

Leases (Automatic Continuation etc.) (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Leases (Automatic Continuation etc.) (Scotland) Bill, introduced in the Scottish Parliament on 11 December 2024.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 54–FM);
 - a Policy Memorandum (SP Bill 54–PM);
 - a Delegated Powers Memorandum (SP Bill 54–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 54–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill

5. The Bill implements the Scottish Law Commission's recommendations in its Report on Aspects of Leases: Termination¹ (the "Report"). It changes aspects of the law in relation to the termination of commercial leases, most notably replacing the common law rule of tacit relocation and the current requirements for the giving of notices to quit and notices of intention to quit with a new statutory regime on the automatic

¹ [Report on Aspects of Leases: Termination \(Report No. 260\) \(Scottish Law Commission\) \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk)

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continuation of leases which have reached their termination dates. The Bill makes other more minor modifications of the law as it relates to the start, end and length of commercial leases.

6. References in these notes to Recommendations are to the recommendations made by the Scottish Law Commission in the Report.

7. Tacit relocation is a common law rule of Scots law whereby a lease continues after its termination date by operation of law. A lease is continued by tacit relocation if—

- neither party to the lease gives valid notice to the other party before the termination date that the lease is to end, and
- the tenant does not, with the agreement of the landlord, give up possession of the property at the termination date.

8. Even if valid notice to end the lease has been given by one of the parties, the lease may continue after its termination date if the tenant continues to occupy the property after that date and the landlord does not take steps to remove the tenant within a reasonable period.

9. Notice to end a lease which is given by the landlord to the tenant is known as “notice to quit”. Notice to end a lease which is given by the tenant to the landlord is known as “notice of intention to quit”.

10. The Bill is in 4 Parts, as follows:

- Part 1 makes provision for the leases to which the Act applies. In essence, the Bill applies to commercial leases which are defined for the purposes of the Bill as being leases which are not residential or agricultural leases.
- Part 2 replaces the common law rules on tacit relocation with a new regime according to which commercial leases may continue automatically after their termination dates.
- Part 3 makes provision about miscellaneous matters relating to the start, end and length of commercial leases.
- Part 4 contains the Bill’s final provisions, including a power to commence the provisions in the Bill by regulations.

Crown application

11. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. The freestanding text in this Bill applies to the Crown in the same way as it applies to everyone else. The Bill makes no change to the application to the Crown of the enactments that it amends.

Commentary on sections

Part 1 – Leases to which this Act applies

Section 1 – Exclusion of certain residential and agricultural leases

12. Section 1 provides that the Bill applies to all leases (including sub-leases) other than the types of lease excluded under paragraphs (a) to (c) of subsection (1) and further defined in subsections (2) to (4). The leases which are excluded are residential leases (as defined in subsection (2)), agricultural leases (as defined in subsection (3)) and leases of crofts, small landholdings and allotments. The termination of these leases is provided for by other pieces of legislation.

13. It should be noted that the definition of “residential lease” in subsection (2) does not include the types of lease set out in paragraphs 5 and 6 of schedule 1 of the Private Housing Tenancies (Scotland) Act 2016 (student lets by institutional landlords and holiday lets). Accordingly, the Bill applies to these leases (though the majority of the provisions of Part 2 do not apply to them, by virtue of sections 2(2) and 5(1) and schedule 1).

14. Similarly, the definition of “agricultural lease” in subsection (3) does not extend to leases of agricultural land other than for agriculture for the purposes of a trade or business (for example, for use of the land for recreational purposes), since these are not leases to which the Agricultural Holdings (Scotland) Act 1991 applies nor leases giving rise to a tenancy within the meaning of section 93 of the Agricultural Holdings (Scotland) Act 2003. The Bill therefore applies to such leases.

15. Subsection (1) is expressed in the present tense. Whether the Bill does or does not apply to a lease depends on whether it is a lease excluded under subsection (1) at the time when the question is considered. For example, a lease might begin as an agricultural lease within the definition in subsection (3) – and thus be excluded by the Bill – but, while it is ongoing, cease to be covered by that definition and thus fall within the scope of the Bill. This is consistent with the approach which is presently taken to agricultural tenancies (for example in *Wetherall v Smith* [1980] 1 WLR 1280 at 1299F).

16. Section 1 implements Recommendation 2 (see paragraphs 1.10 to 1.12 of the Report).

Part 2 – Automatic continuation of lease beyond termination date

Circumstances in which lease continues or terminates

Section 2 – Automatic continuation or termination of lease

17. Section 2 is concerned with the circumstances in which a lease to which the Bill applies will end or continue upon its termination date (other than on the basis of the

parties' conduct after the termination date, as to which see section 5). None of the requirements or effects of section 2 may be varied by the parties to a lease (section 23(1)).

18. Subsection (1) sets out the default rule that a lease continues automatically after its termination date. Section 7 makes provision about the period for which a lease continues automatically and the terms on which it continues.

19. The default rule in subsection (1) does not apply where—

- the lease is ended by notice or agreement under section 3,
- the lease is ended in accordance with a term of the lease under section 4,
- the lease is for a period of less than 3 months (subsection (2)(a)), or
- the lease is one mentioned in schedule 1 (subsection (2)(b)), such as a liferent, a lease granted for the lifetime of the tenant, a student let, a holiday let, a lease granted with the authority of the court, and short-term grazing, mowing and sporting lets.

20. Where the default rule does not apply, the lease comes to an end on its termination date.

21. Under the present law, there is some doubt as to whether parties may agree, by way of a term in a lease, that the lease will end on its termination date without need for notice being given by one of the parties to the lease to the other (see paragraphs 2.9 to 2.11, 2.46 to 2.54 and 2.57 of the Report). Subsection (1)(a)(ii), read together with section 4, puts this beyond doubt (implementing Recommendation 5).

22. Under the present law, a lease of less than 28 days will end on its termination date without notice (see paragraph 2.61 of the Report). Subsection (2)(a) provides that no notice is required for leases of less than 3 months (implementing Recommendation 27).

23. A number of types of lease are presently excluded from tacit relocation. These are a lease granted for the lifetime of the tenant, a student let, a holiday let, a lease granted with the authority of the court, a short-term grazing or mowing lease and a lease (of less than a year) of a right to fish or hunt where there is a close season (see paragraph 2.60 of the Report). Under the Bill, these leases, which are listed in schedule 1, end on their termination dates by virtue of subsection (2)(b) (implementing Recommendation 4).

24. Subsection (3) directs the reader to section 5 which makes provision about cases where, despite a lease being one which should end on its termination date as set out in section 2(1), the lease continues after that date because of the parties' conduct after that date. Note that section 5 does not apply to leases listed in schedule 1.

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25. Subsection (4) states that nothing in Part 2 of the Bill affects any ground upon which a lease may end other than the occurrence of its termination date. Such grounds might include, for example, the service of a break notice (or notice of resumption), irritancy of the lease or renunciation or relinquishment of the lease.

26. Subsection (5) removes any lingering doubt which might arise from old legal authorities about whether automatic continuation can apply where a tenant has sub-let the subjects of the lease and the sub-tenant is in natural possession (as to which, see paragraphs 3.116 to 3.119 of the Report).

27. For the definition of “termination date”, see section 24(1), (2)(c) and (3).

Section 3 – Termination of lease by notice or consensus

28. Section 3 provides that a lease ends on its termination date if the landlord gives the tenant valid notice to quit (subsection (1)(a)); the tenant gives the landlord valid notice of intention to quit (subsection (1)(b)); or the tenant gives up possession of the let subjects with the acquiescence of the landlord and in circumstances which indicate that both parties intend the lease to end on that date (subsection (1)(c)). In requiring valid notice, complying with the requirements set out in subsection (2), it implements Recommendation 14 (see paragraph 3.19 of the Report).

