DRAFT LEASES (AUTOMATIC CONTINUATION ETC.) (SCOTLAND) BILL CONSULTATION: CONSOLIDATED RESPONSES

Question 1 Do you agree with these proposed requirements for the contents of notices to prevent automatic continuation of a lease (notices to quit and notices of intention to quit)? If not, why not?	
Name; **Profession;** **Date;** **Response Number**	**Response**
Centre for Scots Law; University of Aberdeen; 10 January 2022; Response No. 2	We generally agree with the proposed requirements for the contents of notices to prevent automatic continuation of a lease. It is not entirely clear to us, however, why all of the provisions identified as being default rules that can be contracted out of are designated as such, e.g. s 11(2)(b).
Professor Stewart Brymer OBE, WS, Solicitor; Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	I agree with these proposals. I have not encountered problems in practice with regard to tacit relocation but am aware that there are pitfalls for the unwary. As such, a codification and clarification/re-specification of the law is desirable and in the public interest.
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022;	Broadly, yes, the provisions reflect what most practitioners would enshrine in such a notice.

Response No. 5	
CMS; Law firm; 25 January 2022; Response No. 6	Given the ability to contract out of automatic continuation, overall we agree with the more formal approach to notices to prevent automatic continuation, and the proposed requirements for these notices to give everyone more certainty. However, we are unclear on why the sender of the notice (landlord, tenant or their agent) would require to give their address. In the case of the landlord or the tenant the lease will make provision as regards their address for the purpose of serving notices and it seems unnecessary for this requirement particularly as the postal address of that party may not be the address to which the lease requires any formal notice to be sent.
Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh; 26 January 2022; Response No. 8	Yes.
Senators of the College of Justice; Supreme Courts of Scotland; 27 January 2022; Response No. 9	Not entirely. The terms of s 11(2)(b) are far too prescriptive. What is important is that the server of the notice clearly communicates that the existing lease will come to an end. As long as there is fair notice of that the precise terminology used ought not to matter. The proposed change is not user-friendly for an ordinary landlord or tenant who does not have the benefit of legal advice. That is undesirable. An unsophisticated tenant is likely to use layman's language. Such a tenant is unlikely to state in the notice "I intend to give up possession at the end of the period of lease". He or she is even less likely to state in the notice "I do not intend to remain in possession of the subjects after the end of the period of the lease on the same terms and conditions as those of the lease." It is much more likely such a tenant will say something like "I will be leaving at the end of the lease". The Commission may wish to consider whether s 11(2)

	could express the mandatory wording of the notice in more user-friendly language. Moreover, on revisiting the responses to the Discussion Paper (especially the responses to Proposal 11) we do not think that there was general support for such a change. The proposal asked (11(d)) whether any notice should contain "wording to the effect that the party giving the notice intends to bring the commercial lease to an end". That was the proposition which obtained substantial support, not the requirements now set out in s 11(2)b).
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	We agree with the proposed requirements for the contents of notices to quit. However we think that the content of both the notice to quit and the notice of intention to quit should be the same. As drafted the tenant does not need to give the termination date in the notice of intention to quit but in practice the tenant will need to calculate the termination date to plan for vacating the premises. We think that the tenant should specify the date the lease will end in the notice of intention to quit which would be subject to the same relief from error as any notice to quit. This provides for consistency between the notices and if there is any disagreement between the parties as to when the lease will end this can be identified at an early stage.
Brodies; Law firm; 28 January 2022; Response No. 11	The content of a notice to quit by a landlord in terms of section 9 seems to be acceptable but we would question why the content of a notice of intention to quit is different from a notice to quit. The notice of intention to quit does not have to include a termination date and section 11 refers to the end of the period of the lease and not to the termination date. Given that the tenant will have to establish what is the termination date for the purposes of ensuring that enough notice of termination is given for the purposes of section 12, we would suggest that both notices to quit and notices of intention to quit should have the same prescribed content. We also wonder whether it is necessary to refer to a landlord notice to quit and a tenant notice of intention to quit. If they are served correctly, they will both have the same effect. It may therefore be easier to refer to a landlord notice to quit and a tenant notice to quit.

	We would also suggest that, regardless of whether the reference is to a notice of intention to quit or a tenant notice to quit, section 3(b) should be changed to say that a tenant will give up possession. The reference to a tenant intending to give up possession adds an element of uncertainty as to whether they will actually do what they intend.
Scottish Law Agents Society; Representative body; 28 January 2022; Response No. 12	We agree that the provisions ought to be restricted to commercial property. Furthermore we agree that notice of intention to quit by the tenant should be in writing where the lease is for a period of more than one year and that writing ought not to be required where the period is less than one year. We agree that there should be a requirement to provide some description of the property but that this ought not to require a conveyancing description. It may be for example that the tenant occupies two or more adjacent units on separate leases and intends to renounce occupancy of only one [cf para 11 of the consultation] relating to requirement to relinquish the whole of the let subjects. In such a situation the requirement for a description sufficient to allow the landlord to identify the subjects may require a conveyancing description.
Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	Given the ability to contract out of automatic continuation, overall our members agree with the more formal approach to notices to prevent automatic continuation, and the proposed requirements for these notices to give everyone more certainty. However, we question the need for the sender of the notice (landlord, tenant or their agent) being required to give their address, which seems irrelevant and unnecessary.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	We note that a notice of intention to quit has different requirements from a notice to quit, in particular, that the tenant's notice of intention to quit does not require to state when *"the period of the lease will end"* (section 11(5)). We understand that to be the termination date of the lease (with reference to section 24(1)), even though the draft Bill does not use that terminology. In our earlier response[1] to the Scottish Law Commission's Discussion

[1] https://www.lawscot.org.uk/media/360992/18-09-14-pllr-plc-consultation-slc-leases.pdf

	Paper, we favoured the same content of notice in order to avoid confusion. While we appreciate that there may be circumstances in which there is uncertainty about when the lease ends, in practice the tenant will need to calculate the termination date, so that they may establish the appropriate notice period. Provided that the tenant can benefit from the same relief from error as any notice to quit (i.e. the 7 day grace period), we see no reason why a notice of intention to quit should not include a termination date. Inclusion of the termination date would likely avoid confusion or indeed highlight any dispute between the parties. Under the Bill as drafted, although the termination date is not required for the notice of intention to quit to be valid, what happens if the tenant does include the date, but it is incorrect? It is unclear if this invalidates the notice.
Anderson Strathern; Law firm; 28 January 2022; Response No. 16	As regards the proposals in relation to the description of the property, we agree that there should be a "sufficient description" of the property and that this should be as per the current practice of specifying the lease in question and the property address and we agree with the comment in the footnote that a full conveyancing description should not be needed. However we do not agree with the "reasonable recipient" test as we are of the view that is actually less certain, and could open the floodgates for casual descriptions and we have expanded on this more fully below in our answer to question 2. As regards the proposals to create greater certainty by requiring the tenant to state their intention to leave the premises at the end of the lease or their unwillingness to remain on the existing terms of the lease, we welcome this greater certainty and this should avoid the problems which arise from a lease being deemed to have continued or deemed to have been terminated on account of the parties' acting, as exemplified in the recent case of ***Rockford Trilogy Ltd v NCR Ltd [2021] CSOH 49.*** As regards the proposals regarding the name and postal address of the tenant, we note the comments at paragraph 14 regarding notice given by electronic means and the absence of a postal address not being problematic particularly in a tenant's notice as the landlord may contact the tenant at the let property, but

	our view is that this is a mis-statement or a generalisation; often tenants will not wish their landlords to serve notices on the let property as this could result in employees receiving the notices first and learning of an imminent lease end date and for reasons of confidentiality, this may not be desirable.
Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	We welcome the proposal that notices to quit and notices of intention to quit should be in writing (with the exception of tenants' notices in respect of leases of one year or less). This will provide greater certainty. We query why the tenant's notice should not require to provide a date of termination. In the spirit of aiming for greater clarity and simplicity in the law, we consider that, as far as possible, the requirements for landlords and tenants should be the same. We also think that the provisions would benefit from more precision either in the drafting or by way of examples and amplification in the Explanatory Notes. Where possible, these provisions should seek to reduce the likelihood that parties have to litigate over the interpretation of a notice. For example the requirement to provide a "sufficient" description could be somewhat subjective, and open to argument.
DLA Piper; Law firm; 28 January 2022; Response No. 18	Yes.
Shoosmiths; Law firm; 31 January 2022; Response No. 21	Yes.
Burness Paull; Law firm;	Real Estate response: Our view is that section 11(2)(b) of the proposed bill is unnecessarily complicated. Any statutory provision should deliver as much clarity as

3 February 2022; Response No. 23	possible otherwise it raises as many questions as it seeks to answer. At present we do not agreed that the proposed legislation achieves this. A notice of intention to quit should only require a statement that the tenant intends to give up possession of the subjects at the end of the period of the lease. Providing an alternative (in terms of section 11(2)(b)(ii)) complicates matters. This could look like an invitation to treat. A notice of intention to quit should have one purpose, to bring the lease to an end. A statutory provision should not be used to trigger negotiation between the parties. That is a separate commercial discussion between the parties. There is no need to deal with this in the legislation. It creates uncertainty and is not reflective of commercial practice (even if a tenant is not represented most landlords are). The optionality means that there is more scope for the possibility that notices are issued incorrectly. While we appreciate the difficulties of creating a fixed form of notice to be served by a tenant, a valid statutory notice of intention to quit must be set out in the clearest of terms. We agree that provision must be made for notices to be given by electronic means. Use of electronic service increased as a result of Covid and any new legislation must account for electronic execution and communication. At present practice is that an information type notice eg change of address may be acceptable if sent electronically but any notice changing the underlying contract eg notice to break/extend/quit would not be (for evidentiary purposes). This is because one of the main difficulties with electronic service arises in what email addresses can be used for service of notices. The main reason for practitioners not sending notices by email is that one can never be sure if the email address to which a message is sent is still a live email address and, even if it is, then the recipient of the notice may still seek to challenge receipt to the correct person/department. Evidence of issue and receipt need to be considered too as well as service on email addresses not specified in the notice provisions. This is an area to which more thought as to the practical issues is required, to ensure any notice served this way is beyond challenge. Otherwise there is scope for uncertainty and litigation. Without this there is unlikely to be adoption of service of notices by electronic communication by represented parties and it should not

	create a two tier system especially given the potential relief from errors. Could a requirement to provide an electronic address for receipt of correspondence in relation to the notice or to identify the sender (may have been sent on behalf)? Property Dispute Resolution: Notice provisions should be as consistent as possible throughout. We do not see a good reason for having distinctions between landlord notices and tenant notices. If the legislation is too complex or gives rise to too many questions it wil drive practice towards no notice.

Question 2

Do you agree with these provisions for relief from errors (a) in relation to the termination date in a notice to quit; (b) in relation to errors in the description of property in a notice to quit or of intention to quit; (c) in the name and address of the giver of a notice? If not, why not?

Name; **Profession;** **Date;** **Response Number**	**Response**
Centre for Scots Law; University of Aberdeen; 10 January 2022; Response No. 2	We agree with these provisions.
Professor Stewart Brymer OBE, WS, Solicitor;	Agreed.

Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022; Response No. 5	Broadly, yes, these provisions encapsulate the most recent case law in these areas – that there is some flexibility in content but none whatsoever in errors of recipient. Personally I would not permit an extension or occupation beyond the termination date in the Lease, though.
CMS; Law firm; 25 January 2022; Response No. 6	We agree with the position on errors regarding the termination date and the proposed reasonable recipient test for both description of the property and in the name and address of the giver of the notice. As stated above we do not think the statement of address in this context should be a requirement.
Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh; 26 January 2022; Response No. 8	Yes.
Senators of the College of Justice; Supreme Courts of Scotland; 27 January 2022;	We agree.

Response No. 9	
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	We welcome the provisions for relief from administrative errors. We note that the grace period is only if the end date specified is after the contractual termination date and in this regard the 7 day grace period should be sufficient because if there is an error made in calculating the end date of the lease the margin of error would usually be no more than a day or two. Could examples of the types of errors which would be ignored be given in the explanatory notes to help with interpretation of these provisions? We wonder if provision could be made for a grace period for an error in the end date specified in the notice which is before the contractual termination date. In this situation we consider that the actual termination date should be the contractual termination date. It seems to us harsh that if the landlord has made an administrative error (whether a typographical error or a miscalculation of the contractual end date) of just one day too early the notice will be invalid.
Brodies; Law firm; 28 January 2022; Response No. 11	We welcome the provisions for relief from errors. We wonder whether the 7 day grace period should apply to before and after the termination date. If for example, due to a typographical error, the notice includes the day before the termination date, the notice would be invalid. If the incorrect date is given and it pre-dates the termination date, provision could be made in the legislation for the notice to take effect on the termination date. Calculating termination dates can lead to errors in terms of which days count and which do not. We would suggest that it might help the users of the legislation to have examples set out to show which days are included and excluded. Also, we wonder whether any statement has to be made about the timing of receipt of notices in terms of when one day ends and another begins when notices are served electronically.
Scottish Law Agents Society; Representative body;	We agree the inclusion of a reasonable recipient test is appropriate.

28 January 2022; Response No. 12	
Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	Our members agree with these provisions.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	(a) Yes, we consider that the 7-day period seems sensible. (b) Yes. (c) Yes. We suggest that the use of examples to accompany the legislation may help to aid interpretation.
Anderson Strathern; Law firm; 28 January 2022; Response No. 16	As regards (a) errors in relation to the termination date, our view is that the provisions are inconsistent. For dates falling after the actual termination date, the one week period of leeway applies but for an error resulting in a date which pre-dates the termination date there is no relief; this is on the basis that such an erroneous date amounts to a demand for early eviction for which there is no relief. We agree with this generally but wonder whether some element of leeway should be considered for the situation where there is a miscalculation by just one day and the notice specifies a day which is just one day prior to the actual termination date. Also, in relation to the errors in the date, the relief only seems to operate for the benefit of the landlord and not the tenant since the tenant is not required to stipulate the date of termination in their notice to quit. We consider that both landlords and tenants should be required to state the date of termination in their notices and that the relief proposed extends to tenants as well as landlords.

