OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Delegated Powers and Law Reform Committee

Tuesday 6 May 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 6 May 2025

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DELEGATED POWERS AND LAW REFORM COMMITTEE

15th 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:

Dr Jonathan Brown (University of Strathclyde)
Alan Cook (Scottish Property Federation)
Stacey Dingwall (Federation of Small Businesses Scotland)
Dr Mitchell Skilling (University of Aberdeen)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

Committee Room 5

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 6 May 2025

[The Convener opened the meeting at 09:32]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Good morning, and welcome to the 15th meeting in 2025 of the Delegated Powers and Law Reform Committee. I remind everyone to switch off or put to silent their mobile phones and other electronic devices.

I want to make the committee aware that Katy Clark will have to leave the meeting this morning, as she is speaking to amendments to a bill that is going through the stage 2 process. Jeremy Balfour is currently at the committee in question, speaking to his own amendments, and he will join us in due course.

The first item of business is a decision on taking business in private. Is the committee content to take items 7 and 8 in private?

Members *indicated agreement.*

Instrument subject to Affirmative Procedure

09:33

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

Town and Country Planning (Marine Fish Farming) (Scotland) Amendment Order 2025 [Draft]

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instruments subject to Negative Procedure

09:33

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

Council Tax Reduction (Miscellaneous Amendment) (Scotland) (No 2) Regulations 2025 (SSI 2025/112)

Town and Country Planning (Fees for Appeals) (Scotland) Regulations 2025 (SSI 2025/124)

Town and Country Planning (Fees for Applications) (Scotland) Amendment Regulations 2025 (SSI 2025/125)

Town and Country Planning (Fees for Local Reviews) (Scotland) Regulations 2025 (SSI 2025/126)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

09:33

The Convener: Under agenda item 4, we are considering three instruments, on which no points have been raised.

Scottish Elections (Representation and Reform) Act 2025 (Commencement No 1) Regulations 2025 (SSI 2025/106 (C 10))

Children (Care and Justice) (Scotland) Act 2024 (Commencement No 2) Regulations 2025 (SSI 2025/115 (C 12))

Social Security (Amendment) (Scotland) Act 2025 (Commencement No 1 and Saving and Transitional Provisions) Regulations 2025 (SSI 2025/119 (C 13))

The Convener: Is the committee with the instruments?

Members *indicated agreement.*

The Convener: In relation to Scottish statutory instrument 2025/106, does the committee wish to highlight to the Standards, Procedures and Public Appointments Committee its correspondence with the Scottish Government regarding the policy note?

Members *indicated agreement.*

Document subject to Parliamentary Control

09:34

The Convener: Under agenda item 5, we are considering one document, on which no points have been raised.

Scottish Public Services Ombudsman draft revised Statement of Principles for Complaints Handling Procedures (SPSO 2025/01)

The Convener: Is the committee content with the document?

Members *indicated agreement.*

The Convener: In relation to the document, does the committee wish to highlight to the Local Government, Housing and Planning Committee its correspondence with the Scottish Public Services Ombudsman?

Members *indicated agreement.*

Leases (Automatic Continuation etc) (Scotland) Bill

09:34

The Convener: Under item 6, the committee will take further evidence on the Leases (Automatic Continuation etc) (Scotland) Bill. Before we begin taking evidence on the bill, I put on the record that all members of the committee rent office premises in our capacity as members of the Scottish Parliament. Although that does not represent a declarable interest under the bill, we wanted to put it on the record, given that the subject matter of the bill concerns commercial leases.

I welcome Dr Jonathan Brown, who is a lecturer in private law at the University of Strathclyde, and Dr Mitchell Skilling, who is a teaching fellow at the University of Aberdeen. Welcome to you both. Before we start, I remind you not to worry about turning on the microphones, because that will be done for you. If you want to come in on a question, please raise your hand or indicate to the clerks. There is also no need to answer every question if you do not want to deal with something. After the meeting, if there is something that you did not say and you feel that you would like to put it on the record, please feel free to do so in writing.

We will move to questions. Do you think that the law on tacit relocation needs reforming? If so, what are the main problems?

Dr Jonathan Brown (University of Strathclyde): Thank you for inviting me, and I thank Mitch Skilling for passing the first question to me.

My view is that there is probably no pressing need for reform. Indeed, some of the recommendations, particularly those about changing the language that is used, are slightly harmful rather than helpful. I can get into exactly why that is.

One thing that is clear, given that we are dealing principally with commercial leases, is that the interests and imbalances involved are not necessarily like those under other leases. If it is a residential situation, saying that a residential tenant is, ipso facto, in a weaker position than the landlord seems quite straightforward. However, with a commercial lease, just because one party is the landlord does not mean axiomatically that they will be in a stronger position than the tenant.

It is worth bearing in mind that, where commercial leases are concerned—or with any lease, broadly—we are dealing with a contract between two parties. In general, representing the interests of one party as opposed to those of the

other in terms of one party being stronger than the other is not quite correct. The concept of freedom of contract is extremely important in such areas.

The law that has been built up around tacit relocation is quite well understood. The comments about it being unclear and the like do not strike me as correct. If anything, it is more a case of the law being flexible because it is uncodified. That means that the parties to any agreement have a lot of latitude, and that is before we get into the realm of what the courts would make of it. There is a lot of room for the parties to any lease agreement to make their own reality, so to speak. The law of tacit relocation does that, and it does it quite well, so I do not necessarily think that reform is absolutely necessary.

On the point about language, which is the final one that I will address before I pass to Dr Skilling, several representations have been made that the proposed change of language from "tacit relocation" to "automatic continuation" and from "ish" to "date of termination", and so on, is useful. That is not, in fact, the case, because when we are dealing with terms of art, as we are here, changing the language does not come easily. If anything, changing it to use "automatic continuation" rather than "tacit relocation" would just complicate matters, because someone who came across the statute would be likely to think that they knew what it was about and so form their own view of it without necessarily having a full understanding of the background.

If you come across the phrase "tacit relocation", you immediately realise that you do not know what it means. What do you do? You have the impetus to look it up. If you do so, you immediately get a whole host of articles that are concerned principally with the subject as it is understood. You know that the material that you are using is good law, because it is talking about a concept that is expressed in the language that we use in this jurisdiction.

From a teaching perspective, and from a practical one, changing the terminology would lead one to say, for example, "What does 'automatic continuation' mean? It means tacit relocation, which means this." It would just add another layer to the terminology. In any jurisdiction that you care to name, that is what happens when terms are changed. For instance, in Germany, the phrase "Geschäftsführung ohne Auftrag" is explained in any commentary on the basic law as having been drawn from the Roman-law institution of negotiorum gestio.

My final comment is on the word "ish". A number of respondents have said that progressing to the use of plain English is something to be lauded. However, that directly conflicts with the Scottish Parliament's commitment to the Scots language. Although "ish" is most familiar in the context of the Scots law of leases, it is just an ordinary word of the Scots language, which translates as "a means to egress or exit". While one might say that expressing a statute in plain English is quite useful, the Scots language is spoken only in Scotland, as this Parliament recognises, and is not really used anywhere else. However, although Scots has been recognised as an essential element of Scotland's culture and heritage, which is familiar in our songs, poetry, literature and so on, it is also an essential part of our law. It continues to be not only alive but thriving, in the sense that it is still used to describe essential concepts.

In summation, some of the language points that the bill would introduce are actually more problematic than has been understood hitherto. If the suggestion is that the law of leases needs to be reformed because it is not clear, I am afraid that I would have to reject the overall approach outright. The law is quite clear and well understood. If people who come to Scotland from other jurisdictions have an issue with understanding particular Scots law terms, that can be rectified quite easily, especially given the language that is presently used, so I do not think that the objection holds water.

That is not to say that some changes are not needed, which we can perhaps get into, but there is not necessarily a case for a wholesale rewriting of the law that pertains to tacit relocation.

Dr Mitchell Skilling (University of Aberdeen): My opinions largely align with those of Dr Brown on that point, but I will make a few additional observations. One point that struck me is the addition of modernising language—plain English—against the desire to keep particular old Scots terms, which are terms of art that have been developed over historical precedent. In the law of leasing, there have been cases in which we have been perfectly happy for certain words to fall into general disuse.

The biggest example would be the downfall of the word "tack", which, historically, would have been used to refer to the contract of lease but has now largely fallen into disrepair. On the other hand, "ish" has enjoyed a relatively healthy life, to the point where it still appears in the definition of "Extended meaning of tenancy" that is set out, for example, in the Private Housing (Tenancies) (Scotland) Act 2016, which states:

> "if an agreement would give rise to a tenancy but for the fact that it does not specify an ish, it is to be regarded as giving rise to a tenancy".

