



Law Society  
of Scotland



# Consultation Response

## Short-Term Lets

July 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to Scottish Government's consultation on *Short-Term Lets*<sup>1</sup> (the consultation). The short-term lets sector spans a broad range of legal interests including planning law and enforcement, licensing matters relating to possible registration or licensing schemes, property law particularly in the context of flatted properties, equalities and disabilities, consumer matters, criminal issues around anti-social behaviour and enforcement, and tax, both in relation to income and rates. As a result, a number of our committees have contributed to this response including the Planning Law sub-committee, Licensing Law sub-committee, Property and Land Law Reform sub-committee, Mental Health and Disability sub-committee, Criminal Law Committee, and Tax Law sub-committee.

We have the following comments to put forward for consideration.

## General comments

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Short-term lets have become the subject of much discussion<sup>2</sup> as the popularity of Airbnb and other platforms has grown as well as of other forms of temporary letting arrangements outlined in Annex A of the consultation. It seems clear that the problems created by short-term letting do not affect all areas of Scotland or all types of property in a consistent fashion although a robust evidence base at this stage other than anecdotal may be somewhat hard to discern. The problems appear to affect Edinburgh and other major cities. It is recognised that other areas may also face challenges with short-term letting, and these issues may differ from those arising in the major cities. It should be recognised the short-term letting in rural areas is also commonplace.

<sup>1</sup> <https://www.gov.scot/publications/short-term-lets-consultation-regulatory-framework-scotland/>

<sup>2</sup> As referred to at paragraph 1.1 of the Consultation

The potential impacts of short-term letting may include a restriction of available accommodation and there appears to be some evidence of adverse amenity issues for adjoining proprietors, particularly in the context of flatted properties. The benefits of short-term letting to the tourist industry and wider commercial economy also require to be recognised. While we recognise the importance of regulation of the sector, it is important to balance the positive and negative impacts of short-term letting.

We support a comprehensive review as to the nature and extent of any regime which should be put in place in relation to short-term lets. We note the provisions of section 11B of the Planning (Scotland) Bill, passed in June 2019, which empowers planning authorities to designate all or part of its area as a short-term let control area. In such an area, section 11B specifies that “the use of a dwellinghouse for the purpose of providing short-term lets is deemed to involve a material change of use of the dwellinghouse”.

Given the problems are not universal and consistent, we consider it appropriate that any regime to be put in place should be of a discretionary nature enforced on a local authority by local authority basis. Irrespective of the decisions to be taken on the creation, nature and extent of any regime, there does seem to be a need for definitions to be created as to what the various terms relating to short-term lets mean. That promotes consistency in the public and other interested parties’ understanding of the rules and regulations that apply to the circumstances of letting property in the short-term as opposed to being on a longer-term basis.

What appears to be lacking at present is a comprehensive understanding of such rules and regulations that affect not only those that want to let properties on a short-term basis but also those seeking to rent such a property, the health and safety standards that apply to the property and regulation of the conduct of those renting such properties. The current legal position in terms of whether short-term lets represent a material change of use in the context of planning law is unclear. It is a matter of fact and degree and there is uncertainty as to when the use as a dwelling-house or flat changes.

By promoting clarity of the existing legal framework, this will help to identify the gaps that need to be addressed and enhance public awareness and knowledge. Some of this information could be hosted by the Local Authorities on their public facing websites. This, at least in the short-term, would seem to be helpful.

Moving to consider what legislative changes may be required is a longer-term solution. We consider it important that there is a clear evidence base for taking steps to regulate the sector in order that the issues arising are clearly understood and the regulatory framework can adequately address the matters at which it is targeted. We recognise the Scottish Government’s commitment to pilot any registration or licensing regime following consultation and would support this approach. We also note that phased implementation may be required to allow those currently operating in the sector to adhere to any requirements.

## Consultation questions

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### **1. Are you aware of any additional data on the impacts of short-term lets (over and above that set out in Annex A – The Short-Term Rental Sector, Housing and Tourism in Scotland) which the Scottish Government should take into account when considering proposals for regulation?**

We have no comment on this question. We note that there are some limitations with existing evidence.

