OFFICIAL REPORT
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DRAFT

Delegated Powers and Law Reform Committee

Tuesday 29 April 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 29 April 2025

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DELEGATED POWERS AND LAW REFORM COMMITTEE

14th Meeting 2025, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Katy Clark (West Scotland) (Lab)
*Roz McCall (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

David Bartos (Scottish Law Commission)
Steven Blane (Pinsent Masons)
Kieran Buxton (Burges Salmon LLP)
Fergus Colquhoun (Faculty of Advocates)
Carolyne Hair (Law Society of Scotland)
Rona Mackay (Strathkelvin and Bearsden) (SNP) (Committee Substitute)
Rachel Rayner (Scottish Law Commission)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 29 April 2025

[The Convener opened the meeting at 09:32]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 14th meeting in 2025 of the Delegated Powers and Law Reform Committee. We have received apologies today from the deputy convener, Bill Kidd; in his place, I welcome Rona Mackay.

I remind everyone to switch off or put to silent mobile phones and electronic devices.

The first item of business is to decide whether to take items 5, 6, 7 and 8 in private. Is the committee content to take those items in private?

Members *indicated agreement.*

Instrument subject to Negative Procedure

09:33

The Convener: Under agenda item 2, we are considering one instrument, on which no points have been raised.

Disease Control (Miscellaneous Amendment) (Scotland) Order 2025 (SSI 2025/108)

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

09:33

The Convener: Under agenda item 3, we are considering one instrument, on which no points have been raised.

Bankruptcy and Diligence (Scotland) Act 2024 (Commencement No 2, Transitional and Saving Provisions) Regulations 2025 (SSI 2025/107 (C 11))

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Leases (Automatic Continuation etc) (Scotland) Bill

09:33

The Convener: Under agenda item 4, we are taking evidence on the Leases (Automatic Continuation etc) (Scotland) Bill. Before we begin, I put on the record that all members of this committee rent office premises, in our capacity as members of the Scottish Parliament. Although that does not represent a declarable interest in the bill, we want to put that fact on the record, given that the subject matter of the bill concerns commercial leases.

For our first panel today, I welcome David Bartos, former lead commissioner, and Rachel Rayner, chief executive, of the Scottish Law Commission. Before we begin, on behalf of the committee, I thank you, David, for your contributions as lead commissioner to the "Report on Aspects of Leases: Termination" during your five-year tenure at the Scottish Law Commission. You clearly enjoyed that piece of work, and given that we have the bill before us today, we thank you for that.

Before we start, I remind you not to worry about turning on the microphones during the session as they are controlled by broadcasting. If you would like to come in on a question, please raise your hand or indicate to the clerks. There is no need to answer every question; you can simply indicate that a question is not for you to respond to. However, please feel free to follow up in writing any question after the meeting, if you wish.

I now move to questions and I will open the questioning before handing over to colleagues.

First, can you summarise what the main problems are with the current law on commercial leases and how the bill seeks to address those problems?

David Bartos (Scottish Law Commission): Thank you, convener, for your kind words.

The area of commercial lease law that we are concerned with relates to the termination of commercial leases—what has to be done to bring them to an end. There are a number of difficulties with the current law.

First, the law is difficult to find. In order to find a definitive statement of the law, one has to go back partly into 17th or 18th century texts, perhaps modern texts, some statutes from the 19th and early 20th century, and a scattering of case law. It is not straightforward to obtain a statement of the law and the modern textbooks have found it difficult to do so.

Tied in with that is the second issue, which is uncertainty in the law. It is said that the law operates satisfactorily in practice, and it might be that practice operates reasonably satisfactorily, but the underlying law is vague. As an example, it is unclear whether parties can, in their lease, exclude tacit relocation—in other words, whether they can choose to have a lease end, for example, without a notice to quit—from applying. That is a very important thing, and the law is really quite unclear on that. The consequence is that, in practice, notices are always given, even though they might not be necessary.

Tied in with all that is the third difficulty, which is that the law is outdated. A couple of examples will suffice. One is the requirement that notices to quit be given no later than 40 clear days before the end of a lease. The purpose of a notice to quit is essentially to allow the tenant to relocate and find other premises, if necessary. The period of 40 days seems to come from the depths of the 16th century. Perhaps it was suitable then, but few would say that it gives sufficient time in this day and age. Another example is the requirement of the Sheriff Courts (Scotland) Act 1907 that notices be given by recorded delivery. Again, that might be followed in practice, but is unnecessary and outdated.

Those are examples of why, in this instance, reform of the law is necessary.

To give you some background, way back in about 2010, the commission was approached by practitioners and solicitors in the commercial leasing area who indicated that the law should be reformed as it was uncertain and was acting as a deterrent to commercial property investment. Essentially, the point was that the difficulty in explaining the law meant that it was not clear for commercial property investors whether they could obtain fresh tenants or obtain vacant possession for redevelopment and so on. That explains the difficulties in the current law.

The Convener: Can you explain why the decision was taken not to abolish tacit relocation as the default law for commercial leases?

David Bartos: The commission consulted on that matter, and some consultees expressed support for abolishing tacit relocation, in the sense of a notice to quit being required before a lease could come to an end. However, the majority view of the consultees was that tacit relocation for not giving notice should continue, on the basis that the giving of notice could act as a safety net by reminding a tenant that the lease is going to come to an end and that they need to do something about it. That view was probably bolstered by the fact that we have had the notice to quit requirement for hundreds of years. Overall, the view was taken that there was still sufficient merit in having tacit relocation for not giving notice to quit.

The Convener: In answering my initial question, you said that you were contacted about the issue in 2010. However, some of the evidence to the committee has the opposing view. Burges Salmon felt that the law on giving notice is clear due to the Rockford case. The Faculty of Advocates felt that a "thoroughgoing reform" of the law on tacit relocation is not needed. The faculty also thought that the new statutory code will be "broadly similar" to the existing practice. The Law Society of Scotland said that there is possibility for confusion, as the statutory code will operate alongside the common law during the transitional period that is set out in part 2 of schedule 2, which we will come on to. The Law Society also said that a statutory code will be less flexible than the common law.

David Bartos: I will take those points one by one. As far as the clarity of the law is concerned, there has been an interesting situation in which certain firms, or individuals within them, have expressed the view that the law is clear. However, our researchers at the Scottish Law Commission indicate that that is not fundamentally the case and that, if anything, what is perhaps clear is the practice rather than the underlying law. One option would be to keep the status quo and to keep an unsatisfactory law, on the basis that there is a practice that effectively disregards it, but that did not seem to us to be acceptable, and indeed it is not acceptable to many other stakeholders.

Different views have been expressed as to what the Rockford case actually entails. Some stakeholders have favoured the outcome of the Rockford case and others have opposed it, owing to the fact that it causes uncertainty in negotiations relating to whether, in that case, the tenant has given notice to end the lease that they are going to be leaving. There are divergent views on the Rockford case.

On the matter of the code, the commission could have simply left the various strands of the law as they are, coming as they do from 16th-century to 18th-century case law, and then tried to bolt on to that some changes. However, it seemed to the commission, and indeed to the stakeholders that it consulted on the code issue, that it was better to simply bring all the law into one place and create clarity in one place. That approach deals with the accessibility issue and the difficulty of actually finding the law in this area.

The code's importance is particularly relevant in the modern day. A lot of lawyers do their business online, but a lot of the old texts are not online, and finding the relevant passages in them—one has to refer to other textbooks—can be a difficult process. Putting it all in the code will make it

easier. Yes, the code will not be perfect, but no code ever is.

The Convener: That is true. Thank you very much.

09:45

Roz McCall (Mid Scotland and Fife) (Con): Good morning and welcome. Can you explain the rationale behind the bill's definition of the leases to which the legislation will apply?

David Bartos: The rationale is to deal with leases that can be described as commercial in the sense that they are not regulated. The commission's task was to reform the law for commercial leases, so it had two options before it: one was to create a new category of commercial leases with a new definition. It appeared that that route could, in fact, create greater complexity and confusion in the law, because it would create a new boundary between commercial leases and non-commercial leases, which does not exist at the moment. Instead, it seemed more straightforward to keep the existing boundaries between regulated leases, by which I mean private residential leases, which is a classic example, or the public residential leasing sector, agricultural sector and crofts—I think that there are some allotments as well. The decision was to exclude the reform from such areas and keep it to the unregulated leases, which are predominantly commercial.