There are cases in which we are happy to maintain existing terminology while still improving accessibility, which is one of the largest themes

that comes across in the discussion around the bill.

The Scottish Law Commission and several other respondents to the consultation seem to have taken the view—in some cases, quite rightly—that tacit relocation is a central pillar of the Scottish law of leasing. It has existed for a while, but there is now a perception that, for some particular classes of user, it has fallen slightly into obscurity. The biggest ones that I am thinking of are, as the Faculty of Advocates points out, party litigants: persons who are appearing to defend commercial leasing disputes in court and might not have resources of their own.

09:45

As Dr Brown observed, there is a large spectrum of parties to commercial leasing disputes. There are the larger ones, but a sizeable contingent of them are small business owners—franchisees, for example—and simply persons who operate their tiny bricks-and-mortar premises and do not have anything else beyond that.

There are definitely persons who would benefit from clarification of the law of tacit relocation and perhaps even from codification of its principles in a more easily accessible format. However, there is discussion to be had about whether the correct way to do that is to partition tacit relocation into the common law concept, which applies to some classes of lease, and the statutory concept of automatic continuation, which applies to a second tranche of leases. Of course, the third tranche is contracts of lease to which neither of those principles would ever have applied.

Dr Brown: I will follow up on the point about the contractual nature of a lease in general and its relation to tacit relocation.

I note that, although the latest edition of "McAllister's Scottish Law of Leases"—edited by Lorna Richardson and Craig Anderson—mentions that there have been doubts in the commentaries around whether someone can contract out of tacit relocation, that doubt appears to have been raised by the SLC's 2018 report. Anderson and Richardson are quite clear, as was McAllister, that, because of the nature of party autonomy, you can expressly contract out of the law pertaining to tacit relocation.

The whole purpose of that area is well described by my colleague at Strathclyde, Simon Halliday, in an article in the *Juridical Review* from 25 or so years ago. Fundamentally, tacit relocation is a presumption that applies in a limited number of situations in which common custom and usage have shown that contractual relations are desired to continue beyond a particular end date.

From the law as it stands, if you have a situation in which the parties to the contract of lease feel very strongly that the date of ish is when the lease should end, that can be done, so the presumption can be overturned. That point is worth noting. At the moment, the system is quite flexible and allows for party autonomy.

The concern is that making the law rigid and putting it on a statutory basis could be, in and of itself, problematic. Because I am pretentious and cannot help myself, I note that Cicero also observes in "De Officiis"—1.33—that a proliferation of statutes leads only to a proliferation of injustice. Breaking tacit relocation off into its own piece of legislation under a distinct regime could be problematic in a way that might not be foreseeable at this stage.

The Convener: One of the questions that I posed last week was whether, with its proposed codification, the bill would, if it were to pass, help economically. Given what you have both said this morning, my understanding is that you do not think that codification is the right thing to do. However, do you think that the bill would assist businesses in entering and leaving leases?

Dr Brown: Not necessarily, no. My answer can be roundly summed up as a no, but I do not claim to have particular expertise on that point. If anything, the bill might make things more difficult in the short term. Although it might generate new litigation—and lawyers pay taxes, too—fundamentally, I do not think that the bill has any particular economic benefit.

Dr Skilling: There is also something to be said about the existing wording of section 28 of the bill, under which a tenant has a right to withhold rent in certain circumstances, when particularly small formal requirements around the provision of a United Kingdom address are not complied with. That might be seen as too extreme a remedy for what is, in a lot of cases, an administrative oversight rather than a deliberate act of malice on the part of a commercial landlord. In that sense, section 28 might have consequential economic downgrade potential as opposed to upgrade potential, but I am not an economist, so I reserve judgment on that.

The Convener: Before I bring in Roz McCall, I want to know whether, based on what you have both said so far—we will go into the details of the bill later—you recommend that the bill be withdrawn or substantially amended.

Dr Brown: My preference is for the bill to be substantially amended—with the emphasis on the word "substantially". When we have the opportunity to reform the law and make changes that are perceived as necessary, that opportunity has to be taken. In that regard, I think that a less

ambitious bill would better serve the ends of justice.

Dr Skilling: Similarly, I do not believe that this is a good time to consign commercial leases to the doldrums of a lack of statutory discussion or intervention. However, further discussion of the bill would be useful.

The Convener: Thank you very much. I will now hand over to Roz McCall.

Roz McCall (Mid Scotland and Fife) (Con): Good morning. I thank the witnesses for coming to today's meeting. What you have said is very interesting. To narrow the discussion down a little, I will start with part 1 of the bill. You have given the committee your overall opinions, but what are your views on part 1 of the bill, which defines the leases to which the legislation will apply? We will start from the other side of the table this time—Dr Skilling, I will let you go first.

Dr Skilling: I brought up a few little things in my original response to the consultation, which I authored on behalf of the centre for Scots law at the University of Aberdeen. We were generally of the view that the list of exceptions in part 1 makes sense when coupled with schedule 2, which sets out further exceptions.

The biggest issue that I raised was a very minor point about the lack of an exception for charity accommodation for veterans under part of the Private Housing (Tenancies) (Scotland) Act 2016. From its wording, that part, which is in schedule 1, appears to be unlike its sister provision in the same section of schedule 1 of the 2016 act, in that it refers not to a temporary housing measure, but perhaps to a more long-term, charity-based housing scenario in which it is more likely than not to relate to a person's principal home.

The other big exclusion is residential leases in which the residence is not the tenant's principal home—for example, if a person travels for work and has alternative accommodation that is not, say, hotel accommodation. In the past, case law has established that a person's main family residence may still be held as their principal home because that is the area to which they have the biggest ties, thus denying them the protections of a residential tenancy, even in cases in which they spend the majority of their time in another place of accommodation.

The exclusions broadly make sense, but there seem to be a few oversights or things that need more looking into in order to ensure that everything that is excluded is what is really intended to be excluded.

Dr Brown: Likewise, I think that, if the bill is to go forward, its approach, which is to set out exclusions rather than try to capture everything, is a sensible one.

I have nothing further to add to Dr Skilling's observations, apart from the observation from my colleague, Mr Combe—who co-wrote our submission to the call for views—that repairing tenancies are not likely to come into existence.

Roz McCall: That is interesting.

Parts of the written submissions highlighted issues about rural areas. What are your views on the arguments that the definitions need to be tightened in relation to grazing and mowing?

Dr Skilling: My main specialty is more residential than agricultural—more urban than rural—so I will defer to Dr Brown on that question.

Dr Brown: Again, one sees that the general approach of having hived-off, siloed areas of law pertaining to leases causes problems for exactly that sort of purpose. The representative of the Faculty of Advocates, Fergus Colquhoun, indicated that, precisely because of that sort of issue, it tends to be more useful for the general law pertaining to leases to be based on principles rather than on individualised, fragmented and piecemeal statutory enactments. That is my observation.

Roz McCall: Last week, we heard that there needs to be some consideration of the electronic communications code—for example, in relation to wind farms and electrical substations. That is another deviation. What are your views on that?

Dr Skilling: I will defer to Dr Brown.

Dr Brown: My answer is similar to what I just said. The issue might touch on some of the provisions on notice and the like, which will be something of a change from what the law has been settled as since the Rockford Trilogy case of 2021. The general point is that legislating for particular modes of communication is almost certainly doomed to failure, because you are prescribing ways and means of doing things in an area—communications technology—that is evolving all the time.

The law as it stands is clear on that, in the sense that, because we are dealing with an area that is regulated by the principles of contract, the parties have considerable autonomy in how they communicate with one another. There is a great line from an *Edinburgh Law Review* piece from 2004 by the inimitable Professor George Gretton, who observes that you can conclude contracts via skywriting if you feel so minded. To bring in provisions to prescribe how communication is to be conducted is wrong-headed.

Roz McCall: That is interesting.

Bill Kidd (Glasgow Anniesland) (SNP): Thank you for being here and for giving us some background on the issues. On the argument that there is too much ambiguity in the drafting of the bill, especially in sections 2 to 7, do you think that section 5(1)(b)(i) should be amended so that the term "reasonable period" is replaced with a number of days—for example, 30 days? The term "reasonable period" could lead to ambiguity. Would you prefer it to be more straightforward?

Dr Skilling: It may be useful to have two periods, depending on the length of the lease. A bigger difficulty with the term "reasonable" in this case is that, in many situations, the bill distinguishes between short-term leases, which may be for as little as a month, and leases with a longer term. What is considered reasonable in either circumstance will be different, because they work on different timescales and often involve very different relationships between the landlord and the tenant. The most useful thing would be to codify a hard number of days but differentiate between short-term and long-term commercial leases.

