

RESPONSE FORM

DISCUSSION PAPER ON ASPECTS OF LEASES: TENANCY OF SHOPS (SCOTLAND) ACT 1949

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**List of Questions**

1. Do you have experience or knowledge of the 1949 Act assisting negotiations concerning renewal on behalf of a tenant, including a national or international retailer, whose business was not threatened with closure owing to the end of the lease? If so, what, if any, was the effect of the Act on the negotiations and their outcome?

(Paragraph 3.78)

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| **Comments on Question 1**  «InsertTextHere» |

2. Should an unamended 1949 Act remain part of the law? If so, why?

(Paragraph 3.82)

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| **Comments on Question 2**  «InsertTextHere» |

3. Is there presently a shortage of premises to let for listed businesses? If so, for which type of business? Do you expect this to change in the coming years (and if so, why)?

(Paragraph 4.5)

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| **Comments on Question 3**  «InsertTextHere» |

4. What are your views on rent levels for such premises? Do you expect these levels to change in the coming years (and if so, why)?

(Paragraph 4.5)

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| **Comments on Question 4**  «InsertTextHere» |

5. Do you consider that listed businesses are more vulnerable than other commercial tenants to closure or devaluation at the end of a lease owing to the loss of goodwill in the locality of the premises from which they trade?

(Paragraph 4.10)

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| **Comments on Question 5**  «InsertTextHere» |

6. Do the interests of a listed business at the end of a lease merit special provision additional to, or in placeof, the recommendations relating to notice to quit in the Commission’s 2022 Report? If so, which type of business merits it and why?

(Paragraph 4.13)

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| **Comments on Question 6**  «InsertTextHere» |

7. Do the listed businesses provide essential services that would merit special provision at the end of a lease? If so, which type of businesses merit it and why?

(Paragraph 4.14)

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| **Comments on Question 7**  «InsertTextHere» |

8. Do any of these other reasons advanced in 1963 for special provision for listed businesses continue to apply? If so, why?

(Paragraph 4.16)

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| **Comments on Question 8**  «InsertTextHere» |

9. Have you used the 1949 Act in court, or had it used against you? If so, what was the outcome?

(Paragraph 4.23)

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| **Comments on Question 9**  «InsertTextHere» |

10. Have you used the 1949 Act to assist lease negotiations, or had it used against you? If so, what was the outcome?

(Paragraph 4.23)

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| **Comments on Question 10**  «InsertTextHere» |

11. Are you otherwise aware of the 1949 Act being used either as part of negotiations to renew a lease or in court? What effect did this have on the outcome?

(Paragraph 4.23)

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| **Comments on Question 11**  «InsertTextHere» |

12. Should the 1949 Act be repealed without any statutory reform or replacement?

(Paragraph 4.27)

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| **Comments on Question 12**  «InsertTextHere» |

13. If the 1949 Act were repealed without any statutory reform or replacement, what economic impact, if any, would there be?

(Paragraph 4.27)

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| **Comments on Question 13**  «InsertTextHere» |

14. Should legislation replacing or reforming the 1949 Act apply to leases of one or more of the following:

(a) premises for the sale of goods to visitors by retail;

(b) premises for retail-style hire, repair, cleaning, or treatment of personal items or household articles;

(c) hot food takeaway premises;

(d) cafes, snack bars, and restaurants;

(e) pubs;

(f) hairdressing salons and barber shops;

(g) beauty-treatment salons, including nail bars and tattoo studios;

(h) warehouses;

(i) wholesale premises;

(j) retail auction premises;

and if not, why not?

(Paragraph 4.35)

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| **Comments on Question 14**  «InsertTextHere» |

15. Do you agree that, where there is a mixed use of the let premises, a use qualifying for special treatment under the reformed or replacement legislation must be the main activity carried on there (or one of the main activities), and not merely ancillary or incidental to some other use which does not qualify?

