

ISLANDS (SCOTLAND) ACT 2018

EXPLANATORY NOTES

OVERVIEW OF THE ACT

PART 3 – DUTIES IN RELATION TO ISLAND COMMUNITIES

Duty of certain authorities in respect of policies, strategies and services

Section 7 – Duty to have regard to island communities

16. 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 Act, to have regard to island communities in carrying out their functions. See section 10 on compliance with this duty.
17. 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 29(2) of the Act).

Section 8 – Island communities impact assessment

18. 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).
19. 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.
20. 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.
21. 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.
22. Subsection (4) provides that if a relevant authority does not prepare an islands communities impact assessment under this section then it must publish an explanation of its reasons for not doing so.

Section 9 – Reviews of decisions relating to island communities impact assessments

23. This section provides a regulation-making power which the Scottish Ministers must use to make provision about reviews of decisions of relevant authorities relating to island communities impact assessments under section 8. Subsection (2) sets out the items which the review mechanism set up by regulations may contain, such as procedure, time limits and steps to be taken following the review. Under section 29(2) the regulations are subject to the affirmative procedure.

Section 10 – Compliance with section 7 duty

24. This section sets out how a relevant authority fulfils the duty to have regard to island communities imposed by section 7. Under paragraph (a) there is a general duty for a flexible and proportionate review process by requiring the authority to make such arrangements as it considers appropriate to review any of its policies, strategies or services to ensure that it complies with the section 7 duty.
25. Paragraph (b) applies in relation to individual policies, strategies or services. Under that, 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.

Guidance and reporting

Section 11 – Guidance about section 7 duty

26. 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.
27. Subsection (2) requires the Scottish Ministers to consult the local authorities listed in the schedule to the Act, persons representing the interests of island communities and other persons they consider appropriate before they issue any such guidance. The consultation requirements here mirror those in section 4(1) of the Act for the preparation of the national islands plan.

Section 12 – Reporting regarding section 7 duty

28. 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 10 above).
29. 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.
30. Subsection (4) provides that, as the Scottish Ministers will report on the duty imposed by section 7 (and also the duty imposed by section 13) 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 13 – Preparation of island communities impact assessment by Ministers

31. 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.
32. Before the Bill for the Act was introduced, the Standing Orders of the Scottish Parliament already required 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 that only covered 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.
33. “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.
34. Subsection (3) sets out the information that an island communities impact assessment must contain: a description of the differential effect which is anticipated; the Scottish Ministers’ assessment of the extent to which development 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 legislation in question; and set out the financial implications of steps taken to mitigate the outcomes resulting from the legislation for island communities. Subsection (4) makes clear that an assessment completed under this section is considered to be an island communities impact assessment under section 8 and therefore demonstrates compliance with the section 7 duty.

Section 14 – Duty of the Scottish ministers to have regard to request for retrospective island communities impact assessment

35. This section allows a local authority listed in the schedule of the Act to request the Scottish Ministers to prepare and publish a retrospective island communities impact assessment. The request may apply in relation to existing legislation (primary or secondary legislation made in the Scottish Parliament) or national strategies, where they have a significantly different effect on island communities. Under section 14, Ministers have 3 months to approve the request or to give reasons for rejecting it and, if approved, another 6 months to prepare the assessment. Any assessment prepared must describe methods and steps to rectify, mitigate or improve the effect of the legislation or strategy.

Section 15 – Scheme for requests by local authorities for devolution of functions

36. This section provides a regulation-making power which the Scottish Ministers must use to create a scheme for requests for the devolution of functions from local authorities. The request would be for Ministers to promote legislation devolving a function to the authority. Subsection (2) sets out matters that the regulations must contain, such as provision about the form of the request, the information that must be provided, the process, the timescale for the decision and the possible actions following the decision. Subsection (3) lists further discretionary provisions which may be included around consultation and information to be provided in the request.

Duty of the Scottish Ministers to consult island communities

Section 16 – Duty to consult island communities

37. This section requires Scottish Ministers, before making a material change to any policy, strategy or service, to consult with island communities. Subsection (2) sets out that the persons consulted under subsection (1) must include the local authorities listed in the schedule and any other bodies or persons as Ministers determine. Subsection (3) provides that the Scottish Ministers must publish the results of the consultation and any steps to be taken as a result of the consultation 3 months after the conclusion of the consultation. Subsections (4) and (5) provide that in cases where the Scottish Ministers consider that a material change has no significantly differential impact on island communities then a local authority listed in the schedule can request that Ministers consult island authorities (in accordance with subsection (1)) before making the change. Once a request is made, Ministers must consult or, if they do not do so, publish the reasons for that decision not to consult.

Shetland mapping requirement

Section 17 – Shetland mapping requirement

38. This section establishes the Shetland mapping requirement. The requirement applies to the Scottish Ministers, local authorities and other Scottish public authorities with mixed functions or no reserved functions.
39. Unless subsection (2)(b) applies, these bodies must comply with the Shetland mapping requirement when publishing in any form a document that includes a map of Scotland. The Shetland mapping requirement is that, in any map of Scotland, the Shetland Islands must be displayed in a manner that accurately and proportionately represents their geographical location in relation to the rest of Scotland.
40. Subsection (2)(b) sets out that where Ministers or an authority consider that there are reasons not to comply with the Shetland mapping requirement, they must provide, in such manner as they consider appropriate, information about those reasons.