Dr Brown: I take a different view on the basis of the importance of party autonomy when it comes to that sort of thing. What appears, especially at the stage of drafting, to be ambiguous is more likely in practice to be understood as being flexible and accounting for—exactly as Dr Skilling indicates—the different situations in which one can find oneself. Where that is concerned, keeping the term "reasonable" is useful, and it is more reflective of the law as it stands.

If the bill is to be a codification that preserves the best of the law as it stands, instead of it saying, "You have entered into a six-month lease and therefore seven days, 14 days or whatever is 'reasonable', whether you like it or not", it must recognise that situations that we cannot imagine at this table will come up. That means that the term "reasonable" is a good bit more useful than it might initially appear to be.

Dr Skilling: The potential third option would be to provide fixed day limits that allow the parties to contract out of them or to modify them. That would represent a middle ground between the two options.

Dr Brown: Yes.

Dr Skilling: It would preserve more contractual freedom.

Bill Kidd: It is good to see that you are agreeing—sort of.

Dr Brown: Aggressively. [*Laughter*.]

Bill Kidd: Given what you have said, do you think that the new rules on giving notice might be difficult to follow due to potential complexity? Do you think that complexity is an issue in the new proposals overall?

Dr Skilling: One of the proposals that I would bring up here is that oral notice by the tenant would be possible in particular circumstances. It seems to me that that could open a floodgate of litigation, because determining what does and does not constitute oral dealings would require subjective interpretation of how the parties interacted with each other, the hearing of evidence and, overall, more complexity than an issue such as the giving of notice should require. It should be a relatively simple question of whether notice has been given. There is potential for complication in that area.

Dr Brown: I agree. One of the first points that I raised was that, where there is a commercial landlord-tenant relationship, the landlord is not necessarily in a stronger position than the tenant in all cases. I am sure that we will get to the Tenancy of Shops (Scotland) Act 1949 later. Whatever the aims of that legislation might have been, it tends to be large organisations that are in the position of tenant that benefit from it, rather than their landlords.

To rigidify the requirements for giving notice would be wrong-headed and would go against the law at the moment. As I said, I think that the law is quite clear and, certainly since the Rockford Trilogy case of 2021, quite settled. Prescribing ways in which the parties must communicate in order to achieve certain ends seems to me to run counter to the principles of party autonomy. It also seems exactly like creating something that will become a hotbed for litigation, because parties will intend to do certain things but technical or minor issues will cause them to snowball into litigation that could readily have been avoided.

Bill Kidd: I can understand that. There are issues of complexity, as you say, and of overcomplication. Do you believe that they can be worked out before we reach the stage of the bill being passed, through negotiation and discussion?

Dr Skilling: The possibility exists.

Dr Brown: It is possible. You might end up with a piece of legislation that, as a codification of the common law as it stands, did not appear to be an ordinary piece of legislation that was trying to do a certain thing. However, that is exactly what a codification should be—it should not look like an ordinary piece of legislation. Flexibility should be baked into it.

Is it possible? Yes. Is it likely that the draftsman will want to go down that road? Perhaps not. However, it is definitely possible. It is just a question of the tolerance that parliamentarians have for language that—as you indicated earlier,

Mr Kidd—might immediately be perceived as ambiguous but which is, in fact, doing little more than preserving what the law already is.

The Convener: Later this morning, we will hear from the Federation of Small Businesses Scotland. In its submission, it states:

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

Do you agree with that, or do you think that this section of the bill should have a more flexible approach? Dr Skilling, would you like to respond?

Dr Skilling: I will let Dr Brown answer that one first.

Dr Brown: I can see why, especially if you are a member of a group with interests to protect, lobbying for those interests is a logical thing to do. However, if you are going to legislate in an area that is as broad as this one, which relates in complex ways to many areas of law concerning aspects of private law, private life, public life, commercial life and so on, you cannot privilege the interests of one group over another in that way, because, although that might be good in one particular case, it could lead to significant injustice in other cases that are unlike that one. You might be able to address some of the imbalances that small businesses have when dealing with large commercial landlords, but that opens the door to issues in a situation in which, for example, a small firm is letting out commercial property and a big titan of retail or the like is the tenant. In that situation, the imbalance goes completely the other way. That needs to be borne in mind when you are dealing with an area of law such as this.

Dr Skilling: Fundamentally, we are dealing with a long-standing concept of Scots law that should, as an enshrined principle, broadly speaking, have neutral application across the broad spectrum of commercial leasing. If additional protections are envisaged—for example, for small businesses—the more appropriate route to deal with that would be through something in the way of more boutique legislation rather than the more general principles that are discussed in the bill.

Dr Brown: That is exactly right. When you are dealing with common law concepts such as tacit relocation, you are dealing with the development of law without political interest being taken into account. You can make the argument that all law is essentially political, but when the area of law has developed over 700 or 800 years if not more, as is the case with tacit relocation, there is an argument that you are dealing not with political law that favours one party over the other but, rather, with the best available interpretation of justice for all in general.

Albeit that that is the case, however, there is, as Dr Skilling indicates, absolutely nothing to say that, in the case of a particular perceived problem such as a complaint that is raised by the Federation of Small Businesses, you cannot pass individualised acts or other pieces of legislation to deal with that.

Dr Skilling: We are not dealing here with, for example, a piece of social legislation. In his Scottish Universities Law Institute tome "Leases", Professor Rennie comments that the battle between residential landlord and tenant is more or less an economic power struggle trying to balance the interests of the two parties over time. However, all the developments in this sector of law have come from taking an in-depth view over time at how the relationship between those two parties with very specific needs and interests has changed. In the commercial leasing world—the world of contract—the number of potential interests at play may be wider and more varied.

Dr Brown: Just because I am pretentious and cannot help myself, and because I am giving evidence to a Scottish Parliament committee, I cannot leave that issue without quoting the great Viscount Stair, who said, in beautiful language, in his "Institutions of the Law of Scotland":

> "the nations are more happy, whose laws have entered by long custom, wrung out from their debates upon particular cases, until it came to the consistence of a fixed and known custom."

Deviating from that by passing legislation that seeks to codify what is already there and to sneak changes in is not a good way of doing things.

The Convener: Thank you. I will ask a final question before I bring in Roz McCall.

In the information that we have received from the Faculty of Advocates and Pinsent Masons, they argue that it does not make sense to have a statutory code for one type of lease, given that there are rules in case law that apply to various areas of law and not just commercial leases. The bill is very narrow—it is not broad and it does not cover many aspects of leases. Would it work to have what is proposed in the bill for something that is actually very narrow? Is that practical or do you agree with the position that is offered by the Faculty of Advocates and Pinsent Masons?

Dr Skilling: In essence, this is the targeted replacement, for a narrow sector of leases, of a general principle with something that, it is argued, is more tailored and better suited to the needs of that sector. I can certainly see the strength of that argument. The question is then whether anything is lost from the general concept in disapplying parts of it or turning it into something that is slightly different.

Dr Brown: I am more or less in complete agreement with the evidence that Mr Colquhoun gave when he indicated that, if you significantly change an area of law that is hived off from the general law in a small jurisdiction such as Scotland, that will cause more problems than it solves. As it stands, the law relating to tacit relocation is generally well understood, which means that, whenever a dispute arises, there is a well-known body of law that can be referred to in order to resolve it. For instance, I note that the inner house dealt with the law on tacit relocation in the—this case just does not stay in my head—Rockford Trilogy case of 2021. There was a judgment of eight pages, and it was agreed what the law was. It is well settled. It was just the application that was ambiguous.

My point is that, when dealing with an area such as this, if you have bespoke legislation that does things differently from the general law, it is exactly as Mr Colquhoun indicated. You entrench the new system and, if disputes arise, they do not necessarily proceed to the Court of Session or the inner house, and they almost certainly do not go to the United Kingdom Supreme Court. You end up with a new system that is much less clear than what came before, because the law has been unsettled by the legislative intervention. More than that, until you get a dispute on particular points, any ambiguities in the law will not be resolved.

Although, in part, the bill is held out as a codification, it is exactly as you say, convener: it is much more restricted. On the suggested redrafting, the key thing that is necessary is for the bill to change as little as possible from the common law. It should preserve the best of what is already there and not differ from that. For individuals who need to find out about it, the name of the bill should be redrafted. My suggestion is that it be called the leases (tacit relocation) (Scotland) bill, because, if a commercial tenant or a commercial landlord searches for "tacit relocation", they will be able to find what they need quickly and access it quite readily.

Crucially, if the understanding is that the bill will not actually change the existing law, that means that everyone will be able to look to the material that we already have, and it will ensure that, even though there is a bespoke piece of legislation, it will not require a fresh interpretation; it will just be an automatic continuation of what has gone before.

10:15

Roz McCall: This has been very interesting, gentlemen. We have had calls to try to create parity for tenants and landlords with regard to notice, but I get the feeling from what you say that parity might actually cause a split. I do not want to put words in your mouth, however, so it would be interesting to get your opinion on that.

