

# ISLANDS (SCOTLAND) ACT 2018

---

## EXPLANATORY NOTES

### OVERVIEW OF THE ACT

3. The Act puts in place a framework of measures reflecting the unique challenges faced by Scotland's island communities. It is intended to give effect to a range of policy changes to improve outcomes for island communities in Scotland.
4. The Act contains 32 sections, arranged into 8 Parts, as follows:
  - **Part 1**– Key definitions. This Part sets out for the purposes of the Act 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, including for Ministers after a request for a retrospective impact assessment. It also includes duties on the Scottish Ministers to establish a scheme for requests for devolution of functions and to consult island communities in relation to certain policies, strategies and services. Finally, it places a duty on Ministers, local authorities and certain Scottish public authorities to comply with the new Shetland mapping requirement or to state reasons why they have not.
  - **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**– Additional powers requests. This Part provides a regulation-making power which the Scottish Ministers must use to create a scheme for additional powers requests from local authorities.
  - **Part 6**– 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 7**– Delegation of functions relating to regional marine plans. This Part amends the Marine (Scotland) Act 2010 to allow Ministers to delegate regional marine planning to a single local authority in any of the three Scottish marine regions of the Orkney Islands, the outer Hebrides and the Shetland Isles, in order that the single authority can carry out the functions related to preparing a regional marine plan.

- **Part 8** – Final provisions. This Part makes provision about a report on the operation of the Act, regulations made under the Act, about the Act’s commencement, and about its short title.
5. The Act also contains a schedule listing the relevant public authorities to whom the duties in sections 7 to 12 in relation to island communities apply.

## **PART 1 – KEY DEFINITIONS**

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

6. This section defines “island” and “inhabited island” for the purposes of the Act. 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”***

7. This section defines “island community” for the purposes of the Act. 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. An island community may include a group of people whose common interest, identity or geography includes uninhabited islands, so long as there are links to the natural or cultural heritage or economy of an inhabited island.

## **PART 2 – NATIONAL ISLANDS PLAN**

### **Duty to prepare national islands plan**

#### ***Section 3 – National islands plan***

8. 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.
9. Subsection (3) sets out a non-exhaustive list of the topics that the plan will contain in relation to improving outcomes for island communities. Subsection (4) requires the plan to list the public authorities that have duties under the Act. In accordance with subsection (5), in relation to the main objectives in the plan Ministers must consider and outline, in so far as possible, what would be appropriate to use for the purpose of measuring whether quantitatively or qualitatively the extent to which outcomes for island communities identified in the plan are improved.

#### ***Section 4 – Preparation and scrutiny of plan***

10. 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.
11. Subsection (1) obliges the Scottish Ministers, when preparing the plan, to consult the local authorities listed in the schedule to the Act, persons representing the interests of island communities, and those likely to be affected by or have an interest in any proposals contained in the plan, including members of island communities and others. 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).
12. Subsection (2) requires Ministers to lay the first proposed plan before the Scottish Parliament within a year of this section coming into force, and 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***

13. 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, the steps that the Scottish Ministers will take if an outcome identified in the plan has not improved 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 Act. Such reports must be laid before the Parliament and published within 3 months after the end of the reporting year, as per subsection (3).

### ***Section 6 – Review of plan***

14. 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.
15. 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, 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 island 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.

## **PART 4 – REPRESENTATION OF ISLAND COMMUNITIES**

### **Elections to the Scottish Parliament**

#### ***Section 18 – Constituency of Na h-Eileanan an Iar***

41. 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.

42. 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 of calculating the “electoral quota” in paragraph 12 of schedule 1 of the 1998 Act.
43. 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.
44. 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 19 – Number of councillors in wards with inhabited islands***

45. 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.
46. This section of the Act 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 partly 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.
47. 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 20 – Review of wards in certain local government areas***

48. 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 Act.

49. 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.
50. 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 – ADDITIONAL POWERS REQUESTS**

### ***Section 21 – Additional powers requests***

51. This section provides a regulation-making power which the Scottish Ministers must use to create a scheme for additional powers requests from local authorities (similar to section 15). It requires Scottish Ministers to create a scheme for additional powers requests from the local authorities listed in the schedule. Under subsections (2) and (3), the scheme is to set out the process for requests, that reasonable cause must be demonstrated when making the request, actions and statements of Ministers in response to requests, a prohibition on Ministers unreasonably refusing requests and reviews of Ministers’ decisions. Subsection (4) requires the regulations creating the scheme to be laid within one year of Royal Assent. Under section 29(2) the regulations are subject to the affirmative procedure.

## **PART 6 – DEVELOPMENT IN THE SCOTTISH ISLAND MARINE AREA**

### **Key definitions**

#### ***Section 22 – Meaning of “development activity”***

52. This section defines “development activity” for the purposes of Part 6 of the Act, setting out the kinds of activity which are to be subject to the licensing scheme to be created by regulations under section 24.
53. 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”).
54. 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 24. This makes similar provision to section 34 of the 2010 Act. 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 24. This is because planning permission from a local authority is already required for fish farming. In this way the Act 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).”

