LEASES (AUTOMATIC CONTINUATION ETC.) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is 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:

- Explanatory Notes (SP Bill 54–EN);
- a Financial Memorandum (SP Bill 54–FM);
- a Delegated Powers Memorandum (SP Bill 54–DPM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP 54–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

TERMINOLOGY

4. A number of legal terms are used in this Policy Memorandum and a glossary of these terms can be found at the end of this Memorandum.

POLICY OBJECTIVES OF THE BILL

5. The Bill implements recommendations of the Scottish Law Commission ("the SLC") published in its Report on Aspects of Leases: Termination ("the Report").[1] A lease is an agreement under which one party, the landlord, grants to another, the tenant, the right to use land or buildings for a definite period of time in return for regular periodic payments, more commonly referred to as rent. There are essentially 3 main types of lease in Scotland: agricultural leases; residential leases; and commercial leases. It is only the last category with which the Bill is concerned.

[1] The report was published in 2022 and can be accessed at:- https://www.scotlawcom.gov.uk/files/2616/6539/5049/Report_on_Aspects_of_Leases_-_Termination_Report_No._260.pdf.

6. The Scots law of commercial leases is principally governed by common law rules. Where that law is not clear or readily accessible, this can result in unnecessary costs for landlords and tenants. Aside from the monetary costs incurred by legal fees, this can involve delay and inconvenience to tenants and landlords. Needless disputes and litigation can occur with the result that investment in Scotland may be deterred.

7. The overall policy aim of the Bill is to improve, simplify and update aspects of the Scots law of commercial leases, particularly in relation to the circumstances in which leases continue after their termination dates, so that it meets the needs of a modern Scottish economy. Most businesses, large or small, operate at least to some extent from let premises, entering into leases for a variety of uses - from manufacturing through to professional services, retail, digital start-ups and the hospitality sector - and for widely differing durations. They are one of the essential building blocks of the Scottish economy and a key driver of growth and productivity, taking up 44% of all non-domestic premises that pay rates and the rateable value from those premises (which is based upon annual rent), comes to about £2.6 billion.[2] The relationship between landlord and tenant is crucial to commercial life in this country and it is important that the law governing that relationship functions effectively.

National Performance Framework

8. The policy objectives of the Bill will contribute to the National Outcome on fair work and business, by providing the necessary legislative framework to help make our economy more stable, productive and efficient.[3]

CONSULTATION

9. In May 2018, a Discussion Paper ("the Discussion Paper") was published by the SLC asking how the law of Scotland in relation to the termination of commercial leases should be reformed or clarified.[4] The questions were focused principally on reform of the common law rules of tacit relocation and the discussion paper was open for 4 months, during which the SLC's project team delivered seminars on the Discussion Paper to many Scottish law firms, surveyors and organisations with an interest in the law relating to commercial property.[5] There were a total of 39 responses,[6] coming from representative organisations such as the Law Society of Scotland, the Faculty of Advocates, the Royal Institution of Chartered Surveyors and the Scottish Property Federation, as well as a range of legal firms, academics, businesses and interested individuals.

10. In December 2021, the SLC invited comments on a draft Leases (Automatic Continuation etc.) (Scotland) Bill, particularly on certain provisions which had been developed after publication

[2] Figures as at April 2021.
[3] The National Outcome can be accessed at https://nationalperformance.gov.scot/national-outcomes/fair-work-and-business.
[4] The discussion paper can be accessed at https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf.
[5] Figures kept by the SLC show that the project team met with at least 700 solicitors and 130 surveyors.
[6] The published responses can be accessed at https://www.scotlawcom.gov.uk/files/2715/7565/1420/Collated_Responses.pdf.

of the Discussion Paper. There were 25 responses received from a wide range of practitioners, academics and representative groups. A final draft of a Bill was published by the SLC in its Report.

11. The responses to these consultations will be discussed at appropriate points throughout this Memorandum.

OVERVIEW OF THE BILL

12. The Bill makes a number of changes to aspects of the Scots law of commercial leases. Part 2 of the Bill replaces the common law rules of tacit relocation and the difficulties they cause with a new statutory code. If a landlord or tenant enter into a commercial lease and, at the end of the term of lease, the parties have not agreed that the lease will end and neither party has given notice to quit in the proper form and at the right time then the lease continues by tacit relocation. The Bill also modifies the form and content of notices to quit and notices of intention to quit, laying out the manner in which they may be communicated and the persons to whom they must be given.

13. Part 3 of the Bill sets out miscellaneous rules relating to the termination of commercial leases generally, intended to clarify the law and make it more straightforward to apply; making pre-irritancy warning notices capable of delivery by sheriff officer; and reforms the law on apportionment of rent paid in advance, introducing an implied term obliging a landlord to repay overpaid rent covering periods after the ending of a lease.

Tacit relocation

Current law

14. All leases come to an end sooner or later but in Scotland most commercial leases do not end simply because they have reached the agreed date of termination. Instead, the common law doctrine of "tacit relocation" applies to extend the lease.[7] Where neither party gives the required notice to bring the lease to an end and both remain silent ("tacit"), the lease continues ("relocates") for a specified period.[8] If the lease is for more than one year it continues for a further year; if the lease is for less than one year, it continues for its original period. This process repeats until either party gives notice in sufficient time, or the parties agree that the lease will come to an end.

15. From a tenant's perspective, the underlying policy rationale is that a tenant who relies upon a property for their livelihood should not be obliged to vacate it unless they are specifically warned by their landlord to do so, and with sufficient notice to allow them to find fresh premises. From the landlord's perspective, the rationale is that a landlord who has not been warned a tenant is to leave nor received notice of their intention to do so should be entitled to assume that the tenant intends to remain and, therefore, that no new tenant is required.

16. The current law on tacit relocation is uncertain; inaccessible; and outdated.

[7] The doctrine originates from Roman law and is reflected, in various forms, in a number of Western legal systems.
[8] Even if one of the parties has given notice in good time, if the tenant does not vacate and the landlord fails to take reasonable steps to remove them then tacit relocation comes into effect. In this case, the lease is retrospectively extended from its date of termination as if no notice had been given.

Uncertain

17. There is uncertainty as to whether parties can agree that notice is not needed to bring the lease to an end (that is, whether tacit relocation can be excluded) or whether parties can alter the terms in which notice must be given, such as when the notice needs to be received by the other party. Despite the fact that many commercial leases expressly provide that notice is not needed, the uncertainty caused by the current law means that notice is usually given anyway.

18. Not only does this uncertainty cost parties to commercial leases time and money, but in cases where a party does not, or cannot afford to, take legal advice, and if they neither give nor receive notice, then the other party might insist on the lease extending with the consequent burden that this might cause.

Inaccessible

19. The name "tacit relocation" is itself difficult for ordinary persons with little knowledge of commercial leases to understand. Only a few will understand that "relocation" means "re-letting" and fewer still may recognise that the doctrine entails no re-letting as such.[9] Moreover, while "tacit" implies that some form of silence is relevant, a late notice will result in the continuation of the lease.

20. The inaccessibility of the law does not rest with the name alone. For solicitors and courts, and for lay tenants and landlords in particular, there is considerable difficulty in knowing what the law is and where to find it. Some legal rules are buried in court decisions, some are found in seventeenth-, eighteenth- and nineteenth-century texts, and some are found in statutes enacted in 1886 and 1907.[10] Understanding clear legal principles from these dated sources and applying them to modern circumstances can prove difficult.

Outdated

21. The existing rules can lead to difficulties for modern commercial practice. There is no modern statutory statement of the law of tacit relocation in Scotland and, in contrast, a number of other legal systems have a more modern statement of comparable legislative provision. For instance, in the Canadian province of Quebec (whose legal system is similar to Scotland's), the most recent statutory statement is from 1991; in France, the law is largely contained in the Commercial Code of 2000; in England and Wales it is in an Act from 1954.

