

Islands (Scotland) Bill 2017 – policy briefing for the Coastal Communities Network, Scotland

Background

The [Islands \(Scotland\) Bill was introduced](#) by the Cabinet Secretary for Rural Economy and Connectivity, Fergus Ewing MSP, on 9 June 2017.

In July of 2013, then First Minister, Alex Salmond delivered what became known as [the Lerwick Declaration](#) - which stated that a ministerial working group would examine the prospect of decentralising power to [Shetland Council](#), [Orkney Council](#), and [Comhairle nan Eilean Siar](#) (the Western Isles Council). In the lead-up to this the [“Our Islands-Our Future”](#) strategy had been launched by the leaders of these three island councils—calling for greater autonomy for Scotland’s islands. The movement was designed off the back of the Scottish independence referendum, though it took a neutral position on Scottish independence.

Subsequent to the Lerwick Declaration the [‘Empowering Scotland’s Island Communities’](#) prospectus was published in June 2014 and committed the Scottish Government to the principles of subsidiarity and enhanced powers for Scotland’s islands. The Bill is not only relevant to the above Councils however, although its introduction has been pioneered by them, it covers all inhabited islands which brings in three other Councils - [Argyll and Bute](#) (which has 23 inhabited islands); [Highland](#); and [North Ayrshire](#).

This intent was complemented further by the [Community Empowerment \(Scotland\) Act 2015](#), which, when fully rolled out, will enable communities to be more involved in local decision-making.

The Islands (Scotland) Bill seeks to put in place a framework of measures and policy changes which aim to improve day-to-day outcomes for island communities in Scotland - reflecting the unique geographical and socio-economic challenges faced by Scotland’s island communities.

Now having followed the submission of oral evidence, written evidence is being collected and the Bill will undergo further scrutiny early 2018, before being considered and voted on by Parliament during May 2018 - after which it is then anticipated to be passed into an Act later in 2018.

What are the Islands (Scotland) Bill main measures?

It’s a Bill for an Act of the Scottish Parliament to improve outcomes for island communities.

In summary this means:

- A requirement to ‘island proof’ future legislation and policies;
- The creation of a National Islands Plan;
- Statutory protection for the [Na h-Eileanan an Iar](#) (Western Isles) Scottish parliamentary constituency boundary;
- Greater flexibility around Councillor representation within island communities
- Extended powers to island councils in relation to marine licencing.

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, an inhabited island, and an island community. 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, for example, the Isle of Skye is included. Tidal islands, e.g. Oronsay (off Colonsay), are also included. “Island community” for the purposes of the Bill 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.

Part 2–National Islands Plan: This is important regarding actually taking the Bill forward as it will form the detail of much of what is applied on the ground. The process being applied (i.e. developing a Plan after the legal implementation of a Bill) is in line with previous legislation like [the Climate Change \(Scotland\) Act 2009](#) and [the Marine \(Scotland\) Act 2010](#). The National Islands Plan will set out the overarching objectives and strategy of the Scottish Ministers for improving the outcomes for island communities across Scotland. The first draft of the Plan must come before Scottish Parliament within 12 months of the Act coming into force. Ministers will consult not only with island residents but will also have to consult with those they believe represent the interests of island communities and those affected by its proposals, with the idea behind the Plan being for it to be “[co-produced](#)” by all those who have a stake within it.

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 making decisions and policies and to prepare **island impact assessments** in relation to island communities in certain circumstances (see ‘A Closer Look...’, page 2).

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. Currently, under [Schedule 1 to the Scotland Act 1998](#), Orkney and Shetland are fixed as two of the 73 constituencies for the purposes of elections to the Scottish Parliament: this ensures that their boundaries cannot be varied in the future. 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 and allow areas with inhabited islands to return one or two members instead of three or four.¹

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. This provision within the Bill does not refer specifically to Comhairle nan Eilean Siar, which suggests that any forthcoming regulations would apply to all of Scotland's islands, not just Shetland, Orkney and the Western Isles (see ‘A Closer Look...’, page 4)..

Part 6–Final provisions: This Part makes provision about regulations made under the Bill, about the Bill’s commencement, and about its short title.

A Closer Look At: Island-Proofing and Island Impact Assessments

Nowhere does the Bill use the words “island proofing” however [66 public bodies](#) will, through the Bill’s provisions, have a duty put on them to “island proof” their future functions and decision-making. This is referenced in the Bill as their requirement to “have regard to island communities in carrying out” their functions. The responsibility lies ultimately with Scottish Ministers to island proof - all subsequent Government agencies and Directorates that fall under a Minister are therefore also liable.