One caveat to that is that the commission thought that some leases—typically residential ones that are currently not regulated—were not sufficiently commercial for it to be appropriate to apply the code to them without further consultation. As listed in section 1, they include asylum seekers leases and homelessness leases. Those will not be covered because they do not have a commercial element.

Roz McCall: Thank you. You mentioned agriculture, and we have certainly had a couple of submissions that touch on rural leases, especially those for mixed-use land, tree nurseries, forestry, grazing, mowing and such things. What is your response to submissions to the committee's call for views arguing in that definitions need to be tightened in relation to matters such as that, or that clarity is needed that the bill applies only to heritable property?

David Bartos: Speaking personally, I have no objection to clarifying that the bill applies only to land and buildings. That is a drafting matter.

As to the boundary between leases that are covered by the bill and those that are not, that boundary already exists between leases that are covered by the common law in the strands that I mentioned, and those covered by the separate regulatory regimes. At the moment, for example, when it comes to the mixed use of land for agricultural purposes—business and non-business—you apply the tests that are in the agricultural holdings acts, which already exist, to decide whether the acts apply or not. The tests and those acts will continue to apply. The tests will decide whether the acts apply, in which case the bill will not, or whether the acts do not apply, in which case the bill will. I hope that that explains it.

Roz McCall: That is very helpful. Thank you very much.

Jeremy Balfour (Lothian) (Con): Good morning, and thank you for coming along. I want to move on to sections 2 to 7 of the bill, on the statutory code. How will it work in practice, day to day?

David Bartos: In practice, the starting point is when a lease is entered into. If a lease is entered into, it could include a term that the lease ends on termination date, which excludes the need to give notice to quit altogether. It would be up to the parties to negotiate whether it should be there or not. That is the fundamental effect of section 4.

If such a term is not included, the lease can be brought to an end only if there is a prior notice to quit or notice of intention to quit. In those circumstances the code provides rules as to when a notice to quit, or a tenant's notice of intention to quit, has to be given, the form in which it has to be given and how it is to be given. That deals with automatic continuation without such a term being present.

Sections 5 and 6 deal with a situation that can exist in any event where the tenant remains after the end of the lease, the tenant typically pays rent, the landlord accepts rent and the parties behave as if the tenant is still in a lease. Those sections regularise the position of the tenant. In other words, the lease is automatically continued in those circumstances, which can happen whether a notice to quit is given or not given.

There are, in fact, strictly speaking, two different types of automatic continuation. There is the type that happens if notice to quit is required and is not given, and there is the type that happens irrespective of notice, where the tenant remains and the parties treat the tenant as remaining.

One other matter that I should mention, because it was raised by one of the firms replying to the committee's call for evidence, concerns termination where no notice has been given but where the tenant gives up possession of the subjects of the lease with the acquiescence of the landlord, and in circumstances that indicate that both parties intend the lease to end on that date. That provision reflects what is already currently

the common law. It is reflected in the Dundee City Council against Dundee valuation appeal committee case where, in effect, it was said that the lease could come to an end provided that the tenant left, handed over the keys and the keys were accepted. That is another example where the court currently allows the lease to come to an end and, in effect, the bill simply puts that into statutory form.

The criticism has been made that it is not clear what the circumstances are, but the reality is that that is the position at the moment. It cannot really be made more specific from a drafting point of view, so that is why the wording is as it is on that issue.

Jeremy Balfour: I will pick up on your final point. You said at the very start, and it is obvious, that the law is complex at the moment, and part of the aim of the bill is to try to simplify the law for practitioners and for tenants and small businesses, but I think that section 4 and section 5 leave some ambiguity. You just said that you do not think that those provisions could be drafted any more clearly. Will you explain why?

David Bartos: Sections 5 and 6 deal with the circumstances in which the tenant remains and is treated as if the lease is continuing. That is made clearer in some countries, where there is a rule of automatic continuation if the landlord does not raise court proceedings within, say, 30 days. It could have been made clearer; we could have recommended automatic continuation of a lease if a landlord did not raise proceedings within 30 days. That would introduce a certain rigidity to the law that is not there at the moment, so the commission's policy decision was that a flexible approach should be maintained rather than putting in a specific date by which, if proceedings are not raised, the lease continues automatically, with the tenant staying on.

Jeremy Balfour: What was the position of practitioners in your consultation feedback? Is it your sense that they want a bit more flexibility rather than a rule that landlords have 30 days and then that is it?

David Bartos: The practitioner response can be characterised as having no difficulty with the current law in that respect. It might be that the current law is not that well known, which comes back to one of the points that I made earlier. However, no one has suggested that there should be a rigid cut off at, say, 30 days, so that we know whether a lease is continuing. There could be all sorts of reasons why a landlord would not want to go to court within 30 days; they could be away on holiday or something may have happened to mean that 30 days might not be a suitable period. Sadly, I have not heard of anyone suggesting a rigid rule, which would offer clarity. It is one of those things: does one have flexibility with a bit of uncertainty or certainty with a rigid rule?

Jeremy Balfour: I will have one more bite of the cherry and push a wee bit further. Despite the issues that have been raised by different parties on the complexity of the new rules on giving notice, will the rules work quite well in practice, once they get going and everyone is used to them?

David Bartos: Yes, I believe that they will work quite well. In terms of the notice provisions in particular, it is clear that, if they wish, parties can contract out of notice altogether. That may be more frequent in the future. If notices are required, there are rules that make it clear what has to be done.

The Convener: Before I bring in Rona Mackay, I have a question on the comment that you made a moment ago about the rigid rules offering no flexibility, in contrast to common law, which does have flexibility. The purpose of this type of legislation, and other bills that the committee has looked at, is to update the law and to try to respond to the change that has taken place in society compared to when the legislation was first put in place, in order to help the economy. From what is in the bill and the engagement that you have had through your work as a commissioner, will the new rules assist businesses to ensure that they can become more competitive and help Scotland's economy?

David Bartos: The short answer is that the bill will introduce clarity. Such clarity will be found either in the lease or in the bill and it will assist businesses in planning. This is ultimately all about planning, both for tenants, so that they can carry on their business at the property, and for landlords, so that they can manage their investment and look forward, potentially beyond the existing tenant, to gain a fresh tenant or to redevelop or sell the property. The bill should certainly help with regard to planning and that is the key.

10:00

Rona Mackay (Strathkelvin and Bearsden) (SNP): I will follow on from my colleagues' questions and pick up a couple of the arguments that were made in response to the committee's call for views. Some arguments were made that the rules on giving notice should be the same for both tenants and landlords, which differs from the approach that is taken in the bill. Rachel Rayner, what is your opinion on that?

Rachel Rayner (Scottish Law Commission): David Bartos is the expert on this, so I think that it would be better for him to speak to that.

Rona Mackay: That is fine. I just wondered whether you wanted to comment.

David Bartos: The context is that the rules already differ in the sense that, for example, the notice that is coming from the landlord to the tenant must specify that the tenant remove at the termination date of the lease. That is not required for the tenant's notice to the landlord. In practice, the notices from landlord to tenant are written, whereas those from tenant to landlord do not need to be written.

I will turn to the policy reasons for maintaining a distinction. First, the notice from the landlord to the tenant acts not merely as a warning for the tenant to remove by a particular date but potentially then founds an action for removing the tenant, so it has an additional role that the tenant's notice to the landlord does not have.

Secondly, typically, most business tenants in Scotland will be small rather than larger businesses, and, as such, they are likely to be unrepresented at the stage when a lease is coming towards an end. To require, for example, the tenant's notice to specify the date of removal might act as a trap, which could render tenant's notices potentially invalid.

Thirdly, and linked to the two previous reasons, leases for up to a year can be oral; they do not need to be written.

Rona Mackay: I was going to ask about that third issue, of which there is criticism in some of the responses to the call for views.

David Bartos: Yes. The suggestion is that all tenant's notices should be in writing, just as all landlord's notices should be in writing. As I said, leases of up to a year do not need to be in writing; they can be oral. The reason for having landlord's notices in writing for those leases is because of the foundation that the notices give to removal proceedings—court proceedings. It seemed to us that if you have an oral or informal lease for, say, a year, and the tenant tells the landlord that they are leaving at the end of the lease, that should be sufficient to alert the landlord that that lease will not be continuing.

Rona Mackay: I would like clarification on that. At the moment, does the tenant have to give written notice?

David Bartos: No, the tenant does not have to give such notice.

Rona Mackay: Nothing changes in that regard, then.

David Bartos: Nothing, as a matter of law, changes in that regard. That is the position at the moment.

Rona Mackay: Thanks very much for that.