(Paragraph 4.36)

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| **Comments on Question 15**  «InsertTextHere» |

16. Should legislation replacing or reforming the 1949 Act be restricted to lets of buildings or permanent units within them?

(Paragraph 4.37)

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| **Comments on Question 16**  «InsertTextHere» |

17. Would a scheme providing for mandatory notice to quit for leases of six months or longer be an appropriate replacement for the 1949 Act? If not, what should be the minimum term of lease to which the scheme should apply and why?

(Paragraph 5.19)

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| **Comments on Question 17**  «InsertTextHere» |

18. Would the following minimum mandatory period of notice to quit be appropriate:

(a) six months for leases of one year or more?

(b) three months for leases of six months or more and less than one year?

And if not, what periods would be more appropriate?

(Paragraph 5.19)

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| **Comments on Question 18**  «InsertTextHere» |

19. Should the default periods of automatic continuation mentioned in paragraph 5.11 above be made mandatory? (Please feel free to answer differently for different lengths of lease.) And if not, what periods of mandatory continuation would be more appropriate?

(Paragraph 5.19)

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| **Comments on Question 19**  «InsertTextHere» |

20. Should there be any consequential changes in the rules for a tenant’s notice of intention to quit? If so, what should those changes be?

(Paragraph 5.19)

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| **Comments on Question 20**  «InsertTextHere» |

21. Should the tenant have an option to break the lease during its period of automatic continuation on giving three months’ notice? Do you have any other observations on such a break option?

(Paragraph 5.19)

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| **Comments on Question 21**  «InsertTextHere» |

22. Do you have any other observations on the scheme? What, if any, economic impact

would adoption of the scheme have?

(Paragraph 5.19)

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| **Comments on Question 22**  «InsertTextHere» |

23. Should it be incompetent to contract out of the application of a reformed 1949 Act?

(Paragraph 6.7)

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| **Comments on Question 23**  «InsertTextHere» |

24. Should the existing discretion to grant an application when reasonable in all the circumstances be replaced by a test which requires the sheriff to grant an application if, and only if, the tenant satisfies certain objective criteria? If so, what should be the test?

(Paragraph 6.10)

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| **Comments on Question 24**  «InsertTextHere» |

25. Do you agree that inclusion of a statutory statement of objects would be useful in: (a) increasing the predictability of the 1949 Act for parties; and (b) assisting the court in deciding applications under the Act?

(Paragraph 6.16)

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| **Comments on Question 25**  «InsertTextHere» |

26. If you favour a statutory statement of objects, do you agree with the inclusion of the objects listed in paragraph 6.20, or similarly expressed objects? If you only agree with one or two of them, which are they?

(Paragraph 6.20)

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| **Comments on Question 26**  «InsertTextHere» |

27. Do you think any other objects should be included in the statutory statement?

(Paragraph 6.22)

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| **Comments on Question 27**  «InsertTextHere» |

28. Do you think the statutory statement of objects should include a provision that its objects do not include relieving tenants who would reasonably have been able to plan for the removal of their business at the termination date?

(Paragraph 6.23)

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| **Comments on Question 28**  «InsertTextHere» |

29. Do you think that qualifying the “reasonableness” test with a list of disregards would be an appropriate way of addressing the concerns over its width and the unpredictability of outcome when it is applied?

(Paragraph 6.25)

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| **Comments on Question 29**  «InsertTextHere» |

30. If a list of disregards is appropriate, should it be in place of, or in addition to, the statutory statement of objects?

(Paragraph 6.25)

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| **Comments on Question 30**  «InsertTextHere» |

31. If a list of disregards is appropriate, should a “strong” or a “soft” approach be adopted?

(Paragraph 6.25)

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| **Comments on Question 31**  «InsertTextHere» |

32. In applying the “reasonableness” test, should the court be required to disregard the importance of the shop to the public, including the local community?

(Paragraph 6.27)

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| **Comments on Question 32**  «InsertTextHere» |

33. In applying the “reasonableness” test, should the court be required to disregard any effect of renewal or of refusal to renew on the numbers or terms and conditions of employees of the parties or of any prospective user of the premises?

