



12th September 2023

Humza Yousaf
First Minister
Bute House
6, Charlotte Square
Edinburgh

firstminister@gov.scot

Dear First Minister,

Potential Breach of: - ECHR, the Human Rights Act 1998 and the Scotland Act 1998, The Data Protection Act 2018 and The European Union's General Data Protection Regulation

I write as Chair of the Board of the Association of Scotland's Self-Caterers, with a genuine plea to reset the relationship between your government and our 1700 strong membership, to whom we owe a duty of care. I fully understand your government's commitment to fulfil the settled will of the Scottish Parliament through delivery of *The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022* and *The Town and Country Planning (Short Term Let Control Areas) (Scotland) Regulations 2021*. I would therefore hope for reciprocal understanding when the ASSC identifies serious risks to our members safety and security that have emerged during your legislation's implementation phase, and that you are able to recognise and reflect on the consequences for untold numbers of innocent and often vulnerable individuals across the small accommodation sector.

At the outset I want to assure you that this letter is based on the belief that you would not want your government to be linked to the negative impact that the STL legislation is having on people's lives. The content also relies on legal opinion obtained from a top tier, independent commercial law firm, together with verifiable examples of the current and potential misuse of personal information.

Since March 2022 the ASSC has been in contact with over 12000 operators of short term let accommodation. Our single aim has been to provide advice and support in preparing for submission of their application to the STL Licence scheme operating in their locality. No other organisation in Scotland has done more for operators in this regard. Despite this support, it is solely for individual operators to decide, in their personal circumstances, whether to submit their application by the due date.

That being the case, it is with mounting unease that we continue to observe the apparent determination of your government's Ministers and the STL legislation's supporters to drive it to its inevitable conclusion, under three weeks from now, on Sunday 1st of October.

Your Housing Minister, Paul McLennan, announced last week that a total of 6323 license applications had been submitted across the 32 local licensing authorities by 31st August. This figure constitutes 19.75% of your own government's estimate of 32000 STLs in Scotland. At the same time Mr McLennan fervently encouraged people to submit their application by the 30th of September, saying that the process was more straightforward than many anticipated and that no applications had been refused to date. This without seeming to take account of the multiplicity of other reasons that might be causing as many as 80% of operators to decide not to apply. The notion that there might be other and more significant personal reasons to desert their business and livelihoods never seems to have occurred to him.

Together with other Scottish parliamentarians, I am copying this letter to Kate Forbes as my constituency MSP. I would hope that she can confirm that I have shared my concerns over the risks to community cohesion posed by the Short Term Let legislation since February 2021, and as recently as last month.

In my letter to Kate on the 18th of August I said that there is now evidence that the debate surrounding licensing and planning controls of short term lets, including self-catering and bed and breakfasts, is having a negative impact on community relations. Neighbour is being set against neighbour and some residents are being increasingly vocal in their criticism of tourism and visitors in general. Whilst this might not be the intention of the legislation the reality should not be disregarded, as it has the potential to turn very nasty. At that time I was already aware of two cases in my local area where disputes had ended in violent attacks. I continued by saying that this division in communities may be exacerbated when it comes to enforcement of the licensing regime after 1st October. There is already evidence that vexatious objectors are planning to report allegedly unlicensed operators to their Local Authority or the Police.

We have since learned that the impact on community cohesion, and the related prospects for the well-being economy, are already being severely compromised by the availability of the personal data of license applicants and, in some cases, the ability to cross reference this with planning applications related to short term lets.

The ASSC continues to believe that the legislation itself is based on a misdiagnosis of the problem, followed by misapplication of the wrong remedies. In a spirit of co-operation and collaboration, however, we have continually offered more proportionate and balanced solutions whilst simultaneously assisting many thousands of people in their preparations for licensing. We have been variously described as everything from alarmist to entitled parasites over the last two years, merely because we have tried to highlight the shortcomings of the STL legislation on behalf of our members. This low-level abuse has intensified more recently, to the extent that the great majority of our sector now feel under attack from all quarters, including the Scottish Government and Local Authorities. Crucially, the feedback coming from the short term let community now shows such a fundamental flaw in the implementation process that we are unable to continue to advise

applicants to submit their applications before they seriously consider how their personal data, published on Licence Application Notices and Local Authority Licensing Registers, might be used against them by those with ill intent.

Potential Breach of Article 8 of the ECHR and the Scotland Act 1998

Legislation of the Scottish Parliament must be compatible with the rights identified in the European Convention of Human Rights. We have obtained legal advice that has highlighted that the publicity requirements of the 2022 Order in requiring specific categories of personal data of applicants to be provided on public notices and on a public register may breach the applicant's right to respect for a private life and for the protection of their personal data under Article 8 of the ECHR.

The Court of Justice of the European Union determined in November 2022 in the Joined Cases C-37/20 Luxembourg Business Registers that public registers which incorporated detailed personal information about individuals who were the beneficial owners of companies was a serious interference with Article 8 rights. As a direct consequence Companies House in the UK has introduced measures to allow of the redaction and the removal of certain categories of personal data for directors who can demonstrate risk to their safety.

The publicity requirements in the 2022 Order run entirely counter to this case and these developments and we believe would also be regarded as a similar, unjustified and unwarranted interference with Article 8 rights. The requirement to list the applicant's date of birth for example goes beyond what is strictly necessary and proportionate to operate a short-term licensing regime. This regime requires considerably more personal data of applicants to be published as compared to parallel requirements of the Scottish planning regime without clear justification and objective basis. If this is correct, then the 2022 Order is beyond the competence of the Scottish Parliament and thus open to legal challenge.

