excluding any time during which the Parliament is dissolved or in recess for 5 or more days, to scrutinise the plan.

s.6 Review of the plan

We support the requirement to consult on the review of the plan and lay it before the Scottish Parliament although we agree that the revised plan must be published. We also support the review period of 5 years which ties in with the timeframe for reviewing plans under Scottish planning legislation.

Question 2 - The Bill will require Scottish Ministers and certain Scottish public authorities, to prepare island impact assessments. Do you agree with this provision? How do you think it should work in practice?

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.

s.7 – Duty to have regard to island communities

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). However, we also note that under s.126(8)(b) the definition includes “any other office of a description specified in an Order in Council made by Her Majesty under this subsection”. Furthermore we note that additional bodies are listed in part 2 of Schedule 1 of the Freedom of Information (Scotland) Act 2002.² We therefore recommend that a consultation should be held on the bodies to be included.

Question 3 - The Bill proposes to protect the Scottish Parliamentary constituency boundary of Na h-Eileanan an Iar (the Western Isles) from change. Do you agree with this?

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. Furthermore, we note that the protection would only apply in the context of Scottish Parliamentary constituency boundaries.

Question 4- The Bill proposes to make an exception to the rules for local government electoral wards to allow areas with inhabited islands to return 1 or 2 members (instead of the usual 3 or 4). What are your views on this proposal?

s.15 - If the electoral wards are to be varied in this way we agree with the proposed list of local government areas to be reviewed.

Question 5- The Bill will provide a regulation-making power for the Scottish Ministers to create a marine licensing scheme for coastal waters. Do you agree with this power? Do you have any comments on how it should be used?

In 2013 we responded³ to the Scottish Government’s consultation on Planning Scotland’s Seas. We commended them on adopting a holistic approach to the process of marine planning. It is important that any changes resulting from the introduction of legislation relating solely to the islands does not interfere with a coherent approach to management of Scotland’s waters.

² <http://www.legislation.gov.uk/asp/2002/13/schedule/1>

³ https://www.lawsco.org.uk/media/229499/mar_marine_scotland_consultation_on_planning_scotland_seas_law_society_of_scotland.pdf

Currently Marine licences in Scotland are issued by Marine Scotland through the Marine Scotland Licensing Operations Team (MS LOT). 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, particularly where a licence applies to an area in more than one local authority district.

At present we cannot comment on the workability of the scheme under s.17 and s.18 as the details will be provided through regulations. For example, the Scottish Ministers will need to decide where the boundaries lie where two local authorities could potentially claim jurisdiction over a particular marine area as an island marine area because it is within 12 nautical miles of an island under that local authority eg the channel between Arran and Bute which could fall within the jurisdiction of either North Ayrshire or Argyll and Bute.⁴ A further question arises where the marine area in question is within twelve 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 twelve nautical miles of the mainland (with the power to grant a licence ordinarily granted by Marine Scotland). At the same time, it is not clear how an application would be treated if the relevant local authority had not applied for designation of an area as an island licensing area at the time a licence was granted but subsequently did so.

s.18(2)(b) - It is also unclear why the area must be an inhabited area for a special marine area to apply.

Question 6 - Does the Bill achieve its aims and are you in favour overall? Is there anything else that you feel should be included or excluded from the Bill?

We have no comments on this question.

Question 7 - Do you have any comments on the bill in relation to human rights or equalities?

Issues around compliance with the UK's obligations under the ECHR could arise if plans are drawn up which would interfere with the rights of individuals in relation to peaceful enjoyment of their property. As noted above this may be a particular concern if individuals who own island property but are not ordinarily resident there are granted fewer or weaker rights.

⁴ The distance between them is less than 6 nautical miles

Access to justice is a key concern for us. As noted in our response⁵ to the Independent Strategic Legal Aid review, earlier in the year, we noted that independently commissioned research had identified a risk that people in rural areas who were eligible for legal aid would not be able to find solicitors to provide advice, including in cases where a person is detained in custody and the requirement for advice is particularly urgent. We cautioned that if steps are not taken to remedy this it could result in a two-tier justice system. If the duty to have regard to island communities placed upon authorities such as the Scottish Courts and Tribunals Services, Scottish Legal Aid Board and Children's Hearings Scotland leads to improved access to justice in remote areas, this would be welcomed.

For further information, please contact:

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⁵ <https://www.lawscot.org.uk/media/1179917/final-law-society-of-scotland-response-to-independent-strategic-legal-aid-review-call-for-evidence-aug-2017-corrected-.pdf>