29. The circumstances referred to in subsection (1)(c)(ii) will typically be where the tenant returns the keys to the subjects of the lease on the termination date and these are accepted by the landlord. They would also include the situation where the keys are offered and accepted a few days earlier or later than the termination date, but on both parties’ understanding that the lease is to end on the termination date. They do not include the renunciation of a lease which has the effect of terminating the lease on a date other than the termination date.

30. Subsection (2) provides that notice is valid to prevent automatic continuation only if it complies with sections 8, 11, 13 and 17(2)(b) in respect of a landlord’s notice and sections 10, 11, 13 and 17(1)(b) for a tenant’s notice. Sections 8 and 10 set out the content of landlord’s and tenant’s notices. Section 11 makes provision about the circumstances in which notice may be given electronically. Section 13 sets out when notice must be received in order to be valid. Section 17 makes provision about the giving of notice where there is more than one landlord or tenant under the lease (and subsection (3) directs the reader to that section).

31. Sections 13 and 17 contain default requirements for notice which may be modified or disapplied by a written term of a lease in accordance with section 23. Where the default requirements of either section is varied by a written term of the lease, the notice must comply with the requirements of the section as varied by that written term.

32. None of the requirements or effects of section 3 may be varied by the parties (section 23(1)).

Section 4 – Termination in accordance with term of lease

33. Section 4 provides for a lease to end without notice in accordance with a term of the lease, removing the uncertainty regarding the effectiveness of such a term under the present law (see paragraphs 2.8 to 2.11, 2.46 to 2.54 and 2.57 of the Report).

34. Subsection (1) makes it clear that there is no required form of wording for such a term. (Compare the suggestion, noted at paragraph 2.10 of the Report, that under the present law a term of a lease excluding tacit relocation would be enforceable but a term in the form of a “no warning” clause would not.)

35. Subsection (2) makes clear the effect of a term included in a lease in accordance with subsection (1), which is that the lease ends on its termination date.

36. Subsection (3) requires a term that the lease will not continue after its termination date to be in writing.

37. Subsection (4) provides that subsection (1) does not affect the terms of any lease agreed before section 4 comes into force. The validity and effect of such a term is therefore to be determined according to the present law.

38. Section 4 implements Recommendation 5 (see paragraphs 2.8 to 2.11, 2.46 to 2.54 and 2.57 of the Report). None of the requirements or effects of section 4 may be varied by the parties (section 23(1)).

Section 5 – Automatic continuation of lease on basis of parties’ behaviour after termination date

39. Section 5 reproduces the effect of the existing rule of tacit relocation on the basis of parties’ conduct after the termination date (see paragraph 2.6 of the Report). As noted at paragraph 2.53 of the Report, and in implementation of Recommendation 6, none of the effects of section 5 may be varied by the parties (section 23(1)).

40. Under section 5, a lease is continued automatically where the tenant remains in possession of the let subjects after the termination date and the landlord either fails to take steps to remove the tenant within a reasonable period, or otherwise acts inconsistently with the lease having ended (typically by accepting rent) (subsection (1)). What is or is not a reasonable period will depend on the specific circumstances under consideration.

41. This rule does not apply to a lease which falls within schedule 1 (liferents, student and holiday lets, a lease granted with the authority of the court, and short-term grazing, mowing and sporting lets) (see paragraph 2.60 of the Report and Recommendation 4). For the application of this section to leases with multiple landlords or tenants, see section 6.

42. Subsection (2) makes it clear that the effect of subsection (1) is that where a lease should come to an end on its termination date but is continued by the parties' subsequent actings, the lease is to be treated as having continued after that date.

43. Subsection (3) makes clear that a lease is not continued by the parties' subsequent actings if the tenant remains in possession of the property on the basis of a new lease, or in other circumstances indicating that the tenant's continued possession is not on the basis that the lease is continuing.

44. Where there is a head lease and a sub-lease with the same termination date and the head lease is not to continue automatically after that date under section 2, see section 20.

Section 6 – Application of section 5 to leases with multiple landlords or tenants

45. Section 6 makes provision about how the rule of automatic continuation on the basis of the parties' actings after the termination date under section 5 operates where there are multiple landlords or tenants under a lease (see paragraph 2.59 of the Report). None of the requirements or effects of section 6 may be varied by the parties (section 23(1)).

46. Subsection (1) provides that where there are multiple landlords, a lease will continue under section 5 only where each of the landlords behaves as mentioned in subsection (1)(b) of that section – in other words, where none of the landlords takes steps to remove the tenant from the let subjects within a reasonable period, or each of them otherwise acts inconsistently with the lease having ended.

47. So, for example, if one landlord raises a court action to recover possession, that will suffice to exclude automatic continuation under section 5(1)(b)(i). If one landlord accepts rent on behalf of all other landlords, then that acceptance will be counted as the behaviour of all of the landlords and that will suffice for continuation under section 5(1)(b)(ii). If a landlord accepts rent only on their own account, the lease will not automatically continue by virtue of section 5(1)(b)(ii), read with section 6(1). In this scenario, the other landlord(s) would continue to be entitled to raise a court action seeking recovery of possession (provided that it is done within a reasonable period after the termination date).

48. Subsection (2) provides that where there are multiple tenants, the lease will continue under section 5 where at least one of the tenants remains in possession of the let subjects after the termination date and the landlord either fails to take steps to remove that tenant (or those tenants) within a reasonable period, or otherwise acts inconsistently with the lease having ended. The lease will only continue in respect of the tenant or tenants who remain in possession after the termination date. The continuation of the lease in this manner may involve the remaining tenant bearing the whole of the obligations under the lease, including payment of the rent, without the right of relief against their co-tenant that they would have had until the termination date.

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49. Where the interest of the landlord or the tenant under a lease is held jointly by two or more trustees of a trust, the trustees are not to be treated as being more than one landlord or tenant for the purposes of this section (see section 24(4)).

Effect of automatic continuation

Section 7 – Period and effect of automatic continuation of lease

50. Section 7 sets out the period for which a lease is continued under section 2(1) or 5(2), and the terms on which it continues.

51. Subsection (2) sets out the period for which the lease continues. This depends on the period of the lease before its termination date. Where the lease is continuing after its original termination date, the period of the lease which is relevant for the purposes of subsection (2) is the period for which the lease was granted. Where a lease continues after its original termination date, it acquires a new termination date (which is the end of the period for which it is continued). Where the lease is continuing after a new termination date, the period of the lease which is relevant for the purposes of subsection (2) is the period for which it was previously continued under this Part.

52. Subsection (2) provides for default periods for which a lease continues under section 2(1) or 5(2), but also allows the parties to the lease to agree that it will continue for a different period.

53. Subsection (2)(a)(i) provides that if the period of the lease is one year or longer, the default period of continuation is one year.

54. Subsection (2)(b)(i) provides that if the period of the lease is more than 28 days but less than one year, the default period of continuation is the same as the period of the lease. So if, for example, the lease is for 6 months, its default continuation period is 6 months.

55. Subsection (2)(c)(i) provides that if the period of the lease is 28 days or less, the default continuation period is the same period as the period of the lease. So if, for example, the lease is for 14 days, its default continuation period is 14 days.

56. Subsection (2)(a)(ii), (b)(ii) and (c)(ii) allows a provision in a lease to specify a period of continuation which differs from the default period of continuation and which is shorter than the original period of the lease. This period may not be less than 28 days (for leases which were originally granted for a period of more than 28 days) or 7 days (for leases which were originally granted for a period of 28 days or less).

