



Law Society
of Scotland

Consultation response

Short Term Lets: Consultation on a licensing scheme
and planning control areas in Scotland

October 2020



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, Licensing and Privacy Law Sub-committees welcome the opportunity to respond to Scottish Government's consultation on *Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland*¹. We previously responded to the 2019 consultation². We have the following comments to put forward for consideration.

General comments

We note this consultation has been carried out over a much shorter period of time than is usual in Scottish Government consultations. Scottish Government's own best practice guidance³ on consultation states: "Consultations should be open for a minimum of 12 weeks, in order to meet existing SG commitments on consultation. In many instances, consultees will need time to consult with their members / user groups before submitting a response. Only in very exceptional circumstances should less than 12 weeks be given, and the reasons for this should be fully explained where this happens".

Though we recognise that the impact of the COVID-19 pandemic has affected the original timetable for publishing the consultation, we have concerns given the significant implications that will arise as outlined below over the changes. These changes affect public and local authority interests in a policy matter where there has been truncated consultation and also attention perhaps focused elsewhere. This includes the absence of consultation on the proposed regulations themselves. The shortened consultation period appears driven by a desire to lay legislation before the Scottish Parliament in December so that the regulations can come into force by Spring 2021. No explanation is given for why this is necessary, particularly given the inevitable downturn in the use of short term letting as a result of the COVID-19 pandemic.

¹ <https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/>

² <https://www.lawscot.org.uk/media/363183/19-07-19-plan-lic-short-term-lets.pdf>

³ <https://www.gov.scot/publications/foi-201900009119/>

If enacted, the proposals represent the introduction of significant changes and it is important for the public and their advisers to be able to fully understand the detail of what is being proposed. It is difficult to achieve this in the absence of draft regulations. Full consultation on the measures is of particular importance as the uncertainty over COVID-19 and the future has already impacted and will likely continue to impact on the use and operation of short term letting in Scotland.

Scottish Government's Best Practice Guide on Business and Regulatory Impact explains:

“Our Better Regulation agenda aims to reduce unnecessary burdens on business by ensuring all regulation follows the Better Regulation principles of being: proportionate, consistent, accountable, transparent, targeted only where needed....

Better Regulation is supported by a range of measures including: Business and Regulatory Impact Assessments (BRIAs)...

At the outset of any policy development, non-regulatory options such as voluntary regulation should always be considered and a BRIA completed to ensure the costs and benefits of each option are fully considered and compared.

Partial BRIAs should be carried out at consultation stage. The final BRIA builds on the partial BRIA and the consultation analysis. Both of these BRIAs require Ministerial sign-off.”⁴

We note that no partial Business Regulatory Impact Assessment is available with the consultation. This seems vital and an omission as it is difficult to fully understand the impacts of the proposed regulatory regime (and whether there may be a better alternative) without detail. This makes it challenging for fully informed representations to be made. The proposed regimes could be very costly for operators, particularly for those operating more than one property and those owning properties in different local authority areas with discretion afforded for charges to be vary vastly.

The consultation states that “Scottish Government intends to produce two guidance documents in spring 2021, one aimed at local authorities and the other for hosts and platforms”. There are a number of factors which apply to the issue of guidance where we consider that it is of importance that either prior consultation is undertaken in relation to any proposed guidance or a short-life working group set up with appropriate representation is set up to consider carefully the content of such guidance, or potentially both. There is a need to ensure that the issue and updating of guidance is someone's responsibility, so it is kept under review periodically as too easily guidance becomes outdated. Guidance needs to be comprehensive and can be readily understood by all those required to read and understand. Specifically, where guidance is to be issued to the licensing boards only, please note that this is separate to the local authority itself. Our members have seen examples of where guidance is intended for one part of the local authority, and it has been a challenge to have separate parts of the local authority take account of the guidance.

⁴ <https://www.gov.scot/policies/supporting-business/business-regulation/>

We also refer to the case of *Brightcrew Ltd v City of Glasgow Licensing Board*⁵ which sets out the role of guidance in relation to the issue of licences in that it outlines that:

“Those cases apart, it seems to us that licences should, in principle, be granted by the licensing authority, after full and proper consideration and with regard to such guidance as may have been given by the Court⁶.