(Paragraph 6.28)

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| **Comments on Question 33**  «InsertTextHere» |

34. In applying the “reasonableness” test, should the court be required to disregard any effect of renewal or refusal to renew on any prospective third-party buyer, tenant or other user of the premises that is not controlled by or closely linked to the landlord?

(Paragraph 6.30)

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| **Comments on Question 34**  «InsertTextHere» |

35. In applying the “reasonableness” test, should the court be required to disregard any effect of the renewal or termination of the lease on the family of the parties or the individuals who own or control those parties (subject to any applicable UNCRC requirements)?

(Paragraph 6.32)

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| **Comments on Question 35**  «InsertTextHere» |

36. Are there any other circumstances that have not been discussed which you think should feature in a list of disregards?

(Paragraph 6.33)

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| **Comments on Question 36**  «InsertTextHere» |

37. Do you agree that the sheriff should retain the discretion under section 1(2) of the 1949 Act to vary both the rent due under, and also the other terms and conditions of, the renewed lease if, in all the circumstances, they think such variations reasonable? If not, why?

(Paragraph 6.35)

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| **Comments on Question 37**  «InsertTextHere» |

38. In respect of the mandatory ground for refusal for ongoing monetary breach of the lease, do you:

(a) agree with an irritancy-based approach?

(b) agree with an “any ongoing arrears”-up-to-decision approach?

(c) propose any other approach?

(Paragraph 6.40)

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| **Comments on Question 38**  «InsertTextHere» |

39. Should it be a mandatory ground for refusal that the tenant has persistently breached any monetary obligation under the lease?

(Paragraph 6.41)

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| **Comments on Question 39**  «InsertTextHere» |

40. If so,

(a) should the ground incorporate an additional condition that, as a result of the persistent breaches, the landlord has a reasonable apprehension that a breach will occur if the lease is renewed?

or

(b) should the ground be excluded if the tenant can establish that their circumstances have changed since the breaches and that a breach will not occur if the lease is renewed?

(Paragraph 6.41)

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| **Comments on Question 40**  «InsertTextHere» |

41. Do you agree with the retention of the mandatory ground in section 1(3)(a) in respect of non-monetary breaches by the tenant?

(Paragraph 6.42)

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| **Comments on Question 41**  «InsertTextHere» |

42. Do you think that the Act should expressly direct the sheriff in making their decision to have regard to any provision in the lease whereby a particular breach is made material or justifying irritancy?

(Paragraph 6.42)

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| **Comments on Question 42**  «InsertTextHere» |

43. Do you agree that the mandatory ground in section 1(3)(b) of the 1949 Act should be amended in order to cover modern insolvency situations?

(Paragraph 6.43)

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| **Comments on Question 43**  «InsertTextHere» |

44. Do you agree that the mandatory ground in section 1(3)(c) should be repealed without replacement?

(Paragraph 6.44)

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| **Comments on Question 44**  «InsertTextHere» |

45. Do you agree that the mandatory ground under section 1(3)(d) should be retained?

(Paragraph 6.45)

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| **Comments on Question 45**  «InsertTextHere» |

46. Do you agree that the mandatory ground under section 1(3)(e) should be retained, but with an adjustment that the landlord should have to show “material adverse effect” on them, rather than “serious prejudice”?

(Paragraph 6.47)

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| **Comments on Question 46**  «InsertTextHere» |

47. Do you agree that the mandatory ground under section 1(3)(f) should be repealed without replacement?

(Paragraph 6.50)

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| **Comments on Question 47**  «InsertTextHere» |

48. Should it be a mandatory ground for refusal that the lease contains an unexercised option for the tenant to extend the lease?

(Paragraph 6.51)

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| **Comments on Question 48**  «InsertTextHere» |

49. Should it be a mandatory ground for refusal that an application is made to renew a lease the termination date of which was fixed by the court under a previous application?