Automatic continuation

Reform

22. Sections 2 to 7 of the Bill lay out a new statutory code – referred to as "automatic continuation" – that replaces the common law of tacit relocation. The overall effect is that parties to a commercial lease must give notice (at the correct time and in the correct form) to bring the lease to an end, unless they agree beforehand not to (that is, contract out). If they fail to give notice,

[9] It is, instead, an extension of an existing commercial lease.
[10] These are, respectively, the Removal Terms (Scotland) Act 1886 and the Sheriff Courts (Scotland) Act 1907.

and they have not contracted out of having to do so, then the commercial lease automatically continues for a specified period of time.

Contracting out

23. Section 2 lays out the default position that a commercial lease will automatically continue after its termination date unless parties contract out of having to give notice, give notice at the correct time and in the correct form (discussed below), or where the tenant gives up the let premises with the agreement of the landlord that the lease has ended (see section 3).

24. Under the current common law there is doubt over whether parties to a commercial lease can contract out and thereby agree beforehand that a lease will end on its termination date without the need for notice. Section 4 of the Bill makes clear that parties can agree to bring an end to a commercial lease without having to serve notice on the other party. The requirement to contract out must be in writing which provides clarity and certainty.[11]

Post-termination date behaviour

25. In some circumstances parties who have contracted out of the need to serve notice to bring a lease to an end, may, after the termination date, nevertheless act as if the lease is continuing. It is important that the law clearly sets outs what should happen in these circumstances. If, after the termination date, the tenant continues to occupy the let premises and the landlord either does not try to remove them or acts inconsistently with the lease having ended then the lease automatically continues (section 5 of the Bill).[12] In other words, parties who had agreed not to automatically continue their lease may find themselves, by their actions, automatically continuing the terms of their lease for a specified period (see section 7).

26. Parties cannot contract out of this provision. If parties could decide that a lease would not continue beyond the termination date under any circumstances there could be significant consequences, for tenants in particular. For instance, a tenant who continued to occupy let premises would be liable to the landlord for violent profits[13] even in circumstances where the landlord made no attempt to remove them, perhaps even months or years after the termination date.

Period of continuation

27. The length of time that a lease is automatically continued for is set out in section 7 of the Bill. Under the current law, when a commercial lease is continued by way of tacit relocation it is continued for a default period of one year.[14] Parties can also provide for a lease to continue for a period of time which is different from the default period. With some qualification and adjustment, this will continue to be the default period under the new statutory code. Leases of:

- more than one year will automatically continue for one year;

[11] Except for leases of one year or less, the writing required will be formal writing that complies with section 2 or 9B of the Requirements of Writing (Scotland) Act 1995.
[12] Section 5 reproduces the effect at common law of parties' conduct on a commercial lease after the termination date.
[13] See the glossary below.
[14] Unless the lease is for a period of less than 28 days, which currently will end on its termination date.

- less than one year will automatically continue for a period equal to the original duration of the lease.

28. Parties will be able agree to adjust the length of time that a lease may automatically continue in order to fit individual circumstances. They do not, however, have an unrestricted ability to change the period of automatic continuation. For example, automatic continuations of one day would undermine the policy rationale of automatic continuation,[15] while continuations of more than the default period would, in effect, mean that automatic continuation is used as a substitute for a break clause. The Scottish Government's view is that there should be limits to the ability of parties to adjust the period of automatic continuation - 28 days should be the minimum period (or 7 days for a lease of 28 days or less),[16] while parties would not be able to automatically continue a lease for a period greater than the statutory default of one year.

Consultation

Contracting out

29. The SLC received strong views from those involved in the court process for abolishing tacit relocation on the basis of no notice being given altogether, that is, leases would never continue automatically (of the 34 consultees who responded 12 were in favour of this option), but, on the other hand, the majority of surveyors, solicitors and businesses favoured maintaining the current legal framework but with clarification that parties can contract out, that is, parties can agree that a commercial lease is brought to an end without needing to serve notice.[17] A number of consultees pointed out that the giving of notice serves an important function, warning tenants and landlords of the consequences of failing to agree an extension or a new lease before the termination date.

Post-termination date

30. On consultation, the SLC received clear support for retaining the post-termination aspects of tacit relocation.[18] If, after the termination date, tenant and landlord act as if the lease is continuing, then the lease should automatically continue.

Period of continuation

31. The SLC did not ask a specific question about reforming the default period of continuation in its Discussion Paper. It was, however, discussed with attendees at seminars during the consultation period, then with consultation amongst its Advisory Group. Views from both were mixed - solicitors suggested periods ranging from 3 to 12 months, while academics suggested a two month period (although it was recognised that practitioners may be better placed to suggest an appropriate period). Given the lack of consensus the Scottish Government has decided to retain the current default length of time that a lease is automatically continued for. There is also a clear statement that parties can agree to adjust the default period (within certain limits) in order to fit individual circumstances.

[15] The policy rationale is set out at paragraph 15 above. Leases of less than 28 days in duration can continue for a period not less than 7 days.
[16] Any agreed period which is less than 28 days would be ineffective.
[17] See paragraphs 2.32 to 2.51 of the Report.
[18] See paragraph 2.53 of the Report.1

Alternative approaches

Do nothing

32. An alternative option would be to do nothing. This, however, would leave the current law of tacit relocation uncertain, inaccessible and outdated.

Disapplication of tacit relocation

33. The SLC discussed an alternative approach to retaining and clarifying the current law.[19] Consultees were asked whether the law of tacit relocation should be disapplied from commercial leases where no notice had been given prior to the termination date. One rationale for this approach is the lack of widespread knowledge of tacit relocation: landlords continue to issue leases which made no mention of the need to give notice to quit and tenants continue to be caught out by leases continuing by default. Another rationale was that the disapplication of tacit relocation might simplify the law.

34. Of the 34 consultees who responded to this approach, 12 were in favour, including the Senators of the College of Justice and the Faculty of Advocates, along with the Property Litigation Association. Also in favour of disapplication were CMS, DLA Piper, DWF, Anderson Strathern and the Scottish Property Federation, with Pinsent Masons declaring a majority of their commercial property solicitors, although not all, in favour of disapplication.

35. The reasons given by the Faculty of Advocates in favour of this approach were representative of other consultees. Firstly, prospective parties to a lease can be ignorant of the existence and consequences of tacit relocation. Secondly, tacit relocation gives rise to a number of consequential requirements, for example the necessity for notices to quit, which in turn can create complexity, uncertainty, expense and the risk of professional failure. Thirdly, in respect of commercial contractual arrangements, Scots law has always placed emphasis on parties' express contractual terms, and retention of tacit relocation might be seen as swimming against that tide.

36. The majority of consultees, however, were not in favour of this approach. These included TSB, the Royal Institution of Chartered Surveyors and all responses from individual surveyors, the majority of large and medium-sized legal firms including Brodies, Burness Paull, Shepherd and Wedderburn, Dentons, MacRoberts, and Shoosmiths, and most of the academic contributors.

37. Some pointed out that tacit relocation owing to the absence of any notice can reduce costs: it might suit parties that the lease can roll over for a further year without the need to involve lawyers and incur costs. For example, telecommunication leases can be of fairly short original duration with low rents so tacit relocation can keep costs down. Burness Paull stated that a complete disapplication of the need to give notice seemed extreme, as agents and valuers are accustomed to it, and that it is a valuable safety net around the time when a lease is coming to an end. Gillespie MacAndrew said that clients based south of the border preferred the certainty and simplicity of tacit relocation to the complexities of the Landlord and Tenant Act 1954 in England and Wales.

38. Dr Craig Anderson argued that the giving of notices promotes certainty and reduces the likelihood of commercial property being left vacant while a landlord, who has not had any

[19] See paragraphs 2.48 and 2.49 of the Discussion Paper.

indication until the termination date that the relationship is ending, finds a new tenant. In his view, the existence of tacit relocation triggered by the absence of any timeous notice reduces the likelihood of either party being caused difficulties through the sudden need to find a new tenant or new premises.

Notices

Current law

39. A notice to quit may be given to prevent tacit relocation but the practice in relation to giving notices is not clear.[20] Under the common law a notice to quit does not need to be in writing unless otherwise provided for in the terms of the lease but writing is necessary if a special court procedure for removal is to be used.[21] Currently, principal legislation dealing with notices is the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act"),[22] which sets out a procedure for removing tenants by serving a notice and does not involve applying to the court. It is often seen as the cause of confusion and uncertainty about notices in commercial leases.[23] For example, section 34 of the 1907 Act begins with warrants to remove but is also about when a notice must be given and tacit relocation.

