



ASSC Written Evidence
The Scottish Parliament Local Government
and Communities Committee

Part 1: January 2021
Part 2: December 2020



January 2021

WRITTEN EVIDENCE FROM THE ASSOCIATION OF SCOTLAND'S SELF-CATERERS JANUARY 2021

INTRODUCTION

- In addition to our written evidence submitted in December 2020, we would like to provide the Committee with some supplementary evidence to further inform your scrutiny of the Scottish Government's short-term letting regulations.
- This paper outlines our concerns as to how the Scottish Government's short-term let SSIs have been arrived at, as well as detailing the damaging implications of the SSIs for Scottish tourism.
- We affirm that the Scottish Government's proposals are inopportune during the current crisis, ill-judged and not fit for purpose, and will entail huge consequences not only for Scottish tourism but already resourced stretched local authorities.
- The prioritisation of this issue during a global pandemic, when related pieces of legislation such as the transient visitor levy have been dropped, and when many in the tourism industry are struggling for survival, needs to be seriously questioned. Despite widespread stakeholder unease, these concerns have been disregarded in the rush to stick to an artificial, political timeline.

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1. CONCERNS WITH LATE BRIA

- Following on from the truncated consultation timeline, **no BRIA or partial BRIA was published to accompany the Scottish Government's consultation.** The BRIA was only later published on 14th December.¹

¹ Scottish Government, *Short-term lets – licensing scheme and planning control areas: business and regulatory impact assessment* (December 2020). Url: <https://www.gov.scot/publications/short-term-lets-licensing-scheme-planning-control-areas-business-regulatory-impact-assessment-bria/>

- As previously noted in our first piece of written evidence, the Scottish Government did not publish a BRIA to accompany the release of their consultation, as required through standard practice. They eventually published the document in December 2020 – however, this contained a number of shortcomings.

i. Data and Overall Assumptions

- Scottish Government: *“...we using the 2019 data established in the Scottish Government’s 2019 research as a baseline for this BRIA.”*² However, **this data predates the global pandemic which has devastated the tourism sector**, including reducing the demand for short-term let accommodation. **Uncertainties remain and we should not be using evidence to inform this BRIA from a completely different context.**
- The ASSC still assert that the **2019 consultation lacked rigour, was biased, and did not provide a robust evidence-base**. The Indigo House research involved speaking to 583 affected residents, 63 community groups, some Airbnb hosts and 5 professional self-caterers, in five areas of Scotland that have a *perceived* problem. They did not conduct research in Argyll & Bute or Moray Speyside. This did not deliver a balanced outcome and businesses were **not** well represented as it suggested in the Scottish Government’s BRIA.
- Overall, the Scottish Government **are unable to provide full costings for what they want to do**, with lots of references like *“...it is difficult to monetise these benefits precisely”*, or *“...unable to be precise about the cost of the scheme”*. This does not provide a robust evidence base.
- The BRIA is undermined by reference to taxation as the **related tax impacts on business are unknown**: *“Both these instruments will be complemented by possible changes to taxation to make sure short-term lets make an appropriate contribution to local communities and support local services. The review of the tax treatment of short-term lets is being progressed by the Scottish Government separately.”*³

ii. Evidence base missing in support of several claims

- There are a number of assertions e.g., that regulation will increase STL use (contrary to the stated policy intention) are without foundation - 21 last sentence; 59 multiple references.
- Similarly, negative externalities appear to be anecdotal rather than evidenced (15(b)). Also, trends other than STLs are likely to be at play for bank and retail closures. Evidence base (from areas with low STLs) to provide a counterfactual? - 31/32. Opinion is presented as fact. Is there hard evidence of these claimed impacts? - 24(e)/25/26.
- **Cleaners** – there is no impact assessment of the effect of the measures on cleaners, arguably the worst-affected sector after owners themselves. This is a major omission.
- **Criminal Record Check** - is this costed anywhere, or will it be fully borne by councils?
- **Fire safety** - with primary legislation to be enacted requiring fire alarms in all flats, does this not deal with the fire risk? **59 various references, 110(a)(ii).**
- **Actual effects** - neatly summarised in 105 and 106.

² *Short-term lets: licensing scheme and planning control area legislation Business and Regulatory Impact Assessment (BRIA)* (December 2020), p30.

³ *Ibid*, p4.

- **Prison** – what is the impact on a business and family of sending someone to prison for non-compliance or fining them £50k?

iii. Dismissal of viable industry alternatives

- The BRIA notes that the Scottish Government did “*carefully consider industry suggestions for a registration scheme*” and set out reasons why they “*do not regard this as a viable alternative*”.⁴
- It asserts that a registration scheme would necessitate primary legislation and would therefore not be deliverable in the current session of Parliament. This is regarded as too slow compared to licensing via the 1982 Civic Government Scotland Act: “*Development and Parliamentary consideration of a Bill, followed by secondary legislation and an implementation period, would likely push back the opening of a registration scheme to sometime in 2024 (whereas the licensing scheme will open in April 2022). The Scottish Government’s view is that such a timetable is too slow when the 1982 Act provides a suitable mechanism for regulation.*”⁵
- The need for primary legislation to have a registration system is used as the principal reason for rejecting this proposal on the grounds of timing but, **with the announced delay, the timing would now be identical to licensing**. This would argue that the more proportionate registration system should be preferred.
- The BRIA also dismisses the argument put forward that a registration scheme would be more cost effective, less onerous and less bureaucratic: “*...this entirely depends on the requirements of the registration scheme. A “light touch” registration scheme is likely to be less costly to administer than the licensing scheme but, by the very nature of being “light touch”, would not deliver the same assurances and protections around safety and would not provide the tools to manage noise and nuisance. Local authorities are also well-practiced at administering licensing schemes under the 1982 Act and are likely to be able to adapt systems and practices in order to extend to the licensing scheme. A registration scheme would require new, unfamiliar infrastructure which local or national government would need to establish and fund.*”⁶[our emphasis]
- **However, this overlooks the simple fact that registration schemes already exist – for instance, the landlords registration scheme.** This comparison was provided by the ASSC in their policy papers circulated to the Scottish Government well in advance of the BRIA.