In conclusion there is a need to be clear as to the role and content of guidance being issued.

Consultation

Definition of short-term lets

We note that reference is made in the consultation paper to the exclusions which were proposed in the 2019 consultation paper (see paragraph 4.5). It is not clear if it is still intended that these types of accommodation/properties will be excluded under the regulations. We support the accommodation/properties listed at paragraph 4.5 being specifically excluded.

In relation to the proposed definition, we consider that there is a lack of clarity in relation to the ‘temporary’ criterion. We consider that judging this by whether a property is a guests’ only or principal home could give rise to uncertainty and disputes.

The consultation document does not specifically acknowledge that section 26B of the Town and Country Planning (Scotland) Act 1997 (as inserted by section 17 of the Planning (Scotland) Act 2019) states that private residential tenancies under section 1 of the Private Housing (Tenancies) (Scotland) Act 2016 do not constitute a short term let for the purpose of designating a short term let control area.

Control area regulations

While we support appropriate regulation of the short term let sector, we consider that there are major gaps in the proposed regime which cause significant concern.

Under the provisions of the Planning (Scotland) Act 2019, the regulation of short term lets is focussed on control areas, within which, there will be a deemed material change of use of the property. Out with these areas (which may be most of Scotland) however, it remains fundamentally unclear when a material change of use will have occurred and thus when planning permission is be required. This is a significant missed

⁵ 2011 CSIH 46 <https://www.scotcourts.gov.uk/search-judgments/judgment?id=2a9286a6-8980-69d2-b500-ff0000d74aa7>

⁶ Paragraph [31]

opportunity that will undoubtedly impact on all licences applications for short term letting outwith control areas which will require to be accompanied by evidence of a planning permission.

At present, each of 34 planning authorities across Scotland may take a different view on whether there has been a material change of use of a property which is being used for short term letting. In our response to the 2019 consultation, we supported a framework regime due to the variations in the use and operations of short term lets between planning authorities. This was to bring much needed clarity where possible.

That leads us to recommend that definitions should be consistent across all local authority areas in order to promote consistency and necessary clarity for all those operating in the sector. There is little within existing development plan policies about when a material change of use has taken place in respect of short term letting. This results in considerable uncertainty for those operating within this area. That uncertainty for those operating short term let properties and the communities out with control areas will remain as to whether planning permission is required. As such, clear guidance is required as to how planning authorities should determine applications for short term letting - on what principles or criteria will an application be determined?

One option could be to require planning authorities to have a local development policy as to when planning permission is to be obtained for short term lets. We recognise that difficulties with short term lets may only arise in part of a planning authority's area which may mean that a single development plan policy is not necessarily appropriate.

Under the licensing scheme, it is proposed that it will be a mandatory condition that the applicant must "confirm they have applied for, or obtained planning permission (if required), that it remains current and that they are complying with any planning conditions." This will be extremely challenging out with short term let control areas where there remains a great degree of uncertainty as to when planning permission or a certificate of lawful use is required. Additional guidance is also needed on applications for permission in control areas.

Particular factors in respect of assessing a planning application including the nature of the property concerned (for example, a main door or common stair flat or a detached or semidetached property) and the local environment are relevant. It may be that policy guidance could be included in NPF 4 as this is a national issue and will undoubtedly result in a considerable number of appeals or Local Reviews.

The consultation document does not contain sufficient detail about the way in which control areas are expected to work in practice. Reference is made to conservation areas. However, conservation areas are quite different to the control areas for short term lets as conservation areas concern the future control of particular areas and do not have a licensing regime. It is important that there is clarity for planning authorities, hosts, guests and communities as to how the areas will work in practice.