	As regards (b) and (c) and the introduction of the "reasonable recipient" test, we are of the view that this has the potential to create further confusion. At present, the property address and the lease itself is referred to in most style notices to quit and this provides clarity. If a notice is deemed valid in a situation where the property has been described erroneously or perhaps casually (for example, the example given in the explanatory notes is use of the term "the workshop" if that was how the parties habitually referred to the premises), this could open up the floodgates for casual descriptions, for example, in a wind farm lease situation, "field A", "wind farm site" or some such reference known to one of the parties but not the other and actually wrong since it is common for the as-built position to be different from what was intended originally and for the lease in question to have been varied on several occasions to account for this.
Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	We consider that introducing an element of flexibility in the content of the notices in the form of relief from errors and a reasonable recipient test is a realistic and reasonable provision. However we think that the narrow window for errors in the termination date may be somewhat restrictive, and should at least also be subject to the reasonable recipient test. It is just as likely that the month or year could be given incorrectly due to typographical error, when it could be obvious which month or year was intended. We recommend that plenty of examples are given of types of errors that would benefit from the relief, although making clear that it is not a finite list. We think that it would assist if any error (which might otherwise be fatal to the validity of the notice) was subject to the reasonable recipient test.
DLA Piper; Law firm; 28 January 2022; Response No. 18	Yes.

Shoosmiths; Law firm; 31 January 2022; Response No. 21	Yes.
Burness Paull; Law firm; 3 February 2022; Response No. 23	Real Estate response Property Litigation shown in blue: Some would tend to disagree with the proposed provisions regarding relief from error around the date of termination under the lease. It could be considered an unnecessary provision. In practice, we do not see very many cases at all where the termination date is incorrect. Termination dates can often be challenging to identify with certainty due to imprecision in the drafting of the original lease e.g. does a lease for one year terminate on the anniversary of the date of entry or on the day preceding that anniversary. There is competing authority. While the fundamental solution is to draft leases without ambiguity. For those leases where the ambiguity exists this provision would seem to be of benefit rather than the alternative of litigation. In the question of whether the termination date falls on the anniversary or the day before, there is a risk of the notice specifying a day earlier than the actual termination date. That would not benefit from the relief. This provision may drive the undesirable risk-avoidance behaviour of parties specifying a later date in notices than the actual termination date to benefit from the relief. The related provisions around the extended period may cause complications in relation to, for example, dilapidations and yielding up provisions, when it may be unclear when exactly damage was caused to a property (which would be excluded from the tenant's responsibility on the current drafting of the bill). It is something that ought not to be regularly relied on. On balance, the default rules for determining a date of entry (in Section 28) are likely to be sufficient to avoid an ambiguous termination date, making these relief provisions unnecessary. The most likely error in a termination date would be where a party states that the lease is to come to an end on 5 January 2021 rather than 5 January 2022 (the usual error arising at the turn of a year). Such an error would not be caught by the proposed relief provisions.

	This is an error which might, under the current law, benefit from rectification under s.8 of the Law Reform (Misc Provs) (S) Act 1985, but would be unable to be rectified because of s.9(6) of the Bill. That would seem to go against the error-relieving approach of the bill. This is the sort of error (being an administrative error that is unlikely to cause genuine confusion) that ought to be remediable. In which case we do not see there is any need for relief provisions. The termination date for a lease is very rarely anything other than an easily ascertainable and precise date which can be found in the lease documents. Such a relief brings greater complexity and uncertainty. It does seem to us to be over codification. The relief is also aimed at landlords who are more likely to be represented by professional advisers. If one of the intentions of the bill is to allow private individuals (including landlords) to serve notices without obtaining legal advice, then reliefs ought to be available. Issues of notices appearing with the wrong date are not common and so this really is not an area which the bill needs to address. While the reasonable recipient test around the description of the property is interesting, we feel that the provisions of section 9(3) stand sufficiently on their own. That sub-section states that the description is sufficient "if a reasonable recipient of the notice whose knowledge included that of the tenant would be able to identify the subjects from that description". The description would need to be quite badly wrong for it to fall foul of that provision. Additional error provisions are therefore not required. There are also issues around different types of leases (see our general comments and how the property may be described). We consider these error relief provisions should be included. s.9(3) is aimed, per the explanatory notes, at allowing for informal, habitual descriptions of the property. It is not aimed at error relief for e.g. minor administrative errors.If error relief is to be supported as a concept (which we consider it ought to be, to avoid minor administrative errors being taken advantage of and to be consistent with general contractual notices – the reasonable recipient test in Mannai) then the separate provision is worthwhile. Section 9(3) would in any event be insufficient error relief on its own. The tenant may be able to identify certain subjects from a description – so there is no error in terms of s.9(3) - but

	it does not necessarily follow that the subjects identified by the tenant are those which a reasonable recipient would understand the landlord to be terminating the lease in relation to. See for example Tyco v Regent Quay – certain subjects were identifiable from the notice without resorting to the reasonable recipient test, but in applying the reasonable recipient test to the notice as a whole, it was held that the subjects the notice related to were different (wider) than those described in the notice (on a strict reading). It seems odd to have this provision be variable by the parties. What benefit would the parties gain from being able to restrict this relief? Reference is made to errors in the name and postal address of the party giving the notice. We would find it odd if the party giving the notice was unable to sufficiently describe their own company or organisation. We do not see any urgent need to create a relief from the error of wrongly describing the server of the notice on the basis that the person giving the notice should be able to correctly describe themselves or their corporate entity. Minor administrative errors should be able to benefit from the relief, particularly if notices are to be able to be served without legal advice. There is no detriment to the other party if the reasonable recipient test can be satisfied, and the notice is actually given by a party with the power to do so. An overly strict approach to errors only benefits a lucky recipient who can seek to challenge an imperfect (but clearly intended) notice. We would submit that there is a much greater problem in the case of the party giving the notice being able to describe the recipient. In particular, we often see great difficulty in properly designating institutional funds (which may consist of various different corporate entities) and offshore or foreign entities on whom notices must be served. We believe provisions should consider a scenario where a tenant is having to serve notice on various trustees, pension funds, funds, foreign companies and the like. Similarly, to have relief from error in this area would be more understandable and of greater assistance to tenants in particular. Agreed, although this is arguably a more radical suggestion than the comment above. A fundamental part of a notice's validity must be that it is given to the correct party. Any error relief should not compromise that principle, no matter how difficult it may be to describe a party.

	However, that rule should be tempered by provisions which give the party serving notice relief from errors which they could not be aware of. Responsibility for properly describing the recipient of a notice when the giver of the notice could not be aware of the change (e.g. where there has been a change in the make-up of trustees, which has not been notified to the other party and is not ascertainable from a public register) should not rest on the shoulders of the giver. A party should not be able to rely on their non-public dealings to evade the effect of a notice.

Question 3 Do you agree with the proposed default periods of notice for the prevention of automatic continuation? If not, why not?	
Name; **Profession;** **Date;** **Response Number**	**Response**
Centre for Scots Law; University of Aberdeen; 10 January 2022; Response No. 2	We agree that the proposed default periods of notice for the prevention of automatic continuation are preferable to the current periods. They appear to be more logical and clearer; however, it would be useful to know why these particular periods were chosen. We assume that details about this will be provided in the report. We do also have some concern regarding the provisions relating to the period for leases of less than 6 months, in terms of the complexity of how the time period is expressed and the potential for miscalculation.
Professor Stewart Brymer OBE, WS, Solicitor;	Agreed. This is much clearer. I have seen examples of cases where parties were unaware of how to calculate the notice period – mainly due to a lack of knowledge of

Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	the current statutory provision which giverns same. This proposal will update law and practice.
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022; Response No. 5	The periods in question are reasonable, and are welcomed in replacement of the present 40 days. Of course, parties should be free to extend or reduce this period by prior agreement so those that aren't content have an opportunity to address in advance. I am assuming the bill will be passed and shall not be retrospective to existing leases and will apply for new ones created or constituted from its date of passing onwards.
CMS; Law firm; 25 January 2022; Response No. 6	Yes.
Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh; 26 January 2022; Response No. 8	Section 11(1)(b) – is it conceivable that a tenant might give notice of intention to quit a short lease by repudiatory conduct?, e.g. ceasing or significantly reducing operations on the site, not re-stocking. While these examples are drawn from the case law on "keep open" clauses in longer-term commercial leases, I can see no reason in principle why they might not also occur in the context of a short-term lease. At the very least, such conduct might be a trigger for the landlord to demand clarification of the tenant's position.
Senators of the College of Justice; Supreme Courts of Scotland; 27 January 2022;	Yes. In our response to the Discussion Paper we suggested that the period of 40 days was well known and understood, and that we were not aware of any concerns that it was insufficient. However, having now seen all of the responses to the Discussion Paper it is clear that there is widespread concern that the 40 day

Response No. 9	period is too short. Less than one-third of the responses supported the retention of that period. About the same proportion advocated a period of 3 months, and the remainder favoured 6 months. The arguments in favour of a period longer than 40 days now seem to us to be compelling. A period of only 40 days probably favours landlords more than it does tenants, but it has disadvantages for both. For very many properties, especially larger ones, 40 days is insufficient for a tenant to vacate, arrange for new premises, and arrange for the transfer of IT, telecoms and other services. So far as landlords are concerned, for many properties 40 days is insufficient time to remarket the property and deal with any dilapidations. We are persuaded that for leases of 6 months or more a period of 3 months may well strike a good balance between the interests of landlords and tenants. For leases of more than 28 days and less than 6 months a default period of half the duration of the lease also seems to us to strike a good balance between those interests.
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	We agree with the proposed default periods of notice for the prevention of automatic continuation. Having notice periods for commercial leases which are dependent upon whether or not the duration of the lease is less than 6 months and which are irrespective of the location and size of the leased premises will reduce the risk of error. Although 3 months is significantly longer than the current 40 days it seems a reasonable compromise as the parties will need time to make other arrangements (either finding a new tenant or finding new premises). In practice the parties will start negotiations about terminal dilapidations 6-9 months before the lease ends. It would be helpful if explanatory notes contained some worked examples of when notice would require to be given especially under sections 12(2)(b) and 12 (4) of the draft Bill.
Brodies; Law firm; 28 January 2022; Response No. 11	We agree with the default periods and welcome the proposal for the same periods regardless of the size of the premises.

Scottish Law Agents Society; Representative body; 28 January 2022; Response No. 12	For the sake of simplicity we propose for leases of up to six months that a period of 28 days in all cases is more appropriate. Short-term leases are often of less complexity than those for longer periods and may rest on verbal agreements or very scant written agreements and a simple fixed provision is more suited to such arrangements.
Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	Our members agree with the proposed default periods of notice for the prevention of automatic continuation, which could reduce the risk of error. While 3 months is significantly longer than the current 40 days, time will be required to make other arrangements to either find a new tenant or find new premises. Some of our members have suggested that it would be helpful if the explanatory notes contained some worked examples of when notice would require to be given, especially under sections 12(2)(b) and 12 (4) of the draft Bill.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	Yes, the rationalisation of the periods of notice is welcome. However, it is important that the criteria for calculating the relevant default periods of notice are as clear and certain as possible. We note that there is perhaps a greater potential for error in calculating "the number of days, rounded up to the nearest whole day, which is equal to half of the period of the lease" (section 12(4)(b)) than calculation of the periods under the existing law. We suggest that the use of examples to accompany the legislation may help to aid interpretation. In practice, specifying the relevant notice period on the face of a lease may help to make the position clearer for all parties. The extension of the period from 40 days under the existing to law to 3 months may better balance the rights of both parties to a lease, for example, by giving a tenant a longer period of notice to find an alternative property if required or for a landlord to find a new tenant. However, we do recognise that a longer notice period could increase risk to one or other of the parties in some circumstances.
Anderson Strathern; Law firm;	As regards the proposal that for leases of more than 28 days and less than 6 months, the proposed default period is half the duration of the lease (calculated in days and rounded up to the nearest whole day), we do

28 January 2022; Response No. 16	not agree with this and would prefer there to be a fixed period of notice for this length of lease. We think that this proposal has the potential to cause confusion in the calculation of the days and result in errors. As regards the proposed default period of 3 months for leases of 6 months or more, we would be interested in the reasons behind the selection of 3 months as the period.
Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	We are pleased to see that the periods of notice are to be the same for landlords and tenants. We have mixed views on whether a period of three months for leases of more than six months is reasonable (subject to the ability to lengthen or shorten that period expressly in the lease, which we take to be the effect of section 17(3)). Some parties struggle to comply with the current 40 day period, particularly if the decision to remove or leave is a last minute one – these decisions can be dependent on a number of factors, which can mean they are left to the eleventh hour. We think the ability to vary the period in the lease terms should be made more prominent. We are more concerned about the scope for error in calculating the number of days' notice that has to be given for shorter leases. A worked example of such a calculation would be extremely useful, to help avoid mistakes. We also feel that there is considerable scope for confusion and miscalculation, due to the interplay with section 15. This appears to require the last day of the calculation of the notice period to be dependent on receipt by the recipient, which in turn is dependent on the method of delivery, and with a deeming provision of two further days for certain kinds of delivery. This makes the calculation of number of days or establishing the date occurring 3 months prior to the termination date more complicated. Actual sending or service of the notice will have to take the various delivery methods etc. into account as well. It is not that uncommon currently, in giving service of various types of notice that are dependent on a period of time for giving, for several notices to be served over several days, to be sure that one of them will get the notice period right. We do not see anything in these

	provisions that would render that type of action unnecessary. Further concerns with these provisions include: • Section 15(3) refers to "unless the contrary is shown". This introduces a level of uncertainty as to valid service of notices in all cases, which may be periled on a precise calculation of number of days. • The reference to "ordinary course of a postal service" is, these days probably meaningless. How is that day of delivery to be accurately calculated?
DLA Piper; Law firm; 28 January 2022; Response No. 18	Yes.
Shoosmiths; Law firm; 31 January 2022; Response No. 21	Our view is that a 3 month notice period for a 10/15 year lease of office or retail premises does not reflect modern requirements. 6 months would allow tenants a more realistic period to find alternative premises and obtain statutory consents for alterations (which can take 6 – 12 months). From the landlord's perspective, 6 months would give time to remarket the property and deal with any potential dilapidations issues. If the default period remains at 3 months, we anticipate parties wanting to take advantage of section 17(3) and lengthen the notice period.
Burness Paull; Law firm; 3 February 2022; Response No. 23	The periods proposed are longer than as current. Practically most parties will be considering making their decision about termination or not more than 40 days given the time required to negotiate staying or if vacating making suitable arrangements, dealing with any dilapidation/repair issues or identifying and negotiating terms for somewhere new. Many will not – leaving us instructed very close to the 40 days cut off. A longer period would likely only result in a last minute instruction before the 3 month period. Some views were along the lines of whether the notice period had to change (due to the last minute

