



Submission by the Association of Scotland's Self-Caterers (ASSC) – AUGUST 2021

Consultation Questions

1. For Paper 2: Draft Licensing order - please state your issues and how to resolve them:
Please provide any comments and any suggestions you have to resolve this.

Paper 2: Draft Licensing Order

1. **OUR DISMAY AT A FAILED OPPORTUNITY FOR MEANINGFUL CONSULTATION AND FOR LISTENING TO INDUSTRY EXPERTS DESPITE ASSURANCES FROM MINISTERS**
 - 1.1. Before commenting on the draft Licensing Order itself, we wish to formally record our deep concern with what we see as the total lack of meaningful industry engagement in the period between the last-minute withdrawal of the original draft Order in February 2021 and the publication of this consultation.
 - 1.2. Withdrawal of the previous draft Order was in response to the unprecedentedly high level of individual objections and by the reasoned concerns of the ASSC and other major tourism stakeholders. On paper, this seemed to provide an ideal opportunity for the industry and the Scottish Government to work together to produce an alternative that would be fit for purpose and workable in practice.
 - 1.3. The Scottish Government promised to engage with, and listen to, our industry. To do so, the Short-Term Let Working Group was established *“to identify and resolve stakeholder issues and concerns”* and *“to make suggestions to the Scottish Government on any changes to legislation which may be needed”*. [1] But to our dismay, **contrary to commitments made by the Scottish Government, the Working Group has failed to listen to and address our concerns and those of other stakeholders** [2], nor has it addressed concerns previously raised in the ASSC’s detailed evidence submitted to the Local Government and Communities Committee earlier this year.[3]
 - 1.4. In particular, through the Working Group, the ASSC has with unprecedented industry support, submitted detailed and practical proposals for a robust mandatory registration scheme which would require businesses to comply with all the proposed mandatory licensing conditions, including in particular those relating to health and safety and to nuisance. This would meet the Scottish Government’s stated policy objectives for licensing, but in a way that would avoid the serious irreparable damage to our industry, to Scottish tourism generally, and to the local economies that tourism supports.
 - 1.5. To be clear, the ASSC are not against appropriate regulation of the short-term letting sector. Indeed, we first proposed registration in October 2017. In addition, recognising the need to address legitimate concerns over the separate, localised, issues of the recent proliferation of city centre short-term lets and the negative local impact of second home ownership in certain places

(which ironically licensing as opposed to registration would make worse) we supported in principle the introduction of the power to create local short-term let planning control areas where appropriate. What we are against is bad regulation that will fundamentally damage tourism in Scotland and the thousands of small businesses which form the backbone of our industry.

- 1.6. Unfortunately, the Scottish Government casually dismissed the ASSC's registration proposals out of hand without discussion or even any proper explanation, other than suggesting it would be more complicated. Now, in this new consultation – the Scottish Government's third in recent years – **the original licensing proposals have simply been restated with a few amendments that, if anything, make the proposals worse for self-catering operators and the other tourism businesses** that have now been caught by the legislation – such as B&Bs and some small guest houses.
- 1.7. On this evidence, we can only conclude that the purpose of setting up a Working Group was simply to give the external impression of industry involvement rather than listen to those who actually understand the industry and the wider real-world consequences of the proposed legislation.
- 1.8. As a national association representing over 1,300 professional self-caterers, we are saddened to have felt disregarded and dismissed on nearly every point we have made. Assurances made to MSPs, the electorate and Industry bodies that unintended consequences would be identified and changes made appear to us to have counted for nothing.
- 1.9. Page 45 of the Draft BRIA: Declaration and Publication states that:

“I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.” Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison, MSP.

- 1.10. This is simply not the correct. The BRIA is NOT supported by businesses, or tourism bodies in Scotland. If it were, the ASSC, the Scottish B&B Association, Airbnb and UK Short-Term Accommodation Association would not have resigned from the Short-Term Let Working Group.
- 1.11. We are now left with having to consider our legal options, and as you will see further below preliminary legal advice has already identified potential areas of challenge under the Provision of Services Regulations, the ECHR and as a consequence of the lack of proper consultation. In addition, we have identified, and will be seeking Counsel's opinion on the Order in its present form being ultra vires of the powers under which it purports to be made.

2. A REMINDER OF THE CONTEXT

- 2.1. **Self-catering holiday lets are the backbone of the Scottish tourist industry**, providing everything from affordable accommodation for family holidays at busy times of years to special occasion winter weekend breaks for couples and groups of friends.
- 2.2. An onerous licensing scheme is the last thing the self-catering sector needs at this challenging time. The industry, which of course has been hugely damaged by Covid-19 and its associated restrictions, represents **£861million direct visitor spend to the Scottish economy, supporting 23,979 full time jobs according to new data from Frontline Consultants.**
- 2.3. As per the ASSC's evidence to the Local Government and Communities Committee in January 2021, we seriously question the prioritisation of this issue considering the ongoing impact of the pandemic on Scottish tourism. In addition, we believe the focus on licensing runs contrary to the

Scottish Government's commitment to Covid recovery, nor does it align with Scotland's National Tourism Strategy, 'Scotland Outlook 2030', which highlights that supportive policy is one of six conditions for success: *"The potential contribution that tourism can deliver must be understood and acknowledged with the right policy and regulatory landscape in place to support our vision of 21st century tourism."*

- 2.4. Traditional short-term letting activity, such as self-catering / B&Bs, is a small business like any other, with dedicated full-time professionals striving to provide positive experiences for guests and visitors. **Such businesses are heavily concentrated in rural and island parts of Scotland.**
- 2.5. For those in the traditional full-time and professional sector like self-caterers and B&Bs, **their business is their livelihood or a significant proportion of income; it is not a hobby or economic side-line.** Therefore, regulatory issues such as the introduction of a disproportionate licensing scheme, at a time when Covid-19 has disrupted their lives and posed significant personal and economic challenges, is a real and genuine concern.
- 2.6. The Scottish Government's proposed short-term let regulations are the **biggest threat facing the self-catering industry at the current time.** Even in a pre-Covid context, these regulations would have posed significant difficulties for the sector.
- 2.7. To give a small indication of the level of concern amongst our membership, the ASSC held a webinar on Tuesday 20th July 2021. We published details on Monday morning and by 11am on Tuesday, 519 people had registered to join the webinar. Since then, the webinar has been watched over 750 times. That is something that the Scottish Government cannot ignore.

3. THE FUNDAMENTAL PROBLEMS WITH THE PROPOSED LICENSING REGIME

- 3.1. Quite simply, if introduced, the licensing regime will firstly inexorably lead to the closure of many self-catering businesses and small B&Bs. Specifically, in response to an ASSC survey 49% of self-catering operators said they would close if licensing was introduced (and of those, around two thirds said they would just use the property as a second home).[4]
- 3.2. Business closures on this scale will have a huge effect on individual operators (losing their businesses), on the local economies through reduction in tourism accommodation capacity and negative impact on the supply chain, and to Scottish tourism itself (see further below). This has been repeatedly brought to the attention of the Scottish Government and those directly involved in this legislation but seems to have been totally ignored.
- 3.3. There are only two conclusions we can draw from this. Either the Scottish Government chooses not to believe survey results, or they actually want to see a significant shrinking of the self-catering and B&B sectors. If the former, then we would respectfully suggest that ministers and their officials imagine themselves in the position of business operators and ask themselves how they would respond to the issues identified below. If the latter, we believe that would be truly astonishing.
- 3.4. Secondly, those who do feel able to remain open will suffer a wide range of uncertainty, increased costs and bureaucracy. These issues are addressed in detail further on in this submission.
- 3.5. Last but not least, licensing will put Council officials in the unenviable position of having to decide which businesses can stay open and which will close, no doubt leading to charges of unfairness and legal challenges from those that Councils choose to put out of business.