iv. Summary Costs and Benefits by Sectors and Groups Affected

a. Costs to local authorities and recovery through fees

- The Scottish Government state that the fee should cover the establishment of the scheme, running costs and supporting functions: “*...the costs involved in establishing and running their licensing scheme and all the supporting functions should be covered by the fees from the scheme.*”⁷
- **Several local authorities highlighted their concerns** about the start-up costs in their consultation responses, as highlighted in our first piece of written evidence, but these appear to have been ignored.
- **Does this really assuage their concerns about the immediate start-up costs, given that ‘hosts’ will have until April 2023 to apply for a licence?**

⁴ *Ibid*, p12-13

⁵ *Ibid*, p13

⁶ *Ibid*, p13.

⁷ *Ibid*, p16.

- **Can we assume from this that the Scottish Government will not be providing any extra funding to help local authorities with the initial costs?**

b. Costs of control areas

- The Scottish Government are passing responsibility to local authorities on this by ‘permitting’ - paragraph 51 but the cost impact on businesses of control areas is not assessed **if planning permission is refused - 93 / 106 / 118**. The only costings assume that planning is granted.
- If a Local Authority changes or tightens its planning policy, by use of a control area, this has a profound impact which has not been costed (Annex C1).
- **What compensation will councils pay** if they exercise these powers and, effectively, close a business down?
- **How can there be additional capacity of events (for example, the Edinburgh Festival) if planning control area rules outlaw the operation of STLs? 97, final bullet.**

v. Impact of licensing on business

- No account has been taken of the ASSC’s survey results suggesting that **39% will leave market as licensing will render businesses unviable** (even by what may be considered to be a nominal fee. But compare Liquor Licensing with a small self-catering operator. The cost of the fee alone is disproportionate to turnover, let alone profit).
- The BRIA states that: *“Visit Britain has forecast that international visits to Scotland in 2020 may be down 78% compared to 2019, to 775,000, with spend down by 85% to £388 million. They have also forecast that spending from domestic overnight and day visitors in Scotland may both reduce by over 50% from 2019 levels, to £1.6 billion and £2.8 billion respectively.”*⁸ It also notes that the earnings of short-term let operators have fallen as a consequence of Covid-19.
- **At a time when demand for properties has fallen, we do not know when this will recover, and operators have taken a financial hit – yet the Scottish Government are going to burden them with more costs and regulation at a time when individuals and the wider industry can least afford it.**

2. CONCERNS WITH DRAFT SSIs

i. Position of B&Bs vis-à-vis STL regulations

- Andrew Mott of the Scottish Government’s Short-Term Let Delivery Group was initially unable to confirm to the ASSC whether B&Bs were included in the accommodation types to fall within the scope of the regulations.⁹ Some two days later, he came back to say the following:

“Your understanding is correct: home sharing is defined in the Licensing Order (sch. 2, para 13) and includes bed and breakfast activity.

B&Bs are not listed as excluded accommodation at schedule 1. Guest houses are excluded (para 1(d) of sch. 1). Change of use from a house (class 9 in the Use Classes Order) to a guest houses (class 7) generally requires planning permission. So the exclusion applies to properties that have planning

⁸ *Ibid*, p29

⁹ ASSC email communication with Short-Term Let Delivery Group, December 2020.

permission to operate as a guest house. A house (class 9) can be used to offer bed and breakfast without planning permission where no more than two bedrooms are used for this purpose or, in the case of premises having less than four bedrooms, only one bedroom is used for that purpose. A flat cannot generally be used to offer bed and breakfast without planning permission.

The use of houses (class 9) as B&Bs is a form of home sharing and we have always intended to include this activity within definition of short-term lets. Our 2019 consultation paper proposed excluding “licenced hotels and B&Bs and self-catering properties on their premises”. We have excluded (para 1(e) of sch. 1) restaurants with rooms and inns, for example, where they are already licensed specifically to offer accommodation under the Licensing (Scotland) Act 2005.”

