

Agenda Item	16
Report No	CP/34/21

THE HIGHLAND COUNCIL

Committee: Communities and Place

Date: 31 August 2021

Report Title: Scottish Government Short Term Lets: consultation response on draft Licensing Order and Business and Regulatory Impact Assessment (BRIA)

Report By: Executive Chief Officer Communities and Place

1. Purpose/Executive Summary

- 1.1 Members are asked to homologate the attached response to the Scottish Government on the detailed proposals for the licensing of short-term lets in Scotland.
- 1.2 Given the scope of the consultation and the consultation timescale, the response was submitted by the deadline of 13 August following consultation with the Chair of the Tourism Committee, Chair of the Economy and Infrastructure Committee and the Chair of the Licensing Committee.

2. Recommendations

- 2.1 Members are asked to:
 - a) note the issues covered by the latest consultation including the introduction of overprovision as a possible licensing consideration, and the introduction of required policies related to the new legislation; and
 - b) agree to homologate the consultation response as set out at Appendix 2 which was submitted to meet the Scottish Government deadline of 13 August 2021.

3. Implications

- 3.1 Resource –The new regulations will have significant resource implications for the Council in terms of Planning, Licensing and Environmental Health. The majority of these costs can be fully mitigated through the fee structure permitted by the regulations and work is underway to understand the resources required to implement the new regime. This in turn will help set the fees required.
- 3.2 Costs incurred through the establishment of Control Areas under Planning legislation cannot be recovered in this way and so will be additional to the Council. Work is underway to understand the amount of additional resource this is likely to require.

- 3.3 Legal – When the Licensing Order is brought into force the Council will have a duty to establish a licensing scheme for short-term lets in the area.
- 3.4 Community (Equality, Poverty and Rural) – Short term lets have been recognised to bring substantial economic benefits to communities but can also have negative aspects in reducing availability of residential housing and in some circumstances, disturbing residents. The Scottish Government’s new regulations are intended to provide local authorities with proportionate powers to manage the negative aspects of short term lets without undue restrictions on the economic benefits.
- 3.5 Climate Change / Carbon Clever –There are no quantifiable climate change implications known at this time.
- 3.6 Risk – The regulations will place a statutory duty on the Council to licence short term lets and, if appropriate, consider Control Areas under Planning. There are significant risks of failure to implement the statutory duties if resources are not secured through the fee powers.
- 3.7 Gaelic – There are no known Gaelic implications.

4. Introduction

- 4.1 As Members are aware the issues around Short Term Lets have been considered by Scottish Government over the last few years as provided in the following timeline:
- **April 2017** - The Scottish Government set up the Expert Panel on the Collaborative Economy
 - **January 2018** - The panel reported on peer-to-peer accommodation, and short-term lets more broadly
 - **July 2018** - The Scottish Government published its response to the Expert Panel’s report, and this included the establishment of a Short-Term Lets Delivery Group
 - **2019** consultation and independent research (Highland Council response [here](#))
 - **January 2020** - Scottish Government announced proposals:
 - licencing for short-term lets, which will apply to all short-term lets
 - to introduce short-term let control areas
 - to undertake a review of the tax treatment of short-term lets
 - **September 2020** – consultation (Highland Council response [here](#))
 - **December 2020** – Scottish Government publish consultation response, draft legislation & Business and regulatory impact assessment (BRIA) available [here](#)
 - **January 2021** - Scottish Parliament call for views (Highland Council response [here](#))
 - **February 2021** - Scottish Government confirm Licensing Order to be delayed until after the election.
 - **April 2021** – Planning Control Areas legislation comes into force ([The Town and Country Planning \(Short-term Let Control Areas\) \(Scotland\) Regulations 2021](#))
 - **June 2021** - [Planning Circular 1/2021: Establishing a Short-Term Let Control Area](#) was published on 25 June 2021.
- 4.2 The Scottish Government issued a further consultation on the Licensing Control Order with a view to the final regulations being taken forward in September 2021. The consultation responses were required by Friday 13 August. The Scottish Government have made clear the consultation was not on whether to implement a licensing scheme nor the broad framework of the approach but was narrowly focused on identifying

issues and solutions only in relation to the draft Licensing Order and draft Business and Regulatory Impact Assessment (BRIA).

