Law Society of Scotland

Written evidence

Short term letting regulations

January 2021

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Planning and Licensing Law Sub-committees welcome the opportunity to respond to the Scottish Parliament Local Government and Communities Committee's call for views in respect of The Town and Country Planning (Short Term Let Control Areas) Regulations 2021 and The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021[1]. We previously responded to the Scottish Government's 2019 consultation *Short Term Lets*[2] and the 2020 consultation *Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland*[3].

We have the following comments to put forward for consideration.

Consultation questions

1. Do the proposed changes strike the correct balance between protecting the long-term sustainability of local communities and promoting tourism and strong local economies?

We consider that the proposed changes have the potential to strike an appropriate balance, but this is likely to depend on the practical operation of the schemes. In relation to the planning regime, this balance will depend on guidance being issued, the terms of which are crucial to the successful practical operation of the scheme by planning authorities. Please see our more detailed comments on the matter of guidance below.

We note that the Business and regulatory impact assessment (BRIA) suggests that guests who would wish to stay in a short-term let property would be able to secure suitable alternative accommodation if this accommodation was not available as a result of regulation of the sector[4]. However, the BRIA does not provide

[1] https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/116756.aspx
[2] https://www.lawscot.org.uk/media/363183/19-07-19-plan-lic-short-term-lets.pdf
[3] https://www.lawscot.org.uk/media/369667/20-10-16-plan-lic-consultation-short-term-lets-regulations.pdf
[4] See paragraph 109 of the BRIA

evidence to support this, for example, in relation to the saturation of the tourist and business accommodation market. There may be a connection between the approach taken to regulating the short-term let sector and policies in respect of other types of accommodation. The BRIA also appears to assume that the regulations do not apply to traditional B&B properties. Paragraph 59 (at page 17) lists one of the positives of regulation for other hospitality as "Increased business in some areas if availability short-term let accommodation reduces". However, the regulations appear to apply to traditional B&B's as well[5] and it may therefore be that Scottish Government has not fully assessed the impact of the regulations on all sectors.

2. Has the Scottish Government's defined short terms lets in a clear and correct way in the legislation?

We refer to our comments below in relation to the need for guidance concerning the planning scheme and particular comments in relation to the terms of the licensing order.

Private residential tenancies within the meaning of Part 1 of the 2016 Act do not constitute a short-term let by virtue of section 26B(3)(a) of the Town and Country Planning (Scotland) Act 1997 (1997 Act) and are excluded from the licensing regime by virtue of regulation 2(3) of the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021.

Both the planning and licensing regimes will take arrangements out of scope where the guest does not occupy the accommodation as their "only or principal home" (licensing) or the tenancy of a dwellinghouse which is the "only or principal home" of the landlord or occupier (planning). There may be tenancies other than private residential tenancies which would merit express exclusion from the regimes. It seems anomalous to expressly exclude some types of tenancies but not others and this should be considered further. For example, tenancies under the Rent (Scotland) Act 1984 and the Housing (Scotland) Act 1988, and agricultural and crofting tenancies may merit exclusion.

We do not consider that section 26B(3)(b) of the 1997 Act necessarily takes agricultural and crofting tenancies out of scope of the planning regime as it refers only to the tenancy of a dwellinghouse (or part of it), not tenancy of land part of which comprises a dwellinghouse does it cover circumstances where an agricultural tenancy includes more than one dwellinghouse.

A blanket exclusion of agricultural tenancies and croft tenancies may risk difficulties where tenants have diversified to include short-term letting accommodation. We suggest that if there is to be an express exclusion from the regimes, this could be dealt with by excluding tenancies under the Agricultural Holdings (Scotland) Act 1991 and 2003 or the Crofters (Scotland) Act 1993 from the regimes to the extent that any dwellinghouse comprised within the tenancy is occupied by the agricultural tenant or crofter or a family member of the agricultural tenant or crofter. The exclusion of a family member could be on the basis of 'any person mentioned in section 10A(1A) of the Agricultural Holdings (Scotland) Act 1991' i.e. the class of relatives to

[5] For example, see https://www.assc.co.uk/wp-content/uploads/2021/01/ASSC-Letter-to-Fergus-Ewing-21.12.20.pdf

whom an agricultural holding can be assigned (whether or not that sub-section would apply to the tenancy in question).