40. The current law is capable of different interpretations and altogether can lead to lack of clarity and increased costs for both landlords and tenants. The practical result is that solicitors tend to err on the side of caution. For example, the SLC were told that solicitors tend to comply with the terms of the 1907 Act as if they are compulsory in all situations, always giving notice in accordance with the 1907 Act.[24]

Reform

41. Parties may contract out of having to give notice prior to the termination date in order to bring the lease to an end. In the event that parties do not contract out then one party must send good notice to the other party before the termination date. This prevents the lease from effectively being extended.

42. Sections 8 to 18 of the Bill set out a new statutory code that replaces the existing common law and existing statutory provisions concerning when a notice needs to be given and the form it must take. The main features are:

- the form and essential content for notices given by tenants and landlords;
- the consequences of inaccurate wording in a notice;
- the period of notice;
- a non-exhaustive list on the way that written notice can be served;
- contractual modification of content and period of notice;

[20] A notice to quit is sometimes referred to as a "notice of removing", and if instigated by the tenant as a "letter of removal". Removing is the technical term for the giving up of possession by a tenant.
[21] See sections 34 to 37 or 38 of the Sheriff Courts (Scotland) Act 1907 (see footnote 18).
[22] The 1907 Act can be accessed at https://www.legislation.gov.uk/ukpga/Edw7/7/51/contents.
[23] For instance, at paragraph 3.12 of the Discussion Paper the SLC quote K G C Reid and G L Gretton on this issue.
[24] See paragraph 3.125 of the Report.

- withdrawal of a notice.

Notices - form and essential content

Notices - differences between landlords' notice and tenants' notice

43. The Scottish Government's view is that the form and content of a notice sent by a tenant to a landlord should be less demanding than a notice sent by a landlord to a tenant. The current legal requirements for notice from a tenant to a landlord are less demanding and the Bill would retain a similar approach. A landlord's notice to a tenant, on the other hand, is meant to not only prevent tacit relocation, but also to lay the groundwork for possible future court proceedings for removal in the event that the tenant does not give up possession of the let property. Notice given by a landlord should, therefore, be different in form and content than a notice given by a tenant.

44. The Bill refers to notices given by a landlord and a tenant differently: a "notice to quit" is given by the landlord to the tenant; and a "notice of intention to quit" is given by the tenant to the landlord.

Notice to quit – form and content

45. What follows are the essential features of a notice to quit, given by a landlord to a tenant:

- The notice must be in writing (section 8(1)).[25] This will reduce arguments about whether notice has been given.
- The name of the landlord (section 8(2)(c)(i)).[26] Parties should be clear about who has given the notice.
- A sufficient description of the let property (section 8(2)(d)).[27] A notice to quit should be capable of being drafted by a person who is not legally qualified, and so, for example, a postal address may be a sufficient description of let premises from which a tenant is to be removed. Some let premises may, however, not have an address, or may be an undeveloped plot of land: some other form of description would be required in these circumstances.
- That the tenant must leave the let premises on the termination date (section 8(2)(a)). It should be clear to the tenant that the lease is ending and they must leave the property on the termination date. This request cannot be subject to any conditions (section 8(3)).
- The termination date of the lease (section 8(2)(b)).[28] A specific termination date provides certainty to the tenant, allowing them to act on such information without having to consult another document.

[25] A notice to quit which is not given in writing will be ineffective.
[26] In circumstances where the notice is given by a person on behalf of the landlord, for example, by a solicitor acting for the landlord, that person's name must be given.
[27] The description must be sufficient so that a reasonable recipient whose knowledge included that of the tenant can identify the let property.
[28] Although see the below section headed 'Inaccurate wording' for what will happen in circumstances where a landlord gives an erroneous termination date.

46. Given that the essential content of a notice to quit is restricted to just a few requirements and because of their importance, parties are not allowed to contract out of or alter them. So long as the notice to quit contains the information set out above, there is nothing to prevent the landlord, or their agent, including extra information.[29] Including any additional information will not invalidate the notice.

Notice of intention to quit - form and content

47. What follows are the essential features of a notice of intention to quit, given by a tenant to a landlord:

- Under the current law no writing is necessary for a tenant's notice.[30] This will continue for leases with a duration of one year or less (section 10(1)(b)). Leases over one year, however, tend to involve a longer-term investment by the landlord and, just as leases over one year must be in writing, so should a notice of intention to quit (section 10(1)(a)).[31]
- The name of the tenant if the notice is given in writing (section 10(3)(a)).[32] The policy reasoning underpinning the requirement in relation to landlords' notices to quit also applies to tenants' written notices.
- A sufficient description of the let property, regardless of whether notice is given verbally or in writing (section 10(2)(b)).
- The tenant intends to leave the let premises at the end of the lease (section 10(2)(a)). This should be sufficient warning to the landlord that they might have to make arrangements to search for a new tenant and therefore it is important that the notice is clear and unconditional on this point. This is required whether notice is given verbally or in writing.

48. Parties are not allowed to contract out of or alter the essential content of a notice of intention to quit, with one exception. For leases of up to one year, parties should have the flexibility to impose the need for writing if they wish to avoid the uncertainty of an oral notice. So long as the notice of intention to quit contains the information set out above, there is nothing to prevent the tenant, or their agent, including extra information.[33]

Consultation

Notice: distinction between landlords and tenants

49. The SLC asked whether notices from landlords and from tenants should have the same form and content. While consultees who answered this question were unanimously in favour of such a proposal, the SLC ultimately recommended that the form and essential content of tenants' notices should be slightly different from landlords' notices.[34] There were a number of reasons for this decision, some of which have been set out above: currently, tenants' notice requires less

[29] For example, a landlord may wish to attach a schedule of dilapidations.
[30] Unless the lease provides otherwise.
[31] A notice of intention to quit which is not given in this form will be ineffective.
[32] Or the name of the person giving notice on behalf of the tenant.
[33] For example, a tenant may wish to give a forwarding address.
[34] See paragraphs 3.3 to 3.7 of the Report.

content than landlords' notice; landlords' notice also lays the groundwork for possible court proceedings; landlords' notice potentially ends tenants' business at the property; and landlords are more likely to have a retained agent or legal advisor.[35]

Notice to quit: Name of landlord

50. The SLC asked respondents whether the name of the landlord should be included in a notice to quit as an essential requirement in the notice given by the landlord. There was unanimity amongst consultees agreeing to this proposal.[36]

Notice to quit: Address of landlord

51. The SLC also asked whether the address of the landlord should be an essential requirement. In the Discussion Paper, it was suggested that inclusion of the landlord's address would be convenient for the tenant in case there was a challenge to the notice. While most consultees considered that it should be included, of the 4 consultees who disagreed one pointed out that it may well be a third party giving the notice, such as a solicitor, and so having the address of the landlord would be unnecessary if a notice was challenged.[37]

52. A landlord's address must, currently, be included in a notice only if the landlord intends to remove the tenant using the court procedures in the 1907 Act, which are generally not used. Including the address of the landlord as one essential requirement of a notice to quit could set a trap for the unwary, as a notice, valid in every other respect, would be ineffective if it did not include the landlord's address. Further, the giving of notices to quit by electronic means varies but using electronic methods of delivery is likely to increase. Having a landlord's postal address as an essential requirement for a notice delivered electronically could, eventually, be seen as anachronistic.

53. Having considered these issues together, the Scottish Government, in line with the SLC's view, has concluded that the sensible approach is not to include the address of the landlord as an essential requirement in a notice to quit in commercial leases.

Notice to quit: Description of let property

54. All consultees were in agreement that the notice to quit should contain a description of the let property.[38] It was argued by some consultees that a conveyancing description should not be required, nor should there be a requirement that the description be identical to the description of the property in the lease. The provision in the Bill does not require these kinds of description. Instead, as mentioned above, in some circumstances a postal address might suffice. Ultimately, the description must be sufficient for the tenant to identify the let property.