57. Although section 2(2) provides that a lease which is for less than 3 months ends on its termination date, such a lease can continue after that date, by virtue of the parties' behaviour, under section 5. Where that happens, subsection (2) provides for the period for which the lease continues.

58. A provision which purports to specify a shorter period of continuation than is allowed under subsection (2), or which is not in writing (as required by subsection (5)) will be ineffective and the period of continuation will therefore be the default set out in subsection (2)(a)(i), (b)(i) or (c)(i) as the case may be.

59. A lease which was originally granted for a period of more than 28 days, but which is continuing for a period of 28 days (under subsection (2)(a)(ii), (b)(ii)), may not be automatically continued for a period of less than 28 days (subsection (3)).

60. Subsection (4) provides that a lease which continues automatically beyond its termination date by virtue of section 2(1) or 5(2) continues on the same terms as immediately before, except to the extent that those terms are inconsistent with the lease continuing. For example, a 10-year lease which includes an option to renew for a further 10 years will continue on the same terms as before, except that an unexpired renewal option will no longer apply (being inconsistent with section 7(2)(a), which has the (default) effect of turning the lease into a one-year lease).

61. Section 7 implements Recommendations 8, 9 and 10 (see paragraphs 2.65 to 2.73 of the Report). None of the requirements or effects of section 7 may be varied by the parties (section 23(1)).

Notice to prevent automatic continuation

Section 8 – Notice from the landlord: notice to quit

62. Section 8 makes provision about the content of notices to quit. Notice to quit is notice given by the landlord to the tenant which has the effect of ending the lease on its termination date (see section 3(1)(a)).

63. Subsection (1) provides that notice to quit must be given in writing (implementing Recommendation 11).

64. Subsection (2) sets out the elements which the notice must contain.

65. Subsection (2)(a) requires that the notice states that the tenant is required to give up possession of the property on the termination date of the lease. The reference in subsection (2)(a) to the notice's stating "in whatever terms" that the tenant is required to give up possession reflects the Bill's approach of specifying the required content of a notice rather than requiring a particular form of wording (see paragraphs 3.13 to 3.19, 3.29 to 3.30 of the Report and Recommendations 13 and 17(a)).

66. Subsection (2)(b) requires that the notice specify the termination date of the lease (implementing Recommendation 17(b)). For the effect of an error in the specified date, see subsection (5).

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67. Subsection (2)(c) requires the notice to include the name of the person by whom it is given, implementing Recommendation 15 (see paragraphs 3.22 to 3.24 of the Report). For the effect of an error in this information, see subsection (6).

68. Subsection (2)(d) requires the notice sufficiently to identify the subjects of the lease (whether directly or by reference to the lease). The description does not have to be as precise as, say, a description of a property for conveyancing purposes. Subsection (4) enacts the “reasonable recipient” test of whether a description of the subjects of the lease is sufficient, as discussed in paragraphs 3.26 and 3.27 of the Report. The test is whether a reasonable recipient of the notice who had the actual tenant’s knowledge would be able to identify the subjects of the lease from the notice. Together, subsections (2)(a) and (4) implement Recommendation 16. For the effect of an error in this information, see subsection (6).

69. Under the existing law, a notice to quit must be unconditional (see paragraph 3.30 of the Report). Subsection (3) reproduces this requirement for a notice to quit under section 8.

70. Subsections (5) to (7) make provision in respect of errors in the content of a notice.

71. Under subsection (5), an error in the termination date specified in the notice does not invalidate the notice if the date specified is after the (actual) termination date and before the end of the 7-day period beginning with the day after that date. See section 9 for further provision in respect of the parties’ rights during this period.

72. If the erroneous date is earlier than the actual termination date, or after the end of the 7-day period mentioned in paragraph 71, the notice will be invalid (see section 3(2)(a) which provides that notice to quit is valid only if it complies with (amongst other things) the requirements of section 8).

73. Subsection (6) provides that an error in the name of the person giving the notice or in the identification of the let subjects does not invalidate the notice if a reasonable recipient would, in all the circumstances, know both that the information provided was erroneous and the correct information that should have been provided.

74. The reliefs provided in subsections (5) and (6) are exhaustive in relation to the errors that they cover. Accordingly subsection (7) provides that, in respect of errors in a notice to quit, neither section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (rectification of defectively expressed documents) nor any other error-relieving rules of law apply.

75. Section 8 implements Recommendations 11 to 13 and 15 to 17 in respect of the form and content of a notice to quit (see paragraphs 3.9 and 3.12 to 3.31 of the Report) and Recommendations 20, 22 and 23 in relation to errors in such a notice (see

paragraphs 3.47 to 3.59 of the Report). None of the requirements or effects of section 8 may be varied by the parties (section 23(1)).

Section 9 – Effect of error in termination date in notice to quit

76. Section 9 makes provision about what happens if a notice to quit includes an error in the termination date but, because of section 8(5), the notice is not invalid. The notice is not invalid if the erroneous date falls within the period of 7 days beginning with the day after the (actual) termination date. In section 9, the period beginning with the date after the actual termination date, and ending with the date which was included in the notice, is called the “post-termination period” (subsection (5)).

77. Subsection (1) provides that section 9 applies where the notice is not invalid because of the error, but only so long as there is no other basis on which the lease ends on its termination date (for example, as a result of the tenant giving the landlord valid notice of intention to quit under section 10).

78. Subsection (2) provides that, even though the lease ends on the termination date, the tenant may remain in possession of the subjects of the lease until the date which was included in the notice (although section 19(5) makes provision about what happens if the lease is a sub-lease and the head lease has come to an end).

79. Subsection (3) provides that the tenant is not liable to the landlord for certain matters during the post-termination period. These are violent profits (the profit that a landlord could have made from the let property during its unlawful occupation), unjustified enrichment (where one party has benefitted without legal justification at the expense of another person) and damage caused to the property during that period, unless that damage was caused by the tenant.

80. Subsection (4)(a) requires the landlord to continue to comply with the landlord’s obligations under the lease during the post-termination period as if the lease was still in effect. The landlord is also required by subsection (4)(b) to fulfil, or reimburse the tenant for the expense of fulfilling, certain obligations.

81. The obligation placed upon the landlord by subsection (4)(b) relates only to obligations arising during the post-termination period which would have been owed by the landlord to another person had the landlord been in occupation of the subjects. This includes, most obviously, the payment of business rates and common charges relating to the building, but would not include other voluntary obligations entered into by the tenant to which the landlord was not a party.

82. Section 9 implements Recommendation 21 (see paragraphs 3.51 to 3.53 of the Report). It applies where the only defect in the notice lies in an error in the termination date which may be relieved. The effects of section 9 may not be varied by the parties (section 23(1)).

Section 10 – Notice from the tenant: notice of intention to quit

83. Section 10 makes provision about the content of notices of intention to quit. Notice of intention to quit is notice given by the tenant to the landlord which has the effect of ending the lease on its termination date (see section 3(1)(b)).

84. Subsection (1) provides that notice of intention to quit must be given in writing, unless the period for which the lease was granted is one year or less, in which case notice may be given orally or in writing (implementing Recommendation 11). A written term of a lease for one year or less may provide that a notice of intention to quit must be in writing (section 23(1)).

85. Subsections (2) and (3) set out the elements which the notice must contain generally, and if it is in writing.

86. Subsection (2)(a) requires that the notice states that the tenant intends to give up possession of the subjects of the lease at the end of the period of the lease. The reference in subsection (2)(a) to the notice's stating the tenant's intention "in whatever terms" reflects the Bill's approach of specifying the required content of a notice rather than requiring a particular form of wording (see paragraphs 3.13 to 3.19 of the Report and Recommendations 13 and 18(a)).