55. Paragraph (e) of subsection (2) provides that, as well as fish farming under paragraph (d) of subsection (2), other forms of fishing are not defined as a development activity under the Act.

### ***Section 23 – Meaning of “Scottish island marine area”***

56. This section defines the “Scottish island marine area” for the purposes of Part 6. This is the geographical area which the new licensing scheme created under this Part will cover.
57. 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 24(2) qualifies the practical application of the licensing regime to areas that are adjacent to 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 24 – Scottish island marine area licence***

58. 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.
59. 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 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.
60. Subsection (3) provides for particular aspects of the scheme that the regulations may make provision about. This list is not exhaustive.
61. Subsection (3)(a) provides that the regulations may set out the particular types of development activity covered by or exempted from the scheme.
62. 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.

63. 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.
64. 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.
65. 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.
66. 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.
67. Subsection (3)(g) provides that the regulations may create offences and penalties both for the contravention of a general prohibition on a 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.
68. Subsection (3)(h) provides that the regulations may make provision for exceptions and defences to offences created by virtue of subsection (3)(g).
69. 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).
70. 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).
71. 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.
72. Subsection (5) prescribes the maximum penalties in both summary and solemn procedure if the regulations made under subsection (1) do create criminal offences.
73. 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.
74. 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 11(2) of the Act). The regulations will also be subject to the affirmative procedure – see section 29(2) of the Act.

### ***Section 25 – Exception from requirement for licence***

75. This section makes saving provision in respect of the licensing scheme to be established by regulations under section 24. 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 2010 Act;
- the person has made an application for – or already been granted – a marine licence under Part 4 of the 2010 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 26 – Crown application***

76. By virtue of section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010, the Act 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 Act makes the Crown criminally liable: therefore, should it be in contravention of regulations made under section 24 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.
77. 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 Act.

## **PART 7 – DELEGATION OF FUNCTIONS RELATING TO REGIONAL MARINE PLANS**

### ***Section 27 – Delegation of functions relating to regional marine plans***

78. Section 27 amends the 2010 Act to allow the Scottish Ministers to delegate regional marine planning to a single local authority in any of the three Scottish marine regions of the Orkney Islands, the outer Hebrides and the Shetland Isles, in order that the single authority can carry out the functions related to preparing a regional marine plan. It applies the test that before making the direction to delegate, Ministers are satisfied that there would be difficulty in nominating any other person described in section 12(2) of the 2010 Act in relation to the regional marine plan to which the direction applies.

## **PART 8 – FINAL PROVISIONS**

### **Report on operation of Act**

#### ***Section 28 – Report on operation of Act***

79. Section 28 requires Scottish Ministers to publish and lay before the Scottish Parliament a report on the operation of the Act. This is required before the end of 4 years after Royal Assent. In preparing the report, Ministers must consult such of the relevant authorities listed in the schedule and such others as they consider appropriate.

## **Regulations**

### ***Section 29 – Regulations***

80. Subsection (1) of this section provides that the powers of the Scottish Ministers to make regulations under this Act 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), 9(1), 21 and 24(1) are subject to the affirmative Parliamentary procedure.
81. However, subsection (3) provides that this section does not apply to ancillary regulations under section 30(1); or to commencement regulations under section 30(2). By virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, such commencement regulations will simply be laid before Parliament as soon as practicable after being made, with no further procedure.

### ***Section 30 – Ancillary provision***

82. 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 Act. Subsection (2) allows such regulations to modify any enactment (including the Act itself).
83. 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 31 – Commencement***

84. Subsection (1) of this section provides that this section and sections 1, 2, 30, and 32 come into force on the day after Royal Assent. The remainder of the Act, once enacted, comes into force on the day or days appointed by the Scottish Ministers in regulations made under subsection (2).
85. 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 32 – Short title***

86. This section provides that the Act is referred to as the Islands (Scotland) Act 2018.

## ***SCHEDULE***

87. The schedule is introduced by section 7(2). It lists the relevant authorities to whom sections 7 to 12 of the Act 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 no reserved functions
  - NHS Health Boards and Special Health Boards
  - Integration Joint Boards (established under section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014)
  - Local authorities

*These notes relate to the Islands (Scotland) Act 2018  
(asp 12) which received Royal Assent on 6 July 2018*

- Regional Colleges (designated under section 7A of the Further and Higher Education (Scotland) Act 2005)
  - Regional Transport Partnerships
88. The duties imposed by sections 7 to 12 of the Act apply to all the persons listed in the schedule (with the duty imposed by sections 13 to 16 applying solely to the Scottish Ministers and the duty in section 17 applying to the bodies mentioned there). The list of persons can be amended by regulations made by Ministers under section 7(3).