The Convener: I have a supplementary to Rona's question. If the approach was consistent and both tenant and landlord had to provide notice in writing, would that not provide clarity for both parties, in contrast to when one can be done verbally?

David Bartos: I think that that might provide some difficulty in the sense that the purposes of the two notices are different. If one could have content that was exactly the same, there might be some force in your suggestion, but the purposes are different, and consequently the content is different.

There is potential for confusion to arise. For example, if tenants are required to give a date of their departure, that might be a different date to the date that the landlord has given, and the consequences of that might be unclear. I believe that further complexity would arise if the rules had to be the same.

I understand why people would say that we should just have the same rules. However, if that were the case, the content would have to be the same in circumstances where the message that is being given is a different message. The message from landlord to tenant is, "Please leave on such and such a day," whereas the tenant is simply saying, "I'm not going to be staying on." Those are actually slightly different messages.

The Convener: Okay; that was merely a question, not a suggestion.

Katy Clark (West Scotland) (Lab): I have some questions on the points that have been raised.

Section 28 allows tenants to withhold payment if the landlord fails to notify them of the United Kingdom address to which termination documents may be sent. What is your position on the views on that that have been expressed in the responses to the call for views?

David Bartos: That is the remedy that arises where there is an obligation on parties to give each other UK addresses for the giving of notice in order to stop automatic continuation, and that applies not just to notice to quit or notice of intention to quit but to all termination-related notices, such as irritancy notices and break notices, where the lease comes to an end prematurely.

The aim of section 28 is to provide a remedy for the duty to give addresses that is in section 27. The first thing to note about that is that the section 27 duty applies to leases that are over a year. Those are likely to be written leases, and, as such, they are likely to have an address already in them. It is, therefore, unlikely in those circumstances that any duty to provide an address will arise.

Nevertheless, there may be leases involving foreign parties that have a foreign address, and the commission had to think about what the consequences of a failure to comply with the duty should be. It gave very careful consideration to that, and the view was taken that a robust approach was appropriate to ensure that the UK address was given, and the retention of rent where the landlord has not given their address was thought to be a sufficient compulsitor or deterrent to ensure that the address was given.

The commission appreciated the argument that was made to it by stakeholders that that remedy is disproportionate. However, the commission took the view that it was better if a UK address was provided, and that the remedy justified the aim. However, ultimately, it is a matter for the Scottish Parliament to decide whether that is proportionate.

The arguments are reasonably fairly balanced, but certainly, the view of the commission was that it was better to err on the side of having an address supplied, rather than having notices being served as a matter of form to people such as the extractor of the Court of Session, or, as has been suggested, the *Edinburgh Gazette*.

Katy Clark: There has been criticism in some of the responses to the call for views in relation to section 30(3), which requires landlords to serve irritancy notices to a tenant's creditor. What are your thoughts on that?

David Bartos: That section relates to the termination of leases prematurely, where either there has been a breach of lease or, for example, the tenant has become insolvent. A breach of lease, typically, might be non-payment of rent.

On a long lease, a mortgage can be granted by the tenant over the lease to secure a loan that they have received from a lender. As matters stand, the lender bears a risk that the tenant might miss some rent payments, and the lender may not be aware of it and not be made aware of the tenant's breaches and the landlord's irritating terminating the lease, in which case the landlord would lose their security. In effect, the mortgage would fly off and the house would disappear—if I can use that analogy.

Submissions to us said that that was an unsatisfactory situation, and that lenders should be made aware if their security—their mortgage—is about to disappear. That is the purpose of the provisions. Such provisions are not new. The Law Commission recommended them in its 2003 report on irritancy, and the Law Society's response broadly welcomed the provisions in the bill.

The criticisms that are made relate to the landlord having to notify the lender of their intention to irritate being an undue burden. My first observation is that we have had a consultation in 2003 and a consultation on the bill and that provision, and no one raised that undue burden point during any of that, so it is slightly surprising to read of it now.

The suggestion that the landlord's duty to notify the lender should arise only if there has been some notification of the lender to the landlord would introduce extra complexity, and whether there has been notification in that case would have to be established. It seems better to simply let the landlord carry out a search of the registers to see whether a security has been granted over the lease, and then, based on the information disclosed, notify the lender that there have been breaches by the tenant, which means their lease may be irritated, and their security may go. The lender is then open to take action to try and save that. They can try to purge it themselves, and potentially even sell the lease on. Indeed, some commercial-style leases have got provisions to enable that to happen, but of course, it can only happen if the lender knows that the lease is potentially about to disappear.

The cost of searching the registers did not appear to be disproportionate to the aim, which is effectively to make leases more attractive as security for businesses to obtain finance. Therefore, in this instance it does not appear disproportionate at all.

Katy Clark: Some of the responses to the call for views have suggested that the transitional rules are likely to be a source of uncertainty for parties to leases. Could you explain how the transitional provisions in the bill will work with regard to commercial leases that have already been entered into before the bill comes into force?

10:15

David Bartos: The transition provisions can seem a bit forbidding at first glance, but a fundamental thread runs through them, and that is the six-month period after the bill comes into force.

Where a lease is in existence at the time when the bill comes into force, the existing law is saved for six months. In other words, the existing law in relation to contracting out, notice to quit periods, service and so on is saved for those leases that have a termination date within that six months.

Where the termination date is beyond the six months, the new law will apply fully. If, for example, there is a termination date within the six months and there is tacit relocation under the existing law to a date beyond the six months, the new law will apply to that new date beyond the six months. That is the key strand.

The other part is that, if there are express provisions in any pre-existing lease, those will remain undisturbed.

Katy Clark: Thank you.

The Convener: I have a supplementary question on sections 27 and 28. If someone is going to send a termination document to an address within the UK, does it matter whether that address is for the actual landlord or can it be for an agent acting for the landlord?

David Bartos: It does not matter. What matters is that it is an address to which notices can be sent. That is the important thing.

A party might have an agent in the UK—a foreign party might well have such an agent—who can receive service, or they might have an agreement with someone in case that happens, and presumably that agent will inform them if the service has been received. What is important is that the other party knows an address in the UK to which that they can serve a notice.

One of the firms that responded about section 27 suggested that one of the provisions was not sufficiently clear in expressing that, even if the lease requires service to be carried out abroad, the service can still be carried out in the UK. That is certainly the aim. If that sub-section is unclear, that is a matter of concern, because that is clearly the aim. Some drafting adjustment might be required to make that clear.

The Convener: That was Burges Salmon, which we will be hearing from.

David Bartos: Indeed. Burges Salmon made many points, and that is one of a number of its valuable ones.

Roz McCall: I am going to shift to the SLC's conclusion that the Tenancy of Shops (Scotland) Act 1949 should be repealed and that the bill should be amended to implement that. Other responses to the call for views have argued that that should be dealt with as a separate form of legislation. What are your thoughts on that issue?

David Bartos: My thoughts are that it should be dealt with in the bill, because all the consultation has taken place and is recent. The proposal, which is for straightforward repeal, can be brought into the bill technically without undue drafting.

I noticed that the Scottish Grocers Federation response suggested that the matter be dealt with separately. The Scottish Grocers Federation was invited to put in responses to the commission's consultation on the 1949 act. However, it was unable to do so and informed the commission that, although it had sent an email to its board of retailers asking for contributions to the consultation on the 1949 act, it had not received sufficient feedback to allow it to respond to the consultation and that that had led it to think that its members had little experience of the 1949 act or were even unaware of its existence. That last point confirms evidence that the commission also obtained from other sources.

In the circumstances, I respectfully suggest that there would be no benefit in dealing with the act separately to the bill.

The Convener: Do you have any more comments on the bill or any of the arguments that you have made in response to the committee's call for views?

David Bartos: I would like to draw the committee's attention to one particular matter, which relates to section 23(2). Section 23 has general provisions on contracting out, if I can call it that, and modifying the default rules for giving notice and for the periods of notice. Section 23(2) provides that the lease:

"(a) may vary the last day for giving notice under the lease under section 13(1) by making that day earlier or later,

(b) where it does so, must provide for the same day to apply to notice to quit"

from the landlord

"and to notice of intention to quit"

from the tenant.

The genesis of that provision was first a concern that tenants should not be required to give notice of their intentions before landlords have to give notice of their intentions at the end of the lease. In other words, a landlord should not have an advantage in knowing what the tenant is going to be doing before they decide whether to keep the tenant on. The aim was to ensure that the notice period for the tenant did not have to be given earlier than the that of the landlord.

