POLICY NOTE

The Additional Powers Request (Scotland) Regulations 2019

SSI 2019/XXX

The above instrument is made in exercise of the powers conferred by sections 15 and 21 of the Islands (Scotland) Act 2018. The instrument is subject to the affirmative procedure.

These regulations create a scheme under sections 15 and 21 of the Islands (Scotland) Act 2018 (the Act) under which the local authorities listed in the schedule of the Act may request additional functions, duties or responsibilities from the Scottish Ministers.

Policy Objectives

Section 15 of the Islands (Scotland) Act 2018 (the Act) requires that the Scottish Ministers establish by regulations a scheme for the making of a request to the Scottish Ministers by a local authority listed in the schedule of the Act to promote legislation devolving a function to that authority. Section 15(2) sets out the specific features that must be included in the scheme. Section 15(3) sets out other features that may be included in the scheme. Similarly, section 21 of the Act requires that the Scottish Ministers make a scheme under which a local authority listed in the schedule of the Act can request that additional functions, duties or responsibilities are transferred to that authority. Sections 21(2) and (3) set out the specific features of such a scheme.

The Act does not specify the legislative procedure for regulations made under section 15. Through the application of section 33 of the Interpretation and Legislative Reform (Scotland) Act 2010 (combining of certain powers), the procedure for regulations made under sections 15 and 21 are combined.

These Regulations create a scheme that satisfies the requirements of both sections 15 and 21. Under the scheme, the six local authorities listed in the schedule of the Act ("relevant local authorities") may make an "additional powers request" to request an additional function, duty or responsibility from the Scottish Ministers.

The key features of the scheme are as follows:

- Prior to making an additional powers request, a relevant local authority must be satisfied that it can demonstrate reasonable cause for requesting an additional power from the Scottish Ministers.
- The relevant local authority must also carry out a consultation on the proposed additional powers request. In particular, the local authority must consult the relevant island community or communities, which is a means of establishing whether there is community support for the proposal.
- The additional powers request must be in writing and include, among other things, the local authority's reasons for making the request, any anticipated implications for outcomes in the local authority area and information on the level of community support for the additional power being exercised by that local authority.
- The Scottish Ministers must publish a notice containing details of an additional powers request and make the supporting documentation available for inspection on a website or by other electronic means.

- Written representations may be made to the Scottish Ministers by interested parties and the requesting local authority may make comments to the Scottish Ministers on those representations.
- The Scottish Ministers must make a decision as to whether to give effect to or refuse an additional powers request within six months of the validation date (the date on which the Scottish Ministers confirm they have received from the requesting local authority all the information that must be contained in or accompany an additional powers request). This period can be extended by agreement between the Scottish Ministers and the local authority. A request must not be unreasonably refused.
- Where the Scottish Ministers decide to give effect to an additional powers request, they agree to transfer the additional power, or promote legislation devolving the additional power, to the local authority who made the request. The scheme does not give the option for the Scottish Ministers to offer an alternative or modified additional power. However, guidance on these Regulations will be developed which will encourage pre-application meetings between a requesting local authority and relevant Scottish Government officials to discuss the scope of the power being requested. If the Scottish Ministers refuse a request, the Scottish Ministers may discuss with the requesting local authority alternative powers that could be transferred or devolved instead, outwith the scheme created by these Regulations.
- The Scottish Ministers may decide to give effect to the request with regards to one of more of the other relevant local authorities as well. There is no provision for those other local authorities to seek a review if they do not wish to be given the additional power. However, the local authority may negotiate an alternative arrangement with the Scottish Ministers outwith this scheme.
- The Scottish Ministers must then set out the steps they intend to take in order to give effect to the request and their anticipated timescales.
- Where the Scottish Ministers refuse a request, the local authority who made the request may seek a review of that decision. A refusal of a request made by one local authority does not preclude the other relevant local authorities from making the same request under this scheme.
- The Regulations set out detailed rules for the conduct of reviews by the Scottish Ministers and the review panel. The review must be determined within six months of the application for review being made, by either giving effect to or refusing a request. This period can be extended by agreement between the Scottish Ministers and the local authority.

Consultation

To comply with the requirements of section 15(4) of the Islands (Scotland) Act 2018, the Scottish Ministers have consulted with each local authority listed in the schedule of that Act: Argyll and Bute Council, Comhairle nan Eilean Siar, Highland Council, North Ayrshire Council, Orkney Council and Shetland Council. It was not considered appropriate to consult any other persons. A policy proposals paper was circulated to each local authority and followed up by individual phone conversations to discuss the proposals in more detail. As a result of that consultation, the policy proposals were amended to reflect stakeholder concerns and to incorporate suggestions, including amended timescales for decisions and review requests; the form and content of an additional powers request; the option for the review panel to consider representations via a hearing; and refinement of what a decision by the Scottish Ministers to give effect to a request means. Stakeholders felt strongly that a pre-application meeting would be beneficial prior to a relevant local authority undertaking the work required to prepare and make a request under the scheme.

Impact Assessments

These Regulations create a scheme under which the six relevant local authorities may request additional functions, duties or responsibilities from the Scottish Ministers. They do not in and of themselves transfer or promote legislation to transfer any functions, duties or responsibilities, rather, they set out the framework for making and handling such requests.

Screening under the Child Rights and Wellbeing Impact Assessment (CRWIA), Equality Impact Assessment (EQIA), and Strategic Environment Assessment (SEA) concluded that no impact assessments are required, as these Regulations have no effect on equality, privacy, children's rights and welfare, or the environment.

The Scottish Government considers that the Regulations and the scheme they establish do not give rise to any human rights concerns and comply with the European Convention on Human Rights (ECHR). It is anticipated that any improvements to outcomes for island communities as a result an additional powers request will be positive with respect to human rights.

In consideration of the Fairer Scotland Duty (FSD), it is anticipated that the implications of the exercise of an additional power by a relevant local authority will have a positive effect, including on outcomes in that authority's area. The scheme created by these Regulations does not affect socioeconomic outcomes.

While there is no formal Digital Impact Assessment, it is appropriate to consider how the Regulations can be future-proofed in light of upcoming changes to technology. Where the Regulations require publication of notices or documents, this is in the form of publishing a notice on a website or by other electronic means. Part 6 of the Regulations concerns electronic communication.

The Data Protection Impact Assessment (DPIA) did not reveal any impact on personal data and privacy. The Regulations are clear that any representations received in response to an additional powers request notice will be sent to the requesting local authority, and that these representations and any comments received in response, will be published on a website or by other electronic means until such time as the Scottish Ministers publish a decision notice. Similar provisions are made regarding the review process.

Financial Effects

The Minister for Energy, Connectivity and the Islands confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Local Government and Communities Directorate

25 June 2019