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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Islands (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on the 19th September and 31st October 2017, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Islands (Scotland) Bill at Stage 1. The Committee submits this report to the lead committee for the Bill (the Rural Economy and Connectivity Committee) under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has produced a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.ⁱ

ⁱ The Delegated Powers Memorandum is available here: [http://www.parliament.scot/Islands%20\(Scotland\)%20Bill/SPBill15DPMS052017.pdf](http://www.parliament.scot/Islands%20(Scotland)%20Bill/SPBill15DPMS052017.pdf)

Overview of the Bill

3. This Government Bill was introduced by the Cabinet Secretary for Rural Economy and Connectivity, Fergus Ewing MSP, on 9 June 2017.
4. The Bill's purposes are to make provision for a national islands plan, to impose a duty on certain public authorities to have regard to island communities, to make provision about the electoral representation of island communities, and to establish a licensing scheme in respect of marine development adjacent to islands.
5. The Bill contains 6 Parts:
 - Part 1 defines some key terms.
 - Part 2 provides for a duty on the Scottish Ministers to prepare, lay before the Parliament and publish a national islands plan. A national islands plan is intended to set out the main objectives and strategy of the Scottish Ministers to improve outcomes for island communities across Scotland.
 - Part 3 makes provision for relevant public bodies to consider the impact on islands communities when developing, delivering or redeveloping a policy, strategy or service, (and for Scottish Ministers when proposing to make legislation). The relevant public bodies must prepare an 'islands communities impact assessment' when a policy or service is anticipated to have a significantly different impact on an island community than on other communities; and in the case of Ministers when proposed legislation is anticipated to have such an effect.
 - Part 4 makes provision to give the Local Government Boundary Commission for Scotland the flexibility to recommend wards of 1 or 2 councillors to be created in respect of populated islands; and makes provision to give special status to the Scottish parliamentary constituency of Na h-Eileanan an Iar by protecting the boundary from variation.
 - Part 5 provides for 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. Local authorities with inhabited islands will be able to apply to Ministers to exercise these new licensing powers.
 - Part 6 sets out various final provisions.

Delegated Powers Provisions - section 7(3)

6. At its meeting on Tuesday 19 September 2017, the Committee considered the delegated powers in the Bill. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:
 - Section 10(1) (guidance about section 7 duty)
 - Section 18(1) (Scottish island marine area development licence)
 - Section 22(1) (ancillary provision)
 - Section 23(2) (commencement).
7. At the same meeting, the Committee agreed to write to the Scottish Government to raise questions in relation to the remaining delegated powers in the Bill, in section 7(3) and section 21. The Committee's questions, and the responses received from the Scottish Government, are included in the Annex.

Recommendations

8. The Committee's comments and recommendations on the delegated powers in sections 7(3) and 21 are noted below.

Section 7(3) – Duty to have regard to island communities

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative**

Provisions

9. Section 7(3) provides that the Scottish Ministers may by regulations amend the schedule which lists the “relevant authorities”, that is, the bodies, office-holders and other persons which are to be subject to the duty imposed by section 7(1). That duty is to have regard to island communities in carrying out their functions.
10. Regulations may amend the schedule by either adding an entry for any person, body or office-holder, or removing an entry.

Comments

11. The Committee noted in the correspondence with the Scottish Government that some other Acts include a power to *modify* a list of authorities contained in the schedule, by modifying an entry in the list. For example, section 6(2) of the British Sign Language (Scotland) Act 2015 enables the Scottish Ministers by order to modify the schedule of that Act by (in short) adding, removing or modifying entries. Section 8 of the Gender Representation on Public Boards (Scotland) Bill presently before the Parliament contains powers by regulations to modify the list of authorities

in schedule 1, so as to add an entry, vary the description of an entry, or remove an entry.