87. Subsection (2)(b) requires the notice sufficiently to identify the subjects of the lease (whether directly or by reference to the lease). The description does not have to be as precise as, say, a description of a property for conveyancing purposes. Subsection (5) enacts the "reasonable recipient" test of whether a description of the subjects of the lease is sufficient (see paragraph 3.39 of the Report). The test is whether a reasonable recipient of the notice who had the actual landlord's knowledge would be able to identify the subjects of the lease from the notice. Subsection (6) provides that the notice need not specify when the period of the lease will end (unlike a notice to quit, which must specify the termination date (section 8(2)(b))). Together, these provisions implement Recommendation 18. For the effect of an error in this information, see subsection (7).

88. Subsection (3) requires the notice, if the notice is given in writing, to either include the tenant's name or, if it is given by another person on the tenant's behalf, the name of the person by whom it is given, implementing Recommendation 19 (see paragraph 3.38 of the Report). This applies whether writing is required by subsection (1)(a), or is optional under subsection (1)(b). For the effect of an error in this information, see subsection (7).

89. Subsection (4) requires that the tenant's statement of intention to give up possession of the subjects of the lease at the end of the period of the lease be unconditional. This represents a limited departure from the existing common law, as explained by the Inner House in *Rockford Trilogy Limited v NCR Limited* [2021] CSIH 56; 2022 SC 90 (see paragraphs 3.41 to 3.44 of the Report).

90. Subsection (7) provides that an error in the name of the person giving the notice or in the identification of the let subjects does not invalidate the notice if a reasonable recipient would, in all the circumstances, know both that the information provided was erroneous and the correct information that should have been provided. This implements Recommendation 22.

91. The reliefs provided in subsection (7) are exhaustive in relation to the errors that they cover. Accordingly subsection (8) provides that, in respect of errors in the notice, neither section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (rectification of defectively expressed documents) nor any other error-relieving rules of law apply. This implements Recommendation 23.

92. Section 10 implements Recommendations 11, 13, 18 and 19 in respect of the form and content of a notice of intention to quit (see paragraphs 3.10 to 3.19 and 3.35 to 3.45 of the Report) and Recommendations 22 and 23 in relation to errors in such a notice (see paragraphs 3.47 to 3.49 and 3.54 to 3.59 of the Report). None of the requirements or effects of section 10, other than that of subsection (1)(b), may be varied by the parties (section 23(1)).

Section 11 – Consent required to use electronic means to give notice in writing

93. Section 11 makes provision about the circumstances in which notice to quit, or notice of intention to quit, may be given electronically.

94. Subsections (1) and (2) prevent notice which is given in writing from being given electronically unless, before it is given, the recipient has consented to the form in which, and the means by which, the notice is so given. This applies whether writing is required for the notice or is optional. Consent to giving notice electronically may be withdrawn before the notice is given.

95. As well as the giving of written notice to an electronic address (defined in subsection (6)), section 11 governs the giving of written notice by using any other electronic means (subsection (1)). This deliberately broad formulation is intended to cover notice given by messaging apps and by other routes yet to be invented.

96. Subsection (3) provides that consent may be given expressly or by implication. Consent may also be withdrawn expressly or by implication, but withdrawal may be implied only by a course of conduct and not by a one-off event. Where there is doubt as to whether consent has been withdrawn, there is a rebuttable presumption that it was not withdrawn (subsection (5)).

97. Subsection (4) deals with the case where notice is given electronically but the recipient had not consented to its being given in the form, and by the means, in which it is given. In that case, the notice is to be treated as being given in compliance with subsection (1) if the recipient acknowledges receipt of the notice in writing before the last day on which notice may validly be received (see section 13).

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98. Subsection (7) provides that section 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 does not apply to notices given under the Bill. Section 4 of the 2015 Act makes provision for the delivery of traditional documents (as defined in section 1A of the Requirements of Writing (Scotland) Act 1995) by electronic means. It permits such delivery either where there is an accepted method agreed between the parties, or “by such means (and in such form) as is reasonable in all the circumstances.” The Scottish Law Commission considered that such a test of mere reasonableness would be inappropriate in the cases of notices under the Bill (see paragraph 3.84 of the Report).

99. Section 11 implements Recommendations 28 and 29 (see paragraphs 3.83 to 3.88 of the Report). None of the requirements or effects of section 11 may be varied by the parties (section 23(1)).

Section 12 – Further provision about giving notice

100. Section 12(1) provides that a notice to quit, or a notice of intention to quit, need not include the name of, or be addressed by name to, the intended recipient. But if this is included, an error in the name will not invalidate the notice if a reasonable recipient would, in all the circumstances, be aware that it was intended to be given to that person (subsection (2)). It also provides that notice is given to a person when it is received by that person and that it does not matter whether the notice is received directly from the person giving it or from a third party (subsection (3)).

101. Section 12 implements Recommendations 17(c) (see paragraph 3.33 of the Report) and 18(d) (see paragraph 3.45 of the Report).

Section 13 – Day by which notice must be received

102. Section 13 sets out default rules governing the day by which notice given under section 3(1) must be received.

103. Subsection (1) provides that notice must be received on or before the last day for giving notice, as set out in subsection (2). The last day for giving notice depends on the period of the lease. If the period is 6 months or longer, the last day for giving notice is 3 months before the termination date. If the period is less than 6 months, the last day is one month before the termination date.

104. Subsection (3) provides that the day which is 3 months (or as the case may be, one month) before the termination date is the same day of the month that is 3 months (or one month) before the termination date but that if there is no such day, the last day of that month.

105. For example if a lease for a period of 5 years has a termination date of 30 September 2030 the last date for receipt of notice is 30 June 2030. If a lease for the same period (duration) has a termination date of 31 May 2030, the last day for receipt of

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notice is 28 February 2030, being the last day of the third month before the month in which the termination date falls.

106. The “period of a lease” has the meaning given in section 24(2)(a) and (b).

107. In implementation of Recommendation 37(a), a lease may vary the last day for giving notice under subsection (1) (section 23(1)(a)). Any such variation must be in writing (section 23(3)) and must provide for the same last day to apply to both landlords’ and tenants’ notices (section 23(2)). Notice which does not comply with section 13 (including, where relevant, as varied) is not valid (section 3(2)).

108. Section 13 implements Recommendations 25 and 26 (see paragraphs 3.66 to 3.70 of the Report).

Section 14 – Day on which notice given in writing is taken to be received

109. Section 14 sets out rules about when notice to quit, or notice of intention to quit which is given in writing, is taken to be received. These rules depend on how the notice is given.

110. Subsection (1) provides non-exhaustive rules for determining the time at which notice to quit or of intention to quit is received. Subsection (1) does not affect when notice given in a manner not covered by subsection (1) is, or is taken to be, received (subsection (2)).

111. Subsections (3) and (4) provide for addresses which are “listed” addresses for the purposes of the table in subsection (1), and subsection (5) defines other terms used in section 14.

112. In implementation of Recommendation 37(b) the effects of this section may be varied by a written term in a lease (see paragraph 3.99 of the Report and section 23(1)).

113. Subsection (6) disapplies section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (service of documents) in relation to a document containing notice to quit or of intention to quit. That section would otherwise have applied a presumption that a notice sent by recorded delivery post from within the UK, or sent by electronic communications, was received 48 hours after sending. (See paragraphs 3.92 and 3.93 of the Report).

114. Section 14 implements Recommendations 31 to 34 (see paragraphs 3.90 to 3.94 of the Report).

Section 15 – Delivery of notice in writing by sheriff officer

115. Section 15 sets out how notice in writing is to be delivered by a sheriff officer in order for the rule as to when it is delivered under section 14(1) to apply. The notice must

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be delivered in one of the ways set out in subsection (2), and the sheriff officer must prepare a certificate of delivery under subsection (4).

