Scottish Law Commission

promoting law reform

(SCOT LAW COM No. 267)

Report on the Tenancy of Shops (Scotland) Act 1949

report

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Report on the Tenancy of Shops (Scotland) Act 1949

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

February 2025

SCOT LAW COM No. 267
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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Item No 3 of our Eleventh Programme of Law Reform

Report on the Tenancy of Shops (Scotland) Act 1949

To: Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs

We have the honour to submit to the Scottish Ministers our Report on the Tenancy of Shops (Scotland) Act 1949.

(Signed) ANN PATON, *Chair*
DAVID BARTOS
GILLIAN BLACK
FRANKIE McCARTHY
ANN STEWART

Rachel Rayner, *Chief Executive*
18 February 2025

Contents

Abbreviations

1907 Act. Sheriff Courts (Scotland) Act 1907.

1949 Act. Tenancy of Shops (Scotland) Act 1949.

1950 Act. Shops Act 1950.

1954 Act. Part II of the Landlord and Tenant Act 1954. This extends to England and Wales only.

1964 Act. Tenancy of Shops (Scotland) Act 1964.

2010 Act. Interpretation and Legislative Reform (Scotland) Act 2010.

2018 Discussion Paper, or **2018 DP**. Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination* (SLC DP No 165, 2018), available at https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf.

2022 Report. Scottish Law Commission, *Report on Aspects of Leases: Termination* (Scot Law Com No 260, 2022), available at https://www.scotlawcom.gov.uk/files/2616/6539/5049/Report_on_Aspects_of_Leases_-_Termination_Report_No._260.pdf.

Act. Tenancy of Shops (Scotland) Act 1949, except if the context otherwise requires.

BIRA. British Independent Retailers Association.

CMS. CMS Cameron McKenna Nabarro Olswang LLP.

CRA. Charity Retail Association.

Discussion Paper, or **DP.** Scottish Law Commission, *Discussion Paper on Aspects of Leases: Tenancy of Shops (Scotland) Act 1949* (SLC DP No 177, 2024, available at https://www.scotlawcom.gov.uk/files/8717/1396/5114/Discussion_Paper_on_Aspects_of_Leases_Tenancy_of_Shops_Scotland_Act_1949_DP_No_177.pdf.

Draft Bill. Draft Leases (Automatic Continuation etc.) (Scotland) Bill, as introduced into the Scottish Parliament in December 2024.

ECHR. Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), agreed by the Council of Europe at Rome on 4 November 1950, as amended by Protocols Nos 11, 14 and 15, and as supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16.

FSB. Federation of Small Businesses.

Gill Report. Review Board on Provision of Civil Justice by Courts in Scotland, *Report of the Scottish Civil Courts Review (2009), Vols 1 and 2.*

Guthrie Final Report. Scottish Home Department: Board of Trade, *Final Report of the Committee of Inquiry into the Tenure of Shops and Business Premises in Scotland,* Cmd 7903 (1950).

Guthrie Interim Report. Scottish Home Department: Board of Trade, *Interim Report of the Committee of Inquiry into the Tenure of Shops and Business Premises in Scotland,* Cmd 7603 (1949).

PSG. The Property Standardisation Group, formed in 2001 to produce agreed forms of documents and procedures for Scottish commercial property transactions. See http://www.psglegal.co.uk/.

Rennie et al. Robert Rennie with Mike Blair, Stewart Brymer, Frankie McCarthy, and Tom Mullen, *Leases* (2015).

Shops Acts. Shops Act 1912, Shops Act 1934, and Shops Act 1936.

Shearer Report. Scottish Home Department, *Report of the Committee on the Tenancy of Shops (Scotland) Act, 1949,* Cmnd 472 (1958).

SLAS. Scottish Law Agents' Society.

SPF. Scottish Property Federation.

SSP. Select Service Partner UK Limited (part of SSP Group plc). SSP trades under various brands including "Upper Crust" and "Ritazza".

Taylor Report. Scottish Home Department, *Report of the Committee of Inquiry into the Tenure of Shop Premises in Scotland,* Cmd 7285 (1947).

UNCRC. United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification, and accession by United Nations General Assembly resolution 44/25 of 20 November 1989.

Glossary

Agricultural lease. In general terms, an agricultural lease is one for the purposes of trade or business through agriculture. Termination of such a lease is governed by special rules under the Agricultural Holdings (Scotland) Act 1991 or the Agricultural Holdings (Scotland) Act 2003. In general terms, agriculture is the science or practice of farming, including cultivation of the soil for the growing of crops and the rearing of animals.

Automatic continuation. The new expression for **tacit relocation** that is proposed in the Commission's 2022 Report.

Break clause. A **term** commonly found in **commercial leases**, allowing either the **tenant** or the **landlord** (or both) to bring the **lease** to an end at a particular date before its agreed termination date. Typically, such terms require the party seeking to bring the lease to an end to give written notice of their exercise of that right to the other party.

Commercial lease. A **term** which we use to describe any **lease** that is not an **agricultural lease** or **residential lease** (or certain leases of allotments). Commercial leases cover many varied types of property, including plots of open ground, forests, fisheries, industrial units, offices, shops, and entertainment premises. The Commission's 2022 Report is concerned with commercial leases.

Common law. The body of legal rules derived from custom, Roman law, the writings of **Institutional writers**, and the reasoning of judges in court cases that create precedents. It stands in contrast to **statute law**, where the rules are set down in Acts of the UK, British or Scottish Parliaments, or in regulations, orders or rules made in the exercise of powers granted by such Acts. Scots law exists as both common law and statute law.

Convention right. A right or fundamental freedom set out in the ECHR which is one that has been made part of Scots law by the Human Rights Act 1998.

Creditor. A person (either natural or legal, for example a company) to whom another person (a **debtor**) owes an obligation (for example, a debt).

Debtor. A person (either natural or legal) who owes an obligation (for example, a debt) to another person (a **creditor**).

Default. A default rule of law is one that the parties can contract to alter in its application to them, for example by means of a clause in a lease. Where that happens the clause overrides the default rule. A default rule stands in contrast to a **mandatory** rule, which cannot be altered.

Draft Bill. The draft Leases (Automatic Continuation etc.) (Scotland) Bill in Appendix A to the 2022 Report.

Head landlord. The **landlord** under a **head lease** under which **sub-leases** have been granted.

Head lease. A **lease** granted by an owner of **heritable property** under which a **sub-lease** has been granted. It can include a sub-lease under which a sub-sub-lease has been granted.

Heritable property. Generally speaking, **land** or buildings, but also includes **leases** where the tenant has a **real right** in the property let. Sometimes referred to as "immoveable property", "real property", or "real estate". The right to fish salmon in inland waters is a type of heritable property separate from the land forming either the shore or the riverbed.

Heritable title. Ownership of **heritable property**.

Institutional writers. Certain writers from the 17th to early 19th centuries who have produced legal texts which are judicially recognised as authoritative sources of Scots law. Their texts generally follow the style and structure of the Institutes of Justinian in Roman law. They include Stair, Bankton, Erskine, and Bell.

Irritancy. Unilateral termination of the **lease** by the **landlord** to take effect before the **ish**. The conditions for irritancy are set out in the lease. Often, they involve breach by the **tenant** of their obligations under the lease**,** but they can also involve other occurrences such as insolvency of the tenant. In rare cases, the mere occurrence of an event is specified to give rise to irritancy without the landlord having to take any action. Typically, no compensation is due to the tenant upon irritancy.

Ish. Literally, the time fixed for the **tenant's** departure (issue) from the let property under the **lease.** Typically, it is expressed as a date, but it can also be expressed as a time on a date. The ish is either expressed in the lease or it is implied by the general law. Sometimes it is known as the "expiry date" or the "termination date" of a lease. In this Paper, the ish is generally referred to as the "termination date".

Land. Among other things, this includes buildings and also land covered by water, such as riverbeds and the seabed (within the territorial limits).

Landlord. The party to the contract of **lease** who grants the lease. Usually this is the owner of **heritable property** which is the subject of the lease. Also known as the "lessor". In a **sub-lease** the **tenant** is the **landlord** in relation to the **sub-tenant**.

Lease. A contract under which one person, the **landlord**, grants to another, the **tenant,** the right to use **heritable property** for a fixed time in return for a regular, periodical payment known as rent. The tenant acquires a **real right** if they take possession of the property leased. If the **lease** is a long **lease** (over 20 years) the tenant acquires a real right by registering the lease in the Land Register of Scotland.

Leasehold interest. The **tenant's** rights under a **lease**. Also known as the **tenant's interest.** The expression originates from the law of England and Wales.

Lessee. Also known as a **tenant.** The expression tends to be used for long leases of over 20 years, but it can be used in shorter **leases** also.

Licence. A contract under which a person, the licensor, who is entitled to occupy **heritable property**, grants to another, the licensee**,** the right to use the heritable property: (i) for no fixed

duration; or (ii) for a period terminable at any time by the licensor; or (iii) without the payment of rent. Unlike a **tenant**, a licensee cannot obtain a **real right**.

Listed lease. This is an expression used in this Report to cover certain types of lease. It covers a lease where premises are used for (i) the sale of goods by retail; or (ii) the retail-style hire, repair, cleaning or treatment of personal items or household goods; or (iii) hot food takeaway sales; or (iv) a café, snack bar or restaurant; or (v) a pub; or (vi) a hairdressing salon or barber shop; or (vii) a beauty treatment salon including a nail bar or tattoo studio. The reference in this Report to a **listed business** is to the tenant carrying on business under a **listed lease.** A use set out in (i) to (vii) above is sometimes referred to as a **listed use**.

Mandatory. A mandatory rule of law is one that cannot be altered by the contract of the parties. The mandatory rule prevails over any inconsistent clause in the lease. A mandatory rule of law stands in contrast to a **default** rule.

Mid-landlord. The **landlord** in the contract of **sub-lease**. Usually, this is the **tenant** under the **head lease**. Also known as the "principal tenant" or "head tenant".

Notice of intention to quit. Notification given by a **tenant** to a **landlord** indicating their intention to remove from the let property at the end of the **lease**. Such notice must be given in accordance with the provisions of that lease and, where relevant, the rules in **common law** or **statute law**. Such notice brings the lease to an end at its **ish** and prevents the operation of **tacit relocation**.