4. WHY BUSINESSES WILL CLOSE

There are many obvious reasons why owners will close businesses under the proposed scheme:

- 4.1. **Uncertainty over licence being granted:** councils will have very subjective grounds to refuse licence – and could grant a licence then refuse renewal. Appeals against refusal would involve substantial legal costs and more uncertainty.
- 4.2. **Owners will have to make advance bookings made during the licence application period conditional on licence being granted** (which will put off guests) or risk being sued if they don't and licence not granted – and this will be repeated every 3 years when licence must be renewed.
- 4.3. **Increased bureaucracy and hassle:** disproportionately affecting small business owners who are the backbone of Scotland's tourist economy.
- 4.4. **Investment uncertainty:** owners will be reluctant to invest in major repairs, replacements and improvements as they won't know whether licence will be granted or renewed.
- 4.5. **Uncertainty as to ability to access and afford qualified contractors** to ensure compliance.
- 4.6. **Uncertainty as to impact on mortgage and insurance liabilities.**
- 4.7. **Unknown and open-ended licensing costs,** realistically estimated as £1k plus – councils must recover their costs from the scheme and operators will face additionally paying the council for inspections.

5. THE CONSEQUENCES

- 5.1. Introducing licensing will result in significant damage to Scotland's tourist industry, including the businesses that provide services to property owners, and, in turn, to local economies. The irony is that the Scottish Government are pushing ahead with this when we are trying to recover from the economic damage of Covid-19 and when staycations are being encouraged for sustainability and environmental reasons.
- 5.2. Given the competition to maintain standards, holiday let owners often spend money more frequently on additional property maintenance than they would on their own property. **Their guests spend money in local food shops, cafes, gift shops, galleries, restaurants, tourist attractions** etc – many of which would simply be unviable without visitor spending.
- 5.3. **Therefore, the impact of the regulations will not be limited to self-catering as there will be a significant negative impact to businesses in the wider supply chain.** This emphasises the value that short-term letting provides to the wider economy from the operators themselves, with negative knock-on effects on hospitality, local activity providers and local attractions. There will also be a negative impact on laundry providers and cleaning services and guests.
- 5.4. Overall, it is vitally important to see the regulations in a holistic context, not just as an issue for housing and local government, **but one for tourism, economy and Covid recovery.** The Scottish Government should be looking to help support small tourism businesses like self-catering as it recovers from Covid-19, rather than introducing a disproportionate licensing scheme, especially as viable, workable alternatives such as mandatory registration are available.
6. **All this could easily be avoided. Our registration proposal allows for the Scottish Government to introduce licensing, but to exclude registered accommodation.** A register could be introduced via the Development of Tourism Act 1969, delivered by Visit Scotland. Professional operators, DMOs, VisitScotland quality assurance members, as well as members of the ASSC and Scottish B&B

Association could register and become exempt thus avoiding business closures and the knock-on consequences.

7. LACK OF EMPIRICAL DATA

- 7.1. It goes without saying that accurate and objective data is imperative to inform regulatory measures on public policy. Without that it is also impossible to monitor and evaluate the outcomes of the legislation.
- 7.2. In this case, there is a complete lack of baseline data. In contrast, it is apparent to us from a number of sources that the policy has been driven significantly by anecdote and by statistically insignificant but vociferous campaigners in one or two localised areas.
- 7.3. **In particular, it is an indisputable fact that the Scottish Government has not been able to produce any data or robust evidence to show the correlation between the lack of availability of affordable housing and the link with short-term lets.**

8. DON'T JUST TAKE OUR WORD

- 8.1. The ASSC are not alone in voicing concerns. The vast majority of Scotland's tourism industry supports the ASSC's position on mandatory registration and this was evidenced at the recent STA Council meeting of 22 July 2021. This includes the Scottish Bed and Breakfast Association, Scottish Land & Estates, British Holiday & Home Parks Association, the UK STAA, Airbnb, Association of Scotland's Visitor Attractions, Scottish Agritourism, Wild Scotland, VisitArran, and Hostelling Scotland.
- 8.2. Overall, these organisations are united in believing that:
- 8.3. the regulations are flawed, disproportionate and would be bad law if enacted;
- 8.4. the timing of the regulations is completely wrong;
- 8.5. the regulations will hamper the recovery of the industry from Covid-19;
- 8.6. the Working Group has not fulfilled its remit and have not listened to industry; and
- 8.7. it is wrong to use tourism accommodation as a means to attempt to solve wider housing issues – and unlikely to do so in practice.

9. THE ALTERNATIVE: MANDATORY REGISTRATION

- 9.1. The ASSC have a track record of supporting regulation for the Scottish self-catering industry. **The ASSC proposed registration with mandatory health and safety for all short-term lets in October 2017.** The ASSC clearly stated at the same time that it would fully support a limited licensing scheme in any localised and identified pressure zones.[5]
- 9.2. We illustrated **Portugal** as best practice example, who have now introduced a traffic light scheme, in compliance with EU laws on Service Provision, and in accordance with Articles 9 (Authorisation schemes), 10 (Conditions for the granting of authorisation), 13 (Authorisation procedures), 16 (Freedom to provide services). The Services Directive provides that Member States cannot impose an authorisation scheme if it is not justified by an overriding reason of general interest.
- 9.3. **The ASSC then worked constructively and proactively with the Scottish Government to facilitate the provisions on short-term lets in the Planning Act 2019,** which led to the passing of The Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021 (the "Control Area Regulations").