116. Subsection (2) provides that the document is to be delivered by the sheriff officer by hand. If the recipient is an individual, it must be hand delivered to either the individual, at the individual's residence to another person who lives there, or at the individual's place of business to an employee of the individual or someone authorised to receive it. If the recipient is not an individual (e.g. it is a company), the notice is to be hand delivered at the recipient's place of business to an employee of the recipient or a person authorised to receive it. If the sheriff officer's attempts at hand delivery are unsuccessful, the sheriff officer may leave the notice at the recipient's place of business or, where the recipient is an individual, at the recipient's residence.

117. Subsection (3) provides that, for the purposes of subsection (2), an agent of the recipient of a notice is not to be treated as being the recipient.

118. Subsection (4) provides that the certificate of delivery is to be in writing and be signed by the sheriff officer. The notice must set out how and when the notice was delivered, any person other than the recipient to whom it was delivered and, if the notice was left at the recipient's residence or place of business, the ways in which hand delivery was attempted and why it was unsuccessful. Subsection (5) provides that the certificate is sufficient evidence of those matters.

119. Section 15 implements Recommendation 36 (see paragraph 3.94 of the Report). Its requirements may not be varied by the parties (section 23(1)).

Section 16 – Withdrawal of notice

120. Section 16(1) provides that notice to quit, or notice of intention to quit, may be withdrawn by the person who gave it only with the agreement of the person to whom it was given. This prevents notice being withdrawn unilaterally.

121. The withdrawal of the notice and the other party's agreement must be in writing if the notice was in writing (subsection (2)).

122. Subsection (3) makes it clear that if the notice is withdrawn the lease does not end on its termination date.

123. Notice may be withdrawn by a successor of the person who gave it, and a successor of a person to whom notice was given may agree to the notice being withdrawn (subsection (4)).

124. Subsection (5) directs the reader to section 17 which makes provision about the withdrawal of notice where there is more than one landlord or tenant under a lease.

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125. Section 16 implements Recommendations 38 and 39(b) (see paragraphs 3.101 to 3.106 of the Report).

Section 17 – Giving and withdrawal of notice where there are multiple landlords or tenants

126. Section 17 makes provision about the giving and withdrawal of notice to quit, or notice of intention to quit, where there is more than one landlord or tenant under a lease.

127. Subsection (1)(a) provides that if there is more than one landlord, any one of them may give the tenant notice to quit, with or without the consent of the other landlords. The notice has effect as if it were given by all of the landlords (subsection (5)(a)). Paragraph (b) requires that, where there is more than one landlord, notice of intention to quit must be given by the tenant to each landlord.

128. Subsection (2)(a) provides that if there is more than one tenant, any one of them may give notice of intention to quit to the landlord, with or without the consent of the other tenants. The notice has effect as if it were given by all of the tenants (subsection (5)(b)). Paragraph (b) requires that, where there is more than one tenant, notice to quit must be given by the landlord to each tenant.

129. Subsections (3)(a) and (4)(a) provide that, where there is more than one landlord or tenant and only one of them gives notice to quit or of intention to quit, the agreement of the other landlords or (as the case may be) the other tenants is needed for withdrawal of the notice.

130. Subsections (3)(b) and (4)(b) provide that where notice is given to each landlord or tenant, it may be withdrawn only with the agreement of all of them.

131. Subsection (6) makes clear that agreement to the withdrawal of notice where there is more than one landlord or tenant must be in writing where the notice was given in writing.

132. Section 17 implements Recommendations 40 and 41 (see paragraphs 3.108 to 3.112 of the Report). Its requirements and effects may be varied by a written term in a lease (section 23(1)). Failure to comply with the requirements of section 17(1)(b) or, as the case may be, (2)(b) (including, where relevant, as varied by the lease) means that the notice is not valid (see section 3(2)).

133. Where the interest of the landlord or the tenant under a lease is held jointly by two or more trustees of a trust, the trustees are not to be treated as being more than one landlord or tenant for the purposes of this section (see section 24(4)).

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Section 18 – Notice unaffected by change of landlord or tenant

134. Section 18 clarifies that where, after notice to quit or notice of intention to quit is given by a party to the lease, there is a change in the identity of either party (for example, the tenant's interest is assigned to a third party), the validity of the notice is not affected by that change.

135. Section 18 implements Recommendation 39(a) (see paragraphs 3.103 to 3.106 of the Report). Its effect may not be varied by the parties (section 23(1)).

Head leases and sub-leases

Section 19 – Termination of sub-lease

136. Sections 19, 20 and 21 make provision about how the Bill applies where there is a sub-lease over all or part of the subjects of another lease (the “head lease”).

137. Subsection (2) of section 19 removes a doubt as to the duration of a sub-lease that has a termination date that appears to fall after that of the head lease. If that is the case, the sub-lease is to be treated as having a termination date which is the same as that of the head lease.

138. Subsection (3) provides that, if the sub-lease and the head lease have the same termination date, the sub-lease ends on that date if the head lease ends on that date. This is the case even if the sub-lease would otherwise have continued by virtue of section 2(1) of the Bill (subsection (4)). The sub-lease cannot continue after the head lease has ended.

139. Section 9 enables a tenant, in certain circumstances, to remain in possession of the property after the lease is brought to an end by a notice to quit if there is an error in the termination date stated in the notice. Subsection (5) of section 19 disapplies this where the tenant is a sub-tenant and the head lease has ended on the termination date.

140. Subsection (6) prevents a sub-tenant from bringing a legal challenge to the validity of any notice to quit or notice of intention to quit given in relation to the head lease, any term of the head lease under section 4(1) (which means that the head lease will come to an end on its termination date) or any new lease between the parties to the head lease.

141. For the effect of parties' conduct following the termination date in cases where there is a sub-lease, see section 20.

142. Section 19 implements Recommendations 42 and 43 (see paragraphs 3.115 to 3.123 of the Report). Its effects may not be varied by the parties (section 23(1)).

Section 20 – Automatic continuation of head lease and sub-lease

143. Section 20 makes provision about the automatic continuation of a head lease and sub-lease where both leases have the same termination date and both leases end on that date.

144. Subsection (2) disapplies section 5(1) of the Bill in relation to both leases. Section 5(1) provides for a lease to continue after its termination date on the basis of the actings of the parties to it after that date. (But section 5(1) does apply if the head lease and the sub-lease have different termination dates.)

145. Subsections (3) and (4) make alternative provision for the circumstances in which, where section 20 applies, the head lease and the sub-lease are continued after the termination date on the basis of the actings of the parties.

146. Subsection (3) provides instead that the head lease continues if (a) either the tenant remains in civil possession of the property and the sub-tenant remains in natural possession (i.e. the sub-tenant continues to occupy the property) or the sub-tenant vacates the property and the tenant takes natural possession of it, and (b) the landlord does not take steps to remove the tenant within a reasonable period or otherwise acts inconsistently with the lease having ended.

147. Subsection (4) provides that, if the head lease continues under subsection (3), the sub-lease also continues if the sub-tenant remains in possession of the property after the termination date and the tenant under the head lease does not take steps to remove the sub-tenant within a reasonable period or otherwise acts inconsistently with the lease having ended.

148. Subsection (5) provides for the application of sections 5(2) and (3) and 6 to head leases and sub-leases to which section 20 applies. This means that, where the ending of a head lease or sub-lease is of no effect because of section 20(3) or (4), it is to be treated as having continued after its termination date in accordance with section 5(2).