3. Will local authorities have adequate resources, powers and expertise to make a success of their new powers and duties?

This remains a real issue and concern.

The changes being brought in to operate a licensing and planning regime for short term lets will require additional staffing resources. Information and advice from the Scottish Government as to how the licensing and planning schemes and the local authorities will be resourced should be discussed now as part of the debate with regard to the framework that these regulations are setting up. It will take time for the regimes to bed-down particularly the new processes and systems. Information and advice from the Scottish Government as to how local authorities will be resourced to deliver the licensing and planning schemes, and in relation to the planning scheme, potentially also Scottish Ministers and the DPEA, should be discussed as part of the debate with regard to the framework that these regulations are setting up.

In our response to the Scottish Government's consultation *Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland*[6], we noted that the resourcing for the creation of short term let control areas is expected to be significant. For instance, research carried out by the Royal Town Planning Institute (RTPI) in connection with the implementation of the Planning (Scotland) Act 2019 estimates the costs of a planning authority designating all or part of its area as a short-term let control area between £640,710 (lower estimate) and £14,756,800 (higher estimate)[7].

In relation to the licensing regime, we previously outlined that "we understand that the policy intention is that the fee levels should cover adequately the staff and administrative costs. The consultation sets out fairly broad, empowering options around the fees levels that are set. These fee levels vary substantially at present and for those requiring licences in different areas due to owning a number of properties, these costs without any control could be prohibitively high. There are often significant infrastructure costs in introducing new schemes, for example new IT systems, which cannot always be fully recovered."[8]

It does not appear at present that a commitment to the additional funds required will be available for local authorities to carry out the necessary work.

[6] https://www.lawscot.org.uk/media/369667/20-10-16-plan-lic-consultation-short-term-lets-regulations.pdf
[7] https://www.rtpi.org.uk/media/1211/rtpi-scotland-financial-implications-of-implementing-the-planning-scotland-act-2019.pdf
[8] https://www.lawscot.org.uk/media/369667/20-10-16-plan-lic-consultation-short-term-lets-regulations.pdf

Comments on the Regulations

As referred to above, guidance for local authorities will be crucial to the success of these regimes. We understand that Scottish Government have plans in place for the development of guidance. We consider it is necessary for this to be available before the schemes are operational.

We have a number of comments with regard to the Regulations and Order:

The Town and Country Planning (Short Term Let Control Areas) Regulations 2021

Guidance

Under the provisions of the Planning (Scotland) Act 2019, the regulation of short-term letting is focussed on designated short-term let control areas as set out in these Regulations. Within a control area, there will be a deemed material change of use of the property. However, in our response to the Scottish Government's 2020 consultation[9], we highlighted that out with control areas, it remains fundamentally unclear when a material change of use will have occurred and thus when planning permission is be required. We stressed that it is important for there to be clear principles for assessing planning applications. In response to the consultation, Scottish Government committed to issuing guidance on:

- "what constitutes a material change of use with respect to the use of dwellinghouses as short-term lets outside control areas; and
- relevant considerations in determining a planning application in respect of change of use to a short-term let in any area."[10]

We welcome the commitment to issue guidance on these matters. This guidance should be in place before any short-term let control areas are approved by Scottish Ministers and is needed at this time (in any event) to clarify the present circumstances where enforcement action is being taken by planning authorities on an individual property basis in the absence of clear planning guidance. This guidance should be in place before any short-term let control areas are approved by Scottish Ministers. It is not appropriate for a control area to be in place without there being clarity for all parties involved as to how planning applications are to be determined.

Designation, variation or cancellation

We welcome the requirement under Regulations 4(3)(b) and 6(3)(b) that a planning authority must provide a statement setting out the reasons as to why it is proposing the designation, variation or cancellation of a control area. A similar statement is required under Regulation 8 which sets out requirements for a planning authority to submit a proposed control area to Scottish Ministers for approval of a designation, variation or cancellation. It is not currently clear what is expected from this statement – for example, is it expected to be evidence based, will it require to stand-up to detailed scrutiny, what level of detail is expected?

[9] https://www.lawscot.org.uk/media/369667/20-10-16-plan-lic-consultation-short-term-lets-regulations.pdf
[10] Consultation report on proposals for a licensing scheme and planning control areas for short-term lets in Scotland, December 2020, paragraph 6.4

In practical terms, it would be of assistance if a style of the notice to be given by a planning authority under Regulations 4, 6, and 8 was to be set out, for example, in a similar way to the notices under the Compulsory Purchase of Land (Scotland) Regulations 2003.

