Leases (Automatic Continuation etc.) (Scotland) Bill: analysis of responses to the call for views

The Committee's call for views asked 11 substantive questions on the Bill. 29 responses were received.

This briefing summarises some of the main issues raised in the call for views. The key points are included first in an executive summary followed by a more detailed narrative.

Note that the SPICe Bill Briefing includes an overview of what the various sections of the Bill do as do the Explanatory Notes to the Bill.

KEY POINTS FROM THE CALL FOR VIEWS

Q1 - Scope of leases covered by the Bill in Part 1

- In general terms, respondents were largely content with Part 1 of the Bill.
- There were, however, a range of critical comments on the scope of the leases covered by the Bill including in relation to grazing or mowing leases; mixed uses of land in rural areas (leases which could be both commercial and agricultural in nature, e.g. a tree nursery/forest); as well as leases for sub-stations and windfarms.
- More fundamentally, the Faculty of Advocates argue that it does not make sense to have two parallel regimes – i.e. statutory automatic continuation for commercial leases and tacit relocation for other leases.
- The Law Society stresses the need for an awareness raising campaign to ensure that the impact of the Bill is fully understood across all affected sectors.
- The Law Society argues that Part 1 of the Bill should be amended so that it is clear that the Bill only applies to "heritable property" (i.e. land and buildings) and that "movables" (e.g. cars, aeroplanes or electrical appliances) are excluded.
- Pinsent Masons makes a similar point on the need for awareness raising but focussed on the Bill's transitional provisions in Part 2 of Schedule 2 as introduced by section 34 of the Bill. In simple terms the transitional provisions allow pre-existing leases (i.e. entered into prior to the Bill's commencement date) to continue by tacit relocation based on the current law and to be terminated based on the current notice rules, but with a six month cut-off from when the Bill comes into force.

Q2 - Need for reform of tacit relocation

- A number of responses agree with the need for reform largely on the basis that there is currently a lack of clarity for tenants and landlords.

- The Federation of Small Businesses also makes the argument that the imbalance in power between small businesses and landlords is another reason for reform.

- However, certain respondents are less convinced of the need for reform, or in some cases the reform proposed by the Bill. Key arguments include:

    - The law on giving notice is clear due to the Rockford case[1] (Burges Salmon)

    - A thoroughgoing reform of the law on tacit relocation is not needed (Faculty)

    - The new statutory code will be broadly similar to existing practice (Faculty)

    - Possible confusion as the statutory code will operate alongside the common law during the transitional period in Part 2 of Schedule 2 (Law Society)

    - A statutory code will be less flexible than the common law (Law Society).

- Some respondents also think that, while reform is needed, the drafting in the Bill could be improved/simplified (Gillespie Macandrew, Burness Paul, Pinsent Masons).

Q3 - Tacit relocation – options for reform

- Almost all of the responses to this question are in favour of the proposal in the Bill (i.e. a statutory code for tacit relocation combined with the right to contract out).

- The Scottish Grocers Federation also favour rules which allow for contracting out but note that, whatever approach is taken, there should be, “a significant awareness raising campaign to ensure that both tenants and landlords fully understand their rights and obligations.

- There are, however, some dissenting voices on the approach taken in the Bill.

- For example, Craig Connal KC argues that “Option 1 is by far the simplest it preserves the contract terms as the key.”

- The Federation of Small Businesses also states that, “automatic continuation of leases can be an important tool for small businesses seeking stability”, but that there are risks of businesses being locked into terms which do not suit their needs

Q4 - Tacit relocation – statutory code in sections 2-7 of the Bill

- A number of responses to this question simply state that they are content with the statutory code or provide no comment.

- Other responses include general areas of comment or critique. For example:

    - Burness Paull makes a general point that, “it is important that any reform does not replace existing uncertainty with new uncertainty”.

    - Burges Salmon notes that although “the code makes sense in terms of its structure” there is a question as to whether it is appropriate that the Bill

[1] Rockford Trilogy Limited v NCR Limited

makes the law on giving notice stricter than is currently the case following the Rockford Trilogy case.

- There are also detailed comments on specific sections of the Bill. This includes, in particular, criticism of the rules in section 4 on contracting out and the rules in section 5 which allow leases continues after that date because of the parties' conduct after that date – a number of responses question whether section 5 is workable based on its current drafting (for details of the various comments see the summary below).

Q5 - Tacit relocation – notices to quit and notices of intention to quit

- A number of respondents make the general point that the sections of the Bill on notice are too complex (Faculty, Burness Paul).

- The Faculty and Pinsent Masons also argue that it does not make sense to have a statutory code for one type of lease given that there are rules in case law which apply to various areas of the law, not just commercial leases.

- Pinsent Masons also argues that it would be better if the Bill would have included statutory styles as this would reduce the need for most of sections 8, 10 and 12.

- A number of responses criticise the proposal to allow tenants to give notice orally where a lease has a term of less than one year. This includes: Fife Council, Gillespie Macandrew, Gillian Clark, the Faculty, the Law Society, the Scottish Property Federation, the City of Edinburgh Council and Turcan Connell. The Law Society states for example, "the evidential issues surrounding oral evidence are obvious and do create difficulties under the common law at present."

- More generally, a number of respondents (e.g. Gillespie Macandrew, the Faculty, the Law Society) argue that the rules on giving notice should be the same for both tenants and landlords in contrast to the approach taken by the Bill.

- The tenants' representatives (Federation of Small Businesses and Scottish Grocers' Federation) do not directly address the argument that the rules on giving notice should be the same for both tenants and landlords. However, the Federation of Small Businesses does note more generally that:

  > "We welcome the measures contained in the Bill which seek to address some of the power imbalances between small tenants and large landlords."

- In addition to the above general themes, the responses also include a number of comments focussed on individual sections in the Bill as well as the drafting of these sections (see the summary below for details)

Q6 - Tacit relocation – Leases excluded from the rules in schedule 1

- Most of the responses either agree with the approach taken or make no comment.

- The Faculty does make a general point though that listing leases which are excluded rather than basing the rules on the presumed intention of the parties, as is the case in the current law, will mean that the law will become less flexible.

- A number of respondents note the issue also raised in relation to section 1 of the Bill that the application of the Bill to grazing or mowing leases needs clarification (Gillespie Macandrew, Law Society, the City of Edinburgh Council, Turcan Connell)

- Schedule 1 of the Bill excludes leases of a right to fish or hunt where there is a close season from the new rules on automatic continuation. Gillespie Macandrew argue that defining "close seasons" for hunting/fishing by reference to whether hunting/fishing is an offence at the time in question is overcomplicated. It argues that "it would be simpler for any lease of less than a year to fish or hunt to terminate at its termination date."

Q7 - Miscellaneous provisions relating to start, end or length of lease in Part 3

- A number of responses simply state that they have no comment or that they support the proposal in the Bill

- There are, however, also a number of critical views and comments.

- One of the main criticisms relates to Section 28 which provides that tenants can withhold payment if a party to a lease fails to notify the other party what its United Kingdom address is as required by section 27(1) of the Bill. Pinsent Masons and Urquharts see this as disproportionate as does the Scottish Property Federation.

- Burness Paul, Gillespie Macandrew, Pinsent Masons, the Law Society and the City of Edinburgh criticise section 30(3) which requires landlords to serve irritancy notices to a tenant's creditor. They see this as unworkable on the basis that there is no guarantee that a landlord would know of the existence of a tenant's heritable creditor. One suggestion is that there should be an obligation for the tenant to provide information regarding heritable creditors to the landlord.

- Section 31 provides a default term for commercial leases which would require the landlord to repay rent or any other advance payment made by the tenant in relation to a period falling after the termination of the lease. Section 31(3) requires the landlord to repay the tenant no later than 10 working days after the lease ends. The City of Edinburgh Council queries whether this 10 working day period is sufficient.

- Burges Salmon also includes a range of detailed comments and drafting suggestions on sections 27, 28, 30 and 31 of the Bill.

Q8 - Terminology in the Bill

- The majority of responses are positive about the new terminology. However, the responses from the Faculty, Law Society and Strathclyde Law School include some critical comments on the Bill's approach.

Q9 - Tenancy of Shops (Scotland) Act 1949

- The majority of responses are in favour of the Bill dealing with the 1949 Act (a number of these agree with the SLC's suggestion to use the Bill to repeal the 1949 Act)

- However, others including the Scottish Grocers' Federation, Strathclyde Law School and Professor Brymer are in favour of separate legislation being used to reform the law in the 1949 Act.