The second thing was that, as the law stands, the 40 clear days applies to landlord and tenant. Until now, the law has had the same date applying for both, and that influenced the provision in the bill. However, since carrying out our consultation on the Tenancy of Shops (Scotland) Act 1949, a number of stakeholders indicated to us that they would favour parties being able to contract into a situation in which the landlord's notice could be given earlier than the tenant's notice. That would typically be when, for example, a tenant such as a pharmacy or a pub needs a licence to carry out their business, and they would need extra time to obtain a licence for the premises to which they would be moving. It was suggested that, in such a situation, parties might want to contract to have six months' notice to quit and a three-month notice of intention to quit, or maybe even a longer period of

notice to quit and a shorter period of notice of intention to quit from the tenant to the landlord.

It seems to me that such circumstances are a cogent argument for an adjustment of section 23(2) to allow the parties greater flexibility to contract for the landlord being entitled to give their notice before that coming from the tenant, provided always that the landlord would have some notice, such as three months.

That is a particular aspect where it seems to me that there could be improvement. In addition, there are further drafting points relating to sections 19 and 20 on sub-leases, which were raised by, I think, the Law Society, Pinsent Masons and Glasgow City Council. I could go into those in a bit more detail if you wish.

The Convener: Yes, please.

David Bartos: In relation to section 19, which relates to sub-leases and automatic continuation, Glasgow City Council made the point that the section does not refer to the possibility of a head landlord and a sub-tenant agreeing that the sub-lease would survive the end of the head lease. The general rule, as stated in section 19, is that, when the head lease finishes, the sub-lease goes with it, but there could be an agreement between the head landlord and the sub-tenant that, notwithstanding anything that happens to the main lease, the sub-lease will continue beyond the end of the main lease. Glasgow City Council referred to that flexibility, and I see the force of that point.

In relation to section 20, which relates to the prevention of the second type of automatic continuation with sub-tenants, we discussed earlier the possibility of having the flexible position or the 30 days to raise an action. The Law Society and Pinsent Masons have raised a point that section 20 refers to the action simply being raised by the main tenant against the sub-tenant. However, of course, it could also be raised by the head landlord against the sub-tenant once the sub-lease has finished. Again, that is a drafting point that would be desirable.

Finally, another important point was made by Urquharts on section 5(1)(b). The idea in section 5 is to prevent there being automatic continuation with the tenant remaining after the lease. Section 17, I think, makes it clear that, where there are a number of landlords, a notice to quit by one landlord is sufficient to terminate the lease. However, that one landlord would then have to potentially raise an action of removing, and the point that Urquharts makes is that section 5 or section 6 do not make it sufficiently clear that the action of removing can also be raised by only one landlord. That represents a change to the common law, which, as things stand, requires both landlords to raise such an action. Currently, I could describe that as perhaps a lacuna that Urquharts has spotted, and that change can also be carried out with benefit to the bill.

In relation to section 24, and with regard to trustees, there was a suggestion by one of the solicitors that responded that notification to one trustee would suffice. It might not suffice, but the aim is that notification to one of a number of trustees should suffice. The reason for that is that trustees have fiduciary duties to one another, so they can be expected to inform one another of the termination of the lease.

When there are a number of ordinary parties who are not trustees, there is no duty to intimate. That is why, in that situation, the intimation has to be given to all, unless they agree that just one should take it. With trustees, the situation is different, because there is a duty to intimate. Again, that might require clarification.

Subject to that, I have nothing further to add.

The Convener: Thank you very much. Rachel, would you like to add anything?

Rachel Rayner: No, thank you.

The Convener: Okay.

I thank you both for your helpful evidence. The committee might follow up in writing with any additional questions stemming from the meeting.

I suspend the meeting for up to five minutes to allow the panels to change and for a comfort break.

10:31

Meeting suspended.

10:37

On resuming—

The Convener: I welcome our second panel of witnesses. Steven Blane is a senior associate at Pinsent Masons; Kieran Buxton is an associate at Burges Salmon LLP; Fergus Colquhoun is a member of the Faculty of Advocates; and Carolyne Hair is a member of the sub-committee on property and land law reform at the Law Society of Scotland.

I note that Rona Mackay will have to leave at 11:45 if our meeting is still in session.

I will open the questions. Do our witnesses think that the law on tacit relocation needs to be reformed and, if so, what are the current main problems? I put that question to Fergus Colquhoun first.

Fergus Colquhoun (Faculty of Advocates): The law on tacit relocation clearly does need some

level of reform because there are a number of fairly well-known problems with it. Notices to quit and notices of intention to quit are served on fairly short minimum timescales, and there seems to be a general agreement that those should be lengthened.

From a purely legal perspective, the continuing existence of the Sheriff Courts (Scotland) Act 1907 is, to put it gently, unfortunate and is probably the source of a good deal of the complexity and confusion that surrounds the law on tacit relocation.

There are a number of individual areas where tacit relocation could be, let us say, usefully reformed. It is fair to say that those have been fairly well listed and articulated in the various consultation responses. They are largely matters of practice that affect businesses and solicitors more than they do members of the faculty, so I should probably constrain my comments on that question.

Carolyne Hair (Law Society of Scotland): We would certainly welcome reform from the perspective of creating legislation where the law is in one place. As was touched on in the previous evidence session and as many of the consultation responses suggest, the law is quite disparate at the moment—it is contained in common law and in the Sheriff Courts (Scotland) Act 1907. It is definitely helpful to create legislation that provides for the law to be accessible in one place.

We believe that there is still a question mark over some areas that cause the most practical difficulties. Interpretation requires legal advice and often leads to litigation around the more subjective questions of when a lease will roll on, notwithstanding that notice has been given. That will continue after the bill's provisions have come into force, because a lot of the existing issues are replicated in it. We have a slight concern that there will be a period where we have a new law in place without having the benefits of case law on the specific provisions. At present, we at least have the case law.

Overall, however, this is certainly an area where there is sufficient litigation and confusion to justify reform.

Kieran Buxton (Burges Salmon LLP): The consensus that comes through from the consultation responses is that, in principle, there is no objection to reform. It becomes a question of the scope of reform and the approach that is taken to it, and I think that that is reflected in the consultation responses.

I entirely take the point that, from an accessibility point of view, it is important to put the law in one location.

It was mentioned in the previous evidence session that our consultation response noted the general point that tacit relocation is not necessarily complex. I clarify that, in that regard, I was talking about giving some form of intimation 40 clear days before the end of the lease, which can be stated briefly. However, I entirely appreciate that wider points are mentioned in the bill, and I think that it is the breadth of the content of the bill that led to the responses that have been received in that regard.

Steven Blane (Pinsent Masons): There is a high level of agreement that there is a need for reform. There are issues in the detail of the bill. Fergus Colquhoun mentioned litigation, and I note that some cases that relate to how a lease is ended reach the level of the inner house of the Court of Session. I do not wish to do any of the litigators on the panel out of a job, but that is not a cheap process. You asked the previous panel about improving the economy and so on. If there is greater certainty as to what the terms are—we hope that that will be codified in a single place or expressly stated in the lease—that can only be of benefit to the parties, who, given the length of some leases, may not be the parties who originally negotiated them.

With the bill, there is now a good opportunity to reform the system and address some of the difficulties that have been faced for a century plus.

10:45

Jeremy Balfour: I return to Carolyne Hair of the Law Society. We will get into the detail of the bill in a moment through our questions. First, considering the bill holistically and taking an overview, do you think that it goes too far and brings about too much change? I was not quite sure what your position was regarding the general principles of the bill. Is it too wide in its scope, and does it need to be pared back?

Carolyne Hair: We do not think that the bill is too wide. There are certain sections in it—mainly section 5, which was touched on in the previous evidence session—that restate the law as it stands. Some of my colleagues here may disagree, but I would say that a lot of the questions that come from tenants and landlords alike around the operation or otherwise of tacit relocation come from points that are covered in section 5. We are not sure that the wording of that section provides any clarity; it simply restates the issues under the current law, which means that, each time a question arises, a landlord or tenant will have to take legal advice. When the legislation is relatively new, those areas will be particularly difficult for solicitors to give precise or definitive advice on. Therefore, it is more likely that questions will end up in court, as Steven Blane alluded to.

Jeremy Balfour: My next question is for Steven Blane and Kieran Buxton. Is the day-to-day practice working? It may not be clear from an academic legal perspective, but are things working in practice? Are we in danger of making things more complicated in practice for both the landlord and the tenant?