“Island Proofing” would include the Government considering:

- when legislating whether particular functions and responsibilities could be given to island communities;
- when legislating, whether there was a particular need for differential application of legislation for island communities;
- the applicability of the principles contained within the Reference Framework on Regional Democracy of the Congress of Local and Regional Authorities of the Council of Europe; and
- when developing, formulating and implementing policy, the needs and circumstances of island communities.

¹ [The Local Governance \(Scotland\) Act 2004](#) changes brought in the three or four-member wards, which means that populated islands must be placed in an electoral ward that also contains a significant proportion, or a majority, of people from the mainland—this led to concerns that the distinct interests of island communities might not be fully represented in council discussions. The Bill proposes to make an exception to that rule about Local Government electoral wards to allow areas with inhabited islands to return one or two members instead of three or four.

The principle of island-proofing is about normalising and building a broader scale of awareness of the differences of lifestyle within Scotland's islands into decision-making across public sector bodies such as those 66 listed. There is a strong appetite for such a mechanism - the current summary of consultations on the Bill up to now show that a large majority ([91%](#)) [stated](#) that the Scottish Government should consider placing the concept of island-proofing in legislation.

Island impact assessments in particular place 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).

A Closer Look At: The Scottish Island Marine Area and New Marine Licensing Provisions

The Islands (Scotland) Bill will extend powers to island councils in relation to marine licensing, introducing further regulation-making powers to Local Government in respect of marine development. The Orkney and Zetland County Council [Acts of 1974](#) provided for Orkney and Shetland to grant licences up to 12nm. The Islands Bill therefore extends this to the Western Isles, North Ayrshire, Highland and Argyll and Bute (the Bill doesn't refer specifically to Comhairle nan Eilean Siar, which suggests it applies to all of Scotland's islands).

Under the new regulations a person will not be able to legally carry out a development activity in the defined "Scottish Island Marine Area"² without first obtaining a licence from the relevant Local Council. If the licence is granted the person will have to carry out the activity in compliance with the terms set by the respective Council.

Marine Scotland, on behalf of Scottish Ministers, has the primary responsibility for marine planning, conservation and licensing from Mean High Water Springs out to 200 nautical miles. Terrestrial planning authorities (Strategic and Local Planning Authorities and National Park Authorities) are responsible for all terrestrial planning matters down to Mean Low Water Springs and for marine fish farming (finfish and shellfish), where planning consent is required, out to 12 nautical miles. In the intertidal zone, between low and high water springs, terrestrial planning responsibility overlaps with Marine Scotland's responsibilities for the marine area. See the Planning Circular (1/2015): [the relationship between the statutory land use planning system and marine planning and licencing](#) for more on this.

Development activity means

- (a) construction, alteration or improvement works of any description (either in or over the sea, or on or under the seabed),
- (b) any form of dredging (whether or not involving the removal of any material from the sea or seabed).

The following are not development activities

- (a) any activity relating to a matter which is a reserved matter by virtue of Section D2 (oil and gas) in Part II of schedule 5 of the Scotland Act 1998 and which is an activity outside controlled waters (within the meaning of section 30A(1) of the Control of Pollution Act 1974);
- (b) any activity relating to a matter which is a reserved matter by virtue of paragraph (defence) in Part 1 of that schedule;
- (c) any activity falling within the subject matter of Part 6 (pollution) of the Merchant Shipping Act 1995;
- (d) any activity involving the placing, assembly or operation of any equipment within the Scottish island marine area for the purpose of fish farming (within the meaning given by section 26(6) of the Town and Country Planning (Scotland) Act 1997)

The Bill does set 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; and secondly, before making those

² The Scottish Island Marine Area is defined within the Bill as the portion of Scotland's territorial sea (the Scottish marine area) which is adjacent to an island and up to a radius of 12 nautical miles from an island, measured from the low water mark of the ordinary spring tide.

regulations for designating an area, Ministers would have to be satisfied that the area which is to be designated included at least one inhabited island. If Ministers decided to designate an area as an island licensing area, the regulations for this would either set out the detail of the scheme, or add the newly designated area to an existing scheme - in either case, Ministers would be required to consult those relevant.³ The Scottish Government would undertake a further consultation exercise before laying draft regulations before the Scottish Parliament.

The Islands (Scotland) Bill and: The Community Empowerment (Scotland) Act 2015

The Community Empowerment (Scotland) Act 2015 is one of the most recent legislative responses seeking to give communities a range of new powers, to strengthen the community voice within public service delivery. It also aims to build more effective partnerships between National and Local Government – and all other sectors which affect local communities.