Dr Brown: Again, the issue just comes back to party autonomy. This is an area in which we are dealing with a custom. We should strive for anything that provides greater flexibility in this area.

Dr Skilling: My view is similar. This seems like a good time to talk about provisions dealing with multiple landlords or multiple tenants under the same commercial lease. That is an area where, for example, there is more flexibility in allowing one of multiple tenants to leave a commercial lease but leaving the others in place, which creates some disparity in deciding how to deal with notice requirements and all those things. Those matters require to be scrutinised closely to ensure parity.

Roz McCall: That is interesting. Does the same sort of thing apply when it comes to tenants being allowed to give oral notice? Should there be parity there, or is there still a need for flexibility?

Dr Brown: There is a conflict between the need for the preservation of some kind of audit trail and the need for flexibility in that area. On balance, I can see policy arguments for both. The preservation of an audit trail is extremely important but, given that a lease is a private arrangement, the ability of the parties to do as they will with it is important, too.

I would say that this is probably one of the most small-p political parts of the bill. It is a question of policy. For that reason, I will offer that view and go no further than that. The question of which policy is to be preferred is one of expediency.

Dr Skilling: On the one hand, I can see oral notice by tenants working in situations where the landlord and tenant have good relationships but, where that later degrades, that is a problem. Also, with leases involving family businesses, where the older generation might lease premises to the younger generation, they might fall out later, with those sorts of things cataclysming into long-running litigation, which might cause additional problems.

Roz McCall: That is great—thank you.

Jeremy Balfour (Lothian) (Con): Good morning, and thank you for coming. My apologies for being late—I was in another committee trying to make law, unsuccessfully.

What is your position on the criticism that section 28 allows tenants to withhold payment if the landlord fails to notify them of their UK address? That is about those who have different addresses.

Dr Skilling: My note on section 28(3) reads, "This does seem a bit much," which echoes the

view that has been taken by some others. The mistake that results in tenants' ability to withhold rent will, in many cases, be a relatively minor one, as opposed to an act of deliberate malice on the part of the landlord. There are plenty of examples across the leasing spectrum of cases where a tenant is entitled to withhold rent because of actions by the landlord that have severe consequences—for example, a failure to maintain repairing obligations—but what we are talking about in this instance does not seem to be on the same scale as errors, mistakes or, in some cases, negligence of that kind.

Dr Brown: The right of retention, or the like, is born of the fact that a lease is a contractual arrangement. Where there is a breach of contract, the general principle is that any damages that are claimed should be tied to the loss that is suffered as a result of the breach. Therefore, exactly as Dr Skilling indicated, if a landlord is not meeting their repairing obligations, the tenant is obviously going to suffer some kind of loss as a result, so withholding rent payment seems logical in that situation. However, in the situation that you described, I envisage that an administrative failure will have taken place, so I do not see what sort of loss the tenant would have suffered that would justify their retaining payment.

Dr Skilling: There might also be situations in which, in the bill's current form, oral notice could be given without penalty, but written notice—which should arguably be preferred because it leaves a better evidence trail—is penalised because of a comparatively minor mistake.

Jeremy Balfour: Okay. That is helpful.

We have heard some criticism about section 30(3), which says that landlords should serve an irritancy notice to a tenant's creditor. What is your position is on whether section 30(3) works for landlords and tenants?

Dr Skilling: A lot of responses to the consultation gave an example scenario in which the landlord is unaware that there is a heritable creditor, and the responses went on to describe the effect of that on the use of the irritancy provisions. There may be situations where it is beneficial for a tenant to withhold information about a creditor, either because they do not perceive it being a major, long-running issue or because they do not want it to be connected to the lease in some way.

Dr Brown: Again, when we are dealing with transactions of this nature, I do not think that there are grounds for intervening so as to actively attempt to guard the interests of one party vis-à-vis the other.

Jeremy Balfour: What is your view of the argument that the transitional provisions of the bill could lead to uncertainty? Do they need to be altered, removed or strengthened?

Dr Brown: It is probably worth repeating that, given that a lease is principally a contract and the parties to that agreement will have entered into it with certain expectations, we have to functionally presume that the parties are aware of the law as it stands. Anything that purports to change the law and have any sort of retrospective effect is a very bad idea.

On the transitional provisions, yes, any change in the law is going to generate uncertainty. Particularly when there are provisions such as these, although litigation is perhaps not inevitable, a degree of uncertainty and negotiation will be unavoidable.

Dr Skilling: Worked examples would be particularly helpful for understanding how the transitional provisions work.

Jeremy Balfour: I have one further question. If you covered this before I arrived, I apologise. We heard from the Faculty of Advocates last week, as you probably have, and ultimately, its view was that the bill should not proceed and that we should go back and rethink it. That was not necessarily the view of the Law Society of Scotland or those in practice. From an academic perspective, should we proceed with the bill, or are you of the view that the Government should go away and think again?

Dr Brown: We have answered that in a hybrid fashion. I do not mean to speak for you, Dr Skilling—please correct me if I am wrong about your assessment—but we both have a view that reform is worth doing if it is going to be done well. However, as it stands, our position on this bill is that the Government should think again.

Dr Skilling: The general position in academia is to try not to create divisions where divisions should not exist. There are many things that we are very happy to argue with each other about, but the creation of unnecessary arguments is something that should be avoided.

Jeremy Balfour: Can I just push you slightly on that? I am not questioning what you are saying, but are you arguing that, with lots of amendments at stages 2 and 3, the bill could be made to work, or are you saying that it is so flawed that, even with all those amendments, it would not be good law, and we should just vote it down and go away and think again? Can you clarify that for me, please?

Dr Skilling: My opinion is that, if we were able to hold the mirror up to the existing provisions of tacit relocation and simply restate them and make it absolutely clear that they applied in a commercial context, that would be the way to go,

instead of playing judicial "Spot the difference" between two similar but legally different concepts.

Dr Brown: Yes. I do not think that we need go so far as to say, "Throw it out." If this is what it is going to be, then, yes, throw it out and vote it down, but it is possible for the bill to be reworked into something that is consistent with the position at the moment and which will allow for principles that exist, and have existed for hundreds of years, to be stated quite clearly in an easy-to-find place. It is worth doing that, but it will involve a significant rethink of what is in front of us.

Dr Skilling: For me, what the bill really does is bring up the common theme, in leasing legislation in particular, of the educational gap between particular stakeholders in the sector. You will see this sort of thing in the residential sector, and in the commercial sector with small businesses, but not in, for example, the responses that you have received from NFU Scotland or Gillespie Macandrew. It highlights that, in certain sectors, the law of tacit relocation is certainly well known. Obviously, both of us could talk about tacit relocation for hours, but we represent very specific subclasses of people. It is the narrowing of that educational gap that is, I think, the biggest problem in understanding modern 21st century leasing.

Jeremy Balfour: I will leave it there, convener.

The Convener: I think that the phrase that was used earlier by the two panellists was that the bill required substantial change.

Roz McCall: I want to ask about a pet issue of mine—the view that the bill should be amended to repeal the Tenancy of Shops (Scotland) Act 1949. I would be really interested to know what you think about that.

Dr Brown: I should say that I am not going to speak for Mr Combe. We made a joint submission, and in doing so, we kind of thought, "Well, maybe this issue needs its own attention." I would not presume to think that his views on the matter have changed as mine have, but my views are, I think, quite different from what they were, now that I have been thinking about it.

The observation that I would make is that the last time that the Scottish Law Commission produced a report that did not include a draft bill was, I believe, in 2001, with its report on diligence. Even then, it reaffirmed its commitment to including, in so far as possible, a draft bill with any report that it produced. It is worth observing that, when it produced the report on the 1949 act, the commission, which is committed to codification and the production of draft bills, looked at the matter and, instead of saying, "Okay, here's a draft bill to solve the problem" concluded, "No—let's just get rid of this." That is a highly significant observation, and it leads me to the view that a lot of the difficulties in this area have been caused by legislative intervention rather than the common law.

Given that, and recognising that the world now is different from what it was in 1949 or 1964, I would say that the mischief that the 1949 act was designed to remedy is not necessarily there any more. Provided that it is made sufficiently clear that this is going on and that that view is promulgated, I do not see any issue with repealing that piece of legislation. As for reworking this particular bill, it might be a bit odd for it to have a provision to deal with the matter, but given that we have this legislative opportunity, I see no difficulty with doing that.

Dr Skilling: That is also the view that I have taken. I am of two minds that are secretly one mind, and both of them are in favour of the repeal of the 1949 act, mostly for the reasons stated by Dr Brown, but I also do not want the repeal of it to come with a lacuna in the discussion of what, if anything, should replace it.