Q10 - Is there anything else you think should or should not have been included in the Bill?

- As outlined in the detailed summary below, there are a range of suggestions for additional issues which could have been dealt with in the Bill

- Pinsent Masons also makes the general argument that "the proposed Bill goes beyond what is required and rather than providing clarity and certainty introduces new potential pitfalls for parties to a lease."

Q11 - Any other comments on the Bill, or the approach taken by the Bill to reforming the law in this area

- The Federation of Small Businesses argues that scrutiny of the Bill needs to include the needs of small businesses.

- Gillespie Macandrew argue that the main source of uncertainty and dispute is the rules on notice periods and notice and that aspects of the drafting of the Bill are "overly complicated and certain provisions could be expressed more clearly and succinctly".

- Gillespie Macandrew also argue that "the transitional provisions in particular are likely to be a source of considerable difficulty in interpretation and application." Shepherd and Wedderburn also query how elements of the transitional provisions will work in practice.

- Gillian Clark notes on section 24(4) that:

  > " … reference to service on one trustee should extend to service on office bearers raof associations etc."

- The Law Society provides detailed comments on the sections of Part 2 of the Bill which it did not cover at its response to question 5 of the call for views. It argues that:

  - Section 20 on the automatic continuation of head leases and sub-leases needs various elements of clarification (Pinsent Masons shares this view)

  - Section 21 on the information to be given by a tenant to a sub-tenant needs clarification

  - Section 22 on "cautionary obligations" needs redrafting

  - Section 23 which provides rules on contracting out is necessary but potentially creates "additional layers of complexity and new areas on which parties will likely wish to seek professional advice" (Pinsent Masons has specific proposals on section 23).

SUMMARY OF THE CALL FOR VIEWS

1. A summary follows of the key points made in the responses to the call for views.

Q1 - Scope of leases covered by the Bill in Part 1

2. The call for views asked for views on Part 1 of the Bill which defines the leases to which the legislation will apply, excluding certain residential and agricultural leases from the Bill's scope.

3. In general terms, respondents were largely content with Part 1 of the Bill or did not comment.

4. There were, however, certain specific comments on the scope of leases covered by the Bill as well as critical comments on the general approach taken by the Bill in Part 1.

5. For example, the Centre for Scots Law indicated that the definition of "residential" lease would not cover "residential leases for accommodation that is not the tenant's only or principal home, such as accommodation for work purposes" (the implication is that these leases might unintentionally fall within the scope of the Bill).

6. The Centre for Scots Law also noted that:

   "One possibly unintended exception is paragraph 22(1)(a) of Schedule 1 of the Private Housing (Tenancies) (Scotland) Act 2016, covering charity accommodation to veterans. Unlike its sister provision 22(1)(b), 22(1)(a) is not explicitly an exception for temporary accommodation and may cover permanent residential arrangements for veterans."

7. It seems that the Centre for Scots Law is suggesting that charity accommodation to veterans may also unintentionally fall within the scope of the Bill.

8. The law firm Gillespie Macandrew argues that the implications of Part 1 require consideration in relation to rural areas noting that:

   "There may be some situations in which the applicable legislation is unclear, for example in the case of mixed uses of land. For example, a tree nursery falls within the definition of 'agriculture' applied by the Agricultural Holdings legislation but commercial forestry falls within the scope of the Bill. What if a single lease were granted in respect of both uses?"

9. Gillespie Macandrew also argue that the way in which section 1 and schedule 1 deal with grazing or mowing leases needs clarification noting that:

   "A grazing or mowing lease of less than a year is an 'agricultural lease' in terms of S.1(3)(v) of the Bill. Such leases are excluded from scope yet have also been included in Schedule 1(1)(d) (leases which terminate automatically under s.2(2)(b)). Presumably this is seeking to catch non-agricultural leases (e.g. horse grazings or non-commercial enterprises) – clarification on this would be helpful as it appears to be contradictory at present."

10. In a similar vein, the response from David Campbell also states that "equine and grazing lets are not mentioned, but letting for grazing is excluded under Schedule 1."

11. Gillian Clark also makes this point stating that, “the Bill makes no mention of lets for Equine or Grazing however Grazing lets are excluded under Schedule 1.”

12. The Law Society also makes a similar point on this issue noting that, “this provision could cause an inconsistency under the Agricultural Holdings legislation in relation to both SLDTs[2] and grazing leases.”

13. More generally, the Law Society argues that “the definitions set out in Part 1 of the Bill as introduced may lack clarity and could lead to unintended consequences.”.

14. The Law Society argues that Part 1 of the Bill should be amended so that it is clear that the Bill only applies to “heritable property” (i.e. land and buildings) and that “movables” (e.g. cars, aeroplanes or electrical appliances) are excluded.

15. The Law Society also argues that the scope of the Bill means that it could apply to leases for sub-stations and windfarm infrastructure, as well as telecoms infrastructure where there are “are already statutory provisions relating to termination, for example the Electronic Communications Code 2017 which applies to the whole of the UK”. The Law Society argues that having two statutory processes could create further ambiguity instead of simplicity and that “it will be necessary for the Scottish Government to undertake an awareness raising campaign to ensure that the impact of the Bill is fully understood across all affected sectors.”

16. Pinsent Masons agrees with the exclusion of residential and agricultural leases from the scope of the new legislation. However, it makes an additional point that, with the exception of the six- month transitional period under Part 2 of Schedule 2, the Bill has retrospective effect (i.e. applying to leases which are already in existence) and that this is not appropriate. According to Pinsent Masons, this means that agreements already negotiated will be, “usurped to the potential detriment of one party.” It argues that, if the legislation is to have retrospective effect, it will be important for the Scottish Government to undertake an awareness raising campaign on this issue.

17. Strathclyde Law School notes that the definitions in Part 1 seem appropriate but that:

    “ … repairing tenancies have never been implemented, and it may be doubted whether they ever will. Their inclusion in s 1(3) is accordingly unnecessary, but understandable.”[3]

18. The Faculty of Advocates (“the Faculty”) note in their response that, “they have no difficulty with a targeted reform to the law as it applies to commercial leases.” However, the Faculty notes that tacit relocation applies to agricultural tenancies and the majority of residential leases, but that the Bill does not seek to codify these rules.

19. The Faculty states that the effect would to create two parallel regimes - statutory automatic continuation, which would apply to most (but not all) commercial leases, and common law tacit relocation, which would apply to everything else.

20. The Faculty argues that the existence of two parallel regimes would be undesirable on the basis that:

[2] Short limited duration tenancy

[3] Repairing tenancies were introduced by Part 10, Chapter 2 of the Land Reform (Scotland) Act 2016. They require the tenant to improve the land to bring it into a state capable of being farmed.

"It is pregnant with potential for litigation, and in any event adds unnecessarily to the complexity of an already complex area of law. If tacit relocation is to be replaced by a statutory code, we consider that that code should apply to all leases currently affected by tacit relocation."

Q2 - Need for reform of tacit relocation

21. The call for views asked whether the law on tacit relocation needs reforming, and if so for what reasons.

22. A number of responses agree with the need for reform largely on the basis that there is currently a lack of clarity. This includes certain law firms (e.g. Shepherd and Wedderburn and Urquharts) the Scottish Property Federation, the Scottish Grocers' Federation, Strathclyde Law School, the Centre for Scots Law, and the local authorities which responded to this question.

23. The Federation of Small Businesses also makes the argument that the imbalance in power between small businesses and landlords is another reason for reform, noting that:

    "A recurring issue highlighted by our members is the complexity and ambiguity in commercial lease agreements. Small business owners often lack the legal expertise to navigate complicated terms and conditions, which can lead to unintended consequences. We have heard from members that it is sometimes the case, in amongst everything they need to do to secure a space from which to run their operations, that a small business owner may not look as closely as they should at things like lease terms and conditions, which may leave them vulnerable in future negotiations."

24. However, certain respondents are less convinced of the need for reform, or in some cases the reform proposed by the Bill.

25. For example the law firm Burges Salmon argues that the current law, "is clear at present (particularly when viewed against proposed reform in statutory form by way of the Bill)." On that point it refers to the Court of Session case from 2021 of Rockford Trilogy Limited v NCR Limited where the Court of Session found that e-mails sent by the tenant to a landlord were sufficient notice of the desire to terminate the lease. The response states:

    "Whilst, in practice, a formal notice to quit is often timeously served to bring a lease to an end, that is not the strict legal requirement under the present law to exclude tacit relocation and therefore to bring a lease to an end. All that is required is timeous, sufficient intimation, whether verbal, written (formal or informal) or by conduct, that the lease will not continue on its present terms. That analysis is acknowledged by the Scottish Law Commission in their Report, at paragraphs 3.41-3.42."