Steven Blane: Broadly, the system works, but that is often because people have to take advice, which is not always clear, even if someone asks a property lawyer or a property litigator. There is an example in our written submission, in answer to a different point, about calculating the date or term of the lease. It is sometimes not clear what the start date is. If the lease runs on anniversaries of that date, when are the 40 clear days? People sometimes have to make a judgment call to identify where they think that the line is. Practically, there can sometimes be multiple notices served—if not quite a scattergun of notices—just to ensure that whoever is acting for the landlord has put the tenant on notice, for instance.

In the recent decision on the Rockford Trilogy case, it was established that behaviour could be sufficient to give indication of a notice of intention to quit. That added an extra complexity in relation the final period approaching a lease end because, in practice, there may be a lease extension negotiation happening in the background. Is a tenant's position strengthened by saying, "Okay, I'm off"? If it is a somewhat poorer economic market, the landlord may be thinking that it is better to remain with someone they know and work with.

We get there, but it is not without its difficulties, even when there are two sophisticated landlord and tenant entities both taking advice.

Kieran Buxton: I agree that the system generally works. If you have the simple scenario whereby your client comes to you and says that they want to end the lease, and it is more than 40 clear days in advance, it is fairly straightforward—at least, that is how I would approach it. In that scenario, I would simply prepare a notice to quit and make sure that is timeously served on the other party.

The difficulty comes up if you are approached as the adviser at a stage when it is too late to give that timeous intimation—as Steven Blane alluded to—because there is the possibility that some form of communication that has taken place earlier could still be enough to exclude tacit relocation, which is what happened in the Rockford Trilogy case.

In relation to routine matters, therefore, it works as it is. However, there is an element of complexity if you are approaching a situation after the event.

Roz McCall: Part 1 of the bill defines leases to which the legislation will apply. What are your thoughts on that part of the bill?

We will go right back down the line, starting with Steven Blane, please.

Steven Blane: I am broadly supportive of it. The excluded categories are largely all subject to their own regime, such as private residential tenancies and a lot of the agricultural holding provisions.

There are different ways that Parliament could approach the matter. For example, you might have the list of exclusions, or you might say that, for example—I am not dictating the terms—the bill relates to commercial leases that do not involve student residential, or grazing, or so on.

Turcan Connell referred in its response to certain pseudo-agricultural leases and how, for example, a forest would be under one situation and a nursery under another. It is not an area that I have ever practised in, and so I would defer to others on that.

This is perhaps, therefore, not the final word, but there is no objection to this applying to conventional commercial leases.

Kieran Buxton: I am in a similar position to Steven in that I would defer to the consultation responses of others who have commented on the nuances of residential and agricultural leases. I have referred to the bill's approach as definition by exclusion—Mr Bartos explained the different approaches that they thought about—and I agree that that might be the best approach.

Carolyne Hair: The Law Society agrees in general terms. We raised a point about clarifying that the bill relates only to heritable properties—the land and buildings—which I think that Mr Bartos accepted.

We also question whether there should be further consultation around exclusions. A few of our members have raised points in relation to telecommunications apparatus, which is generally subject to its own legislative regime—although I am no expert in that area. Another member raised the question of energy leases—wind farms and so on—and whether it would be appropriate for the bill to apply to those. We simply question whether that should be considered further by the Law Commission.

There was also a drafting point in connection with some agricultural leases, the essential point of which was that the same exclusion appears in two different sections, which might confuse a person as to whether it is excluded or not. That

was a specific drafting point, which I imagine that the SLC has read and considered.

Subject to those points, we generally agree with the application to commercial leases.

Fergus Colquhoun: The Faculty of Advocates has taken a slightly different view of the matter. Generally speaking, we see part 1 of the bill not necessarily as creating problems but as creating a significant amount of complexity in the overall law relating to leases.

In essence, it will create two parallel statutory regimes. The basic underlying assumption of the way in which the leases to which the act applies have been defined is that residential and agricultural leases—crofts and so on—all have their own statutory regimes, so they do not need to be considered. In one sense, that is true: for example, crofts have a particular regime and so do the various forms of agricultural tenancy. However, once the layers of the statutory regimes are stripped back, we find, sitting underneath it all, tacit relocation.

One example that we referred to in our written response is the Agricultural Holdings (Scotland) Act 1991, which deals with the majority of agricultural leases in Scotland. In section 3, that act explicitly provides for continuation of the lease. However, when you look at section 3, it says that the lease continues by tacit relocation. It is nothing other than a declaration that the common law applies. The tacit relocation that section 3 imports is the common law concept, which does not have its own rules. As the inner house of the Court of Session has continued to develop the law of tacit relocation, that continuing development applies to the law that affects tenancies under the 1991 act.

Similar points are made in relation to crofts and to a proportion of residential tenancies—private residential tenancies are changing the field on that, but even a PRT can have a defined end date and, if it does, tacit relocation will apply. Those regimes create security of tenure by significantly limiting the number of situations in which a landlord can serve notice to quit and thereby effectively force tacit relocation to renew the lease for another year. Looked at properly, an agricultural tenancy under the 1991 act is just a lease that is continuing year to year by tacit relocation. There are strict rules about when notices to quit can be served but, if you strip those away and look only at how the lease is renewed, it operates through common law tacit relocation. It is not a statutory scheme on its own.

That would not be a problem if the approach that had been taken in the bill had been to make a couple of minor, piecemeal changes that only applied to a particular set of circumstances; nor would it be a problem if the bill had said that there were general problems with tacit relocation—relating to service of notices, for example—and had introduced a universal rule that notices to quit needed to be served at least three or six months in advance unless a specific statutory provision said otherwise, as there would be for tenancies under the 1991 act.

Instead, a decision has been taken to codify tacit relocation into a new thing called automatic continuation. Therefore, the effect of section 1 of the bill is to create two parallel regimes: one regime applies to a residuary category of agricultural leases, crofts, houses and so on, and the other applies to everything else. The two regimes are similar but not the same. It is likely that over time, as the act is considered by the courts, the regimes will diverge.

11:00

Deciding whether a lease falls into one regime or the other will not necessarily be straightforward, because leases can fall in and out of the various statutory regimes that are excluded from the bill. It is possible for a 1991 act agricultural tenancy to become a commercial tenancy. It does not happen very often, but it is perfectly possible. If you have two regimes, you have the potential for a notice to quit to be served validly under one regime but not the other, which would then lead to arguments as to what applies.

At its heart, that is our concern about section 1, which feeds through to the general concern that we note in our submission, which is that although a reform of tacit relocation is probably welcome, a codification of it might not be the right way to go about it.

Roz McCall: That has been very interesting. Thank you very much.

Steven Blane: I have one specific point. Carolyne Hair mentioned leases that are covered by the electronic communications code. The committee should reflect on the interaction between the two regimes. Mobile phone masts on the roof of a building or in a field are governed by the code that is set out in the Digital Economy Act 2017, as it has been updated. In Scotland, the "code agreement"—as it is referred to in the electronic communications code—is often a lease. However, because the Westminster Parliament took the view that the provision of electronic communications services to the general public is nigh on a utility—it is a public good—the grounds on which a landlord can effectively terminate a lease and then remove a mast under the code agreement are very specific and limited.

The fact that some of those arrangements are leases could add extra complexity to the existing rules, which require the Lands Tribunal for

Scotland's involvement in order to manage the renewal or termination of what might be referred to as "code leases". I wanted to flag that specific regime, because it already has its own levels of complexity.

Roz McCall: As I represent a rural area, part of my issue with the bill is the rural concerns that have been alluded to. I whole-heartedly accept that that is not your field—excuse the pun—and that you do not want to get involved in that. Are you all saying that tightening up the definitions will be essential following stage 1?

Kieran Buxton: I will defer to the others on that.

Carolyne Hair: Some of the specific points should definitely be reconsidered.

Roz McCall: That is great. Thank you very much.

Jeremy Balfour: Thank you all for coming along this morning. I want to go back to sections 4 and 5, which Carolyne Hair commented on. She and others have said that there is a lack of clarity and too much ambiguity in the drafting. If you are not happy with the drafting as it is, what would you like to see in its place?

Carolyne Hair: My first point is in connection with section 4. I think that David Bartos said in the earlier evidence session that the law as it stands is not absolutely clear that parties can contract out of tacit relocation in leases, albeit that that is something that is done. As we understand it, section 4 creates a situation in which a pre-commencement lease may purport to include wording excluding tacit relocation—the parties' intention being that the lease should not continue beyond the contractual expiry date—but find itself caught by automatic continuation because of the wording of section 4.