The Act is focused on improving public service outcomes for communities, through a process of improving Community Planning – as well as directly empowering communities through the acquisition of land and buildings and having new rights to participate in the way public services are delivered. In effect, this means that communities will have a greater say in many of the processes that affect their lives. Log in and see the [Coastal Communities Network's Info Hub+](#) for a briefing on the [Community Empowerment Act](#) and its relevance to coastal community groups.

The ambition behind both the Islands Bill and the Community Empowerment Act appear to be closely interlinked. In particular, Part 2 of the Islands Bill, the 'National Islands Plan', seeks to delegate additional powers at the local level, right through to community councils, which will in turn generate more interest in increased participation. Complementary to this, Part 2 of the Community Empowerment Act seeks to restructure community planning, ensuring that communities are engaged in developing Locality Plans and Local Outcomes Improvement Plans – essentially the core Community Planning instruments within local council areas, generating more interest in increased participation.

The Islands (Scotland) Bill and: The Crown Estate Scotland

Scotland is currently undergoing a process of reallocating [Crown Estate responsibilities](#)⁴ and redistributing its associated income from the Crown Estate Commissioners to the Scottish Government (although the Queen will continue to own the Crown Estate on behalf of Scotland). This has thus far been facilitated through [the Scotland Act 2016](#), which delivers the recommendations of the [Smith Commission](#) and grants the Scottish Parliament new legislative powers.

On 1 April 2017, powers over the revenue and management of Crown Estate resources in Scotland were formally transferred from the UK Government to the Scottish Government and an interim body 'Crown Estate Scotland (Interim Management)' is now managing the process. The full process will be taken forward through a separate Crown Estate Bill with the Scottish Government [currently saying](#) that the Scottish Parliament could potentially complete consideration of a Scottish Bill on the Crown Estate during 2019 - and that the provisions could then commence from 2019/2020.

Crown Estate Scotland has also recently committed to [launch a new scheme](#) that will enable local authorities, development trusts and other bodies to apply to manage assets in their local area. The aim of this new pilot scheme is being described as "trailing different models and assess which ones work best in delivering financial, social and environmental benefits".⁵

³ There are also exemptions to the application of the islands area licencing scheme – for example it does not apply if the development activity commenced before the area was designated as an island licensing area, or if the development activity is in a part of the island licensing area for which a person has a lease, or an agreement to lease, entered into before the area was designated as an island licensing area.

⁴ These include land and property including the seabed, foreshore, rural estates, salmon fishing rights, wave and tidal energy developments: <http://www.gov.scot/Publications/2011/07/01085059/2>

⁵ www.crownestatescotland.com/media-and-notices/news-media-releases-opinion/crown-estate-scotland-commits-to-pilot-local-management

Although there is much work ahead on the full devolution of the Crown Estate, the Scottish Government has [already committed](#) to provide the net revenue from marine activities out to 12 nautical miles to coastal and island Councils.

The Islands (Scotland) Bill and: The Marine (Scotland) Act 2010

In accordance with the Marine (Scotland) Act 2010, Scottish Ministers have responsibility for marine planning, nature conservation, licensing and enforcement from Mean High Water Springs out to 12 nautical miles. In addition, the [UK Marine and Coastal Access Act 2009](#) executive devolves responsibility to Scottish Ministers for marine planning, nature conservation, licensing and enforcement in waters adjacent to Scotland out to 200 nautical miles. This means that it is subject to the approval of the UK Secretary for State but that with this approval it includes responsibility for planning for reserved activities such as oil and gas, shipping and telecommunications - although licensing for these activities remains reserved to the UK Government. In effect this means that marine planning in Scotland applies to both reserved and devolved functions from Mean High Water Springs out to 200 nautical miles.

With the designation of the Marine (Scotland) Act in 2010, Scotland received a mechanism for delivering a [National Marine Plan](#) and, from this, a [Regional Marine Planning](#) process. [Regional Marine Planning](#) divides Scotland's seas into [Scottish Marine Regions](#) and sets up [Marine Planning Partnerships](#) whose function involves stakeholder engagement, data collection and the development of plans and reviews. The powers under Regional Marine Planning don't include licensing or consenting as these remain the responsibility of consenting bodies such as Marine Scotland and Local Authorities under the Zetland and Orkney County Council Acts. What the Island's Bill will do therefore is add additional Councils into this regulating ability.