26. The Faculty thinks that reform is needed, but is not convinced that the SLC has taken the right approach in trying to codify the existing law. It states:

    "We would agree that aspects of the law on tacit relocation would benefit from reform. As the law currently stands in relation to relevant leases, either party may serve a valid notice to quit relatively close to lease expiry (40 clear days). This is considered inadequate notice for either party to organise their commercial affairs.

We question the need for a thoroughgoing reform of the law on tacit relocation, though. It is a well-developed and relatively well-understood area of law. We note that whilst the Bill aims to codify much of the existing approach, the new statutory code will be broadly similar to existing practice."

27. The Law Society has broadly similar views to the Faculty. It notes that landlords can sometimes be 'caught out' by the operation of tacit relocation and that there is therefore a case for clarifying the law by statute. However, it also stresses that, "replacing the common law with a statutory code does not in itself make the law clearer or more accessible". Issues which the Law Society raises are:

- The possibility for confusion given that the statutory code will operate alongside the common law and other statutes and codes during the transitional period in Part 2 of Schedule 2 of the Bill.

- The fact that a statutory code is unlikely to offer, "the same degree of flexibility as the Scottish economy continues to evolve" as compared to the common law rules

28. Professor Stewart Brymer also questions whether reform as proposed in the Bill is needed. He states:

"I do not consider that the law on tacit relocation is uncertain, inaccessible or outdated … Any solicitor experience in their role and acting with ordinary skill and care should have no problem in checking the law on this subject.

The only aspect of the law which I consider to be outdated is the reference to Schedule H to the Sheriff Courts (Scotland) Act 1907 for the style of a Notice to Quit.

To be clear, I am not against law reform when this is necessary and, on balance, I suppose a reform is required here."

29. West Lothian Council takes the view that the existing law on tacit relocation is not particularly problematic, but that the Bill is welcome since it "would modernise existing practices and provide clarity on a number of existing areas of uncertainty".

30. In addition, some respondents think that, while reform is needed, the drafting in the Bill could be improved and simplified.

31. For example, the law firm Gillespie Macandrew LLP argues that, "codification of the common law is beneficial from the accessibility perspective" and that the key source of uncertainty and dispute are the rules on notice and notice periods. However, it is also of the view that aspects of the drafting in the Bill are "overly complicated and certain provisions could be expressed more clearly and succinctly." It argues that the transitional provisions are "likely to be a source of considerable difficulty in interpretation and application."

32. Similarly, while the law firm Burness Paul thinks that the law needs reforming as this would provide clarity for its clients, it states that,

" …it is important that any new law meets the aim of providing clarity and certainty but does so by avoiding unnecessary over complication in relation to new provisions which we feel could be expressed and drafted in a clearer and more succinct way e.g. the transitional provisions."

33. Pinsent Masons also considers that reform is needed but indicates that it has concerns that the proposed Bill does not provide the certainty and clarity that it wishes to see.

Q3 - Tacit relocation – options for reform

34. The call for views asked for views on the two options for reform proposed by the SLC, i.e. option 1 (disapplication of tacit relocation from commercial leases, but with the possibility of contracting in to the doctrine) and option 2 - a statutory code for tacit relocation combined with the right to contract out (the proposal in the Bill).

35. Almost all of the responses to this question in the call for views are in favour of the proposal in the Bill (i.e. the SLC's option 2).

36. Arguments of favour of the proposal in the Bill include the fact that tacit relocation is a long-standing principle in Scots law and that allowing a lease to continue can lead to benefits to both landlords and tenants.

37. For example, the Law Society, referring to its response to the SLC's 2018 consultation states that:

> "Tacit relocation can play a very useful role in allowing the status quo to prevail, avoiding a state of limbo arising. This can be of benefit to both parties, depending on the circumstances and the economic drivers in play at any given time or in relation to any given sector. Abolition of tacit relocation may, for example, bring additional expense to parties who would instead require to renegotiate and renew leases in writing along with the corresponding requirement to submit Land and Buildings Transaction Tax (LBTT) returns for fresh leases, rather than any that might be required in relation to a one year (or less) extension."

38. Stephen Webster from the law firm Urquharts echoes this stating:

> "I would not favour Option 1, because I believe tacit relocation provides significant benefits in terms of cost-effective continuity, and its dangers are capable of being mitigated without any dramatic change in the Law."

39. Glasgow City Council also emphasises that tacit relocation can be useful and that in practice disputes are more linked to notice rather than tacit relocation itself:

> "Option 2 is the preferable option.
> Tacit relocation can be a useful provision for landlords and tenants. In our experience, disputes which have arisen have not been in relation to the doctrine of tacit relocation per se, but rather on whether notices have been correctly served in accordance with provisions in a lease."

40. The Scottish Property Federation notes:

> "We agree with option 2 which allows parties to contract out but retains tacit relocation as the default. This is to avoid a potential scenario where a lease comes to an end, the tenant remains in occupation without a new lease, and the landlord is unable to claim rent."

41. Malcolm Combe and Jonathan Brown of Strathclyde Law School state that there are policy arguments for both options, but that, “default disapplication strikes us as being an overcorrection to any current issues.”

42. An additional argument made for retaining tacit relocation is that it will provide consistency across the board given that the principle also applies to other forms of lease, not just commercial leases. This argument is made by the Faculty and also the Centre for Scots Law.

43. Responses to the call for views also favour contracting out if option 1 is chosen. For example, Pinsent Masons states:

    “It is also useful, in some circumstances, for the parties to be able to contract out of tacit relocation. For example, in retail parks or centres, where the landlord may be actively managing the tenant mix, the landlord may prefer certainty that leases will terminate on the contractual termination date.”

44. The Scottish Grocers Federation also favours contracting out but notes that, whatever approach is taken, there should be, “a significant awareness raising campaign to ensure that both tenants and landlords fully understand their rights and obligations”

45. There are, however, some dissenting voices on the approach taken in the Bill.

46. For example, Craig Connal KC argues that “Option 1 is by far the simplest it preserves the contract terms as the key.” He also suspects that, “it may become standard for a compliant clause to be included in all commercial leases in the future so the law as amended will gradually fade away.” This suggestion is that clauses in commercial leases will simply end up reflecting the underlying law in the Bill.

47. The Federation of Small Businesses is also not convinced that the Bill’s approach is correct. It states that, “the automatic continuation of leases can be an important tool for small businesses seeking stability”, but also notes that there are risks with businesses being locked into terms which do not suit their needs. The Federation of Small Businesses proposes an alternative approach stating that:

    “Our position remains unchanged from that in 2018, in that we concur that it would make sense to allow fixed term leases to be created and to allow for the contracting out of tacit relocation. Indeed, when the lease itself is drawn up, it could be mandatory to specify what is to happen when at the end-date (e.g. that it comes to an end, or it is renewed following a specified procedure or on certain terms or is temporarily renewed on a month-to-month basis). In these circumstances, it would not be necessary to continue with tacit relocation as a default backstop – unless the parties explicitly stipulated to the contrary”

Q4 - Tacit relocation – statutory code in sections 2-7 of the Bill

48. The call for views asks for views on the statutory code in the Bill which will replace tacit relocation.

49. A number of responses to this question simply state that they are content with the statutory code or provide no comment. This includes the responses from: the local authorities who responded, Professor Stewart Brymer, and the Scottish Property Federation. Certain responses stress the need for guidance from the Scottish Government on how notice should be given (e.g. the Scottish Grocers’ Federation).

50. Other responses include general areas of comment or critique as well as detailed comments on specific sections of the Bill.

51. For example, the law firm Burges Salmon notes that although "the code makes sense in terms of its structure" there is a question as to whether it is appropriate that the Bill makes the law on giving notice stricter than is currently the case following the Rockford Trilogy case. Burges Salmon does not take a view on this matter but suggests that the Bill may make it harder for "legally unrepresented tenants to get out of a lease."

52. In relation to section 2, Pinsent Masons states that:

> "We would like it to be made clear in Section 2 that nothing in Part 2 of the Bill prevents a lease being terminated by renunciation during the period of the lease or during the period of automatic continuation."

53. On section 2 Gillespie Macandrew states:

> "The wording of s.2(3) – "But see also section 5…" is inappropriate - the relevant section or sub-section(s) should simply be made "subject to" section 5 at their outset."