[35] See paragraphs 3.3 to 3.7 of the Report.
[36] See paragraphs 3.22 to 3.25 of the Report.
[37] See paragraphs 3.22 to 3.25 of the Report.
[3838] See paragraphs 3.26 to 3.28 of the Report.

Notice to quit: Termination date

55. All consultees were in agreement that the notice to quit should contain the termination date of the lease.[39] There was some concern among consultees that too strict a requirement around including the termination date could result in notices being rendered ineffective if, for example, the date was calculated wrongly. Others took the view that a specific termination date is essential so that the tenant has certainty, which the Scottish Government agrees with, and is in line with the Scottish Law Commission's recommendation on this issue.[40]

Notice to quit: Identification of tenant

56. The Law Society of Scotland and SOLAR[41] responded to the Discussion Paper that the name of the tenant should be an essential requirement. The Scottish Government's view is that what is essential is that notice to quit is given to the tenant, not that the tenant is named in the notice.

Notice of intention to quit: End date and intention to depart

57. The decision of the Inner House of the Court Session in *Rockford Trilogy Ltd v NCR Ltd*[42] ("Rockford") was delivered after the SLC's Discussion Paper was published. The circumstances of that case were that a tenant made a statement in the course of ongoing negotiations about the possible renewal of the lease that the Inner House held was enough to prevent tacit relocation.[43] At the centre of the decision in *Rockford* is that what is required in order to avoid tacit relocation is a lack of consent to the continuation of the lease. It does not matter how the lack of consent is communicated. This is different from the approach taken in the Bill, where a level of formality is required.

58. The SLC tested this approach in its consultation on a draft Bill. Respondents expressed differing views regarding the requirement that a statement by a tenant that they would not remain upon the existing terms and conditions of the lease could amount to notice of intention to quit. Burness Paull, for example, suggested that this requirement could lead to confusion because a statement to that effect could be seen as an invitation to negotiate and not an intention to continue the lease beyond the termination date.

59. As mentioned above, the rationale for including a clear statement of intention to leave is to give the landlord sufficient warning in order that they can make arrangements to search for a new tenant. In *Rockford*, the tenant's statement was made in the course of negotiations and was in conditional terms which could cast doubt on whether a tenant will leave at the termination date. Accordingly, the Scottish Government's view is that the tenant's notice of intention to quit must be unconditional, as is the case with a landlord's notice to quit.

---

[39] See paragraphs 3.29 to 3.30 of the Report.
[40] Although see the below section headed 'Inaccurate wording' for what will happen in circumstances where a landlord gives an erroneous termination date.
[41] The Scottish Local Authority Lawyers & Administrators (SOLAR).
[42] [2021] CSIH 56.
[43] The wording concerned was, "[T]he only way [the tenant] would consider remaining in the building is if the dilapidations are capped at £300k together with the nil rent proposed for 12 months."

60. With respect to requiring a level of formality, although one respondent was in favour of allowing increased flexibility (more like in *Rockford*), all other respondents agreed that a greater degree of formality was the correct approach.

Alternative approach

61. Consultees were asked whether they would prefer either a prescribed statutory form of notice, or whether legislation set out the essential content of a notice while giving the drafter of the notice some flexibility (the latter is the approach taken in the Bill). Of the 34 responses to these questions, 27 were against a legally obligatory form while 31 respondents wanted to see legislation specify the essential content.

62. Five consultees preferred a prescribed statutory form of notice as this would avoid legal disputes. Of the 27 against a prescribed statutory form, it was pointed out by some that it would be impossible for a prescribed statutory form to cover all situations. One other respondent mentioned that a prescribed form might be too prescriptive, leading to litigation on technical grounds. Taking the approach of requiring essential content in a notice should, in the Scottish Government's view, help to minimise any such litigation.

63. There was some support for a style notice that would be non-obligatory. The Law Society of Scotland, for instance, thought that a style notice would help to minimise errors that would lead to failure of notices, particularly for landlords and tenants who do not want legal advice. CMS and the Scottish Property Federation thought that, although the legislation should set out the essential content of a notice, the inclusion of a style would be helpful.

64. Having considered the views of a number of stakeholders, the Scottish Government has decided not to adopt a statutory style for a number of reasons. First, a non-compulsory style might actually mislead tenants and landlords, particularly those without legal advice, into thinking that the use of such a form was legally required. Second, including a statutory form might influence questions about whether the essential content of a notice was or was not satisfied. Third, a style might interfere with the application of special rules proposed elsewhere in the Bill about the invalidation of notices through error or insufficient description (see section below). Fourth, a style notice could not be easily or quickly updated in response to court decisions. Finally, in relation to notice of intention to quit, a notice can be given verbally for leases of up to one year and therefore a statutory style would be inappropriate in that regard.

Inaccurate wording in notice

65. Although notices must contain essential information they should not be invalidated because of minor errors, particularly because they may often be drafted by parties who have had no legal training. Notices need to be clear but almost inevitably some will contain errors. For example, a notice to quit Unit 22 might instead refer to Unit 21, or a party's name might be misspelled. A notice is meant to give the recipient fair warning about the other party's intentions by setting out the essential information. An error in detail which does not impact on that warning, however, should not be capable of invalidating the notice.

Error in termination date

Current law

66. The law treats differently notices that give the wrong date to quit which is before the termination date from notices that give the wrong date which is shortly after the termination date. Notices that give a date to quit which is before the termination date are treated as invalid because they ask the tenant to leave let premises at a time when they are still legally entitled to be there. Where the date given in a notice is shortly after the termination date, though, there is less unfairness to the tenant because they are being warned to leave after the actual termination date. Their continued possession does not lead to liability for violent profits or to tacit relocation and so the law treats these kinds of notice as valid.[44]

Reform

67. The Scottish Government views the current law's different treatment of errors in the termination date as reasonable. The law should not treat as valid a notice to quit that requires a tenant to leave let premises early. On the other hand, a notice to quit should be treated as valid if the date to quit is a few days after the correct termination date. For example, a date to quit given as 1 February 2026 rather than 31 January 2026 for a year's lease beginning 1 February 2025 would seem to cause little harm and not be unfair.

68. Accordingly, sections 8(5) and 9 allow flexibility in circumstances where there is an error in the date to quit so long as it post-dates the termination date. The mistaken date must, however, be within the range of 7 days beginning with the day after the termination date, otherwise the tenant might think they are entitled to remain longer than the landlord could possibly intend.

69. As the tenant's continued possession is because of an error in the notice to quit they should have certain immunities from legal liabilities during that short period, including the tenant not being liable to pay the landlord violent profits or under the law of unjust enrichment for the continued possession. The tenant, though, would continue to be liable under the law of delict in respect of any damage they might cause to the let premises.

Error in description of let property or obligatory name

Current law

70. At common law, an incorrect description of let premises will not invalidate a document if the intended description is clear from the context in which the document was granted.[45] This means that errors in the spelling of the name of the let subjects for example, can be dealt with by use of the common law. The SLC note[46] inaccurate expressions in notices might also be capable of being

[44] If anything, the prejudice is suffered by the landlord who allows a tenant to remain on the property beyond the termination date of the lease.

[45] This common law principle is known as *falsa demonstratio non nocet,* literally meaning "a false description does not injure."

[46] See paragraphs 3.54 to 3.59 of the Report.

rectified under section 8(1)(b) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act"),[47] although there appears to be no reported decisions.

Reform

71. As the Bill sets out a statutory code dealing with notices then, in the interests of clarity, the Scottish Government considers that an approach to dealing with errors in the description of let property or a person's name should be dealt with (see section 8(6) and section 10(7)).

72. While the provision in the Bill allows obvious or minor errors to be excused it does not seek to encourage error-strewn notices. Notices to quit and of intention to quit are unilateral documents and there is a rule in Scots law that the words of an alleged promise should be interpreted objectively on the basis of what a reasonable recipient with the knowledge of the background would have understood by the document in question. This rule underpins the approach to errors taken in the Bill. The effect is that an error in the information provided in the notice is excused if a reasonable recipient in the position of the tenant would, in all the circumstances, know that the information was erroneous and what the correct information was. This strikes an appropriate balance between having an accurate warning and excusing minor errors.