- Some B&Bs will therefore be captured by the regulation – was this really the policy intention of the Scottish Government? Furthermore, the **Scottish Government’s Short-Term Let Delivery Group did not consult with the B&B sector** which we believe would be a basic duty given the impact of the regulations.

ii. Repairing Standard

- Mandatory Conditions for the licensing scheme will include meeting Repairing Standard Legislation and EPC legislation. **However, self-catering was excluded from Repairing Standard (The Housing (Scotland) Act 2006 (Modification of the Repairing Standard) Regulations 2019).** B&Bs are also exempt from both pieces of legislation. While the Repairing Standard was amended to cover short-term lets, the EPC legislation has not been amended to cover B&Bs.
- Simon Roberts, Scottish Government Better Homes Division, maintains that **it was never Scottish Government’s intention that self-catering should be part of Rep Standards, as there is not a Tenancy.**¹⁰ Self-catering or short-term lets is a Licence to Occupy, not a tenancy. The SSI was therefore poorly drafted to assume a Tenancy.
- This is **yet another** unintended consequence of the regulations, with operators potentially being liable for approximately £5,000 in order to meet the minimum standards of EPCs. **This was not identified in the BRIA.**

iii. Conditional bookings

- The Licensing Order creates problems around conditional bookings. When an owner of a short-term let applies for a licence (or a renewal) they will not know: (a) if it will be granted or refused; and (b) how long the application will take to process.
- For a significant period before, and after, the date of the licence application either: (a) future bookings will need to be conditional on a licence being obtained, failing which the owner can cancel without penalty; or (b) owners will have to take the risk of cancellation. In regard to the latter, such an approach would be wholly dishonest, could lead to potential legal claims for breach of contract, and damage the hard-earned reputation of our tourist industry. That leaves making bookings conditional on a licence being granted.
- The Scottish Government propose the following as a solution: Scottish Government – *“With regard to the handling of bookings, please see paragraph 7.15 of the consultation report. We would expect the position in respect of refunds etc. for future bookings affected by refusal,*

¹⁰ ASSC email correspondence with Scottish Government Better Homes Division, December 2020.

*suspension or revocation of a licence to be covered by booking terms and conditions in the same way as any other scenario in which the accommodation becomes unexpectedly unavailable, such as through fire damage or flood”.*¹¹ This, however, is commercially impractical.

- **Licensing will therefore result in potential loss of future bookings over extended periods.** The commercial reality is that guests will simply not book if their bookings are conditional and subject to a term between owner and guest that says the owner can cancel the booking if they cannot either obtain or renew a licence.
- We understand that David Nash, an experienced parliamentary draftsman (was responsible for drafting the Pow of Inchaffray Drainage Commission (Scotland) Bill) has elaborated on this issue in further detail and we would strongly encourage members to refer to his submission when considering the issue of conditional bookings.

3. **KEY QUESTIONS**

- **Overall approach:** if the Scottish Government are unwilling to postpone their regulations when the tourism industry is facing real hardship, what changes are the Scottish Government willing to consider at this point? Why have they disregarded key concerns on the proposals as flagged by the Law Society of Scotland in their consultation response?
- **Data:** Why are the Scottish Government using pre-pandemic data to inform their December 2020 BRIA when the tourism sector has been devastated by Covid-19? Do the Scottish Government still believe in their Better Regulation principles given the truncated consultation and failure to publish a partial BRIA to accompany it?
- **Registration:** why has registration been so easily disregarded by the Scottish Government, with particular reference to the comment “[it would require] new, unfamiliar infrastructure which local or national government would need to establish and fund”, when we have the Scottish Landlords Register?
- **Control areas:** only costings provided assume that planning is granted. If a Local Authority changes or tightens its planning policy, by use of a control area, this has a profound impact which has not been costed. Why?
- **Local authorities:** what is the estimated cost for a local authority setting up a licensing scheme? Are the Scottish Government intending to provide additional money for local authorities to prepare and establish the licensing regime? At a time of financial pressure, are local councils being expected to soak up these costs and recoup them years later through fees? How many local authorities have requested additional funding, including in the form of grants or loans, to assist with the initial set up costs of a licensing scheme?

4. **CONCLUSION**

- Overall, we do not believe that the Scottish Government have provided a proportionate and evidence-based solution that balances the needs of local communities as well as the health and vibrancy of our tourist economy. They have not adequately defined a short-term let¹², which forms the basis of the entire regulatory discussion, and there are significant weaknesses and flaws in the Scottish Government’s approach.

¹¹ Letter from Kevin Stewart MSP to Willie Rennie MSP, December 2020.

¹² For further information and background on this, please consult our submission to the Scottish Government’s consultation (2020) on short-term lets: <https://www.assc.co.uk/wp-content/uploads/2020/10/ASSC-Consultation-Response.docx>

- The BRIA, which ought to have been published before the SSIs were laid, does not fully address the costs related to the introduction of the regulations. Moreover, the SSIs will result in unintended consequences for Scottish tourism, as evidenced by the points raised on the repairing standard, conditional bookings and the fact that the regulations will capture B&Bs. This could have been avoided through proper consultation with industry.
- The ASSC remain greatly concerned that the haste of this work will not result in a well-designed and proportionate regulatory framework and could be one which may have negative consequences for the fragile recovery of Scottish tourism and burden local authorities during a period of immense financial and resourcing challenges.
- We would therefore respectfully call on the Committee to reject the SSIs so that the Scottish Government can return to the issue of regulating short-term lets when the industry has recovered from the devastating effects of Covid-19. This would also enable the deficiencies in the regulations to be addressed so that we can arrive at a regulatory approach that works for all: business, communities and Scottish tourism. The ASSC stands ready to work with all policymakers to achieve this end.