149. Subsection (5) also has the effect that the head lease or (as the case may be) the sub-lease is not continued by virtue of any possession of the property by the tenant or sub-tenant on the basis of a new lease or other agreement, or in other circumstances indicating that the parties to the lease intended that possession to be on a basis other than continuation of the lease (as provided for in section 5(3)). The rules in section 6 about how section 5(1) applies where there are multiple landlords or tenants apply also to section 20(3) and (4).

150. Section 20 implements Recommendations 44 and 45 (see paragraph 3.119 of the Report). Its requirements and effects may not be varied by the parties (section 23(1)).

Section 21 – Information to be given by tenant to sub-tenant

151. Section 21 requires the tenant under a head lease to provide the sub-tenant under the sub-lease with certain information in relation to the head lease, unless the head lease is for a period of less than 3 months or is one listed in schedule 1 (subsection (3)). This information relates to the continuation or ending of the head lease. If the head lease ends, the sub-lease also ends.

152. Subsection (1) requires the tenant to give the sub-tenant a copy of any notice to quit or notice of intention to quit in relation to the head lease, to notify the sub-tenant if the tenant gives or withdraws notice of intention to quit orally (rather than in writing), to give the sub-tenant a copy of any agreement to the withdrawal of notice in relation to the head lease, or an agreement under section 4(1) that the head lease will end on its termination date, and to notify the sub-tenant in writing if the tenant enters into a new lease of the property with the landlord which will take effect on the termination of the head lease.

153. Failure to comply with the requirements of subsection (1) does not affect the validity of anything to which those requirements relate, but the tenant will be liable to the sub-tenant for any loss caused to the sub-tenant by that failure (subsection (2)).

154. Section 21 implements Recommendations 46 and 47 (see paragraphs 3.120 to 3.123 of the Report). Its requirements and effects may not be varied by the parties (section 23(1)).

Cautionary obligations

Section 22 – Effect of continuation of lease on caution for obligations under lease

155. A cautionary obligation is a guarantee by a third party to perform an obligation owed by another person. This can be an obligation guaranteeing the performance of obligations under a lease.

156. Section 22 provides that, where there is a cautionary obligation in relation to a lease which continues after its termination date by virtue of section 2(1) or 5(2), the cautionary obligation does not continue after the termination date unless its terms provide otherwise.

157. Section 22 implements Recommendation 7 (see paragraph 2.63 of the Report). Its effect may not be varied by the parties (section 23(1)).

Contracting out of Part

Section 23 – Restriction on modification or disapplication of this Part

158. Section 23 makes provision regarding the variation (which here means modification or disapplication (subsection (6)) of the other provisions of Part 2 of the Bill.

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159. In terms of subsection (1)(a), a lease may vary any requirement or effect of:

- section 10(1)(b) (form of notice to quit in relation to leases of one year or less);
- section 12 (further provision about the giving of notice);
- section 13 (day by which notice must be received);
- section 14 (day on which notice given in writing is taken to be received);
- section 16 (withdrawal of notice);
- section 17 (giving and withdrawal of notice where there are multiple landlords or tenants).

160. The requirements and effects of the other provisions of Part 2 of the Bill may not be varied (subsection (1)(b)). Any term of a lease will be of no effect to the extent that it purports to vary such a requirement or effect (subsection (4)(a)).

161. If a term of a lease varies the last day for giving notice under the lease, the same day must apply for both landlords' and tenants' notices (subsection (2)), otherwise it will be of no effect (subsection (4)(b)).

162. A term of a lease which varies any requirement or effect of a provision of Part 2 must be in writing (subsection (3)). For the form of writing required in relation to a lease of more than a year, see section 1(2) and (6) of the Requirements of Writing (Scotland) Act 1995.

163. Subsection (5) provides that, where a term of a lease is inconsistent with (but does not expressly vary) a provision of the Bill which may be varied under subsection (1), the term is to be treated as varying the provision so far as it is inconsistent with the term. This applies only where the term of the lease is in writing. If such a term of a lease is not in writing, the term of the lease has no effect to the extent that it is inconsistent with the provision of the Bill (and the provision of the Bill therefore applies to the lease without variation).

164. Section 23 implements Recommendations 6 (see paragraph 2.58 of the Report), 24 (see paragraph 3.60 of the Report), 30 (see paragraph 3.88 of the Report), 35 (see paragraphs 3.90 to 3.94 of the Report), 37 (see paragraphs 3.96 to 3.99 of the Report), 38 (see paragraph 3.101 of the Report), 40 and 41 (see paragraph 3.109 to 3.112 of the Report).

Definitions

Section 24 – Interpretation of this Part

165. Section 24 contains provision relating to the interpretation of Part 2 of the Bill.

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166. In subsections (1) and (2) the reference to the ish is to the moment at which the lease provides that the tenant ceases to have a right to use the subjects of the lease (see paragraphs 2.23 and 2.24 of the Report).

Disapplication of certain common law rules

Section 25 – Disapplication of common law rule of tacit relocation and other rules relating to the termination of leases

167. Section 25 disapples the existing common law concerning the ending of leases on their termination dates and tacit relocation in relation to the leases to which the Bill applies.

168. Section 25 implements Recommendations 1, 3 and 51 (see paragraphs 2.55, 2.62 and 3.132 of the Report).

Part 3 – Miscellaneous provision relating to start, end or length of lease

Default duration and date of entry

Section 26 – Duration of lease and date of entry in absence of agreement

169. Section 26 makes provision for determining the period and date of entry under a lease in the absence of agreement. It applies where the tenant has taken possession of the subjects of the lease. It displaces any common law rules by which period or date of entry may be implied (subsection (8)).

170. Subsection (2) restates the common law rule that, where the period of the lease cannot be established, the period of the lease is one year beginning with the date of entry.

171. Subsections (3) and (4) provide for the case where the date of entry under a lease cannot be established. Subsection (4) provides that the date of entry is to be treated as being—

- the date on which the tenant took possession of the subjects of the lease,
- if that date cannot be established, the date on which the lease was granted, or
- if neither of those dates can be established, 28 May in the earliest year in which rent was paid under the lease.

172. Subsection (5) allows the parties to a lease to apply to the sheriff to determine the date of entry. An application to the sheriff under subsection (5) would be by way of summary application in terms of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 (SI 1999/929).

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173. Subsection (6) allows a court or tribunal which determines the date of entry under a lease to order the lease to be endorsed with that date.

174. Section 26 implements Recommendations 52 to 56 (see paragraphs 4.3 to 4.14 of the Report).

Documents leading to termination of lease

Section 27 – Notification of postal address in United Kingdom for termination documents

175. Section 27 places a requirement on a party to a lease, in certain circumstances, to provide the other party with a UK postal address to which termination documents may be sent.

176. Subsection (1) requires each party to a lease to notify the other party of a UK postal address to which a termination document may be sent, and enables the parties to keep those addresses up-to-date by notifying new addresses from time to time. The notification must be in writing and must state that termination documents can be sent to that address (subsection (4)(a) and (b)). Different addresses can be notified for different types of document, and the notification may be given in more than one document (subsection (4)(c)).

177. A termination document includes any document which, if given by one party to a lease to the other party, will bring the lease to an end or is a document which must be given as part of a process for bringing the lease to an end (subsection (2)). The definition of “termination document” in subsection (2) is intended to include all break and irritancy-related notices, as well as notices to quit and notices of intention to quit.

178. The requirement to provide an address under subsection (1) does not apply in certain circumstances where such an address is ascertainable by the other party to the lease. It does not apply if there is a UK postal address for the party included in the lease or in certain documents registered in the Land Register or recorded in the Register of Sasines, or of which the other party to the lease has been given a copy (subsection (3)(a) and (b)). The requirement in subsection (1) does not apply to a body corporate or other legal person with a registered office in the UK (subsection (3)(c)).

