

Rural Economy and Connectivity Committee

Islands (Scotland) Bill

Submission from Orkney Islands Council

### **Introduction**

Orkney Islands Council (“the Council”) welcomes the opportunity to submit written evidence on the Islands (Scotland) Bill (“the Bill”).

The Council previously responded extensively to the consultation for provisions for a future Islands Bill in 2015.

In 1984, the Montgomery Committee clearly considered the Islands Councils unique and deserving of special status. The key principles established by the Montgomery Committee were:

- (a) Opportunities should be taken whenever possible to consolidate, develop and extend the powers of Island Councils in a continuing process of development in the local government of the islands; and
- (b) Acts of Parliament should include a position to vary the application to the Islands areas.

The Council considers that the Bill has taken a very cautious step in the right direction in acknowledging Montgomery’s principles. There is much still to be done.

In the context of additional powers, the Council is presently exploring what actions would require to be taken, in the event of further national or international constitutional changes, to allow the people of Orkney to exercise self-determination, similar to that proposed in the “Grimond Amendment” of 1979.

The Islands Councils are ambitious as demonstrated through the Our Islands Our Future Campaign. The Council considers the Bill as evolutionary, paving the way for future Islands Bills. The provisions in respect of “island proofing” are particularly welcome. The National Islands Plan has the potential to make a substantive impact, provided the Islands Councils and Authorities with islands have a direct role in writing the Plan. The Council considers that the National Islands Plan should include key priorities for the islands such as connectivity and fuel poverty. For example, Transportation is central to life and economic well-being to all of Scotland. For islands, this is even more acutely the case as the means of moving people and freight around our dispersed communities are central to all activity. This is particularly the case for connecting our outlying islands and most fragile communities where the inter-island ferry and air services provide vital lifeline connections to the Orkney Mainland, and also, critically, to the Scottish Mainland for business. The provision of long term, sustainable and affordable solutions to inter-island and Orkney-Scottish Mainland connections for business, freight, health, commuting social and education trips is one of the highest priorities for the Council.

The Council considers that the Islands Bill should explicitly express that the Council, as presently constituted, shall continue to enjoy all such special powers and legal status as it has at present; and that no legislation shall be passed which derogates

from the Council's powers or varies its territorial jurisdiction. The Council does not wish to become part of a larger authority and seeks formal legal protection against this. The Council believes that the Scottish government should have the confidence to enable such a proposal.

In the absence of facilitative powers, providing greater flexibility, it could be considered that the Bill misses an opportunity to be truly transformational. This is particularly pertinent given the uncertainty emanating from Brexit. It is also disappointing that there is no distinct mechanism to deal with retrospective island proofing. The Council gave numerous examples in its consultative response where its islands have suffered detriment through failure to island proof legislation. It is recognised that both the Islands Strategic Group and the National Islands Plan can have an important role to play to address the significant past deficits in policy and legislation affecting the islands.

In regard to community benefit, the Council also considers that powers should be included in the Bill to allow islands to generate community benefit from major projects occurring in or around the islands.

In regard to inter-island ferry services, the Council believes that there should be formal recognition that the revenue and ferry replacement costs of internal ferry services in Orkney should not place a disproportionate financial burden on the Council.

The Bill, however, is undoubtedly a strong foundation on which to build.

The three Islands Councils, through Strand 1 of the Deal for the Islands (Enhancing Local Democracy) are currently seeking to establish and agree with government shared principles that will characterise its relationships with government in the coming years. This work stream seeks to reaffirm the place of the Islands Councils as the elected voice of the islands and as a tier of Government, and provide the flexibility to develop new ways to generate solutions with Community Planning Partners to best meet the needs of islands' communities. Strand 1 of the Islands Deal is considered key to enabling specific projects to be truly transformational.

The Council has responded to various consultations relevant to the Bill and this submission.