FIONA CAMPBELL, CEO, ASSC

JANUARY 2021

WRITTEN EVIDENCE FROM THE ASSOCIATION OF SCOTLAND'S SELF-CATERERS December 2020

Introduction

- The ASSC wish to share some comments to help inform the Local Government and Communities Committee discussion of the SSI associated with the Scottish Government's plans to establish short-term let licensing and planning controls.
- The purpose of this evidence is not to comment on the merits of those regulations, which has been addressed in the consultation(s), but to highlight concerns about the process undertaken by the Scottish Government – namely, how the consultation and regulations have been taken forward, which have not followed Scottish Government best practice and have not taken full cognisance of the impact of Covid-19 for affected stakeholders. The ASSC believes this highly pertinent to your consideration of the SSI.
- Overall, our evidence outlines concerns in relation to the following: (i) the truncated consultation process; (ii) the timing associated with bringing forward the regulations during a challenging period for the tourism industry; (iii) the failure to publish a Business Regulatory Impact Assessment at the time of the consultation; and (iv) the lack of consideration of the impact of planning and licensing regulations on local authorities.
- Our written evidence also provides two policy recommendations to help mitigate some of the likely unintended consequences of the Scottish Government's plans: the creation of a working group to inform the guidance to local authorities, as well as the insertion of grandfather rights into the regulations.

i. Truncated Consultation Process

- The Scottish Government's consultation **did not follow the usual three-month practice but was instead condensed it into little more than four weeks**. The Scottish Government's own best practice guidance 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"*.¹³
- The **Law Society of Scotland** observed that the shortened period of consultation seemed to be *"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."*¹⁴

ii. Timing: Impact of Covid-19

- Surprisingly, the Scottish Government's consultation document from October 2020 – some seven months after lockdown – **made no reference to the impact of Covid-19 on the tourism sector**.¹⁵ Covid-19 has been devastating for Scotland's tourism sector, with a large drop in tourist numbers and cancelled bookings as a result of various coronavirus restrictions. Frontline Consultants estimate that the **self-catering sector has lost £265m due to Covid-19 restrictions since September 2020 alone**.¹⁶

¹³ Scottish Government, *Consultation Good Practice Guidance*. Url: <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2019/12/foi-201900009119/documents/foi-201900009119---information-released/foi-201900009119---information-released/govscot%3Adocument/FOI-201900009119%2B-%2BInformation%2BReleased.pdf>

¹⁴ Law Society of Scotland, *Consultation Response - Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland* (October 2020), p2. Url: <https://www.lawsociety.org.uk/media/369667/20-10-16-plan-lic-consultation-short-term-lets-regulations.pdf>

¹⁵ Scottish Government, *Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland* (September 2020). Url: <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2020/09/short-term-lets-consultation-licensing-scheme-planning-control-areas-scotland/documents/short-term-lets-consultation-licensing-scheme-planning-control-areas-scotland/short-term-lets-consultation-licensing-scheme-planning-control-areas-scotland/govscot%3Adocument/short-term-lets-consultation-licensing-scheme-planning-control-areas-scotland.pdf>

¹⁶ The figures from Frontline Consultants are available to view here: <https://www.assc.co.uk/wp-content/uploads/2020/12/ASSC-Sectoral-Survey-on-Impact-of-Covid-19-Restrictions-December-2020.pdf>

- The ASSC were one of **38 signatories to an open letter to the Scottish Government in October 2020**, including CBI Scotland, Scottish Chambers of Commerce, the Scottish Tourism Alliance, Scottish Land and Estates, FSB Scotland, UKHospitality, and the Scottish Retail Consortium to **call for a delay in the Scottish Government’s regulations to allow the tourism industry recover from the pandemic**.¹⁷ This letter did not receive a reply from the Scottish Government (as of 14th December 2020).
- This letter reflects widespread concern on the timing of the regulations. Interestingly, the **Minister for Local Government, Housing and Planning Kevin Stewart MSP** readily acknowledged this fact in the Scottish Government’s consultation response: *“Perhaps the greatest number of comments centred on whether to proceed with regulation at this time or to delay it.”*¹⁸ However, the volume of correspondence has not dissuaded the Minister at all.
- The decision to proceed is made more perplexing when **similar legislation has been postponed by the Scottish Government**. There remains a real inconsistency in terms of regulations and legislation that has been prioritised by the Scottish Government. For instance, the 2020-21 Programme for Government advised that **plans for the Transient Visitor Levy have been put on hold due to COVID-19** and *“future consideration of the levy will take account of the changed context the industry is operating in.”*¹⁹ This was a welcome and pragmatic approach that the ASSC fully endorses. However, as the proposed short-term let regulations will impact a key part of the tourism sector, it defies sense that the consultation does not take cognisance of the *“changed context”* in this regard.
- Moreover, the Scottish Government have **postponed the taxation element of their short-term let plans until 2021**, demonstrating once again that it is possible to review intended regulations in the light of Covid-19.
- In their consultation response, the **Scottish Tourism Alliance** maintained the importance of the Scottish Government supporting the recovery of the tourism sector: *“We feel that if the government is seeking to support the tourism sector’s recovery should not be pressing forward with this legislation in what is unprecedented times and still with no clear horizon for recovery, arriving at a wrong decision due to haste without greater consideration would cause significant harm to the sector as a whole and those that are dependent on it.”*²⁰
- From a more localised tourism perspective **VisitArran** declared: *“The timing of this whole scheme is appalling. It is being driven through at a time when the industry (and the country) is in the middle of a pandemic. It would be the opinion of VisitArran that such implementation is delayed until the current situation is resolved with regards to CV-19, and a fuller consultation and engagement can take place.”*²¹