54. Burness Paull makes a general point that, "it is important that any reform does not replace existing uncertainty with new uncertainty". It states further that the drafting of section 3(1) could be improved noting that:

> " …in particular 3(1) (c)(ii) what does "in circumstances which indicate that both parties intended the lease to end" mean? How do we advise clients on what indications would qualify to invoke this option regarding termination ....

This type of language and drafting in the bill feels like a new uncertainty and should be avoided in this and other sections of the draft bill."

55. For context, section 3(1)(c) provides that a commercial lease will end on its termination date if the tenant gives up possession of the subjects of the lease: (i) with the acquiescence of the landlord, and (ii) in circumstances which indicate that both parties intend the lease to end on that date. The Explanatory Notes to the Bill explain that:

"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."

56. The Law Society argues that it isn't clear whether section 4(4) is intended to provide that the new legislation on opting out will only apply to leases entered into after it comes into force, or something else.

57. Shepherd and Wedderburn make a similar point on section 4 and seem to suggest that the rules on opting out should apply to existing leases which include an agreement to contract out of tacit relocation.

58. Gillespie Macandrew have similar concerns as regards section 4(4) noting that:

"We are unclear as to the meaning and intended application of s.4(4) in particular the word 'purported'."

59. Pinsent Masons also argues, referring to section 4, that "clarity is also required as to how the parties may contract out of automatic continuation."

60. The Faculty argues that there is a lack of clarity in certain aspects of the drafting of section 5 of the Bill which deals with the continuation of leases where the tenant remains in possession and the landlord doesn't take steps to remove within a 'reasonable period'. It considers that the phrase "within a reasonable period" in section 5(1)(b)(i) is "loaded with ambiguity" and that the relationship between section 5(3) and the opt-out rules in section 4 is also unclear.

61. Gillespie Macandrew also argues that the phrase "within a reasonable period" in section 5(1)(b)(i) is unclear and adds:

"Further how would such a rule be applied to non-resident landlords who are unaware of the situation on the ground? How does one ascertain 'possession' of let subjects which are not a shop or a building, for example a forest?"

62. The Law Society shares this view in relation to section 5 noting that:

"This section simply seems to restate many of the unresolved/unclear issues which exist under the current law, which makes practical application difficult."

63. Pinsent Masons also has concerns about section 5 noting that it isn't clear what "reasonable period" or "acts inconsistently with the lease having ended" mean. It states that:

"Section 5 provides a means by which unscrupulous tenants might stay in occupation against the wishes of the landlord, arguing that the landlord did not take steps to remove them within a 'reasonable period'. This introduces uncertainty rather than clarity to the termination of leases in Scotland."

64. Craig Connal KC shares the concerns in relation to section 5 noting that the provisions "have been drafted to create lots of litigation."

65. The Scottish Grocer's Federation also shares these concerns noting at the end of its response that:

"While the explanatory notes suggest this is an attempt to codify an aspect of common law, greater clarity is needed in the statute on what constitutes 'reasonable steps' by the landlord. Specifically, it would be helpful to confirm whether the landlord must initiate court proceedings within this period or whether issuing formal letters to the tenant would suffice (with court action only becoming necessary if the tenant refuses to vacate). The same issue also arises in section 20.

We believe the Bill should provide clearer guidance to avoid uncertainty and potential disputes over lease termination procedures."

66. The Scottish Property Federation makes the same argument as the Scottish Grocer's Federation (the wording of the two responses appears to be identical).

67. Stephen Webster from the law firm Urquharts makes a specific point on how section 5 might work in relation to multiple landlords or tenants. He notes:

"In relation to section 5(b)(i)[4] I am not sure whether it is competent for a pro indiviso owner/landlord to raise an action of removal on their own. In relation to section 6(2)(b) it appears that, in practice, it may be difficult for the landlord (and other parties) to know who is the legal tenant under a continued lease (and therefore the persons who must be given notice to quit or who must give notice of intention to quit) where there were multiple tenants before the termination date, because of the nature of possession and the potential difficulties in evidencing it."

68. The Faculty argue that parties should be allowed to agree any continuation period they wish in contrast to the minimum 28 days laid down in section 7(2)(ii).

69. Gillespie Macandrew appears to argue in contrast that it is not clear that section 7 as drafted does set a minimum period of continuation of a lease. They note:

"Section 7 contains provision on default periods and provides that these may be shortened by the lease, subject to minimum terms … however if such periods are provided for in the lease then they are contractual, not within the remit of tacit relocation/automatic continuation. If the intention is to limit the minimum period of continuation within a lease (which is what the SLC Report appears to suggest) then these provisions do not appear to do that."

Q5 - Tacit relocation – notices to quit and notices of intention to quit

70. The call for views asked for views on the sections of the Bill which deal with notices to quit and notices of intention to quit and the approach taken to giving notice (sections 8-18 of the Bill).

71. Note that, in line with the SLC's recommendations, notice given by a landlord to a tenant is referred to in the Bill as "notice to quit" whereas notice given by a tenant to a landlord is referred to as "notice of intention to quit". The requirements for giving notice for tenants are less demanding than for landlords. For example, tenants can give notice orally for leases with a duration of one year or less (section 10(1)(b)). In contrast, landlords' notice must be in writing (section 8(1))

72. The responses to this question in the call for views can be grouped into a number of general themes

73. For example, a number of respondents make the general point that the sections of the Bill on notice are too complex.

74. As an example, Burness Paull state:

"These provisions do seem very complex which might go against the spirit of the reform and could be reconsidered to ensure that they are simpler and do not create a situation that prejudices either party. There should be consistency between the requirements of either party to a lease eg. Notices to in writing, what the notice includes and indeed is it necessary to include two names for those notices served by

[4] This seems to be a typo and may refer to section 5(1)(b)(i)

landlords or tenants. That seems unnecessary. Any inconsistencies could lead to confusion not certainty."

75. The Faculty makes a similar point, albeit in stronger terms. It notes:

"In our view, the Bill does not provide a statutory framework for service of valid notices that can readily be understood and applied by parties to commercial leases. There is a significant risk that service of notices, as prescribed by the Bill, will lead to more disputes and litigation than at present under the common law."

76. The Faculty also argue that it does not make sense to have a statutory code for one type of lease given that there are rules in case law which apply to various areas of the law, not just commercial leases. It states:

"By way of general comment, we consider the notice provisions contained within the Bill to be somewhat cumbersome, and potentially problematic. There is well-developed and authoritative case law concerning the validity of written notices which applies to all commercial contracts, including leases. We do not fully understand why it is considered desirable to either codify or depart from that, in statute, for only one category of commercial contract."

77. The Faculty conclude that:

"We do not consider there to be a requirement for, or any benefit in imposing, a statutory code which applies only to Notices to Quit and Notices of Intention to Quit."

78. Pinsent Masons also makes similar points noting that:

"There are many notices which may need to be served under a lease and ideally, we would like to see the SLC address the law of notices in Scotland in one go rather than adopting a piecemeal approach by type of notice.

For example under the Bill notice of intention to quit or notice to quit sent by fax will be treated as service of notice by electronic means requiring consent under section 11 whereas for any other notice under Scots law service by fax is treated as service of notice in writing …"

79. Pinsent Masons also argues that it would be better if the Bill would have included statutory styles for notice stating that:

"We note that the decision was made not to prescribe statutory styles for the notice to quit and the notice of intention to quit but it would simplify the Bill considerably to have a style as it would reduce the need for most of sections 8, 10 and 12."

80. In contrast. Stephen Webster of Urquharts notes that

"These sections are relatively lengthy and complex but, on more detailed reading, probably necessarily so.

I have some concerns that the notice provisions might be overly rigid in practice, but note that the provisions of section 23 provide some scope for variation of these provisions within the lease."

81. A number of concerns are also expressed about the Bill allowing tenants to give notice orally where a lease has a term of less than one year. For example, Fife Council states:

"We would have concerns about notice being given orally in terms of s 10(1)(b). A local authority is a large organisation with many employees and offices. We currently have well understood processes to ensure any notices served at an office are passed quickly to the correct departments. It will be difficult for example for Reception staff to accurately record any oral notice given to them. This introduces scope for uncertainty about the content of oral notices, or the status of statements made by parties who are not legally qualified. This seems a step back as regards clarity and certainty."