This means that across Scotland some Local Councils will be given the right to be the marine licensee, some will not be given this right, and some, inevitably perhaps, may choose not to avail of the right to grant local marine licencing.

Key Points of Relevance for the Coastal Communities Network, Scotland

- The Islands (Scotland) Bill shouldn't be viewed in isolation either but, rather, as one mechanism within a variety of newly introduced mechanisms to empower Scotland's communities at the local level. For example, the mechanism of Regional Marine Plans under the Marine (Scotland) Act 2010 and the mechanism of Participation Requests which can be made to certain public authorities under the Community Empowerment (Scotland) Act 2015. The Islands Bill's ethos and impact is closely interlinked with that of the Community Empowerment Act and if both pieces of legislation achieve their aims then these would be highly complementary and could help to facilitate community action in improving local outcomes.
- In terms of the Bill's relevance to *all* coastal communities across Scotland, there is a recognised and respected desire held by the three all-island councils of Orkney, Shetland and the Western Isles to maintain separate social and cultural identities to the rest of Scotland across all elements of life (including politically – being the only Local Councils where independent Councillors form a majority). However the Bill is indeed relevant to six Councils which further includes Argyll and Bute (which has 23 inhabited islands); Highland; and North Ayrshire (all of which are involved in the [Islands Strategic Group](#)) – meaning that it's impacts will be wide-ranging.
- Even beyond the six Councils and island areas mentioned above there is the opportunity that this new legislation could set a precedent more generally for devolved power and encourage an ethos of enhanced powers for local authorities with regards to the testing of appropriate models of local coastal and marine management. Applying the Marine (Scotland) Act 2010 and the National Marine Plan (as well as national regulations set within European Directives) will be fundamental to ensuring the marine environment is well-managed into the future.

- The new licensing powers to relevant Local Councils will undeniably add further complexity to the existing national licensing process that Marine Scotland operates, and with only some Local Councils gaining the right to be the marine licensor, it seems there is a risk that an inequitable regulatory system will be reinforced. Rather than undermine the provisions for enhanced power to the islands from the Islands Bill, which are well-placed, the suggestion would be to integrate the ethos of subsidiarity which exists within the Bill to all Local Councils with respective coastlines. Local Councils are already taking initiative in building local and regional partnerships and demonstrating their constituent's desire for having more say in the management and protection of their local resources - there needs to be sufficient support, both technical and financial, provided to Local Councils to enable them to fulfil new responsibilities and deliver them in the interests of associated local communities.
- The parallel system of Regional Marine Planning Partnerships being rolled out can help provide the technical advice needed to support the Councils in delivering these new regulation responsibilities. Crucially here, there would need to be confidence in the various Regional Marine Planning Partnerships capacity and discretion in receiving membership from all local stakeholders including community bodies such as local trusts, associations and groups so that there are strong mechanisms for communities' right across the coast to become involved in preparing technical advice in Marine Planning.
- The new marine licencing provisions are only relevant to certain types of development within inshore waters. A broader range of mechanisms to intervene should be provided to local communities. For example, aquaculture and inshore fisheries management are of high concern to many coastal communities who are interested in conserving their local marine environment. The Planning consenting process for aquaculture sites is already a responsibility of Local Authorities (see the [Marine Aquaculture Consenting Guide](#), published by Sustainable Inshore Fisheries Trust and Marine Conservation Society in 2017, for more info). It is beyond the remit of the Islands Bill, but in applying its ethos of subsidiarity, there would be benefits to ensuring there are mechanisms for local participation within all kinds of marine management including inshore fisheries management.
- There is no direct reference to the natural environment around the islands within the Islands Bill - as custodians of some of the most biodiverse and highest valued natural environments in Scotland, both to local communities and to visitors. Indeed many local economies within the islands population's dependent upon a healthy natural environment, it would make sense to connect this custodianship to the enhanced local power more explicitly and to the tools that can be provided to communities to lead on this. It is hoped therefore the National Islands Plan sufficiently accounts for the natural environment of the islands and local conservation of Scotland's terrestrial and marine environments.
- The Scottish Parliamentary briefing centre ([SPICe](#)) note that "the 2011 census found that 7% of those employed in Scotland's islands worked in agriculture, forestry and fishing (as opposed to 2% in Scotland as a whole). Given that these areas are tied heavily to both EU regulations and EU funding, it's reasonable to assume that Brexit will have a strong impact in this area." The Scottish Islands Federation set out its concerns in relation to Brexit a January 2017 briefing – see [Scottish Islands Federation website](#) for more information and expertise of this context.