Notice to quit. Notification given by a **landlord** to a **tenant,** indicating that the tenant should remove from the let property at the end of the **lease**. Such notice must be given in accordance with the provisions of that lease and, where relevant, the rules in **common law** or **statute law**. Such notice brings the lease to an end at its **ish** and prevents the operation of **tacit relocation**.

Ordinary Cause Rules. The rules which apply to court procedures in the sheriff court where the value of the claim is over £5,000. They are contained in a Schedule to the Sheriff Courts (Scotland) Act 1907. Different versions of the rules have appeared in the Schedule since 1907. The most recent version is from 1993 and it has been regularly amended since.

Personal right. A right against a particular person. Contracts create personal rights to enforce obligations of the other contracting person, but such rights can also have non-contractual sources (such as the rights under **common law** to obtain recompense for unjustified enrichment or to obtain compensation (damages) for negligently caused physical damage or injury). A personal right stands in contrast to a **real right**.

Proprietor. The owner of property.

Real right. A direct right in **land** or in moveable property. In contrast to a **personal right**, it is enforceable against persons in general and not merely the person who granted it. Real rights divide into: (i) the right of ownership; and (ii) the subordinate real rights, such as servitudes (for example, rights of access) and, to a more limited extent, the **tenant's interest** where the **tenant** has taken possession, or in respect of long leases, has registered the **lease**.

Residential lease. In general terms, a residential lease is a **lease** of a property for use by the **tenant** as a separate dwelling and which is occupied by them as their only or principal home. With certain exceptions, termination of such a lease is governed by special rules. The applicable rules depend on whether the **landlord** is from the private sector or from the public or housing association sector. Private sector rules are in the Private Housing (Tenancies) (Scotland) Act 2016, the Housing (Scotland) Act 1988, or the Rent (Scotland) Act 1984. The public sector rules are in the Housing (Scotland) Act 2001.

Security of tenure. The statutory right of a **tenant** to occupy the let property beyond the **ish** (termination date of the lease) despite the giving of a valid **notice to quit**.

Sheriff. A judge in the sheriff court. A "sheriff principal" is the sheriff who is the head of the area of the sheriff court (that is, the "sheriffdom") and who also sits in the Sheriff Appeal Court.

Simple Procedure Rules. The rules which apply to proceedings in the sheriff court for claims up to £5,000. It is intended that these supersede the **Summary Cause Rules** for all proceedings still covered by them.

Statute law. The legal rules which are set down in Acts of the UK, British or Scottish Parliaments or regulations, orders, or rules made under those Acts.

Sub-lease. A **lease** by a **tenant** of part or all of the property leased to another person (**sub-tenant**). Sub-leases without the consent of the **landlord** are frequently prohibited in a lease. A sub-lease can exist as between a sub-tenant and a sub-sub tenant, and so forth down a sub-letting chain.

Sub-tenant. A person who leases property from a **tenant** who is sometimes known as a **mid-landlord**).

Summary Cause Rules. The rules which apply to certain non-monetary claims in the sheriff court, such as proceedings by a **landlord** for recovery of possession of **heritable property**, or by a **tenant** for renewal of their **lease** under the 1949 Act.

Tacit relocation. The continuation of a **lease** beyond its **ish** by operation of the **common law.** It can arise either: (1) at the ish; or (2) after the ish with retrospective effect back to the ish. In (1) it arises because neither party has taken the necessary steps before the ish to terminate the arrangement, such as the giving of a **notice to quit** or **notice of intention to quit** and at the ish the **tenant** has not given up possession with the consent of the **landlord**. In (2) it arises because the landlord has not taken reasonable steps (such as raising court proceedings) to remove the tenant within a reasonable period of time of the ish, or the landlord acts inconsistently with the lease having ended at the ish (such as demanding or accepting payments of rent). The Commission's 2022 Report recommends the replacement of tacit relocation with a statutory concept known as "**automatic continuation**".

Tenancy. A **lease**.

Tenant. A person who, in terms of a **lease**, occupies **heritable property** belonging to a **landlord** to whom they pay rent. The occupation of heritable property by a tenant of fishing, shooting, or mineral rights is limited to the purposes for which the lease of such rights exists.

Tenant's interest. The whole of the **tenant's** rights and obligations under a **lease**, which are potentially transmissible to another tenant and are enforceable against the **landlord**, any successor of the landlord, and, in certain instances, against third parties.

Term. This can have a number of meanings, the appropriate one of which must be selected from its context. It can mean: (1) any provision of a **lease**, whether expressed or implied (for example, "the terms and conditions of the lease"); (2) the duration of a lease (for example, "a 10 year term"); or (3) the **ish** (termination date) or entry date of the lease, particularly where it coincides with a traditional date for removal from, or entry into, the let property (for example, entry at the "Whitsun term", ish at the "Martinmas term").

Termination date. See **ish**.

Violent profits. All profit that a **landlord** could have made from possessing **heritable property** during its unlawful occupation plus compensation for any damage caused to the property during that period. The rule of thumb is that violent profits are double the market rent if the **tenant** did not have probable cause (that is, a good though possibly incorrect argument) to remain, or the market rent if the tenant did have probable cause to remain.

Chapter 1 Introduction

Background

1.1 This Report follows on from our 2022 Report, entitled *Aspects of Leases: Termination*.[1] The 2022 Report recommended important reforms to the law that applies at the end of commercial leases in general, including leases of shops, offices, industrial premises, or indeed land for non-agricultural use. However, the 2022 Report left open the question of whether one element of that law, namely the Tenancy of Shops (Scotland) Act 1949 should be reformed, replaced, repealed, or left on the statute book, unamended.

1.2 The future of the 1949 Act had been raised in our Discussion Paper also entitled *Aspects of Leases: Termination*.[2] The 2018 Discussion Paper asked consultees whether the 1949 Act should be repealed.[3] No reform or replacement was suggested. While consultees from the legal and surveying communities gave a virtually unanimous answer of "yes", this was not the case for the business and business representative stakeholders who responded. As a consequence we held two mini-consultations with such stakeholders.[4] These disclosed a view that the Act should not be repealed without consideration of its reform or something being put in its place. Overall, this left an unclear picture as to what, if anything, should be done with the Act.

1.3 In the light of this uncertainty, our Eleventh Programme of Law Reform included a review of the 1949 Act.[5] As part of the review process we issued a Discussion Paper putting forward various proposals for the 1949 Act.[6]

Scope of Report

1.4 The 1949 Act applies to many, but by no means all, leases where the tenant occupies the let property for the purposes of a business. In this respect its scope is much more restricted than that of Part II of the Landlord and Tenant Act 1954 which applies to England and Wales and to which the 1949 Act is often compared. As set out in the Discussion Paper, the 1949 Act applies only to leases of a building or part of a building which the tenant occupies for one or more of the following uses:

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[1] Scottish Law Commission, *Report on Aspects of Leases: Termination* (Scot Law Com No. 260, 2022) available at https://www.scotlawcom.gov.uk/files/2616/6539/5049/Report_on_Aspects_of_Leases_-_Termination_Report_No._260.pdf.

[2] Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination* (SLC DP No. 165, 2018) available at https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf.

[3] 2018 DP, para 6.28 (Question 40).

[4] See DP, paras 1.18 to 1.24.

[5] Scottish Law Commission, Eleventh Programme of Law Reform (Scot Law Com No.264) available at https://www.scotlawcom.gov.uk/files/1816/8552/2957/Eleventh_Programme_of_Law_Reform_2023_-_2027.pdf.

[6] Scottish Law Commission, *Aspects of Leases: Tenancy of Shops (Scotland) Act 1949* (SLC DP No. 177) available at https://www.scotlawcom.gov.uk/files/8717/1396/5114/Discussion_Paper_on_Aspects_of_Leases_Tenancy_of_Shops_Scotland_Act_1949_DP_No_177.pdf.

- sale of goods by retail (including auction sale by retail but excluding sales by remote communication);[7]
- retail-style hire of goods;[8]
- sale of hot food for consumption off the premises;
- operation of a cafe, snack bar and probably restaurant;[9]
- operation of a pub;
- possibly – repair, cleaning or other treatment of goods for consumers;
- barbering, hairdressing – and possibly beauty treatment and tattooing;[10]
- warehousing of goods; and
- sale of goods wholesale.

1.5 The 1949 Act allows the tenant of such a lease to apply to the sheriff court for its renewal beyond its termination date. The maximum period of renewal is one year although there is no limit on the number of renewals that can be sought and the renewed lease itself may be continued by tacit relocation beyond the fresh expiry date caused by the renewal. There are certain exclusions from the entitlement to seek renewal. One is if the lease is a sub-lease. Another is if one of the mandatory grounds for refusal of renewal applies.[11] If no such exclusion applies the tenant may make the application. In that event it is then for the sheriff to decide whether to grant it, and if so for what period and under what conditions. The test which the sheriff has to apply is "reasonableness in all the circumstances".[12]

1.6 The 1949 Act has been the subject of criticism. This has been directed principally at it having become unnecessary[13] and it being used to provide unfair leverage in negotiations by large businesses whom the Act was not intended to benefit.[14] A further source of discontent is the lack of any guidance within the Act on the factors which may or may not be taken into account by the court when deciding whether it is or is not reasonable to grant the application. This has resulted in conflicting court decisions on that important matter.[15]

1.7 As explained in the Discussion Paper[16] the review which we have carried out in relation to the Act is limited. It does not consider whether the 1949 Act (or any replacement) should be extended beyond its current scope, broadly interpreted. For example, we have not considered whether the Act should be extended to cover all premises used for business

[7] DP, paras 3.7 and 3.8.
[8] DP, paras 3.18 and 4.2 (fn 2).
[9] There is case law applying the Shops Acts to restaurants but none applying the 1949 Act to them.
[10] At first glance beauty treatment or tattooing might appear not to be covered but it might be argued that they are using the analogy of barbering and hairdressing: see DP, para 3.21 and para 3.2 below.
[11] These are discussed in Chapter 2.
[12] See para 2.22 below and in DP, paras 3.41 to 3.62.
[13] 2018 DP, response to Question 40 by CMS, Law Society of Scotland, Burness Paull.
[14] 2018 DP, response to Question 40 by Craig Connal QC, CMS, Law Society of Scotland, Society of Local Authority Lawyers and Administrators in Scotland.
[15] Most notably *Edinburgh Woollen Mill Ltd v Singh* 2014 SLT (Sh Ct) 141 and *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116.
[16] DP, paras 1.26 to 1.30.

including leases of offices, industrial units, or leisure premises. Nor have we considered whether the maximum period of renewal should be extended so as to give business tenants security of tenure akin to that which exists in England and Wales under the 1954 Act. We are unaware of any general appetite for any such changes. Internationally Scots law in this area sits close to important jurisdictions such as the USA, Australia, New Zealand and Germany.[17] The current flexibility in the Scottish commercial property market for both investor landlords and tenants is seen as an advantage.