Consultation

73. The SLC asked respondents whether they agreed with a draft provision for relief from errors as part of its consultation on a draft Bill. A majority of respondents agreed with the provision and the SLC made such a recommendation.[48]

Alternative approach

74. An alternative approach would be to do nothing and allow any defects to be rectified by either the common law or section 8 of the 1985 Act. However, an application under section 8 would incur the legal expense and potential delay of a formal application to the court for the wording of the document to be rectified. Having statutory provision in the Bill makes the position clear for solicitors and those who have no legal training.

Period of notice

Current law

75. There are default common law rules on the amount of time that a landlord must give their tenant warning them that they must leave the let premises, and vice-versa. This is known as the period of notice and is currently 40 days. Parties are able to change the default period by agreeing a longer or shorter period for leases of up to months, and a longer period only where the lease is over months.[49]

[47] Available at https://www.legislation.gov.uk/ukpga/1985/73/section/8.
[48] See recommendations 20 to 24 of the Report.
[49] There is doubt over whether parties to a lease of over 4 months can contract for a period of notice of less than 40 days.

Reform

76. The purpose of a landlord's notice is to allow the tenant time to remove themselves from the let premises and, perhaps, to find new premises for their business. A tenant's notice is meant to allow the landlord time to find a new tenant. It is important that the period of notice gives tenants enough time to find alternative premises while at the same time does not force parties to make a major financial commitment about whether to continue a lease on existing terms too early. This could be detrimental to the landlord or tenant if market conditions or individual circumstances change in the intervening period.

77. It is the Scottish Government's view that a default 3 month period strikes the right balance. This gives parties a clear legislative statement that will help them to understand the default period of notice. It is sensible, however, to take into account the length of lease when considering default periods of notice and so different periods of notice should apply to leases of less than 6 months' duration.

78. Section 13 of the Bill replaces the current default period of notice as follows:

- If the lease is for 6 months or longer, then the notice must be received 3 months before the termination date of the lease;
- If the lease is for less than 6 months, then the notice must be received one month before the termination date of the lease; and,
- If the lease is less than 3 months, then no notice need be received before the termination date of the lease (by virtue of section 2(2)(a)).

79. Taken together, these changes make sure that the default period of notice will never be more than half of the duration of the lease itself.

Consultation

80. When asked what the length of a reformed period of notice should be there was no clear preference among consultees, although almost all agreed that the length should vary according to the length of the lease.

81. The majority of solicitors, TSB, Boots and all surveyors who, on consultation, responded to this matter said that 40 days' notice should not remain as the default period of notice.[50] TSB felt that the 40-day period is too heavily weighted in favour of the landlord, and said that they would find leaving let premises while fitting out and opening new premises in 40 days extremely difficult. Boots said that they would need at least 6 months' notice in order to have a reasonable period of time within which to put in place all necessary arrangements to cover finding a new store, transferring any pharmacy licence, fitting out the new store, stripping out the store being vacated and obtaining all necessary planning and building warrant consents. Other types of tenant may have licensing requirements which mean that 40 days' notice is insufficient for them.[51] Some

[50] See paragraph 3.63 of the Report.
[51] Examples include licences of premises for the sale of alcohol, food business registration, and taxi operators' licences.

consultees, on the other hand, supported the current period of 40 days' notice because it was well known to practitioners.

82. The SLC asked whether the periods of notice should differ between leases of a year or more and those of less than a year, or whether the difference between periods of notice should happen with leases of two years, or some other point. Of the 31 responses, 18 felt that the difference between periods of notice should happen when a lease is of one year or more.[52]

83. For the default period of notice for leases of a year or more, consultees divided almost evenly between those favouring a period of 6 months, 3 months, and 40 days.[53] For the default period of notice for leases of less than a year, a cross-section of consultees suggested that no period of notice should be required but did not provide any reasons as to why this should be the case. Of those consultees who suggested that there should be some period of notice for leases of less than a year, the majority favoured a period which was one half of the length of the lease. If, however, the default period of notice for a lease of a year or more is 3 months as provided for under section 13 then this could lead to circumstances where leases of less than a year have a longer period of notice than leases of a year or more.

Alternative approach

Months versus days

84. An alternative approach to calculating the period of notice in months is to use days, as is currently the case (40 days is the default period of notice at common law): so rather than 3 months for a default period of notice the legislation could use the alternative of 90 days. The Scottish Government's view agrees with that of the SLC that the use of months[54] is straightforward and avoids potential errors in the calculation of days.

Extent of let property to calculate period of notice

85. Under the 1907 Act the length of the period of notice varies depending on the size of the let property. For example, different rules apply to property greater than an area of two acres. The SLC asked whether default rules regarding periods of notice should apply no matter the size of the property. All consultees thought that the notice period should apply regardless of the size of the let property concerned.

Methods of serving written notice

Current law

86. Currently, a written notice under sections 34 to 38 of the 1907 Act may be served by a sheriff officer, by anyone entitled to give the notice or by the entitled person's solicitor or factor, posting by registered post or first class recorded delivery service.[55] This is an exhaustive list of the

[52] See paragraph 3.65 of the Report.
[53] See paragraph 3.66 of the Report.
[54] This will mean a calendar month (under the Interpretation and Legislative Reform (Scotland) Act 2010).
[55] See the Act of Sederunt (Sheriff Court Ordinary Cause Rules Amendment) (Miscellaneous) SI 1996/2445 rule 3(61) (November 1, 1996), available at https://www.legislation.gov.uk/uksi/1996/2445/made.

methods for service of a written notice. The current methods of service were updated in 1996 but since then how we communicate has changed significantly.

Reform

87. The Scottish Government considers that the methods of serving a written notice should be updated to reflect the ways we communicate in a modern society. Where a notice to quit or of intention to quit is given in a traditional (i.e., non-electronic) document, then parties should be able to freely decide the preferred method of delivery. This does not require specific provision in the Bill.

88. Instead, the Bill provides that if a written notice is delivered using one of a number of specified methods of delivery, then the serving party benefits from a presumption that service has taken place at a specified time (see sections 14 and 15). In the event of a dispute, the serving party would not need to prove the fact or timing of delivery.

89. With respect to an electronic document, the Scottish Government recognises that while the bulk of day-to-day business correspondence takes place electronically, by email or otherwise, this method of communication is not used by everyone. If a party to a lease does not consent to a notice being given electronically, then they should not be forced to. Section 11 of the Bill sets out that electronic service of a notice is possible only when the receiving party agrees to accept it being so delivered and has not withdrawn their consent, either expressly or impliedly. This is subject to an exception in circumstances where the recipient acknowledges having received the notice at any time before the last day on which it may validly be received (subsection (4)).

Consultation

90. When asked on consultation, a number of large firms of solicitors responded that notices should be served in the manner specified in the lease or, where the lease is silent, in accordance with the 2010 Act. As was pointed out by one respondent, given the pace of change in methods of communication, legislative provision on methods of service is likely to become outdated almost as soon as it is brought in. On the other hand, the Senators of the College of Justice considered that any widening of the means of service beyond those allowed in the 2010 Act would not be appropriate, given the importance of the notices in question.[56]

91. The SLC proposed a comprehensive and exhaustive list of methods by which written notice could be served in the draft Bill that it consulted on. A number of respondents considered that approach to be unduly restrictive.

Alternative approach

92. One alternative would be to do nothing, but this would leave the law as it is – unreflective of the changes in the way we communicate in a modern society. This would be at odds with the overall policy intention of the Bill which is to improve, simplify and update aspects of the Scots

[56] See paragraphs 3.77 to 3.81 of the Report.

law of commercial leases, particularly in relation to the circumstances in which leases continue after their termination dates, so that it meets the needs of a modern Scottish economy.

93. An alternative option would be to proceed with an exhaustive list of the way in which written notice may be served, as was consulted on by the SLC in its consultation on a draft Bill. This approach, though, was seen as unduly restrictive by respondents.