In its response to the Local Government and Regeneration Committee Inquiry into the Flexibility and Autonomy of Local Government, the Council stated:

“Applying the principle of subsidiarity will give the three islands group the opportunity and responsibility to provide the services and carry out the functions appropriate to their communities. In addition, application of the principles contained in the European Charter of Local Self Government will give the three islands groups the power to develop initiatives and introduce strategies to meet the special needs of their areas and ensure sustainable economic growth”.

In its response to the Commission on Strengthening Local Democracy, the Council stated:

“We believe that the autonomy of our local communities is being seriously eroded. This has impacted on our freedom to make policy-choices and of having an input into

the running of our own affairs. We believe that the true import and meaning of the principle of subsidiarity is often conveniently disregarded for political expediency”.

The Council’s response to the consultation for provisions for a future Islands Bill in 2015 stated, in respect of the proposition for a Single Public Authority:

“The SPA is considered a compelling proposition in the context of the current economic downturn linked to public sector cuts. We can demonstrate a higher vulnerability to the cuts owing to a heavy dependence on public sector jobs.

The pooling of resources or sharing of services is the natural direction of travel to optimise efficiency. However, this is not possible for us to the same extent as with mainland councils. We do not have co-terminous neighbouring councils. In remote island regions, it makes much better sense to look to co-terminous local partners for synergy and efficiency gains as the optimum approach to public sector reform”.

The Government’s Programme for Scotland 2017-18, A Nation With Ambition, has an encouraging message at P109 in respect of a single authority model. It states:

“Now, working closely with councils, community councils, community planning partnerships, regional partnerships, businesses, the third sector and others, we will continue to reform the way Scotland is governed, focusing on delivering local decision making, not on behalf of a community, but by a community itself. Specifically, we will:

decentralise power to a more local level in Scotland and launch a comprehensive review of local governance ahead of a Local Democracy Bill later in this Parliament;

support those island authorities who want to establish a single authority model of delivering local services – including health and social care. We will support proposals that are developed with stakeholders, including trade unions, and which clearly improve people’s lives, create efficiencies and protect local democracy and our NHS”.

Orkney Islands Council, in conjunction with its stakeholders, looks forward to exploring the single authority model with government and making representations in respect of the Local Democracy Bill. The Council would also welcome discussions about the possibility of exploring a pilot scheme in advance of any legislation.

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

The Council welcomes this provision.

The Scottish government has indicated that the Plan is seen as the principal instrument to make a difference on the ground for island communities.

The national islands plan was discussed at the Islands Strategic Group in Stornoway on 11 July. At this meeting, positive comments were made in relation to the structure of the Gaelic Language Plan; how it cascaded to other bodies; and the scalability it provided. The Council considers that the structure of Gaelic Language Plan would be a good model to follow when developing the National Islands Plan, thus ensuring

that policy aspirations are achieved in a proportionate manner and that communities are truly empowered.

While it is acknowledged that annual reporting may present a difficulty for major strategies, the Council considers it important to retain the annual reporting requirement as in certain circumstances actions would be required in a timescale shorter than a year. The challenge would be to ensure that measures for longer term strategies were programmed over the implementation period and SMART. The Council considers effective annual monitoring would facilitate the sharing of best practice by considering successful initiatives.

The Council considers it of fundamental importance that local authorities have ownership of and direct input into the drafting of the national islands plan, thereby influencing it at an early stage. The Council considers this vital owing to the uncertainty of Brexit and the potential vacuum in respect of cohesion policy and regional funding.

The Council considers that while the Islands Strategic Group can facilitate this process, it should be explicitly referred to in the Bill.

Section 4 of the Bill places a duty on Scottish Ministers to consult “such persons as they consider represent the interests of island communities, and such persons as they consider likely to be affected by the proposals contained in the plan”.

Recommendation: The Council considers it a reasonable that the relevant council authorities (along with their community planning partners) are made statutory consultees. This could be achieved through the guidance to the Bill.