4.3 The new draft BRIA sets out the purpose of the legislation:

- The Scottish Government's purpose in regulation of short-term lets is to ensure that local authorities can balance the needs and concerns of their communities with wider economic and tourism interests.
- The Licensing Order establishes a licensing scheme to ensure short-term lets are safe and address issues faced by neighbours; and to facilitate local authorities in knowing and understanding what is happening in their area and handling complaints effectively.
- The Control Area Regulations makes provision for local authorities to designate control areas. The purpose of control areas is to help manage high concentrations of secondary letting (where it affects the availability of residential housing or the character of a neighbourhood); to restrict or prevent short-term lets in places or types of building where it is not appropriate; and to help local authorities ensure that homes are used to best effect in their areas.

4.4 It should be noted that the Government has stated that it will review the tax treatment of short-term lets to ensure that they make an appropriate contribution to the communities that they operate in. The review of tax treatment is being progressed separately and is outside the scope of this consultation.

5. Latest consultation

5.1 In February 2021 the Scottish Government established a stakeholder working group to help develop guidance for hosts and operators, local authorities and platforms. The stakeholder working group met in February, March and May and has provided significant input into shaping the guidance and suggesting changes to the licensing order as detailed in the new consultation.

The working group had industry and local authority representatives (Housing, Licensing, Planning and Environmental Health) – full details of representatives are [here](#).

5.2 Although [the consultation](#) was specifically on the draft Licensing Order and draft Business and Regulatory Impact Assessment (BRIA), three draft guidance notes were also included to assist the consultation:

1. Short Term Lets in Scotland - Licensing Scheme Part 1: Guidance for Hosts and Operators;
2. Short Term Lets in Scotland - Licensing Scheme Part 2. Supplementary Guidance for Licensing Authorities, Letting Agencies and Platforms;
3. Short Term Lets in Scotland - Planning Guidance for Hosts and Operators;

The Scottish Government and the stakeholder working group are to finalise the guidance over the summer and they were not for comment as part of the consultation.

6. The draft licensing order

6.1 Following the previous consultation and input from the working group the order has been revised. **Appendix 1** details some of the revisions made and also where revisions were not made.

6.2 The draft order defines three types of short-term let as follows:

- "home sharing" means using all or part of your own home for short-term lets whilst you are there;
- "home letting" means using all or part of your own home for short-term lets whilst you are absent, for example whilst you are on holiday; and
- "secondary letting" means the letting of property where you do not normally live, for example a second home.

6.3 The timescale for licencing implementation has been changed. The previous proposals were for local authorities to accept applications from 1 April 2022. Local authorities now have until 1st October 2022 to open a licensing scheme to receive applications.

The other timescales are unchanged:

- Existing hosts and operators will have until 1 April 2023 to submit an application for a licence. This date remains unchanged. However, new hosts and operators will require a licence to operate after 1 October 2022.
- All short-term lets must have a licence by 1 April 2024 in order to continue operating.

6.4 The draft licensing order requires local authorities to have policies prepared for:

- a) licence duration and renewal;
- b) overprovision; and
- c) temporary exemptions;

Inclusion of overprovision is a revision and is discussed below.

6.5 The draft guidance to local authorities suggests the following process in establishing a licensing regime:

'3.12. Each licensing authority should have regard to their planning authority's objectives and policies, including:

- *the local development plan;*
- *other relevant planning policies; and*
- *any intended or designated control areas.*

3.13. Licensing authorities should then develop policies on:

- **licence duration and renewal** - see [paragraphs 3.16](#) and following below;
- **overprovision** – see [paragraphs 3.23](#) and following below;
- **temporary exemptions** – see [paragraphs 3.48](#) and following below;
- **temporary licences** – see [paragraphs 3.58](#) and following below;
- **additional conditions** – see [chapter 5](#); and
- **compliance and enforcement** – see [chapter 7](#);

*3.14. These policies will affect the volume of work, the costs and potential chargeable activities and should be determined **before** setting fees, see [chapter 4](#).'*

Apart from overprovision, officers do not have significant concerns on this approach to the implementation of the licensing order.