Roz McCall: That is interesting. I have no more questions.

10:30

Bill Kidd: On an awareness-raising campaign, from what you have said and what we have uncovered, as it stands, the bill will affect an awful lot of people who are unaware. Perhaps some of them should be aware, but a lot of people who do not have any legal background whatsoever will not be aware of the outcomes of what is being talked about. This might sound like a strange thing to say, but should the Scottish Government carry out an awareness-raising campaign to ensure that the many affected people will fully understand the impact of the bill? Should such a campaign be conducted and how do you think that could best be done?

Dr Skilling: Yes, absolutely. An awareness-raising campaign is a good thing to have in these circumstances. Leasing especially would benefit from that, simply because a lot of the time it is viewed as a relationship, but not as a legal relationship until something goes wrong.

Dr Brown: I completely agree, but my view goes slightly further. Even if the bill goes nowhere, an awareness-raising campaign would be incredibly useful. Exactly as Dr Skilling said, people go through life entering into legal transactions every day without thinking that that is what they are doing. One of the key points in teaching the law of voluntary obligations that I always reiterate is to tell people who have a can of Coke in front of them—I am not telling them off, because they are not meant to be drinking it in a

lecture hall—that if they bought it today, they have entered into a contract, which is a legally binding relationship.

Whether the bill is passed, or whether it is substantially reworked, an awareness-raising campaign is absolutely necessary. There is a perception that the law is not working in a great many areas, but the law is actually fine; the issue is that people do not know what it is.

What form a campaign could take is a very good question. For example, I know that, for a good many years, Professors Gretton and Reid at the University of Edinburgh offered their conveyancing roadshow to solicitors and the like in continuing professional development seminars. The universities have a part to play in that. If academics such as Dr Skilling and I were to engage in outreach not merely to practitioners of law but to tenants and landlords, that could be useful.

As with many things, the issue comes down to money. Someone has to pay for that sort of thing. If there were any kind of appetite for an awareness-raising campaign that would extend to financial support, the skills to run it are there.

Dr Skilling: One of the most important audiences, especially here, are people who are thinking of starting a business for the first time, and small businesses in particular. It must not be overlooked that many people who want to start a business go to organisations such as Business Gateway, which operates in Aberdeen and is one of the biggest such organisations that I can think of. If it is installed at a foundational level, some kind of educational framework, working with organisations such as those, and giving people that toolkit when they are starting their business career and starting to think about leasing premises, will be of far greater effectiveness.

Dr Brown: That comes back to a drum that I never stop beating, which is the need to look at these things holistically. That sort of awareness-raising campaign could be integrated into other means of supporting small business owners and those who are thinking of becoming small business owners.

Dr Skilling: That also goes to interdisciplinary work in universities, especially through talking to our business schools.

Dr Brown: Absolutely.

Bill Kidd: So, should there be an awareness-raising campaign—as you both believe that there should be—that could, rightly, lead to an educational input that is missing at the moment, never mind in the future, in the existing circumstance of people who start businesses and the people who deal with them, such as those who own land and property and so on.

The Convener: I will follow up Bill Kidd's question. Dr Brown, a few moments ago, you said—I jotted it down, but the *Official Report* will give me the full wording—something along the lines of there being a perception that the law is not working: the law is fine, but some people do not know what it actually is. Do you have any indication as to what the level of that perception is and how many practitioners do not know the law?

Dr Brown: To clarify that, I did not mean that legal practitioners do not know what the law is. My assessment is that legal practitioners absolutely know what the law is; if they do not, that is a problem for the Law Society of Scotland to take up with them because they are not competent to do the job. Legal practitioners understand clearly what the law on tacit relocation is.

The perception that the law is not working comes not from the profession—which, broadly, says that it knows what the law is and that it works quite well—but, more likely, from those who are not lawyers. The law is a skilled profession that involves specialist knowledge. If you are not trained in that, you do not have that knowledge. When I say that there is a perception that the law is not understood, I have in mind business owners who do not have access to legal advice. If they sought and obtained access to legal advice, the issue would not happen. However, as we well know, not every business that enters into a contract of lease will have sought legal advice in the construction of that contract.

Dr Skilling: That goes back to the point that we raised about the increasing number of party litigants before court disputes in Scotland. When I am not teaching at Aberdeen, my other hat is legal journalism—I write the case reports for *Scottish Legal News.* With increasing frequency, cases pass across my desk in which, generally speaking, the claimant is represented by themselves rather than through legal representation. The need for people outside the legal profession to gain and increase knowledge of legal rights becomes more pressing with each passing year.

The Convener: That is helpful. Thank you.

Do you have any further comments about the bill that you would like to put on record, or about any arguments that were made in response to the committee's call for views during last week's evidence session?

Dr Skilling: The last thing that I have written down echoes the submissions that were made about clarifying the application of the provisions to unincorporated associations and trusts in addition to bodies corporate. I leave it at that.

Dr Brown: I reiterate that, if the bill is to go forward, the language of tacit relocation and ish should be retained, for the reasons that I highlighted at the beginning of the session.

The Convener: As colleagues have no final questions, I thank you both for your evidence this morning. It has certainly been thought provoking and interesting.

With that, I briefly suspend the meeting to allow witnesses to change over and a five-minute comfort break.

10:39

Meeting suspended.

10:46

On resuming—

The Convener: I welcome to the meeting our second panel: Alan Cook, chair, commercial real estate committee, Scottish Property Federation; and Stacey Dingwall, head of policy and external affairs, Federation of Small Businesses Scotland. I should, first of all, make you both aware of the fact that you do not need to switch on your microphone—that will be done for you. Please raise your hand or indicate to the clerks if you want to come in on a question. You do not have to answer if you do not feel that the subject is for you.

Does the law on tacit relocation need reforming? If so, can you give some examples of the practical problems for landlords and tenants that are caused by the current law?

Stacey Dingwall (Federation of Small Businesses Scotland): Thank you for inviting me along to speak today.

In developing our written response to the call for views on the bill, we spoke to quite a few of our small business members. Given that, overall, we represent tens of thousands of small businesses across Scotland, we will never get complete agreement on any topic, not least commercial leases, but on balance, small businesses acknowledged the bill and welcomed its attempt to modernise some of the legislation in this area.

Alan Cook (Scottish Property Federation): Similarly, the Scottish Property Federation membership has generally welcomed the bill and the idea that the law should be modernised.

Our perspective on this is that we support codification—that is, bringing everything into one place instead of having various bits of legislation, as is the case at the moment. Is it the best position to be in to need case law in order to understand something? We also support modernising aspects of the law, such as changing the notice period from 40 days to something more representative that brings it more in line with the way in which modern business, and modern society, work.

In a couple of different respects, then, we support the idea of the bill and the modernisation agenda behind it.

The Convener: You will have heard the evidence in the previous session from the two academics, who felt that the bill will require substantial change if it proceeds and that elements of it are not clear. As currently drafted, is the bill clear, or does it, as we have heard this morning, need to be substantially changed?

Alan Cook: We are broadly content with the bill as it stands. Its intention is not to have a fundamental root-and-branch reform of the approach to tacit relocation and automatic continuation of leases, but to evolve and codify that approach. If you tried to use the bill as an opportunity to target specific aspects of the law of tacit relocation and to make those specific changes, all you would be doing is adding yet another overlay to an existing set of rules that already has a number of overlays. I do not think that that would make the law clearer.

We are also supportive of the idea that the terminology should be updated to something more modern. I happen to be a solicitor, and I have great respect for the traditions and terminology of Scots law, but I am here on behalf of the Scottish Property Federation, which generally represents investors in property—owners and landlords—and wants to see a set of rules that are clear and understood. We think that the purposes behind the bill mean that it will be a good step towards achieving that, and we are supportive of that.

Stacey Dingwall: I agree with a lot of that. The main thing for us is that the bill seems to seek to make the process clearer and fairer for small businesses or for people entering into leases. When we speak to our members, they often tell us something that was touched on by the previous panel, which is that, when they take on premises, they have to do a mixture of things. They think about what they have to do to, say, fit out the premises and get customers, and they might not spend as much time as they should on understanding the legal aspects of what they are signing up to.

They might not have the means to engage a lawyer because, as we all know, setting up a small business and getting premises is an expensive process, and that would be just another expense for a small business owner. Anything that can give small businesses a better understanding of what they are entering into would be welcome.

In 2018, the Scottish Law Commission's discussion paper on this area of legislation noted that

"Many other countries across the world recognise the concept of tacit relocation, but most do so on the basis of positive action of a party, while Scots law operates through an act of omission."

We think that it would be good to address that issue. When small business owners get into negotiating a lease, there might be an automatic rollover at the end of the lease or a set notice period, and we think that it would be good if there were more discussion and understanding of what small businesses were getting themselves into, rather than a lease just being signed quickly.