82. Similar criticism of the proposals in relation to giving oral notice is included in the responses of: Gillespie Macandrew, Gillian Clark, the Faculty, the Law Society, the Scottish Property Federation, the City of Edinburgh Council and Turcan Connell. In particular, the Law Society states, "the evidential issues surrounding oral evidence are obvious and do create difficulties under the common law at present."

83. More generally, a number of respondents make the argument that the rules on giving notice should be the same for both tenants and landlords. For example, Gillespie Macandrew argue that:

"Notice to quit by the landlord must specify the termination date (s.8(2)(b)) but notice of intention to quit by the tenant 'need not specify when the period of the lease will end' (s.10(6)). Notice provided by either party should specify the termination date. Consideration should be given to a single set of rules on notices applicable to either party."

84. Similarly, the Faculty argues that:

"If there is to be a statutory code, we do not see why there should be different sets of rules for Notices to Quit (section 8) and Notices of Intention to Quit being given by the tenant. We assume a different approach has been taken to the types of notice because of a perception the tenant will usually be in a weaker bargaining position. Whilst that perception will usually be accurate when dealing with residential tenancies, it will often be inaccurate when dealing with commercial leases ...

Apart from the fact we fail to see the justification for different regimes, having one set of rules for landlords and another set for tenants is likely to lead to confusion. If there are to be rules on the form and content of notices, it would be better to have one set which apply in both instances."

85. The Law Society makes a similar argument, noting that:

"We note that a notice of intention to quit has different requirements from a notice to quit, in particular, that the tenant's notice of intention to quit may be given orally in some circumstances (section 10(1)(b)) and does not require to state when "the period of the lease will end" (section 10(6)). In our previous responses to the Scottish Law Commission, we favoured the same content of notice in order to avoid confusion."

86. The tenants' representatives (Federation of Small Businesses and Scottish Grocers' Federation) do not directly deal with this question in their responses. However, the Federation of Small Businesses does note more generally that:

"We welcome the measures contained in the Bill which seek to address some of the power imbalances between small tenants and large landlords."

87. In addition to the above general themes, the responses also include a number of comments focussed on individual sections in the Bill as well as the drafting of these sections.

88. The comments on specific sections of the Bill are often very detailed and it is not the aim of this document summarise them exhaustively. However, some of the key comments on sections 8-18 include the following.

89. Burgess Salmon include detailed drafting comments on sections 10(6), 11(3)(a), 12(2). 12(3)(a) and 24(4).

90. In addition, Burges Salmon also make detailed comments about the transitional provisions in Part 2 of Schedule 2 of the Bill.

91. The focus of Burges Salmon's comments is on paragraph 8 of Part 2 of Schedule 2 of the Bill which, in effect, disapplies the new rules on automatic continuation in Part 2 of the Bill for commercial leases which were entered into before the commencement date and which are still subsisting. Burges Salmon suggest various changes to the drafting of paragraph 8 of Part 2 of Schedule 2 of the Bill.

92. The Faculty argues that section 11(3), which deals with implied consent being given and withdrawn in respect of the serving of notice by electronic means, is "fraught with potential for argument" and that "it would be better if consent could be given or withdrawn expressly."

93. Under section 8(5) an error in the termination date will not invalidate the notice if the date specified falls within a seven-day period starting the day after the actual termination date. The Faculty argue that, if there is to be a statutory code, section 8(5) is a "backward step" on the basis that it would have the effect of reversing "a long-standing and consistently followed decision of the House of Lords". This refers to the so-called "Mannai Principle" in the case of Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd which confirmed that minor errors in contractual notices will not necessarily mean that such notices have no effect (for a discussion of the case see this legal blog).

94. Gillespie Macandrew makes a specific argument in relation to sections 8(7) and 10(8) of the Bill which excludes the possibility of rectification of an error in a notice under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 or by a court order where an error is not otherwise excused by the provisions of the Bill. Gillespie Macandrew argue that this is not necessary stating that:

"We do not consider the Bill need go so far as to exclude the 1985 Act; this only definitively takes away a remedy which might, albeit likely in novel or unusual circumstances, be suitable. While the Bill may address common errors it is not inconceivable that a party may otherwise require relief by a court and as such we query the rationale for exclusion."

95. Glasgow City Council makes specific comments on section 9 of the Bill which provides rules protecting the position of the tenant during the seven day "post termination period" under section 8(5) (this includes allowing the tenant, in certain

circumstances, to remain in possession of the property during this period post-termination period.) Glasgow City Council's argument is as follows:

"s.9 - Agreed that the tenant should not be liable to the landlord for violent profits etc as set out in s. 9(3). However, in relation to s.9 (4) (b) - If the tenant remains in occupation during this post termination period, then the tenant, rather than the landlord, should be responsible for the costs of the occupation, eg non domestic rates, utilities etc. Also, the tenant should have to continue to comply with the tenant's obligations under the lease with the exception of the obligation to pay rent, service charge and to reimburse the landlord for insurance premiums."

96. Shepherd and Wedderburn share similar concerns to Glasgow City Council on section 9 also arguing that the tenant should be subject to the majority of obligations if they remain in occupation of the property as a result of section 8(5). More generally they state:

"We support the simplification and clarification that reform could bring to this area. However, we consider that the provisions of sections 8(5) and 9 of the Bill (Effect of error in termination date in notice to quit) may give rise to unnecessary complexity which goes against this aim."

97. The Law Society has various comments on sections 8-18 of the Bill.

- It argues that "the scope of section 8(7) is very broad and may have the unintended consequence of excluding court remedies where these are in fact the most appropriate remedies in the particular circumstances." This appears to be the same argument as made by Gillespie Macandrew.

- It argues that the seven-day grace period in section 9 is helpful but that, "the mechanism appears to be convoluted, and we would suggest that the drafting of this section could be clearer."

- It argues that notices of intention to quit should also be required to include a termination date under section 10 noting that "Inclusion of the termination date would likely avoid confusion or indeed highlight any dispute between the parties."

- It argues that the rules on giving notice electronically in section 11 are "a significant change in approach" to the current rules and that, "consideration need to be given to the practicalities of electronic service".

- It argues that the default rules in section 13 which govern the day by which notice given under section 3(1) must be received are:

"confusing and unusually prescriptive, and that it will be necessary for the Scottish Government to provide guidance, with illustrative examples, to assist parties in applying these provisions."

- It makes the general comment on section 17, which includes provisions on the giving and withdrawal of notice where there is more than one landlord or tenant under a lease, that, "there will remain circumstances under the Bill where the tenant or landlord will require to service notice on each landlord or tenant (sections 17(1)(b)) and 17(2)(b))".

- It makes the following points on section 18 which clarifies that, if there is a change in the identity of either party after notice is given, the validity of the notice is not affected by that change.

"We consider that such provisions will be particularly of use where parties are not instructing agents. We recognise that this provides a safeguard, particularly for a tenant where they have not been notified of a change in the identity of the landlord. We also recognise that there are certain risks involved for an incoming party who may not be made aware of a termination notice which has been served on a former party."

98. Pinsent Masons also makes a number of specific comments:

- It argues that, as a result of the provisions of section 12 that notices do not need to include the name of or be addressed by name to the tenant, "there is a danger that the notice will be ignored as being junk mail".

- It suggests drafting amendments to section 14(3)(a)(ii) of the Bill on the address of a body corporate or other legal person with a registered office. According to it these are aimed at dealing with "the risk of the registered office of the body corporate or other legal person changing after the notice has been sent (which we have experienced in practice)"

- It argues that, "to be consistent with the other provisions in the Bill, Section 16 (on withdrawal of notice) should state when withdrawal takes effect."

- It argues, in relation to a landlord's notice to quit, that the Bill should include a "grace period for an error in the end date specified in the notice which is before the contractual termination date." It states, "it seems to us harsh that if the landlord has made an administrative error (whether a typographical error or a miscalculation of the contractual end date) of just one day too early the notice will be invalid."

- In relation to service of notice by sheriff officers it states that this "is permitted but will only be possible if the address for service is in Scotland. Would it be possible to include service of notice by process servers where the recipient is based in England & Wales or the equivalent if the recipient is in Northern Ireland?.

99. The Scottish Property Federation make a number of points

- It agrees that the "approach to the content in the notices should differ depending on whether it is the landlord or tenant that gives it" but argue that more flexibility should be allowed in relation to "parties who both may want to mutually agree to make reasonable changes to the notice period" (i.e. under section 23) noting that:

"this is likely to apply to more specialised tenants such as pharmacies (and who are likely to benefit from professional advice) who would benefit from knowing the landlords' intentions earlier than 3 months".