- 9.4. However, the proposed Licensing Order is a **blunt tool to fix a perceived and localised problem of amateur operators in, primarily, Edinburgh, rather than being a solution that is appropriate for the whole of the Scotland.**
- 9.5. It is not too late for the Scottish Government to change course and back Scottish tourism for a sustainable recovery. In place of this disproportionate and blanket licensing regime, the ASSC have again proposed a more targeted and bespoke response to the Scottish Government – **the introduction of a registration scheme, with mandatory health and safety criteria**, rather than licensing, as the most proportionate and achievable for Scotland.[6]
- 9.6. **Rather than proposing to completely replace the current draft Licensing Order, we are proposing to amend Article 3(1) to provide that an activity is exempt from the licence requirement if it is in respect of “registered accommodation” AND the “registration conditions” (essentially the existing mandatory licensing conditions) are being complied with.** This would have the effect of providing a robust and legally effective registration scheme. So, if an owner fails to register or having registered fails to comply with the registration conditions, they would no longer be exempt from the licensing requirement and would therefore be in breach of the Order with resulting legal penalties.
- 9.7. The ASSC’s paper outlined proposals that would see short-term rental properties come under a mandatory registration scheme in order to provide local authorities with as much information as possible.[7] The paper also outlined the ASSC’s support for the introduction of pressure zones which would allow local councils to limit the number of holiday lets in areas that meet certain conditions. If implemented, the *Long-Term Approach* would have addressed several of the concerns that have been raised about short-term lets by balancing the rights and interest of local communities with those involved in the self-catering market.
- 9.8. **The ASSC’s statutory registration scheme would meet the policy objectives of the Scottish Government’s The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021 using the powers in the Development of Tourism Act 1969.** These powers could be used by VisitScotland or delegated to local councils to implement local schemes. The ASSC recommends that the centralised registrar should be VisitScotland.
- 9.9. **Statutory registration of tourism accommodation is common in many other tourism destinations.** In detailed proposals, the ASSC evidenced two registration schemes within the UK – the **Isle of Man and Northern Ireland**, both underpinned by Tourism Acts – that are examples of existing schemes that work well and where lessons can be learned for the Scottish approach.
- 9.10. **This, and other papers, have been rejected by the Working Group and the Scottish Government despite unprecedented industry wide support without any real discussion or explanation, graphically highlighting the lack of meaningful industry engagement despite promises to listen.** This is despite the fact that the industry proposals would help secure the Scottish Government’s policy objectives in a more cost-effective and proportionate manner.

10. DETAILED COMMENTS

11. Our detailed comments and concerns are set out in the following paragraphs covering –
- 11.1. The extensive and robust existing regulatory control that already applies to our industry which the licensing regime would overlap and duplicate, and which certain case would lead to confused responsibilities (Para 1)
- 11.2. The unexpected inclusion of B&Bs etc (para 2)

- 11.3. The Booking Problem: how the licensing regime will simply will not work with advance bookings that are a feature of our industry, and will put off many potential visitors from booking holidays in Scotland as opposed to England (Para 3)
- 11.4. The practical problems for guests of warrants authorising entry (Para 4)
- 11.5. Our concerns over the subjectivity of grounds for licence refusal, particularly regarding overprovision and neighbour objections, leaving owners totally unable to assess the risk of future licence refusals and hence to plan future investment (Para 6 & 7)
- 11.6. The problems licensing will create for availability of commercial lending (Para 8)
- 11.7. How licensing will disincentivise owners from investing on improvements and repairs, much of which will impact on local trades (Para 9)
- 11.8. Problems for insurance (Para 10)
- 11.9. Contractual issues for property management providers etc (Para 11)
- 11.10. Excessive and unquantifiable costs of licence applications – particularly damaging for small businesses which form the majority of operators (Para 12)
- 11.11. The negative impact on local authority resources (Para 13)
- 11.12. The lack of proper consultation, with this, the third exercise in recent years, being at our industry's busiest time (Par 14)
- 11.13. The material flaws in the 2019 and 2020 consultations already flagged up by the ASSC but ignored by the Scottish Government (Para 15)
- 11.14. The failure to consider, and the potential illegality under, the Provision of Services Regulations (Para 16 & 17)
- 11.15. Potential illegality under ECHR (Para 18)
- 11.16. Inconsistency with the Scottish Government's Better Regulation Agenda, as well as breaches of the Strategic Code of Practice. (Para 19)

These comments are to be read alongside our detailed concerns on the BRIA. As you will see, our key concerns with the BRIA relate almost entirely to the complete, and in our view unacceptable, lack of empirical data in the key areas.

PART 2: DETAILED COMMENTS

1. EXTENSIVE AND ROBUST EXISTING REGULATION ALREADY APPLIES TO SECTOR

- 1.1. The current campaign against short-term lets in Scotland frequently asserts that such properties are not subject to sufficient levels of regulation. However, it is important to recognise that **professional operators and the self-catering sector are already subject to numerous regulations.**
- 1.2. The professional sector already has a robust framework of regulations associated with it, including health and safety, fire regulations, anti-social regulations and taxation. There is specific legislation for Scottish businesses and there are clear ways to understand legal compliance. The ASSC provides comprehensive Guidance Sheets and advice on regulations and best practice to its members.
- 1.3. In October 2017, ASSC proposed that all collaborative economy platform hosts should adhere to the pre-existing regulations in place for professional short-term rental operators: *“Operators, whether professional or peer-to-peer, must have full public liability insurance as well as specialist holiday home insurance, and comply with regulations including fire safety, carbon monoxide detectors, gas safety certificates, and so on”*.^[8]

2. B&BS / GUEST HOUSES AND OTHER FORMS OF SHORT-TERM LET

- 2.1. **B&Bs and guest houses** etc that are not under Use Class Order 7 or licensed under the Licensing Act 2005 now fall within the definition of a Short-Term Let.
- 2.2. That means that such operators will be captured by the new regulations, resulting in costs for businesses at a time when they can least afford it.
- 2.3. This also shows that what is termed ‘short-term let’ regulation can quickly snowball and have consequences not only for traditional self-catering but other related sectors too.

3. THE BOOKING PROBLEM

- 3.1. The combination of long periods to decide on licence applications (12 months for the first and 6 months for a renewal), the frequency of licence renewal and the fact that at peak periods many guests are booking up to 12 months ahead creates a perfect storm for booking uncertainty for both operators and their guests.^[9]
- 3.2. Operators will have to make it clear in their terms and conditions that the booking is conditional on obtaining and complying with a licence.
- 3.3. **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.**
- 3.4. People won't book with an owner who says, *“I will take the booking, but I might not honour it, and I am telling you that now Mr and Mrs Guest, just so you know and it is incorporated in our agreement as a term”*. **This shows a complete lack of understanding of commercial contracts in the tourism sector.**

4. WARRANTS AUTHORISING ENTRY

- 4.1. According to the draft Licensing Order and Policy Note, **“an unannounced inspection may be the only way of proving a violation of some licensing conditions (e.g., occupancy)”**. [10] A sheriff or justice of the peace may authorise entry to the property, if necessary, using reasonable force.
- 4.2. It goes without saying that **this will not be acceptable to guests but will have to be allowed for in their contracts.**

5. LICENCE REFUSAL: GENERAL

- 5.1. **Refusal of a licence (or of its renewal) is a very real risk.** There are many reasons for refusal, in particular:
 - 5.1.1. Breach of planning control
 - 5.1.2. Applicant would not be able to “secure compliance” with conditions. That includes standard conditions the local authority may choose to apply to licences
 - 5.1.3. The Council “considers” there will be a resulting over provision of short-term lets. This is completely subjective.
- 5.2. **It is simply impossible for a business owner, or a prospective guest, to quantify this risk in any way.**
- 5.3. **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 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.