The Convener: Do you believe that there is a power imbalance between landlords and tenants, or between large and small businesses? If so, do the provisions in the bill address that issue?

Stacey Dingwall: It is certainly our experience that there is a power imbalance in such situations. In recent years, we have seen small businesses taking on energy contracts while prices are rising, but their ability to negotiate those contracts is pretty much the same as that of a domestic consumer. The Consumer Scotland Act 2020 gave that body a specific remit to look at small businesses as well as individual consumers, which reflects the situation that small businesses find themselves in. They lack bargaining power when they take on a tenancy.

Alan Cook: I agree that there can be an imbalance between the interests of landlords and tenants, just as there is between the interests of big and small businesses.

That imbalance can be different in different circumstances. For example, there could well be cases in which the tenant has power over the landlord. We are all aware of the challenge of high streets having lots of empty units; if you are a landlord in such a high street and a potential tenant comes along looking to take a lease, the tenant has the whip hand in negotiations. Equally, if an individual wants to lease out some property that they own and there is a national retailer that is extremely powerful and well represented, the owner will be keen to get them as a tenant.

Again, there is a power imbalance, but it is not always the case that the landlord has the whip hand with regard to the tenant. In that regard, we are looking for a balanced approach—which we think that the bill offers—because neither party should be enabled to have the whip hand as a result of the regime that we have.

The Convener: The general approach to the bill has generated a fair amount of discussion. Obviously, you will have heard the previous evidence session, and we had an evidence session last week, too. Is the general approach to reform in the bill the right one for landlords and tenants, or would it be more appropriate to, say, abolish tacit relocation?

Alan Cook: The bill is not seeking some huge revolution in the approach to this matter, and we are supportive of that. Completely abolishing tacit relocation will only lead to lots of examples of uncertainty, because it is very often the case that parties—more often tenants, I would agree, but landlords, too—are not aware of what the law is.

However, it is also the case that, when a lease is coming to an end, the parties will sometimes act in a more acquiescent manner. The whole point about tacit relocation is that it recognises that it might suit both parties for the lease to roll on, even though the contractual period of the lease has come to an end.

The law in that respect exists to recognise that that is something that can happen, and our view is that you still need a regime that allows for that pattern of activity to be recognised legally. Tenants do not want to find themselves, suddenly and unexpectedly, at risk of being ejected from the premises that they think that they are continuing to trade from, and landlords want to know that they can continue to recover rent in an orderly manner while the tenant continues to trade from the premises. Therefore, it is appropriate to have a regime that recognises the idea of automatic continuation of leases.

Stacey Dingwall: No, we would not support the total abolition of tacit relocation. Instead, we would like it to be made mandatory that, when the lease is agreed, the parties have to agree what will happen at the lease end date—that is, whether people are happy to opt in to an automatic rollover or whether they want to specify a notice period. We would leave that option open, because, as Alan Cook has said, there are situations when automatic continuation is desirable for both parties.

The Convener: The FSB Scotland submission touches on that. Would you want it to be mandatory to set out what happens when you get to the lease end date, or would other language be used that would not make that mandatory?

Stacey Dingwall: We would like it to be mandatory to have an agreement about what happens at the end of the initial lease period.

The Convener: What impact will the proposed reforms have on the economy and on businesses in general? We have had SLC bills before, and a key element of them has been to update the law to make specific parts of it better in relation to economic opportunity. Obviously, that is what you are doing for Scotland's economy—and thank you

very much for that—but will the bill help in that respect?

Stacey Dingwall: I hope that it will offer more stability for small businesses. We have heard about worst-case scenarios of small businesses being given days' notice to vacate premises. In the case of licence-based businesses, a very short notice period might lead them to decide not to move to new premises and to simply wind up the business, because it takes quite a long time to move to and get a licence for new premises. I hope that having a fair and clear process and a specified notice period would mean less risk of a business going under as a result of having to vacate their premises.

11:00

Alan Cook: I generally agree with that. As I have said, the bill's intention is not to revolutionise the approach being taken. It is more of a law-updating process, rather than an upending of the relationship between landlords and tenants.

I agree, for example, with changing the notice period from 40 days. It is the general view, I believe, that 40 days is not long enough for landlords and tenants to react to what should happen at the end of the lease. Extending that period would be a positive thing, and it would reflect the more complex nature of business both for landlords and for tenants.

In our submission, we say that there should be more flexibility in the length of the notice period to give parties the ability to vary the period from three months, if that was felt appropriate. An example of that is, as Stacey Dingwall has highlighted, where business tenants require to have other licences to be able to trade from a premises. Pharmacies are a good example of that; they need to be able to organise themselves. The ability of the parties, when the lease is being written, to recognise that and to specify that longer notice periods have to be given will be helpful from an economic perspective.

Roz McCall: Good morning. What are your views on part 1 of the bill, which defines the leases to which the legislation will apply? That is for Stacey Dingwall first.

Stacey Dingwall: What is that in terms of?

Roz McCall: Part 1 sets out where it would be applied. I am wondering whether you have any views on that.

Stacey Dingwall: I do not think that we had any views on that in our written submission.

Roz McCall: That is fine—thank you. Alan, do you have any views?

Alan Cook: We generally agree with that approach.

I seem to recall that the bill's provisions on tacit relocation came out of a much wider study by the Scottish Law Commission on how leases might terminate, and they are just one part of that. There was disagreement among the different sectors of the economy about what the right approach to that should be. For example, agricultural leases are a totally different kettle of fish from leases of a high street retail unit.

In updating the law in respect of regular commercial premises, the bill leaves such things as agricultural and residential leases alone, and we support that. They have their own regimes and totally different drivers behind them. In this bill we should focus on a sector that can be ring fenced from those other ones, which have their own sensitivities.

Roz McCall: Should the bill apply equally to premises covered by the electronic communications code, electricity substations and that sort of thing? Do you see those similarly to how you see rural matters, or should this law apply to them?

Alan Cook: I have seen reference to the electronic communications code and telecoms leases. Our membership does not have a specific view on that, other than what I have noted. I can see the point that some people are making that those leases also have their own regime and that the notice-to-quit process is an additional overlay on that.

In respect of other leases, such as substation or energy leases, I would say that the parties to those leases would be able—leaving aside the way that transitional arrangements might work—to agree what their own arrangements would be. The bill would give them the ability to contract in or to contract out, or, as we have proposed, it would give them the flexibility to adjust the notice periods. With that flexibility being given, we do not necessarily feel that there needs to be a particularly extensive set of carve-outs.

Roz McCall: That is interesting. Stacey, I do not want to force you to answer if it is not in your field, but I will give you the chance to answer the other part of that question, about substations. I do not know whether that would be something that your membership would be speaking about.

Stacey Dingwall: No, sorry. Unfortunately, that matter has not come up.

Roz McCall: I did not want to not give you the opportunity to answer the question, if you wanted to. That is all, convener.

The Convener: No problem. I call Bill Kidd.

Bill Kidd: Thank you both very much for being here. It has ben argued that there is too much ambiguity in the drafting of the new statutory code in sections 2 to 7 of the bill. I put this question to a previous panel. Should section 5 be amended so that the term "reasonable period" is replaced with a number of days, such as 30 days? Is the term "reasonable period" open to different interpretations and too ambiguous? Should the wording be more specific? Does that matter at all?

Alan Cook: Yes, we have concerns about that. There is some uncertainty about the reference to "reasonable period" and the reference to whether the landlord has taken steps

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

It is bit unclear as to what someone could or could not do in order to meet that test.

As far as the term "reasonable period" is concerned, we do not have a hard alternative proposal to make that would suit our membership, other than to say that we would agree that something that is a bit more definite would be helpful. It might be that there could be a baseline that you can move away from in a particular situation. More guidance on that part of the legislation would be helpful.

On the reference to not taking reasonable steps to remove the tenant, we said in our submission to the call for views that more guidance on that would be helpful. For example, does that mean that a landlord would have to launch court action? Would writing a letter be enough? Would doing something more than just being completely silent enough? Guidance on that would be helpful, because we can see the scope for argument and dispute arising from that.

Stacey Dingwall: Yes, definitely. What are the parameters of a "reasonable period"? Your understanding of a reasonable period could be very different from mine.

When we spoke to our members about the bill and the Tenancy of Shops Act (Scotland) 1949, they were very clear that they would require, as an absolute minimum, a three-month notice period. That is what they would see as reasonable.

Alan Cook mentioned court action. Court action was the absolute worst thing that small businesses could see having to enter into. Some of them said that it would be absolutely catastrophic for their business if they had to engage in court action.

On section 5, although we might not need to specify 30 days, as you mentioned, we would need to establish parameters as to what a reasonable period would be.