Recommendation: The Council considers that retrospective Island Proofing and the review of Island Proofing generally should be explicit functions of the National Islands Plan.

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

The Council considers Islands Proofing as key to creating the sustainable change in Government that could give real meaning to the Montgomery Commission recommendations. The Council’s position is based on experience that numerous “one size fit all” policies were having unintended negative impacts on our communities. Examples of such negative impacts were given in the response to the consultation for provisions for a future Islands Bill in 2015.

More recently, there are real concerns in respect of Social Care and the Safe Staffing Consultation. This consultation is in advance of plans to enshrine in law the staffing requirements for specific professional disciplines starting with nursing and eventually extending into social care services. The staffing models are to be dictated by workforce mapping tools which the Council knows from experience do not fit with very small services. To extend this badly fitting model into all professions and then legislate for it both takes away local determination and, critically, will absolutely not work for small isles teams and lone handed practitioners. This will force the Council into a workforce and cost scenario that it simply cannot accommodate.

In its commitment to close the attainment gap in Scottish schools, in June 2017 the Scottish Government delivered its “Next Steps” document with regard to its school governance consultation. The “Next Steps” proposals includes proposals to increase Head teacher responsibility, develop teacher training opportunities, increase parental involvement and introduce collaborative groups of local authorities across Scotland. The “Next Steps” proposals will result in the introduction of new educational legislation in the Scottish Parliament. These proposals were accompanied by a consultation on Fairer Funding for Schools where the Scottish Government proposes giving Head Teachers more control over school budgets either through a Head Teachers’ Charter or through an enhancement of the Pupil Equity fund delivery, or both. The Scottish Government also, in their “Blueprint” for Early Learning and Childcare delivery, have outlined an entitlement of 1140 hours for children in early years and this massive infrastructure expectation places huge pressures on remote and island councils.

The context of the governance and financing of schools in island local authorities is complex with sometimes very small schools serving remote areas with vastly differing provision in terms of school management and financial, physical and human resources. Pupils, teaching and support staff often have to travel considerable distances, stay away from home for periods of time resulting in island education authorities having to provide high levels of support to their schools in terms of curriculum, management, finance/resources being mindful of rural poverty and poverty of access and opportunity

The Islands Bill therefore will require to “Island Proof” the approach by Scottish Government and island councils towards the delivery of education, particularly with regard to the Scottish Government’s proposal and consultations outlined above in school governance, school finance and early years.

The Council was delighted that 91% of respondents to the Islands Bill consultation stated that the Scottish Government should consider placing the concept of island proofing in legislation. A large majority (98%) also stated that Scottish Ministers should have the power to issue Statutory Guidance to other relevant public bodies related to island-proofing. There is therefore a significant mandate for Government to now do something positive and lasting. It also creates an expectation that this will make a meaningful difference.

The Council agrees with the inclusion of a power for Scottish Ministers to amend the list of relevant authorities in the schedule by regulations.

Section 8 of the Bill refers to the duty of a relevant authority preparing an island communities impact assessment in relation to a policy, strategy or service,

“which, in the authority’s opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities (including other island communities) in the area in which the authority exercises its functions”.

The Council considers the terms “in the authority’s opinion” and “significantly different” too subjective. It is essential therefore that the measure of significance be agreed by all interested parties and not just the authority or body proposing the actions to be island-proofed.

**Recommendation: A shared process and safeguards should be introduced through guidance to ensure that an objective process is conducted by each relevant authority in determining the impact of their proposals on islands. The process should be transparent, proportionate and equitable.**

Section 12 refers to preparation of island communities impact assessment by Ministers. The Council welcomes the fact that this will apply to proposed legislation which is both primary and secondary in nature and which is anticipated to have a significantly different effect on an island community from its effect on other communities in Scotland.

The Council notes that there is a lack of an appeal process as a check to ensure that island proofing is a genuine exercise rather than public authorities seeking reasons not to carry it out.