### **2. Should a regulatory framework distinguish between sharing, swapping and secondary letting?**

We note that there may be some benefit in such distinctions being made in the context of a regulatory framework. In particular, the positive or negative impacts of short term letting and the extent to which any issues arise may vary depending on the type of letting. If such distinctions are to be made, it will be necessary for clear definitions, as set out in paragraph 3.6, to be in place so that individuals and businesses can clearly identify and understand the category within which their letting falls. A property may be used over time in a number of different ways including for sharing, swapping or secondary letting, and any framework will require to be capable of addressing such changes.

In respect of the provisions of section 11B of the Planning (Scotland) Bill, we note that “a tenancy of a dwellinghouse (or part of it) where all or part of the dwellinghouse is the only or principal home of the landlord or occupier” is excluded from the definition of a short-term let under that section.

### **3. Should the rules be capable of being different depending on the type of accommodation? For example, to distinguish between tenement flats and detached houses.**

It is important to recognise that in a number of planning enforcement cases and appeals relating to short-term letting, the adverse amenity impacts of a short-term let on common stairs and doors is often cited as an issue. Without citing any examples, it may be the case that the impacts of short-term letting on adjoining proprietors is no worse than longer term occupiers. The impacts that would arise in the context of terraced, detached or semi-detached properties (with their own main door) is likely to be less than with flats with shared common parts.

While we recognise that certain types of property may experience different challenges or benefits of short-term lets, we consider it most appropriate that the focus is on the type and purpose of the let rather than the type of property. Depending on the approach taken to any regulatory framework, there may be scope to

recognise differences in types of property particularly in relation to shared or common parts, for example in the provisions of a Code of Conduct.

#### **4. Do you have any comments on any other aspect of the definition of short-term lets?**

It is important that the matters are clearly defined and that any definitions can be clearly understood. Short-term let is not currently a defined term, for example there is no definition in the Planning (Scotland) Bill although the relevant section provides that Scottish Ministers may issue guidance on “what constitutes providing a short-term let for the purposes of this section”<sup>3</sup>. There is the potential for clear difficulties in setting limits related to the duration of let. In terms of the provisions relating to London, a decision was taken to aggregate short-term letting within the same calendar year on the basis that exceeding 90 nights of use of the property as temporary sleeping accommodation would be a material change of use<sup>4</sup>.

While we support a framework regime with the opportunity for local authorities to choose which, if any, measures to implement within their area, we consider it appropriate that definitions are consistent across all local authority areas and therefore support these being set at a national level. This will help to ensure clarity and consistency for all those operating in the sector including hosts, guests, platforms, intermediaries and others.

#### **5. Do you have any comments on the positive or negative impacts of short-term lets?**

As referred to above, we consider it important to balance the positive and negative impacts of short-term letting. We note that the full nature and extent of these impacts are largely unknown and not supported by quantitative evidence. The need for such evidence as highlighted above is required in order to fully understand the impacts of the short-term lets market. We support an evidence-based approach to implementing a framework scheme for regulation of the sector. That seems to us to be a pre-requisite although there are steps that can be addressed at present to identify and assist with the issues that have been identified in the consultation. We consider that there is merit in comparing and having regard to approaches to both data collection<sup>5</sup> and regulation in other countries and cities<sup>6</sup>.

We note that while loss of amenity to neighbourhoods is identified in the consultation, there may be wider environmental impacts which are not specifically identified, including a potential impact on parking.

<sup>3</sup> Planning (Scotland) Bill, section 11B.

<sup>4</sup> Deregulation Act 2015, section 44.

<sup>5</sup> For example, arrangements in Portugal which aims to allow for the cross-referencing of data in relation to short-term let properties. See commentary here: <https://www.auraree.com/portugal/hospitality/portuguese-government-wants-platforms-cross-reference-data-like-airbnb/>

<sup>6</sup> Including the examples set out in Annex B to the consultation.