6. ISSUES WITH OVERPROVISION AS A GROUND FOR LICENCE REFUSAL

- 6.1. Before considering a licensing application in detail, the licensing authority will consider it in the context of their licensing and planning policies, including: their local development plan; their overprovision policy, if they have one; and their policy on planning control.
- 6.2. How the local development plan and any overprovision policy **affects an application may depend on several factors**, including: where the premises are located, the type of premises, the type of short-term let, the concentration of short-term lets in the local neighbourhood, the availability of housing for local people etc.
- 6.3. According to the Draft Licensing Order and Policy Note, *a “licensing authority might consider that, given the number of short-term lets operating in an area, it is more important that a particular type of property is directed towards meeting the housing needs of permanent residents.”* [11]
- 6.4. Overall, these are totally subjective considerations that will make it impossible for operators to predict the outcome of applications and to plan their future business marketing and investment. It is even worse for small businesses – who of course make up the majority of operators – who will not be able to afford expensive court appeals.
- 6.5. **This also raises some fundamental questions about what the Scottish Government are seeking with their regulation – is this really a scheme centred around basic health and safety?**
- 6.6. **Overprovision was not mentioned at any point by the Short-Term Let Working Group and is a new consideration.**

7. ISSUES WITH NEIGHBOUR OBJECTIONS TO LICENCE AS A GROUND FOR LICENCE REFUSAL

- 7.1. There is significant emphasis on neighbour complaints throughout the guidance. **However, the primary purpose of the licensing scheme is to ensure short-term lets are safe, not to address issues faced by neighbours.**
- 7.2. Issues raised by anyone should be addressed not just by neighbours but by guests, council officers or statutory consultees such as Police Scotland or Scottish Fire and Rescue. By pinpointing neighbours there is a suggestion that neighbours carry a greater weight when considering objections.
- 7.3. **Were a community to have issues, it is not enough for an objection to say there are issues in the community. There must be a link between those issues and the applicant premises.**

8. INVESTMENT PROBLEMS: COMMERCIAL

- 8.1. **Commercial Investment:**
- 8.2. **A bank / mortgage provider or other lender is unlikely to lend to a business that may face a licence being refused or revoked.** Finance companies will be far more conservative about lending. Finance simply may not be granted for a holiday let.
- 8.3. If a licence is refused or revoked, the owner may have the opportunity to diversify into long-term letting (dependent on planning), however, the return may not be as high as self-catering, and it may not fulfill lending arrangements.
- 8.4. **Investment in a new holiday let business will become impossible given underwriting challenges.** Moreover, current lenders may find themselves over exposed resulting in damage to their businesses.
- 8.5. Given the importance of short-term lets to local economies, rural areas would suffer as a consequence.

9. DISINCENTIVE TO PERSONAL INVESTMENT

- 9.1. Licensing will have a material impact on how the sector spends and invests. It **introduces a disincentive to invest in a property**, given the possibility of having a licence refused or revoked.
- 9.2. If you may have your licence refused or revoked, you may be reluctant to spend significant sums on improving the property externally and internally less appealing, given the potential lack of return on the that investment. **This could result in a reduction of quality accommodation, materially damaging Scottish tourism**, and economic loss for local trades etc.
- 9.3. This applies to investment in furnishings and fittings too. If a licence is refused or revoked, what is the owner to do with the furniture, fixtures and fittings if they sell the property? Unless of course they retain it simply as a second home which around a third of ASSC survey respondents say they will do.
- 9.4. This has been ignored in the BRIA and by policymakers, as have the serious consequential implications for the onward supply chain.

10. INSURANCE PROBLEMS

- 10.1. Insurance companies will have to consider the ramifications of a licensing scheme. **It is most likely that a client's policy could become invalid if they are trading outside of licencing requirements.**

10.2. If an owner is not operating in accordance with licensing requirements, **it would be akin to driving a car without an MOT**. It may have significant consequences on how an insurance company may deal with any claim, subsequently impacting on your financial position.

11. CONTRACT ISSUES

- 11.1. Where an owner has contracts with staff / cleaners / laundry / maintenance companies, that contract may be broken if a licence is refused or revoked.
- 11.2. If a property management business has, for example, 20 properties in rural Perthshire and a portion of those properties has a licence declined, it will have a financial impact on their business.

12. EXCESSIVE AND UNQUANTIFIABLE COSTS TO SMALL BUSINESSES

- 12.1. Local authorities will each determine their own fees and fee structures to recover establishment and running costs specific to their area. This means that the **fees charged by local authority will vary**. Relevant factors include whether they can achieve economies of scale, rurality and how they integrate their short-term lets licensing scheme with other housing and licensing functions.
- 12.2. Different licensing authorities may charge different fees. The exact fee that an operator will need to pay may depend on things like how many guests they want to accommodate. **If an operator has premises in more than one licensing authority area, the fees they pay may be different, even for the same circumstances**. If the application is refused, the fee will not be refunded.
- 12.3. Local authorities can differentiate their fees dependent on the characteristics of the short-term let. For example, a local authority could charge a different fee based on: the maximum number of guests specified on the licence and whether a property is licensed for (a) secondary letting or (b) home sharing and home letting; this is not an exhaustive list.
- 12.4. Other determinations may include: the size of the premises; number of bedrooms; number of guests; duration of the period it is made available for use; and the extent to which the licence holder has complied with the conditions of the licence.
- 12.5. The BRIA assessment suggests that the average indicative fee for processing an application will be between £223 and £377. However, a representative from SOLAR (Society of Local Authority Lawyers & Administrators in Scotland) on the Working Group suggested that the scheme would have to run on a cost recovery basis and could cost in the region of **£1,500-£2,000 per licence**.^[12]
- 12.6. To put this in context, landlord registration fees are set nationally at £67 plus £15 for each property, making the lowest fee £82 for one property. This cost is incurred once every three years.
- 12.7. **The ASSC has no confidence whatsoever that the fee will be as low as £223, nor how this figure has been set**, although it appears to reflect a two bedroomed flat.
- 12.8. According to the draft legislation, a local authority may also charge a fee in respect of an inspection. **There is no other regime (liquor licensing, building, planning and similar) where premises are charged for an inspection which is a statutory requirement**.
- 12.9. BRIA costs are inconsistent with reality (for example, £100 for insurance). The ASSC consistently asked for a robust industry verified BRIA to be delivered and this request was ignored.

13. IMPACT ON LOCAL AUTHORITIES

13.1. As detailed by the local authority responses to the second consultation, **many local councils are concerned about the resource implications of the regulations at a time when their budgets are already stretched**, as well as the administrative burden and the lack of specific Scottish Government funding for set-up costs.[13]

13.2. 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.

13.3. The **unprecedented scale and resource implications for local authorities** are well summarised by licensing expert Stephen McGowan of TLT LLP, providing 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” [14]

13.4. **Alternatively, can we assume that this is in fact intended to be a method of revenue generation for local authorities? This would undermine the principle of transparency.**

14. TRUNCATED & LIMITED CONSULTATIONS – THIS ONE AT THE INDUSTRY’S BUSIEST TIME

14.1. The Scottish Government carried out two consultations prior to the current one: an initial consultation in July 2019 and a truncated consultation in October 2020 shortly before the legislation was published, and then withdrawn. The first was an extremely partial, badly advertised consultation, led by a non-impartial consultancy entirely focused on housing challenges. They identified 5 regional areas where there were perceived problems, and had to be persuaded to speak to 5 professional self-catering operators as part of the consultancy process.

14.2. This was followed by a foreshortened 6, instead of 12, weeks second consultation in 2020 that failed to involve sectors that are now within the scope of the regulations, including B&Bs.

14.3. We are now faced with yet another truncated consultation which can only be responded to online, taking place when most professional operators are at their busiest during the summer period.