Bill Kidd: Those points are useful, because we were wondering whether the new rules on giving notice could sometimes be difficult for people. I would imagine that SPF and FSB members can be guided towards reasonable or decent legal advice, but there will be those who do not have access to that. Will the new rules be more difficult for them to follow than the present rules or will it be the same for them?

Alan Cook: I do not see them as being any more difficult to follow. It is correct to recognise that there is a whole swathe of landlords and tenants who do not ordinarily take legal advice or are aware of what the law is. A lot of them, particularly tenants, are not represented when small leases are entered into.

As a landlord representative body, we are very aware of that. Landlords are not here to try to exploit people. However, if you are not aware of the current law on tacit relocation, it is just as likely that you will not be aware of the law on automatic continuation of leases. Yes, you can have education campaigns, but that will only ever take you so far. That is why it is important for the law to have applicable default arrangements that are reasonable, balanced approaches in circumstances in which people do not realise that there are things that they could or should not be doing as the lease is coming to an end.

The law on tacit relocation gives a default that is seen as a fair and balanced thing to do when people do not realise that there are things that they might otherwise positively do. The bill takes a similar approach, so I do not see the bill as disturbing in that regard. I do not think that it will make much difference. In itself, it is not going to educate people.

Bill Kidd: I do not want to cause any contentious disagreement between you, but will you give your views on the argument that the rules on giving notice should be the same for tenants and landlords, which contrasts with the approach that is taken in the bill? Should both sides—if I can put it in that way—have the same rules and just work with those? That might make things easier for people to understand.

Stacey Dingwall: I should say that our membership is broad and the FSB represents small landlords as well, so we are not on completely opposing sides in that regard.

We considered that as part of our submission. Our understanding is that section 3 of the bill would prevent parties from having the flexibility to negotiate a clause where the landlord would be required to provide a longer notice period than the tenant. In practice, scenarios in which that would be negotiated might be few and far between but, on balance, given our understanding that the bill is

geared towards providing greater protection for tenants, our recommendation is that the bill be amended to offer that flexibility and, therefore, protection for small business owners.

We are aware of the situation in England and Wales, where, if the parties have not contracted out of the Landlord and Tenant Act 1954, the requirement is that the landlord must give six months' notice of whether they oppose renewal expiry and the tenant must give three months' notice of whether they wish to renew. Given that that is the situation in England, where there is the ability to have different notice periods, we would support the same situation in Scotland.

Alan Cook: I have a broadly similar view. The bill is a bit rigid on the notice that is to be given by either party. We support more flexibility on that. We are also cognisant of the fact that the preponderance of power is perhaps in favour of the landlord. As I have said, that is by no means always the case, but we suggest in our submission that there should be more flexibility whereby the parties could agree in the contract—the lease—that different notice periods will apply.

We are content to propose that the tenant's notice period may never be shorter than the landlord's one, so that the tenant does not have to give more notice than the landlord. Tenants need to understand where they stand, but adequate notice would still be given on both sides.

Bill Kidd: What do you think about tenants being able to give oral notice where there is a lease term of less than a year? That proposal has been challenged to some degree by the legal profession, which says that it could create evidential difficulties should there be disagreements and so on. Would oral notice be sufficient or is written notice the direction that we should go in?

Stacey Dingwall: It is reasonable to expect an e-mail as a minimum. It does not have to be handwritten notice; I think that an e-mail would suffice.

Bill Kidd: Does that apply regardless of whether the lease is for one year or 10 years?

Stacey Dingwall: Yes. For everyone's certainty and understanding, it is good practice that something is documented in writing.

Bill Kidd: Alan, do you agree?

11:15

Alan Cook: Yes, we are of a similar view. We are not comfortable with the idea that notice could be oral for a shorter lease. You can imagine a scenario in which a conversation takes place between landlord and tenant in which the tenant says, perhaps in a fairly informal way, "Oh, my intention is to leave," after which the conversation moves on. Should the landlord treat that as notice of intention to leave, or was it just a conversation? Those are grounds for a dispute. We are not comfortable with the uncertainty that that creates.

Bill Kidd: That is helpful. Thank you both.

Jeremy Balfour: Good morning. Thank you for coming along and for your evidence. I will ask similar questions to those that I asked the first panel—again, if you do not have a view, that is absolutely fine.

What is your position, if you have one, on the criticism that has been made in response to the call for views on section 28 of the bill, which would allow tenants to withhold payment if a landlord fails to notify them of their UK address?

Alan Cook: We think that that is disproportionate to the situation at hand. It is recognised that, if a landlord is not in the UK, it is helpful for there to be an address in the UK that can be used for notices. However, the bill still gives some guidance to the tenants as to what they can do to serve a notice: ultimately, they can serve a notice to the court instead of the landlord.

If a landlord has not complied with the requirement to provide an address to service in the UK, hell mend them. The risk that they run is that they do not find out what the tenant says is to happen at the end of the lease. That is a big risk to run and is in itself a sufficient stick, if you like, with which to beat the landlord—rather than have the additional move of withholding rent, which is not appropriate but disproportionate.

Jeremy Balfour: Stacey, have you anything to add?

Stacey Dingwall: It is not just about the ability to give notice to a landlord. Not being able to get a hold of a landlord can be a common issue for small businesses, not just when it comes to exiting a tenancy. That is also why—to go back to my earlier point—it is important to have an agreement up front as to what will happen at the end of the initial lease period.

Jeremy Balfour: What is your position on the criticism in response to the call for views on section 30(3), which requires landlords to serve irritancy notices to a tenant's heritable creditor?

Alan Cook: We have no particular concern with that. It does not feel that much different from the reality of how most leases work these days whereby, if the lease is a long one on which the tenant is able to grant a standard security over its lease interest, and a creditor might therefore be in place, it is normal for there to be provisions in the lease that require such notice.

Landlords are comfortable with that scenario. A landlord or a solicitor goes through careful steps to make sure that the notice that they are serving is the correct one. One step would winkle out whether there was a standard security over the tenant's interest—and therefore somebody to whom notice needed to be given.

From the perspective of the bank or the security holder, it is appropriate that they should be aware of what is happening to the lease, which is the asset over which they hold security. We do not have a particular concern with that approach.

Jeremy Balfour: The Law Society has gone a step further, saying that the tenant should have to give notice to the landlord if there is a heritable security over the property. Do you agree with that position?

Alan Cook: From a landlord's perspective, it is helpful to get that notice. If they do not get it, there are still ways in which they could find out about a security: for example, they could do a search on the Registers of Scotland. Doing such a search is a step that a prudent landlord and their solicitors would undertake before they served a notice, so that they would know that they were serving it to the right people. Awareness of a security, and for the tenant to notify them that a security has been granted, is certainly helpful from a landlord's perspective.

Jeremy Balfour: Stacey, do you have anything to add?

Stacey Dingwall: I have no views on that.

Jeremy Balfour: I have a final question. What is your view on the arguments made that the transitional provisions will lead to uncertainty for partners in a lease during a transition period? Do you have any views on that?

Alan Cook: Our members do not have a particular settled view on the transitional arrangements. I am in two minds about them. On one hand, in some ways, rolling over existing leases into the new regime so that the new regime applies to them is a cleaner approach if you take the view that the law is not a revolution that seeks to completely alter the economic and commercial arrangements of landlords and tenants. On the other hand, I can see the point that a lease is a contract framed between the parties in the context of the law as it was understood at the time. If new laws that had not previously applied are imposed on that arrangement, the parties will not have the opportunity to take them into account.

We do not have a settled position on that question, other than to agree that it is not straightforward. That is probably not a very helpful view to have.

Jeremy Balfour: All the views are helpful. What about you, Stacey?

Stacey Dingwall: It is not something that we have discussed with our members.

The Convener: I will go back to Jeremy Balfour's first question about landlords' UK addresses. Does it matter whether the address is for an agent acting on behalf of the landlord? Are you content with that?

Stacey Dingwall: It is pretty common practice for an agent to be a point of contact. It is helpful.

Alan Cook: We would agree with that. Almost by definition, if the landlord is outside the UK, the address in the UK will be for somebody who is acting on their behalf, not for them. It seems to me that it will always be an agent of some sort.

The Convener: Earlier, Stacey Dingwall indicated that there are occasions on which small business owners find it difficult to engage with and talk to their landlord. In the context of this part of the bill, would it be problematic if the address were for an agent in contrast to the landlord, or would that not matter?

Stacey Dingwall: My understanding is that the agent would have the right to make commitments and negotiate on behalf of the landlord, so I do not think that that would be an issue.

Alan Cook: There is a distinction between being able to have negotiations and conversation with somebody who is outside the UK—which could still be done—and having a place in the UK to which notices can be served for legal purposes. It is the latter that the bill is talking about. It does not change the fact that someone may still have a phone number or an email address. Although those might not be the correct medium for serving notices, they are still a line of communication. There is still potential for communication.