	consultation) on the basis that this happened irrespective of the period. Changing this will not stop the task we are actually having to deal with ie assessing whether the time period for service of notice can be complied with. Extending the period could have the unintended consequence of making more parties miss the cut off point for service of a valid notice. Some real estate views were that it is better not to change what is considered a reasonable and established period which is familiar to the majority working with commercial leases. The period is reasonable in that most parties will as mentioned above start to think about determination of their lease at least two months before it happens. This allows time for parties to consult with professional advisers and catch the problem timeously. Some practitioners commented that this seemed to be in the nature of how parties approach the issue. Extension of the period three months, that would be problematic. We would tend to favour a longer period than 40 days, and expressed in a number of months. 3 months gives parties more time to deal with practical issues and legal responsibilities (e.g. dilapidations) before the termination date. It also dovetails well with the proposed periods for shorter duration leases. 3 months is more straightforward to calculate than 40 days. 40 days is not actually 40 days, when you take account of service requirements and the need to give clear days. The question is would that still be an issue with 3 months and clarity around service and clear days is required. Whatever period is selected, the method of calculation ought to be set out in the legislation. The proposed calculation methodology in s. 12 is clear. Could the default periods be contracted out of? The wordin go fs.12 suggestions that as the period is the last day for the giving of notice they period could be contractually extended and so the statutory period is a minimum. We have also very rarely, if ever, come across a situation where the parties complain that 40 days' notice is not sufficient. Landlords of any size will have a property management team looking out for lease

	events, and will prepare for these well in advance. Smaller landlords who may have one or two assets only may be surprised to learn that they will only be entitled to 40 days' notice, but it is within their power to take matters into their own hands and bring the discussion to the tenant. One view expressed what that the advantages of keeping to the existing 40 day periods outweight the advantages of a longer period. What about existing leases? Presumably if silent as to the notice period the new statutory provisions would apply but there may be existing leases which contain contractual notice periods which are the same as the current common law ie 40 days. Would that still prevail or would new statutory provisions apply? It is important to understand what the position would be for example to allow clear operation of management records regarding key dates. What about other legislation impacting on leases that would be caught by the terms of the Bill which will prevail?

Question 4 Do you agree with these methods for delivery of (a) notices in traditional documents and (b) notices in electronic form? If not, why not?	
Name; **Profession;** **Date;** **Response Number**	**Response**
Centre for Scots Law; University of Aberdeen;	We agree with what is proposed here. However, we have some concern regarding the possibility of hand delivery where the parties are individuals. While we understand why this provision has been included, there may be

10 January 2022; Response No. 2	evidential problems proving that delivery has taken place in such circumstances. We accept that it is not the role of this legislation to provide for rules of evidence; however, perhaps the issue could be considered further.
Professor Stewart Brymer OBE, WS, Solicitor; Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	Agreed.
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022; Response No. 5	I am fine with the extension of methods of service to include sheriff officers. I am, however, very concerned at the concept of electronic delivery and believe it will create more difficulties than remedies. I don't pretend to be on top of IT at the best of times, but parties agreeing an email address at the outset is the easy part. The difficulty is going to be where an email with a notice is unsuccessful (and the sender is not always told it has not been delivered). What if its caught in a spam filter or blocked out by security settings? How does the Commission believe service by electronic means is to be proven? Presumably, human error, ie missing a letter in the email address, is the sender's fault - fair enough if that is the intention albeit it is harsh in a setting where the content of paper notices is being relaxed beyond the present law. However, if a Landlord sells the property during the term the new Landlord is then stuck with a notices provision that sets out service to an old email address is valid and the intimation sent by the new Landlord to the sitting Tenant is good practice but not obligatory. The same is also true of a permitted assignation, although in that instance the notices provision could be updated in the assignation itself (although Landlord's consent is not always part of that deed – so this will not always be a remedy). Personally I would extend the means of delivery but not include electronic delivery in any form – to me this seems a bit ambitious!

CMS; Law firm; 25 January 2022; Response No. 6	Yes however we think there needs to be provision for service in the rest of the UK by Process Server. We think it would be better if electronic service provisions were encouraged. We appreciate that the lack of requirement to include an email address with, for example, Companies House makes this a little more difficult to provide for. However, we think it would be possible to provide that electronic notice should be automatically permitted for new leases, with the parties obliged to give a service by email address (which they can change by service of a notice to that effect). There should then be a corresponding obligation to provide a new service email address in any change of owner/tenant notification. Given most communications between landlord and tenants now take place by electronic means, it seems rather backward for this to be an opt in situation.
Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh; 26 January 2022; Response No. 8	Section 13(2)(c) – I take it that if one or both parties are not individuals, then one or other of the methods of delivering a notice in a traditional document in section 13(2)(a) and (b) must be used? I couldn't see the policy reasons for excluding hand delivery where one or both parties are not individuals. I note, however, that delivery *by a sheriff officer* can be by hand to either an individual or a non-individual, and that can be, according to the circumstances, to another person who either lives at the intended recipient's usual residence or works at the recipient's place of business (section 14(1)). Further the sheriff office can leave the notice at the recipient's place so long as it is done in a manner likely to come to the recipient's attention (section 14(1)(c)). I take it that all this is tied to the requirement for a sheriff office to prepare a certificate of service (section 14(3) and (4); see further below). Section 13(3) and 14(2) - While I can see the force in the policy reasoning behind prohibiting delivery to or by agents (i.e. avoiding disputes about the authority of the party delivering or receiving), the limitation may also create significant practical difficulties for the parties. Their freedom under section 17(1) to vary *in the lease* the requirements of section 13 (but not those of section 14) may not be quite enough to meet this difficulty. May room also be allowed for the parties to vary the requirements of section 13 *after* the conclusion of the lease?

	Section 14(3) envisages only that the certificate of service be a written, i.e. traditional, document, but does not make clear what happens to this certificate after it is completed by the sheriff officer. It seems to me that the party with an interest to have it is the party who sent the notice and I wonder if some express provision on this would be useful. There is also no suggestion that there might be an electronic equivalent to the certificate. I have no idea what is technically possible for sheriff officer services, but I have been impressed by the development in the private delivery sector of electronic advance intimations and notifications of physical delivery of goods and other communications. In my observation these systems typically cover the ground identified in section 14(3)(a). What they lead to is a confirmation for the sender that delivery has been made as far as possible. There is the added benefit, where the recipient's email or mobile phone number are available to the person effecting delivery, of notification of the recipient by email or text, and the possibility of the recipient confirming actual receipt. That is possible, I think, in our situation even if the parties have not agreed that the actual notice be given in electronic form as per section 13(4)(a) and (5). Section 16 – multiple landlords/tenants – is it necessary to clarify what happens where there is internal dissensus as between the multiple landlords or the multiple tenants?
Senators of the College of Justice; Supreme Courts of Scotland; 27 January 2022; Response No. 9	Yes. The proposed provision allows for traditional forms of delivery, and electronic means if the parties agree to it. We think that that is a sensible approach.
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	The pandemic has highlighted the difficulties in signing and delivering traditional documents so delivery in electronic form would seem a useful alternative. However there are difficulties in proving service by email where a delivery receipt only confirms that the email was sent from one server not that it was received by the recipients server. We would prefer to see delivery in hard copy or delivery by email followed by hard copy (as with

	the delivery of missives under the Legal Writings (Counterparts and Delivery)(Scotland) Act 2015. We do not see the use of a portable medium or device containing the document being popular because of the cyber-security risks of using portable devices such as USB sticks. We would like delivery by hand not to be restricted to individuals under s.13(2)(c). It can be useful for agents (such as solicitors or surveyors) to be able to deliver notices by hand where instructions are received from clients at the last minute. We would welcome confirmation that delivery by hand includes delivery by courier. We note the use of sheriff officers for service of a notice to quit or notice of intention to quit in Scotland. Given that a UK address is required for service of notices would it be possible to provide for the use of process servers where the landlord is based in England & Wales or of their equivalent where the landlord is based in Northern Ireland? We note a discrepancy between s.13 (2) which does not permit service of a notice to quit or notice of intention to quit by ordinary post and s.15 (3)(b) which deals with when a written notice is taken to be received and refers to a notice delivered in the ordinary course of a postal service (other than a postal service which providers for delivery of the document to be recorded).
Brodies; Law firm; 28 January 2022; Response No. 11	Restricting hand delivery to situations involving only individuals will mean that professional delivery services such as couriers will not be available to those who are not individuals. This will curtail the time they have to serve notices and may cause issues in some last minute cases. And it could lead to added expense if sheriff officers have to be employed. If it is not possible to allow hand delivery for all, we would suggest that hand delivery be available for all those serving a notice but only when they are serving the notice on an individual, i.e., hand delivery may be used by all senders but only when the recipient of the notice is an individual. While we appreciate that provision for service of notice stored electronically in a device is seeking to make service easier and to facilitate development of the way

	we might communicate, it will always be necessary to ensure that the device containing the notice is accessible to the recipient, e.g. any encryption should be removed or the notice served with the relevant access password or key. We would suggest that, as well as provision for service by sheriff officers, provision should be made for service by the equivalent to sheriff officers in other jurisdictions, e.g. process servers.
Scottish Law Agents Society; Representative body; 28 January 2022; Response No. 12	We draw attention to the decision in *Uddin v Henderson* 2021 which confirms that NTQ can be served by Sheriff Officer — we consider to be correct. However we also note the intention in the proposals to exclude the 1886 and 1907 statutory provisions and replace them with new provisions for commercial leases which we consider appropriate for the purposes of the proposed legislation. We also agree recorded delivery remains appropriate. The provision for electronic service is appropriate.
Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	Our members generally agree with the methods of delivery. However, we think that there needs to be provision for service in the rest of the UK by Process Server, as sheriff officers cannot operate outside Scotland. In addition, we do not agree that delivery by hand should be restricted to individuals via s.13(2)(c). We would also welcome confirmation that delivery by hand includes delivery by courier.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	In connection with section 13(2)(c), we are unclear as to why hand-delivery is only available as a means of service where both parties are individuals. We presume that 'individual' refers only to a natural person in this regard. We do recognise that hand delivery could introduce some level of risk as a party could deny receipt of a notice which could give rise to difficulties, particularly if litigation follows. It would be helpful if delivery by courier were expressly permitted, failing which, if hand delivery might be extended for all senders of notices (individual or not) where the recipient is an individual. In relation to delivery of notice by sheriff officer (section 14), we are unclear whether this also permits service in other parts of the UK by equivalent post-holders, for example, process server in England and Wales.

	In terms of delivery by electronic means (section 13(4) – (7)), while we appreciate that the draft Bill provides the safeguard of requiring parties to agree in writing to giving notice by electronic form/on a portable medium or device (section 13 (5) – (7)), we do consider that there is potential for difficulties with service by way of a portable medium device due to possible cyber-security risks and issues of encryption and compatibility. We consider the reference to "ordinary course of postal service" under section 15(3)(b) to be vague. In addition, we consider that the intention of this section is unclear as it does not appear to reconcile with the requirements for service under section 13 - according to section 13(2), it would not be valid to send a notice by non-recorded postal service. In relation to the provisions of section 13(4) and (5), we suggest that the provisions of section 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, including the provision that "delivery may be by such means (and in such form) as is reasonable in all the circumstances" (section 4(5)) should be considered, perhaps by expressly stating that section 4 of the 2015 Act does not apply to the Bill.
Anderson Strathern; Law firm; 28 January 2022; Response No. 16	As regards (a) notices in traditional form, our comment relates to the option of delivering the notice by hand delivery where both the giver and recipient are individuals:- - Our view is that what is important is the delivery of the notice rather than who delivers it; the focus should be on whom it is to be served and not who is serving it, as, for example, the landlord or the tenant, serving the notice, might not be a person and might be an entity and the solicitor acting for the landlord or tenant entity might be the person hand-delivering the notice, having drafted it, if time is tight. We see that the person's agent is excluded by virtue of Section 13(3). As regards (b) notices in electronic form, we have the following comments:- - As this question is just relating to delivery, we are assuming that the reference to notices in electronic form does just relate to, for example, pdf electronic copies of traditional wet-ink signed notices as

	opposed to "true electronic documents " i.e a notice to quit signed with the appropriate electronic signature (on this we understand that on one view, a notice to quit wouldn't actually require a qualified electronic signature but just a simple electronic signature). If this assumption is correct, would it be worth considering expanding the provision here to enable service of an e-signed notice to quit? - On the specified modes of electronic delivery, we do not agree with the option of hand-delivery or post of a portable medium or device containing the document. We believe this will create security issues and cause confusion and actually slow down receipt of the notice. The recipient of such a portable medium or device would either not know what to do with it (for example if delivered to the premises and received by an employee) or not have a suitable PC or other device on which to read the contents or in cases where a suitable PC or other device was available, there would be valid security concerns (checks required with IT teams for example) before the device could be read or compatibility issues. - As regards delivery in electronic form in principle, we welcome this advancement as this will be useful in situations where speed is required where, for example, instructions to serve a notice to quit are given late and close to the ish.
Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	We agree with the delivery methods proposed for notices in traditional documents with four important provisos: • delivery by courier should be permitted – this is one of the most common ways of serving a variety of documents, and can be essential in last minute cases; • personal delivery to, and by non-natural persons should be permitted; • personal service by the equivalent of sheriff officers in other jurisdictions should be catered for, where the usual residence or place of business may not be in Scotland, and it should be possible for local agents of this type to be able to serve notices; • delivery to or by a person's agent should be permitted. Again this is not that uncommon. Alternatively it should possible for the lease to vary this provision. Section 17