iii. **Lack of a Business Regulatory Impact Assessment with consultation**

- Following on from the truncated consultation timeline, **no BRIA or partial BRIA was published to accompany the Scottish Government’s consultation**. The BRIA was only later published on 14th December.²²
- To quote the Scottish Government’s consultation document, *“The purpose of this consultation is to help the Scottish Government ensure that the legislation laid at the Scottish Parliament in December is as efficient and effective as possible.”*²³ However, the best way to ensure the efficiency and effectiveness of the regulations would have been to publish the BRIA at the same time as the consultation. Alternatively, the BRIA could have been produced at the consultation stage in draft or partial form then finalised before being laid with the drafted SSI.
- The approach taken in this consultation **has not met the Scottish Government’s own Better Regulation principles, nor has it fulfilled best practice**. The completion of BRIAs is central to the

¹⁷ Letter from 38 stakeholders to the Minister for Housing, Planning and Local Government, Kevin Stewart MSP, October 2020: <https://www.assc.co.uk/wp-content/uploads/2020/10/Letter-to-Kevin-Stewart-MSP-26-October-2020.pdf>

¹⁸ Kevin Stewart MSP quoted in Scottish Government, *Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland* (September 2020), foreword.

¹⁹ Scottish Government, *Protecting Scotland, Renewing Scotland: The Government’s Programme for Scotland 2020-2021* (2020), p121. Url: <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2020/09/protecting-scotland-renewing-scotland-governments-programme-scotland-2020-2021/documents/protecting-scotland-renewing-scotland/protecting-scotland-renewing-scotland/govscot%3Adocument/protecting-scotland-renewing-scotland.pdf>

²⁰ Scottish Tourism Alliance, *STL Consultation Response* (2020). Url: https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent? b_index=600&uuld=799462370

²¹ VisitArran, *STL Consultation Response* (2020). Url: https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent? b_index=660&uuld=480315273

²² Scottish Government, *Short-term lets – licensing scheme and planning control areas: business and regulatory impact assessment* (December 2020). Url: <https://www.gov.scot/publications/short-term-lets-licensing-scheme-planning-control-areas-business-regulatory-impact-assessment-bria/>

²³ Scottish Government, *Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland* (September 2020), p47.

objectives of Better Regulation – they are required to assess the costs and benefits to any business from the proposed regulations. The Scottish Government did not even publish a partial BRIA which again run contrary to Better Regulation principles. As the Scottish Government note, **“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.”**²⁴

- A partial BRIA would have enabled and facilitated responses by those the Scottish Government’s intended regulations would affect. It could have then been fed into the production of a final BRIA, building on the information received in the consultation analysis, thereby improving the efficacy of the regulations overall. Again, to quote the Scottish Government: *“The BRIA helps assess the impact of new legislation, as well as other changes such as voluntary guidance or policy changes, even where they do not necessarily present additional obvious burdens. In such cases it can either help confirm understanding that the impact will not change or identify and address unintended impacts which have not been identified.”*²⁵
- In their consultation response, **the Law Society of Scotland flag the omission of a BRIA:** *“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.”*²⁶
- The manner in which this consultation was undertaken undermines the Scottish Government’s commitment to Better Regulation. When the BRIA is published when the secondary legislation is laid in December 2020, there will not be adequate time for stakeholders to respond in any meaningful way to affect the regulations. We are left posing the following: why was no full or partial BRIA published to accompany the consultation document? If a final BRIA was to be published in December 2020, why was this not explained in the October consultation document? Do the Scottish Government still believe in their Better Regulation principles given the lack of a partial BRIA?
- As of 14th December, the SSIs had not been published by the Scottish Government. The Scottish Government’s Short Term Let Delivery Group **refused to share the draft SSI**, or comment on how it has been amended in light of the consultation or any comments from the Law Society of Scotland. Again, we would suggest a lack of transparency.
- It is also our view that **no assessment has been carried out under Article 1 of Protocol 1 to the European Convention on Human Rights**. The proposals on control areas could well result in the closure of businesses by reason of a change in public policy, without offering any fair compensation to the affected businesses.

iv. Lack of Consideration of Impact of Planning & Licensing Regulations on Local Authorities

a. Concerns from Planning, Licensing and Legal Stakeholders:

- Legal experts predict a surge in licensing applications when the scheme goes live, potentially overwhelming local authority departments. **Stephen McGowan, head of Licensing (Scotland) at TLT LLP and an authority on the 1982 Civic Government Act on which the Scottish Government’s plans are based**, said: *“Provision will need to be made to deal with the impact of such a magnitude of applications on local authority resources. A massive rush of applications of this order could bring licensing administration to a halt, and have a knock-on effect on reporting obligations with Police Scotland and other authorities such as Fire and Building Standards, who will likely have to comment on each application. This could impact on processing times for other types of civic licence.”*²⁷
- This was echoed by the legal firm **Shepherd and Wedderburn LLP:** *“In addition to any increased workload for licensing departments, there will likely be an impact on the Police, Fire Service, Building Standards and others who may be required to comment on applications. It will therefore be vital that*

²⁴ Scottish Government, ‘Supporting Business’. Accessed 13/12/20. Url: <https://www.gov.scot/policies/supporting-business/business-regulation/>

²⁵ Scottish Government, *Business and Regulatory Impact Assessments (BRIA) toolkit* (2018).