Withdrawal of notice to quit or of intention to quit

Current law

94. Currently, at common law, a party giving a notice cannot withdraw it after it has been expressly accepted by the recipient.[57] There may, however, be circumstances where parties might wish to agree to withdraw a notice – perhaps a prospective tenant enters liquidation or goes bankrupt before beginning their tenancy, or negotiations for alternative let premises fail at the last moment.

Reform

95. Section 16 provides a clear legislative statement that in order for a notice to quit or of intention to quit to be withdrawn the recipient must consent, otherwise the lease will be brought to an end. If the notice has been given in writing, then the withdrawal and the consent of the recipient to the withdrawal must be in writing. Parties have the freedom to modify or disapply this provision.

Consultation

96. The SLC asked consultees if there was need for a statutory statement to the effect that a notice may only be withdrawn with the consent of both parties. Of the 32 responses to this question, 25 stated that they felt that a clear statement was needed.[58] A majority drew attention to the generally accepted practice that a party cannot withdraw such a notice without the consent of the other, and it was suggested that it would be helpful if the law reflected practice.

Alternative approach

Do nothing

97. Doing nothing would mean that the current legal position at common law continues, that is that a party giving notice cannot withdraw it after it has been expressly accepted by the recipient. This would be unsatisfactory given the benefits that a clear statutory statement would have for those involved with commercial leases.

Miscellaneous matters

98. The Bill also reforms 3 miscellaneous legal rules regarding the process of termination that are currently vague, inaccessible or unsuitable for a modern Scottish economy. These are:

[57] See the judgment in *Gilmour v Cook* 1975 SLT (Land Court) 10.
[58] See paragraph 3.101 of the Report.

- the legal rules fixing the date of entry, duration and termination date of a lease in the absence of express provision by the parties;
- the UK postal addresses to which a landlord or tenant may send termination notices; and
- the giving of termination notices where the identity of the party upon whom service must be made has changed or where that party has died.

Giving notice to quit where termination date unknown

99. Sometimes a commercial lease may be lost with no copy or the original lease is constituted verbally and therefore no written copy exists. In these circumstances, if a landlord wants to give notice to quit then there may be difficulty in trying to establish the termination date on which the tenant must vacate the let premises. Currently, upon application, the court can fix the duration and termination date of a lease.[59]

100. Consultees were asked whether there should be a statutory presumption that a lease is for one year in circumstances where the termination date is not known but the date of entry is.[60] A clear majority of respondents agreed that a statutory provision about the presumed duration of a lease would be helpful. The presumed duration of one year beginning with the date of entry is in line with the existing position at common law.

101. Furthermore, consultees were asked whether, where the date of entry is unknown, there should be a statutory presumption that the lease was entered into on a particular date. In most cases, the agreed date of entry is likely capable of being determined by a court on the evidence available, but in some difficult cases the available evidence might be insufficient or unreliable. The Scottish Government's view is that it is sensible to have a clear statutory statement for parties to fall-back on should the circumstances merit it. A majority of respondents supported having clear provision set out in legislation and most were content with the proposal for a presumed date of entry of 28 May and section 26 of the Bill sets this out.

Alternative approach

102. An alternative option is to do nothing but this would leave the law unclear. Currently, where no duration has been agreed there is a common law presumption that the lease is for one year from the date of entry. If the date of entry cannot be established then the law presumes the date of entry to be the Whitsunday or Martinmas immediately following the date of the lease, which for most commercial leases is unrealistic and artificial. There is, though, also case law that could be interpreted as supporting a presumption that the date of entry is the date of the lease itself.

[59] *Redpath v White* (1737) Mor 15196; *Wilson v Mann* (1876) 3 R 527, 533 (Lord Neaves). The power is sometimes referred to as "*arbitrum judicis*".

[60] Where the duration of a commercial lease has not been agreed, the common law presumes that the lease is for one year from the date of entry.

UK postal addresses for serving termination documents

103. Communication by post remains vitally important in the process of termination of leases, as was clear during consultation by professionals who advise on and draft leases and lease-related documentation, even in an age where electronic communication has proliferated. Postal communication can provide greater certainty and, if carried out in the United Kingdom, also greater verifiability than electronic communication, which can be desirable when critical matters like the termination of a commercial lease are involved. It can, though, be difficult to find a postal address to which a written notice or other document under a lease can be served when the intended recipient is not a company registered in a part of the United Kingdom.

104. In England and Wales, section 48(1) of the Landlord and Tenant Act 1987 applies to residential leases[61] and addresses the difficulties that residential tenants experienced in giving postal notice to their landlord when they had no UK address. The section imposes a duty on residential landlords to notify their tenants of an address in England or Wales at which notices may be served. The Scottish Government considers that a similar obligation can be usefully imposed on both landlords and tenants of commercial leases in Scotland in circumstances where the lease does not mention a UK postal address for either party.

105. On consultation, respondents expressed broad agreement with this approach. Sections 27 and 28 of the Bill set out the statutory obligation and makes clear that parties cannot contract out of the obligation and that the obligation does not apply to leases of one year or less in duration since these need not be in writing.

Alternative approach

106. An alternative approach would be to provide for a non-exhaustive list of postal addresses at which any termination document could be served but consultees were concerned about the practical difficulties of such an approach, possibly resulting in the terminating party serving on multiple addresses unnecessarily.

Service of notice upon change or death of tenant or landlord

107. Sometimes there will have been a change in the party upon whom a termination document is to be served which can lead to difficulties with service, especially where the receiving party is the landlord. For example, an assignation by the landlord of the commercial lease will not normally be notified to the tenant and so they might serve their notice of intention to quit on the former landlord.

108. For agricultural tenancies, section 84(4) of the Agricultural Holdings (Scotland) Act 1991 provides that unless, or until, the tenant has received notice that the former landlord has ceased to be such, as well as notice of the name and address of the new landlord, any notice served on the former landlord is deemed to have been served on the new landlord.[62] Consultees were asked whether a similar provision should be introduced in respect of changes to landlords and tenants

[61] Section 48 can be accessed at https://www.legislation.gov.uk/ukpga/1987/31/section/48.
[62] Section 84 can be accessed at https://www.legislation.gov.uk/ukpga/1991/55/section/84.

under commercial leases and broad support was expressed. Section 29(2) of the Bill brings forward reform on this matter.

109. A lease does not end with the death of the landlord or the tenant, and so where a landlord or tenant is an individual, and that individual dies, there can be practical difficulties in serving notice. Until an executor has been confirmed ownership of the deceased's interest in the tenancy or the let premises is uncertain. Once an executor has been confirmed though the deceased's interest is vested in the executor with retrospective effect from the date of death. This gap in the law, however, means that for a period of time it may not be clear upon whom notice of a termination should be served. Section 29(4) of the Bill makes clear that where either party to a lease has died, and the surviving party has yet to receive notification that an executor has been confirmed, the surviving party is entitled to serve notice on the deceased party as if they were still alive.

Alternative approach

110. One alternative is to do nothing but this means that tenants who have not been informed of a change in landlord might continue to unwittingly serve notice on a party who has ceased to be the landlord of the let property, particularly in circumstances where the landlord employs an agent who acts for both the former and the new landlords.

Irritancy

111. Irritancy is the unilateral termination of a lease by the landlord which takes effect before the termination date. The conditions for irritancy are set out in the lease but quite often involve a breach of monetary obligations on the part of the tenant, such as a failure to pay all rent due. Irritancy is a remedy of last resort. It is a way that a landlord can remove a tenant who has defaulted on their payment of rent and, in circumstances where a tenant has disappeared, irritancy allows the landlord to terminate the lease.