We wonder whether it would be helpful to clarify in the bill that it is valid to contract out of tacit relocation and that, in turn, if that is something that parties have done, that lease should not be subject to automatic continuation. We think that that could be helpful.

Section 5 is probably best spoken to by the litigators on the panel, but our main concern is the subjectivity of the wording in section 5 on what steps the landlord has to take and timescales. I heard the previous evidence, and we can understand the rationale there, but, if we are to codify this area of the law, it would be very beneficial to create more certainty. We believe that that should be one of the main benefits of codifying the law. As I mentioned, there is a concern that section 5 simply restates much of the common-law position, which, in turn, requires interpretation by solicitors.

Jeremy Balfour: On that issue—others can pick this up—we heard that, in other jurisdictions, there is a much more fixed way of doing it. For example, there can be a 30-day period. Not necessarily from a practitioner's point of view, but from the perspective of your clients, would that be too much of a change to the law?

Carolyne Hair: I would need to take that back. I do not have a view from our members on precise timescales, but, as a general policy position, our view would be the clearer or more concise it could be, the better. Certainly, from the perspective of giving legal advice, that is a much easier way to give definitive advice rather than opinion.

Fergus Colquhoun: There are situations in which a lease can come to an end without notice to quit. Currently, if a lease comes to an end without the parties realising it—which happens, for example, when a tenant dies or something similar—the tenant remains in possession and the landlord continues to accept rent, the rule that applies was stated by the House of Lords in the 1980s in a case called Morrison-Low v Paterson. In effect, a new lease is created.

At the moment, the test is, does the tenant stay in possession with the knowledge and consent of the landlord, and has the landlord accepted rent? If those three things are established, an unwritten lease for one year on the same terms, so far as is possible, as the previous lease comes into existence at that point. In effect, section 5 simply imports that, except that it makes it a continuation of the previous lease rather than a new lease.

Arguably, section 5 is slightly less clear than the current law, because instead of those three broad criteria, it simply has the landlord not taking steps

"to remove the tenant from those subjects within a reasonable period".

Something such as accepting rent might be a more objective test.

That is the only point that I would make on that. I certainly agree that whenever a bill contains a term such as "within a reasonable period", litigation will follow, as sure as night follows day.

Kieran Buxton: I agree with that point. Maybe one way to balance that would be to give examples of ways in which a landlord might act inconsistently. For example, they might do so by accepting rent after the relevant period. I think that they would have to give it back again. Examples could be given to provide more certainty without necessarily changing the principle of what are quite general paragraphs to an alternative such as the 30-day period that was discussed.

The statutory analogy that I would draw for giving examples to fit a general principle is section 52 or 53 of the Title Conditions (Scotland) Act

2003. To help someone to figure out what a common scheme is, it gives examples of what factors they might look for to determine whether the test is met. I suggest that as an alternative that might balance the competing suggestions.

Steven Blane: Earlier, the question was about how it works in practice. The new questions would be: what is "a reasonable period"? What does "acts inconsistently" mean? Without examples and guidance from the court—which would come with time, I imagine, particularly in relation to section 5—we would probably be taking a step back in terms of our ability to properly advise clients.

At the moment, we all have a feel for how it works in practice. Sometimes we would not immediately raise removal proceedings in the court, and sometimes we might be ready for the day after the lease ends, for various commercial reasons. I think that section 5, as it is currently drafted, would generate litigation in the short term, because it is just crying out for an unscrupulous tenant to take those statutory defences and, depending on their circumstances, appeal that decision.

Jeremy Balfour: I appreciate that, as members of the judicial sector, you might regret answering this question, but, in one sentence, what would you define as "a reasonable period"? If you were advising a client who was coming in today, what would you say to them was a reasonable time?

Steven Blane: My answer is not going to be one sentence, I am afraid, because it will always depend. Is it a one-year tenancy—

Jeremy Balfour: Let us just say that we wanted to redraft section 5 of the bill and that we wanted to take out the term "reasonable period" and put in a period of time—a week, two days, 10 days, 30 days or whatever. Is there a period that you feel would define "reasonable"?

Steven Blane: If you were to put in a period, I would say 28 days. I do not say that to advocate for that specific time, but that could be the trigger. Do I raise court proceedings before then? That would give me a window in which to negotiate, potentially. A number of types of court action, not only in relation to property, have to be raised within a statutory period that is provided in legislation. I would not necessarily say that 28 days would always be reasonable, but I think that Parliament will have to come up with a figure, and if it were 28 days, it would be clear in the bill that the landlord could have problems if they had not raised litigation by the 29th day.

Jeremy Balfour: We might seek to amend the bill; I am just trying to get some expertise from practitioners. If I were to lodge a stage 2 amendment to stipulate "28 days", "30 days" or "50 days", what would be reasonable, from a practitioner's perspective?

11:15

Steven Blane: Twenty-eight days would allow a reasonable period for a client to consult their lawyers and for the necessary papers to be drafted. Seven days could easily be missed due to people not being aware of the termination date. Fourteen days would be problematic due to the Christmas or summer holidays. You then get to 21 or 28 days; I have said 28 days, so I will stick with that.

Jeremy Balfour: Would you be happy with 28 days, Kieran?

Kieran Buxton: Yes. The range of 28 to 30 days seems reasonable. The prior action might be to ensure that everyone is thinking the same about the "steps to remove". I assume that we are all thinking that that means raising a court action for removal. Some of the consultation responses asked whether it meant just writing with a demand to remove. Would that count as a step to remove, or are we speaking about the raising of proceedings? Certainty on that would be welcome. If it were to be understood as raising court proceedings, 28 or 30 days would be a fair reflection.

Jeremy Balfour: Carolyne, I appreciate that you have not consulted your members, so you might not want to answer that question.

Carolyne Hair: No, we would need to consult.

Jeremy Balfour: Does the faculty have a view?

Fergus Colquhoun: My concern about section 5(1)(b) as drafted, which I do not think would be particularly altered by putting in 28 days, 21 days or whatever, is exactly the point that Kieran has just raised. Realistically,

"steps to remove the tenant"

is likely to be interpreted as the raising of proceedings in the sheriff court for removal. Without wishing to do myself and my colleagues out of work, I note that that would funnel people towards litigation in a way that the current law does not.

An approach that focused on objective criteria such as the acceptance of rent, for example, would mean that parties would not feel themselves butting up against a time limit beyond which the lease would continue. That would perhaps allow for situations in which a tenant and landlord might agree that the tenant had a month to remove their stuff, for example, without needing to worry about whether, under section 5, a new lease had been erected in the meantime, which would not necessarily be what either party wanted.

Jeremy Balfour: We all understand, and it has become clear this morning, that this is a complicated bill and area of law at the moment. What other parts of the bill are overcomplicated? Could they be simplified?

Steven Blane: I am happy to start on that; apologies for leaping on to a different part.

The provisions prescribing how notices are to be served and by what method might create an issue for the future. We would be creating a notice code on how to serve notices to quit and notices of intention to quit. Some of that would be inconsistent with the common law. In our response, we give the example of faxes, which would be treated as serving notice electronically under the bill as enacted, but as serving notice in writing under common law. If the Law Commission wished to review the law of notices and there was then a notice code for everything, that would perhaps be a better approach.

Under a lease, a tenant might have to give notice to a landlord about alterations that have taken place, and a landlord might have to give notice to a tenant to comply with a particular provision. There is the irritancy regime as well. However, the issue that you would have with the bill is that, all of a sudden, there would be two notice regimes that were based on the same contractual arrangement. The prescriptive method of giving notices in the bill should be reflected on.

The Convener: Before other witnesses come in, I have a question. Are faxes still commonly used in legal activity?

Steven Blane: My firm still has a fax machine. Faxes are allowed under the sheriff court and the Court of Session rules. I imagine that there are not many members of the public who will be looking to replace their fax machine when it finally gives up the ghost.

Faxes can be exceptionally effective, because it is a way to give written notice that day when people are not physically in the same place. Until the fax machine finally gives up the ghost, it is a method of giving notice. I have personally given the advice, “Just fax it.”

Kieran Buxton: I would echo the comments on the provisions, but for the slightly different reasons that are set out in our consultation response.

This is quite an involved point, but I am conscious that we are looking to save time. Basically, the bill has provisions on notices, including mandatory provisions, but section 23(5) says that, if an existing lease is

“inconsistent with (but does not expressly vary) a requirement”

or a provision in the bill that can be varied, there might be a question about the notice clauses of a lease. It is very common to have notice clauses in leases. They will usually provide for when delivery or service is deemed to have taken effect, such as 48 hours after the time of posting, and they set out what needs to be proved for that presumption to be engaged.