Potential Breach of the Data Protection Act and the GDPR

The Data Protection Act 1998 and the GDPR further specifies a considerable onus on data controllers – in this case local authorities- to ensure personal data of applicants is processed in a manner that is lawful, fair and respects GDPR principles of data minimisation, only processing data for a proper purpose etc. To the extent that there are clear vulnerabilities with the underlying legality of the 2022 Order as explained above, there are similar challenges to the actions being taken by local authorities in enforcing the publicity requirements without any consequential safeguard mechanisms. This is particularly true for cases where applicants have disclosed material personal safety concerns and evidence of stalking, harassment and criminal behaviour directed to them, as a consequence of being short term let operators. Such obvious consequences of the 2022 Order ought to have been considered through the conduct of legally required Data Privacy Impact Assessments and safeguards embedded within the licensing regime to protect an individual's right to privacy, protection of their personal data and personal safety. The licensing regime utterly fails in this regard.

Irrespective of whether Local Licensing Authorities are complying with the letter of the law it is now clear that the Data Protection legislation's intention, to empower people to take control of their data and protect individuals from its misuse, is being undermined to a significant extent. Further, individuals are encountering substantial difficulties in getting their personal data removed from public view, even when they are aware that this is a possibility.

Whilst Argyll & Bute provides a rare example of having a privacy notice this only gives an email contact for the possible redaction of personal information, including names and addresses, after the event. At the same time Argyll & Bute gives a hyperlink for those wishing to object to an application where the objectors' personal details are neither published nor shared with the applicant, or anyone else, until such time as the application is being determined.

We also understand that the enforcement framework being planned by your government with SOLAR and COSLA and Police Scotland will take active steps to protect the privacy of individual complainants, with no such protection being offered for those who are to be accused of a criminal offence. The lack of balance in this approach and the heavy handedness being contemplated is regrettable. It hardly represents the "light touch" enforcement strategy that we had been informed would be the case.

In Edinburgh there is no sign of the requisite privacy notice anywhere on their websites. Critically, there is precious little, if any, evidence that any Licensing Authority in Scotland has conducted a data privacy impact assessment, as required by the relevant legislation and regulation.

We are now receiving a deluge of examples demonstrating the impact that this is having on perfectly law-abiding, hard-working and sometimes vulnerable self-catering and bed and breakfast owners and their staff. Whilst we have no intention of breaking confidentiality for the individuals concerned, we can say that they originate from a broad range of urban and rural local authority areas and, in some cases, the individuals concerned have already suffered serious harm directly related to the publication of their personal information.

There are instances of operators who have worked in the security services and law enforcement, well versed in protecting their personal information from public scrutiny, who have now decided that the risks to them and their loved ones which are posed by a licence application are simply too great to take. Others tell us that the Licence Notices and online Licence Registers are providing a valuable resource for those who wish to pursue activity that ranges from threatening behaviour involving discrimination, harassment and victimisation, through formulation of mass objections to planning and license applications, and on to criminal activity involving burglary, blackmail, identity theft, online fraud, graffiti, squatting, stalking, child abduction and domestic violence. I am old enough to remember the arson attacks on Welsh holiday cottages in the 1960's. It does not stretch credulity too far to anticipate that this might re-occur in our rural and remote communities, ably assisted by postcodes and satellite mapping technology.

There are also serious questions being raised as to the use of the data by Local Authorities for enforcement purposes and whether this use is permissible, under the terms of the Data Protection Act 2018. We have documentary evidence that officials plan to use, for example, the data to refer Council Tax paying home sharers to the Scottish Assessors for apportionment of their home for Non-Domestic Rates. Even if this was an acceptable practice by the authority concerned, no advance notice has been given of this possible use to any applicants. Once more this is contrary to the terms of data protection legislation.

It is hardly surprising, therefore, that many of the over 20000 who are still to apply have decided that the risks posed to their personal safety and security, through the publication of their personal data, are simply too serious to ignore. Essentially the Licensing and Planning Data held and published by Local Authorities, in compliance with the duties outlined in the Short Term Let Legislation, provide what might best be described as a Call Sheet for Criminal Activity. The implications of and consequences for community cohesion are extremely serious. I don't believe that your government would want to be even remotely associated with this outcome.

The ASSC stands ready to support you in action to address these very serious concerns. It is not too late to suspend the relevant SSIs, pending a review to deal with this and other problems with implementation. Suspension would help avoid a deeply divisive debate, scheduled for the Scottish Parliament this Wednesday, and give the Scottish Government an opportunity to demonstrate its commitment to monitoring its own regulations and listening to the tourism industry, in line with your New Deal for Business principles.

Please don't hesitate to get in touch with me if you or your advisers would like to discuss these matters further. My email address and telephone number are provided below.

With kindest regards,

AHS Carmichael

Adrienne Carmichael



cc

Minister for Housing, Paul McLennan MSP

Cabinet Secretary for Wellbeing Economy, Fair Work and Energy, Neil Gray MSP

Minister for Small Business, Innovation, Tourism and Trade, Richard Lochhead MSP

Kate Forbes MSP

Anas Sarwar MSP

Ivan McKee MSP

Murdo Fraser MSP

Alex Cole-Hamilton MSP

Douglas Ross MSP

Jackie Baillie MSP

Willie Rennie MSP

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Kevin Stewart MSP
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Daniel Johnson MSP
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Mark Griffin MSP
Shona Robison MSP
Ben McPherson MSP
Brian Whittle MSP
Patrick Harvie MSP
Lorna Slater MSP
Angus Robertson MSP
Jamie Greene MSP
Sue Webber MSP
Ross Greer MSP
Ariane Burgess MSP
Alister Jack MP
Alister Carmichael MP
Ian Murray MP
Stephen Flynn MP
Ian Blackford MP