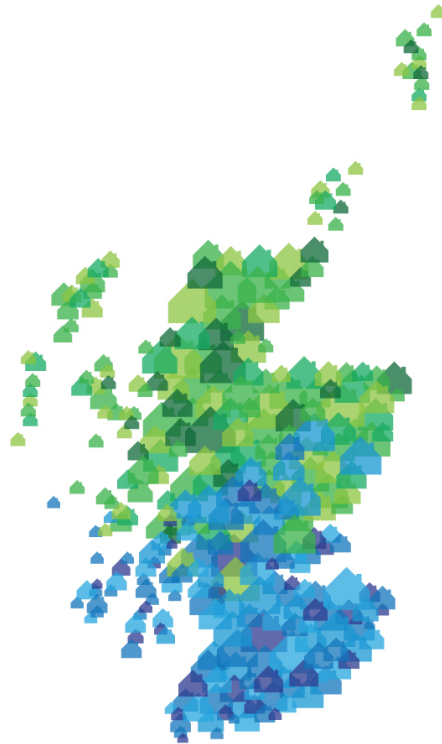


Energy Efficient Scotland Consultation:
Making our homes and buildings warmer,
greener and more efficient



July 2018

Founded in 1978, the Association of Scotland's Self-Caterers (ASSC) is the leading source of knowledge on short-term letting and holiday homes in Scotland. The ASSC is the only trade body representing the interests of the traditional self-catering sector. It has more than 665 Members, operating in excess of 7,000 self-catering properties throughout Scotland, and has close links with other European countries, as founding members of the European Holiday Homes Association (EHHA). The ASSC commits its members to maintaining the principles of "quality, integrity, cleanliness, comfort, courtesy and efficiency" and to offering visitors to Scotland consistently high standards within their self-catering properties. The ASSC's vision is to place our members at the forefront of a professional, vibrant and prosperous Scottish self-catering sector.

Overview of Response

The ASSC welcomes the opportunity to respond to the Scottish Government's consultation, *Making our homes and buildings warmer, greener and more efficient*. The ASSC have limited their response to Question 13 of the Consultation document.

In summary, the ASSC affirm that short-term holiday lets should not be subject to the same regulation as tenancies in the private sector. The ASSC requested legal advice from Brodies LLP, in light of the withdrawal of guidance from the Scottish Government as to the requirement for an Energy Performance Certificate (EPC) for self-catering accommodation, in June 2018. This advice stated that a "holiday let" of self-catering accommodation does not fall within the ambit of the Energy Performance of Buildings (Scotland) Regulations 2008 (hereafter referred to as 2008 Regulations) such that an owner of such accommodation is not required to obtain and produce an EPC Certificate to a prospective occupier of such legislation.

In relation to any future regulation proposed, the ASSC would respectfully advise that the Scottish Government, across various Directorates, to be mindful of the significant role our sector plays in the tourism economy. All-encompassing regulation could have unintended consequences not only for our members but the Scottish tourism economy.

Question 13 – What are your views on requiring all types of accommodation to meet the Long-Term Domestic Standard over time? Please explain your answer, giving examples of accommodation you think should/should not be required to meet the Long-Term Domestic Standard if relevant.

The ASSC believes that all types of accommodation should not be treated in the same manner in regard to the Long-Term Domestic Standard and that the Scottish Government should clarify that short-term holiday lets should **not** be subject to the repairing standard. Moreover, we are also of the view that an exemption should be granted for short-term holiday lets in terms of compliance with EPCs, as occurs in several other European Union Member States.

The 2008 Regulations (as amended) implemented EU Directive 2002/91/EC on the energy performance of buildings. This directive has now been replaced ("recast" in the words of the EU) by EU Directive 2010/31/EU (the "Directive"). The key provisions of the 2008 Regulations for present purposes are regulations 5(1) and (2) which state:

- “Where a building or building unit is to be sold or let the owner must make a copy of a valid energy performance certificate for the building or building unit and of the related recommendations report available for inspection free of charge to a prospective buyer or a prospective tenant”;
- “Where a building or building unit is sold or let, the owner must provide a copy of a valid energy performance certificate and of the related recommendations report free of charge to the buyer or tenant.”