	permits variation of section 13, but we suggest for clarity the provisions in sections 13 and 14 should say "does not include, unless the lease so provides, delivery [by][to] or the [person's][recipient's] agent". In connection with notices in electronic form, it is quite usual for certain types of notice or communication to be sent as a pdf attached to an email. As this is a common and universally accepted way of communicating these days, we think that it should be a method of service that is regarded as reasonable. We would suggest that this Bill incorporates provisions similar to those in section 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 (although not in relation to part only of the document) and in particular the provision as to reasonableness contained in section 4(5). It might be appropriate in fact to say that that is an acceptable method unless the lease expressly excludes it? We are slightly uncomfortable about the provisions for other electronic transmission (disc, memory stick etc.) Particularly with increased levels of IT security, it may prove impossible to access even an agreed format. The provisions say that agreement as to format must be reached "before it is given". We suggest that this should refer to "immediately" before or something like "not more than [5] working days" before.
DLA Piper; Law firm; 28 January 2022; Response No. 18	Yes, generally, but subject to the following two comments: 1. In relation to section 13(2) (c) and 13(3) some colleagues have expressed the view that the provision restricting hand delivery to siuations where both giver and recipient are individuals might create difficulties in practice. They point out that it is not uncommon for commercial clients to give last minute instructions on the last day for service of notice and we have frequently had to hand deliver notices to company registered offices. 2. In relation to section 13 (4) to (6) we wondered whether there would be any merit in allowing greater flexibility for notices of intention to quit (as opposed to notices to quit) so that notice of intention to quit given in the course of ongoing correspondence (in the same form and using the same recipient’s address as in the ongoing corresponcence) would be sufficient even if the parties have not agreed in advance that

	notice may be transmitted in that form. In support of this suggestion we refer to the judgement in *Rockford Trilogy Ltd v NCR ltd, [2021] CSIH 56.*
Shoosmiths; Law firm; 31 January 2022; Response No. 21	Yes.
Burness Paull; Law firm; 3 February 2022; Response No. 23	It has long been known that certain requirements to deliver letters by recorded delivery (wherever that is stated in leases or in statute) have been problematic. Recorded delivery is no longer a method of posting which is recognised by the Royal Mail. Instead, they have substituted recorded delivery with "signed for" mail. The provision in the proposed bill therefore is to be welcomed as describing a method of signing which is recorded (such as signed for mail), rather than specifically referring to what was once known as "recorded delivery". It also allows for other postal services which might provide more reliable evidence of receipt. It is right to provide for service by electronic means. The issue of which email addresses can and should be used for electronic delivery needs to be addressed. The petitioners will still be concerned around service by email only, and the possibility that email addresses to which service is made is an email address which is no longer used or which is not recognised by the recipient as being an appropriate address to which notice should have been served. We consider there ought to be default rules within the legislation to deal with such situations. If parties provide for service electronically, then they should be obliged to provide and maintain an electronic address/communication method for the purpose of receiving notices eg a notices mailbox. They should be obliged to notify the other party of any changes to that address/communication method, and failing which they should not be entitled to evade a notice sent to the last notified address/communication method (even if it is no longer in existence).

	These provisions really ought to also apply to postal addresses and fax numbers (although where a postal address is publicly available from an official register (e.g. registered office on Companies House), there should be no need for notification. Perhaps including a notices mailbox or equivalent as part of information to be held by an official register would help address this. As practitioners will be distrustful of serving by email, it will most likely be used in conjunction with another method of service ("belt and braces"). More practical consideration of electronic service is required as the recent pandemic demonstrated that mail or other forms of traditional delivery are also not failsafe if there is no recipient at the physical address on which service is made. Being able to serve notices by email will also be of great assistance in circumstances where time is short and where notices are being served on foreign entities and in foreign jurisdictions. As such, we think this is an area which is worthy of further consideration and focusSection Section 13(3) should include agents. We see no good reason for preventing properly instructed and empowered agents from giving and accepting delivery by hand, particularly if the principals are abroad. There need not be statutory codification beyond this to add agents in this clause. Section 13(2)(a)(ii) should include a reference to a courier service. Section 13(2)(b) should also allow for service in other jurisdictions by process servers and the like ie equivalent of Sheriff Officers. This is particularly the case at least for England, Wales and Northern Ireland (with reference to the structure of the Bill requiring service at a UK address). The same equivalent options should be available across the UK to serve the notice. Section 13 (2(c) – we do not think that delivery by hand should be limited to circumstances when both parties are individuals. Section 13(4)(b) should be omitted. There should not be an option to send a notice by fax.

	Section 13(4)(c) should be omitted. It is difficult to see a circumstance in which this option would be used by parties. It would be cleaner if this was removed. For Section 13(5), we wonder if wording such as that adopted in the Coronavirus (Scotland) Act 2020, Schedule 4, para 1(3)(b) could be of use here. If an entity agrees to electronic communication and engages in that generally with the serving party, they should not be entitled to ignore communications via their regular channels of communication. Section 15(3)(b) is an anomaly as we understand it, since a notice cannot be served using a postal service "other than a postal service which provides for delivery of the document to be recorded": see Section 13(2)(a)(ii). Further what is meant by "ordinary course of a postal services" this is not a provision that is sufficiently clear.

Question 5

Do you agree with (a) these addresses being available for service of all termination documents, (b) the proposed statutory duty to provide a UK postal address, and (c) the remedies for breach of the statutory duty? If not, why not?

Name; Profession; Date; Response Number	**Response**
Centre for Scots Law; University of Aberdeen; 10 January 2022; Response No. 2	We agree.

Professor Stewart Brymer OBE, WS, Solicitor; Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	Agreed.
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022; Response No. 5	Generally no objection to what is proposed here, overall. The remedies may be somewhat disproportionate – the legislation could simply specify that service at the entity's last known address will be deemed as sufficient if specified in the Lease (having just served a Notice in Panama I know how awful that actually is – but withholding rent will need to be considered against the law of Irritancy as a specific exclusion).
CMS; Law firm; 25 January 2022; Response No. 6	Yes.
Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh; 26 January 2022; Response No. 8	Yes.
Senators of the College of Justice; Supreme Courts of Scotland;	(a) Yes. Making more addresses available should facilitate the serving of termination documents.

27 January 2022; Response No. 9	(b) Yes. Once again, ensuring that there is a UK address where they can be served will facilitate the serving of termination documents. (c) Yes. The remedies seem to us to be proportionate and appropriate.
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	We agree with the proposal that a UK address is provided for service of notices. We think that (d) “a more recent residential or business address of which the sender is aware” is rather subjective. What if the sender has been given the wrong information and the recipient never receives the notice? It would be helpful to have guidance in the explanatory notes on what is the most recent address where there are multiple addresses for a party. The retention of rent by the tenant if the landlord fails to give a UK address for service is not a proportionate commercial remedy for what could be a simple administrative error. We note that the addresses provided in s.28(3) are for service by post only. It is unclear as to why the addresses for sheriff officers listed in s.14 differ from and are less extensive than those listed in s.28(3).
Brodies; Law firm; 28 January 2022; Response No. 11	The ability to serve notices on a number of addresses may give rise to confusion and duplication. It could also result in more expense in the pursuit of ensuring that a notice is served, e.g. employing sheriff officers to serve in more than one location. It may be advisable to provide that the notice should be served at the UK address either provided in the lease whether that be under the statutory duty or otherwise or UK corporate address in the first instance and if this address is not known, then at any of the other addresses provided for.
Scottish Law Agents Society; Representative body; 28 January 2022; Response No. 12	We consider the imposition of a statutory duty to provide a UK service address obviates certain difficulties in relation to services of notices. We are aware that some already leases provide addresses for service of notice which if not complied with renders the notice ineffective. We express no view on the remedies for breach of statutory duty.

Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	Our members agree with the proposal that a UK address is provided for service of notices. We are of the view that a more recent residential or business address of which the sender is aware is subjective. There is a risk that the sender has been given the wrong information and the recipient does not receive the notice. Our members have also suggested that it would be helpful to have guidance in the explanatory notes on what is deemed the most recent address where there are multiple addresses for a party. Our members are firmly of the view that the retention of rent by the tenant, if the landlord fails to give a UK address for service, is not a proportionate commercial remedy for what could be simply an administrative error.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	We question whether it is clear when the notification requirements for a UK address take effect for the purposes of sections 29 and 30. We have some concerns regarding the provisions within the draft Bill in this regard, particularly in connection with section 28. It appears that the terms of section 28 could be fairly subjective given that a party may or may not be aware of the existence of an address of an office, and in particular, section 28(4) raises concerns in this regard. Section 28(3) does not appear to provide a hierarchy, however, some paragraphs refer to the “most recent” address. It is unclear how this might be determined, particularly in circumstances where a party may have multiple current addresses. We consider that this has the potential to result in parties serving notices to multiple addresses in order to protect their position and thereby compromise the objective of efficiency sought to be achieved by the Bill. We consider that the Explanatory Notes could be clarified and provide further detail here – for example, we consider the reference to section 28 containing a “Non-exclusive list” is unclear. We also note that this list applies to service by post but not by sheriff officer or by hand. In relation to section 28(3)(c) and 29(3)(b), we would welcome clarity as to how a “principal office” may be determined within the context of this Bill. This does not appear to us to have the same type of objectively ascertainable meaning as the “registered office” of a company or LLP which is publicly available via Companies House. If “principal office” is to be retained, it

	would be useful to define the circumstances or entities in respect of which it is to be treated as applying within the scope of this Bill. In respect of limited partnerships, we suggest that the 'principal place of business' would be the most appropriate address at which to execute service. We recognise that there may be particular difficulties in respect of an 1890 Act partnership, for which there is no register, and therefore no registered address. There would, however, presumably be a UK address for such a partnership narrated in the lease, even if not specifically for the purposes of giving notices. In that case, section 29(3)(a) would be satisfied. Such a partnership may therefore be exempt from the obligation of section 29(1) by that provision. If the partnership does not have a UK address designed in the lease, and as there is no public record of an 1890 Act partnership having a "principal office" (which could in any event change without public knowledge), that could change without any public record of that change. The address in the lease would therefore be out of date. Where there is no public record of such a change, it might be said there is a case for that partnership (or any other entity that does not have a publicly available register containing a registered address) being caught by the obligation in terms of section 29(1) of the Bill. We recognise that the safeguard in section 28(4) may allow the sending party to rely on the prior principal office named in the lease in this example, assuming that "business address" would capture within its scope "principal office" - a point that may be best clarified. We consider the reference to "business address" in section 28(3)(d) would benefit from greater clarity, perhaps by way of the Explanatory Notes. For example, in the case of a landlord with a multi-occupancy property, does the reference to "business address" mean that a notice could be served at the front desk of the property? In relation to remedies under section 30, we note that retention of rent is generally considered to be a fairly significant step in the context of commercial leases, and careful consideration would be merited as to whether this appropriately balances with the breach.
Anderson Strathern;	We agree with (a). With regard to (b) we agree with the proposed statutory duty because it has been made clear

Law firm; 28 January 2022; Response No. 16	that this duty does **not** apply if a UK address for the party does appear in the lease or if the party is a UK corporate body. With regard to (c), we do not agree with the proposed remedies for breach of the statutory duty, particularly the remedy available to a tenant of retention of rent; this seems too extreme and not commensurate with the breach in question here. Also there doesn't seem to be an equivalent remedy available to the landlord if the landlord was in the equivalent situation. As regards the option available to the landlord of service at the let property, there are reasons why this will not be the preferred option for the landlord, for example:- (i) The let property might be a field if the lease is of a wind farm site, for example, and so service on the property would not reach any person. A similar example is a sub-station lease where there would be no people occupying the site. Both a wind farm lease and a sub-station lease would come within the scope of the Bill as it applies to all commercial leases other than those excluded at Section 1. Also included in the scope of the Bill would be mineral extraction leases, commercial livery leases, leases of workshops/artists studio;leases for growth of non-foodstuff crops; leases of houses (which are outwith the scope of Housing legislation) and mooring/pontoon leases. (ii) Where the let property is a building or a shop, the landlord might not want to serve the notice on the property and thereby alert employees of the tenant before the relevant person at the tenant company/body – this could create alarm.
Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	We agree that the proposed types of address are all suitable addresses for service of these notices. We do however think that the provisions could be clearer about the notification mechanism, particularly in cases where the parties giving or receiving notification are not the original parties to the lease. We have mixed views about the tenant's remedy of retention of rent. Most landlords will find this provision unpalatable. On the other hand it could act as an incentive on the landlord to ensure that notification of address is timeously given.

	We do however wonder at the practicalities of such a provision, where most commercial leases provide for payment of rent quarterly in advance. At what point is a tenant entitled to withhold payment of rent and for how long? Section 29(1)(a) would appear to apply from the very start of the lease, but we find it difficult to envisage a situation where it would be acceptable for a tenant retains rent from the date of entry.
DLA Piper; Law firm; 28 January 2022; Response No. 18	Yes.
Shoosmiths; Law firm; 31 January 2022; Response No. 21	Yes, apart from the following point. Many commercial landlords are corporations registered in the Channel Islands or the Isle of Man. The Royal Mail Signed For service can be used to send letters by recorded delivery to those islands for the same price as if they were sent to an address within the UK. Delivery times are similar. No real purpose would be served by requiring a party with an address at which notices could be served in one of those territories being required to have, in addition, an address for service in the UK. Therefore, we would suggest that the references to an address in the UK should be extended to include an address in the Channel Islands or the Isle of Man.
Burness Paull; Law firm; 3 February 2022; Response No. 23	We do not agree with the approach adopted here. The landlord may be unable to procure a UK address, and this restricts or appears to create hurdles to inward investment in Scotland. In our experience, high value commercial property in Scotland is increasingly owned by entities which are based outside the UK including entities registered in Luxembourg, British Virgin Isles, Jersey, Guernsey, etc. in relation to investment leases the investors are sophisticated, having taken into account a wide variety of reasons prior to committing to an investment in Scotland we should avoid any legisltation which cuts across Scotland being an attractive option for than the rest of the UK.