²⁶ Law Society of Scotland, *Consultation Response - Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland* (October 2020), p3.

²⁷ <https://www.scottishlegal.com/article/licensing-expert-warns-of-flood-of-short-term-let-licences-1>

*the Scottish Government ensures the necessary resources are in place together with sufficient publicity to facilitate a smooth transition to the new licensed regime.*²⁸

- Similarly, the **Law Society of Scotland** said: *“...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 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.”*²⁹
- **Stephen McGowan of TLT LLP** provided a comparison with changes made to the liquor licensing regime: *“It has been put to me that councils can “gear up” and bring in temporary staff to help process these applications, but that would only take us so far. There are approximately 32,000 properties in Scotland registered on the successful Airbnb platform alone. By contrast, when the liquor licensing regime changed in 2009 there were around 16,500 applications to process and it was a mammoth task for everyone concerned. The licensing system is supposed to wash its own face and it will be for local authorities to determine a fee for these applications to cover projected costs, but even that is not the full picture. Licensing is a specialist area and the impact of the new regime is not just about the cost of employing temporary office staff to process bits of paper. It’s also about the inspections that will have to occur in order to produce reports that the properties meet the required safety standards. There is also the impact on police resource. Every application will need to be reported on and every person checked for criminal convictions and so on. The police may also be asked to report on evidence of antisocial behaviour. The police will see no percentage of the licence fee, and all of this will be happening on top of the other licensing business that both the council and the police are dealing with. It is not too wild a projection to see how the licensing system itself could creak and create delay and logjam, without the right precautions being taken.”*³⁰
- The **Royal Town Planning Institute** raised concerns with the proposals for local councils, highlighting, *“resource implications of changes to the regulatory framework”*; *“the related impacts associated with the additional duties for local councils set out within the Planning (Scotland) Act 2019 which remain uncoded”*; *“the overall financial context of diminishing resources in Councils, both staff levels and fee income streams”*; and *“the need for effective enforcement measures and joint working across several Council services.”*³¹
 - Research carried out by the **RTPI** in connection with the implementation of the Planning (Scotland) Act 2019 estimated 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).³²
- The **Law Society of Scotland** warned that local authorities may not be ready from a resourcing perspective: *“There are unlikely to be resources in place at present in local authority licensing or planning departments to cover such additional and in certain areas, extensive work.”*³³ The policy intention is that the fee levels should cover adequately the staff and administrative costs. However, that **ignores the considerable cost of establishing the scheme**, as the Law Society of Scotland also assert: *“There are often significant infrastructure costs in introducing new schemes, for example new IT systems, which cannot always be fully recovered... 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*

²⁸ Shepherd & Wedderburn LLP, ‘Short-Term Letting: Greater regulation, licensing and control in Scotland in a post Covid-19 world?’, 07/05/20. Url: <https://shepweed.com/knowledge/short-term-letting-greater-regulation-licensing-and-control-scotland-post-covid-19-world>

²⁹ Law Society of Scotland, *Consultation Response - Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland* (October 2020), p7-8.

³⁰ McGowan, S, ‘System overload? Licensing short term lets’, *The Journal of the Law Society of Scotland*, (February 2020). Url: <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-02/system-overload-licensing-short-term-lets/>

³¹ Royal Town Planning Institute, ‘Short Term Lets: RTPI Scotland’s response to the Scottish Government’s Consultation on a licensing scheme and planning control areas in Scotland’, 06/10/20. Url: <https://www.rtpi.org.uk/consultations/2020/october/short-term-lets/>

³² Royal Town Planning Institute, *Financial Implications of Implementing the Planning (Scotland) Act 2019* (2019), p10. Url: <https://www.rtpi.org.uk/media/1211/rtpi-scotland-financial-implications-of-implementing-the-planning-scotland-act-2019.pdf>

³³ Law Society of Scotland, *Consultation Response: Short-Term Lets* (2019), p13. Url: <https://www.lawscot.org.uk/media/363183/19-07-19-plan-lic-short-term-lets.pdf>

*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.*³⁴

- Furthermore, the criteria for setting fee levels do not appear to be linked to the cost of administering the licences but, rather, the revenue generated. This contradicts a statement elsewhere that it is to be cost neutral.

Additional burdens will be placed on local authority planning and licensing teams to manage the requirements of a new scheme at a time when they can least afford it – despite claims that councils will be able to recoup this later down the line through fees. A proper impact assessment of the costs is required and it underlines the case that a postponement of the regulations is desirable.

b. Concerns from Local Authorities

- In addition to legal stakeholders, several local authorities have drawn attention to the financial impact of licensing which we believe has not been adequately addressed by the Scottish Government in their consultation response.
- The consultation responses from local councils highlighted below make clear that there will be significant costs to local authorities in terms of finances and personnel, from both the initial set up costs and thereafter.
- Responses also indicate that many are concerned about the interplay of a new licensing regime during a period in which their resources are stretched due to Covid-19. These concerns appear to have been ignored by the Scottish Government in their response to the consultation.