12. The Scottish Government responded that it has been considered that the approach taken in the Bill, to add or remove an entry in the schedule, is sufficient to ensure that the list of relevant authorities correctly identifies those persons, bodies or office-holders which must have regard to island communities in carrying out their functions. In particular, it is considered that where a relevant authority has its name changed, the entry under the former name may be removed and the new name added to the list in the appropriate place.
13. The Committee accepts that, were it to be required to change the name of an authority listed in the schedule, the practical effect of providing for the removal of the existing entry and the addition of a new entry with the changed name is the same as providing for the variation or modification of the name. However the Committee sees no good reason why, for consistency with other previous examples, this power could not be expanded to include the power to modify an entry. For example, this would be consistent with the drafting of section 6(2) of the British Sign Language (Scotland) Act 2015.
14. In its response, the Scottish Government contends that no power to modify is needed because the schedule of the Bill simply comprises a list of names. However the schedule of the British Sign Language (Scotland) Act 2015 also consists of a list of names of authorities. In relation to the schedule of this Bill, the name of a “relevant authority” could be modified in future. For example, paragraphs 8, 14 and 34 of the schedule specify limited company names and company numbers. It is possible that a company name could be modified, but the company number could remain the same (or vice versa).

Recommendation

15. **The Committee is not persuaded by the Government's explanation for why the powers in section 7(3) do not include a power to amend the schedule by modifying an entry. The Committee considers that to include this power would be consistent with the approach taken in earlier provisions, such as in section 6(2) of the British Sign Language (Scotland) Act 2015. The Committee therefore recommends that a consistent approach should be taken to the drafting of this power, unless there is a good reason not to include the power to modify an entry.**
16. **The Committee accepts that the exercise of the power is subject to scrutiny by the affirmative procedure.**

Section 21- Regulations

Provisions

17. This section contains a general provision. The powers of the Scottish Ministers to make regulations under the Act (once passed) include power to make incidental, supplementary, consequential, transitional, transitory or saving provision, and different provision for different purposes. This does not apply to the ancillary regulations or the commencement regulations under sections 22 and 23. Separate powers to make ancillary provisions by regulations are proposed in section 22.
18. The Committee sought further explanation in the correspondence with the Scottish Government on the ancillary powers in section 21 to add supplementary, incidental or consequential provisions to the regulations under sections 7(3) or 18, as the DPM did not provide an explanation why those additional ancillary powers are necessary or appropriate.

Comments

19. The Scottish Government has confirmed, initially, that it has been considered that the extension of the principal powers in sections 7(3) and 18(1) to include the ancillary powers as mentioned above is appropriate, given that the principal powers in those sections are proposed to be subject to scrutiny by the affirmative procedure. This would be a higher level of scrutiny of the ancillary powers, compared with the so-called “stand alone” ancillary powers contained in section 22 of the Bill. The exercise of those powers may, in some circumstances, be subject to scrutiny by the negative procedure.
20. The Scottish Government has also explained in correspondence that the power to make provision for supplementary purposes has (generally) been considered necessary to ensure that any unexpected issues which arise and which require further changes, when the principal powers in sections 7(3) and 18(1) are exercised, can be dealt with effectively. The Government has provided examples of when the powers might be needed:
21.  “An issue may arise when considering a licensing scheme under section 18 and its interaction with the existing statute book. While section 7(3) is a more focussed power, an issue might arise in adding or removing a body or office-holder to the schedule, particularly if that body or office-holder has related statutory functions which require to be adjusted in the legislation governing that body or office-holder.”

Recommendation

The Committee accepts the ancillary powers contained in section 21(1) of the Bill in principle.

Annex

CORRESPONDENCE WITH THE SCOTTISH GOVERNMENT

LETTER FROM THE DELEGATED POWERS AND LAW REFORM COMMITTEE TO THE SCOTTISH GOVERNMENT (20 SEPTEMBER 2017)

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 19th September and seeks an explanation of the following matters:

Section 7(3) – Duty to have regard to island communities

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative**

Section 7(3) provides that the Scottish Ministers may by regulations amend the schedule which lists the bodies, office-holders and other persons which are to be subject to the duty imposed by section 7(1). That duty is to have regard to island communities in carrying out their functions. Regulations may amend the schedule by either adding an entry for any person, body or office-holder, or removing an entry.