The Discussion Paper

1.8 In April 2024 we published our Discussion Paper, containing options for the future of the 1949 Act. The Paper set out the historical background which led to the 1949 Act being enacted, firstly as a temporary measure, and then as a permanent feature of the law. It examined the detail of the Act. Our provisional view was that the Act could not be retained in its current form. The Discussion Paper then considered whether there should continue to be some legal regime aimed to benefit those tenants who might – at least in theory – be able to use the 1949 Act. On the assumption that there continues to be some such benefit, the Paper put forward two alternative options for consideration, each with detailed rules. One option was the reform of the Act through the removal or minimisation of the areas of criticism (Option C).[18] The alternative was its replacement with a mandatory notice to quit scheme (Option A).[19]

1.9 Consultation ran for three months, until the end of July 2024. During that period the Commission's project team posted two webinars on YouTube, one of 13 minutes duration and the other of 36 minutes duration. These summarised the background of the review and the options for reform. The videos were made available on the Commission's website and through its social media channels. The consultation process was publicised on X and LinkedIn.

1.10 We offered to give seminars and/or provide articles to relevant stakeholders and publications. These included tenant and landlord representatives and all 30 of Scotland's Chambers of Commerce. Seventeen articles were provided for those stakeholders[20] who accepted our offer, and the articles appeared in their newsletters and/or on their websites.

1.11 The options canvassed in the Discussion Paper were presented at six events in total. In addition to the two publicly accessible webinars, in May and June, four presentations were made to particular stakeholders: in person for a meeting of the SPF's Commercial Real Estate Committee, at online meetings for the Scottish Law Agents Society and the British Independent Retailers Association and at a round table discussion arranged by the Federation of Small Businesses. The roundtable was attended by two members of FSB staff and four interested FSB members. Webinars were also arranged for four additional interested stakeholders,[21] but were subsequently cancelled due to lack of interest from their members.

[17] DP, para 1.30 and Appendix B.
[18] See Ch 6 of the DP.
[19] See Ch 5 of the DP.
[20] Journal of the Law Society of Scotland, Property Law Bulletin, Dumfries & Galloway Chamber of Commerce, Scottish Law Gazette, Scottish Legal News, SPF, FSB, Propertymark, BIRA, Inverness Chamber of Commerce, Forth Valley Chamber of Commerce, Lochaber Chamber of Commerce, Perthshire Chamber of Commerce, Aberdeen and Grampian Chamber of Commerce, Edinburgh Chamber of Commerce, Essential Edinburgh and Moray Chamber of Commerce.
[21] Dumfries & Galloway Chamber of Commerce, Propertymark, Inverness Chamber of Commerce and Perthshire Chamber of Commerce.

1.12 We received 28 responses to the Discussion Paper. These responses were analysed and the policy recommendations in this Report were decided. The reforms recommended in the 2022 Report are the subject of the Leases (Automatic Continuation etc) (Scotland) Bill which was introduced into the Scottish Parliament in December 2024. If the recommendations of this Report are implemented, amendments will need to be made to that Bill. We expect these amendments to be small in scope.

Structure and content of the Report

1.13 This Report is divided into eight chapters. This Chapter considers introductory matters. Chapter 2 gives an abbreviated account of the background to the Act together with its key features. Chapter 3 looks at whether there should be legal rules solely applicable to leases of premises used for retail, food and drink hospitality, or hair and beauty services. Chapter 4 considers the retention of an unchanged 1949 Act (Option D). Chapter 5 examines the possible reform of the Act (Option C). In Chapter 6 a proposal for its replacement with a mandatory notice to quit scheme is considered (Option A). Chapter 7 sets out the option of repeal without reform or replacement and any impact that might have (Option B). Chapter 8 lists our recommendations.

1.14 The Report has three appendices. Appendix A contains a copy of the Act. Appendix B lists those who responded to the Discussion Paper. Appendix C sets out the members of our Advisory Groups and other individuals and bodies who have assisted us.

Legislative competence and UN Convention on the Rights of the Child

1.15 The Scottish Parliament has no power to make or alter any rule of law if, among other things, it relates to "reserved matters"[22] or if in certain circumstances it seeks to modify a law the subject matter of which is a reserved matter.[23] The recommendations contained in this Report neither relate to reserved matters nor do they seek to modify a law the subject matter of which is a reserved matter.

1.16 In addition, the Scottish Parliament has no power to make or alter any rule of law if, among other things, it is incompatible with a "Convention right"[24] under the European Convention on Human Rights. We take the view that the recommendations in this Report, if enacted, would be compatible with Convention rights.

1.17 In all the circumstances, we are satisfied that our recommendations are within the legislative competence of the Scottish Parliament.

1.18 Furthermore, any Public Bill being introduced into the Scottish Parliament must be accompanied by a written statement about the extent to which, in the view of the MSP introducing it, the rules of law to be made or altered by the Bill would be compatible with the "UNCRC requirements".[25] We are satisfied that any Bill giving effect to our recommendations will be compatible with those requirements.

[22] As defined in Scotland Act 1998, Sch 5. These are reserved for the UK Parliament.
[23] Scotland Act 1998, s 29.
[24] As defined in Scotland Act 1998, s 126(1).
[25] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, s 23(1). The "UNCRC requirements" are defined in s 1(2) of the 2024 Act. Broadly speaking they are children's rights.

Scottish Land Rights and Responsibilities Statement

1.19 In preparing this Report we have taken account of the Scottish Government's Scottish Land Rights and Responsibilities Statement, which was published in 2022, under the Land Reform (Scotland) Act 2016.[26] Principles 2 and 3 of the Statement include, that there should be more opportunities for citizens and local communities to lease land and buildings. We consider that if implemented our recommendations will have little effect in this regard. If there is any marginal impact it is likely to be in making more properties available for letting by individuals and local community bodies. This is because any potential block on re-letting at the end of a lease that results from the Act would be removed.

Business and Regulatory Impact Assessment (BRIA)

1.20 In line with Scottish Government requirements for proposed legislation,[27] we have prepared a business and regulatory impact assessment in relation to our recommendations. We asked consultees for information or data on the possible economic impact of our proposed reforms, and are grateful for their responses. The BRIA's principal conclusions are that:

- The existing Act is widely regarded as outdated, inaccessible to those for whom it was intended, used by parties and for purposes never envisaged by Parliament, and highly unpredictable in its effect. In this respect, it is unfit for the realities of modern commercial letting practice;

- In addition to parties themselves, our recommendations affect a range of commercial property-related practitioners (including legal professionals, surveyors, letting agents, dispute resolvers, and commercial mortgage lenders) and, as letting to businesses covered by the Act is a key component of the commercial property sector, the Scottish economy as a whole;

- There is broad support amongst key stakeholders for repeal of the Act. This would result in there being in one place a clear set of rules for the termination of all commercial leases, irrespective of trading activity and be in line with the recommendations in the 2022 Report;

- Such a unified approach should remove any existing distortion in the market caused by the Act whether through its favouring of large tenant businesses during negotiations for renewal or through its possible encouragement of a landlord to discriminate against a candidate covered by the Act during the selection of a tenant for a commercial lease;

- The repeal of the Act would carry with it little or negligible effect on the Scottish economy as a whole.

1.21 Given that the Act is virtually never used by the small businesses for whom it was devised and is used, albeit sporadically, by large businesses whose negotiating power with landlords requires no statutory assistance in the shape of the court-ordered renewal of their leases, we expect that repeal of the Act will bring no additional commercial costs. Indeed,

[26] See https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement/.
[27] See Business and Regulatory Impact Assessment (BRIA) - Toolkit - gov.scot.

through the exclusion of an uncertain and expensive route to court litigation it may have the effect of reducing the cost of transactions at the end of a lease.

Consumer duty

1.22 In April 2024 the Scottish Law Commission came under a duty, when making decisions of a strategic nature to have regard to (a) the impact of those decisions on consumers in Scotland; and (b) the desirability of reducing harm to those consumers. In this respect "Consumer" includes a small business. In preparing this report we have taken account of the impact of our recommendations on both consumers and small businesses. We approached both Consumer Scotland and the Consumers Association (trading as "Which") for their views on the proposals in the Discussion Paper.

1.23 Given the very limited use of the Act, we consider that if implemented our recommendations will have little or no detrimental effect in this regard. If there is any marginal impact it is likely to be in making more properties available for letting by individuals and local community bodies. This is because any potential block on re-letting at the end of a lease that results from the Act would be removed.

Acknowledgements

1.24 We are grateful to all those who have responded to our consultations or who have otherwise assisted us. In particular, we are grateful to the members of both of our Advisory Groups, whose names are listed in Appendix C and the numerous other individuals and bodies who gave us the benefit of their knowledge, expertise and time on a gratuitous basis.

Chapter 2 Current law: overview and assessment

Introduction

2.1 In the Discussion Paper we gave a detailed account of the historical background of the Act, the types of leases to which it applies, the remedy that it gives the tenant, the court procedure that the tenant has to follow to obtain the remedy, and the test applied by the court in deciding whether to grant the remedy. We also considered the issues of cost and delay involved in going to court under the Act and how the Act is being used by large retailers for whom it was never intended. What follows in this chapter is an abbreviated version of what is in the Discussion Paper. The views of consultees expressed following the Discussion Paper, in relation to the use of the Act either in negotiations, in applications to the court, or both have also been taken into account.