There is case law, which is not entirely consistent, about whether that can be rebutted. If a notice that is served under a lease is treated as served 48 hours after it is posted, the question is whether that is inconsistent with the bill, because the bill basically provides for the date on which notice is treated as being received to be capable of being rebutted by contrary evidence. There is potential scope for litigation in that scenario.

It is probably better to read our consultation response on that issue rather than my trying to explain it in the compressed time that we have.

Carolyne Hair: Colleagues have expressed well some of the concerns around the forms of notices. We have a very general question in connection with electronic communications. We think that it would be beneficial for the provisions to be looked at again in more detail. It is worth noting the Property Standardisation Group-style lease, which is generally accepted as an agreed form, or as the basis for an agreed form, of commercial lease in Scotland. However, that does not, as standard, provide for electronic service of notices because of the perceived issues around that. We would query whether the bill’s provisions should stand as they are.

There are some more practical queries around the detail of what an electronic communication is and what writing in an electronic sense is. Is it a signed PDF attached to an email? Is it a qualified electronic signature?

As a general point, we would question whether those provisions specifically should be looked at a bit more carefully.

Fergus Colquhoun: In its response—as I think Steven Blane has already said—the faculty expressed considerable concern about creating a subcode for the service of notices in relation to ending leases.

The law on service of notices is actually quite well developed. Since the House of Lords judgment on the Mannai Investment Company case in the late 1990s, the basic rules relating to service of notices in Scotland are pretty clear. They apply to notices served under leases and notices served under contracts more generally, covering a wide range of commercial activity in Scotland. It is not clear to us that hiving off the termination of leases from that general law would be a sensible way to legislate.

It is worth remembering that, as a general principle—particularly in a system such as Scots law, which has a lot of influence from Roman law—the preference is to have general rules that apply to a variety of situations, rather than having specific rules that apply to specific situations. In other words, if you want to serve a notice under a lease, you look to the general law regarding service of notices, rather than to particular rules regarding service of notices under leases. That is the heart of the basic structure of Scots law, which we teach to law students in their first year.

If the law relating to service of notices needs to be changed, reformed and updated to take account of emails and so on, that is one thing, but to come at it in this piecemeal way strikes us as undesirable and as likely to result in increased litigation for no particularly good purpose. The desire to have everything for ending leases in one place is a laudable one but it is not necessarily consonant with maintaining Scots law as a coherent system of legal principles overall.

In our response, we refer to one or two specific criticisms that we have of the proposed code. It is more rigid than the current common law. In one sense, that reduces the potential for litigation, because if the law is rigid, there is much less scope for arguing about whether a notice is served incorrectly. On the other hand, rigidity means that people are more likely to fall on one side or the other accidentally, and the law is unable to take account of that.

I think that we specifically mentioned the time by which a notice must be served. Section 8 refers to a period of seven days. If the notice to quit is served against a date which is two or three days after the termination date, or anything up to seven days after the termination date, that notice can still be effective.

11:30

That is much more rigid than the existing rules, which would probably allow for what might be called fat-finger errors—whereby, for example, to denote a month, a six might be substituted for a five. A notice to quit that was accidentally served against 30 May rather than 30 April would probably be effective under the existing rules but not under the bill.

We have one or two specific criticisms, but our more general criticism is a concern about the wisdom of codifying notices.

Rona Mackay: Good morning. I was going to ask you the same question that I asked of David Bartos about responses to the call for views, in which some arguments were made about tenants and landlords being given the same amount of time, and about whether oral notice of the ending of a lease could be given by a tenant who has a lease of less than one year. However, I am not going to ask you about that, because, from what you have said, I think that I have gathered what the answer is.

I am mindful that, in relation to one of the rules—I cannot remember which—David Bartos said that there was no change. I had said something like, “But does that not happen just now? Does the landlord not have to give written notice?”, and he said yes. In that sense, therefore, on that particular aspect, nothing changes. Am I correct in that, or am I getting confused?

Kieran Buxton: At present, my understanding is certainly that the landlord’s intimation that tacit relocation be excluded does not need to be in writing. I ask Steven Blane whether that is his understanding.

Steven Blane: I will characterise it in this way: if the bill is being presented as though things have not changed, I give a caution.

Rona Mackay: My question was just on that one aspect.

Steven Blane: On that specific aspect, there may have been good reason why, historically, oral notice was sufficient. However, the immediate problem with that in the 21st century is that there are various ways—such as WhatsApp or email—of having a dated communication, and an oral notice immediately begs the question of who said what, and when.

Rona Mackay: That is what I had thought as well. That makes sense.

Steven Blane: It may be a reform, but I would encourage that even for the unwritten lease scenario.

Rona Mackay: Yes, because we all like to have something to look at when we have made an agreement, I guess.

I get the impression from what has been said on that particular aspect of giving notice that it could create more litigious tenants. Does it give them the opportunity to say, “That’s not right, and I am going to take it further”? As the bill stands, could that happen?

Kieran Buxton: The area that I explained in response to the previous question is under question 5, paragraph 4 in our response. However, the area in which I think that there is scope for litigation is which regime applies when the notice is treated as having been received.

I appreciate what Fergus Colquhoun has said. Typically under a lease, there will be a clause that sets out when a notice is deemed to have been received. That could be conclusive—that is, treated as having been received on a particular

date. However, wording in the bill says, “unless the contrary” is proved, which would allow a tenant to suggest that they did not receive it on the day on which it was deemed under the lease to have been received—

Rona Mackay: So, it could be disputed.

Kieran Buxton: —and if you are really up against the deadline, that might be the difference between it being timeous or not timeous.

I should say that the question that involves the case law that I mentioned in that answer is probably still live and its resolution could be based even on the current law, because there are competing decisions. The bill would not necessarily introduce new litigation—it would just be litigation through a different vehicle.

Rona Mackay: Fergus Colquhoun spoke about litigation being more possible in certain circumstances.

Fergus Colquhoun: As a general rule, if there is any ambiguity or question that needs to be answered, a tenant or, indeed, a landlord who wants to maintain or end the lease, will be incentivised to grab on to the ambiguity as the grounds for an action. They would not necessarily want to run the action to its conclusion, but they could use that to force a commercial settlement on more preferable grounds for them than they might otherwise have received.

Rona Mackay: Would that be more preferable for the landlord or the tenant? I am trying to get an idea of what the power balance would be.

Steven Blane: The power balance will always be fact specific. If an individual landlord and family-owned company on a high street in a rural town in Scotland has a mini supermarket as its tenant, it would be great for it to do that, because it would have an excellent covenant, but the company could afford to take advice or push things a little further. The flipside of that is that the dynamic would change for a small business that expands into a small unit in a shopping centre that is owned by a multinational investment fund. The David versus Goliath scenario will always be fact specific, depending on the nature of the unit and who the respective landlords and tenants are.

Rona Mackay: I understand.

Fergus Colquhoun: Commercial leases are different from residential leases, in that respect. You cannot assume that the tenant is always in the weaker position: it would not be at all uncommon for the tenant to be in the stronger position. One of the main unsatisfactory elements of the Tenancy of Shops (Scotland) Act 1949 is that it appears that it is largely taken advantage of by Tesco and Sainsbury’s and not by the small shopkeepers whom it was intended to benefit.

Rona Mackay: That is interesting. Thank you.

Katy Clark: I will ask the same question that I put to the previous panel. What is your position on some of the criticisms of section 28 of the bill, which allows tenants to withhold payment if the landlord fails to notify them of their UK address? You probably heard the evidence that David Bartos, on the first panel, gave. Is it right that the landlord should have a UK address? If they have only a registered office or a plaque on the wall, is that pretty meaningless? Do we need to know where the landlord is located?

Steven Blane: I have no issue with the requirement for the landlord to have a UK address; there will be such a provision in many leases. However, I think that the suspension of rent is entirely disproportionate. I made the point earlier that leases can change, as can the parties to them. If the requirement is to protect tenants from having to serve their notice in person in the European Union, America, or wherever, which would be expensive, the Parliament could express its view that notice could be served in other ways, such as by placing a notice in the *Edinburgh Gazette*, as suggested in our consultation response.

Suspending the rent could have implications further up the line because, if the landlord has a security and the rent is paid quarterly, for example, they could then be in default on that security through an administrative error, which would change the dynamic with the tenant. If there is a view that a UK address should be provided, which would allow recorded delivery and such things to be used as a method of service, I believe that suspending the rent if that requirement is not complied with would be entirely disproportionate.