We also note the potential for difficulties arising where individuals letting property do not have appropriate buildings and contents insurance in place, may be in breach of their conditions of a standard security (commonly referred to as a mortgage) or a lease, and/or may be acting in contravention of a real burden in the title to their property. Although it could be argued that the right for an individual to let their property is an intrinsic element of ownership, there are responsibilities of ownership with regard to neighbours that should be considered. Owners may not be aware of these requirements. There may be scope to ensure that information is publicly available, for hosts, guests, and platforms, about these requirements. While this may do little to reduce the prevalence of short-term lets, it may have the benefit of ensuring that hosts are compliant with existing legal frameworks. There may also be implications in the context of Development Management Schemes where there is no compliance with the requirements. Exactly how and where the balance lies between the interests of owners of properties using their property for short-term letting and the interests of neighbours and the wider community may be a matter for Scottish Government in considering both the publicity required in relation to short-term letting and the need for some kind of licensing or registration regime being established.

## **6. Do you have any examples of other positive or negative impacts of short-term lets?**

We have no comment on this question.

## **7. Do you have any comments about the impact of short-term lets on the housing market?**

We note that while there is limited quantitative evidence available in relation to the impact of short-term letting on the housing market, it is reasonable to assume that the availability of short-term letting will be a desirable outcome stream for many second homeowners and purchasers. While we do not have evidence for the following assertion, this appetite may have the effect of increasing the capital value of properties in certain areas with consequent impacts on a reduction of available affordable housing. There is a potential for this to have a disproportionate impact on certain types of property in the market, for example student accommodation or properties which may traditionally be purchased by first-time buyers.

In addition, 'secondary letting' is likely to have differing impacts on the market to 'sharing' or 'swapping', as it has greater potential to result in properties lying empty while not being let or properly maintained, or for properties to be sold by owners in the event that they are no longer able, for whatever reason, to use the property for short-term letting. The possibility of unintended consequences arising as a result of a regulatory regime should be carefully considered.

## 8. Do you have any comments on the restrictions imposed on short-term lets by planning law?

In the event that the use of a property is a material change of use, then it will be vulnerable to enforcement under planning law. The law in this area is uncertain in a sense that each case requires its own assessment.

An important case in this area is *Moore v Secretary of State for Communities and Local Government*<sup>7</sup>. Although this is an English case, it is persuasive in terms of Scottish planning law. Whether a material change of use has occurred is a question of fact and degree. The court held that the answer depended on the particular characteristics of the use as holiday accommodation. It was not correct to say that using a dwelling-house for commercial holiday lettings would always amount to a material change of use; nor was it correct that it could never amount to a change of use.

In this case the inspector identified the following factors as relevant:

- the pattern of arrivals and departures, with associated traffic movements,
- the unlikelihood of occupation by a family or household group,
- the numbers of people constituting the visiting group on many occasions, and
- the likely frequency of party type activities and the potential lack of consideration for neighbours

On that occasion, the inspector considered that the use of the property as part of the appellant's holiday letting business was a material change of use.

Another important case is *Gravesham BC v Secretary of State for the Environment*<sup>8</sup>, which considered the meaning of 'dwelling-house' and concluded that the distinctive characteristic was its ability to afford to those who use it the facilities required for day-to-day private domestic existence. The court firmly rejected the notion that such a building ceased to be a dwelling-house because it was occupied only for part of the year, or at infrequent or irregular intervals or by a series of different persons.

Whether a material change of use has occurred requires a detailed assessment of each case. Given the sheer scale of such a potential undertaking, that may have been a consideration for the UK Government in supporting a time restriction (90 day aggregate in any year) basis for regulating short-term letting in Greater London<sup>9</sup>.

<sup>7</sup> [2012] EWCA Civ 1202.

<sup>8</sup> (1982) 47 P&CR 142.

<sup>9</sup> See Deregulation Act 2015, section 44.