It therefore makes a suggestion to amend section 23(2)(b) which currently only allows the last day for giving notice to be varied if the same day must apply for both landlords' and tenants so that, "the deadline for service of a landlord's NTQ is never later than the deadline for service of a Tenant's NITQ"

- It argues for the need for clarification in section 17 on whether "sending notice to quit via post to a lead landlord or tenant is sufficient, or if the notice must be sent to all parties individually to their respective postal addresses."

- It makes the same argument as Pinsent Masons that there should be a provision allowing for service in the rest of the UK by process server.

- It states that "additionally, we do not agree that delivery by hand should be restricted to individuals under s.13(2)(c).[5]We would also welcome confirmation that delivery by hand includes delivery by courier."

100. The City of Edinburgh Council argues that the 3 month notice period for notices to quit for leases longer than 6 months (section 13) is too long and suggests, as an alternative, 40 days (or if that is not accepted a compromise period of 60 days). It also states that:

"It is useful to have the option to withdraw a Notice to Quit (with the agreement of both parties). At present, where parties change their minds, a new lease requires to be entered into involving additional time and expense."

101. West Lothian Council shares this view stating:

"The rationale behind moving from 40 day notice periods to 3 month notice periods for leases in excess of 6 months is understood, however in practical terms this would result in an increased onus and resource burden on those areas 2 within the public sector who manager property interests. Similarly, the extended notice period could prove detrimental to unwitting tenants who might miss the 3 month notice period deadline."

102. Stephen Webster of Urquharts expresses some concerns regarding the practical operation of the provisions relation to multiple landlords or tenants stating that:

" … in relation to section 6(2)(b) it appears that, in practice, it may be difficult for the landlord (and other parties) to know who is the legal tenant under a continued lease (and therefore the persons who must be given notice to quit and who must give notice of intention to quit). Section 17(2)(b) provides that, where there are multiple tenants, the landlord must give notice to quit to each tenant. It appears also that any difficulty in identifying who is the legal tenant/occupier might also create complications in relation to liability for business rates and LBTT."

103. Stephen Webster of Urquharts also makes similar arguments in relation to section 9 as the ones noted above – i.e. that there needs to be more regulation of the tenant's activities during the period they remain in occupation if section 9 applies.

Q6 - Tacit relocation – Leases excluded from the rules in schedule 1

104. The call for views asked for views on schedule 1 of the Bill which excludes certain leases from the new rules on automatic continuation. i.e. a lease granted for the lifetime of the tenant; a student let; a holiday let; a lease granted with the authority of the court, the Accountant of Court, or the Accountant in Bankruptcy; a short-term

[5] Note that this appears to be a typo in their response and should refer to section 15(2)(c)

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.

105. Most of the responses either agree with the approach taken or make no comment.

106. The Faculty also agrees with the approach in principle stating that:

> "Inasmuch as schedule 1 reflects the common law, we have no comment to make. Leases which are not currently subject to tacit relocation should not become subject to automatic continuation — the exclusion of tacit relocation in each case is long-standing, and justified on principle."

107. However, it notes than one downside of listing leases which are excluded rather than basing the rules on the presumed intention of the parties, as is the case in the current law, is that the law will become less flexible. The Faculty notes in this regard that:

> "At least in principle, there is space within the common law for the list of leases excluded from tacit relocation to expand or contract. In replacing the principle of presumed consent with a fixed list, some of the flexibility of the current approach is lost — albeit for the benefit of making the law slightly more certain"

108. Gillespie Macandrew refer to the issue also raised in relation to section 1 of the Bill that the rules on grazing or mowing leases need clarification.

109. In addition, Gillespie Macandrew argue that defining "close seasons" for hunting/fishing by reference to whether hunting/fishing is an offence at the time in question is overcomplicated. It argues that "it would be simpler for any lease of less than a year to fish or hunt to terminate at its termination date."

110. The Law Society also refers to its comments on section 1 of the Bill on grazing leases.

111. The City of Edinburgh Council make a similar point noting that:

> "It would be useful if legislation provided that short term grazing lets terminate on the expiry date (without the requirement for notice)."

112. In relation to grazing and mowing leases Turcan Connell also notes that it is unclear:

> "why grazing and mowing leases for one year or less have been excluded from the automatic continuation provisions in terms of s2(b) and paragraph 1(d) of schedule 1, as they already fall outwith scope of the Bill. This is confusing and we think that it needs to be reviewed and amended as appropriate."

113. Shepherd and Wedderburn agree that student leases should be excluded from the new rules on automatic continuation, but make the following additional points:

> "However, we think it would be useful to clarify that Section 112 of the Rent (Scotland) Act 1984 (which requires that a notice to quit gives at least 4 weeks' notice to a residential tenant of the requirement to remove) does not also operate in respect of such student leases.
>
> We are aware of some ambiguity relating to the circumstances in which Section 112 may be engaged, and whether, at common law, there is always a requirement to give

a residential tenant some form of “notice to quit” (compliant with the terms of Section 112) before raising any type of action for removing (such that Section 112 is always engaged whenever there is a requirement to remove a residential tenant).

We therefore suggest that this point is put beyond any doubt by the Bill providing that where a lease terminates under the Bill, then there is no separate requirement to issue a notice to quit under Section 112 (such that Section 112 is not also engaged).”

114. In his response to this question, David Campbell argues in relation to section 24(4) that:

“The reference to service on one trustee of a trust being sufficient should be stated explicitly as including service in respect of one office bearer of an unincorporated association.”

115. Note that section 24(4) is in the interpretation section of Part 2 and deals with interests in leases held jointly by two or more trustees of a trust.

Q7 - Miscellaneous provisions relating to start, end or length of lease in Part 3

116. The call for views asked for views on the miscellaneous provisions relating to start, end or length of lease in Part 3 of the Bill.

117. A number of responses simply state that they have no comment or that they support the proposal in the Bill

118. There are, however, also a number of critical views and comments.

119. For example, the Faculty simply states that it believes “these provisions are unnecessary”

120. Others provide more detailed comments on Part 3 of the Bill.

121. The Law Society notes that it supports the approach in section 26(2) whereby there is a statutory presumption that a lease is implied to be for one year in the absence of an express provision in the lease. However it adds that:

“We are unclear as to how the date of entry would be unknown to parties, particularly given the interaction with other regimes including business rates. We believe this would merit further consideration in relation to unintended effects – would this, for example, apply if the parties were simply not in agreement as to the date of entry?”

122. Section 28 lays down what the remedies are if a party to a lease fails to notify the other party what its United Kingdom address is as required under section 27(1) of the Bill. One of the remedies is that tenants can withhold payment of sums due during the period of non-compliance (section 28(3)). Pinsent Masons does not agree with this section arguing that:

“It is disproportionate for the tenant to be able to withhold payment of the whole or part of any sum due to be paid if the landlord does not provide a postal address in the UK to which any termination document in relation to the lease may be sent, particularly if the Bill has retrospective effect. Instead, the Bill might provide that if the landlord fails to provide a postal address for service the tenant may serve notice in a publication such as the Edinburgh Gazette.”

123. Stephen Webster of Urquharts makes a similar point on sections 27 and 28 noting:

> "I have some concerns in relation to the practical operation of sections 27 and 28. In particular I am not convinced that it is necessary for landlords to be subject to the penalty of their tenant withholding rent and other payments on account of what seems likely to be in practice a fairly common administrative oversight. The consequences for the landlord of not receiving rent when due are potentially very serious and may include including missing payments and therefore defaulting under loan agreements to secured lenders."

124. He also makes the additional point that

> "In practice it may be months or even years before registration of a landlord's title is completed in the Land Register and the landlord is excused compliance with section 27(1)(a) under section 27(3)(b). It seems likely that non-compliance with section 27(1)(a) by tenants will be widespread. The deemed receipt provisions in section 14 do not apply to notifications of postal address under section 27."

125. The Scottish Property Federation indicates that it agrees generally with the provisions in sections 26. 27 and 29 of the Bill. However, it states that "we do not think it is a proportionate penalty for the landlord to be unable to collect rent for failing to provide a UK address." (section 28(3) of the Bill)

126. Burgess Salmon makes a general point that the overall scheme behind sections 27 and 28 is not clear enough noting that "it seems to leave undesirable gaps between what would be contractual schemes (e.g. break notices) and the statutory scheme." Its response includes a number of examples which it argues back up this view (note that is refers to the various sections as "clauses" in line with UK Bill terminology).