112. Irritancy of leases was considered by the SLC in 2003 and a number of recommendations were made in its Report on Irritancy in Leases of Land ("the 2003 Report").[63] A significant amount of time has passed since then and the SLC used its reform project on commercial leases to consult on various parts of the 2003 Report. The SLC asked consultees whether the law of irritancy requires reform and, if so, what aspects of the law are in need of reform. The Bill takes forward some limited reforms regarding service of a pre-irritancy warning notice. These are:

- Under the current law, a landlord cannot rely on an irritancy provision to terminate a lease unless they have served a pre-irritancy warning notice on the tenant. The tenant must have failed to comply with the pre-irritancy warning notice in order for the landlord to terminate the lease. Recorded delivery post is the only means by which the warning notice may be served on the tenant. The Scottish Government does not agree that this should be the only way that a landlord can serve on their tenant a valid pre-irritancy warning notice. This is too restrictive and other methods of service should be capable of being utilised while still ensuring certainty for both parties. Accordingly, section 30(2) of the Bill expands the manner in which a pre-irritancy warning notice

[63] The 2003 Report can be accessed at https://www.scotlawcom.gov.uk/files/3812/7989/6877/rep191.pdf.

may be given and includes service by sheriff officer or email insofar as provided for in the lease.

- Leases often contain a contractual condition that a pre-irritancy warning notice needs to be served regardless of whether the tenant has provided a UK address for service. It is likely that the majority of leases contain details about the methods for service of such a notice but where the lease makes no provision or where the landlord is simply unaware of any UK address for the tenant, then difficulties arise. The Bill sets out, as a fallback option, that in these circumstances the notice can be served on the tenant at the let premises.
- Tenants may take out a heritable security over their interest in a commercial lease and should the tenant default in repayment, the security may be called up. For lenders, not only is there the risk of default in repayment but there is also the risk that the lease is terminated earlier than expected through irritancy. Leases often include a provision that gives a creditor holding security over the lease an opportunity to call it up and to sell and transfer the tenant's interest before it is terminated through irritancy. Section 30(3) provides that the landlord should have to serve a copy of a pre-irritancy warning notice or irritancy notice on the secured creditor.

Consultation

113. As mentioned above, irritancy of leases was considered by the SLC in 2003 but given the amount of time that had passed the SLC used the Discussion Paper to consult on its various recommendations from the 2003 Report. The SLC asked consultees whether the law of irritancy requires reform and, if so, what aspects of the law are in need of reform. About half of consultees were of the view that no reform was required. Some consultees, however, suggested that the existing law could be improved in a number of discrete areas, which are those taken forward in the Bill.

Alternative approach

114. As mentioned above, irritancy of leases was considered by the SLC in 2003 and a number of recommendations were made. An alternative approach to bringing forward reforms in discrete areas of the law of irritancy would be to implement in full, the SLC's recommendations. There was not, however, a significant majority of stakeholders in favour of comprehensive reform. During consultation, for example, about half of consultees were of the view that no reform was required, pointing out that, in general terms, the law of irritancy works well. A number of discrete areas for reform were identified with stakeholders and these are taken forward.

Apportionment of rent

Current law

115. In the English case of *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another*,[64] the tenant had validly exercised their right under a break clause to terminate the lease. Before doing so, they had paid an advance on the quarterly rent which covered periods falling both before and after the date of termination of the lease under the break

[64] [2015] UKSC 72; [2016] AC 742.

clause. Proceedings were raised by the tenant to recover that part of the rent which covered the post-termination period and two arguments were advanced for the grounds of repayment: first, was that section 2 of the Apportionment Act 1870 ("the 1870 Act")[65] applied, and the second was that there was an implied term in the lease which obliged the landlord to repay. The Supreme Court rejected both grounds finding that 1870 Act did not apply to leases where rent is payable in advance (only leases where rent is paid by arrear) and that there was no implied term. The result was that the tenant could not recover the sum covering the post-termination period.

116. There is little authority for apportionment of rent payable in advance under the 1870 Act and the common law rules by which implied terms are governed in Scots law coincide with those in England and Wales. The SLC concluded, therefore, that it is highly unlikely that the Supreme Court's decision would be departed from by a Scottish court.

Reform

117. Section 31 introduces a new statutory term to be implied into commercial leases, dealing with problems caused by the kind of overpayment described above. It is reasonable to expect that the landlord should have to exclude their obligation to make this kind of repayment rather than have the tenant take steps to protect themselves against a potential loss. The section therefore sets out clearly that landlords are obliged to repay rent paid in advance be a tenant in respect of a period falling after the termination of the lease. The implied term is subject to exclusion by agreement.

Consultation

118. A number of stakeholders asked the SLC to consider the decision and in particular whether it would likely be followed by Scottish courts. The SLC concluded that it is highly unlikely that the Supreme Court's decision in the case would be departed from by a Scottish court, and the majority of consultees agreed with this view. The SLC asked whether the 1870 Act should be amended in order to resolve the issue and most were in favour, with only two expressing opposition.

119. Considering the matter further, though, the SLC concluded that amendment of the 1870 Act would not resolve the issue. The purpose of the 1870 Act, as it applies to leases, is to determine who should receive rent payable in arrears in relevant circumstances and not to deal with overpayments of rent. Accordingly, the result sought by consultees is better achieved by a statutory implied term, as the SLC recommend and as provided for in the Bill.

Alternative approach

Do nothing

120. Doing nothing would mean Scottish courts would likely apply the decision to Scottish leases with the result that tenants will be unable to recover to recover that part of the rent which covered the post-termination period. In circumstances such as these, landlords would receive an unearned windfall at the expense of the tenant.

[65] Section 2 of the 1870 Act can be accessed at https://www.legislation.gov.uk/ukpga/Vict/33-34/35/section/2.

Amend the 1870 Act

121. As discussed above, another option would be to amend the 1870 Act. This would not resolve the issue for the reasons already set out: that is, the purpose of the 1870 Act, as it applies to leases, does not deal with overpayments of rent but instead determines who should receive rent payable in arrears where there is a change of landlord during a period in which rent is payable but before it falls due.

Application of automatic continuation, notices and miscellaneous provisions to existing leases

122. Part 2 of schedule 2 of the Bill makes transitional and saving provision for how it will apply to existing leases. It will apply to leases entered into before and subsisting before it comes into force, but subject to detailed rules including about how tacit relocation running at commencement day will apply, the position for leases which have less than 6 months to expire at commencement day, the position on head leases, the validity of existing express terms, the interaction with the Tenancy of Shops (Scotland) Act 1949, the validity of notices given before commencement day in relation to the termination date of a lease after commencement date, existing rights or legal proceedings in relation to the lease.

123. The date for the provisions in the Bill to come into force will be set by regulations, providing needed flexibility to deal with matters than can arise after Royal Assent.[66] Section 35 of the Bill also sets out that such commencement regulations can amend the legislation so that the actual date of coming into force is substituted for references to the day of coming into force of the provisions in the Act. The Scottish Government has also included a power for Scottish Ministers to make any necessary ancillary provision which is the standard approach taken in Scottish Government bills, in case missed consequential or incidental provisions, etc. are needed to implement the Bill.

Alternative approach

124. An alternative approach is to have a fixed commencement, as the SLC recommended. The rationale for such a provision is that the primary legislation should make clear the circumstances when the pre-commencement law should be applied by the courts after the commencement date. Section 35(3) of the Bill sets out that the commencement regulations can amend the legislation so the day of coming into force is substituted for references to the day of coming into force in the Act, addressing these concerns, together with enough time being allowed in advance by way of notice to those who will be affected. This provision was not discussed in the Discussion Paper but a provision was included in the SLC's draft Bill which was consulted on, although no specific question was asked of consultees about that provision.

[66] The Scottish Government's intention is to allow for due notice by commencing the Bill not before 6 months beginning with the day of Royal Assent.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

125. An Equality Impact Assessment (EQIA) has been carried out and has been published on the Scottish Government's website at http://www.scotland.gov.uk/Publications/Recent. The EQIA concluded that, overall, the Bill will have no significant impact on identified groups. The policy will impact parties to a commercial lease – that is, tenants and landlords of commercial property. The overall policy aim of the Bill is to improve, simplify and update aspects law of commercial leases so that it meets the needs of a modern Scottish economy. Tenants and landlords can come from any group or community of people and so this legislation has the potential to impact on any person operating from leased commercial property or letting such property. While young people in student lets by educational institutions may be covered by the Bill, those lets are currently excluded from the rules on the continuation of leases which the Bill replaces[67], and so they will not be adversely affected.