## **9. Do you have any comments on powers to tackle antisocial behaviour caused by short-term lets?**

We note that there is a limited evidence base in respect of antisocial behaviour issues caused by short-term lets. While short-term lets will generate a degree of noise and disturbance in their turnover, in some cases this may be no different to that experienced from permanent occupiers.

We consider that there requires to be a consistency in the treatment of antisocial behaviour regardless of the context within which it arises and short-term lets should not be distinguished in their treatment. There would be benefit in greater information being available and publicised about the applicable law so that all those using such properties and those affected by any such behaviour arising can easily find out about and understand the law which applies.

We recognise that criminal law may be used to enforce certain types of offending behaviour but in reality, the nature of the person occupying such properties are transient who may be hard to pursue let alone enforce anything other than the commission of serious offences.

## **10. Do you have any comments about complaint systems for short-term lets?**

We consider it important that a clear, widely accessible and effective complaint system is in place and that potential complainers are aware of its existence. In the event that a new regulatory framework is introduced, consideration will require to be given as to whether new complaint mechanisms are also required or whether existing systems can adequately deal with complaints arising. It is necessary for the system to be provide real solutions where legitimate complaints are upheld. A complaints system which has no meaningful outcome is likely to merely compound existing frustrations of neighbours and others.

## **11. Do you have any comments on safety issues related to short-term lets?**

We note the importance of let property being of a suitable standard and adhering to any appropriate legal requirements for safety. We consider that there would be merit in short-term let properties being required to comply with fixed safety standards. This could be in line with the requirements for properties in the private rented sector as a minimum.

If any safety regime is discretionary, there is the potential for tensions arising between areas where properties do not need to comply as opposed to the areas where they do and the potential for uncertainty for hosts or guests operating across multiple areas. There is a need for safety requirements to be well publicised and clearly understandable for both hosts and guests. It is important that any safety requirements which are put in place can be appropriately enforced and consideration should be given to appropriate compliance mechanisms.



In order to comply with human rights norms, it is necessary that safety requirements include the needs of people with physical, sensory and cognitive disabilities.

## **12. Do you have any comments on eligibility for non-domestic rates?**

We have no comment on this question.

## **13. Do you have any comments on the additional eligibility requirements recommended by the Barclay Review?**

We have no comment on this question beyond noting that we support the recommendations of the Barclay Review.

## **14. Do you have any comments on the eligibility of self-catering accommodation for the Small Business Bonus Scheme?**

We have no comment on this question.

## **15. Do you have any other comments on taxation relating to short-term lets?**

We consider that the treatment and use of property for business purposes should require to be supported by evidence in order to ensure that reliefs are applied fairly and as intended. Income derived from short-term lets will clearly be liable to taxation.

## **16. Do you have any additions or amendments to the proposed design principles?**

We do not suggest any additions or amendments. We note the importance of any framework being clear and understandable for individuals and businesses so that they may guide their conduct appropriately.

## 17. Do you have any comments on the proposed scope of a regulatory framework?

If any regulatory framework is proposed, we consider there would be merit in their being discretion for local authorities given the differing issues and extent of issues faced in relation to short-term letting. We note that proposed changes in respect of planning law or licensing would require legislation, however, in the meantime, there may be scope for raising awareness and making more information available as to regulations that currently apply and existing sources of assistance, for example planning legislation in relation to a 'material change of use', enforcement of real burdens, environmental health, and anti-social behaviour. We agree in the longer term there should more specific policy set out on how to resolve the issues which are identified in the consultation.

We consider that a mandatory scheme is not required for the reasons that we outline above, in particular as a result of the differing impacts of short-term lets between geographical areas and types of letting and properties. There is precedent for a discretionary approach as the Civil Government (Scotland) Act 1982 distinguishes between mandatory and discretionary licences. We would also have concerns over the application of a mandatory system on a Scotland-wide basis as this could have disproportionate impacts or unintended consequences on certain areas, for example rural areas which may be more heavily dependent economically on attracting visitors than urban areas. Additional regulations and the consequential costs that could apply to the homeowners in respect of licence or planning application costs or costs of compliance or renovation may in some cases be disproportionate to the income derived from such lets.