Historical background

2.2 The 1949 Act originated in the specific economic conditions in the retail sector in urban Scotland in the late 1940s. At that time the retail environment was quite different to that of today. Supermarkets were still a decade away.[1] People obtained their groceries from shops where goods were sold over the counter. Many of these shops were local to the area where shoppers lived. Often they were small enterprises. If the shop was rented, typically it was on a one year lease from Whitsunday to Whitsunday[2] and continued on a rolling annual basis by virtue of tacit relocation. Food rationing was still in place, there was a housing shortage and opportunities for commercial development were scarce and restricted.[3] In these circumstances certain landlords sought to take advantage of the situation by requiring small shopkeeper tenants to buy the premises – at an inflated price – or to quit the premises at the end of the year's let. Notice to quit could be as little as 40 clear days before lease expiry, leaving the tenant with no other premises to move into. As a result small businesses required to be wound up. In addition to the effect on the business owner the loss of the local shop had the potential to cause difficulties for shoppers in obtaining basic supplies. This caused a demand by MPs that such shopkeepers be protected.[4]

2.3 Following the issue of two independent reports[5] to the UK Government, the 1949 Act was brought into force with considerable speed and just in time to allow tenants with leases ending on Whitsunday 1949 to apply to the court for their renewal. The Act was passed as a bi-partisan measure designed to relieve the specific hardship being suffered by small

[1] The first supermarket in Scotland, in Leven Street, Edinburgh was opened in 1959. See "Facelift for the first Scots supermarket" *The Grocer* (6 June 2009) available at https://www.thegrocer.co.uk/news/facelift-for-the-first-scots-supermarket/200425.article.
[2] For lets of non-agricultural buildings or parts of them, Whitsunday was 28 May, albeit notice to quit still had to be given 40 clear days prior to 15 May: see Removal Terms (Scotland) Act 1886, s 4. Today, for the purpose of any lease Whitsunday means 28 May: see Term and Quarter Days (Scotland) Act 1990, s 1(1)(a), read together with (2)(b).
[3] Guthrie Final Report, para 31.
[4] See DP, paras 2.2 to 2.9.
[5] Taylor Report and Guthrie Interim Report.

shopkeeper tenants at that time owing to the economic situation then prevailing. For that reason it was intended to be only temporary[6] with an annual renewal of it by Parliament being required.[7] In its final report to the UK Government,[8] the Guthrie Committee recommended that owing to what it described as the "exceptional circumstances" of scarcity of premises and restrictions on capital investment being likely to prevail into the early 1950s, the Act should be renewed annually up to but not beyond 1955.

2.4 Hundreds of applications under the Act were made from the spring of 1949[9] to the mid-1950s.[10] This was despite a change in economic conditions from those that existed in the late 1940s.[11] Given its temporary nature the UK Government appointed another committee to examine whether the Act should continue on the statute book beyond 1958.[12] In its report ("the Shearer Report"), the committee recommended that the Act be continued for a further five years (to the end of 1963). However this was not so much because of the then economic conditions but rather because the Act was seen as providing relief against what was viewed as too short a period for the giving of notice to quit by a landlord to a tenant. Notice given 40 clear days before the last date of the lease was seen as providing inadequate time for a tenant to find and move into alternative premises irrespective of their general availability.[13]

2.5 Shortly before the end of 1963 and under pressure from Labour MPs the then Conservative UK Government considered whether the Act should be made permanent or not renewed. A consultation by the Government on the future of the Act revealed a division of views as to its future. A majority of trade associations favoured retention of the Act while lawyers and landlords' representatives favoured non-renewal.[14] At this time there were still about 100 applications a year being made to the courts under the Act. The UK Government decided to make the Act permanent.[15] No change was made to its core provisions.

2.6 In giving the reasons for the Act being made permanent, the Government Minister Lady Tweedsmuir MP pointed to:

- The continuing scarcity of shop premises, particularly in cities and larger towns;
- A possible increase in scarcity due to the redevelopment of city centres planned for that time;
- The continuing normality of year-to-year leases with 40 day notice to quit periods exposing the tenant to hardship in finding other premises or disposing of their existing stock in such a short timeframe;
- The incentive the Act gave to landlords to offer reasonable terms for renewal;

[6] DP, para 2.13.
[7] 1949 Act, s 3(3) as originally enacted.
[8] Guthrie Final Report (1950), paras 31 to 35.
[9] Professor A Dewar Gibb, honorary sheriff in 1949, kept a pocket diary for 1948-49, It has entries for "Shops Act Court" or similar on 3, 6, 12, 13, 16, 18, 19, 24, 25, 26, 31 May 1949, 2, 3, 15, 16, 21, 22, 27 and 30 June 1949 and 20 July 1949. It is held in the National Library of Scotland, Dep.217/19. See also Shearer Report, Appendix C.
[10] Shearer Report, Appendix C.
[11] Shearer Report, para 21 and see also para 13.
[12] The Committee on the Tenancy of Shops (Scotland) Act, chaired by IH Shearer QC (later Lord Avonside).
[13] Shearer Report, paras 2.20 to 2.21.
[14] DP, para 2.22.
[15] Tenancy of Shops (Scotland) Act 1964 (c.50).

- The number of applications under the Act still being made;
- The protection that the Act gave to tenants from a speculator landlord intent on buying the property with a view to a quick profit on sale.

Post-1964 use

2.7 Since 1964 both awareness and use of the Act have dropped dramatically. A number of factors appear to have contributed to this. Firstly, the economic conditions from the mid-1960s onwards became far removed from those that existed either when the Act was introduced or when it was made permanent. Commercial property became ever more readily available. This brought with it less of a threat for a tenant, at least in an urban environment, of being unable to find alternative premises. Secondly, the retail environment changed enormously from that which existed in the 1950s. Shopping centres, usually with supermarkets, sprang up. Later in the 1980s and into the 1990s retail parks appeared often on the edge of urban areas. The units in them were often let to national retailers. In most urban areas small shopkeepers ceased to be the principal means for buying essential items. Thirdly, and linked to these economic changes, the practice of rolling annual leases disappeared. Longer leases were offered to tenants, often with break clauses. With a longer period of lease there was no need for a tenant to have to resort to the Act, potentially on an annual basis. Fourthly, in 1976 the court procedure for obtaining renewal changed.[16] It became more expensive.[17] The possibility of appeal was introduced bringing with it a threat of further delay and expense. Using the Act or even contemplating its use ceased to be a practical proposition for most small businesses.

2.8 Instead, generally speaking, use of the Act has become something of a "niche" matter resorted to by a few lawyers acting for large retailers who can afford to apply to the court under the Act. Members of our Advisory Groups told us that the Act could be used to block redevelopment of a larger site, or to keep a competitor off a desirable site. Use of the Act by small businesses is very rare. While one Advisory Group member told us of a case where a well-established family business was able to use the Act to negotiate with a local authority landlord to obtain a further year which they were able to use to find alternative premises, this is exceptional. More typical was another instance where the small business tenant operated from neighbouring units under different leases. Needing both units to trade and faced with the expiry of the lease for one unit, the tenant contemplated using the Act to obtain its renewal. However, the thought of the costs that might be involved deterred them from doing so.

2.9 The use of the Act by large retailers[18] has also had a material change in the perception in whom the Act should benefit. Indeed, in one article in a legal journal, a lawyer expressed concern about a "danger" that the Act would be of use only by small businesses.[19]

[16] DP, para 3.38.
[17] The small debt procedure was replaced by the summary cause procedure – which exists to this day.
[18] E.g. *Superdrug Stores Plc v National Rail Infrastructure Ltd* 2006 SC 365; *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141; *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116.
[19] Richard Turnbull, "The Tenancy of Shops (Scotland) Act 1949 – Time for Renewal?" (2005) PropLB 3, 6.

Leases to which the 1949 Act applies

2.10 The Act applies to leases of "premises consisting of a shop and occupied by a tenant".[20] However the Act does not leave the word "shop" to stand with its ordinary, literal meaning. Instead, the drafters of the Act chose to define it further. It is not known why this was done.[21] However the effect of this definition has been to extend the meaning of the word "shop" beyond its ordinary meaning. Unsatisfactorily the Act simply provides that "shop" includes anything that is a "shop" under the Shops Acts 1912 to 1936. Those Acts had nothing to do with leases. They were repealed in 1950 when they were replaced by the Shops Act 1950. That 1950 Act was itself repealed in 1994. None of the changes to the Shops Acts or the 1950 Act are apparent from an ordinary reading of the 1949 Act. It is not wholly clear whether, given the repeal of all of the Shops Acts, this extended definition still applies.[22] Our working assumption has been that it does. None of the respondents to the Discussion Paper questioned this.

2.11 It is on the basis that the extended definition of "shop" continues to apply, that we have taken it that the Act applies to the wider range of leases set out in Chapter 1.

2.12 Even with this approach the exact scope of the Act remains hazy around its edges. Thus reported case law has ruled out travel agencies as "shops", either under the Shops Acts[23] or the 1949 Act itself.[24] However in its response to the Discussion Paper, the Scottish Law Agents Society informed us of an unreported case where a member of theirs had been successful in persuading the court that a solicitor's premises with an estate agency frontage and disabled access and which the lease described as a "shop", was covered by the 1949 Act.[25]

2.13 Where the tenant uses the premises for both a use that is covered by the Act and a further use that is not covered, there is mixed use. Examples include a local shop with residential accommodation above it. Another example is a workshop where goods are both manufactured and sold. Night clubs with both dancing and the sale of alcohol would have a mixed use. A tourist office selling tickets for tours and memorabilia and gifts is a frequently-found mixed use.

2.14 The Act does not set out a test for deciding whether it applies to such mixed uses. Reported cases under the Act have not set out a clear test. However, in the Discussion Paper we concluded that if a use covered by the Act was not incidental to another "non-Act" use, the premises were likely to be covered by the Act.[26]

2.15 Entitlement to apply under the Act is limited to tenants "occupying" the premises as a shop.[27] While the Act does not specify the time at which occupation and use are to be assessed, given the aim of protection of ongoing businesses, it can be taken that the tenant

[20] 1949 Act, s 1(1).
[21] Neither the Taylor Report nor the Guthrie Interim Report suggested an expansion of the Act beyond the retail sector.
[22] See DP, paras 3.3 and 3.4.
[23] *Erewash Borough Council v Ilkeston Co-operative Society Ltd* (1988) 153 JP 141 (QBD) (a Shops Act case).
[24] *Wright v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 152.
[25] SLAS in answer to Question 9 of the DP.
[26] DP, paras 3.23 to 3.26.
[27] 1949 Act, s 1(1).

must be carrying on the Act-covered use at the premises at the time that the landlord gives notice to quit and continuing with that use until the court grants the application.