179. The requirement in subsection (1) also does not apply to a party to a lease who is an executor over an estate which includes the lease, or a heritable creditor who has entered into possession of an interest of a lease of someone who has died (subsection (3)(d)). Finally, the requirement in subsection (1) does not apply where the lease is not one for which the formality of a written document is required by section 1(2) of the Requirements of Writing (Scotland) Act 1995.

180. Subsection (5) provides that, where an enactment, rule of law or term of a lease requires or permits a termination document to be sent to a party at an address outwith the UK, the requirement in subsection (1) to provide a UK address still applies, and a

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termination document sent to a notified UK address is not invalid only because of that enactment, rule of law or term of the lease.

181. Parties may not disapply the effect of this section or section 28 (subsection (6)). Section 28 makes provision about the effect of failing to provide an address in accordance with section 27.

182. Section 27 implements Recommendations 57 to 59, 63 to 65 and 68 (see paragraphs 4.23 to 4.29 of the Report).

Section 28 – Effect of failure to notify United Kingdom address under section 27

183. Section 28 provides for the effect of a party failing to comply with the notification requirements in section 27, and the remedies available in such a case.

184. A party to a lease who fails to comply with section 27(1)(a) is not liable to the other party for any loss sustained as a result of that failure (subsection (2)), but where the other party is the tenant the tenant may withhold payments due to the landlord until the landlord does provide a UK address to the tenant (subsection (3)(a)). When the landlord does comply with the requirements of section 27(1)(a), the tenant must pay any sums withheld within 14 days (subsection (3)(b)).

185. Subsections (5) to (7) set out how a party to the lease may send termination documents during any period when the other party has failed to provide an address under section 27(1)(a). These rules apply during the period of non-compliance and, where the other party does subsequently provide an address, for 14 days following the address being provided. Sending a document in accordance with these rules has the same effect as if it was sent to an address notified under section 27(1) (subsection (8)).

186. Where the person who has failed to provide an address is the tenant, the landlord may send termination documents to the tenant at the subjects of the lease (if they are capable of receiving post) (subsection (5)).

187. If the document cannot effectively be sent by electronic means, or it is not reasonably practicable to send it that way, or if, where the document is from the landlord, it is not possible to send the document to the let property, the document can be sent by post to the Extractor of the Court of Session (subsection (7)). There is a presumption that it is both legally effective, and reasonably practicable, to send a document by electronic means unless the contrary is shown (subsection (9)).

188. Section 28 implements Recommendations 60 to 62 (see paragraphs 4.30 to 4.37 of the Report).

Section 29 – Effect of termination document given after death or change of party to lease

189. Section 29 makes provision for the effect of a termination document given after the death of a party to the lease or another change in the parties to a lease. Its effect may not be disapplied by the parties (subsection (6)).

190. Subsections (1) and (2) deal with the case where the landlord's interest has transferred to another party (other than on the death of the landlord) and the tenant has not been notified in writing by the new landlord of the new landlord's name and postal address (which need not be in the UK). If the tenant gives a termination document to the former landlord, the document is to be treated as if it had been given to the new landlord (and so is not invalid by not been given to the other party to the lease).

191. Subsections (3) to (5) deal with the case where a party to a lease has died, and the other party to the lease has not been notified that an executor has been confirmed over that person's estate or the person's heritable creditor has entered into possession of the person's interest in the lease, and the executor or creditor has not notified the other party in writing of that fact, and of their name and UK postal address.

192. If the other party to the lease sends a termination document to the deceased person at an address to which the document could have been sent when the person was alive, the document is to be treated as having been given to the executor or creditor. For these purposes, it does not matter whether the executor has yet been confirmed, or the creditor has yet entered into possession of the interest in the lease (see subsection (5)(b)).

193. Subsection (4) sets out the day on which the document is to be taken to be delivered for these purposes, by applying rules which would have applied had the deceased person still been alive. Where the termination document is a notice to quit or notice of intention to quit, "any relevant rule" for the purposes of subsection (4) would include any applicable provision of section 14 (day on which notice given in writing is taken to be received), whether or not varied by a written term of the lease (section 23(1)).

194. Subsection (7) confirms that this section does not affect any other ground on which the document might not be effective.

195. Section 29 implements Recommendations 66 to 68 (see paragraphs 4.39 to 4.45 of the Report) and 69 to 73 (see paragraphs 4.47 to 4.52 of the Report).

Irritancy notices

Section 30 – Service of irritancy notice and copies to be given to heritable creditors

196. Section 30 amends provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (the “1985 Act”) relating to irritancy of leases. Irritancy of a lease can occur where the tenant is in breach of the lease and the landlord brings the lease to an end.

197. Section 4 of the 1985 Act provides that the landlord is not entitled to end the lease, or treat it as having been terminated, where the tenant fails to pay the rent or make any other payment due under the lease unless the landlord serves a notice on the tenant requiring payment and stating that if the tenant does not make payment the lease may be terminated. This notice is known as a pre-irritancy warning notice. The only way in which the notice can be served under section 4 is by recorded delivery post.

198. Section 30(2) of the Bill amends section 4 of the 1985 Act so as to change how that notice may be served on the tenant. In addition to be served by recorded delivery post, the notice may be served by being delivered in Scotland by a sheriff officer (section 4(4) of the 1985 Act, as substituted by section 30(2) of the Bill). New section 5B of the 1985 Act, inserted by section 30(3) of the Bill, sets out the requirements for delivery by a sheriff officer.

199. New section 4(4A) provides that, where sent by recorded delivery, the notice is sufficiently served if it is sent to the last postal address in the UK given by the tenant to the landlord for the purpose of sending the notice, to the tenant’s registered office in the UK if the tenant is a body corporate or other legal person, or where the tenant has not given the landlord an address for these purposes and is not a body corporate or other legal person, to the tenant’s last known address in the UK of which the landlord is aware.

200. If the landlord is sending the notice to the tenant’s last known UK address, the notice is sufficiently served even if the tenant does have a subsequent address which the landlord was unaware of, and even if the landlord could reasonably have been expected to become aware of it (new subsection (4B)).

201. Note that, if the tenant does not have an address in the UK known to the landlord, and has not provided an address in the UK to the landlord for the purpose of service, there is no requirement for the landlord to serve the pre-irritancy warning notice (see section 4(1) and (5) of the 1985 Act).

202. New subsection (4C) allows the parties to the lease to provide additional methods of service to be used for serving the notice, but those additional methods do not displace the need for the notice to be served in accordance with the methods set out in section 4(4).

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203. Section 30(3) of the Bill inserts new sections 5A and 5B into the 1985 Act. Section 5A is concerned with notice to be given to a heritable creditor in relation to the irritancy of a lease. Section 5B sets out how a pre-irritancy warning notice, or a copy of a notice to be given to a heritable creditor in connection with the irritancy of a lease, is to be delivered where it is served by a sheriff officer.

204. New section 5A applies where there is a heritable creditor over a lease, and either the landlord consented to the security being granted, or the landlord's consent was not required for the security.

205. If the landlord serves any irritancy-related notice on the tenant, the landlord must also serve a copy of the notice on the creditor in certain circumstances (section 5A(2)). Failure to do so prevents the landlord from relying on the irritancy clause in the lease, or the material breach of the lease, to which the notice relates (section 5A(6)).