A private landlord registration type scheme could be put in place, but we suggest that careful consideration should be given to the scope of any such scheme. For example, some of the housing repair standards and requirements for electrical and gas safety inspections required in connection with such registration may be perceived as being excessive, for example if it were to be applied to those operating short-term letting on a 'sharing' basis. We also note that there are similarities with other housing licensing arrangements, in particular the house in multiple occupation licensing regime<sup>10</sup>.

We recognise that there is a difference between renting out a property via an online platform for a few days or 'sharing' letting as opposed to either short- or long-term commercial or business letting. Exemptions may be appropriate from any regulatory scheme where the owner is residing in the property during the period of the let, i.e. 'sharing'.

Any licensing scheme would place certain obligations on the property owner to be licensed (i.e. the host) but consideration needs to be given as to whether any secondary obligations should be placed on the platform used to advertise the let and/or any host intermediaries. For example, advertising residential property for let

<sup>10</sup> We responded to the Scottish Government's recent consultation on adding new categories to the definition of an HMO (<https://www.gov.scot/publications/houses-multiple-occupation-hmo-consultation-adding-new-categories-definition-hmo/>). Our response can be found here: <https://www.lawscot.org.uk/media/363128/2019-07-05-lic-houses-in-multiple-occupancy-adding-new-categories-to-the-definition-of-an-hmo.pdf>

under a lease without the owner's landlord registration number is an offence.<sup>11</sup> If a system was introduced for owners of such short-term lets to be registered, a simple extension of the provision of that offence could apply so that any advertisement must include the registration number given by the authority. There are criminal sanctions for non-compliance which would include a fine and a criminal conviction which could adversely affect employment prospects for such owners who did not comply.

Again, in a discretionary scheme, this may only have local application, but some landlords may have properties in more than one area and so there would be merit in some level of consistency. Postcodes could be used to ensure compliance as a discretionary scheme would only affect certain areas in Scotland. It is important that any regime is easily accessible for those wishing to register or obtain a license and can be clearly understood.

We note that if a regulatory framework is to be introduced which would require properties to be brought up to a certain standard or other steps taken, there requires to be sufficient time for those required to take action to do so. Interim arrangements may be necessary.

## **18. Do you have any comments on the controls or conditions which councils should be able to set through a registration or licensing regime?**

Any controls of conditions set by councils should be in accordance with the agreed design principles.

There may be an opportunity to draw on parallels with the houses in multiple occupancy regime under the Housing (Scotland) Act 2006. This regime already has a two standard test which might be applied of (a) minimum property standard and (b) fit and proper person test. This could also seek to deal with some of the issues arising between the types of properties such as tenements and detached houses. Though having as a starting point, an inclusive regime, it is likely easier to apply and to change where issues arise, or trends change. Such a system may have sufficient flexibility to be able to deal with any new and not yet developed methods of short-term letting while arise in time.

## **19. Do you have any comments on whether a licensing scheme and/or market based approach, and any associated charges, should apply to all types of short-term lets and whether conditions and/or charges should vary according to the type of property, its location or the number of rooms?**

In the event that there are to be different conditions and/or charges applying for different properties, it is important that there is clarity around these conditions and to whom/what they apply. We consider that there

<sup>11</sup> Section 6 of the Private Rented Housing (Scotland) Act 2011 now section 92B of the Antisocial Behaviour etc. (Scotland) Act 2004

is potential for uncertainty and a lack of clarity for all those operating in the sector if there are a number of differences in conditions and charges.

## **20. Do you have any comments on the effectiveness of a days per year limit in meeting the Scottish Government's objectives?**

As referred to above, a days per year limit is the system introduced in Greater London, beyond which, a material change of use is determined to have taken place and planning permission is required.

It is difficult to settle on 'a one size fits all' approach. For example, Edinburgh has summer and winter festivals where short-term letting has been the norm over decades. In Edinburgh, a limit of 90 days may be considered to be too short to be an effective balance of all interests. The 40-day limit suggested by Edinburgh City Council may not properly recognise the importance of the city as a tourist destination and the need for accommodation for families at the cheaper end of the market.