Neither "buyer" nor "tenant" is defined in the 2008 Regulations. Regulation 3 states that a person becomes a "prospective buyer" or "prospective tenant" on the earliest of their (a) requesting any information about the building or building unit from the owner (for the purpose of deciding whether to buy or lease), (b) makes a request to view the building or building unit for such purpose, or (c) makes an offer to buy or lease. This of course provides no guidance as to the meaning of "tenant". Nor do the 2008 Regulations contain a definition of "let" or "lease". Accordingly, Brodies LLP base their analysis on the ordinary meanings of these words under Scots law.¹

The exclusion of "Holiday Lets" from the ambit of the current legislation on private residential tenancies is not helpful. Paragraph 6 of Schedule 1 to the Private Housing (Tenancies) (Scotland) Act 2016 states:

¹ Legal Opinion: The Requirement for Energy Performance Certificates in the case of Self-Catering Accommodation, Brodies LLP, June 2018

"A tenancy cannot be a private residential tenancy if the purpose of it is to confer on the tenant the right to occupy the let property for a holiday."

Scots law requires that any agreement purporting to comprise a lease contains agreement between the parties as to four "cardinal" or essential elements.¹² These are: (a) the parties; (b) the subjects; (c) the duration; and (d) the rent. Recent case law suggests that there may be a fifth "cardinal" element, namely exclusive possession. Without agreement as to each of these four (or five) elements, an agreement cannot comprise a lease under Scots law. The best it can comprise is a "licence to occupy" which is purely personal to the "licensor" and "licensee".

Brodies LLP consider that only where the agreement comprises, or is to comprise a Lease, can the subjects be said to be "let" to a "tenant" or marketed to a "prospective tenant" as the case may be. In other words, only if the agreement comprises a Lease will it fall within the ambit of the 2008 Regulations requiring the provision of an EPC.³

Furthermore, the UK Department for Communities and Local Government in their paper, *Improving the Energy Efficiency of our Buildings*, states the following on holiday lets:

“An EPC will only be required for a property rented out as a furnished holiday let, as defined by HMRC, where the building is occupied for the purposes of a holiday as a result of a short-term letting arrangement of less than 31 days to each tenant, and is rented out for a combined total of four months or more in any 12 month period, and if the occupier is responsible for meeting the energy costs for the property. The property must meet all the conditions of a furnished holiday let as defined by HMRC and the occupant must not be responsible for the energy costs in order for an EPC to be necessary.”⁴

In addition, Italy, Denmark, Sweden and Germany have introduced exemptions – approved by the European Commission – for holiday lets in terms of energy performance improvements under the Energy Performance of Buildings Directive 2010/31/EU. To take two of those examples: the Danish Government accepts a 4-week rental period limit; while in Italy, regulations for short-term rentals (less than 30 days) do not require an EPC. The ASSC considers that Scottish operators should not be disadvantaged compared to their English and European counterparts in terms of EPCs.

² Ibid

³ Ibid

⁴ UK Government., *Improving the energy efficiency of our buildings A guide to energy performance certificates for the marketing, sale and let of dwellings* (2014).

It is regrettable that the Scottish Government has seen fit to withdraw its guidance on the application of EPC regulations to "holiday lets" of self-catering accommodation, particularly when the Regulations are drafted in such an unclear manner. Moreover, the ASSC believe that the Scottish Government's recently-published *Route Map on Energy Efficiency of Buildings in Scotland* does not clarify the position either.

A requirement to hold an EPC places yet another regulatory burden on a sector, which faces significant cost pressures. Furthermore, the introduction of EPCs to short-term holiday lets appears to run contrary to the principles of the Scottish Government's Better Regulation agenda, particularly in relation to proportionality and targeting.⁵

While measures to reduce carbon emissions and promote energy efficiency should be welcomed, the use of EPCs in short-term holiday lets is unlikely to have any real material effect on the behaviour of holidaymakers or owners. For long-term letting, an EPC under these circumstances is important as it could affect the consumers' decision on what will be their home – but visitors making decisions about short-term letting will not choose a property based on its EPC rating.

Overall, we contend that the notion of an EPC on short-term holiday lets is both impractical, unnecessary and potentially damaging to tourism business. All types of accommodation should not be treated in the same manner in regard to the Long-Term Domestic Standard. Instead, the Scottish Government should be looking to maximise the opportunities for our tourist economy and not impose unnecessary burdens on the holiday let industry.⁶

Consultation document: <http://www.gov.scot/Resource/0053/00534912.pdf>

⁵ <https://beta.gov.scot/policies/supporting-business/business-regulation/>

⁶ For background information on the economic value of the traditional self-catering sector in Scotland, see Frontline Consultants., *Economic Impact Assessment of Short-Term Lettings on the Scottish Economy* (2017). Url: https://www.assc.co.uk/wp-content/uploads/2017/09/ASSC_Economic_Impact_Assessment_of_Short_Term_Lettings_on_the_Scottish_Economy_-_Final_Report_v1.2.pdf