15. **MATERIAL FLAWS IN 2019 AND 2020 CONSULTATIONS ARE IDENTIFIED IN OUR SUBMISSION TO THE LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE IN FEBRUARY 2021, YET ARE DISREGARDED.**[15]

- 15.1. In a letter to the Scottish Government's Expert Panel on the Collaborative Economy on 22nd August 2017, the ASSC put on record our deep concern at the scoping research commissioned by the Scottish Government, undertaken by Indigo House, on the supply and demand for short-term lets in Scotland. This analysis relied heavily on the use of so-called 'data scraping' from an unreliable third-party site. While the report briefly mentions the "limitations" of this kind of data, the authors then go on to state that it provides a "fair representation of the trends in the emerging market." In fact, scraped data is subject to numerous assumptions which can, in turn, lead to unsupported conclusions. Relying on this type of data does not lead to sound policymaking.
- 15.2. In addition to problems with the underlying data from the scoping report, we also have concerns with the level of dialogue between Indigo House and key stakeholders. Both Airbnb and the ASSC supplied evidence-based data, which would have helped to provide a clearer representation of the Scottish short-term rental market. Both organisations met with resistance from Indigo House that this data would be able to be used. While the authors maintain that their research involved "in-depth consultation", this has not been the experience of our organisation.
- 15.3. We understand that Indigo House was asked to consult with the ASSC on 12th March 2017. For inexplicable reasons, they chose not to do this.
- 15.4. With this in mind, it should not be forgotten that Indigo House were awarded £9,950 by the Scottish Government, on a non-competitive tender, to undertake this scoping research over a two-month period. Despite this substantial use of taxpayers' money, they have singularly failed to consult in an appropriate manner with key stakeholders involved in the short-term let market – the very organisations who would be most affected by any regulations pursued.
- 15.5. In our view the Scottish Government has simply **not listened to critics, or industry experts** (including the Scottish Tourism Alliance, the Regulatory Reform Group, the Law Society of Scotland amongst others), but based this legislation on the lobbying of unrepresentative geographically restricted pressure groups. This does not amount to a viable consultation.
- 15.6. In 2020, 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.***" [16]
- 15.7. **Over the past few years, the entire consultation process has failed to meet Scottish Government best practice guidelines in terms of transparency, accountability, proportionality and consistency.** 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*". [17]

15.8. **More fundamentally, as noted by Burness Paull LLP advice to the ASSC, the conduct of this consultation process calls into question whether it is in fact fair and genuine and adheres to the Supreme Court approved consultation requirements that:**

- 15.8.1. the consultation must be undertaken when proposals are still at a formative stage;
- 15.8.2. sufficient reasons for the proposal must be given to allow intelligent consideration and response;
- 15.8.3. adequate time is given for consideration and response; and
- 15.8.4. the product of the consultation is conscientiously taken into account in the decision-making process.

16. POTENTIAL ILLEGALITY UNDER THE PROVISION OF SERVICES REGULATIONS PRESERVED IN UK LAW BY THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

16.1. **The ASSC engaged the respected legal firm Burness Paull LLP in Summer 2021 to provide expert comment on the Scottish Government’s short-term let regulatory plans and their arguments are set out from points below (16-19) in this submission.**

16.2. In our view, the proposed licensing regimes **are incompatible with the legal requirements of the Provision of Services Regulations** (the “Regulations) 2009 (as amended) and the Provision of Services (Amendment etc.) (EU Exit) Regulations 2018 which preserved the Regulations notwithstanding the UK’s withdrawal from the EU.

16.3. The Regulations protect UK businesses and consumer rights by maintaining obligations on UK competent authorities to ensure that their regulation of service activity is proportionate and justified in the public interest. Service activity includes tourism activity which we have interpreted as encompassing self-catering accommodation provision.

16.4. Overriding reasons of general interest relevant to short-term accommodation rental services can be:

- social policy objectives such as ensuring the availability and affordability of local housing;
- the protection of the urban environment;
- public security;
- the protection of consumers; and
- ensuring tax compliance and effective fiscal supervision.

16.5. Justifications for imposing policy and regulatory restrictions on short-term accommodation rental services must be supported by **clear evidence** that the general interest needs to be protected, and **evidence of the link** between short-term accommodation rental services and the protection of the general interest.

16.6. The Scottish Government has provided no empirical data that there is a direct link between short-term letting and loss of housing stock, thus it cannot be considered to be an overriding reason of general interest.

16.7. The Regulations require that an authorisation (licensing) scheme can only be implemented under certain circumstances: to treat issues locally, if these issues are justified by an overriding reason of general interest. In these circumstances, a registration/authorisation (licensing) scheme must be simple, fast, easy to complete, the criteria should be clear, objective and transparent. Once again, we have serious concerns that the draft Order does not meet these requirements.

17. REQUIREMENTS OF THE REGULATIONS

17.1. Specific requirements of the Regulations which we consider the draft Order to breach include:

17.2. **Part 3 of the Regulations** Competent authorities are required to provide a clear process for their authorisation scheme and that any scheme meets the requirements within the Regulations. Businesses cannot be prohibited from delivering a services activity due to an economic test, involvement of competing operators or other requirements such as quantitative or territorial restrictions, minimum number of employees etc.

17.3. Competent authorities are **obliged not to impose disproportionate or unnecessary requirements** on businesses that seek to provide services, unless justified. We have queried above the failure of the Scottish Government to date to provide a sound, evidence-based justification for its approach.

17.4. Conditions for the granting of authorisation

17.4.1 An authorisation scheme must be based on criteria which preclude any competent authority from exercising its power of assessment in an arbitrary manner.

17.4.2 The criteria must be: (a) justified by an overriding reason relating to the public interest (ORRPI); (b) proportionate to that public interest objective; (c) clear and unambiguous; (d) objective; (e) made public in advance; and (f) transparent and accessible.

17.4.3 We have set out above our views that the Scottish Government has failed to provide empirical data to support the proposition that these requirements are necessary and justified in the public interest or that they are objective or proportionate.

17.5. Fees

17.5.1. Fees charged by a competent authority under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme, and must not exceed the cost of those procedures and formalities. See regulation 18(4) of the Regulations.

17.5.2. **Fees should not be used as an economic deterrent to certain activities or to raise funds.** If a business believes the fee to be disproportionate, they can contest it with the competent authority concerned.

17.5.3. We have set out above why we consider that the fees approach proposed is excessive, disproportionate and constitutes a real deterrent to many small businesses in raising funds or simply continuing to operate.

18. POTENTIAL HUMAN RIGHTS VIOLATION (PROTOCOL 1, ARTICLE AND ARTICLE 17 OF THE CHARTER ON FUNDAMENTAL RIGHTS – RIGHT TO PROPERTY

18.1. **We seriously question whether the draft Order is compliant with the European Convention on Human Rights (“ECHR”). Protocol 1 Article 1** provides that every natural or legal person is entitled to peaceful enjoyment of their possessions. To be deemed compatible with Article 1 of Protocol No. 1, the interference must fulfil certain criteria: it must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised. It is in our opinion clear that the draft Order fails to comply with the latter.