COSLA

*“It will be necessary to understand the administrative burden that this [STL regulations] may place on local authorities and how this will be resourced.”*³⁵

Aberdeen City Council

*“We believe that the 12-month lead-in time to establish our Short-term Let regime will be resource intensive and there will be no ability to recruit additional staff when resources aren’t available until licence applications are submitted and fees paid. This poses staffing issues for the council. Consequently, we believe that the Scottish Government should fund the start-up costs.”*³⁶

Borders Council

*“...it is considered essential that Scottish Government provide specific funding for additional resources required by LA’s to cover the initial set up costs, including the transitional and compliance elements of the new legislation.”*³⁷

Comhairle nan Eilean Siar

“The evidence gathering, consultation and mechanism to set up a control area will require resourcing, finance and additional staff time to deal with retrospective planning applications where these are required during the transitional period. This legislation will have significant implications for both Development Plans & Development Management, ever diminishing teams against a background of annual budget cuts. The issue of enforcing regulations and the extra work this will entail is likely to fall on Planning and Licencing staff. In the current climate, the Comhairle is undergoing consultations on cuts that will need to be made to balance support given during lockdown. There is no budget available currently for the recruiting and training of staff and although it is anticipated that potential fees will pay for any staff, there is an initial outlay required, which has not been planned for in budgets. We propose an initial start-up grant or loan from Scottish Government.

³⁴ Law Society of Scotland, *Consultation Response - Short Term Lets: Consultation on a licensing scheme and planning control areas in Scotland* (October 2020), p7.

³⁵ COSLA, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?b_index=900&uuld=552786991

³⁶ Aberdeen City Council, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?b_index=480&uuld=738532527

³⁷ Borders Council, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=borders&uuld=648059965

Each application would require due consideration and income from planning fees for Change of Use, at current levels, would be unlikely to cover additional staff time for this work.”

“Paragraph 6.4 all local authorities must have a live licencing scheme open to receive licensing applications by 1 April 2022.

- *There are 18 months until this needs to be in place, and probably about 12 months once we know the outcome of this consultation and see guidance in the spring. There are policies to be written, consultations to be carried out with public and stakeholders, committees to seek approval from, staff to be employed and trained etc. We are still working from home and under restriction, and with the best will in the world, 18 (or 12) months to get everything underway, when we don’t know what is happening with our workplace, or indeed the way we are working, seems ambitious. We propose the deadline is pushed back by one year.”³⁸*

Glasgow City Council

“It is anticipated that there will be significant resourcing issues for the Local Authority in setting up a licensing scheme. Significant staff resourcing for set of scheme/verification process/carrying out inspections/enforcement etc. would be required.”³⁹

Highland Council

“The new regulatory responsibility of both licensing and control areas are anticipated to have significant, budgetary and regulatory impacts on the Highland Council; invoking responsibilities in relation to the status and safety of a very large number of properties across a dispersed geographical area...”

Highland Council also estimate that they could receive as much as “10,000 potential applications” on licensing and that while the “scheme permits a phased approach over a 3-year period but this will still present considerable administrative and operational undertaking for dealing with the initial applications. Ongoing resource will then be needed for renewals and new premises.

The workload will necessitate additional staff for the following teams:

- *Licensing team - additional administrative licensing staff*
- *Planning team – additional full-time posts (professional support officers) for a two-year period. There would still be resource required after this two-year period to cover new and renewed licence enquiries, however this is anticipated to be at a much lower level.*
- *Environmental Health additional full-time posts (technical officers) for a two-year period. There would still be resource required after this two-year period to cover new and renewed licence enquiries, however this is anticipated to be at a much lower level.*
- *ICT systems – a review of the on-line tools to enable self-service and on-line payments to streamline the application and payment process.”⁴⁰*

North Ayrshire Council

“Councils are to set up a new system, complete with new conditions and an inspection system involving Housing, Protective Services and Planning by 1 April 2022 at the latest. This would be a substantial task at any time, but it is particularly onerous when Council staff, working remotely, are facing increased demands to provide services to the public due to the coronavirus pandemic and Councils are facing unprecedented challenges, particularly with regard to licensing due to the coronavirus pandemic.

(a) if premises are to be inspected, Council staff must be available for this;

(b) Council staff are already having to work under pressure as the Coronavirus restrictions are regularly changed. In the case of STLs, where there are objections or representations to Licence Applications, delegated powers are not available to Council officers and the Application must be considered by the

³⁸ Comhairle nan Eilean Siar, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?b_index=780&uuld=458288928

³⁹ Glasgow City Council, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?b_index=900&uuld=52867059

⁴⁰ Highland Council, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?b_index=840&uuld=880423694

Licensing Committee. If there are to be around 327 Applications in North Ayrshire, then a portion of them will need a 'virtual hearing' compliant with ECHR 6. This would place a burden on Licensing Authorities at a time when they are least able to bear it.

2.2. Although Councils will be able to choose when the licencing scheme will start locally, it must be within 12 months after 1 April 2021.