2.16 From the requirement of "occupation" by the tenant it follows that a sub-let of the premises as a whole will prevent the tenant under the head lease from satisfying the "occupation" requirement and thus exclude the head lease from the Act. The effect of a partial sub-let will depend on whether having regard to its extent, the tenant can still be seen as substantially in occupation of the whole premises as a shop.

2.17 The Act does not express whether it applies to sub-leases. Sub-leases are a species of lease but with special rules given their derivation from a head lease. The view in the late 1940s and early 1950s was that sub-tenants were unlikely to have established businesses worthy of protection under the Act.[28] This was reinforced by case law that excluded an application for renewal of a sub-lease.[29] However this did not take account of the phenomenon of the ground lease. Under this an investor owner grants a long lease of ground to a developer for over 20 years and sometimes a lot longer. The developer constructs a retail development and then lets individual units for periods of anything between five and 15 years. Technically those lets are sub-leases but functionally they can give rise to firmly established trade from the unit that might be deserving of protection. While it might be said that the Act cannot apply even to such sub-leases, in one case the Act was held to extend to a sub-lease created through the sale of the let property and lease-back (under a head lease for 99 years) to the seller.[30]

Contracting out and notice to quit

2.18 The 1949 Act is silent on whether parties can agree to exclude the tenant's entitlement to apply under it. Nevertheless it has been accepted in practice that there is no entitlement on the parties to provide in the lease that the Act shall be inapplicable.[31] While the Act is contingent on the landlord giving notice to quit and in theory a lease can exclude the need to give notice to quit,[32] in practice notice to quit is always given and therefore that pre-condition for the Act's application is always satisfied.

Remedy: one year renewal and interim order

2.19 The Act allows the sheriff court to renew the lease for a period of up to one year.[33] There is no limit on the number of renewals that can be sought.[34] The Act allows an application to be made to the court at any time up to the expiry of 21 days after the giving of notice to quit.

2.20 Given the time taken to deal with the application the lease might well expire before the court can renew it. Accordingly, the Act allows a tenant to apply to the court for an interim order authorising them to occupy the property for a period of up to three months beyond the termination date of the lease on such terms and conditions as it thinks fit.[35]

[28] DP, para 3.31.
[29] *Ashley Wallpaper Co Ltd v Morrison's Associated Companies Ltd* 1952 SLT (Sh Ct) 25.
[30] *James Craig (Glasgow) Ltd v Wood & Selby Ltd* (1953) 69 Sh Ct Rep 164 and see DP, para 3.32.
[31] DP, paras 3.34 to 3.35.
[32] 2022 Report, paras 2.9 to 2.10; and *McDougall v Guidi* 1992 SCLR 167.
[33] 1949 Act, s 1(2).
[34] 1949 Act, s 1(4).
[35] 1949 Act, s 1(5).

2.21 Both the Scottish Law Agents Society and Angus Wood[36] made the point that an application was unlikely to be disposed of before the end of three months after the expiry of the lease. The Act is silent on whether more than one interim order can be made. We take the view that applying a practical interpretation to the Act, more than one application for an interim order can be made.

Requirements: the "reasonableness" test

2.22 The 1949 Act does not set out what requires to be established in order to obtain renewal from the court. Instead, it provides the court – a single sheriff – with a general discretion either to renew the lease on terms and conditions that appear to it to be "reasonable" in all the circumstances,[37] or to dismiss the application.[38] As is noted below,[39] that discretion is excluded in certain instances where the court must refuse the application. Despite this, the discretion of the sheriff is the overarching feature of the test for renewal.

Onus

2.23 The Act does not say whether it is (a) for the tenant to satisfy the court that it is reasonable to renew or (b) for the landlord to satisfy the court that it is reasonable for them to obtain possession on the lease's expiry date. The current legal position is quite unclear.[40]

"Reasonableness" test in practice

2.24 The Act does not provide any guidance to the court – or to the parties – on what to take into account or disregard in deciding whether lease renewal or non-renewal is "reasonable".[41] No factors, whether comprehensive or non-exclusive, are given. An analysis of individual cases illustrates the breadth of the factors taken into account or disregarded under the test of "reasonableness". The list is extensive. Some factors may favour the tenant.[42] Others may favour the landlord.[43] Yet others may relate to the interests of third parties such as customers or members of the public.[44] Finally there are matters that have been held irrelevant.[45]

2.25 However, cases are decided on an individualised basis. Simply because a factor was decisive or irrelevant in one case does not mean that it will be so in another case. Factors decisive in a decades-old case might have little relevance for modern commercial practice.

2.26 In recent times courts have tried to bring some order into this confusing kaleidoscope. However, perhaps unsurprisingly, they have taken divergent views as to the breadth of the "reasonableness" test. The uncertainties in the scope of this test were revealed in two important cases.

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[36] Litigation solicitor with BTO.
[37] 1949 Act, s 1(2).
[38] 1949 Act, s 1(3).
[39] See paras 2.34 to 2.48 below.
[40] See DP, paras 3.42 to 3.44. The case law is contradictory.
[41] *McDowall v Thomson* (1950) 66 Sh Ct Rep 101 at 105 (Sheriff JL Duncan).
[42] See DP, para 3.57.
[43] See DP, para 3.58.
[44] See DP, para 3.60.
[45] See DP, para 3.59.

2.27 The first case was *Edinburgh Woollen Mill Ltd v Singh*.[46] It concerned a 20-year lease of a shop on Edinburgh's Lawnmarket. The shop was one of the tenant's 300 trading outlets, with a combined turnover of £161 million and generating post-tax profit of £19 million. The tenant had three other stores near the Royal Mile. The landlord also had stores on the Royal Mile, and was a direct competitor of the tenant in the sale of Scottish-themed goods. The landlord served a valid notice to quit requiring the tenant to vacate the shop at the end of the lease. The tenant was unable to find suitable alternative premises and sought renewal.

2.28 In his decision, the sheriff took the view that the test of "reasonableness" had to be applied in the context of the mischief that the Act was designed to deal with, namely injustice to, and economic oppression of, "small scale shop traders".[47] As he put it:

> "The types of protection envisaged includes allowing the trader time to relocate to another property (*Robertson v Bass Holdings* […]), to preserve his business and goodwill (*MacLeod v MacTavish* […]), or to avoid the trader being forced out of business altogether through removal of premises from which to trade."[48]

2.29 Applying the "reasonableness" test in that context, the sheriff found that,[49] while the tenant's business would be somewhat diminished by ceasing trade from the premises, it would otherwise continue uninterrupted. There was no threat to its goodwill or good name, as it could adapt other stores to carry its name. There was nothing sudden, unexpected, or unfair in the lease coming to an end. Accordingly, there was nothing unreasonable in refusing the application. The sheriff, in finding for the landlord, characterised the dispute as "no more than an attempt to retain a highly successful site, and to keep it from a direct competitor."[50]

2.30 The second case followed within two years of the first. In *Select Service Partner Ltd v Network Rail*,[51] the let premises were a takeaway food outlet in Edinburgh Waverley railway station. Originally on a five-year lease, the lease had continued on a year-to-year basis through tacit relocation. The tenants were a multi-national company operating in 29 countries with a revenue of almost £2 billion. The landlord served the notice to quit, as they wished to let the premises to a well-known coffee retailer instead. The tenant's business was focussed on transport hub outlets and there was no suitable alternative premises in Edinburgh. It sought renewal.

2.31 In coming to his decision, the sheriff observed that, "what is reasonable in all the circumstances is a wide discretion."[52] Disagreeing with the sheriff in *Edinburgh Woollen Mill* he took the view that the factors to be taken into account in the "reasonableness" test could not be cut down by reference to the original purpose of the Act in 1949. He opined that, if Parliament had intended to restrict the Act to small shopkeeper tenants, it could easily have

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[46] 2013 SLT (Sh Ct) 141.
[47] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [29] (Sheriff NA Ross).
[48] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [29] (Sheriff NA Ross). The restricted use of the discretion in *Edinburgh Woollen Mill* echoed the approach in an early 1960s case where the sheriff had observed that the discretion was not designed to alleviate hardship caused to a business through renewal being offered at an increased, though reasonable, rent: see *Stenhouse v East Kilbride Development Corp* 1962 SLT (Sh Ct) 35 at 37 (Sheriff JA Forsyth QC).
[49] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [30]–[31] (Sheriff NA Ross).
[50] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [30] (Sheriff NA Ross).
[51] 2015 SLT (Sh Ct) 116.
[52] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [8] (Sheriff NMP Morrison QC).

done so.[53] In any event, even if legislative purpose could be used to restrict the discretion, the appropriate purpose of Parliament was that in 1964 when it made the Act permanent. In finding for the landlord the sheriff took into account various factors, including whether it was reasonable for a landlord to seek to replace as a tenant a multi-national travel-food company with an international coffee shop chain.[54]

2.32 This divergence of approach is unhelpful. And even on the more narrow view of "reasonableness" a sole trader tenant's exclusive reliance on the shop as a means of livelihood can be insufficient for renewal to be reasonable, depending on other circumstances. In *Loudon v St Paul's Parish Church*,[55] the tenant, a married man with three children, obtained his livelihood from the shop, had done so for over 10 years, and had been unable to find suitable alternative premises. Nevertheless, as the landlord was a charity that needed funds from the sale of premises with vacant possession, the court found reasonableness favoured the landlord. In *Stenhouse v East Kilbride Development Corp*,[56] despite the tenant evidently earning his living from the business premises,[57] the sheriff also refused renewal. He held that the 1949 Act was not designed to give relief by effectively subsidising a tenant who, through incapacity or inability, was unable to turn sufficient profit to afford a reasonable rent increase.[58]

2.33 Moreover, given the high threshold to be surmounted in appealing a single sheriff's decision made on a discretionary basis,[59] the sheriff appeal court is unlikely to be presented with a case decided in that way and even if it did receive such a case it might not wish to choose between the two approaches to reasonableness. The inconsistencies, uncertainties and lack of predictability of outcome are therefore unlikely to be resolved.