The Convener: Thank you. Roz McCall has questions.

Roz McCall: Yes—it is back to me. The Tenancy of Shops (Scotland) Act 1949 might fall more within your wheelhouse than my other questions did. Does your organisation have any experience of how the rules that are set out in the 1949 act work in practice?

Stacey Dingwall: We engaged with our members on the discussion paper that the Scottish Law Commission published last summer. We were also grateful that the commission hosted a roundtable to discuss the paper with our members, which is where a lot of the comments from small businesses came from on how catastrophic it is to have to engage in court action.

That discussion is also where the notice period arguments originated. A lot of people were

pushing for a six-month minimum notice period. As we discussed, such a length is probably required for certain licence-bearing businesses. On balance, however, we settled for three months.

We have been reticent about repealing the 1949 act altogether without something being in place to deal with the issues that it might leave behind. It might be thought by some that we have completely dealt with some of the issues that we had in the past, such as the power imbalance between landlords and tenants. As I have said, we are finding that issues still exist, so we are reticent about repealing the 1949 act completely without something else acting as a backstop.

Alan Cook: We similarly engaged with the Scottish Law Commission on its 1949 act proposals. We support it being repealed, and we support such a proposal being brought into the bill. The act is not well known about or recognised in the landlord community and—I do not want to put words in Stacey Dingwall's mouth, as this might be the wrong thing to say—the tenant and retailer communities are also not really aware of it. If you tell somebody that they have a mechanism and ask if they want it to be removed, they will probably say no, but they might not have known about it in the first place.

From a landlord perspective, such cases end up in court in very few instances. The 1949 act tends to be used more by well-represented national retailer tenants as a negotiating chip against their landlord, rather than it being something that protects the rights of shop owners and retailers. I think that it was said in the previous session that the mischief that the act was designed to address just after the war is not really as relevant now, which I agree with.

It is the right time for the act to be abolished and for the regime that applies to shops to be same as the one that applies to anybody else.

Roz McCall: Thank you.

Stacey, you talked about there still being an imbalance between landlords and tenants. The assumption is that the act is primarily used by larger businesses, such as larger supermarkets, rather than smaller shops. Is the act working as intended? What imbalances are you seeing?

Stacey Dingwall: Alan Cook is right: we do not have scores of our members coming to us and saying, "We know our rights under the 1949 act." That is certainly not happening.

The discussion was last summer, and now the bill has been introduced. If the bill takes care of some of the minimum notice period issues and makes it mandatory to agree what happens at the end of an initial lease period, that will address some of our concerns about repealing the 1949 act.

It is absolutely right that the original act was brought in to address mischief, as people have called it, that is no longer widespread, but we are still seeing some incidences of mischief.

Roz McCall: Thank you for that. You have both given me your opinion on whether the act should be repealed. Has there been enough consultation on the proposal? Has there been enough engagement and understanding to justify slipping the repeal of the 1949 act into the bill? Are we in the right place for such a decision to be made?

Stacey Dingwall: It is difficult to say, because we find it quite challenging to engage with our members on what are mostly hypothetical situations. We are asking, "What would happen if this happened?" In the current times, our members are busy trying to keep their doors open and hoping that they still have doors to open. It is therefore challenging to engage them with something that is technical and legal in nature.

I mentioned the session that we held with the Scottish Law Commission, and we have certainly tried to speak to our members regarding the call for views. There have been many efforts, and I am content with our attempts to engage with them.

11:30

Roz McCall: My last question is about the issues that would arise as a result of pushing through a repeal of the Tenancy of Shops (Scotland) Act 1949 in this bill. You have stated that you would not like that act to be repealed. What issues would come from repealing it? I know that that is like asking how long a piece of string is, as you do not know exactly what would happen, but can you foresee any issues?

Stacey Dingwall: As I said, I would be a bit softer about repealing the 1949 act because of this bill, which will address some of our concerns. In the worst-case scenario, could repealing the act make some landlords withdraw from offering premises to small businesses, meaning that those businesses would have to move out? Anything that risks the stability of small businesses further endangers their relationships with their landlords. I talked about some cases in which landlords have been unscrupulous but, equally, there are as many members that have a great relationship with their landlord. Indeed, as I said, we represent some of those landlords. I do not want to tar all landlords with the same brush.

Roz McCall: Is there anything that other witnesses wish to add on this point?

Alan Cook: There have been years of engagement and consultation by the Scottish Law

Commission on what should happen to the 1949 act. That process has concluded at a convenient moment to allow the proposed measure to repeal the act to be brought into the bill at a later stage. It would not be something that will have come out of nowhere—I would not look at it in that way.

Roz McCall: I accept that—thank you very much.

The Convener: I have a question to ask before I bring in Bill Kidd.

Stacey Dingwall, a few moments ago, you said that you would be "reticent" about repealing the 1949 act and that, if that were to happen, you would need to have some type of backstop to deal with it. You also touched on how the bill will go some way to dealing with your concerns. Are there any other specific things that FSB Scotland would like to have in place if the repeal were to go ahead, whether that is in the bill or as a separate piece of legislation?

Stacey Dingwall: We would like there to be a move away from the 40-day notice period, which we have all agreed is not long enough. There should be a move towards positive action with regard to agreeing what happens at the end of an initial lease. That is the key thing for us.

Bill Kidd: You were both in the room when I asked the two academic witnesses on the earlier panel for their views on the arguments and responses to the call for views that suggested that the Scottish Government should carry out an awareness-raising campaign. The two doctors were of the opinion that this is an educational situation in which people need to learn more about their rights and be aware of them, so that they do not find themselves in difficult circumstances so often. People would then be prepared for anything that took place that was not necessarily what they had been looking for.

On that basis, to make sure that landlords and tenants are aware of all the new and different aspects of the policy that will be coming towards them, should there be an awareness-raising campaign on the suggestions and proposals that are in the legislation?

Stacey Dingwall: Yes, I am always a fan of disseminating information. The main thing to think about is what the right vehicle for that would be. With all due respect, information from the Government does not perhaps land with our members in the way it does if it comes from us. That might be to do with engagement or understanding, and I guess that that is a big reason why membership bodies exist.

I liked the point that one of the earlier witnesses made about people going to Business Gateway when starting up a small business and having a package of what they need to know. That is a very good point. Our position is that an awareness campaign on what goes into starting a small business and all the things that you need to be aware of should be incorporated into vocational courses in further education. There should be a module on what it is like to run a small business and on the things that you might need to do—joining the FSB being one of them, obviously. That is helpful for the basics, such as places to go for help. As someone mentioned, if you are part of the FSB, you have access to a legal helpline.

An awareness campaign on the fact that the law has changed would probably be good. A lot of people, unless they were right in the middle of a dispute with their landlord, would probably just ignore it and focus on getting on with the day job, but it might plant a seed so that, if they run into issues in the future, they know that there is something to help them.

Bill Kidd: As well as the education aspect, which everyone seems to agree is extremely important, would it be useful for the Scottish Government to bring on board FSB Scotland to talk through the bill and to develop knowledge among those who are most likely to be affected by it?

Stacey Dingwall: Yes, there are certainly many examples of that approach working well in the past. I would support it for this bill, as well.

Alan Cook: I agree with everything that has been said. We always want people to know where they stand and to have awareness of the law and of the impact that it has on how a business needs to operate commercially, including how it should operate when its business leases are coming to an end or when a landlord's lease is coming to an end.

The bill will make some changes. For example, if you happen to be somebody who knows what the law of tacit relocation is, you will have that 40 days' notice period in your mind, yet the bill will require a longer period. We would not want people on any side of the table to be tripped up by that. We support the longer period, but a transition phase is needed to guide people through.

The best way for outreach to happen is through organisations such as the FSB and other member organisations that have a direct connection to the people you are trying to approach. A targeted information campaign would be helpful and supported.

Bill Kidd: Thank you both very much. It is helpful to have witness panels 1 and 2 going in the same direction.

The Convener: Are there any other points or comments about the bill that witnesses would like

to put on the record? We had the earlier evidence session this morning, and we heard from two panels of witnesses last week. Are there any particular points that you would like to pick up on from any of them?

Alan Cook: I have nothing else to add. I commend our written response to you, but there is nothing else that I want to emphasise today.

Stacey Dingwall: Similarly, I have nothing to add.

The Convener: As colleagues have no final questions, I thank you for your evidence this morning. Once again, it has been very helpful and thought provoking. It will certainly help us as we continue our deliberations, with the minister in front of us in a couple of weeks' time. If there are any particular points to make after today, please send them to us in writing—that would be helpful.

That concludes the public part of the meeting. I move the committee into private.

11:39

Meeting continued in private until 12:05.

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