(Paragraph 6.53)

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| **Comments on Question 49**  «InsertTextHere» |

50. Should it be a mandatory ground for refusal that the landlord requires possession of the premises in order to carry out work in fulfilment of:

(a) a statutory obligation relating to climate change legislation? or

(b) any statutory obligation?

(Paragraph 6.56)

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| **Comments on Question 50**  «InsertTextHere» |

51. Should a reformed 1949 Act have a gateway test which ensures that only small business tenants are eligible to seek renewal of their leases?

(Paragraph 6.68)

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| **Comments on Question 51**  «InsertTextHere» |

52. For purposes of the test, should the definition of “small business” be based on it falling below thresholds based on:

(a) all of (i) annual turnover, (ii) closing net assets, and (iii) a monthly average of number of employees; or

(b) just one or two of these criteria, and if so which ones?

(Paragraph 6.68)

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| **Comments on Question 52**  «InsertTextHere» |

53. Are the proposed thresholds for turnover, net assets, and number of employees which currently denote a micro-entity under the Companies Act 2006 appropriate for identifying the “small business” for whose benefit a reformed Act should operate? If not, should the figures be lower or higher and if so, why?

(Paragraph 6.68)

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| **Comments on Question 53**  «InsertTextHere» |

54. Should Scottish Ministers have the power to review and adjust the thresholds based on turnover and net assets?

(Paragraph 6.68)

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| **Comments on Question 54**  «InsertTextHere» |

55. Should the following be disqualified from being a “small business”:

(a) public companies?

(b) share-traded companies?

(Paragraph 6.68)

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| **Comments on Question 55**  «InsertTextHere» |

56. If the tenant’s business is part of a group, should the group’s turnover, net assets, and employee figures be attributed to the tenant as if they were the tenant’s business’ own figures?

(Paragraph 6.68)

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| **Comments on Question 56**  «InsertTextHere» |

57. Should the proposed definition of “small business” apply to all tenants, including sole traders, partnerships, SCIOs, and trustees? If not, why not?

(Paragraph 6.68)

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| **Comments on Question 57**  «InsertTextHere» |

58. Do you have any other proposal or criteria for a gateway test?

(Paragraph 6.68)

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| **Comments on Question 58**  «InsertTextHere» |

59. How should a foreign-registered tenant entity be treated under the gateway test?

(Paragraph 6.69)

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| **Comments on Question 59**  «InsertTextHere» |

60. Should short-term leases be excluded from a reformed 1949 Act?

(Paragraph 6.71)

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| **Comments on Question 60**  «InsertTextHere» |

61. If so, should the leases being excluded be ones that were granted for:

(a) less than six months? or

(b) less than one year?

(Paragraph 6.71)

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| **Comments on Question 61**  «InsertTextHere» |

62. If you favour the exclusion of leases for less than six months, should leases of over six months but less than one year be renewable by the court only if the lease has previously been continued by tacit relocation (automatic continuation) under which the tenant has been in continuous possession of the subjects of the lease for one year or more at the date of renewal?

(Paragraph 6.71)

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| **Comments on Question 62**  «InsertTextHere» |

63. If the premises are occupied by a sub-tenant, should the sub-tenant be excluded from seeking renewal under a reformed Act?

(Paragraph 6.77)

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| **Comments on Question 63**  «InsertTextHere» |

64. If so, should there be an exception where the sub-lease is held under a registered ground lease?

(Paragraph 6.77)

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| **Comments on Question 64**  «InsertTextHere» |

65. If the premises are sub-let to any extent, should the mid-landlord (tenant under the head lease) be excluded from seeking renewal of the head lease under a reformed Act?

(Paragraph 6.77)

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| **Comments on Question 65**  «InsertTextHere» |

66. Should an application under a reformed Act be made no later than the day that is two months before the termination date of the lease?