	We see the benefits of being obliged to provide a UK address, but recognise that it may not always be possible and should not be mandatory. There should at least be an obligation to include in the lease or to notify the other party of a single address (even if abroad) for the service of notices. This is always be possible and is not so onerous. If there is no UK address, we would see the benefit in there being a rule that a notice in the English language is not invalid because it is not the usual language of the recipient (notwithstanding any rule in a foreign jurisdiction to the contrary). A change of landlord may make this become an issue during the period of a lease, even if it is not relevant at commencement. There should be default rules for service of the notice: a registered office for a UK body corporate (which should always be competent), the last notified address, the address stated in the Land Register for the proprietor (if they are the landlord) or midlandlord (as tenant registered under a long lease), the Extractor of the Court of Session. Notification of a new address should be in writing and make express reference either to the provisions of the lease or the legislation. Notification of a change of address must be the responsibility of the party changing the address. It should not be for the other party to carry out substantial investigations into the appropriate address for service of a notice, especially where parties may be registered in an offshore corporate register with a lack of transparency or public access, and accessible only in a foreign language. This is an area which currently generates a lot of time for the server in terms of investigating. These default provisions should not be capable of variation. Companies governance requirements are already strong regarding UK companies. Additional regulations are not required to protect from other issues or simply to make service of notices more convenient. It is open to parties to nominate a party on whom service can be validly made (a practice adopted in England). Well advised parties can provide for that in their leases

	and other contractual documents. Statutory regulation of this is something which we would rather avoid. Not only does it add further complexity, but it could have the adverse consequence of making Scotland look like a difficult place to buy commercial property. Any nomination of a party on whom service can be validly made (if in addition to the statutory default rules) should not be capable of preventing a party from giving valid notice if they only follow the statutory rules or could the statutory provision allow for a nominated party. For example, a provision that a notice must be sent additionally to A, B and C at X, Y and Z Addresses should not affect the validity of a notice if it is not complied with, provided the notice is given in accordance with the statutory rules. While a failure to follow those provisions should be capable of giving rise to a claim for breach of contract, it should not be capable of affecting the validity of the notice. Such provisions do not stand the test of time, changes of address or changes of parties. Statutory regulation is necessary to deal with situations where there is a change of party during the period of the lease, in which case the other party will not be able to insist upon a nomination within the body of the lease (as they are able to at commencement). Fundamentally, notices should go to where they need to to be dealt with wherever that is. There are not so many instances of overseas companies with additional burdens of service relating to costs. With the evolution of electronic service this will be less of an issue.

Question 6 Do you agree with the proposal that notices be valid despite a change in the identity of landlord or tenant? If not, why not?	
Name; **Profession;**	**Response**

Date; Response Number	
Centre for Scots Law; University of Aberdeen; 10 January 2022; Response No. 2	We generally agree with this. However, where there is a new landlord, does the notification under s 31(1) need to come from the previous landlord or can the new landlord provide this and what does the notification need to consist of (e.g. do they need to prove that a transfer of ownership has taken place)? For example, a tenant could receive notice from a third party, unknown to the tenant, claiming that they are now the landlord and there should be clarity as to whether this is acceptable and what exactly is required.
Professor Stewart Brymer OBE, WS, Solicitor; Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	I agree with this proposal.
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022; Response No. 5	Most commercial leases require consent in writing from a Landlord before any assignation of the Tenant's interest is competent. An intimation is then sent by the Tenant to the Landlord of completion taking place. As such, this is not considered to be a practical issue for a Landlord. In terms of change of Landlord from the Tenant's perspective, most practitioners will check the land register for ownership before they are serving a notice. What is proposed generally seems fine – it will probably impose a greater significance on Seller's notifying Tenants of a change of ownership than we see at present.
CMS; Law firm; 25 January 2022;	Yes but there should be a similar obligation on the original landlord/tenant to notify the new landlord/tenant with the same consequences for failure as there are in Section 22 for the tenant/sub-tenant scenario.

Response No. 6	
Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh; 26 January 2022; Response No. 8	Yes.
Senators of the College of Justice; Supreme Courts of Scotland; 27 January 2022; Response No. 9	Yes. The proposal seems sensible.
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	We agree with the proposal that notices be valid despite a change in identity of the landlord or tenant.
Brodies; Law firm; 28 January 2022; Response No. 11	Yes we agree.
Scottish Law Agents Society; Representative body;	We agree the issue of invalidity of notices where the change of landlord is unknown to the tenant is a potential issue under the current law and the proposals will address this problem satisfactorily.

28 January 2022; Response No. 12	
Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	Our members agree that notices should be valid despite a change in identity of the landlord or tenant.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	Yes. We consider that such provisions will be particularly of use where parties are not instructing agents. We recognise that this provides a safeguard, particularly for a tenant where they have not been notified of a change in the identity of the landlord. We also recognise that there are certain risks involved for an incoming party who may not be made aware of a termination notice which has been served on a former party. In practice, we consider an appropriate level of protection is given in the draft Bill by virtue of section 31(1) and transactionally, it will be open to parties who wish to do so to make provision for contractual obligations for an outgoing party to pass on any notices to the incoming party within a fixed period.
Anderson Strathern; Law firm; 28 January 2022; Response No. 16	Agreed but we do have the following comment which we think is relevant here to be considered:- In our view, the situation of a tenant not knowing that the landlord has changed must surely only arise occasionally as when a property is sold, notification of the change of ownership is given to the tenant in order that rent payments can be made to the correct party and if, for some reason, this notification is not made, the change in landlord would become apparent as and when rent payments are triggered if the tenant tried to make payment to the old landlord. Notification of change of landlord is one of the completion deliverables to be delivered by the seller to the purchaser at completion in terms of the PSG offer to sell style.

	In the situation of a change of ownership of the property occurring close to the ish of the lease and the purchase application not having completed and the new owner not yet appearing in the Land Register by the time the termination notice needs to be served, in terms of the purchase missives (if based on the PSG investment offer to sell), all notices received by the seller must be provided by the seller to the purchaser as soon as possible after the date of conclusion of the missives. In addition, in terms of the lease confirmations, the seller must confirm that except as disclosed to the purchaser, no break or termination notices have been served on the seller by the tenant or vice versa.
Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	We agree broadly with this proposal. It is usual for solicitors acting in a sale or purchase of investment property to issue Notification of Change of Landlord letters to tenant, but we accept there may be occasions when for one reason or another this does not happen. Usually when such letters are sent they are sent in duplicate with the request that the tenant acknowledges receipt and returns the duplicate. Often this doesn't happen. However it would very quickly come to the attention of both the old and new landlord if the rent continued to be paid to the outgoing landlord after this intimation. Consideration should be given to time-limiting this provision, and whether that is realistic. Prudent solicitors acting for a tenant will often check the Register (via ScotLIS) for the identity of the current owner, but as it can take some time for the Register to be updated with the details of the new owner, so that is not always a reliable indicator. On the other hand it seems unreasonable to allow this to continue indefinitely, even after a property has changed hands several times.
DLA Piper; Law firm; 28 January 2022; Response No. 18	Yes.
Shoosmiths;	Yes.

<table>
<tr><td>Law firm;

31 January 2022;

Response No. 21</td><td></td></tr>
<tr><td>Burness Paull;

Law firm;

3 February 2022;

Response No. 23</td><td>In practice, a change of landlord is apparent from the Land Register. If the identity of the landlord or the tenant can be found from a public register, then we see no reason to legislate in the way proposed.

There are various practical points to note which mean our view is that statutory regulation is not required:

1. a landlord will intimate change of ownership to a tenant to ensure that they are able to collect rent and sums due to them are not erroneously paid to the previous landlord. There are often assignations of rent granted to a heritable creditor where a landlord purchases a property. In those circumstances, it is even more likely that the tenant will be sent intimations and notices confirming that they have a new landlord.

2. whilst no change is made to the lease, the reality is a change of landlord will likely be made known to the tenant by way of some form of notification.

3. Checking public registers may also be possible.

We do appreciate that there can be circumstances where a notice needs to be served just at a point in time where a property is in the course of being sold. These instances will be relatively rare. We do think, from a certainty point of view however, that a landlord would be entitled to ask why a notice served on their predecessor in ownership of the property is competent. The fact that change of ownership can be detected from the Land Register would also mitigate against a mischievous landlord who may hold back on serving notice of change of ownership in the hope of catching out a tenant.

If we were to make any change in this regard, then we would say that the tenant is entitled to rely on the information available at the Land Register on the date on which the notice is served. If a transaction has completed and title has changed hands but a</td></tr>
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	disposition has not yet been registered, then the tenant should not be prejudiced by that as the change of ownership is not something which they could have discovered from a search at the Land Register. We feel that this is a more precise provision. We generally agree with our property colleagues, but the provision ought to be more precise about when something is deemed to be discoverable from the Land Register. Is it the application record? But what if the application is subsequently withdrawn? Should it therefore only be the identity of the proprietor on the title sheet? But what if a property is undergoing first registration? Citizen tenants may use the public access version of ScotLIS so careful thought is required. It may be beneficial to have a provision similar to that for changes of registered office for companies – allowing notices sent to the previous landlord to be effective for a short period of time (7 days) after the purchase. That allows for changes to the landlord in the period between posting and deemed or actual service, during which the tenant may be unaware and incapable of being aware of the change. We do not habitually carry out post-service searches. This may be a risk area, which could be negated by this proposed change.

Question 7

Do you agree with the proposal that a notice may be sent to a party who has died where no notice has been given to the sender of the name and address of the deceased party's executor or of a heritable creditor in possession? If not, why not?

Name; **Profession;** **Date;** **Response Number**	**Response**

Centre for Scots Law; University of Aberdeen; 10 January 2022; Response No. 2	This seems to reasonable to us.
Professor Stewart Brymer OBE, WS, Solicitor; Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	Agreed.
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022; Response No. 5	Yes – the tenant has no real way of checking if a Landlord is still alive or not and in the absence of knowing / being contacted / having a certificate of confirmation in the name of the executors the Tenant should be entitled to rely on most recent records.
CMS; Law firm; 25 January 2022; Response No. 6	Yes.
Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh;	Yes.

26 January 2022; Response No. 8	
Senators of the College of Justice; Supreme Courts of Scotland; 27 January 2022; Response No. 9	Yes. The proposal seems sensible.
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	We can see that this is a pragmatic solution to the problem although it could cause distress to the deceased's family. It can take some time for an executor to obtain confirmation so there does need to be a way for a tenant to still serve a notice of intention to quit and for a landlord to serve a notice to quit so we welcome this proposal. We note that there is no provision for service of notices where a company has been dissolved or struck off or if a landlord cannot be traced. It would be useful if in those circumstances notice could be served on some designated official entity or party.
Brodies; Law firm; 28 January 2022; Response No. 11	Yes we agree. It would also be useful to provide for what should be done if the entity on whom service is to be effected no longer exists, e.g. a 'struck off' company or dissolved partnership.
Scottish Law Agents Society; Representative body; 28 January 2022; Response No. 12	Service on an executor or heritable creditor in possession is appropriate. The issue identified in the absence of an executor is broader than service of notices under leases and affects a number of areas in relation to executries where no executor is confirmed to the estate. We recognise that this is outwith the scope of the proposals but merely note that the problem is not unique to services of notices to quit or intention to remove.

	The proposal for service on the deceased is a novel solution to the problem. This may present its own difficulties with service by recorded delivery but particularly by sheriff officer where it is known that the person is deceased.
Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	Our members agree with this proposal.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	Yes, we consider that this is a sensible proposal. The period following the death of a party before executors are confirmed commonly creates challenges in practice. We consider that this is a practical solution.
Anderson Strathern; Law firm; 28 January 2022; Response No. 16	Yes – Agreed.
Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	We agree that this is a sensible proposal.
DLA Piper; Law firm;	Yes.

28 January 2022; Response No. 18	
Shoosmiths; Law firm; 31 January 2022; Response No. 21	Yes.
Burness Paull; Law firm; 3 February 2022; Response No. 23	This is not an area which we deal with regularly. In commercial property, the parties to a lease are most likely to be corporate entities of some form. Therefore, it is relatively rare that individuals are party to a lease. We deal with it occasionally and agree it is a sensible proposal. Similar rules around changes to trustees, partners, members of unincorporated associations would be similarly useful. Not all trustees, partners etc are infeft and so will not necessarily be noted in the property registers. There is always a risk of a change in such appointments which is not detectable from any search of a public register. The Register of Controlling Interests in Land comes into effect on 1 April 2022 and controlling parties goes beyond registered/recorded interests and would capture the details of uninfeft trustees if they have a controlling interest. However, that is not a property register and there is no certainty that it is up to date.

Question 8 Do you agree with (a) the proposed changes to methods of service of pre-irritancy warning notices and (b) the proposed new rights for heritable creditors of registered leases in relation to irritancy? If not, why not?	
Name;	**Response**

Profession; Date; Response Number	
Centre for Scots Law; University of Aberdeen; 10 January 2022; Response No. 2	We agree with this. However, we raise the same point as above in relation to hand delivery.
Professor Stewart Brymer OBE, WS, Solicitor; Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	Agreed. In the absence of detailed reform of the law of irritancy as recommended by the Commission, these reforms are welcome.
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022; Response No. 5	Agreed, but I am firmly of the view that again this should not be capable by electronic delivery.
CMS; Law firm; 25 January 2022; Response No. 6	Yes.
	Yes.

Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh; 26 January 2022; Response No. 8	
Senators of the College of Justice; Supreme Courts of Scotland; 27 January 2022; Response No. 9	Yes. It is noted that these proposals are based on the earlier proposals contained in the 2003 Report on Irritancy in Leases of Land (Scots Law Com No 191, 2003) For completeness, we note that we find s 5A(4) introduced by s 32(3) of the draft Bill and, in particular, the "but could reasonably be expected to become" wording to be confusing. It would appear to be unnecessary.
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	In relation to (a), we refer to our previous comments at Q. 4 about hand delivery and service by sheriff officers. We do not agree with (b). It is for the parties to amend the lease to provide for service of notice on any heritable creditors rather than for the law to be changed. (b) provides legislative protection for a third party who is not a party to the lease and this is not appropriate. If this is enacted then landlords will by default require that every heritable security requires consent because landlords will not want to risk losing the right to irritate the lease which may put constraints on tenants commercial activities. In some situations landlords and heritable creditors enter into direct agreements to deal with what will happen if the tenant is in default (particularly in energy leases) and this would be an alternative to legislating for the landlord to serve notice on heritable creditors.
Brodies; Law firm; 28 January 2022;	(a) Subject to our comments above about hand delivery, we welcome the changes proposed on the service of pre-irritancy notices. (b) Scottish leases are often criticised by pan-UK and other lenders for failing to provide them with any

Response No. 11	statutory protections when irritancy is threatened. Such lenders will welcome the right to be notified of any potential irritancy.
Scottish Law Agents Society; Representative body; 28 January 2022; Response No. 12	Yes. The LRMP(S) Act 1985 provision, always intended as a stopgap solution, was welcome to prevent the potential detriment caused to the tenant by the landlord exercising his right of irritancy. We agree the modest proposals in relation to amending the methods of service of such notices would be a valuable reform.
Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	Some of our members do not agree with (b), on the basis that it is for the parties to amend the lease to provide for service of notice on any heritable creditors rather than for the law to be changed, and (b) provides legislative protection for a third party who is not a party to the lease and this is not appropriate.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	(a) In relation to hand delivery of notices and service by sheriff officers, we refer to our comment at Q4 above. (b) Yes, we broadly welcome the requirement to notify heritable creditors of registered leases as this will protects their interests. We do recognise that there may be additional cost associated with this where a heritable creditor has not been notified to the landlord or required to have their consent sought in terms of the lease. This would require investigations to be undertaken by a landlord, most likely with Registers of Scotland, which are likely to involve some cost.
Anderson Strathern; Law firm; 28 January 2022; Response No. 16	With regard to (a), we do not agree with hand-delivery as one of the proposed new modes of delivery of pre-irritancy warning notices. Such notices are different in nature from termination notices as an irritancy situation is often a contentious situation and the possibility of delivery by hand-delivery opens up the risk of the recipient denying receipt of the notice. There needs to be some proof that the notice has been delivered, and

	this is required in any subsequent court action. Hand-delivery leaves the matter open for debate. With regard to (b), our first comment is a general one and is as follows:- - The well-advised creditor when granting the funding and taking a security over the lease in the first place, will review the lease in detail (as the security is only as good as the underlying lease) and should be advised to insist upon variations to the lease to provide for the creditor to receive copies of notices of irritancy and indeed copies of other notices such as break notices or termination notices which threaten the existence of the lease and therefore their security. We would have thought it would only be relatively rarely that a creditor taking a security over a lease would proceed without legal advice and so would have thought the situation of a creditor not knowing of a potential irritancy would be relatively rare. Our second comment is a specific one and relates to the proposal outlined at paragraph 34 and is as follows:- - The proposal is that the landlord should be required to give a pre-irritancy warning notice to the creditor of the tenant as well as to the tenant. Why should this obligation fall upon the landlord? Should not the obligation be upon the tenant to pass on a copy of the notice to its own creditor and indeed will the tenant not already be under such an obligation in terms of the lease (see our general comments above) or in terms of the loan documentation (either the security itself or the loan agreement)? - As regards the power to be given to the creditor to challenge the validity of the notice or the subsequent irritancy on grounds that would be available to the tenant, is it not the case that a ground of irritancy exists or it doesn't; it is a matter of fact? How would the creditor know of the details of the tenant's breach? - As a practical point, if the landlord is required to give a pre-irritancy warning notice to the creditor,on whom would the landlord serve the notice? Would the landlord have sufficient details of the creditor in order to ensure the notice was received by the right person? Serving it at the branch of the bank in

	question would be unlikely to reach the right person. Would the landlord need to do some investigative work beyond looking up details of the security-holder? The potential for it not to reach the right person at the creditor entity seems rather large.
Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	We have similar comments on this proposal as in our response to Question 4. In particular it should be possible for the lease to contract out of the provision that prohibits delivery by the landlord's agent (which is not uncommon) and to the tenant's agent. Also courier or hand delivery (not limited only to individuals) should be permitted.
DLA Piper; Law firm; 28 January 2022; Response No. 18	Yes.
Shoosmiths; Law firm; 31 January 2022; Response No. 21	Yes.
Burness Paull; Law firm; 3 February 2022; Response No. 23	We think these provisions are beneficial. In the realm of heritable securities over leases, we have long found that funders are slightly reticent to accept long leases as security. Accordingly, anything which strengthens and makes the position of a heritable creditor more secure is to be welcomed. While most commercial leases will include contractual provisions to protect the heritable creditor's interest, that is not universally the case. Statutory provisions would avoid situations where heritable creditor's interest is not recognised in the irritancy provisions. With reference to Section 32(2), inserting a new s4(4)(a) into the 1985 Act, we question why the wording in Section 13(2)(a)(ii) (by a postal service which provides

	for delivery of the document to be recorded) is not carried through to the reforms to the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985. This is particularly where there remains some uncertainty about when the date of service would be under a lease where there is no deemed service provision. We do not see a reason for keeping a distinction between recorded delivery for pre-irritancy warning notices and a broader type of postal services (others are more reliable) for notices to quit and notices of intention to quit. With reference to Section 32(2), inserting a new s4(4)(c) into the 1985 Act, as with the comment in relation to notices to quit and notices of intention to quit, we do not think that hand delivery service should be restricted to individuals. With reference to Section 32(2), inserting a new s4(4C) into the 1985 Act, we disagree with the option for the lease to provide for service by such other method as specified in lease. This is particularly in the case of pre-irritancy notices, where delivery might take place on different days. Depending on how the pre-irritancy notice is drafted, that may give rise the uncertainty.

Question 9

Do you have any other comments to make in relation to the draft Bill or the project more generally?

Name; **Profession;** **Date;** **Response Number**	**Response**
Lionel Most; Solicitor (retired);	I would confirm that I agree with all the points but have a question on one issue.

30 December 2021; Response No. 1	I do recollect the discussion on one of a multiple of landlords or tenants, as the case may be, being able to serve notice to terminate and I have no issue with that. However I cannot recollect if we discussed whether there should be any reservation of any right to the non-notifying landlord or tenant as the case may be against the notifying one. From a personal point of view I think it is unfair that a person should lose their right to claim loss should they incur any. And so I think it would be fair to reserve any right to the non-notifying landlord or tenant as the case may be, against the notifying one, to make a claim for such loss without interfering with the termination itself. I accept that this might be an existing right at common law but a statement preserving such a claim amongst the landlords inter se or the tenants inter se as the case may be, would, I think, clarify the position.
Centre for Scots Law; University of Aberdeen; 10 January 2022; Response No. 2	We broadly support the proposals within the draft Bill. We agree with the terminology used, including “automatic continuation”. While no specific question is asked in relation to paragraphs 9 and 10 in the consultation document, we are content with the approach outlined there. We consider that the proposals would improve, clarify and simplify the law in this area, subject to the points made above.
Professor Stewart Brymer OBE, WS, Solicitor; Solicitor, Brymer Legal Limited and Honorary Professor in Law, University of Dundee; 14 January 2022; Response No. 3	No. The reform is timely.
Dr Craig Anderson; Lecturer in Law, Robert Gordon University;	This is just a short note to say that, having read through the proposals and the draft Bill, I agree with the Commission’s proposals.

17 January 2022; Response No. 4	
Amir M Ismail; Solicitor and Director, Holmes Mackillop; 23 January 2022; Response No. 5	Codification of the existing law is generally welcome, overall, and will improve the instances that typically don't quite meet the usual set of circumstances. Other than electronic service, the Law Commission should be praised for its work and proposals to date.
CMS; Law firm; 25 January 2022; Response No. 6	The Bill as drafted carves out a private residential tenancy within the meaning of the Private Housing (Tenancies) (Scotland) Act 2016 in Section 1(2)(a). That Act itself carves out many residential tenancies from its ambit in Schedule 1. In Clause 5 of the Bill most of these are then specifically carved out (for example a student tenancy). However not all are carved out the ambit of the Bill (an example would be a lease where there was a resident landlord). Is this intentional? We would have thought that these should also be carved out. Our reading is that the Bill as drafted would mean the Tenancy of Shops (Scotland) Act 1949 would not apply to a lease where the parties contract out of the requirement for notice to prevent automatic continuation but it would be useful to put this matter beyond doubt with a specific provision to that effect. We think the Bill should in fact go further and in line with feedback to the previous consultation repeal the Tenancy of Shops (Scotland) Act 1949.
Jennifer Henderson; Registers of Scotland; 26 January 2022; Response No. 7	With the exception of a new lease incorporating terms expressing that it will end on its initial termination date - per s.4(1) of the draft bill – none of the provisions provide for a Land Register registration event. The main effect as regards operation of the Land Register appears to be clarification of the types of evidence that might be suitable in support of a request to rectify the register to remove an expired lease. As this appears to be broadly equivalent to what is required under the current common law scheme, I have no concerns with the proposals. From a slightly wider perspective, the proposals seem

	sensible and will presumably provide some helpful clarity in this space. As well as the broader proposition, I note the Bill sets out some detail on various issues such as the types of leases to which the provisions apply, clarification on the interaction between head leases, sub-leases and interposed leases, time frames required for compliance, and requirements for the validity of notices to quit and delivery. While much of that detail will ultimately fall to be considered by the parties to the lease rather than the Keeper, any clarity that simplifies conveyancing and minimises scope for disagreement between parties and inaccuracies appearing on the register is to be welcomed.
Professor Hector L MacQueen; Emeritus Professor of Private Law, University of Edinburgh; 26 January 2022; Response No. 8	The draft Bill's complexity and extensive internal cross-referencing is probably inevitable but it does not make for an easy read. Given that the Bill is meant to apply to all leases other than those specifically excluded (an approach with which I agree in preference to any attempt to define "commercial leases"), I wondered whether it would be best to begin with a definition of a lease and have section 34 included within that, rather than left till near the end. In thinking this I am influenced by reading a recent Edinburgh PhD thesis which points up the difficulty in expounding exactly what the difference between a lease and a "licence to occupy" land may be, even though such a distinction is commonly drawn in legal practice and ordinary language. I assume that this Bill would not be intended to apply to "licences to occupy" or "licences to use"; perhaps they too should be excluded? I accept that definition of a lease is far from straightforward, but might be inclined to adapt the one in Gloag & Henderson para 35.02 to read as follows: "A contract whereby an owner or occupier of land grants exclusive possession of it to a tenant for a period of time not exceeding the maximum permitted duration [175 years] in return for rent, in money or goods [?or services or some combination of the foregoing?]." Might section 3(5) be placed before section 3(4) to ease the path of the user of the legislation? Section 32(8) – does this not end up as defining "material breach" as "material breach"? I think

	something needs to be said to bring in the common law (of contract or relating to leases so far as distinct) after "which is", e.g. "which is, under any applicable rule of law, or is deemed etc".
Senators of the College of Justice; Supreme Courts of Scotland; 27 January 2022; Response No. 9	Overall, we do not consider that the draft Bill, as a whole, will be easily understandable by the lay reader. We appreciate that the matters dealt with in the bill are complex and technical. However there would clearly be benefit in the law on continuation of leases being set out in a statutory code which is as simple and easy to understand as is possible. In this regard, we also wonder whether the drafting of the provisions could be simplified if, rather than trying prescriptively to address many hypothetical eventualities, matters were approached by setting out the key principles.
Pinsent Masons; Law firm; 27 January 2022; Response No. 10	We welcome this new legislation and the draft bill has been carefully considered taking account of the feedback from the profession. We think the law of notices generally, not just in relation to leases, would benefit from reform and clarification. We have a few further comments on the legislation: Use of the expression "termination date". Termination date is defined in para 24 (as an aside would it be possible to move the interpretation provisions to the start of the Part of the Act rather than at the end- we struggled to find the interpretation provisions for Part 2 as they are buried in the middle of the bill) as including the ish following a period for which the lease continues by virtue of section 2(1) or 6(2). Sometimes termination date though is used to mean the contractual end date of the lease (without continuation) and we wonder if it would be helpful to have a separate definition of "contractual termination date". Written notice is taken to be received on the second day after the day on which it is sent for both electronic notices and those sent by post (para 15(3)(a)). 2 days for electronic service seems rather a long time given immediate delivery. We consider para 15(3)(b) to be too vague- what is the day on which it would be delivered in the ordinary course

	of a postal service for a first class letter? It could be next day or 2 days or more. Para 27 (3)(b) establishing the date of entry- what is intended by the date on which the lease was granted? Is this the date the landlord signed the lease? Para 27(5) with regard to the court or tribunal ordering that the lease is endorsed with the date of entry this may prove difficult when we have electronic leases. How would an electronic lease be endorsed? There is a typo on the top of page 22 – it should read “Land Register of Scotland” and not Law Register. We should be grateful for clarification on whether the legislation extends to leases of the seabed by the Crown up to the 12 nautical mile limit, and also to “leases” of seabed areas beyond the 12 nautical mile limit (which, although technically a grant of rights rather than a lease, are still to all other intents and purposes regarded as equivalent to leases to which Scots law rules are applied) – this is relevant in particular for offshore wind farm leases. Is it intended that a lease of more than 7 years by a heritable creditor which has been approved by the Court under the Conveyancing and Feudal Reform (Scotland) Act 1970 will terminate automatically under s.5(2)(b)(i)? Under s.10(4) if there is an error in the termination date in a notice to quit the landlord must continue to comply with its obligations under the lease (to insure, provide services etc). We consider that there should be corresponding obligations on the tenant to pay for these services up to the end date. With regard to the automatic continuation of head lease and sub-lease in s.21 we would be grateful for clarification on what would be considered a ‘reasonable period’ for the purposes of s21(3)(b)(i) and (4)(b)(i). This appears subjective.
Brodies; Law firm; 28 January 2022;	We welcome the codification of termination of leases in the one place and the application of the same notice periods to all premises, regardless of size and who is serving the notice.

Response No. 11	At section 3(1)(c) – we think it would be desirable to set out what will constitute acquiescence of the landlord and whether, for example, it will require a physical act or some evidence of acknowledgement that the tenant has given up possession. For example, section 16 of the Title Conditions (S) Act 2003 sets out the circumstances in which a benefited proprietor will be deemed to have acquiesced in the breach of the burden. We believe that section 6 should prevail over any express provision in the lease bringing the lease to an end at the termination date as permitted by section 4, but this could perhaps be made clearer in sections 4 and 6. Also in section 6, the reference to the 'termination date' could be confusing when the definition of 'termination date' in section 24(1) is considered. We would suggest that reference is made to the last date of contractual expiry of the lease and expiry of any automatic continuation period. We are also not sure that the draft legislation makes it clear that there may be more than one instance of automatic continuation. Given that sections 9 and 11 contain the information that "must" be included in a notice to quit, it would be helpful for a form of notice to quit to be added to the legislation for parties to use. The form should not be compulsory but provided as a drafting tool / aid. Reference at section 15(3)(b) to "ordinary course of a postal service" could mean different things in different parts of Scotland and the UK. For example, a notice may take longer to reach a rural destination in Scotland than it would take to reach a city centre location in the "ordinary course of a postal service". We would suggest that a fixed period be chosen that will work for the majority of locations. We also wonder when that method of service would apply, since the draft legislation provides that notices must be served by recorded delivery post, electronic means or by hand. We would suggest that the legislation provides an opportunity to introduce plain English where possible and that the term 'ish' could be replaced by 'end' or another more readily known term. At sections 29 and 30, reference is made to a non-compliance period but it is not entirely clear when the non-compliance period begins, i.e. when the notification requirements are activated. We would suggest that the

	notification requirement becomes effective no later than the date of entry in terms of the lease or, if later, the first date that a party becomes a party to the lease. We wonder if there is a need for a remedy of non-payment of sums due for a tenant in section 30(3) if the notification requirements are not met when there is also the ability to serve notice on the Extractor of the Court of Session.
Scottish Law Agents Society; Representative body; 28 January 2022; Response No. 12	We have no further comments.
Scottish Property Federation; Trade association; 28 January 2022; Response No. 13	No comment.
Urquharts; Law firm; 28 January 2022; Response No. 14	Given the time between the Consultation Paper and the draft Bill, and the Bill consultation starting shortly before the festive break, a longer period of consultation on the Bill might have been helpful, to allow time for a more considered response. Generally, it might be useful for all sections containing lists within subsections to be reviewed to consider whether “and” or “or” (or neither) would be appropriate and would assist clarity/ understanding. Some specific comments are set out below:- 2(1): Suggest inserting “automatically” between “continues” and “after”. 2(2): Suggest “end” rather than “terminate” (given use of “end” in 5(2) and 5(3)).

	2(4): Suggest “of” rather than “over”. 3: Query whether it is necessary/desirable to call a tenant’s notice a “notice of intention to quit”. “Intention” suggests a current plan which may change and the use of this word in leases already causes issues concerning uncertainty/ambiguity. Should the tenant not be required simply to give notice that the tenant “will” give up possession? 3(1)(c)(ii): Query whether the word “indicate” is too vague. Is any indication at all sufficient, even if there are also some contrary indications? 3(2): Query whether it is desirable to exclude any other method of service of notices which is actually effective (albeit the onus would be on the server to demonstrate such actual effectiveness). 4(1): Suggest inserting “automatically” between “continue” and “after”. Also suggest deleting all words from and including “regardless”. These words seem unnecessary and may cause confusion in drafting relevant lease provisions (e.g. the section arguably reads as if the lease must actually repeat these specific words to be effective). 4(3): Suggest “(purported term)” is unnecessary. Also query whether “agreed” may be ambiguous (e.g. if heads of terms are agreed would this constitute “agreement”, or must any term have been actually formally documented as part of the lease?). 5(5): Suggest “end” rather than “termination, for consistency. 6(b)(ii): Query why “acts inconsistently” is used here rather than following the wording of 3(1)(c)(ii). See also comments in relation to 3(1)(c)(ii) above. 6(2): Suggest inserting “automatically” between “continues” and “after”. Suggest adding “under section 2” at the end. 6(3)(a): See comments on “agreed” in relation to 4(3) above – in relation to “agreement”. 6(3)(b): Suggest inserting “automatically” between “continuation” and “after”. Suggest also deleting “after that date” at the end (they seem unnecessary).

	7: Query whether “Where there is more than one landlord” should be “Where the landlord/tenant comprises more than one person”, or similar, with consequential amendments. 8(1): Suggest inserting “automatically” between “continues” and “after”. 9: See comments in relation to 3 above. 9(a): As such notices are generally given by solicitors on behalf of clients, on headed paper, there seems no need for (ii). Also query whether “a” postal address might be preferable to “the” postal address. 9(5): It is not uncommon for notices to state the termination date one day early. Is there any reason why a slightly early notice should be automatically invalid? 10: I am not convinced this section is a good idea. In tha vast majority of cases the precise correct termination date can be ascertained and it would seem preferable that the termination date is what it actually is rather than artificially changing it to a date which could be patently wrong, particularly when there is a procedure for independent determination of the actual termination date. There may also be unintended consequences. For example, under the proposed s.10(4)(b), could a tenant set up an onerous obligation to pay another party a substantial sum if the lease term is extended under s.10, rendering the landlord liable for payment of such sum? 11: See comments in relation to 3 and 9 above. 12: See comments in relation to 3, 9 and 11 above. Also, query whether the traditional 40 clear day period should continue to apply in relation to leases entered into before the new Act comes into force. In many cases, solicitors will have provided advice on termination and timescales well in advance. It seems some period of grace may be required in any event for “transitional leases”. Noted that there are transitional provisions in the Schedule which may cover this point. 13(2)(c): It is not clear to me why delivery by hand should be limited to where both parties are individuals.

	13(3)(a): Delivery by hand by a person's agent would be quite common, and it is not clear why such delivery should be necessarily excluded. 13(5): It is not uncommon, where time is tight, and where last-minute negotiations are ongoing, for parties to agree that service of a traditional notice to quit may be given to a party's solicitors, who have been authorised to accept service. This should perhaps be permitted within s.13. 14(1)(a)(iii): If the recipient is e.g. Starbucks or McDonalds, could "the recipient's place of business" be any of their franchised branches? 14(1)(c)(i): "likely to come to the recipient's attention" seems quite vague. 16: See comments in relation to 7 above.Also, this section potentially creates dangers and complications in relation to properties owned and leased pro indiviso. For example, where pro indiviso tenants fall out, one who may not be involved in running the business could effectively terminate the business run by the other two, without their knowledge or consent. 20(1): Suggest "of" rather than "over". 20(5): Should this read "Nothing in section 10 or otherwise under this Part"? 21(b)(ii): See comments in relation to 3(1)(c)(ii) and 6(b)(ii) above. 22: Should the tenant require to give details of a new lease to the sub-tenant where the tenant does not want the sublease to continue? 23(1)(b): Suggest this might read instead: "on that date a cautionary obligation applies to the performance of an obligation of the tenant or the landlord under the lease which also continues after that date". 23(2): Suggest this might read instead: "The cautionary obligation does not apply to the performance of the lease obligation after the termination date unless a provision of the cautionary obligation provides otherwise (whether expressly or to that effect)". 27(5): The concept of physical endorsement seems quite old-fashioned. The lease may comprise a number of

	variations and other documents. Would a decision notice which could be registered in the Books of Council and Session be preferable? Consideration might also be gioven to competence of registration of any such endorsement or notice in the Land Register where applicable. 29: Query whether this section is necessary/desirable when there are default provisions. 30: See comments in relation to 29 above. 31: Query whether, if a tenant/landlord knows full well that the identity of the other party has changed despite not having been formally notified, the serving party should be entitled to serve only on a party no longer interested who may be unlikely to try to pass on the notice. In practice, no doubt solicitors would often recommend service on both, but there may be situations where the serving party could benefit unjustly from serving only on the former, to the prejudice of the current landlord/tenant. Subject to this qualification, the provisions for service in relation to deceased parties seem generally sensible. 32: See comments above in relation to notices to quit generally. 32(3)/(6): In many cases it may not be known whether landlord’s consent was given historically to the grant of a standard security over the tenant’s interest. In 5A(2) should “serving” be “dispatching”? Actual service on a heritable creditor may be earlier than service on the tenant, even if the notices are dispatched at the same time. 5A(2)(a) appears to leave a blind period between dispatch and actual service where the validity of the landlord’s notice is put at risk. 5A(7)(b)(iii) introduces a “fair and reasonable landlord test” which would apply in relation to monetary breaches, when no such protection is given to the tenant.
Law Society of Scotland; Representative body; 28 January 2022; Response No. 15	We have a number of additional comments on the draft Bill: In sections 4(1) and (2) we query whether “termination date” is the correct expression to use given that this includes any continuation after the *ish* by virtue of sections 2(1) and 6(2). Perhaps including a definition of

	"contractual expiry date" might assist for the purposes of drafting section 4? In relation to section 13(4)(a) regarding electronic communication, we question how and at what point the communication is deemed to be delivered to an electronic address – for example, is it when an email is sent by the sender or is a 'delivery receipt' required to be used? Although section 15(3) does not apply if the contrary is shown, under section 15(3)(a) 2 days for deemed delivery of an electronic communication of a type which falls within section 13(4)(a) or (b) seems too long and provides no advantage when compared with service by recorded delivery post. In relation to section 17(5), it would be useful and assist in the objective of efficiency to provide examples of terms that would be considered as inconsistent with the Bill. It is assumed that this provision is intended to cover pre-commencement day leases. For example, are notices provisions in an existing lease that refer to any notices served "*under this lease*" or "*in accordance with the foregoing provisions of this lease*", which might have terms inconsistent with the terms of the Bill, broad enough in the SLC's view to capture notices under this legislation? Many commercial leases make no express provision about notices to quit[2] or pre-irritancy notices. *Edinburgh Tours Ltd v Singh* 2012 Hous LR 15 appeared to hold that the notices provision in that case applied to a statutory pre-irritancy notice. The notices provision in that case provided "*any notice sent by recorded delivery post in accordance with the foregoing provisions shall be deemed duly served at the expiry of two business days after the date of posting unless the contrary can be proved*". It would be useful if there could be a general statement of the position in the legislation – for example that, unless restricted to specific clauses/notices that can be given under the lease and not of general wording or application, notices provisions in leases are to be deemed as applying to the notices to be served under this Bill. That would give advisors a certain basis for assessing any potentially inconsistent terms in the notices provisions.

[2] although the PSG style office lease does now include notices to quit within the notices clause.

<table><tr><td></td><td>Under section 27(3)(b), the date of entry may be deemed to be the date on which the lease was “granted”. It would be helpful if an explanation could be provided of what “granted” means in this context. For example, is it intended to refer to the date on which the landlord signs the lease?

Section 27(5) concerns the endorsement of a lease where a court or tribunal has determined the date of entry under the lease. We are not clear how a date of entry would be endorsed on an electronic lease.

It would be helpful if the Bill also caters for service of notices where a company has been struck off the register of companies or dissolved or where, for some reason, the party on whom notice is being served cannot be traced. In the case of a dissolved or struck off company or LLP, we suggest that provision could be made to also serve the notice on the QLTR, whether or not in addition to the last known registered address of the struck off or dissolved company.

In relation to sections 21(3)(b) (i) and (4)(b)(i), what constitutes a “reasonable period” could be rather subjective.

In the Schedule to the draft Bill, we question whether the references in paragraph 8(2) and 8(8), should be to Part 2 of the Act rather than Part 1?

We wonder whether the Bill would benefit from a provision in terms of section 1(2)(a) of the Interpretation and Legislative Reform (Scotland) Act 2010 clarifying the inapplicability of section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 to the Bill, given the intricate nature of the provisions? It is recognised that there may be a substantial amount of overlap between the provisions but while it is probably clear from the context of the Bill that section 26 is not to apply, it would minimise confusion and time needed to consider that interaction if the relevant provision were to be included.

Finally, we consider that it would be beneficial to clarify the position around valid service on particular types of parties - unincorporated associations and trusts. This would be beneficial to clarify for all “termination documents”. In some cases, the trustees narrated in the lease may no longer be the correct ones - the trustees of</td></tr></table>

	an unincorporated association or trust may change over time, in some cases there may be no up-to-date public record of the relevant information (details may be available in some cases on the title sheet or in the Register of Controlled Interests in Land once this comes into effect in April 2022), and an unincorporated association or trust might not have a separate address from those of the trustees. How is a serving party to deal with such a situation? It may be helpful to consider whether the Bill should provide, for example, for a deeming provision that a notice is valid if sent to those identified as the trustees in the most recent lease document between the parties (who, presumably, are collectively "party B") unless the sending party is otherwise notified in writing of a change in trustees by or on behalf of the receiving parties more than 10 working days before the date of issue of the notice? Alternatively, or additionally, there could be reliance on any trustees identified (with addresses) on the title sheet if these entries are more recent than the latest lease document, with a default (if the property is not registered) to the parties named in the latest lease document, unless otherwise in writing notified in the terms above. This would put the onus on the parties to ensure others have the most up to date details for them. We also consider that it would be worth clarifying whether the "multiple landlords" and "multiple tenants" provisions of the Bill (sections 7 and 16) would be considered to apply to the trustees of a trust or unincorporated association. **General comments** We welcome the work of the Scottish Law Commission in this area and consider that new legislation will be welcome.
Anderson Strathern; Law firm; 28 January 2022; Response No. 16	We have two general comments as follows:- - As explained at paragraph 8, a number of the provisions in the Bill are in the form of default provisions which parties can contract out of in their leases. At present, parties can contract out of the doctrine of tacit relocation and can contract out of the default notice periods. However, if the proposal now is that varous provisions can be contracted out of, does this not muddy the waters and create the potential for much confusion? Parties would be able to pick and choose bits of the Act and seek to

	disapply and contract out of certain sections, meaning both the Act and the lease will need to be reviewed together in great detail. What if the attempt to contract out is not sufficiently clear and fails in some way and so the default is the Act? This seems to open things up to interpretation and confusion. - As we highlighted in our response to question 5, the Bill applies to all commercial leases other than those excluded at Section 1. Therefore, included in the scope of the Bill would be wind farm leases, sub-station leases, mineral extraction leases, commercial livery leases, leases of workshops/artists studio;leases for growth of non-foodstuff crops; leases of houses (which are outwith the scope of Housing legislation), mooring/pontoon leases, shop leases, and telecoms mast leases. In relation to shop leases, we note that the provisions of the Tenancy of Shops (Scotland) Act 1949 have been varied in terms of Part 1 of the Schedule to the Bill (modification and disapplication of enactments) and so we assume that means that the provisions of the Bill will work with the existing provisions in the 1949 Act in this regard. In relation to telecoms mast leases, as these are heavily regulated and governed by the provisions of the Electronic Communications Code, we wonder how the provisions of that code sit with the provisions of the Bill; has consideration been given to this in the way that existing statutory provisions affecting shop leases has been considered? We have one specific comment as follows:- - With regard to section 15 (when written notice is taken to be received) (3)(b), this sub-section states that unless the contrary is shown, the document is taken to be delivered on the day on which it would be delivered in the ordinary course of a postal service (other than a postal service which provides for delivery to be recorded). However the preceding sections don’t allow delivery by ordinary post but rather only by recorded delivery, hand-delivery, sheriff officer, or electronic delivery. Therefore this seems inconsistent.

Shepherd and Wedderburn; Law firm; 28 January 2022; Response No. 17	1. At the risk of stating the obvious it would help if the Bill could make clear whether or not it applies to termination notices that are served under the provisions of an early break provision, or only to notices served at the final termination date of the lease. It is usual for break clauses to set out, sometimes in some detail, how and when they are to be served, such that the termination rules in this Bill may be inconsistent with that, in which case the terms of the break clause should apply. However if the break clause is silent as to periods of notice, it would make things simpler if the same termination rules were to apply to break notices. This is particularly so in the case of multiple landlords etc. 2. We have mused on the effect of section on pre-Act leases that expressly contract out of tacit relocation. While we take section 4(3) to mean or include such pre-existing clauses, we are unsure what the effect would be of section 26 which abolishes tacit relocation. Although it seems likely that such an express clause could continue to have effect after commencement of the Act, it would be helpful to have section 26 state this expressly. We could not immediately see anything in the transitional provisions in Part 2 of the Schedule. Paragraph 8(10) might apply but, since such a clause is not exactly a "right", it may not get there. 3. Section 4 states that a lease may include a term that has the effect of preventing automatic termination, however it does not say anything about how that term ought to be expressed, or how it will be interpreted. One view is that it would be useful for the Bill to add some further detail on the nature of the term (however expressed) required to prevent automatic continuation. For example, it could be provided in section 4 that the term must make it *reasonably clear* (either by express provision or necessary inference) that the parties did not intend for the Lease to automatically continue beyond its termination date in the absence of notice. 4. We note that the provisions of the Tenancy of Shops (Scotland) Act 1949 are amended by the

	consequential amendments in Part 1 of the Schedule. We are also aware that the Commission's Discussion Paper No 165 (para 1.19 and Chapter 6) argues that there is a strong case for repeal of that Act. Has consideration been given to including repeal of the 1949 Act in this Bill? 5. Apportionment of rent: Since the approach of the termination date of a break date will usually be known in advance, section 33 could provide that, where that is the case, a tenant may pay only a proportionate part of the rent for the period from the start of the quarter until the termination date, particularly if the rent is paid after notice to terminate or break has been served. In most cases this will make the final reconciliation less of an administrative burden. 6. In section 31 it could help to clarify what is meant by "notified in writing". For example even though a landlord may be well aware of the intention to assign to a new tenant, that assignation is not effective until intimated. 7. We are unclear how these provisions would apply to leases which are stated to be for a fixed period and then continue month by month until one or other party terminates. Often the lease may provide the period that is to be given. Would this contractual arrangement in a lease to which the Act applies continue to be followed so that it would be out of scope of the Act? If no notice period is stated in the lease there is no termination date, so how is the period of notice to be determined? Would the intention of the Act be to consider such an arrangement to be a series of leases of one month's duration, which would mean that section 12(4) would apply with the number of days being half of a month (between 14 and 16 days depending on the length of the month in question?
DLA Piper; Law firm;	No, other than to say we are grateful to the Scottish Law Commission for all their work towards welcome codification of this difficult and uncertain area of the law.

28 January 2022; Response No. 18	
Gillespie Macandrew; Law firm; 28 January 2022; Response No. 19	[19 Gillespie Macandrew.pdf]
Professor Andrew J M Steven; Professor of Property Law, University of Edinburgh; 29 January 2022; Response No. 20	[Excerpt from K G C Reid, G L Gretton and A J M Steven, *Conveyancing 2021* (forthcoming, 2022).]
Shoosmiths; Law firm; 31 January 2022; Response No. 21	**Section 3 Termination of lease by notice or consensus.** Adding "or" between options (a), (b) and (c) would add clarity here. **Section 8 Period and effect of automatic continuation of lease.** It would be useful to clarify here how automatic continuation applies to a lease that has been extended. For the purposes of section 8, is the period of lease the original duration plus the extended period or just the extended period? For example, if there is a 10year lease that is then extended for 6 months, is the lease automatically extended for one year (based on a lease period of 10 years and 6 months) or 6 months based on the period of the extension? Arguably, the shorter period is likely to be the desired outcome as by that stage the parties are looking at the lease short term. However, whatever the outcome, clarity would be welcome as this does come up in practice. We disagree with the restriction in **section 8(2)(a)(ii)** that the shorter period of automatic continuation that may be provided for in the lease may not be less than 3 months. Parties may wish to agree – and currently sometimes

	already do – that, if the lease is not brought to an end on its termination date, it is to continue from month to month or even from week to week. We see no reason for precluding that possibility.
Adrian Stalker; Advocate; 1 February 2022; Response No. 22	[The Bill] is very interesting, and proposes some welcome changes in the law. I would like to offer some limited observations, rather than formally responding to the consultation paper questions. These thoughts are in relation to residential tenancies, which would be caught (or not caught) by the new Act. For explanatory purposes I will refer, at various points, to my book: *Evictions in Scotland* (*"Evictions"*). *The effect of the proposed bill on "excepted" residential tenancies* If I understand sections 1(1) and (2) of the Bill correctly, all residential tenancies, which are not protected by the 1984, 1988, 2001 and 2016 Acts, would be covered by the new Act. At pp16-17 of *Evictions*, I refer to these as "Tenancies Excepted from Statutory Control". I also point out that, because they do not enjoy statutory security of tenure, excepted tenancies are often referred to as "common law" tenancies. However, that description is perhaps misleading, in that certain important statutory protections are still enjoyed by the tenant. In particular, the tenant has the protection of section 112 of the 1984 Act. Section 112 is extensively discussed in chapter 3 of *Evictions.* At the parts of *Evictions* which discuss the rules for achieving the protection of the 1988, 2001 and 2016 Acts (chapters 4, 7 and 9) I set out the tenancies excepted from the relevant statute. Although excepted tenancies are dwarfed in number by the residential tenancies subject to the 1988, 2001 and 2016 Acts In Scotland, there are still (I should think) a substantial number of excepted tenancies in operation, at any given time. I would draw attention to two particular categories as being commonplace. The first is tenancies, in the private sector, of resident landlords, which are excepted from the 1988 and 2016 Act. In my experience, these are often "back of an envelope" arrangements, where there is no proper written tenancy agreement. The second is the tenancies granted by local authorities and social landlords to homeless persons, who are provided with a let on a temporary basis, while the authority is discharging duties

	towards them under the homelessness legislation (in particular, under section 29 of the Housing (Scotland) Act 1987). These tenancies are excepted from Scottish secure tenancy status, provided that the tenancy agreement meets the requirements of paragraph 5 of schedule 1 to the Housing (Scotland) Act 2001. My main concern about the Bill, is that: (a) there will be residential tenancies covered by new Act, such as those just described, in which the tenants previously enjoyed a measure of limited protection, under section 112. (b) there does not appear to be any mention of section 112 in the Bill, or any indication of how to resolve the differences between the rights of the excepted residential tenants under the Bill, and under section 112. That section is not mentioned in part 1 of the Bill's schedule (modification and disapplication of enactments), but it would seem to be covered by section 26(1) of the Bill: "…any rule of law concerning the giving of notice by a party to a lease to the other party to prevent the lease so continuing, do not apply to a lease to which this Act applies". (c) if section 112 is disapplied to excepted tenancies, and the provisions of the Bill apply instead, that will result in a reduction in the rights of certain residential tenants, which may be politically problematic, as the trend of Scottish housing legislation, for some time, has been towards improving the rights of residential tenants. To illustrate, I'd like to focus particularly on temporary tenancies for homeless persons. These are regularly granted by nearly all local authorites in Scotland. They tend to be of a short duration (usually 14 days), so as to enable the authority to recover possession, as soon as possible, after it has discharged its duties to the tenant under the homelessness legislation (i.e. part II of the 1987 Act). The 14 days will tacitly relocate until such time as authority decides that it has discharged its duties, at which point it serves notice to quit. Because of section 112 of the 1984 Act, that notice to quit has to be in writing, and has to have a minimum period of 28 days' notice (even though the duration of the tenancy is 14 days). This type of tenancy can give rise to some tricky issues (pp84 to 85 of *Evictions*).

Let's consider how the Bill, if enacted, would apply to such a tenancy:

- If the tenancy has been granted by a local authority, for a duration of 2 weeks, which is covered by para 5 of sch 1 to the 2001 Act, then it would be caught by the new Act. It would not be a Scottish secure tenancy or Scottish secure tenancy under the 2001 Act. It would not, therefore, be a "residential tenancy" for the purposes of section 1.

- Given the tenancy's duration, it would be a lease which terminates automatically, under section 5(2)(c). [Note, it would not be covered by section 5(2)(a)(i), because the tenancy is granted by a local authority, not by a private landlord.]

- Because the lease terminates automatically, section 6 applies.

- This means that the tenancy will terminate without the requirement for any notice to be given to the tenant, in contrast to the current position, where the tenant gets at least 4 week's notice, under the 1984 Act.

- The operation of section 6 will result in both the tenant, and the landlord, being in a rather uncertain position, assuming (as is usually the case) the tenant remains in possession on the termination date. That will be particularly so, where the tenancy has previously continued, under section 6, on several occasions already. At the end of any given two week period, it will not be clear whether the lease is at an end, until the landlord either takes steps to remove the tenant, or acts inconsistently with the lease having ended. Both of those tests leave room for argument and uncertainty.

Another possible issue, in this type of case, is the relationship between sections 5 and 6 of the Bill and the tenant's rights under article 8 of ECHR. Where a house is let to a homeless person by a public authority, it will be his home, for the purposes of article 8, even where the period of accommodation is intended to be temporary. So, termination of the tenancy by the local authority, followed by eviction proceedings, engages article 8. In such proceedings, the tenant has the right to notified of the reasons why the local authority has terminated the tenancy. [*Houslow LBC v Powell* [2011] 2 AC 186. See the discussion at pp391 and 395 of *Evictions*]. I appreciate

	that there is a distinction between: a) notice of termination; and b) notice of the reasons for termination. But, having a legal regime in which the authority would be bound to give b) (under ECHR), but not a) (under the new Act), seems a bit paradoxical, and maybe a recipe for confusion. I note that paragraph 1 of the consultation document states that: "Residential, agricultural, crofting and allotment leases, all of which are subject to separate statutory regimes, are excluded." In order for that broad statement to be correct, as regards residential leases, I would suggest that section 1(2) would need to be amended, so that, as well as listing the tenancies that are subject to the 1984, 1988, 2001 and 2016, it also lists the types of tenancies excepted from those Acts, by some form of words such as: (a) a private residential tenancy within the meaning of the Private Housing (Tenancies) (Scotland) Act 2016, *or any tenancy that would be a private residential tenancy, but for section 1(1)(c) and schedule 1 of that Act.*" That way, you be taking out the tenancies covered by the 1984, 1988, 2001 and 2016, *and* all of the residential tenancies that are excluded from coverage under those Acts. I hope that makes sense. *Extending the scope of section 27?* I think section 27 is a very welcome provision. Over the years, I have been instructed in many cases in which parties entered into a verbal lease, some time in the distant past, and now cannot recall when the tenant began paying rent, or when he took entry. If memory serves, all of these cases were protected tenancies under the 1984 Act, or contractual assured tenancies under the 1988 Act. So, we were in a position to say: o There is definitely a tenancy here o It's definitely an assured tenancy under the 1988 Act (or a protected tenancy under the 1984 Act) But, the landlord faced a substantial problem in trying to recover possession (even if there were statutory grounds to do so), because he had to terminate the contractual tenancy first. That was problematic, because there was no ish date to which one could tie the notice to quit, and no written lease with an irritancy clause.

	Is it possible that the scope of section 27 could be extended to such tenancies? I think this would perhaps entail saying that sections 1(1) and (2) were subject to section 27, and then making clear that section 27 applies to assured and regulated tenancies under the 1988 and 1984 Acts.
Burness Paull; Law firm; 3 February 2022; Response No. 23	Clause 10(3)(c) of the Bill should include damage caused negligently and arising out of a deliberate act of the tenant (even if the damage itself was not intended). For example, this might occur as a result of stripping out works. As a general comment, we welcome legislation which can clarify areas of the law which have been subject to long term uncertainty. There are pockets of the law which could interfere with the daily practice of the law but which have, for one reason or another, in fact been subject to "work-around" practices in the real world of legal practice. Certainly, the law relating to notices to quit is one of those areas. Legislation which is clear and precise, certain and concise with foreseeable legal implications is to be welcomed. Any new legislation must also be proportionate. Any measures must be appropriate, not unduly onerous or restrictive incase they create disproportionate disadvantages to individuals or to trade generally when weighed against the good faith aims of the legislature. We believe that the service of notices in respect of leases is an area where reform is required. There are far too many complexities in this area which, in our view, means that any tenant or landlord is best advised to seek professional legal support in serving notices. That should not be the case. Notices under leases should be capable of being served by parties to a lease without obtaining legal advice. This is unlikely to be common at this time. The risk of failing to serve notices properly is high whether the task is undertaken by a private individual or by their legal adviser. Equally, outdated laws such as the Sheriff Courts (Scotland) Act 1907 need to be cleared from the scene in order to achieve aims of certainty. We also support reconsideration of tacit relocation. Firstly, the name alone signifies that this is a relatively complex area of legal practice and not readily

	understood by non-lawyers. It is also a legal doctrine which is counter intuitive. Tenants and landlords should be free to rely on the written word within the documents which they sign. It seems to be a curious disadvantage of the Scottish leasing system that a lease can state that it comes to an end on a particular date and parties to find that they are still bound by the lease for a further period. We should have a system which is transparent and provides certainty. Other general comments are: 1. Telecoms leases are not excluded from the ambit of the Bill but are affected by their own statutory rules under the Telecoms codes. As drafted they would be caught and this would need to be considered since the provisions do not sit together. Which would prevail or rather since the Telecoms codes is UK wide would should they probably be excluded. 2. Renewables and other types of leases eg minerals/aggregates sometimes contain provisions which relate to access/possession post termination date in terms of access for removal of equipment, reinstatement works and the like. Rent or another type of payment may or may not be payable depending on what has been agreed. Any ability to override termination by the actings of the parties would need to be very clear so that it did not cut across such provisions given the Bill as drafted provides that parties may not disapply this rule. It would not be acceptable in practice.