6.6 **Overprovision**

As stated above, the inclusion in overprovision as part of the licence approval process is a new development. Overprovision is only relevant to secondary letting. Licensing authorities cannot consider overprovision as a factor in determining home sharing and home letting licence applications.

6.7 In the previous proposals, the use of the proposed planning control areas was seen as the key measure to address overprovision concerns in local areas. The introduction of overprovision as a consideration of the licence application is a significant change. The draft guidance makes clear that applications may be refused if the licensing authority considers that there is already too much short-term let activity in the area in which a premises is located.

6.8 The [draft guidance to local authorities](#) provides guidance on preparing an overprovision policy and the considerations and consultation that may be required. Examples include formulas for city use, rural areas and unconventional secondary letting or that a statement may be 'overprovision is not a ground for refusing a licence application'.

6.9 The draft order makes it clear that it is for the licensing authority to determine the localities when considering overprovision. In some cases, these will be informed by, or aligned to, control areas but they might also be informed by other natural or artificial features, such as a group of homes within easy access to a significant amenity.

7. **Draft BRIA**

7.1 The draft BRIA contains detailed information on:

- a) Scottish Government's objectives for the Licensing Order and Control Areas;
- b) the Rationale for Government intervention;
- c) details of consultations;
- d) options appraisal;
- e) summary costs and benefits by sectors and groups affected including Local Authorities;
- f) example costs to local authorities and recovery through fees (including 6 step application process outlined and details of factors that could lead to a significant degree of variation in the cost such as Rurality; IT systems; Accuracy of applications; Objections and complaints; Turnover rate; Feedback loop; Compliance);
- g) wider economic context including impact of Covid19; and
- h) summary and recommendation of the Scottish Government that it is confident that the preferred option, implementing a licensing scheme and empowering local authorities to go further with discretionary conditions and control areas, as needed, is the right approach.

8. **Consultation response**

8.1 The consultation response is provided in **Appendix 2**.

8.2 In summary, the key matters raised were:

1. officers are concerned that the introduction of overprovision is confusing as the purpose would appear very similar to Control Areas. Clarification of this issue is requested; and
2. officers are concerned over the timescale for gathering evidence for an Overprovision Policy Statement by October 2022. Clarification of the approach to this is requested.

9. Future reports

- 9.1 The Council agreed on 29 October 2020: ‘... that after the regulations are finalised, the implementation of Planning Control areas should be the subject of a report to the Economy & Infrastructure Committee and following consultation with the Housing & Property Committee and relevant Local Committees and that the setting of fees for the proposed licensing scheme should be the subject of a report to the Licensing Committee.’
- 9.2 If the licensing order and guidance is published as per the consultation it is likely the Council will require the following reports:

Licensing Committee

1. Report to establish the policies in relation to:
 - a) licence duration and renewal;
 - b) temporary exemptions;
 - c) temporary licences;
 - d) additional conditions; and
 - e) compliance and enforcement;
2. Report on setting of fees.

Economy & Infrastructure Committee

1. Report to establish framework policy on overprovision and Control areas.

Local Committees

1. Reports on establishing overprovision and Control Area requirements for their localities.

Designation: Executive Chief Officer Communities and Place

Date: 30.7.21

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Background Papers:

[Scottish Government Short Term Lets: Consultation on draft Licensing Order and Business and Regulatory Impact Assessment \(BRIA\)](#)

Extract from [Consultation paper](#)

Changes suggested by members of the stakeholder working group, which have resulted in changes being made to the Licensing Order:

Table 1. Revisions made to the Licensing Order		
	Suggested change	What we did
Bothies		
1	Consider exclusions for properties such as bothies which may be used as accommodation by somebody working the land, for a fee.	We have revised the Licensing Order to exclude bothies. The definition of a bothy is set out at paragraph 3 of Schedule 1.
Excluded tenancies		
2	Consider excluding agricultural and crofting tenancies, in addition to private residential tenancies.	We have revised the Licensing Order to exclude a number of tenancies, which include agricultural and crofting tenancies. These are set out at paragraph 2 of Schedule 1.
Temporary exemptions		
3	Provide more detail on the process licensing authorities must apply when granting temporary licence exemptions.	Licensing authorities can exempt premises from the requirement to have a licence for a particular occasion or for up to 6 weeks each year. We have revised the Licensing Order at paragraph 4 of schedule 2 to require licensing authorities to publish and review a short-term lets temporary exemptions policy statement. This is explained in Paper 5.
Overprovision		
4	Require licensing authorities to assess overprovision and produce a policy following consultation.	We have revised the Licensing Order at paragraph 7 of schedule 2 to require licensing authorities to publish and review, a short-term lets overprovision policy statement. This is explained in Paper 5.
Public register		
5	Amend the power for licensing authorities to make the public register available in an electronic format to a duty.	We have revised the Licensing Order at paragraph 11 of schedule 2 to require licensing authorities to publish the public register in an electronic format.
Energy efficiency and Energy Performance Certificates		
6	Remove requirements to comply with minimum energy efficiency standards.	We have removed requirements to meet specific energy efficiency standards from the Licensing Order. Hosts and operators are still required to comply with the standards set out in current building standards legislation[1]. Broadly speaking, this requirement applies to secondary letting of dwellinghouses. Hosts and operators must include the Energy Performance Certificate rating in any advert or listing, where they are required to have an EPC by building standards legislation.

Insurance		
7	Insurance cover for premises may not be held by the host or operator. Requirement should be that appropriate cover is in place, regardless of whether the host or operator is the policy holder.	We have revised the Licensing Order at paragraph 14 of schedule 3 requiring the host or operator to ensure that insurance cover is in place for the premises; thus removing the requirement that the insurance cover is necessarily held by the host or operator.
Activity		
8	Define “short-term letting activity” to include advertising a property for short-term letting	We have not changed the Licensing Order to include advertising as an activity requiring a licence. However, we have revised articles 3 and 4 so that the activity requiring a licence includes the making of an agreement to let the property. This means that taking bookings is a designated activity. This is explained further in Papers 4 and 5.

The table below sets out a number of changes suggested by members of the stakeholder working group, **which have not resulted in any revisions to the Licensing Order but have either been clarified below or in guidance.**

Table 2. Suggestions which did not lead to revisions		
	Suggested change	What we did
Traditional B&Bs		
1	Issues with inclusion and definition of “traditional” bed and breakfasts.	<p>We have not excluded “traditional” bed and breakfasts but made changes to the Licensing Order to address specific concerns, for example around EPCs (see above).</p> <p>In the 2020 Licensing Order, we explicitly excluded guest houses, boarding houses and hotels. Stakeholders raised concerns about the inclusion of so-called “traditional” bed and breakfast accommodation.</p> <p>The Scottish Government’s policy position has always been that traditional bed and breakfasts are in scope. Our 2019 consultation proposed excluding “licensed hotels and B&Bs and self-catering properties on their premises”. We have revised schedule 1 to address the previous anomaly around excluding guest houses, boarding houses and hotels, but including bed and breakfasts. Guest houses and boarding houses and some hotels can be variants of home sharing and should not be automatically excluded. The exclusions have been simplified to hotels with planning permission and premises licensed under the Licensing (Scotland) Act 2005. In broad terms, schedule 1 makes provision to exclude everything other than the use of houses, flats and unconventional accommodation. However, a property is not excluded simply because of how it is</p>

		labelled. For example, a house used as a hotel, guest house or bed breakfast is not excluded by being labelled as such, unless excluded specifically by provision within schedule 1. The exclusions are explained in more detail in the Policy Note, see Paper 2.
Overprovision		
2	Require licensing authorities to use licensing data as evidence for any overprovision policy, and require Ministerial approval of the locality to which the overprovision policy applies.	We have not revised the Licensing Order to limit licensing authorities to using licensing data as evidence for any overprovision policy; this would make it hard to apply overprovision policies in the period before 1 April 2024. However, we have required licensing authorities to produce an overprovision policy statement (see Table 1) and set out detailed guidance on overprovision within licensing Guidance Part 2 – see Paper 5.
Tiered approach		
3	Tiered approach to licensing, with home sharing and home letting exempt from planning and licensing requirements.	Our policy position remains that all short-term lets require a licence, as meeting basic safety standards is important in all short-term lets. Licensing authorities have powers to grant temporary exemptions for periods of up to six weeks. We have set out guidance on this and the parameters for licensing authorities to consider when setting fees, such as lower fees for home sharing and home letting, see Paper 5.
Deemed grant of licences		
4	Require licences to be automatically granted if a licensing authority has not determined an application within a 12 month timescale.	This is already the case. Where an application has not been determined within statutory timescales it will be deemed granted for a period of one year with no conditions.
Unconventional accommodation		
5	Add unconventional accommodation to the list of excluded accommodation.	Unconventional accommodation was included following feedback received during our 2020 consultation. The reasons for doing so are set out in paragraph 5.4 of the 2020 consultation report[2].
Likely breach		
6	“Likely breach” provision in relation to enforcement notices (schedule 2) is unusual.	We have previously considered this. The reasons are set out in the Policy Note, see Paper 2.
Recurring fees		

7	Require licensing authorities to provide for annual or other recurring fees, such as monthly fees.	We understand that this could provide valuable flexibility for applicants, and have asked licensing authorities to consider this approach in Guidance Part 2, see Paper 5. However, we have left the decision as to whether to offer this with licensing authorities. Offering a monthly payment option could increase the costs incurred by the licensing authority in running the scheme in some cases, which would then be passed on in licence costs.
Insurance		
8	Remove requirement that all hosts obtain £5 million public liability insurance cover.	The requirement to have public liability insurance in place is to protect both hosts and guests. We understand that some platforms offer public liability insurance cover as part of their service.
Registration		
9	Introduce a registration system, with mandatory conditions (broadly based on the licensing scheme conditions). Those who are complying with registration conditions would be exempt from requirement to obtain a licence.	We believe a hybrid approach would make the arrangements more complicated. One perceived advantage of registration by hosts and operators is that it allows them to continue operating uninterrupted by any application processing. With regard to the licensing scheme and the ability of hosts and operators to be able to continue operating pending determination of their licence application: this is already provided for existing hosts who apply for a licence by 1 April 2023 under transitional arrangements; and in any other case, licensing authorities have the power to issue a temporary licence to allow this. The other perceived advantage of registration is an assumption that fees would be lower. It is not obvious why this would be the case, if the registration scheme offered similar protections for guests and neighbours as the licensing scheme. Proposals for registration are explored further in section D of the BRIA, see Paper 3.
Timescales		
10	Give local authorities powers to require existing hosts to apply for licence before April 2023.	In response to comments made in the 2020 consultation, we aligned the deadlines across Scotland. The reasons for taking this approach are set out in chapter 4 of the 2020 consultation report. The date by which existing hosts and operators must apply for a licence remains 1 April 2023. The final date by which all short-term lets must be licensed remains 1 April 2024.
Licence numbers		

11	Using separate licence numbers for secondary letting, home letting and home sharing will greatly aid the collection of data for enforcement.	We have set out requirements on the licence number format in Guidance Part 2, see Paper 5. The licence number will distinguish between the two types of licence: home sharing and home letting; and secondary letting.
Planning permission		
12	Planning permission checks are fundamental to securing the safety of residents in tenements, and should also be required outwith control areas.	We have explained our reasoning for focusing limiting this requirement to secondary letting of dwellinghouses in control areas at paragraph 7.6 of the 2020 consultation report.
Notification		
13	Applications for licences should be advertised locally to give communities the opportunity to object.	Licensing authorities have the power to notify such other persons as they consider appropriate about a licensing application. Guidance Part 2 says that licensing authorities should consider whether to give notice to any community council or development trust in whose area the premises is located, see Paper 5.

The Highland Council

Response to the Scottish Government Short Term Lets: Consultation on draft Licensing Order and Business and Regulatory Impact Assessment (BRIA)

Question 1.

For Paper 2: Draft Licensing order - please state your issues and how to resolve them:

Issue 1 Overprovision rationale

The Council support the introduction of the Licensing Order and Control Areas particularly the provisions to address concerns in some areas of the Highlands where short term lets result in reduced availability of residential housing with the negative impact on affordability, sustaining communities, and the negative impact on the wider local economy and local public services.

However, the Council have concerns over the introduction of Overprovision into the Order. Although referenced in the guidance the distinction between overprovision and Control areas is not clear and the rationale for introducing overprovision is not explicit when Control areas would appear to be addressing the same issue.

The general view of officers is that the intentions as set out in the BRIA are straightforward:

Control Areas - Purpose

The purpose of control areas is to help manage high concentrations of secondary letting (where it affects the availability of residential housing or the character of a neighbourhood); to restrict or prevent short-term lets in places or types of building where it is not appropriate; and to help local authorities ensure that homes are used to best effect in their areas.

Licensing - Purpose

The Licensing Order establishes a licensing scheme to ensure short-term lets are safe and address issues faced by neighbours; and to facilitate local authorities in knowing and understanding what is happening in their area and handling complaints effectively.

This gives clear distinction of issues licensing is addressing and what planning is addressing and matches the general approach taken for other licensing regimes (that planning controls are distinct from licensing).

The draft Schedule 2 para 7(c)(3C) of the Licensing Order requires licensing authorities to have regard:

'A licensing authority must publish, and keep under review, a policy statement as to the extent to which the authority considers there to be overprovision of short-term lets, or short-term lets of a particular description, in any locality within its area,'

This consideration falls wholly within the remit of planning and should not be a matter for consideration within the licensing regulations.

To resolve this matter:

- The distinction between overprovision and Control areas must be clearly stated with clear guidance on intended purposes. If there is no clear distinction, then there appears to be legal duplication resulting in two processes to regulate the same issue.
- If the intention is for overprovision to provide more flexibility for case by case control (on amenity) compared to control areas addressing wider society/development impacts, then this should be explained and clarified in accompanying guidance.

Issue 2 Overprovision evidence

The need for overprovision policy is noted as are the comments in paragraph 3.42 of the local authority guidance that initially 'In terms of the data used to establish the case for overprovision, licensing authorities should first and foremost rely on the public register. However, this will be an incomplete picture in the transitional period to April 2024 and licensing authorities will need to rely on other information.'

The order sets out the legal requirement for the Council to have an overprovision policy statement published by 1 October 2022 (*'as to the extent to which the authority considers there to be overprovision of short-term lets, or short-term lets of a particular description, in any locality within its area, which is to be referred to as the 'short-term lets overprovision policy statement'*).

The Council have concerns over the timescale to monitor and gather evidenced data to support a case for overprovision by October 2022 given the scale of Short Term Lets in the area.

To resolve this matter:

- Further guidance on evidence and approaches related to overprovision (& Control areas) would be welcomed.
- It is noted that the Council could use its overprovision statement to not make overprovision a consideration of licensing (local authority guidance Example 1 'Overprovision is not a ground for refusing a licence application.'. It is assumed this would allow the Local Authority to develop Control Areas to control numbers of short term lets if appropriate. Or similarly the policy statement could limit the consideration only to one locality initially to allow a pilot of the approach to be pursued. Again, guidance and discussion on this would be welcomed.

Question 2.

For Paper 3: Draft Business and Regulatory Impact Assessment (BRIA) -
please state your issues and how to resolve them:

The BRIA is welcomed. The Council wish to highlight the significant resource implications the Licensing Order will have for the Highland Council:

- Impact on officer time and resources - With approximately 10,000 premises that this will affect in the Highland officers will not only be required to implement policies and guidance but also carry out site visits and monitor compliance and enforcement.
 - Impact on committee time and resources - there may be an increase in the potential applications before the committee as a result of objections made or lack of information provided by the applicant in respect of their application.
-