127. Burgess Salmon also argues that it is doubtful that section 27(4)(c) is "consistent with the policy objectives to make service of notices simpler." For context section 27(4)(c) provides, in relation to the obligation to provide a UK postal address, that different addresses can be notified for different types of document, and the notification may be given in more than one document.

128. Burgess Salmon argues in this respect that:

> "In our experience, a party will want any type of termination notice for the same lease to be dealt with by the same person or team at the same address. As such, it seems to us that Clause 27(4)(c) would have limited benefit and potentially negative impact."

129. Burgess Salmon also argues that section 27 should have an equivalent provision to section 14 of the Bill which outlines when notification is deemed to have been given. It states, referring to "diligence" (i.e. the legal steps a creditor can take to recover a debt), that:

> "This is important because one of the potential remedies for non-compliance with Clause 27 is withholding of rent under the lease. As such, understanding how and when notification can be given or is deemed to be given by the landlord to the tenant could be the difference between a landlord carrying out wrongful diligence or lawful diligence against a tenant."

130. Burgess Salmon's response also includes detailed drafting suggestions on section 30(2) of the Bill. For context, section 30(2) expands the manner in which a pre-

irritancy warning notice may be given. This includes the introduction of a new section 4(4A) to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (the "1985 Act") which 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;
- 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.

131. In this respect Burgess Salmon argues that the current drafting of section 30(2) seems to require "actual delivery, in circumstances where such a notice might be undelivered by Royal Mail" and that the result might be "sheriff officers being instructed to serve pre-irritancy notices and irritancy notices in all cases where that is possible."

132. In relation to section 30(3) which requires landlord to serve irritancy notices to a tenant's creditor, Burness Paull states:

"We do not support the requirement to serve an irritancy notice on a heritable creditor given that a landlord might not know of their existence without carrying out a search. This could only be workable to the extent any creditor was notified to the landlord."

133. Gillespie Macandrew shares this view stating that:

" … The purpose of an irritancy clause is to protect the landlord who has no direct relationship with the creditor. This obligation therefore imposes an undue burden on the landlord in securing that protection, and it should properly fall on the tenant to inform their own creditor of the position.

The landlord may also be unaware of the creditor and there is no requirement on the tenant to intimate this to the landlord. If the obligation should be imposed on the landlord at all, then it should only be in respect of creditors who have been notified to them. The effect of (2)(b)(i) is unclear: if the landlord simply does not know the creditor's postal address then are they relieved from this duty? The consequences of non-compliance may be severe as they may enable a creditor of whom the landlord was unaware to challenge the validity of the irritancy notice."

134. Pinsent Masons also shares this position stating that:

"We consider that it is for the parties to amend the lease to provide for service of notice on any heritable creditors rather than for the law to be changed. This provides legislative protection for a third party who is not a party to the lease and this is not appropriate."

135. The City of Edinburgh Council also shares this view stating that, "the requirement to serve an irritancy notice on a heritable creditor will place an additional burden on landlords."

136. The Law Society notes that it broadly welcomes section 30 of the Bill, but that:

> " … there may be additional cost associated with this where a heritable creditor has not been notified to the landlord or required to have their consent sought in terms of the lease. This would require investigations to be undertaken by a landlord, most likely with Registers of Scotland, which are likely to involve some cost. We note that there is no obligation for the tenant to notify the landlord of the existence of a heritable creditor, with the consequence being that landlords will require to undertake their own investigation to fulfil their obligation under this section and mitigate risk."

137. The Law Society therefore conclude, in line with Gillespie Macandrew, that "it may be helpful to include an obligation for the tenant to provide information regarding heritable creditors to the landlord."

138. Section 31 provides a default term for commercial leases which would require the landlord to repay rent or any other advance payment made by the tenant in relation to a period falling after the termination of the lease. Section 31(3) requires the landlord to repay the tenant no later than 10 working days after the lease ends. The City of Edinburgh Council queries whether this 10 working day period is sufficient stating:

> "The period of 10 working days set out in Section 31 may not be realistic for local authority landlords and other landlords with corporate processes in place for payment which may take longer than 10 working days. In order to disapply this, landlords would specifically require to provide for this in the lease which will add to the number of lease terms."

139. Burgess Salmon makes the following drafting suggestion on section 31:

> " … it should be made clear in the body of Clause 31 as to the caveat of which leases it applies to. As such, we would suggest that Clause 31(1) has the following words added at the start: "Subject to Schedule 2, paragraph 10(1)…""

Q8 - Terminology in the Bill

140. The call for views asked for views on the new terminology in the Bill and whether there any other areas in the Bill where the terminology could be improved or changed.

141. A number of responses were positive about the new terminology. This includes: Dumfries and Galloway Council, Glasgow City Council, Pinsent Masons, Craig Connal KC, the Scottish Grocers' Federation, the Scottish Property Federation, the City of Edinburgh Council, and Urquharts.

142. However, there are also some critical comments.

143. For example, although the Faculty agrees with the new terminology of "automatic continuation" and "termination date" instead of "tacit relocation" and "ish", its response also states:

> "We do, however, question the need for replacement of the existing terminology, particularly where pre-existing case law (which will, of course, refer to tacit relocation) will continue to be applicable to leases subject to the new statutory regime. Playing devil's advocate, we would observe that a change in terminology would obscure the connections between the old and new regimes, and make the law harder for non-

lawyers (and student lawyers) to understand and apply correctly. Given the increasing presence of party litigants in the Scottish courts, the replacement of established terms of art should be approached with a considerable degree of care."

144. Similarly the Law Society state:

"Whilst we recognise that the terms 'tacit relocation' and 'ish' may not be widely understood, we do note that 'ish' is a Scots word and that use of such Scottish legal terms contributes to the distinctive nature of the Scottish legal system and its history."

145. Malcolm Combe and Jonathan Brown of Strathclyde Law School argue more strongly in favour of sticking to the existing terminology stating that:

"We are opposed to the introduction of new terminology into what is already a complex area of law. The terminology of 'tacit relocation' – though obviously disliked by those who wish to see legal language 'modernised' – has formed part of the law of Scotland for centuries now and, crucially, will continue to be relevant to other kinds of leases. Introducing novel terminology to denote an already existent concept will introduce redundancy and additional complexity to the law."

Q9 - Tenancy of Shops (Scotland) Act 1949

146. The call for views asks for views on the fact that the Bill does not include reforms to the Tenancy of Shops (Scotland) Act 1949 and whether this should be added to the Bill.

147. Certain responses simply indicate that it would be preferable for the Bill to deal with this issue, particularly given that the SLC has now reported on the 1949 Act, e.g. Burges Salmon and Burness Paull.

148. The Faculty argue for repeal of the 1949 Act noting:

"In our view, the Tenancy of Shops (Scotland) Act 1949 ought to be repealed outright. We note that the Law Commission published its report on 18 February 2025, and has recommended repeal of the Act. It may be that this will be added as an amendment to the current Bill, an initiative we would support."

149. Gillespie Macandrew share this view noting:

"Given the recent recommendations by the SLC to repeal the entire 1949 Act, it would be timely and appropriate to include this in the Bill."

150. Pinsent Masons also argue that the Bill should repeal the 1949 Act as does Shepherd and Wedderburn.

151. The City of Edinburgh Council states that "it would be preferable to have clear consolidated legislation which covers all retail premises."

152. Glasgow City Council argue that the Bill should legislate on this issue stating:

"It would make sense to use the opportunity provided by the Bill to legislate on the Tenancy of Shops (S) Act. It is rarely used - we have seen only one example of its use in approximately 20 years, and that was use by a national company with multiple premises. There is no obvious policy or other reason why shops should have

additional protections which are not granted to other tenants under commercial leases."

153. Urquharts state that "as the Scottish Law Commission has now published its report and recommended repeal of the 1949 Act, it may be convenient to include provision for this repeal in the Bill."

154. The Law Society argue that it would be practical to give effects to the SLC's recommendations on the 1949 Act in the Bill.

155. The Scottish Property Federation also support repeal as recommended by the SLC, but also state that if the Act remains in place and is only amended it should be streamlined in to the current Bill to maintain simplicity.

156. Professor Brymer takes a slightly different stance on the use of the Bill to deal with the 1949 Act noting that:

"It should not in my opinion. During my time in commercial practice and specialising in commercial property matters, I have never, at any time, had a problem in interpreting and dealing with the 1949 Act as re-enacted in 1964.

If, however, the direction of travel is that we, in Scotland, now need our law to be written down for us in statutory provisions then why not either have a separate [B]ill or a consolidating Bill on both matters. My instinct is that it should be separate."