**Recommendation: The Council considers that there should be a mechanism to review a decision not to conduct an islands impact assessment. Again, this is considered a guidance issue. The Council also considers that all islands impact assessments should be published.**

The Council welcomes the issuing of guidance from Scottish Ministers on the duty to have regard to island communities. Members of the Islands Strategic Group have offered in the help of drafting such guidance to ensure that it is appropriate to the needs of local authorities.

**Recommendation: The Council considers that that there should be a formal mechanism that would require consultation on the guidance with the six councils covered by the Bill.**

**Recommendation: The Council also considers that the status of the guidance should be non-statutory, allowing the guidance to evolve. This is considered preferable to the alternative of a court based challenge.**

The Council's response to the consultation for provisions for a future Islands Bill referred to Articles 170 and 174 of the Lisbon Treaty which seek a level playing field is created, that measures are taken to ensure connectivity and that islands are not disadvantaged as a result of their peripherality or insularity.

**Recommendation: The Council considers that the principles enshrined in Articles 170 and 174 of the Lisbon Treaty are adopted in the guidance.**

The Council's response to the consultation for provisions for a future Islands Bill referred to the local limitations of the Scottish Index for Multiple Deprivation.

The Islands Councils have made representations in the past to the Scottish Government about the inadequacy of the SIMD as a measure of deprivation in rural, remote and island communities, where the demographic profile may be very different from the urban communities which the SIMD is designed to identify. Deprivation in urban communities tends to collect in pockets, whereas in rural areas it is disseminated. Individual families may be struggling but will be hidden in the statistics which show that an area is generally well off. Some of the proxy measures used in the SIMD – for example, benefit claims as a proxy for low income – do not work well in rural areas where many people are self-employed and some may be on very low

incomes, but would not consider claiming benefits. In urban areas where claiming benefits might be the norm, it would not be perceived as such a stigma.

**Recommendation: the Council considers that the limitations of the Scottish Index for Multiple Deprivation and its adverse impact on island areas is acknowledged in the Guidance.**

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

Yes, the Council supports this provision.

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

The Council supports this proposal but would emphasise that proposed changes must be suitable for specific local circumstances in relation to the size of wards and the number of members that are returned from areas with inhabited islands.

Therefore, a one size fits all approach is unlikely to be sustainable, and considerations such as this would provide for asymmetry to suit local circumstances and local communities.

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

The Council supports this proposal.

Section 18(1) empowers Scottish Ministers through regulations to establish a scheme by virtue of which a person must not, except in accordance with a licence granted by a local authority, carry on a development activity within such part of the Scottish island marine area as is designated.

The Council notes that Section 18(2) requires an application to be made.

“Scheme” is not defined in the Bill. Guidance could cover this.

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

The following are matters for further consideration for inclusion in the Bill:

1. Protection of Our Legal Status

As indicated in the council’s consultative response, the Council considers that the Islands Bill should explicitly express that the Council, as presently constituted, shall continue to enjoy all such special powers and legal status as it has at present; and that no legislation shall be passed which derogates from the Council’s powers or varies its territorial jurisdiction.

The Council does not wish to become part of a larger authority and seeks formal legal protection against this.

## 2. Enabling powers.

The Council stated in its consultative response:

“It is suggested that, rather than producing a prescriptive list of additional powers at the moment, the Islands Bill should provide a mechanism whereby any such powers can be granted by secondary legislation where island councils, and councils with island responsibilities, can demonstrate, working with their communities, that such additional powers would enable them to protect the island communities they serve better”.

Such powers would provide flexibility to respond to changing circumstances; and address the need to anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by Parliament.

For example the Council’s consultative response stated:

“If energy efficiency and fuel poverty programmes could be more ‘island proofed’ when first developed, or even better if Council’s across Scotland could be given more freedom to create their own programmes that fit their locality and circumstances, then the available funding could be targeted to those in the most need and spent in the most effective way.

The Islands Bill is the perfect opportunity to address the problem by allowing greater flexibility to meet specific island needs”.

The Commission on Strengthening Local Democracy opined that communities are feeling disempowered and alienated from the democratic system. In many respects, granting “additional” powers through the Islands Bill could be seen as returning some of the powers and flexibilities that have been removed over the past twenty years.

The Council has engaged with the Bill Manager in this regard through the Islands Strategic Group. It is acknowledged that Parliament may be wary of the prospect of giving away what may be perceived as wide powers.

However, as the Islands Bill makes provision for an application to be made for additional powers (in the context of marine licensing), then there could be a similar provision for a more general power over a range of competences. This would be by way of application (on cause shown) – essentially what the Council asked for in its Islands Bill submission.

Such a power could be used to remedy the situation whereby the Council was left in a frustrating position in terms of the building of our new schools. The most carbon efficient way of heating these according to the standard method used for energy modelling buildings to achieve regulatory compliance was to install LPG as a secondary heat source. At Stromness Primary School, Kirkwall Grammar School and the new Halls of Residence, the Council is now encumbered with importing LPG by lorry during the life of the buildings.



Such a power could also be used to remedy the adverse impact of SAP “Standard Assessment Procedure” measurements. Orkney struggles badly as SAP essentially measures carbon as opposed to actual efficiency. It assumes that all mains electricity is carbon heavy and so we are penalised for using electricity (which is our only primary fuel source). Frustratingly, there is no facility within the system to recognise our largely decarbonised mains electricity grid within Orkney.

Building regulations are but one area where such a power would make a fundamental difference. Another example is The Social Care (Self Directed Support) (Scotland) Act 2013 which requires local authorities to offer four choices to meet the support needs of those assessed as in need.

The Social Care (Self Directed Support) (Scotland) Act 2013 legislation was conceived by Scottish Government as a cost-neutral piece of legislation, with the cost of implementation envisaged as being met through the redesign of high volume services resulting in the ability to offset the cost of payments to individuals who wish to purchase their own support. However, long experience has shown that this does not translate into practice in Orkney where there is a lack of economy of scale to fit with the vision of implementation.

In essence, what the Council is proposing is not a blanket power. The Council is not proposing that it has unlimited flexibility. There would be appropriate checks and balances. What is proposed would be a clear, fair and reviewable process, similar to those in the Community Empowerment (Scotland) Act 2015 for asset transfers or participation requests.

As in community empowerment, there could be a presumption in favour of such requests through an agreed mechanism – set out in Guidance – provided that the Council could demonstrate that granting it such powers would enable it to improve services in and for its communities and, most importantly, improve outcomes.

The appropriate checks would be:

- Evidence of support from the communities that we represent
- Business case

The Council would make an application to the Scottish government for consideration of a “scheme” as would be the case in the Marine Licensing provision in the Bill. As indicated, the application could be made over a range of competences which could include public sector reform.

The Council considers the inclusion of such an enabling or facilitative power as providing a real opportunity to engage with and reflect the priorities of our communities recognising that “one size does not fit all” in delivery of Council services and, as has been recognised by Government in the establishment of the Islands Strategic Group, that there are particular issues affecting islands which do not affect mainland Scotland, or to the same degree.

The Council considers that the inclusion of such a power would be truly transformational and would allow it to make things happen and give it the ability to react to change. Such flexibility and adaptability would be entirely consistent with the principles of the European Charter for Local Self Government.

The Council considers that the inclusion of such a power would demonstrate parity of esteem between local and central government and invigorate and strengthen local democracy. It would also be evidence of a mature and confident government that acknowledges the principles of the Montgomery Commission and that islands require to be treated in different and imaginative ways to deal with their unique circumstances.