Guidance should be provided clearly setting out Scottish Minister's expectations as to what is required for a control area to be determined and the factors which a planning authority should consider before deciding to propose a control area. Reflecting on the challenges experienced with the approval of supplementary guidance under the Planning (Scotland) Act 2006, there must be clarity on the process for all parties involved.

The guidance might also usefully suggest how and when it is appropriate for control areas to be reviewed. We note that there is a potential for Scottish Ministers to refer a proposal to the DPEA for examination under section 265 of the Town and Country Planning (Scotland) Act 1997. This will require sufficient resourcing.

While the requirement for a planning authority to submit the proposed control area to Scottish Ministers for approval under Regulation 8 provides a safeguard, it is concerning that the Regulations do not set out a requirement for a planning authority to consider representations made in response to consultation under Regulations 4 or 6 or a process to be followed in considering whether or not to accept representations. When submitting the proposed control area to Scottish Ministers for approval, it would be appropriate for a planning authority to be required to set out a summary of the representations received, any modifications made to the proposal as a result, and if not, to set out why no modifications have been made. Even without legislative provision, guidance should be provided to planning authorities as to how representations are to be considered and responded to.

Regulation 8(4) provides that a planning authority may not designate a short-term let control area or vary a designation to include an area within a short-term let control area unless the Scottish Ministers have approved the designation or variation. The Regulations should set out a period within which the Scottish Ministers must approve or refuse a proposed designation or variation. This would provide certainty to planning authorities, operators and the public at large as to the expected time frame for a decision by Scottish Ministers.

In relation to regulation 9, we welcome the inclusion of a requirement for a notice of designation, variation or cancellation of a short-term let control area to specify a date on which the area is to be designated as a control area, or the variation or cancellation is to take effect, being not earlier than 28 days after the date of publication of the notice.

The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021 (the Order)

<u>Definition of a Guest (Regulation 2)</u>

Regulation 2(1) includes the definition of a guest. This assumes that the party booking is the party staying. Regulation 2(2) refers to the "grant of an agreement in the course of business for the use of residential accommodation (or a part of the accommodation) by a guest." It is assumed that it relates to that particular guest. What happens where a third party makes the booking, which is a relatively common scenario, such as

someone hiring a cottage for family members? In this scenario, the agreement is with the person making the booking, but they are not the guest.

We suggest that the “grant of an agreement” should be defined in relation to whom the agreement is granted as this lacks clarity. This could be covered in written guidance. From an operator’s point of view, they will wish to be clear on as to who the agreement is with for the purposes of the legislation. This is an issue encountered by operators at present. This is generally dealt with in practice by intimation of terms and conditions and it is up to the operator to ensure if a third-party books for a guest, that third party understands that they are taking responsibility for those who are the guests. If they decline to do so, the operator must consider whether they will take the booking.

Multiple Units

These are to be treated as a single activity under the Order as long as the accommodation is on a single site and has shared facilities. For example, one licence would cover a whole building of serviced apartments as long as there are shared facilities. If there are no shared facilities, this means one licence is required per apartment. If a single licence is going to cover all apartments, what happens if safety conditions are breached in one or more apartments? That would place all apartments under an issue as it is one licence. Static caravan parks may also give rise to difficulties as they will generally be a single site. We suggest that this matter be covered by guidance.

Temporary exemption from the requirement to have a licence (schedule 2(3))

Schedule 2(3) refers to temporary exemption from the requirement to have a licence, however, there is no detail set out in relation to the process. The Scottish Government have advised that they intend to set out more information as to how and when licensing authorities might use temporary exemptions in guidance. It is our view that it is not appropriate to have this process laid out in non-statutory guidance. This is a decision of the licensing authority which must be based on a transparent statutory process. The basic criteria and timescales should be laid out in law. There should be an appeals process in law. We are strongly of the view that this requires revisiting.

Neighbour notification/Notification (schedule 2(4))

The neighbour notification can be disregarded if the authority displays a notice. We would suggest this will cause practical issues as in other licensing regimes, it is for the applicant to display the notice, not the local authority. The local authority might not have access to all areas that the applicant has which may prevent its correct display. What happens in circumstances where the notice is removed or defaced? This may disrupt the application and is a matter over which the applicant has no control.

We understand that it is expected that notices will specify the last date for objections, and this will be clarified in guidance to be issued.

We have concerns with conflation of the planning and the licensing applications with regard to one site notice. As highlighted above, these are two different regulatory regimes. We recognise that local authorities will have discretion as to whether or not this an approach they wish to pursue. This is an important matter to be addressed in the guidance to be issued in due course. However, we are concerned that where ‘joint’

notification has been undertaken, there will be circumstances where objections will be made to the licence application on grounds which relate to planning matters. This may create public confusion and does not promote efficient processes for all parties.

Overprovision (schedule 2, paragraph 6(c))

Schedule 2, paragraph 6(c), refers to the introduction of an overprovision ground of refusal. It is crucial that there is transparency as to overprovision which means the law must require the authority to reach an evidential position. The law should require the authority to assess overprovision and produce a policy following consultation.

There is no requirement placed on the licensing committee by the legislation to define overprovision. There is no equivalent Statement of Licensing Policy (SPL) required as there is with liquor licensing in terms of the Licensing (Scotland) Act 2005, as amended. The SLPs for all local authorities in Scotland require that the licensing board have an overprovision statement. This is a serious consideration. We do not consider that written guidance is a sufficient place to address the lack of an overprovision policy. There must be a clear definition of what each local authority area, and therefore its licensing committee, regards as overprovision for that area.

We consider that this lack of requirement will result in significant costs being spent on appeals.

Overprovision should have a link to some form of objective as there is no clarity on what refusal on overprovision is designed to prevent, if there is a requirement for an overprovision policy, then that policy should have objectives (for example, the avoidance of public nuisance)

Enforcement Notices (schedule 2, paragraph 8)

We are strongly of the view that the “likely breach” provision in relation to enforcement notices may be at odds with natural justice. In all other licensing regimes in Scotland, it is the occurrence of action or inaction which is the test, not that it might happen or be likely to happen.

Looking at the list of mandatory conditions, we are not satisfied how the “likelihood” of any of these being breached can possibly be quantified objectively. We note that the Scottish Government has suggested that this could occur in the example of a “likely” breach of the capacity condition where there is evidence of overbooking. However, removing the “likelihood” element does not mean that overcapacity could not be subject to an enforcement order. If there was overcapacity, that would be a breach of the mandatory condition. It is a concern for us that this provision creates a legislative environment where the mere possibility of something occurring, which is a subjective measure, can lead to a punitive process or a criminal conviction. If the overbooking issues requires the “likeliness” test, it should be possible to amend the provision so that the “likely to breach” only applies to that specific condition.

Under the terms of paragraph 10A(4) to be inserted into the 1982 Act, a condition of an enforcement notice becomes a condition of the licence itself. We understand that the Scottish Government take the view that breach of an enforcement notice being a criminal offence is not of itself unusual, and we agree with that view. However, this does not address the fundamental clash which transposing an enforcement notice condition to

the principal licence would bring. The issues with this are three fold: there is no notice or formal hearing before the enforcement notice is applied so the premises licence holder has no right to answer; the enforcement notice immediately becomes a condition of the licence; and there is no appeal procedure nor a definition or style for the enforcement notice.

It is not good law to have clashing potential criminal offences: (1) breach of a licence condition itself, which is a discrete offence and (2) breach of an enforcement notice. In addition, there are other practical considerations such as:

- What is the longevity of the transposed condition?
- How long does it sit on the licence for?
- Is it proportionate to have what could be a small or time limited requirement under the enforcement notice a perpetual condition of the licence?
- What happens if the enforcement notice has been served unlawful or is itself unlawful?
- Is the condition then void?

If an enforcement notice is going to become a condition of the licence, it should be considered prior to being applied.

Our suggestion is that this provision should be deleted as it not necessary.

Mandatory Licence Conditions (schedule 3)

Schedule 2, paragraph 2 refers to circumstances where it is not the owner or sole owner who is applying to hold the licence. Schedule 3, paragraph 10 provides as a mandatory licence condition that the holder of the licence must hold valid buildings insurance. In the case of agricultural tenants, they will not hold buildings insurance for the dwellinghouse but may seek to be a holder of a short-term let licence which would appear to create a potential difficulty for this condition.

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