Requirements: mandatory exclusion of renewal

2.34 Overriding the "reasonableness" test are circumstances where the 1949 Act directs the court to refuse renewal.[60] These are the mandatory grounds of refusal. There are six such grounds. They are lettered (a) to (f) in section 1(3). The onus of establishing any one of these lies with the landlord.[61]

Tenant's material breach or insolvency

2.35 The first two grounds are:

> "(a) where the tenant is in breach of a condition of their tenancy which the court thinks is material;

[53] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [13] (Sheriff NMP Morrison QC).
[54] 2015 SLT (Sh Ct) 116 at [45] (Sheriff NMP Morrison QC). The replacement of the tenant with a coffee-based outlet was reasonable.
[55] 1949 SLT (Sh Ct) 54.
[56] 1962 SLT (Sh Ct) 35.
[57] Both the applicant and his wife devoted their whole time to the newsagent, stationery, and tobacconist business, from which they made weekly withdrawals for their maintenance. Additionally, their daughter and daughter-in-law were employed full-time in the business, and their son part-time.
[58] *Stenhouse v East Kilbride Development Corp* 1962 SLT (Sh Ct) 35 at 37 (Sheriff JA Forsyth QC).
[59] Appeal is competent only on a point of law: see Act of Sederunt (Summary Cause Rules) 2002 (SSI 2002/132), sch 1 r 25.1. Where the law concerns the application of a general reasonableness test it may be exceptionally difficult to demonstrate an error in applying the law on the part of the sheriff.
[60] 1949 Act, s 1(3).
[61] *McDowall v Thomson* (1950) 66 Sh Ct Rep 101 at 105B (Sheriff JL Duncan); *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20 at 21 (Sheriff AM Chalmers).

(b) where the tenant (not being a company) is apparently insolvent,[62] or is divested of their estate by a trust deed or is a company unable to pay its debts".

2.36 Unsurprisingly there is little reported case law on these grounds.[63] If a lease is nearing its end and the tenant is in financial difficulties or is accused of breaching its terms, it is unlikely that they would be seeking its renewal. However, situations can be conceived where the tenant might believe that the breach is immaterial and can be purged while seeking renewal of the lease.

2.37 With regard to a failure to pay rent or fulfil any other monetary obligation, the landlord can prevent any possibility of renewal by terminating the lease on the basis of irritancy prior to the court deciding an application. If the landlord commences an irritancy process but unusually, the lease has not been terminated and the arrears continue (or new arrears have arisen) by the time that the sheriff decides the application the question is whether the failure to pay is "material". This is also the case if no irritancy process has been commenced. No guidance as to when monetary arrears become "material" is given by either the 1949 Act or the case law applying it.

2.38 With regard to breach of a non-monetary obligation, irrespective of whether the lease allows the landlord to irritate the lease on that ground, the court has to assess materiality for itself.[64] If the parties have agreed that the obligation is material or that its breach entitles irritancy by the landlord, that is likely to be a strong factor pointing towards materiality.

2.39 It is most unlikely that a tenant which has gone into bankruptcy or is unable to meet its debts as they fall due would be seeking a one-year renewal of a lease. The same can be said for any insolvency practitioner who has taken control of the tenant's assets.

Price fixed by arbitration

2.40 Ground (c) is,

"where the landlord has offered to sell the premises to the tenant with the price to be fixed by arbitration or the court".

The circumstances of ground (c) are likely to occur rarely.[65] In today's marketplace few landlords would offer to sell the let premises to the tenant and leave it to an arbitrator or the court to fix the price.

Offer of suitable alternative premises

2.41 Ground (d) is,

[62] The reference in s 1(3) of the 1949 Act to the tenant being "notour bankrupt" must be read as the tenant being "apparently insolvent": see Bankruptcy (Scotland) Act 2016, s 234(7).
[63] One rare example is *McCallum v Corporation of Glasgow* (1955) 71 Sh Ct Rep 178 (breach of user term of lease found to be material).
[64] *McCallum* (above).
[65] *Hunter v Bruce* 1949 SLT (Sh Ct) 57, a case decided within two months of the 1949 Act coming into force, is a rare example of ground (c).

> "where the landlord has offered reasonable and alternative accommodation to the tenant which is suitable for the business carried on by the tenant in the premises".

2.42 The suitability of the accommodation offered by the landlord includes not merely the structural *suitability* for the tenant's kind of business but also its location for the purpose of maintaining the tenant's existing trade. For a business relying substantially on passing trade, the offer of accommodation in a location where customers were much less likely to be shopping was insufficient to satisfy ground (d).[66] Similarly where the tenant's business was an Edinburgh southside pub relying on its food trade, the offer of a traditional pub on the high street of the small Midlothian town of Penicuik, where the food element was minor and the previous tenant had depleted it of a substantial part of its goodwill, did not satisfy ground (d).[67]

Tenant's notice of intention to quit

2.43 Ground (e) is:

> "where the tenant has given notice of termination of tenancy and as a result the landlord has contracted to sell or lease the premises or taken any other steps as a result of which the landlord would be seriously prejudiced if he could not obtain possession of the premises".

In this ground "notice of termination of tenancy" is notice from the tenant of intention to quit at the end of the lease. As the law stands this can be given by the tenant orally to the landlord at any time no less than 40 clear days before the last day of the lease.

Hardship from renewal outweighing hardship from termination

2.44 Ground (f) is,

> "that, having regard to all the circumstances, the sheriff believes that greater hardship would be caused by renewing the tenancy than refusing to do so".

2.45 This "greater hardship to landlord" ground was not part of the original recommendations for the 1949 Act.[68] The thinking behind it was to ensure equitability for the landlord. It appears to have been inspired by the legislation regulating residential tenancies that was in force in the late 1940s.[69] However, it has proved ill-fitted to the commercial retail letting sector where landlords and many tenants are often corporate bodies, partnerships or

[66] *Hurry v McLauchlan* (1953) 69 Sh Ct Rep 305 at 307.
[67] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55 at 60F-G.
[68] See DP, para 3.72.
[69] See, for example, ground (iv) of s 5(1)(d) of the Increase in Rent and Mortgage Interest (Restrictions) Act 1920, replaced by ground (h) of Sch 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act 1933. The onus under the 1920 Act was on the landlord to establish greater hardship to them through non-eviction. The onus under the 1933 Act was on the tenant to establish greater hardship to them through eviction. In *Swirles v Isles* 1926 SLT (Sh Ct) 73, the landlord, who was an individual, succeeded in establishing greater hardship through non-eviction where medical evidence indicated that their health was unable to cope with their current first-floor flat and so would benefit from use of the ground floor tenanted flat. In *Kerrigan v Nelson* 1946 SC 388, the tenant failed to establish greater hardship.

bodies of charitable trustees rather than individuals. Courts have struggled to apply the greater hardship test to such landlords or tenants. The ground has been upheld rarely.[70]

2.46 The first step is for the landlord to establish "hardship". If the landlord succeeds in this, it is then for the tenant to establish their hardship and if both are found to arise the court must weigh them up.[71] In most cases there is an initial obstacle: how can a company (or other corporate body or partnership) establish hardship? If a party is a small company with a small handful of individuals comprising its shareholders the courts have been able to take the hardship of those individuals as a proxy for the hardship of that company. Where a landlord was a charitable body hardship to its beneficiaries (who might use the premises) has been taken into account.[72] However such a proxy-based approach remains difficult if not impossible to apply for parties with many shareholders, such as co-operatives.[73]

2.47 The difficulties come into further focus in the final stage when, assuming that both parties are likely to suffer "hardship" from the court's decision, the hardships come to be weighed. It is unclear, for example, how hardship to the ultimate beneficiaries of a charity tenant holding a number of shops can be weighed against the hardship of a commercial landlord? A similar doubt arises in respect of the hardship of a charity landlord letting a shop with a view to obtaining income for its beneficiaries when weighed against that of a sole trader tenant who derives his livelihood from their business at the premises.

2.48 Furthermore, the wording of ground (f) does not limit consideration to the hardships of the landlord and tenant. In some cases it has been argued that the hardships of third parties should be taken into account.[74] There is conflicting case law on whether hardship to third parties who use, or might use, the commercial services of the tenant or of the landlord is relevant. In *Hurry v McLauchlan*,[75] it was held that hardship to the potential new tenant in the event of refusal was irrelevant. Yet, in *Select Service Partner*, the potential inability for rail passengers to obtain coffee for their journeys from a potential new tenant in the event of renewal being granted was not seen as irrelevant in the assessment of hardship for ground (f).[76]

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[70] *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* 1954 SLT (Sh Ct) 76; (1954) 70 Sh Ct Rep 289, and *Jalota v Salvation Army Trustee Company*, Aberdeen Sheriff Court, 24 February 1994, unreported (Sheriff Principal DJ Risk QC).

[71] This mirrors the elaborate process for agricultural lease cases whereby once the landlord establishes their hardship, the tenant acquires an onus to establish their hardship, and if that is done it remains for the court to decide whether the former is greater than the latter: see *McLaren v Lawrie* 1964 SLT (Land Ct) 10, followed in *Somerville v Watson* 1980 SLT (Land Ct) 14; *McRobbie v Halley* 1984 SLCR 10. In *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* (1954) 70 Sh Ct Rep 289 at 291, the sheriff upheld the ground in finding that the tenant had demonstrated inconvenience at best and not "hardship".

[72] *Jalota v Salvation Army Trustee Company*, Aberdeen Sheriff Court, 24 February 1994, unreported (Sheriff Principal Risk QC).

[73] In *White v Paisley Co-operative Society Ltd* 1956 SLT (Sh Ct) 95 at 96–97, the notion was rejected, in passing, by the sheriff.

[74] For example, in the residential lease case *Harte v Frampton* [1948] 1 KB 73 (CA), it was held that hardship to anyone who might be affected by the grant or refusal of eviction ought to be taken into account, but with weight being accorded to them according to their proximity to the landlord or tenant. Thus, hardship to refugees to whom a landlord intended to provide accommodation at the let premises could not be irrelevant in a residential lease context: see *Cumming v Danson* [1942] 2 All ER 655 (CA).

[75] (1953) 69 Sh Ct Rep 305.

[76] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [48].