206. An irritancy-related notice is a document given by the landlord to the tenant which results in the lease being terminated under an irritancy clause or as a result of a material breach of the lease, or which must be given before the lease is terminated in that way (section 5A(9)). An irritancy clause is a clause in a lease which purports to terminate the lease, or enables the landlord to terminate the lease, in the event of an act or omission by the tenant or a change in the tenant's circumstances. A material breach by the tenant is an act or omission by the tenant, or a change in the tenant's circumstances, which the lease deemed to be a material breach of the lease.

207. The circumstances in which a copy of an irritancy-related notice is to be served on the creditor are that the security was registered more than 10 days before the day on which the notice is served on the tenant, and the landlord knows of a UK address for the creditor or has been given a UK address by the creditor for these purposes. The copy must be served on the creditor as soon as reasonably practicable after the notice is served on the tenant (section 30(2)).

208. Section 5A(3) to (5) sets out how the copy is to be served on the creditor. As with pre-irritancy warning notices under section 4 of the 1985 Act, the copy must be served either by being sent by recorded delivery post, or by being delivered by a sheriff officer. The copy is sufficiently served if sent by recorded delivery post to the last UK postal address given by the creditor to the landlord for these purposes, to the creditor's registered office in the UK if the creditor is a body corporate or other legal person, or, where the creditor has neither of those addresses, to the last postal address for the creditor in the UK of which the landlord is aware.

209. If the landlord is sending the notice to the creditor's last known UK address, the notice is sufficiently served even if the creditor does have a subsequent address which the landlord was unaware of, and even if the landlord could reasonably have been expected to become aware of it (section 5A(5)).

210. Section 5A(7)(a) allows the creditor to challenge the validity of any irritancy-related notice in civil proceedings (including arbitration).

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211. Subsection (7)(b)(i) and (ii) allows the creditor to challenge the termination of the lease in reliance on an irritancy clause or material breach of the lease on the grounds that the landlord failed to give the tenant a pre-irritancy warning notice under section 4 of the 1985 Act, failed to serve the creditor with a copy of an irritancy-related notice under section 5A(2), or failed to do something that was required by the lease before terminating the lease or treating it as terminated.

212. Subsection (7)(b)(iii) allows the creditor to challenge the termination of the lease on the grounds that a fair and reasonable person in the position of the landlord would not have terminated it, or treated it as terminated, having regard to the interests of the creditor, but not where the tenant has failed to pay money due under the lease (subsection (8)).

213. New section 5B of the 1985 Act sets out how a document is to be delivered by a sheriff officer for the purposes of sections 4 and 5A of that Act. Its requirements are the same as those of section 15 of the Bill for notices to quit and notices of intention to quit (see paragraphs 115 to 118).

214. Section 30 implements Recommendations 77 to 83 (see paragraphs 5.14 to 5.19 and 5.21 to 5.28 of the Report).

Apportionment of rent

Section 31 – Repayment of rent and other payments relating to period after lease ends

215. Section 31 makes provision regarding the apportionment of rent. It sets out, as a default, a term to be implied into leases to which the Bill applies. However, it may be disapplied (subsection (5)(a)) or modified (subsection (5)(b)) by the parties.

216. The current law appears to be that, unless there is express provision in the lease to the contrary, a tenant cannot recover overpaid rent in the event of early termination of the lease (see paragraph 6.6 of the Report).

217. Subsections (2) and (3) set out the term to be implied into a lease. The term applies where the lease ends, except where that is because of an irritancy clause (i.e. a term of the lease which terminates it or allows the landlord to terminate it because of an act or omission of the tenant or a change in the tenant's circumstances).

218. If, before the ending of the lease, the tenant has paid the landlord rent or other sums due under the lease which relate to the period after the lease ends, the landlord must pay the tenant the amount of the rent or other payment which relates to the period after the lease ends. The landlord must make that payment no later than 10 working days after the lease ends.

219. Section 31 implements Recommendations 84 to 86 (see paragraphs 6.10 to 6.16 of the Report).

Part 4 – Final provisions

Section 32 – Meaning of “lease”

220. Section 32 makes it clear that, unless the context requires otherwise, a reference to a lease in the Bill includes a reference to a sub-lease. Sections 19, 20 and 21 make specific provision about how the Bill operates in cases where there is a sub-lease.

Section 33 – Ancillary provision

221. Section 33 sets out that the Scottish Ministers may, by regulations, make ancillary provision for the purposes of, in connection with or for giving full effect to the Bill.

Section 34 – Consequential, transitional and saving provision

222. Section 34 introduces schedule 2, which contains modifications to certain enactments and transitional and saving provision connected with the coming into force of the Bill.

223. Part 1 of schedule 2 modifies and disapplies other enactments in consequence of the Bill.

224. Part 2 of schedule 2 makes transitional and saving provision in relation to leases entered into before the day on which the Bill comes into force (“commencement day”).

225. Paragraph 8(1) provides that Part 2 of the Bill applies to such leases subject to the provision made in paragraph 8.

226. Where a pre-existing lease is continuing by tacit relocation when the Bill comes into force, the Bill does not affect the period for which it is continuing (sub-paragraph (2)).

227. Where the termination date of a pre-existing lease is within 6 months of the Bill coming into force, any notice to quit or notice of intention to quit given in relation to that termination date is subject to the requirements of the current law (sub-paragraphs (3) to (5)).

228. Where a pre-existing lease is a head lease, certain requirements for the tenant under that lease to give notice to the sub-tenant contained in section 21 do not apply to the lease (sub-paragraph (6)). Other requirements of section 21 do not apply in relation to certain things happening during the period of 6 months after the Bill comes into force (sub-paragraph (7)).

229. Sub-paragraph (8) preserves express terms of pre-existing leases which are valid under the current law but would be contrary to Part 2 if agreed to after the Bill comes

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into force. Such terms are therefore not rendered invalid by the coming into force of the Bill.

230. Sub-paragraph (9) provides that the modifications to the Tenancy of Shops (Scotland) Act 1949 made by paragraph 3 of the schedule do not affect any notice of termination of tenancy given before the Bill comes into force.

231. Sub-paragraph (10) preserves the legal status of notices given, and other things done, in relation to a pre-existing lease before the Bill comes into force, and provides that nothing in Part 2 affects existing rights in relation to a pre-existing lease or any legal proceeding or remedy relating to such a right.

232. Paragraph 9 applies to a lease which reached its termination date before commencement day. Sub-paragraph (2) provides that if there is any question as to whether the lease continued after its termination date, that question is to be determined in accordance with the law before commencement day. Sub-paragraph (3) makes it clear that the parties' behaviour after commencement day (for example, any continued occupation of the premises by the tenant) may be taken into account when determining whether such a lease continues.

233. Paragraph 10 deals with the application of Part 3 to leases which are ongoing on commencement day. Part 3, other than section 31 (which makes provision about apportionment of rent) applies to a pre-existing lease subject to sub-paragraphs (2) to (5) (sub-paragraph (1)).

234. Where a court or tribunal has previously determined the period of, or date of entry of, a lease, or proceedings have been raised in relation to the period of, or date of entry of, a lease before the Bill comes into force, section 26 does not affect the court or tribunal's determination or apply to those proceedings which is to be made in accordance with the current law (sub-paragraphs (2) to (4)).

235. The changes made by section 30 of the Bill in relation to irritancy notices are of no effect in relation to notices served before the Bill comes into force (sub-paragraph (5)).

Section 35 – Commencement

236. Section 35 sets out when the provisions of the Bill will come into force (i.e. have legal effect). Most provisions will be brought into force by regulations as determined by the Scottish Ministers. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure. However, this section, section 32 (meaning of "lease"), section 33 (ancillary provision) and section 36 (short title) come into force on the day after Royal Assent.

Section 36 – Short title

237. Section 36 provides for the short title.

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Leases (Automatic Continuation etc.) (Scotland) Bill

Explanatory Notes

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