157. Craig Connal KC states:

"Should be a separate issue perhaps but I have no info in whether it is still in practical use or has fallen into disuse (in which case abolish it)"

158. The Scottish Grocers' Federation is in favour of separate reform stating that:

"On balance, it is SGF's preference that the Tenancy of Shops (Scotland) Act 1949 be discussed and reformed separately. In order to allow for specific engagement with businesses and retailers on the different reforms being proposed."

159. West Lothian Council also argues that "it is sensible not to include reforms to the Tenancy of Shops (Scotland) Act 1949 in this Bill and that it would be preferable to address it as a separate exercise."

160. Malcolm Combe and Jonathan Brown of Strathclyde Law School are also of the view that dealing with the 1949 Act in this Bill would not make sense. They argue that, while it might be attractice to "shoehorn" the reform into this Bill given that "suitable legislative vehicles do not come around with great regularity":

" … on balance this logistical advantage is (in our view) countered by the need to have a suitable lawmaking process for tenancies of shops that ultimately produces an output in a suitably named and accessible statute.

Further, with this Bill being about clarifying the law, introducing this complication strikes us as wrongheaded."

Q10 - Is there anything else you think should or should not have been included in the Bill?

161. The call for views asked whether anything else should or should not have been included in the Bill

162. Gillespie Macandrew argues that, instead of just excluding the operation of provisions in the Sheriff Courts (Scotland) Act 1907 from leases covered by the Bill (para. 2, part 1 of Schedule 2), consideration should be given to their repeal generally. The argument made is as follows:

"These provisions prescribe different notice periods for different types of lease with different remedies. They have been a source of litigation and have been widely criticised across the profession for introducing uncertainty and complexity in relation to termination of leases. Rather than simply limit the application of the provisions, consideration should be given to their repeal."

163. The Law Society makes three additional comments:

- Further work should be carried out in relation to the legal doctrine of "confusio" "with a view to resolving the enduring uncertainty".
- It would be beneficial to clarify the position around valid service on particular types of parties - unincorporated associations and trusts.
- The rules in the Sheriff Courts (Scotland) Act 1907 could benefit from a wider review and being updated as they generate significant litigation at present (this is broadly the position of Gillespie Macandrew but suggesting review rather than repeal).

164. Pinsent Masons makes the following general comment:

"Whilst as we commented above, we think the law of tacit relocation needs reform we are concerned that the proposed Bill goes beyond what is required and rather than providing clarity and certainty introduces new potential pitfalls for parties to a lease."

165. Shoesmiths makes the following additional comment:

"One point which requires to be clarified in the legislation is what the automatic continuation period is in the following scenario:

A lease of say 10 years duration is coming to an end, with an appropriate notice to quit having been served. The parties then extend the lease, by way of a Minute of Variation and Extension for a further month. If no further notice is served, and the parties take no action to terminate the lease, is the lease continuing under tacit relocation (or automatic continuation) for a further month or a further year following expiry of the month's extension?"

Q11 - Any other comments on the Bill, or the approach taken by the Bill to reforming the law in this area

166. The call for views asks whether there are any other comments on the Bill or the approach taken by the Bill to reforming the law in this area.

167. In the conclusion to its response the Federation of Small Businesses argues that scrutiny of the Bill needs to include the needs of small businesses noting that:

"In conclusion, FSB supports the overall objectives of the Leases (Automatic Continuation etc.) (Scotland) Bill in modernising the law surrounding commercial leases, but we urge that the specific needs and challenges of small businesses be fully considered throughout the legislative process.

We welcome the measures contained in the Bill which seek to address some of the power imbalances between small tenants and large landlords, and the points we have raised in our response are intended to demonstrate where the legislation could go even further in that regard."

168. Gillespie Macandrew refers to its response to question 2 of the call for views. In that response it argues that the main source of uncertainty and dispute is the rules on notice periods and notice and that aspects of the drafting of the are "overly complicated and certain provisions could be expressed more clearly and succinctly". It also states that:

"The transitional provisions in particular are likely to be a source of considerable difficulty in interpretation and application."

169. Gillian Clark notes on section 24(4) that:

" … reference to service on one trustee should extend to service on office bearers of associations etc."

170. The Law Society provides specific comments on the sections of Part 2 of the Bill which it did not cover in its response to question 5 of the call for views. It argues that:

- Section 19 on the termination of sub-leases could be more clearly drafted. The Law Society states:

  "We note that there can be practical difficulties in respect of service of notice on sub-tenants. If a notice to quit is given under the head-lease but not mirrored on the sub-lease, the sub-lease will fall as a result of the head-lease falling. We consider that there is little that can be done in the circumstances however, given that a landlord may not have knowledge of the identity of a sub-tenant. … Rather than referring to section 9, this section could simply state that nothing allows a sub-tenant to remain in possession of the subjects of a sub-lease after the head lease comes to an end."

- Section 20 on the automatic continuation of head leases and sub-leases needs various elements of clarification. The Law Society states:

  "If a tenant under a head lease has served notice to terminate on both the head landlord under the head lease and its sub-tenant under a sub-lease, but the sub-tenant has remained in possession post-termination date, the tenant could not both (1) take the position that the head lease has terminated (so it is no longer the tenant), and (2) take steps to remove the sub-tenant within a reasonable period following the termination date in terms of section 20(4)(b)(i) (as it would need to remain as the tenant under the head lease to have title to do so). The head landlord would be the one who would have to take steps to remove the sub-tenant (as an illegal occupier). We would suggest that section 20(3)(b)(i) should also refer to "steps to remove the tenant and/or the sub-tenant from those subjects..."

- Section 21 on the information to be given by a tenant to a sub-tenant needs clarification. The Law Society states:

  "It is unclear why a tenant has to inform its sub-tenant if it agrees a new head lease of the sub-let premises which would take effect after expiry of the sub-lease.

  In the case of the duty to service notice on sub-tenants, exclusion of interposed leases (section 19(8)(a)) could in more complicated structures including sub-undertenants result in some sub-tenants or sub-undertenants not receiving copies of notices to quit. Also, if there is a complicated structure involving tenants, sub-tenants and sub-undertenants, we do not consider that it is clear who is entitled to a copy of a notice."

- Section 22 on "cautionary obligations" needs redrafting. This is a Scots law term pronounced "cay-shunry" which refers to a third-party guarantee to perform an obligation owed by another person. The Law Society states:

  "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.

  We would suggest that section 22(1)(a) should also refer to a head or sub-lease continuing under the terms of section 20."

- Section 23 which provides rules on contracting out is necessary but potentially creates "additional layers of complexity and new areas on which parties will likely wish to seek professional advice" with the result that "awareness-raising and public education regarding the impact of the Bill will be important to avoid unintended consequences for parties". In addition the Law Society also states in relation to section 23(2) that:

  " … where a term of the lease varies the last day for giving notice, it must provide for the same day to apply to notice to quit and to notice of intention to quit. This is a departure from the position under the common law, where parties can agree any combination of notice period."

171. Pinsent Masons also argues that section 20 on the automatic continuation of head leases and sub-leases needs clarification in line with the arguments made by the Law Society above.

172. On section 23 Pinsents Masons states:

  "With regard to section 23 of the Bill we agree with the proposal that where the landlord and tenant agree to vary the last day for giving notice under the lease under s13(1) it must be the same day for a notice to quit and a notice of intention to quit.

  We think that the same notice period applying for both parties is a fairer position as both parties need certainty. It also reduces the chance of parties mis-reading the notice period as it applies to them reducing the risk of the lease continuing automatically when this was not what one party wanted"

173. Shepherd and Wedderburn makes a comment on the transitional provisions in Part 2 of Schedule 2 to the Bill, in particular sub-paragraph 9(2) which states "any question

as to whether the lease continues after its termination date is to be determined in accordance with the pre-commencement law". Shepherd & Wedderburn note:

"We recognise that such a lease (one which is continuing by tacit relocation on the day before the commencement date) will not be affected by the Bill and the current law will apply (e.g. 40 days notice to terminate). However, if such a lease does not come to an end on expiry of the current period for which it is continuing by tacit relocation and automatically continues for a further period, will it continue to do so by tacit relocation and not automatic continuation (such that the current law will continue to apply until the lease is eventually terminated)?"

174. The City of Edinburgh Council, in line with its views on the Tenancy of Shops Act, argues that, "having consolidated legislation in Plain English which also covers all retail premises would be useful."

Angus Evans
SPICe Research
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