2.3. The new STL system commences at most 18 months away, and Councils have not seen the secondary legislation on which the new system will be based. It will be laid in Parliament in December 2020 and has not been issued in draft. It has not been stated whether Application forms and other documentation will be prescribed, or whether they are to be drafted by individual Councils.⁴¹

South Ayrshire Council

"...there is an element of concern regarding the proposed lead in time for implementation of a robust licencing regime, the resources this will require and the added pressure to workloads required of staff and services."⁴²

Stirling Council

"The implementation, management and enforcement of the [licensing] process is considered particularly resource intensive for local authorities, with little guidance given around who would be expected to lead the process."⁴³

West Dunbartonshire Council

"For smaller authorities with fewer short term let premises it may be difficult to fully resource an effective and efficient service without the fees being very high and thereby creating a wide and varying fee structure across the country. There is a concern about the level of Fees that a smaller Local Authority may charge where they are not dealing with a large volume of applications and have limited resources to deal with such applications. The fee structure may not be of a sufficient level to meet resource concerns and the adverse comparisons by the public as to differing fee structures around the country as can happen in Civic Government Licensing."⁴⁴

Recommendations to Mitigate Unintended Consequences

Despite the impact of Covid-19 on tourism, the Scottish Government are intent on pushing ahead on an ambitious timeline. In order to mitigate some of the likely unintended consequences of their approach, the ASSC argues that grandfather rights should be provided to self-catering operators who have been operating for 3+ years and that the Scottish Government should establish a Working Group to contribute to the guidance that will be prepared for local government.

1. Insertion of Grandfather Rights

- We believe that **grandfather rights should be granted to operators and property managers who have been operating for 3 years and over**. There is precedent for this in alcohol licensing. In the transitional process for the Licensing (Scotland) Act 2005, premises had to have a current licence. That was because there was a transition from one licensing regime (The Licensing (Scotland) Act 1976) to the 2005 Act. The current proposal is to introduce a new licensing system but a grandfather right approach could still be used and would reduce the uncertainty for some operators.
- During the transition period from the 1976 Act to the 2005 Act, there was a period for all premises licence holders to lodge new applications by a specific deadline. Once lodged, the licence holder benefited from grandfather rights re the application. There was still scope for objections and proper

⁴¹ North Ayrshire Council, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?b_index=780&uuld=560815682

⁴² South Ayrshire Council, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?b_index=900&uuld=900902345

⁴³ Stirling Council, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?b_index=900&uuld=465853950

⁴⁴ West Dunbartonshire Council, *STL Consultation Response* (2020): https://consult.gov.scot/housing-services-policy-unit/short-term-lets-licensing-scheme/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=West+Dunbartonshire+Council&uuld=124670121

consideration of the licence but it meant the operator could trade in the knowledge over provision would not apply. It also meant planning, building control and environmental services would not have an impact on the application. This in no way fettered Councils from taking action against operators who were not meeting the standards and requirements of planning, building control or environmental services – the point here was the method of ensuring compliance with the regulations of each of these three departments was through the actions of the departments themselves and not through the licensing process.

- **Grandfather rights would give the following advantages to existing professional self-catering and short-term let providers:**
 - Continued certainty to pre-existing professional businesses
 - Would not result in an increase in cost base over that already in place
 - Target the 'significant minority of bad operators' without negatively impacting the innocent majority of professional operators.
 - Opportunity for local authorities to revoke grandfather rights if evidence of inappropriate activity is forthcoming.
- The ASSC's proposal for grandfather rights is **supported by Scottish Land & Estates**: *"We remain of the view that this is not the time to introduce these measures. However, given the Scottish Government's position is to progress with licencing, we wholeheartedly support ASSC's calls to grant Grandfather Rights to operators and property managers who have been operating for 3 years and over. Many of our members can already demonstrate that they run professional, safe businesses so all the extra cost to the owner and the local authority in licencing would serve no real benefit. Such an approach would allow for a sensible level of discretion on the part of the local authority without putting visitors at risk."*

2. Creation of a Working Group

The ASSC also believes that the regulations would benefit from the **creation of Working Group to steer the guidance for local authorities**. This could be chaired by a prominent national tourism body, such as VisitScotland, and could include relevant industry, regulatory and legal stakeholders such as:

- The ASSC
- The Regulatory Review Group
- Solace
- Law Society of Scotland

Conclusion

- The ASSC has fully and proactively engaged with the Scottish Government throughout this consultation process, as we have done throughout the regulatory discussions, devising proportionate, evidence-based and future-proofed solutions for national and local government in Scotland in terms of short-term regulation – for example, see our *Forward Together* paper.⁴⁵ Our concern lies not with regulation per se – we want to ensure a balanced and proportionate approach for business, tourism and local communities and get a regulatory framework in place that works for all.
- Introducing short-term let licensing and planning restrictions is not a straightforward task but one that necessitates detailed scrutiny of proposed regulations. At a time when other important pieces of regulation were postponed by the Scottish Government due to Covid-19, we are disappointed at the truncated nature of this consultation, the rapidity of the timetable associated with the legislation, the lack of consideration to the alternatives to the proposed regulation, as well as the failure to follow best practice.
- The ASSC remain greatly concerned that the haste of this work will not result in a well-designed and proportionate regulatory framework and could be one which may have negative consequences for

⁴⁵ ASSC, *Forward Together* (2020). Url: https://www.assc.co.uk/wp-content/uploads/2020/08/2020ForwardTogether_Covid.pdf

the fragile recovery of Scottish tourism and burden local authorities during a period of immense financial and resourcing challenges. However, we have put forward a few policy suggestions which we can hope can help mitigate against unintended consequences in the regulations.

- The ASSC hopes that you find our written evidence useful towards informing your consideration of the SSI and is content to provide additional information where necessary, including supplying oral evidence before the Committee.

Fiona Campbell, CEO, ASSC

December 2020