The Committee notes, however, that other Acts include a power to modify a list of authorities contained in the schedule, by modifying an entry in the list. For example, section 6 of the British Sign Language (Scotland) Act 2015. Section 8 of the Gender Representation on Public Boards (Scotland) Bill presently before the Parliament contains powers by regulations to modify the list of authorities in schedule 1, so as to add an entry, vary the description of an entry, or remove an entry.

The Committee therefore asks the Scottish Government, in relation to section 7(3), why it has been considered appropriate not to extend the power to modifying an entry in the schedule, in addition to the power to add or remove an entry?

Section 21- Regulations

In regard to the power in section 21 to add supplementary, incidental or consequential provisions to the regulations under sections 7(3) or 18, the Delegated Powers Memorandum provides no explanation of why these powers are necessary or appropriate.

The Committee therefore asks the Scottish Government, in relation to the ancillary powers in section 21(1)(a) to add supplementary, incidental or consequential provisions in the regulations under either sections 7(3) or 18, for explanation why these powers are considered to be necessary or appropriate?

In particular:

(a) why are these powers appropriate in addition to the powers to make ancillary provisions by regulations in section 22, and

(b) why is the power to add supplementary provision appropriate, in respect of both regulations under section 7(3) and section 18?

LETTER FROM THE SCOTTISH GOVERNMENT TO THE DELEGATED POWERS AND LAW REFORM COMMITTEE (3 OCTOBER 2017)

Thank you for the Delegated Powers and Law Reform Committee letter of 20 September 2017 to James Hynd. The Committee asked two questions and our responses are provided below.

“The Committee therefore asks the Scottish Government, in relation to section 7(3), why it has been considered appropriate not to extend the power to modifying an entry in the schedule, in addition to the power to add or remove an entry?”

We think that the approach taken in the Bill to add or remove an entry in the schedule is sufficient to ensure that the list of relevant authorities correctly identifies those persons, bodies or office-holders which must have regard to island communities in carrying out its functions.

Where a new person, body or office-holder comes into existence which requires to be added to the list in the schedule, an entry may be added. Where a relevant authority ceases to exist, the entry may be removed. Where a relevant authority has its name changed, the entry under the former name may be removed and the new name added to the list in the appropriate place.

We think that there was no need to take a power to vary the description of an entry in the schedule as it simply comprises a list of names. Whereas, in the Gender Representation on Public Boards (Scotland) Bill, the list in Schedule 1 is more complex as it names authorities and sets out excluded positions which are described, sometimes by reference to statute. Therefore, it could be possible that the name of the public authority could remain the same but that the legislation by virtue of which a position is excluded could be amended which would require a variation of the description.

“The Committee therefore asks the Scottish Government, in relation to the ancillary powers in section 21(1)(a) to add supplementary, incidental or consequential provisions in the regulations under either sections 7(3) or 18, for explanation why these powers are considered to be necessary or appropriate?”

In particular:

(a) why are these powers appropriate in addition to the powers to make ancillary provisions by regulations in section 22, and

(b) why is the power to add supplementary provision appropriate, in respect of both regulations under section 7(3) and section 18?”

The ancillary power in section 21(1) allows regulations under section 7(3) and 18(1) to include ancillary provision and to make different provision for different purposes.

In relation to question (a), while ancillary provision could be made through the standalone ancillary power in section 22, it was considered that the principal regulations should themselves carry this power, rather than rely on section 22, which may be used for another purpose. In particular, it was considered that such extension of the principal powers in sections 7(3) and 18(1) was appropriate given both are proposed to be subject to the affirmative procedure, in contrast to the ancillary power in section 22 which may in some circumstances be subject to the negative procedure.

On question (b), an ancillary provision was considered necessary to ensure that any unexpected issues which arise and which require further changes when the principal powers in sections 7(3) and 18(1) are exercised can be dealt with effectively. This would prevent the purpose of the Bill being inadvertently obstructed. For example, an issue may arise when considering a licensing scheme under section 18 and its interaction with the existing statute book. While section 7(3) is a more focussed power, an issue might arise in adding or removing a body or office-holder to the schedule, particularly if that body or office-holder has related statutory functions which require to be adjusted in the legislation governing that body or office-holder.

I hope this is helpful to the Committee and we are always willing to give consideration to changes that will improve the Bill. If there are any other questions please get in touch.