18.2. The specific public interest objective being pursued by the Scottish Government via this Order is unclear and as already articulated above, not sufficiently explained or underpinned by clear, sound data or evidence. There appears to be no account taken of the following:

- 18.2.1. the existing regulatory framework for short-term lets. There is no substantive evidence put forward to support the proposition that this existing framework is not fit for purpose or that the proposed measures are necessary and capable of effectively addressing potential issues such as availability of affordable housing and safety of short-term lets. This results in the draft Order failing to be in the general interest; and
- 18.2.2. the lack of data to support the draft Order further underlines it ought to be regarded as irrational and arbitrary, such as in the case of *R (Kensall) v Secretary of State for Environment* [2003] EWHC Admin 459, where measures were found to be in convention of ECHR rights.
- 18.3. The proposed framework includes several aspects which prima facie look to be subjective and could lead to irrational decisions and/or disproportionate interference with property rights:
- 18.3.1. the short time duration of licenses, being three years, means that interference with peaceful enjoyment is extremely frequent and imposes an excessive burden, as in *Sporrong and Lönnroth v Sweden* [1983] 5 EHRR 35 where measures were found to be in contravention of the right to peaceful enjoyment of property;
- 18.3.2. the framework would appear to levy excessive, irregular and currently unquantifiable costs upon licence-holders and applicants; and
- 18.3.3. there are more proportionate and less intrusive measures available to the Scottish Government, including a mandatory registration scheme, as proposed by the ASSC previously.
- 18.4. We also challenge whether the draft Order would be in compliance with the Charter of Fundamental Rights of the European Union (the “Charter”). Whilst the Charter no longer has effect in UK law following Brexit, the Scottish Government has made clear its desire to stay aligned with EU law as far as possible, and protect rights that existed for UK citizens.
- 18.5. Article 17 of the Charter provides that everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions, and the use of property may be regulated by law in so far as is necessary for the general interest. For the reasons outlined above, we do not consider that objectively, a case has been made, backed up by evidence that the draft Order is either in the general interest or is only interfering in use of property so far as necessary.

19. BETTER REGULATION AGENDA AND THE REGULATOR’S STRATEGIC CODE OF PRACTICE

- 19.1. **We consider that the draft Order creates a regulatory framework that is manifestly inconsistent with the Scottish Government’s Better Regulation Agenda** [18] and the principles of regulation being proportionate; consistent; accountable; transparent and targeted only where needed
- 19.2. Furthermore the draft Order creates a framework that is inconsistent with the Regulator’s Strategic Code of Practice to which local authorities as regulators must have regard under Section 5 (5) of the Regulatory Reform (Scotland) Act 2014 in exercising any regulatory functions.
- 19.3. **In particular we consider that the draft Order would effect breaches of the Code in the following manner:**
- 19.3.1. **Clause 2 of the Code:** Regulators should pursue a positive enabling approach in their pursuit of outcomes, which contribute to ‘sustainable economic growth’. **[Section 4 and 5, Paper 2: Draft Licensing Order]** demonstrate the drastic economic consequences that will inevitably result from the new regulatory proposal.
- 19.3.2. **Clause 2 of the Code.** Regulators require to be committed in their decisions, actions and policies to the five principles of better regulation: regulation should be transparent, accountable, consistent, proportionate and targeted only where needed. However, as has

been outlined above, the ASSC considers the entire framework to be disproportionate, potentially inconsistent in its application between regulators (e.g., local authorities) and that, without empirical data, seeks to regulate distinct sections of the self-catering industry in a blunt and blanket manner manifestly failing to target its regulation at genuine, identified issues.

19.3.3. **Clause 3 of the Code requires Regulators to be enablers** to help support businesses to grow sustainably. The draft Order for all of the aforementioned reasons cannot meet this objective it will stifle rather than support small businesses in this sector. This regulatory framework would also force regulatory decisions to be taken in a manner that is entirely inconsistent with many of the principles in this clause including:

- (a) minimising business compliance costs, where possible, by reducing unnecessary bureaucracy and delays;
- (b) helping those they regulate to design simple and cost-effective compliance solutions to improve confidence and day to day management control.

REFERENCES FOR LICENSING ORDER SECTION – QUESTION 1

- [1] Scottish Government, ‘Short-Term Lets Stakeholder Working Group’, Url: <https://www.gov.scot/groups/short-term-lets-stakeholder-working-group/> [Accessed 10/08/21]
- [2] ASSC, ‘Short-Term Let Working Group’, 26/02/21, Url: <https://www.assc.co.uk/short-term-let-working-group/> [Accessed 10/08/21]
- [3] ASSC, *ASSC Submission to Scottish Parliament Local Government & Communities Committee* (January 2021). Url: <https://www.assc.co.uk/wp-content/uploads/2021/01/ASSC-Submission-to-Scottish-Parliament-Local-Government-and-Communities-Committee.pdf> [Accessed 10/08/21]
- [4] ASSC, *Sectoral Survey into the Impact of the Proposed Licensing Scheme for Short-Term Lets Across Scotland* (October 2020). Url: <https://www.assc.co.uk/wp-content/uploads/2021/01/ASSC-licensing-survey.pdf> [Accessed 10/08/21]
- [5] ASSC, *Short-Term Rental in Scotland: White Paper & Policy Recommendations* (October 2017). Url: <https://www.assc.co.uk/policy/short-term-rental-in-scotland-white-paper-policy-recommendations/> [Accessed 10/08/21]
- [6] Further information on the benefits of registration over licensing can be found at ASSC, *Licensing or Registration for Short-Term Lets in Scotland* (August 2020). Url: <https://www.assc.co.uk/wp-content/uploads/2020/09/Licensing-or-Registration.pdf> [Accessed 10/08/21]
- [7] ASSC, *Long-Term Approach to Short-Term Letting* (February 2019). Url: <https://www.assc.co.uk/policy/policy-paper-the-long-term-future-for-short-term-letting/> [Accessed 10/08/21]
- [8] ASSC, *Short-Term Rental in Scotland: White Paper & Policy Recommendations*
- [9] ASSC, *ASSC Submission to Scottish Parliament Local Government & Communities Committee: Appendices* (January 2021), p13. Url: <https://www.assc.co.uk/wp-content/uploads/2021/01/ASSC-Committee-Submission-Appendices.pdf> [Accessed 10/08/21]
- [10] Scottish Government, *Paper 2: Draft Licensing Order and Policy Note* (2021), p8.
- [11] *Ibid*, p13.
- [12] Estimation from SOLAR quoted in Scottish Government, *Short Term Lets Working Group papers and minutes: February 2021*. Url: <https://www.gov.scot/publications/short-term-lets-working-group-minutes-february-2021/>

[Accessed 10/08/21]

[13] ASSC, 'Local Authority Responses to the Scottish Government STL Consultation', 13/12/20. Url: <https://www.assc.co.uk/local-authority-responses-to-the-scottish-government-stl-consultation/>

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[14] 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/> [Accessed 10/08/21]

[15] ASSC, *ASSC Submission to Scottish Parliament Local Government & Communities Committee* (January 2021), p6.

[16] 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.lawscot.org.uk/media/369667/20-10-16-plan-lic-consultation-short-term-lets-regulations.pdf> [Accessed 10/08/21]

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[18] Scottish Government, 'Supporting business – business regulation'. Url:

<https://www.gov.scot/policies/supporting-business/business-regulation/> [Accessed 10/08/21]

Consultation Questions

2. For Paper 3: Draft Business and Regulatory Impact Assessment (BRIA) - please state your issues and how to resolve them:
Please provide any comments and any suggestions you have to resolve this.