There is the potential for planning applications to be refused and for a refusal to be appealed. Given the proposed mandatory requirement for an applicant for a licence to have planning permission or the equivalent there is the potential that a back-log of planning applications and/or appeals or local reviews could hold up the

progress of licensing applications. It is not clear how the potential significant volume of applications will be dealt with given sheer numbers of current short terms let properties

We also note that the resourcing for the creation of short term let control areas is expected to be significant. Research carried out by the 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. It does not appear that additional funds will be available for planning authorities to carry out the necessary work.

Permitted development rights

The consultation (paragraph 5.10) makes reference to the availability of permitted development rights Class 15 of GPDO that enables a dwellinghouse to be used for secondary letting which is in the following terms:

“Class 15.

The use of land (other than a building or land within the curtilage of a building) for any purpose, except as a caravan site, on not more than 28 days in total in any calendar year, and the erection or placing of moveable structures on the land for the purposes of that use.”

Class 15 does not apply to the use of a flat or dwellinghouse. There is therefore no need to remove these permitted development rights.

It is unfortunate that the consultation appears to have confused this issue, but it further underlines the importance of clear-cut national guidance on when a material change of use outwith short term letting areas takes place.

Revocation

It is proposed that planning authorities are given power to revoke planning permissions for short term lets in control zones. There is no reference in the consultation to compensation being payable for such revocation. This approach is not reasonable and we do not consider that the analogy with advertisement control is appropriate. Consideration does not appear to have been given to the possibility that there may be existing short term lets that have operated for more than 10 years and so are lawful or properties which have an existing planning permission. What is the justification for the revocation of new permissions in circumstances where there may be existing lawful short term lets that can carry on without such a threat?

⁷ <https://www.rtpi.org.uk/media/1211/rtpi-scotland-financial-implications-of-implementing-the-planning-scotland-act-2019.pdf>

Licensing order under the 1982 Act

Under paragraph 6.4 of the consultation, discretion is being given to the Licensing Authorities as to when they bring in a scheme. We have some concerns that the Civic Government (Scotland) Act 1982 is being used as a vehicle which provides opportunities for local authorities to 'opt-in' to certain licences. We have issues with the approach of 'one size fitting all' as the experience of each local authority with short term lets varies.

The current proposals mean that a host allowing the use of a single room in their property for even a single night would require to obtain a full licence with all of the mandatory requirements set out in the consultation. This may be a disproportionate level of regulation for a situation that involves the continuation of personal use of the property and, on the basis of Scottish Government's planning proposals, would not involve a material change of use.

Resourcing

The introduction of a licensing scheme raises significant concerns with regard to the resources that will be needed by the local authorities. 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.

We note that the consultation states: "Local authorities will be able to charge fees to cover the establishment and running costs associated with the licensing scheme. Establishment costs including setting up the system and preparing staff to run the scheme." We question whether it is proportionate for applicants to be fully liable for costs of establishing a system, including preparing staff to run the scheme. We suggest that it is appropriate to consider this question in the context of balancing the extent of the mischief which the scheme aims to regulate with the potential gain to the wider public of regulation.

In addition, there are likely to be practical challenges with this approach. How may each local authority calculate expected numbers of applications be quantified to be able to work out what the costs should be per application? What is the approach to be by local authorities to differing circumstances, for example, those undertaking home sharing versus those undertaking secondary letting? The omission of a BRIA, or partial BRIA, from this consultation make these questions particularly pertinent.

We query what opportunities have been considered for sharing services (e.g. with those involved with inspection processes related to Fire and Rescue Services) as some of the inspection processes should replicate ones that exist already. This could involve dedicated teams or an in housing/HMO team. Unresolved issues regarding fee-setting is only one part of the resource implications. The numbers of staff involved is the more crucial factor as this licensing regime is imposing on local authorities additional requirement for staff. The number of applications and the need for this process could impact other areas of work such as e.g. liquor, street traders, public entertainment, and taxi licences. This licensing scheme is introducing additional requirements when local

authorities are already hard-pressed. In certain areas there will be a flood of applications which will require immediate short-term staffing issues, the implications of which should be considered now.

We would also raise a number of other issues.

Fees

The consultation proposes the idea of a monitoring fee⁸ which could be monthly. Consideration needs to be given as to whose responsibility it would be to seek payment of that fee and how that is to be enforced if payment is not made. This needs careful consideration with local authorities.

There are around renewals for instance when applying for a new liquor license, the renewal fee has been increased significantly recently. By allowing discretion under paragraph 6.65 of the consultation which states that “guidance [will be provided to] to local authorities on how they might use the powers to set fees to best effect” we have concerns over how some local authorities may choose to operate from a simple set of fees or a more elaborate structure. That may not benefit those wishing to let within this sector.

Notification processes

The practical effects of the proposal under paragraph 6.69 that someone applying will have to serve notice on neighbours needs to be considered. How should this be evidenced? It suggests that the applicant will list those who have been notified. As the applications are generally public, we would suggest that potential GDPR compliance issues might arise.

We understand that the Scottish Government are considering that local authorities should accept one ‘set’ of notification to neighbours for both planning and licensing. While this seems sensible, this appears to be conflated in the consultation document. We would suggest that legislative change is likely to be required to accommodate this given that at present, notification for planning applications is carried out by the planning authority and for licensing application, by the applicant. Furthermore, we wonder how practical this may be as these matters will be dealt with by two different teams/bodies; there are delegated powers for planning applications and the relevant department would consider such objections and for other objections to a licensing committee. This needs clarity as the resourcing implications for local authorities in having ill-founded objections could be potentially significant.

The grounds of objections set out in the consultation go further than the 1982 Act allows in relation to both planning and licensing grounds. If there is provision for objections on grounds out-with the scope of the 1982 Act, this could be a difficulty, particularly in line with the significant body of case law that has developed. This links to the fit and proper person test. Though reference is made in the consultation to this, there needs to be clarity that reference to the fit and proper person test means the test under the 1982 Act, and not to any separate regime.

⁸ Paragraph 6.62 (b)

Renewals

We note the reference to streamlining the renewal process in paragraph 6.125. The 1982 Act processes need to be followed. There is also a need to manage expectations. For example, a variation of a licence could be used as an attempt to get around notification requirement to neighbours of changes to the licence at time of renewal.

Remember too that Police Scotland will be a consultee in the process. What are the implications for them? There is a potential for them to be overwhelmed in transitional period.

Offences and Fines

We note that the consultation includes some measures with regard to criminal law and sentencing for relevant offences. Regarding the suggestion that the maximum fine⁹ is increased to £50,000, this seems very high notwithstanding the reference to “party mansions” which is not explained in detail nor is any evidential support provided. In sentencing any judge will have regard to the facts and circumstances of the case. There should be clarity and proper support for the basis of increasing the fines to this level.

Similarly we take issue with the reference in paragraph 6.120 with regard to “the fine for failing to comply with the licence condition must outweigh the profit made from such a breach.” Reference is made to the Scottish Sentencing Council¹⁰ with regard to the purpose of sentencing. Judges are independent and will consider a range of issues when setting out the sentence. This is not about civil compensation.

In connection with paragraph 6.123 of the consultation, there is a reference to fixed penalty notices issued under the Antisocial Behaviour etc. (Scotland) Act 2004. Guidance will be provided following the implementation of the licensing regime and provisions regarding short term lets.

Data sharing

We note the proposals that local authorities must maintain a register of hosts and licensed accommodation. The consultation states that “Scottish Government will amalgamate local authority data to produce a national report....This will ensure that we have a national picture of short-term let activity in Scotland, closing a significant gap in knowledge that currently exists”¹¹. We consider that it would be more appropriate for this information to be held on a national register with information being channelled through local authorities. A national register would help to ensure a clear picture and accessible information as to those operating short term lets across more than one local authority area. This would be in line with the national Scottish Landlord Register.

⁹ Paragraph 6.117

¹⁰ <https://www.scottishsentencingcouncil.org.uk/about-sentencing/introduction-to-sentencing/>

¹¹ Consultation paragraph 6.140.



We suggest that a clear data management policy needs to be set out, with information to be held and managed in line with GDPR, for example, details of the purposes of collecting information, how long data will be held, and how the data will be maintained in line with rights of access and rights of redress.

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