If a limit is imposed, careful consideration must be given to how the property will be used the rest of the time. If it is used for longer term letting, then there may be a reluctance on the part of owners to do this where they cannot easily recover possession to resume short-term letting.

Looking at the purpose of the letting arrangements may be one way of deciding, even with a discretionary letting arrangement, the types of lets that should be affected, however, it is important that this is clearly defined. There are, as we highlight in our answer to Question 17, differences between a short-term let for a few days via an online platform to commercial letting. A registration system based on the number of days for which the property is let might be an effective way to consider setting up a regulatory scheme.

We suggest that consideration be given to possible challenges around ensuring compliance under such a scheme, particularly in the event that properties are advertised across a number of platforms and/or offline. Could hosts be required to submit an annual return showing the number of nights that their property was advertised for let and the number of nights let?

Finally, we note that additional planning-based controls on short-term lets would not be capable of ensuring mandatory safety requirements for properties let on this basis.

## **21. Do you have any comments on how regulations should deal with commercial hosts?**

We have no comment on this question.

## **22. Do you have any comments on who should be subject to enforcement and sanctions?**

We consider that the focus of enforcement and sanctions should be on hosts and if applicable, platforms. The detailed nature of enforcement and sanctions will be dependent on the nature and scope of any regulatory framework.

Where the consultation lacks detail in relation to the creation of a registration scheme is how this would work with health and safety standards, including in relation to fire risks. Stringent requirements might mean that it is not worth those who might otherwise let on this basis from doing so as the costs of compliance might outweigh any benefit derived from income gained.

There would need to be suitable penalties imposed in connection with any regulatory scheme that was put in place in order to ensure compliance with any scheme. There also requires to be effective powers of enforcement and sufficient resources (police and local authorities) to enable this to be carried out. The powers of enforcement owe much to the power to deter others who may not comply with the regulatory requirements. We would suggest similar provisions for enforcement for licensing provisions which would relate to the standard of accommodation and use resulting in an Anti-social Behaviour Order or similar.

## **23. Do you have any other comments on short-term lets not covered in your answers to the above?**

As the consultation recognises, there will be implications with regard to the resources required by the Local Authorities who may choose to put a scheme into place regarding the establishment and administration whether of registration, licensing, market based approach or additional planning requirements. These costs would likely need to be recovered by way of the costs of any scheme for those affected by the regulations. 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. We can understand why such costs in relation to the creation of a discretionary scheme would be set on a local basis. Sufficient income would need to be generated to cover the set up and continuing regulatory system. Unless a market-based approach to regulation is taken, any fees associated with an application to register and/or obtain a license or planning permission should reflect the costs to the local authorities of processing the application.

In respect of the operation of short-term lets generally, it is important to note the right of people with disabilities under Article 19 of the UN Convention on the Rights of Persons with Disabilities (hereafter the Convention) to reside in the accommodation of their choice, and to have necessary services provided to them there. It is wrongful, and contrary to the obligations undertaken by the UK in ratifying the Convention, to put pressure upon such individuals for reasons of economic or administrative convenience to live somewhere which is not their first choice. That could include a short-term let property, with or without resident or visiting support. It is important that any regime put in place to regulate the short-term lets sector does not adversely impact upon these obligations under the Convention.

Finally, we note the Scottish Government's commitment to pilot any registration or licensing regime following consultation. We consider there is merit in this approach particularly given the different issues arising in the context of short-term lets. We would emphasise not only a pilot would be needed but also a phased approach that would identify and seek out an evidence base as to the extent and location of the problems. Registration of the relevant properties to be let may allow that to be achieved followed by consideration as to the standards required in due course. In addition, a phased approach is necessary to allow for transitional arrangements as owners would need to have time both to ensure that they complied with any registration requirements but also standards required. The key to making any changes is widespread publicity so that all those covered by the requirements are aware and can comply.

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