Paper 3: Draft BRIA

1. LACK OF SUPPORT FROM BUSINESSES CONTRARY TO “DECLARATION AND PUBLICATION”

Page 45 of the Draft BRIA: Declaration and Publication:

“I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.” Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison, MSP.

The BRIA is NOT supported by businesses, or tourism bodies in Scotland. If it were, the ASSC, the Scottish B&B Association, Airbnb and UK Short-Term Accommodation Association would not have resigned from the Short-Term Let Working Group. Contrary to commitments made by the Scottish Government, the Working Group has not adequately addressed concerns from stakeholders following the withdrawal of the Licensing Order in February 2021.

2. HOTELS & HOSTELS V SHORT-TERM LETS

- 1.1 According to the Draft Business and Regulatory `Impact Assessment for Consultation, *“some visitors displaced by a reduction in short-term let capacity may use other forms of accommodation, such as hotels and hostels. This may also encourage the further provision of these types of accommodation”*.^[1]
- 1.2 **A loss in capacity of professional self-catering and B&Bs may result in unintended consequences in relation to responsible tourism. If self-caterers / B&Bs are forced out of business then people may move even more towards campervans which simply increases carbon impact.**
- 1.3 This cannot be in line with the Scottish Government’s commitment to Better Regulation, or the National Performance Framework objectives.
- 1.4 The availability of short-term lets provides travellers with numerous benefits and there is demand for this type of accommodation due to consumer trends. Scotland’s tourism industry risks losing out in this competitive marketplace if the Scottish Government provides hotels and hostels preferential treatment, as inferred from the aforesaid comment in the BRIA.
- 1.5 Moreover, it is simply not practical or feasible to suggest that hotels or hostels could accommodate all those visitors displaced by a reduction in short-term let capacity, especially when one considers that, for example, many self-catering units are in remote locations in Scotland.

3. LACK OF RESEARCH AND DATA ON RURAL AREAS WHICH MAKE UP 98% OF SCOTLAND’S LAND MASS

- 2.1 (B1.7) *“The BRIA noted it has based its research on the range of approaches adopted in cities and countries around the world”*. With that in mind, we would ask how much research was undertaken in rural areas across Scotland?

2.2 (B1.13) The BRIA refers to consultations dated 2019, 2020 and 2021. There is reference that such consultations were to a point no further north than Fort William. This excluded approximately one third of Scotland's land mass, the vast majority of which is classified as rural. **Why was this area excluded from the consultations when it is home to such a large number of professionally run short-term lets?**

2.3 According to Scottish Land & Estates, 14 % of SMEs (by industry sector) in rural Scotland are directly linked to the accommodation and food services businesses. For urban it is just 9%. **Has it been calculated how many of these SME's will potentially go out of business, with additional unemployment consequences, if these regulations were to go ahead?**

2.4 Rural neighbourhoods with anti-social behaviour problems account for only 14% of those surveyed, and the largest element of this (making up 4% of the 14%) is due to noisy neighbours, not visitors. In urban areas the total figure for anti-social behaviour is 43% which is approximately over three times higher. There is mention in the current proposals that Scottish Government anticipate a benefit, in that the regulations will cut down on these problems. **Why are the same regulations and obligations being imposed upon rural businesses when the greatest such problems are clearly linked to urban areas such as Edinburgh? The powers already exist with local authorities and Police Scotland to deal with such issues.**

4. ABSENCE OF EMPIRICAL DATA SHOWING ANY LINK BETWEEN SHORT-TERM LETTING AND LACK OF/PRICE OF HOUSING STOCK

3.1 There is **no baseline data on which to evidence a link between short-term letting and loss of housing stock or increasing house prices**. This assumption is based on anecdote and narrative. In addition, any figures should be placed in context: for instance, **there are five times more empty houses in Scotland than self-catering units**.^[2]

3.2 ASSC has provided empirical data regarding the impact of short-term letting on housing.^[3] This has been unilaterally ignored in favour of Airbnb listings data.

3.3 There is a clear repeated policy intention to reduce the stock of short-term lets to increase availability of housing / encourage a *"Better functioning housing market"*.^[4]

3.4 **Housing should be addressed by the Planning Act 2019, with Planning Control Zone legislation having been passed in February 2021**. Housing issues should not play a part in this legislation. Scotland's housing challenges are multifaceted and seeking to reduce the number of short-term lets as a panacea is completely wrongheaded.

5. ABSENCE OF EMPIRICAL DATA ON ANTISOCIAL BEHAVIOUR

4.1 A well-run business will not incur either noise or nuisance to neighbours. However, should there be occurrences of either, **existing anti-social behaviour legislation specific to holiday lets is already in existence**. Local councils need to utilise this legislation.

4.2 The Scottish Government should set out just how many complaints have been received by all local councils in relation to holiday lets and how many times local councils have used existing legislation to deal with any problems. This should also be viewed within the context of the total number of holiday let properties in Scotland.

4.3 **An FOI has been requested from 32 local authorities by the ASSC about the reported incidences of anti-social behaviour (ASB) attributed to holiday lets from 2018 to 2021**, as well as making a comparison with ASB in other types of housing tenure.^[5] This demonstrated that:

- 4.4 **Complaints against holiday lets remain extremely rare in many parts of Scotland**, especially in rural areas, and these figures are a drop in the ocean compared to ASB complaints against other housing tenures.
- 4.5 For example, in **East Ayrshire, Scottish Borders and Perth & Kinross Councils**, there was just one ASB complaint against holiday lets received in each authority from 2018 to 2021, with **Clackmannanshire and Shetland Councils** receiving no ASB complaints over the same period.
- 4.6 From 2018 to 2021, **North Ayrshire Council** received two ASB complaints against holiday lets, while over the same period received 447 complaints for other housing tenures such as private or non-owner occupier. **North Lanarkshire Council** had 6 ASB holiday let complaints but 3,232 ASB complaints for other housing tenures.
- 4.7 The FOIs also showed that **local councils are not using the Antisocial Behaviour Notices (Houses Used for Holiday Purposes) (Scotland) Order 2011** in response to the limited number of complaints against holiday lets, which the **former Minister for Housing Kevin Stewart** described as *“quite comprehensive powers to deal with antisocial behaviour and noise nuisance”*, before noting that *“I expect them to use those powers effectively...I challenge local authorities to consider using it [Order 2011] and other antisocial behaviour powers, as well as the powers in relation to noise and environmental health that are currently at their disposal.”*[6]
- 4.8 In terms of background, **Part 7 of the Antisocial Behaviour etc. (Scotland) Act 2004** enables local authorities to serve an Antisocial Behaviour Notice on a private landlord when an occupant or visitor engages in antisocial behavior at, or in the locality, of the property. Furthermore, the Scottish Government introduced the **Antisocial Behaviour Notices (Houses Used for Holiday Purposes) (Scotland) Order 2011** that granted local authorities the power to deal specifically with the problem of antisocial behaviour in properties let for holiday use.
- 4.9 To again quote the Minister formerly in charge of short-term let regulation, Kevin Stewart MSP: *“The [ASB] powers may not be being applied properly, which might be the difficulty in all this...Under the order that I mentioned, the antisocial behaviour notice is served not on the people in the property who are causing the problem but on the landlord. That is extremely important. Folk having left a property should not affect in any way, shape or form the serving of a notice on the landlord.”* [7]

6. ABSENCE OF EMPIRICAL DATA ON CRIMINAL USE

- 5.1 The use of short-term let accommodation for criminal enterprises (such as drug dealing, sex trafficking), with or without the collusion of the host is cited as a negative externality in the BRIA.
- 5.2 Again, **there is no empirical data on this activity to suggest that it is an issue**. At best, it is anecdotal. It is insulting to suggest that dedicated, hardworking and professional self-caterers would utilise their properties for criminality.