Remedy: court procedure

Sheriff court summary cause

2.49 The effectiveness of the 1949 Act hinges on the ability of the tenant to go to court and, with reasonable promptness, to obtain from it a renewal sufficient to allow them to preserve their business. The Guthrie Committee recognised this in 1949: they thought that the procedure before the sheriff should be "of the most summary character following the lines of practice in small debt actions or summary removings", and that the sheriff should be "specifically empowered to remit the application in whole or in part to a man of skill [that is, an expert]".[77] They also recommended that legislation should require the sheriff to dispose of applications under the Act within a specified period.[78] Neither of these last two recommendations proved feasible. However in accordance with the intended summary nature of the remedy, the 1949 Act, as originally worded, excluded any appeal.[79]

2.50 In 1976 the small debt procedure was replaced with the summary cause procedure.[80] While that procedure allows factual matters to be remitted to a single expert, there is no presumption for the use of a single expert. All cases under that procedure, including those under the 1949 Act, allow appeal to the sheriff appeal court on the grounds that the sheriff erred in their assessment of the law.[81]

Court procedure expense

2.51 Under summary cause procedure, costs for a tenant can mount rapidly. These can include not merely court fees but also lawyers' costs and those of expert witnesses. If unsuccessful it is likely that the tenant will have to contribute to the landlord's costs (expenses) by the court, but even if the tenant succeeds in obtaining renewal, not all of their legal costs will be recoverable as expenses from the unsuccessful landlord.[82] A landlord against whom an application is made will face the same pressures.

[77] Guthrie Interim Report, paras 23–25.
[78] Guthrie Interim Report, para 23.
[79] 1949 Act, s 1(7) as originally worded.
[80] 1949 Act, s 1(7) substituted by the Sheriff Courts (Scotland) Act 1971, s 47(2) and Sch 1 para 3.
[81] Sheriff Courts (Scotland) Act 1971, s 38 and Act of Sederunt (Summary Cause Rules) 2002, rule 25.1 as read with Courts Reform (Scotland) Act 2014, s 109(2) and (3).
[82] The amount recoverable is not likely to exceed 70% of the actual legal fees and expenses incurred: Gill Report, Vol 2, p 76, para 13.

Chapter 3 Separate regime for retail, food and drink, hair and beauty tenants?

Introduction

3.1 An important question is whether the leases covered or potentially covered by the 1949 Act should continue to have special legal rules applicable to them in relation to their termination, which do not apply to other commercial leases. This issue plays a key role in the assessment of whether the Act should be retained, reformed, replaced, or simply repealed without replacement. We look at those options in detail in subsequent Chapters in this Report. Meantime in this Chapter we consider whether, irrespective of the other merits or drawbacks of a particular option, there continues to be justification in having a special regime for these types of commercial lease.

Listed leases

3.2 In Chapter 1 we outlined the leases that are or might be covered by the 1949 Act.[1] In the Discussion Paper we noted that if special rules for the termination of certain types of lease were to continue, the types of lease covered would have to be clarified.[2] We asked consultees whether, if special rules were to continue, they should extend to the types of lease covered by the 1949 Act but with a few adjustments.[3] The adjustments which we proposed were (a) the exclusion of leases of warehouses and of premises for wholesale supply of goods and (b) the inclusion of leases to which the 1949 Act might apply but where there was a doubt.[4]

3.3 The consultees who responded on this matter included both those who favoured the retention of special rules and some of those who were opposed to having special rules at all. Those who responded were not all of the same mind. However, majorities took the view that if special rules were to apply, they should cover leases of:

- premises for the sale of goods to visitors by retail;
- premises for the retail-style hire, repair, cleaning or treatment of personal items or household goods;
- hot food takeaway premises;
- cafes, snack bars and restaurants;
- pubs;
- hairdressing salons and barber shops;

[1] See para 1.4 and in DP, paras 3.6 to 3.22.
[2] DP, paras 4.28 to 4.34.
[3] DP, para 4.35 (Question 14).
[4] Restaurants, premises for cleaning, repairing or treating of goods for consumers, beauty treatment and tattooing.

- beauty-treatment salons including nail bars and tattoo studios.

In the discussion that follows in this and the following Chapters we refer to these leases as "listed leases". The tenants who occupy under listed leases will be described as "listed businesses".

Scope of Report

3.4 Many commercial leases are not listed leases. For example leases of premises used for providing services such as various forms of therapy, financial, legal,[5] design and other professional services, estate agency or for manufacturing are not covered. The tenants under those leases are not covered by the 1949 Act and the law does not give them an entitlement to seek a court order renewing the lease. As noted in Chapter 1 the extension of the 1949 Act to such tenants is beyond the scope of our review.[6]

Arguments for special provision

3.5 Given that many commercial tenants are not covered by the 1949 Act and there is no pressure for its scope to be extended to them, the basic question arises: why should tenants under listed leases continue to enjoy some form of special provision? The Discussion Paper identified a number of possible reasons why that might be so. The possible reasons identified were:

- shortage of premises available for let;
- rent levels;
- preservation of tenant's goodwill;
- tenant's provision of essential services;
- period of notice to quit inadequate for removal and relocation;
- protection of tenant from property speculators and security of tenure for year-to-year leases.

Shortage of premises to let

3.6 The 1949 Act was enacted initially, and then made permanent, at times when there was perceived to be a shortage of suitable premises to let at least in major urban areas. The Discussion Paper sought views on whether there was, in 2024, a shortage of premises available for let to listed businesses and whether this was expected to change in the coming years. Eleven consultees answered this question.[7] Six consultees advised that there was currently no shortage of retail units, or that there appeared to be a surfeit of available

[5] A lease of solicitors' offices in an office block would not be a listed lease. Nor would a solicitor's office with a high street frontage that had once been used for retail be covered. This would remove any doubt that exists currently under the 1949 Act: see para 2.12.
[6] See para 1.7.
[7] DP, para 4.5 (Question 3).

premises.[8] One consultee advised that there was a shortage of premises for listed businesses due to rent levels and planning issues.[9] Four consultees, thought that the answer depended on the specific business, its needs and location, with shortages more prevalent in areas with high customer footfall but also where the location was in a small community.[10] Representative of the views of this last group, Professor Sparks noted:

> "It is widely accepted that we have too much floor space in retailing and that the shifts to new locations (out-of-town etc) and channels (the internet) have not been combined with a loss of physical floorspace. We see this in the vacancy rates in many high streets, town centres and shopping centres. There is some adjustment occurring, but it is extremely difficult to argue that there is no space for retailers to occupy.
>
> Saying that there is space available is however not the same as saying that it is the right or suitable space. This though strikes me as a business or market issue not a legal problem. I do not hear of putative retailers saying there is no space available; I do hear comments about waiting for the 'right' space for their business. This is tied up with the time to move and fit-out a new store. This should not be underestimated and is not as quick as often supposed.
>
> The concept of the right space for a retailer is important and you raise it in the [DP] via the concept of community. I can for example see how a retailer (the sole one?) in a rural type community could be at risk of a change in (the attitude of) the landlord and not be able to find alternative space."

The Charity Retail Association noted that in the context of charity retailers the location of a shop, its state of repair and competitive rental costs were vital for its profitability and its consequent ability to raise funds for good causes.

3.7 With regard to a possible change in the supply of premises in the coming years, no change was expected. The Scottish Property Federation thought that given advancements in digital commerce a lack of suitable premises was not foreseeable as a significant issue for listed businesses in the future.[11] CMS did not expect any change in the short to medium term noting that many retail units did not lend themselves to repurposing.

3.8 We acknowledge that in specific circumstances a small business trading under any listed lease might have difficulty in finding alternative premises that are in a suitable location. Aside from the high street charity shop referred to, where there might be other premises in the locality but in not as attractive a micro-location for trading, we have in mind for example a shop in a residential suburb or a pub in a rural location where there might not be anything else in the locality and immediately available. However consultees' views reflected those that we had expressed in the Discussion Paper, namely that at the present time there is no general shortage of retail premises.[12] We were not told of any shortage of premises suitable for food

[8] SPF, CMS, Senators of the College of Justice, Faculty of Advocates, Urquharts, and in relation to food & drink, Greene King.
[9] SLAS.
[10] SSP, CRA, BIRA and Prof Sparks (in general comments).
[11] In answer to DP, para 4.5, Question 3.
[12] DP, para 4.4.

and drink hospitality businesses. Furthermore it seems clear that this situation is likely to continue into the foreseeable future.

Rent levels

3.9 Closely linked to possible shortages of available premises are the levels of rent. Concern over unreasonable lease terms, including rent, being imposed on tenants, was a factor behind the 1949 Act being made permanent in 1964.[13] Responding to the question in the Discussion Paper about rent levels,[14] views were expressed that rent levels remained affordable particularly in high street locations,[15] that rents were led by market demand (rather than a shortage of supply),[16] that rents would vary depending on location,[17] and that if anything the market favoured tenants.[18] At a roundtable discussion the FSB told us that in some cases landlords would prefer a new tenant who could pay a higher rent than an existing tenant who could not.

3.10 With regard to the future, while it seems to be accepted that rents will rise, the Scottish Property Federation noted,

> "Outside prime pockets or affluent areas, we do not expect a dramatic increase in rent considering the well-publicised challenges for the high street. Instead, our members have expressed significant concern over business rates, which represent a substantial cost for businesses."

3.11 The evidence with regard to rent levels suggests that a listed business is no more vulnerable than any other business in being able to afford to either remain in the premises or trade from alternative premises. The concerns expressed in 1949 and 1964 no longer exist. Nor is it thought that this situation will change in the future. Indeed it might be thought that the levels of business rates (which are payable by tenants) are likely to act as a brake on any significant rise on levels of rent that might reasonably be sought by landlords from tenants.

Preservation of tenant's goodwill

3.12 Back in 1949 the Guthrie Committee considered whether the Act should be extended to all commercial tenants. In concluding that it should not, the committee gave as a reason that the business of "shopkeeper" tenants was more likely to be dependent on goodwill generated by footfall in the locality of the premises than the businesses of other tenants such as professional service providers or industrial manufacturers.[19] The necessity to provide "breathing space" for a small business tenant dependent on local custom to enable it to find alternative premises while preserving that goodwill was therefore a key driver behind the 1949 Act. Consequently we were particularly interested in whether listed businesses were more

[13] See DP, paras 2.23 and 2.24.
[14] DP, para 4.5 (Question 4).
[15] CMS.
[16] Urquharts.
[17] British Independent Retailers Association.
[18] Faculty of Advocates.
[19] Guthrie Final Report, para 18. The committee acknowledged that its view differed from the conclusions of the Leasehold Committee for England and Wales. The Leasehold Committee found no reason to distinguish between the different types of tenant and recommended security of tenure legislation for all business tenants. That resulted in Part II of the Landlord and Tenant Act 1954 which applies to England and Wales only.

vulnerable than other businesses to closure (or loss of value) at the end of the lease owing to loss of goodwill generated by the locality of the let premises.[20]

3.13 A clear majority of consultees expressed the view that listed businesses were no more vulnerable to closure owing to loss of local goodwill than non-listed businesses.[21] Consultees' views reflected the contemporary business environment. The Federation of Small Businesses took the view that the small café was no more vulnerable to loss of goodwill at the end of a lease than the small physiotherapist next door. It acknowledged that current economic conditions made retail and food/drink hospitality businesses more vulnerable to disruption than pure service businesses. However in the long term – which was the perspective of the Discussion Paper – this would be expected to become more similar. The Scottish Law Agents' Society observed that listed businesses were not more vulnerable to loss of goodwill at the end of a lease than say a small solicitors' firm or estate agency.