### 3. Community Benefit

The Council stated in its consultative response to the Bill:

“The central role of the Islands Councils in regard to Community Benefit was recognised within Empowering Scotland’s Island Communities. We believe that the principles pertaining to community benefit are relevant. Thus: “Islands Councils can have a central role in ensuring that community benefit is shared equitably and strategically to communities in their island groups. In such cases, the Islands Councils would each be responsible for administering their own fund, including determining how funds are spent, who would benefit and the level of benefit. The Council would have a strategic role in aligning the distribution of benefit with national and local priorities, securing agreement as required within Community Planning Partnerships to assure the direction of benefit towards communities.

In developing community benefit packages the Islands Councils can have a central role in making investment for community ownership to benefit all communities in their island groups, and in ensuring that community benefit can be shared equitably and strategically to all communities in their island groups”.

The Orkney Council Act has worked well for Orkney over the years. Orkney Islands Council’s Reserve Fund is a simple example of how community benefit works successfully in practice.

Section 69 of the Orkney County Council Act 1974 empowers Orkney Islands Council to apply its reserve funds “for any other purpose which in the opinion of the Council is solely in the interests of the county or its inhabitants”. A similar provision is contained within the Zetland County Council Act 1974.

This wide power is an example of the operation of community benefit. It is not geographically fixed. There is scope to incur expenditure outwith the geographic limits of the Orkney area. What is important is that the expenditure “is solely in the interests of the county or its inhabitants”.

Both Orkney and Shetland have demonstrated their ability to use these powers responsibly to best serve local interests and capitalise on the use of their own resources.

The Council considers that following the local act principles, there should be provision in the Bill for community benefit. For example, there may be development opportunities in our area which would require major infrastructure and other investment from councils and those councils, in these circumstances, should be able to apply any surplus income for the benefit of their communities without impacting on GAE.

#### 4. Marine Planning

The delegation of planning functions is referred to under section 12 of the Marine Scotland Act 2010.

Subsection 2 requires that a delegate must comprise of—

- (a) a person nominated by the Scottish Ministers, and
- (b) one or more of the following—
  - (i) a public authority,
  - (ii) a person nominated by a public authority with an interest in the Scottish marine region to which the regional marine plan applies as the Scottish Ministers consider appropriate.

The effect of section 12 means that the Council cannot have outright delegated authority; there must be another person nominated by Scottish ministers.

This issue was raised under Marine Planning which was tabled at the second Island Areas Ministerial Working Group on 29 October 2013.

Derek Mackay MSP and Chair of the Group suggested that this matter might be addressed should an islands Act be passed by a future Parliament.

The Council is having difficulties establishing another partner and would like an amendment to allow a simple delegation to itself.

The Council appreciates that the scope for delegation of responsibilities was compromised by opposition amendments during Stage 3 of the Parliamentary Scrutiny of the Marine Planning Bill in 2010. In particular, the Committee found ‘it almost impossible to envisage circumstances where a single public authority would be an appropriate “partnership” and suggested that the provisions enabling this to happen be removed from the Bill’.

However, given the difficulties experienced locally in Orkney, the council considers that the Islands Bill should be amended to allow for a simple delegation to the Council.

#### **7. Do you have any comments on the bill in relation to human rights or equalities?**

The Council stated in its consultative response to the Bill:

“We consider insularity to be an equality issue and as such island proofing is important in ensuring that our island areas are treated fairly and consideration is given at all levels to the impact of decisions on our communities. We believe that statutory guidance should have regard to the principle of insularity and remoteness being an equality issue”.

Numerous examples of inequality in our islands were given in the Council’s consultative response to the Bill. Many of these inequalities still persist.

Digital exclusion is a reality for many individuals, communities and businesses based in the three island areas. Fit-for-purpose broadband and mobile communication access is important for economic growth, community health and wellbeing, learning and development and access to public services.

The Council considers that it remains imperative that guidance on Island proofing should include insularity and remoteness as an equality issue.

Orkney Islands Council  
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