7. ABSENCE OF EMPIRICAL DATA ON SCALE OF SHORT-TERM LETTING

- 6.1 The Scottish Government has simply not sought to secure empirical data regarding the scale of the short-term let sector.
- 6.2 To quote one senior Scottish Government official:

“Recent figures (1 June) show that there are approximately 17,850 self-catering properties on the NDR roll and over 1,400 small accommodation providers on the council tax register (although this figure includes B&Bs and guest-houses alongside self-catering premises). The 32,000 quoted in the

[BRIA](#) relates to Airbnb listings (May 2019), of which around 70% were entire properties, and is taken from our [independent research](#).

“There are a number of challenges in gauging the size of the STL market which are highlighted in para 127 of the BRIA. In addition to short-term lets that are listed as self-catering properties on the NDR register, there are a range of short-term lets that pay council tax, rather than non-domestic rates. Our licensing scheme aims to resolve issues around robust data on the size of the short-term let sector in Scotland.

“The assessors roll is a live administrative document and the overall number can and does change from day to day when assessors make changes, hence the most recent 17,997 figure you have quoted based on SSA data.

“Scottish Government analysts take quarterly snapshots (Jan, April, July, October) each year and 1 annual snapshot to match to our annual NDR billing data (which this year was 1 June).” [8]

6.3 Point 127 of the BRIA shows a lack of understanding of the sector and a clear disregard for the number of businesses that licensing may affect. A footnote states that, *“a host currently pays non-domestic rates if their property is not their main residence and intended to be let commercially for at least 140 days per year”* and yet in the body of the text, *“It is hard to be definitive about the number of businesses affected because of a lack of robust data about the sector (which the licensing scheme will resolve) and because the classification of a property as non-domestic does not necessarily mean it is part of a business”*. This is clearly not the case, and issues regarding second home applying for Small Business Bonus Scheme was resolved by the Barclay Review. If a property is available for let for under 140 days, the property is in the Council Tax system; if it is available for let for over 140 days and actually let for 70 days, the property is eligible for non-domestic rates.

6.4 The BRIA does not reflect any data provided by the ASSC in terms of professional operators and the economic impact of the sector and is instead entirely reliant on data from Airbnb. **Scottish Government policy should not be driven by one commercial operator’s data but should be robustly and independently evidenced.**

6.5 A licence should not be used as a way to resolve a lack of robust data. [9] **A registration scheme should be used to provide empirical data**, and a licence can be introduced to resolve evidence led problems, as illustrated in Portugal.

6.6 **Airbnb listings:** The assumption in the BRIA that there are 32,000 short-term lets is based on the number of listings on Airbnb, not empirical data. It should be noted that the number of listings on Airbnb is not reflective of number of properties. For example, a five-bedroom house could easily have 6 (or more) listings: one for each room plus the entire property. In addition, duplicate listings can result in greater visibility, therefore deliver more bookings, making additional listings appealing to some.

7 CONCLUSION

7.1 Overall, the ASSC has set out a number of concerns relating to the Licensing Order and the BRIA, as well as the process related to the proposed regulations.

7.2 The Short-Term Let Working Group has failed to fulfil its remit to respond to industry concerns and our proposal mandatory registration was not properly considered. Furthermore, the revised regulations do not contain any substantive changes which will benefit self-catering or B&Bs and in fact contain additional provisions which will inhibit the recovery of Scottish tourism.

- 7.3 It is extremely disappointing that after years of regulatory discussion, where the industry has been constructive and cooperative, offering up data, their expertise and insight, as well as evidenced-based policy recommendations, that it is still unclear what that the Scottish Government are seeking to achieve through their proposals.
- 7.4 If the policy rationale is to address health and safety issues, this could be secured through the industry's mandatory registration proposals.
- 7.5 If the policy rationale is to address anti-social behaviour, this could be achieved by enforcing existing legislation such as the Anti-Social Behaviour (Houses Used for Holiday Purposes) (Scotland) Order.
- 7.6 If the policy rationale is to address housing, this could be accomplished through the short-term let control zone regulations in the Planning (Scotland) Act and basing policy on empirical data.
- 7.7 A disproportionate licensing scheme as set out in the Licensing Order, plus the control zone provisions in the Planning Act, would amount to the strictest regulatory framework in Europe and would come at the worst possible time for the self-catering industry given the impact of Covid-19.
- 7.8 This would materially impact the Scottish tourism industry at a time when the Scottish Government should be supporting small businesses for a sustainable recovery.
- 7.9 We do not have confidence in the data underpinning the BRIA and the failure of the Working Group to respond to industry concerns led the ASSC, as well as the Scottish B&B Association, Airbnb, and the UK STAA, to resign their membership in August 2021.
- 7.10 The Licensing Order was unfit for purpose in February 2021, when it was withdrawn, and it remains unfit for purpose in August 2021, as the Working Group have not properly engaged with industry, nor made any substantive changes to the regulations.
- 7.11 However, viable and cost-effective alternatives exist – a mandatory registration scheme – and this would be the best means of securing the Scottish Government's policy objectives on health and safety in a manner which also enables the industry to recover from the pandemic. We would implore the Scottish Government to revisit their short-term let proposals to support small tourist accommodation businesses in Scotland at this critical time.

REFERENCES FOR BRIA SECTION – QUESTION 2

- [1] Scottish Government, *Draft Business and Regulatory Impact Assessment for Consultation*, p34.
- [2] ASSC, *Far More Than Just Houses: The Benefits of the Short-Term Rental Sector to Scotland* (June 2018). Url: <https://www.assc.co.uk/wp-content/uploads/2018/06/MoreThanJustHouses.pdf> [Accessed 10/08/21]
- [3] ASSC, *Short-Term Letting and The Housing Crisis* (February 2020). Url: <https://www.assc.co.uk/policy/short-term-letting-and-the-housing-crisis/> [Accessed 10/08/21]
- [4] Scottish Government, *Draft BRIA*, p36.
- [5] More details about the FOIs from the local authorities in Scotland is available on request from the ASSC.
- [6] Kevin Stewart MSP quoted in Scottish Parliament., *Official Report*, 08/11/17. Url: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=11177> [Accessed 10/08/21]
- [7] *Ibid*
- [8] Email from 30th June 2021 from Andrew O'Neil, Assistant Economist, Culture & Tourism Economics, Office of the Chief Economic Adviser, to the ASSC.
- [9] Scottish Government, *Draft BRIA*, p37.