Human rights

126. The Scottish Government is satisfied that the provisions in the Bill are consistent with the European Convention on Human Rights (ECHR). In particular, the Government has considered the effect of the provisions of the Bill in relation to Article 1 of Protocol 1 and Article 6 ECHR.

127. The impact of the Bill generally is considered proportionate. Specifically on the provisions in relation to apportionment of rent, the approach taken in the Bill is for a statutory implied term in leases agreed after the relevant provisions come into force. Implying the term into leases entered into before the law takes effect would potentially interfere with a landlord's entitlement to receive and retain rent, a possession in terms of Article 1 of Protocol No. 1 ECHR.

Statement of compatibility under section 23(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024

128. The Cabinet Secretary for Justice and Home Affairs has made a statement in writing that, in her view, the provisions of the Bill are compatible with the UNCRC requirements, and the Bill will not directly impact on children.

Island communities

129. The Scottish Government does not anticipate any significant impact on island or rural communities as a consequence of this Bill. The provisions will apply equally to all communities in Scotland. The Bill will affect those who have entered into, or are considering entering into, a commercial lease. It will apply to leases of property situated on an island or the mainland. An impact assessment has been carried out and has been published on the Scottish Government website.

[67] See paragraph 2.60 of the Report.

Local government

130. The Scottish Government does not expect any impact on Local Government, except insofar as a local authority may act as either a landlord or tenant.

Sustainable development

131. Given that the Bill is concerned with the continuation of commercial leases and how they may be brought to an end, the Scottish Government does not anticipate any significant impact on the environment. The policy objectives of the Bill, though, will contribute to the National Outcome on fair work and business, by providing the necessary legislative framework to help make our economy more stable, productive and efficient. The National Performance Framework is Scotland's way to localise sustainable development goals, in this case the goal of decent work and economic growth.

CROWN CONSENT

132. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Great Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of those things.

133. For the source of the requirement for Crown consent, see paragraph 7 of schedule 3 of the Scotland Act 1998,[68] and rule 9.11 of the Parliament's Standing Orders.[69] For further information about the considerations that go into determining whether Crown consent is required for a Bill see Erskine May, the guide to procedure in the UK Parliament.[70]

GLOSSARY

134. In this Memorandum, the following terms are intended to be read by reference to the descriptions of those terms set out below.

Break clause	A term commonly found in commercial lease agreements, allowing either the tenant or the landlord (or both) to bring the lease to an end at a particular date before its agreed termination date. Typically such terms require the party seeking to bring the lease to an end to give written notice of their exercise of that right to the other party.

[68] Accessible at https://www.legislation.gov.uk/ukpga/1998/46/schedule/3/paragraph/7.
[69] Standing Orders can be accessed at https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-9-public-bill-procedures#topOfNav.
[70] This is available at https://erskinemay.parliament.uk.

Common law	The body of legal rules derived from custom, Roman law, the writings of Institutional writers and the reasoning of judges in court cases that create precedents. It stands in contrast to statute law, where the rules are set down in Acts of the UK or Scottish Parliaments or regulations, orders or rules made in the exercise of powers granted by such Acts. Scots law exists as both common law and statute law.
Confirmation	The legal process that empowers specified persons to administer the estate of a deceased person.
Creditor	A person (natural or legal) to whom another person (a debtor) owes an obligation (for example, a debt).
Executor	A person appointed by the terms of the testamentary writing or, in relevant circumstances, the court, to administer the estate of a deceased person.
Formal writing	Writing in a document which complies with section 2 or 9B of the Requirements of Writing (Scotland) Act 1995. Section 2 applies to traditional paper documents and requires them to be signed by the parties. Section 9B applies to electronic documents and requires them to be electronically authenticated by the parties. A lease for a period of over one year must be in formal writing in order for the tenant to be able to acquire a real right in the property let.
Irritancy	Unilateral termination of the lease by the landlord to take effect before the termination date. The conditions for irritancy are set out in the lease. Often they involve breach by the tenant of their obligations under the lease but they can involve other occurrences such as insolvency of the tenant. In rare cases, the mere occurrence of an event is specified to give rise to irritancy without the landlord having to take any action. Typically no compensation is due to the tenant upon irritancy.
Ish	The termination date at the end of a lease.
Heritable security	A real right in security over heritable property (generally speaking, land or buildings, but also includes leases where the tenant has a real right in the property let). Popularly known as a mortgage, it allows the creditor who holds it to take possession of and sell the heritable property over which it is held if their debtor fails to comply with their obligations, for example to repay a sum lent. A heritable security over a lease can exist only where the lease is a long lease which has been registered in the Land Register or Register of Sasines.
Landlord	The party to the contract of lease who grants the lease. Usually this is the owner of heritable property which is the subject of the lease. Also known as the “lessor”. In a sublease the tenant is the landlord in relation to the sub-tenant.

Lease	A contract under which one person, the landlord, grants to another, the tenant, the right to use heritable property for a fixed time in return for a regular, periodical payment known as rent. Fishing and, it is thought, hunting, rights over heritable property can themselves be let in leases coexisting with leases of the heritable property itself. The tenant acquires a real right if they take possession of the property leased. If the lease is a long lease (over 20 years) the tenant acquires a real right by registering the lease in the Land Register.
Notice of intention to quit	Notification given by a tenant to a landlord, indicating their intention to remove from the let property at the end of the lease. Such notice must be given in accordance with the provisions of that lease and, where relevant, the rules in common law or statute law. Such notice brings the lease to an end at its ish and prevents the operation of tacit relocation.
Notice to quit	Notification given by a landlord to a tenant, indicating that the tenant should remove from the property let at the end of the lease. Such notice must be given in accordance with the provisions of that lease and, where relevant, any common law or statutory requirements. Such notice brings the lease to an end at its ish and prevents the operation of tacit relocation.
Personal right	A right against a particular person. Contracts create personal rights to enforce obligations of the other contracting person, but such rights can also have non-contractual sources (such as the rights under common law to obtain recompense for unjustified enrichment or to obtain compensation (damages) for negligently caused physical damage or injury). A personal right stands in contrast to a real right.
Real right	A direct right in land (or moveable property). In contrast to a personal right it is enforceable against persons in general. Real rights divide into (i) the right of ownership and (ii) the subordinate real rights such as servitudes and, to a more limited extent, the tenant's interest where the tenant has taken possession, or in respect of long leases, has registered the lease.
Roman law	The legal system of ancient Rome. Roman law forms the basis of civil law in many countries today and greatly influenced the development of Scots common law.
Statute law	The legal rules which are set down in Acts of the UK or Scottish Parliaments or regulations, orders or rules made under those Acts.
Tacit relocation	The continuation of a lease beyond its ish by operation of the common law. It can arise either (1) at the ish or (2) after the ish with retrospective effect back to the ish. In (1) it arises because neither party has taken the necessary steps before the ish to terminate the arrangement, such as the giving of a notice to quit or notice of intention to quit and at the ish the tenant has not given up possession with the consent of the landlord. In (2) it arises because the landlord has not taken reasonable steps (such as raising court proceedings) to remove the tenant within a reasonable period of time of the ish, or the landlord acts inconsistently with the lease having ended at the ish (such as demanding or accepting payments of rent): see Chapter 2. The Report recommends the replacement of tacit relocation with a statutory concept known as "automatic continuation".

Tenant	A person who, in terms of a lease, occupies heritable property belonging to a landlord to whom they pay rent. The occupation of heritable property by a tenant of fishing, shooting or mineral rights is limited to the purposes for which the lease of such rights exists.
Tenant's interest	The whole of the tenant's rights and obligations under a lease which are potentially transmissible to another tenant and are enforceable against the landlord, any successor of the landlord and, in certain instances, against third parties.
Violent profits	All profit that a landlord could have made from possessing heritable property during its unlawful occupation plus compensation for any damage caused to the property during that period. The rule of thumb is that violent profits are double the market rent if the tenant did not have probable cause (that is, a good though possibly incorrect argument) to remain or the market rent if the tenant did have probable cause to remain.

This document relates to the Leases (Automatic Continuation etc.) (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 11 December 2024

LEASES (AUTOMATIC CONTINUATION ETC.) (SCOTLAND) BILL

POLICY MEMORANDUM

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents