Law Society of Scotland

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Consultation Response

Houses in Multiple Occupation (HMO): Consultation on adding new categories to the definition of an HMO

8 July 2019

Introduction

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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 Licensing Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Houses in Multiple Occupation (HMO): Consultation on adding new categories to the definition of an HMO (the consultation).

The sub-committee has the following comments to put forward for consideration.

General

The consultation seeks to add new categories to the existing definition of HMO properties. To operate HMO properties, HMOs properties require to be licensed as this provides a means to check on the standards of shared properties to ensure that such properties are safe, of good quality and are well managed. The background to the consultation seeks to address health and safety concerns that have been identified in relation to accommodation in which contract and transient workers stay. The intention is for such properties to be included in the future within the definition of HMO properties.

The principles that are intended to underpin the consultation are to ensure that those requiring to work away from home such as contract and transient workers should be able to expect similar standards of accommodation to be available for them. Such standards should be able to be enforced as currently exists for HMO properties.

Certain requirements for HMOs must be observed before licences are granted which include:

- The owner and any manager of the property being a fit and proper person to hold a licence

- The property meets the required physical standards
- The property is suitable for use as HMO

Non-compliance with such a licence for HMOs is a criminal offence which carries sanctions by way of a conviction as well as financial implications for those who breach such licence provisions. This ensures that such standards will and can be enforced.

However, before extending the definition of HMOs, it would have been helpful if the consultation had set out an evidence base with statistics to identify the extent of the problem, the location within Scotland of occurrence of these issues and the likely number of transient and contract workers affected. Our concerns, in the absence of the provision of such evidence, are that the consultation with the draft Statutory Instrument[1] presents a rather broad-brush approach to issues which are not necessarily consistent or uniform across Scotland that merit a national approach.

We appreciate that contract or transient workers should not be subject to sub-standard housing.

We also accept that, as the consultation mentions, there are major once in a lifetime infrastructure projects such as the Queensferry Crossing (which projects will be few and far between) where contract or transient workers will require to live in accommodation which is not their main or principal residence for lengthy periods. That does not necessarily make this issue of accommodation a Scotland wide issue and as such, requiring a standard solution.

We have two main concerns to outline (and discuss these further below):

Expense: Householders affected by the proposed changes would require to put their properties into the standard required of HMOs. That will be expensive and may affect the nature of their property long-term for what may be a short-term gain.

Rather than secure the maintenance of property standards, the policy here instead will reduce the number of properties available to rent significantly. Owners would consider that it was simply not worth their investment in bringing their property up to standard. Furthermore, for example, where there may already be a dearth of accommodation for the workforce on smaller projects such as a rural roads project within remote island communities, this legislation proposed here may create an even more significant shortage. Owners will not be prepared to bring the properties up to the HMO standard in the short term while such a short-term project is ongoing.

[1] The Houses in Multiple Occupation (Scotland) Order 2019 which is included under Annex A

There is also a time factor. It takes time to ensure that a property complies with HMO standards. Just how long in advance would it be known that a work project was ongoing or about to start with an additional workforce looking for accommodation when it would be worthwhile for property owners to seek out such licences.

Permanence: We also query the “permanence” provision which indicates that a property is to be included within the definition if it is used for a single day. A single day does not equate to the permanence of tenancy that underpins the policy intentions regarding the maintaining and management of the condition of privately rented properties with the aim of improving standards and quality of service for tenants.

Question 1: Should holiday lets, hostels or B&Bs be licensed as HMO’s, when contract and transient workers are residing in these and special arrangements have been made for them?

We refer to our comments above. We are unaware of the extent of the issues nationally. Infrastructure projects may provide an exception to the general rule. There may well be circumstances where there are short stays by workers in certain situations, but we suspect that the long stays bordering on the “permanent” are not all that common.

To introduce this type of regulation seems to be an overreaction to what may not be a particularly widespread problem. Bear in mind that the purpose of the legislation governing HMOs is there to try to maintain standards and provide safe accommodation for tenants.

Though the consultation refers to the deliberate aims of landlords to flout accommodation standards, where contract or transient workers are involved, we see no actual evidence presented of this being the case.

In any event, the type of regulation envisaged here goes further than what is needed to address an issue that may exist but not be widespread.

Any licensing scheme introduced will have implications for the relevant local authority. See our answer to Question 10.

If these proposals are to go ahead, how exactly or when an owner is affected would need to be made clear by a publicity campaign. The nature of the arrangements required for HMOs is such that they may not be publicly known to require licensing, being more of a private arrangement.

We would be interested in the Scottish Government’s proposals around publicity of the requisite legislation envisaged here.

The Statutory Instrument proposes to revise the HMO definition under section 125 of the Housing (Scotland) Act 2006 (2006 Act) so that the owners of properties affected would commit an offence under

the 2006 Act as soon as it is commenced. It appears to include no transitional provisions. Additionally, and we assume unintentionally, it refers under Article 1(1) to a coming into force date of 24 May 2019 which would render the provisions retrospective which cannot be correct.

In order to prevent such offences, the Statutory Instrument should either:

(a) create a transitional provision to allow those falling within it the opportunity to apply for HMO licence or

(b) somehow make it clear that the “reasonable excuse” provisions of section 155 of the 2006 Act cover a person who now falls into the regime for the first time if they apply for HMO licence within a prescribed period. "Reasonable excuse" does not appear to cover this at present.

Question 2: Do you agree with the policy approach to change the focus from the only or main residence test to the focus on the type of accommodation and its manner of occupation?

We refer to our comments above.

Though we understand the approach being adopted is to focus on the accommodation and its manner of occupation, the consultation is silent as to the effect of costs on the owners of the properties.

The consultation specifically refers to holiday lets, hostels or B&Bs. We consider particularly in relation to holiday lets and B&Bs, that the cost involved in adapting premises to comply with the usual HMO standards would be wholly out of proportion to the benefit received by the owners. The likelihood would be that there will be a large decrease in the number of property owners willing to allow their properties to be used by transient or contract workers.

The application costs for HMOs tend to be high on their own but even greater than that (and requires to be factored in) is the cost of satisfying the HMO standards. Normally, an owner would be looking at the introduction of fire doors throughout the property, for example, which are not cheap. They would also require to arrange for their gas and electrical installations to be suitably inspected by qualified electricians and gas engineers along with the necessary portable appliance testing. Whilst this may be positive in the context of properties being wholly used as a commercial enterprise (i.e. the current HMO operation), it is quite different where in B&B operations, the property in question is also occupied by the owners themselves.

It is their own home which they would be expected to adapt to meet HMO standards and in so doing, they would incur huge costs but perhaps, even arguably more important, potentially destroy the character of their own home. Faced with that situation, we are sure that most B&B operators will simply take the

decision that it is not worth while providing accommodation to contract or transient workers. They will simply continue to make such money as they can from the normal tourist trade.

Similarly, with holiday lets, in many instances, these may well be family homes which have been passed down from generation to generation. They may now be in the category of a “second home” but still used mainly by family members except for the period that they are lying empty when they might be used as relatively short-term holiday lets. If these were now to be brought into the HMO regime, the same comments and criticisms already made in respect of B&B operations would apply equally. The likely result of the imposition of HMO status on such properties will again lead to a number of owners simply deciding that it is not worth the expense or inconvenience. They will simply cease to let their properties to such workers. This again would lead to a reduction of properties available for use by the transient or contract workforce.

There is also the question of planning status.

We understand that if the local authority has decided to consider the planning position of the property as potentially being a reason not to process the application (as they are entitled so to do in terms of the legislation), this might lead to an additional expense being incurred. Parties wishing to utilise their properties as HMOs may require making an application for planning consent before they can progress matters. That is a further cost and consideration for owners.

Question 3: Do you agree with the types of living accommodation set out in article 2(1) of the draft Order?

We are unaware of the extent of the problem as stated above.

We are therefore unable to comment on the extent of the properties intended to be involved within the legislation

Question 4: Do you agree with the policy approach outlined in article 2(2) of the draft Order?

Article 2(2) concerns the manner of occupation. We refer to our answer to Question 2 regarding the disproportionate costs involved for the owners of the property irrespective of the use being made of the property.

Question 5: Do you agree with the manners of occupation set out in article 2(2) of the draft Order?

We refer to our answer to Question 4. We also refer to our answer to Question 2 regarding the disproportionate costs involved for the owners of the property irrespective of the manners of occupation being made of the property.

Question 6: Are there other manners of occupation that should be described in the Order?

We are unaware of the extent of the problem as stated above. We are unable to comment on the manners of occupation involved and included in the legislation.

Question 7: Do you agree with the time pattern approach outlined in article 2(3) of the draft Order, whereby there does not have to permanently be 3 or more persons living in the accommodation?

No.

We understand that such premises as have been discussed above would fall within the HMO category (assuming all other criteria are satisfied), if the premises are occupied for only part of a week or the 3 or more “tenants” occupy the same living accommodation for a minimum period of one day in a 12 month period. As currently drafted, the HMO requirement for the B&Bs/holiday lets would be effective even if the relevant workers were only there for one day each year. That does not sit with the apparent desire for the legislation to deal with the long-term worker situation. How can a stay of one day in a 12-month period be the same as satisfying the HMO approach to be of the test of a “permanent” residence i.e. being used as the person’s main residence?

If the minimum period is 1 day, what is the purpose of the qualification of a 12-month period? As soon as it is used for one day, the HMO licence is required. Does that mean if the property is not used for a further period of 12 months and 1 day, the HMO permission is then not required? This would make the regime retrospective in determining whether permission was required. The licensing system should be prospective.

If the policy is to proceed, it seems that there is a need for a longer, more realistic qualifying period to be set out such as 28 days in any 12-month period. This would presumably allow a business to plan and decide whether it would offer such accommodation complying with the required standards.

Question 8: Are there any proposals in this consultation which impact or have implications for islands communities?

In island communities, there can be instances when workers move to the island (usually on a very temporary basis) i.e. a matter of a few days at worst to fulfil some obligation which the local work force may not be able to supply. There may be occasions when specialist or similar work is required in connection with a project on a short-term basis.

If it is intended that one day's accommodation is enough to trigger the HMO status (assuming shared amenities), then there is a problem because people will not nor indeed will not be able to afford the expense of bringing their premises up to HMO standards. Most B&B owners on the islands use their properties to bring in "a little extra money" rather than truly "making a living" out of the venture.

There will be exceptions, but the main issue is how island B&Bs work. There would be little sense commercially for them to go down the HMO route. There will therefore be less accommodation open to the contract or transient work force.

Even in the situation where there are long term construction works in an area, then that might well be the only such project in that area for many, many years to come. B&B/holiday would incur these expenses and then once the construction works are finished, such properties would no longer need to have HMO status. By then, the money is spent and perhaps more importantly potentially altered their own home and destroyed its character to achieve HMO status for what would appear to be for a limited purpose and little good reason.

Question 9: Are there any proposals in this consultation which impact or have implications on equality groups?

The consultation hints that foreign workers may benefit from this legislation. There are areas of Scotland in which foreign workers are more prevalent such seasonal fruit picking and in the fishing industry. More information on the extent of the problem would help confirm if these regulations would have a significant impact on that group.

Should consideration be given to those with mental or intellectual disability?

We refer to the UN Convention on the Rights of Persons with Disabilities[2] where there are strong incentives to give people with such disabilities the same status and protections as non-disabled persons.

[2] Article 19 which refers to the right to reside in the accommodation of their choice, and to have necessary services provided to them there.

There may be implications for such groups too as bringing up the properties to the requisite HMO standard may require disabled access provision to be made as well.

Question 10: Do any of the proposals in this consultation have financial, regulatory or resource implications for you and/or your business (if applicable)?

The consultation makes no reference to the costs and resources required to administer any licensing regime.

The costs of applying for a licence when required is one cost for the owner to consider to which we refer above. At what level should the application costs be set as this needs to cover the costs for the relevant authorities to put in place the resources to deal with the number of applications?

There is no information in the consultation about how many applications for HMO licences are anticipated. Resources will be required from the local authority to establish and administer the regime to generate sufficient licensing income to meet that cost. This may be adequate in some high tourist areas but not in other areas.

We would suggest if there is a problem identified for transient and contract workers then consideration could be given to making such legislation discretionary. That may well represent a much more proportionate response rather than this wholesale approach. We can appreciate that requiring simple registration of such properties let to transient or contract workers would not appear to fully address problems discussed such as fire safety.

We do consider that fuller identification and analysis of the problems is required before adopting this legislative approach.

Question 10: Do any of the proposals in this consultation have financial, regulatory or resource implications for you and/or your business (if applicable)?

The members of our Licensing Law sub-committee represent all groups from the licensed trade including the local authorities, the licensed trade and the public. There will be implications for local authorities as outlined in our answer to Question 9.

Question 11: Over the coming months, would you be willing to take part in a short

interview to expand further on your comments to Question 10?

We refer to our answer to question 10. It may be relevant to speak direct to some of those members of the sub- committee as there may be resource implications for the local authorities involved in considering the potential increase in licence applications for HMOs.

The consultation is silent as to any calculations on the number of applications which may be expected to arise initially and in the longer term with regard to HMO property licences. For instance, should a major infrastructure project be announced, there may be an assumption that there would be a number of applications to be processed quickly to take account of accommodation required for such a project. These could be significant for already hard-pressed Councils.

Other comments

Turning to the draft Statutory Instrument, though not specifically referred to in the consultation, we have the following observations, in addition to those mentioned above about transitional arrangements and the date of commencement.

Article 1(1) refers to “ad-hoc” which does not seem appropriate for a Statutory Instrument. Surely the statutory interpretation rule of *eiusdem generis* (of the same kind) would apply without the use of such wording? The word “similar” could be included in relation “to other reason.” That would deal with tis point.

For further information, please contact:
Gillian Mawdsley
Policy Executive
Law Society of Scotland
DD: 01314768206
gillianmawdsley@lawscot.org