Katy Clark: Do any of the other witnesses have a view on that particular issue?

Kieran Buxton: On section 27, which imposes a requirement for a UK address for notification, I am conscious that Mr Bartos mentioned a consultation response—actually, it was ours—about the drafting not necessarily being clear. As I understand it, the aim is that, if a UK address is notified, there is no requirement for the other party to send the notification to the non-UK address. When I read sections 27(1) and 27(5) together, I can kind of see that aim, but my concern is that it is not clear enough—I refer in particular to the bracketed text at the end of section 27(5).

I wonder whether, in relation to an address being notified under section 27(1), it can be more clearly stated that the other party need send the document only to that address and that they are not required to send it to any other address outwith the UK that might be required in the lease. Perhaps that could be made a bit more express

instead of just saying that a document sent to such an address

"is not invalid only by reason of any such enactment".

I just do not think that that goes far enough in achieving the aim.

As for the remedy, I am conscious that we did not express a view on that in our response. The only issue that I would flag—and this picks up on Steven Blane's point about looking further down the line—is diligence that is carried out for unpaid rent. If the tenant is entitled to withhold the rent and there has been no communication about that, the diligence might be wrongful, because the tenant would have had a right to withhold the rent. That is just another potential unintended consequence to flag up.

Katy Clark: Some responses made criticism of section 30(3), which requires landlords to serve irritancy notices to a tenant's creditor. Do any of you have a view on that? Do you agree with the criticisms that have been made?

Carolyne Hair: Our only comment is that, in circumstances where the landlord is not required to give consent to the grant of a security by the tenant, the tenant should notify the landlord of any securities that they have granted. We thought that that would be helpful. In practice, a landlord would, with a registered recorded lease, be likely to carry out a search to confirm who the tenant was, which would, in turn, disclose a standard security or a mortgage. However, we did think that, in that one scenario where the tenant could unilaterally grant the security without reference to the landlord, it would be helpful if they could notify the landlord at the time.

Steven Blane: From our point of view, it provides a legislative protection for a party that is not part of the contract—it is, at least, a contract at the end of the day. If the tenant has a security and has financial issues that might impact it, the onus is on them. The landlord should be entitled to recover possession if they are not having their rent paid, and the heritable creditor has the relationship with the tenant, not the landlord.

Katy Clark: Finally, some have suggested that the transitional provisions are uncertain, or could lead to uncertainty. Do you think that the transitional provisions, as they stand, are likely to lead to uncertainty, or are problematic, or do you feel that, as the previous panel set out, they are perfectly reasonable? Do any of you have a view on that?

11:45

Fergus Colquhoun: Looking back, we did not mention that in our consultation response. Having said that, transitional provisions are always complex. They are frequently a source of litigation, and it might well be simpler to provide that the bill applies only to leases that are entered into after its commencement. That is the only thing that I would say.

Steven Blane: I have a one-word answer—yes. Look ahead and do not try to innovate on what could be quite complex commercial arrangements that are already in place.

Katy Clark: Sure. Do other witnesses agree with that or have a view?

Kieran Buxton: I wish I had thought about it at the time. I wrote about it in my consultation response, but I was approaching it as if the bill was being implemented as is. Looking back, to some degree, I can entirely see the benefit of the approach that has been suggested.

What I would say about our response on that is that the word "notice" is used in an undefined way throughout paragraph 8, in part 2, of schedule 2. I suggested a way of resolving that, but, having read it again multiple times, I am not necessarily sure that the way that I proposed would be the best. That might highlight the inherent complexities in transitional provisions. The concern is about using the word "notice" in relation to the pre-commencement law, when we are using it in other sections of the bill to mean different things. It is also defined in paragraph 8(11) of schedule 2, but only for the purpose of paragraph 8(10). If transitional provisions are to remain about that, it could certainly be more succinctly put. The word "notice" is in there, understandably, from a draftsperson's perspective, to tie it in with section 3(1), which is in part 2 of the bill. That is the key issue that I identified.

The other point that I would flag is that I noticed that Shepherd and Wedderburn's response was about paragraph 8(2) of schedule 2 and clarification of whether a lease is continuing by tacit relocation from commencement day and, if it continues for more than one year, it is still under the pre-commencement law until it has ended. That could be five years after. It is definitely worth clarifying that point. In its response, Shepherd and Wedderburn asked whether the pre-commencement law will run until the lease is terminated. That might not necessarily be the case, because it might run on tacit relocation for two or three years and then be varied. A contractual end date would then be put in and at that point it would not be running on tacit because it would have been varied. That might just be emphasising Fergus Colquhoun's point.

Carolyne Hair: From the Law Society's perspective, absolutely anything to simplify transitional provisions would be helpful.

David Bartos touched on Mr Buxton's point in his earlier evidence. I might be incorrect, but his view was that tacit would apply and then the new law would kick in, but I agree that Shepherd and Wedderburn raised the point that the wording is not quite clear. We would need to check, but I did pick that up in the earlier session because I was aware of the point. The SLC is in agreement that that is how it should work, but the provision is perhaps not as clear as it thinks.

Roz McCall: What is your view on whether the Tenancy of Shops (Scotland) Act 1949 should be repealed and the bill amended to implement that? You already brought that up, Fergus, so do you have anything to add?

Fergus Colquhoun: The 1949 act is a fairly elderly piece of legislation. The problems that it creates are largely matters of practice and not matters of law. It is, as I understand it, relatively straightforward to apply, not that I have ever had to do so. The faculty has said that, if a decision is taken to repeal the 1949 act, that could be done perfectly well in the bill, and I would certainly adhere to that position. However, the faculty makes no comment on whether that act should be repealed.

Carolyne Hair: It is the same from our perspective. I have no view on whether the 1949 act should be repealed, but if a decision is made that it should be, our preference would be that that is covered in the bill.

Kieran Buxton: I agree with those comments.

Steven Blane: Repeal and include.

Roz McCall: Wow—that was easy. I do not normally get a question like that. That is fine.

The Convener: Jeremy Balfour has a brief supplementary question.

Jeremy Balfour: Fergus, I am a wee bit confused on where the Faculty of Advocates is on the bill. Do you want it to be withdrawn, thought about again and fundamentally rewritten?

Fergus Colquhoun: I think that the general tenor of our responses is that a rethink or a different approach might be preferable. If tacit relocation is to be reformed, renamed or whatever, that should be done in a way that does not leave elements of the common law in existence in the long term. Also, it would be better to separate out the parts of the bill that relate to tacit relocation proper and those that do not but are simply elements of broader rules of law, where there is no particular benefit to be derived from hiving off this particular area from those broader areas of Scots law.

It is also worth remembering that Scotland is not a large legal jurisdiction. The number of cases that go all the way to the inner house of the Court of Session and from there on to the Supreme Court is relatively small. If you have a single area of law that covers a wide range of situations, you are more likely to get development of that than if you have a very narrow set of rules that relate to just leases, which the court might consider only once, twice or three times in the next 50 years. That would not be uncommon, at least to get high-level authoritative decisions relating to the legislation. You will also potentially preserve ambiguities for a longer time if you hive off areas into their own little silos.

Roz McCall: What are your views on the responses to the call for evidence on whether the Scottish Government should carry out an awareness-raising campaign to make sure that the impact of the bill is understood across all affected sectors?

Steven Blane: If the bill was enacted in its current form, there would be value in that. However, I would caution the parliamentarians on the committee that awareness raising does not change the law. We need to highlight the matter, but it has to be right in the four corners of the legislation.

There will be firms, such as my firm and Kieran Buxton's firm, that will be talking about it internally and with clients, but, to go back to one of my earlier answers, the small independent landlord on a rural town high street would probably benefit from some form of Government nudge about it.

Kieran Buxton: I agree. As to the methods, I suppose that there would be some element of business development, articles and so on. Noting that some of the respondents to the consultation are trade organisations, co-ordinating through those organisations to get the message out as widely as possible, with a sort of leaflet, would presumably be of benefit.

Carolyne Hair: Absolutely. The Law Society's view is that advertisement and widespread education on the new legislation, whichever form it eventually takes, would be required, as far as it is sensible to do so.

Fergus Colquhoun: I have nothing useful to add to any of that.

The Convener: I thank the panel members for their helpful evidence this morning. The committee might follow up any further questions with you in writing. If you would like to put any other points regarding the bill on the record, please do so in writing. That would be very helpful.

That concludes the public part of the meeting.

11:56

Meeting continued in private until 12:17.

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