(Paragraph 6.80)

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| **Comments on Question 66**  «InsertTextHere» |

67. Should the application be made no earlier than the day that is one year before the termination date of the lease?

(Paragraph 6.80)

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| **Comments on Question 67**  «InsertTextHere» |

68. Alternatively, do you consider that some other time limit or limits should apply and, if so, what should they be?

(Paragraph 6.80)

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| **Comments on Question 68**  «InsertTextHere» |

69. Should a reformed Act clarify on whom the onus lies for proving the relevant elements of any application for renewal?

(Paragraph 6.81)

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| **Comments on Question 69**  «InsertTextHere» |

70. If so, do you agree that the burden of proof be distributed such that it lies on the tenant to establish (i) their “small tenant” eligibility, and (ii) that renewal of the lease would be reasonable, while it should be for the landlord to establish one (or more) of the mandatory grounds for refusal?

(Paragraph 6.81)

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| **Comments on Question 70**  «InsertTextHere» |

71. Should a reformed Act clarify that, if it is not possible to dispose finally of the application within the extension granted in any interim order, the sheriff should have power to make further interim orders authorising the tenant to continue in occupation, for a further period not exceeding three months, and on such terms and conditions as the sheriff thinks fit?

(Paragraph 6.82)

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| **Comments on Question 71**  «InsertTextHere» |

72. Would transferring applications under a reformed Act to the simple procedure assist parties in reducing:

(a) the delay in deciding an application; and

(b) the costs involved in relation to an application?

(Paragraph 6.89)

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| **Comments on Question 72**  «InsertTextHere» |

73. Should the court:

(a) retain the power to find an unsuccessful party liable for the court-related expenses of the successful party; or

(b) have no such power unless the unsuccessful party’s claim had elements of fraud, was pursued with manifest unreasonableness, or involved an abuse of process?

(Paragraph 6.89)

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| **Comments on Question 73**  «InsertTextHere» |

74. If the power to find an unsuccessful partly liable for the court-related expenses of the successful party is to be retained, should the amount of liability be capped? If so, what should be:

(a) the appropriate form of cap (that is, monetary limit or percentage limit); and

(b) the appropriate limit of capped liability (under whichever form of cap)?

(Paragraph 6.89)

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| **Comments on Question 74**  «InsertTextHere» |

75. Should the parties have the ability in advance of any application to agree to exclude appeal against the decision on the application?

(Paragraph 6.90)

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| **Comments on Question 75**  «InsertTextHere» |

76. Should the parties’ ability to appeal the decision on the application require the permission (leave) of the court?

(Paragraph 6.90)

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| **Comments on Question 76**  «InsertTextHere» |

77. Should it be a pre-condition of a tenant’s entitlement to apply for renewal of the lease that they have made a formal proposal for mediation to the landlord?

(Paragraph 6.98)

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| **Comments on Question 77**  «InsertTextHere» |

78. Should the sheriff have express powers to:

(a) disallow liability of the unsuccessful party for the court-related expenses of the successful party if the successful party has acted unreasonably in not engaging with mediation of the dispute; or

(b) make some other order in relation to court-related expenses as sanction for non-engagement in mediation?

(Paragraph 6.98)

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| **Comments on Question 78**  «InsertTextHere» |

79. If your answer to the above question is “yes”, should the onus lie on the party who has not engaged in the mediation to establish that they had reasonable grounds for non-engagement?

(Paragraph 6.98)

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| **Comments on Question 79**  «InsertTextHere» |

80. What, if any, economic impact would the proposed reform of the 1949 Act have?

(Paragraph 6.99)

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| **Comments on Question 80**  «InsertTextHere» |

81. Having considered the points raised in this Discussion Paper in relation to them, please advise which of the four potential outcomes (A, B, C or, D) is your preferred option and explain why. If, however, you feel favourably towards more than one, please could you rank them and explain your reasoning behind the ranking.

(Paragraph 7.6)

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| **Comments on Question 81**  «InsertTextHere» |

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| **General Comments**  «InsertTextHere» |

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.