3.14 The general point made by most consultees was that a mere listed use of premises did not make a business more vulnerable to loss of goodwill at the end of a lease than a non-listed use. A retail chain might require to close a branch store owing to the end of its lease. That might leave its goodwill and business substantially unaffected. On the other hand if a small gift shop or café required to close its only premises owing to the end of a lease its goodwill and business might disappear overnight. The Charity Retail Association thought that charity retailers were particularly vulnerable to loss of goodwill brought about by a change of location.

3.15 Dr Craig Anderson saw the strongest vulnerability to exist for tenants of "traditional corner shops" who had an exclusively local clientele and would be likely to suffer greatest hardship in having to move to a different area. He could see the same issue in relation to pubs outside of towns or city centres. SSP is a UK-wide provider of food and drink hospitality at transport hubs such as railway stations. It contended that landlords continue to "hold all the cards" and tenants were unduly vulnerable where their businesses were inescapably tied to a location such as a shopping centre, retail park or railway station that could not be replicated readily within a short geographical proximity. However vulnerability to business-endangering loss of goodwill will occur only if the business is a small one depending on one or two such sites. As observed in a case involving SSP, if the tenant has many stores, closure of one store upon a lease ending is unlikely to damage goodwill.[22]

3.16 We conclude from this that the vulnerability of a tenant to loss or devaluation of their business owing to loss of goodwill at the expiry of the lease might in some cases be greater for listed businesses than for non-listed businesses. However the carrying on of a listed use of the premises is only one of a number of factors bearing on vulnerability. Other factors such as the specific location of the tenant's business and the size of the business appear to be more pertinent.

[20] DP, para 4.10 (Question 5).
[21] FSB, SPF, Prof L Sparks, CMS, Urquharts, SLAS, Senators of the College of Justice. Taking the view of greater vulnerability were SSP, CRA, and Dr C Anderson (for some types of listed business).
[22] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [38] (Sheriff NMP Morrison QC).

Essential services for communities

3.17 In the Discussion Paper we observed that the 1949 Act was enacted against the background that the small shopkeepers that it was intended to protect also provided essential services to their communities most notably in the distribution of food. Indeed in the years immediately before the Act, the Government had used its war-time emergency powers to requisition certain shops in order to maintain essential supplies and services for the community as a whole.[23] That was in an era before any supermarkets. Clearly most groceries are now bought from the stores of large supermarket chains. However the Paper noted that during the COVID-19 pandemic local businesses such as grocery shops and pharmacies had played an important role in the supply of food and medical supplies.

3.18 We wondered whether some listed businesses might be seen as providing essential services that would merit special provision at the end of the lease. Consultees' views were split roughly evenly.[24] Only one consultee went so far as to suggest that all listed businesses provided essential services that merited special provision.[25] Others gave qualified support. Pointing to the position during the COVID-19 pandemic, Boots were of the strong view that special rules should apply to all pharmacies and other "shop premises" in "neighbourhood areas" that deliver a vital service to local communities. The Scottish Property Federation shared this view in respect of pharmacies. The CRA saw charity shops as providing an essential service in supplying good quality and affordable second-hand goods to the communities in which they were located. However the British Independent Retailers Association thought that only some of the listed businesses should be seen as providing essential services. Whether that was so would depend on the location of the premises and the existence of other options for provision of that service to the community.

3.19 A marginally higher number of consultees thought that no special provision for businesses that provided essential services was merited. Among these, CMS opined that if there was a market demand for their essential services a tenant would be able to find alternative premises. The Faculty of Advocates and Dr Craig Anderson took the view that even if a tenant provided essential services to the community, that factor should not justify special rules that would in turn impact upon the negotiation of the lease terms and conditions.

3.20 From consultees' responses we do not find any consensus over whether the provision of essential services merits special legal treatment at the end of a lease for a tenant business that provides them. A majority of consultees was not persuaded of this. We can see that whether goods or services are seen as "essential" may depend on where they are provided. Goods or services provided by the only shop or pub in a remote rural area might be seen as essential to the community. The same activity by the same shop but in a busy high street in a large urban area might not be so seen: the goods or services might be readily available elsewhere nearby or through the internet. Only in respect of pharmacies was there a suggestion that the service might be seen as essential irrespective of location. We look at these in Chapter 6.[26]

[23] DP, para 2.10 and fn 20.
[24] Fifteen respondents did not express a view one way or the other.
[25] SLAS.
[26] Paras 6.32 and 6.38.

Period of notice to quit inadequate for removal and relocation

3.21 That a tenant, whether under a listed lease or not, might receive only a 40 day[27] warning of the landlord's wish that they quit the premises at the end of the lease has long been seen as offering inadequate notice for the tenant to remove from the premises and find and relocate to alternative premises. From the 1940s to the 1960s the ability of the tenant under a listed lease to apply to the court for renewal for up to one year was seen as providing some relief from any prejudice caused by this short period.[28] However since at least the late 1970s, owing to the factors of time and cost,[29] the availability of this "relief" has become more illusory than real. The result has been that tenants have continued to live with the 40 day period and learned well in advance of any receipt of the notice to quit to plan for possible departure. Indeed following the decrease in commercial rents experienced in the late 2000s such planning by tenants has been necessary in case the landlord should wish to have the lease continued, for up to a year beyond its termination date, at the existing rent.[30] We consider the question of the period of notice to quit in Chapter 6 of this Report.

Protection from speculators and security of tenure for year-long tenants

3.22 The final two reasons put forward in the Discussion Paper for possible separate treatment of listed-business tenants were matters that had been put forward by the Government in 1963 in support of the Act being made permanent. They were (1) the need to protect shop tenants from speculators seeking to buy the premises with a view to a quick profit for sale from development; and (2) that the Act provided some form of security of tenure for shop tenants who at the time typically held their leases on a year-to-year rolling basis. We asked consultees whether either of these reasons continued to apply.[31]

3.23 All but one of the consultees who answered this question took the view that neither reason continued to apply or justify special legal provision for listed leases. The Scottish Property Federation noted that the modern lease system and current market conditions sufficiently address these concerns. As observed in the Discussion Paper, from the 1970s onwards the practice of granting year-to-year leases of shops and other premises to listed businesses ceased. Longer leases accompanied with provisions for rent review and break clauses became more frequent. Leases could be for 25 years or more. Although since the financial crisis of the late 2000s leases have been shortening, it remains the case that, in contrast to the position in 1963, a tenant who wishes a longer period of time to allow them to develop their business will negotiate a lease say for five years with a break option to allow them to terminate the lease early if their business situation so dictated. This applies to all business tenants whether or not listed. Indeed such a lease is likely to provide a more secure business platform for a listed business tenant than any special rule on termination. Against that background, as the SPF observed, there is no need for special treatment of listed business tenants in order to enable them a secure platform at the premises from which to conduct their business.

[27] There must be at least 40 *clear* days between the date of receipt of the notice and the termination date.
[28] DP, paras 2.18, 2.20 to 2.21, 2.23 to 2.24.
[29] See paras 4.18 to 4.22 and 4.27 to 4.30 below.
[30] If there is neither notice to quit from the landlord nor notice of intention to quit from the tenant, the lease continues automatically after the termination date unless the parties agree otherwise.
[31] DP, para 4.61 (Question 8).

3.24 The Scottish Law Agents Society submitted that the reasons given in 1963 continue. They focussed on rising prices in the property market and thought that tenants remained at risk of "having their premises bought over" by future speculative investors. However they did not suggest that this was an existing problem. What happens in the future cannot be predicted with any real degree of accuracy. Changes of landlord are not uncommon. They do not bring a lease, listed or not, to an end.[32] We do not think that any future risk of tenants being evicted by speculator landlords justifies having long-term special rules for listed leases. If such a problem should arise in the future, Parliament can legislate for it with bespoke measures at that time.

Conclusion

3.25 Looked at overall, there appears to be no overriding reason as to why leases to listed businesses should be subjected to laws that differ from leases for other commercial uses. We bear this in mind when in the chapters that follow we consider the options for the future of the 1949 Act.

[32] Leases Act 1449.

Chapter 4 Keeping an unreformed Act

Introduction

4.1 In our Discussion Paper we took the preliminary view that the 1949 Act was no longer fit for purpose. In short on any view, it should not, in its current form, remain part of the law. A number of reasons were put forward for our thinking. We invited the thoughts of consultees. In this Chapter we discuss consultees' responses, and the arguments for and against retention before concluding that the 1949 Act cannot continue in its current form.

Stakeholder views

4.2 In the Discussion Paper, we asked whether an unamended 1949 Act should remain part of the law. Not a single respondent thought that it should.[1] Two consultees noted that given the lack of use of the Act they would not oppose its retention but that they would prefer its repeal. The Charity Retail Association, the British Independent Retailers Association and the UK-wide businesses Boots and SSP advised that they would support the retention of the Act as a minimum protection for tenants if no other recommendations were taken forward which would protect commercial tenants. Similarly, the Scottish Law Agents' Society indicated that the Act should not be repealed but instead reformed. For these consultees keeping an unamended Act was seen as a last resort in preference to repeal of the Act without replacement.

The 1949 Act: arguments for retention in current form

Benefits for existing tenants

4.3 As noted in Chapter 2, the Act is used by a few large retailers or food and drink providers.[2] If they request to remain at the premises either under a fresh lease or a renewed lease the Act can induce the landlord to negotiate in response. Once such a negotiation process begins the Act can give them an advantage over other potential candidates for the tenancy at the end of the lease.[3]

4.4 A further benefit might lie in providing the tenant with leverage to negotiate more time to allow them to carry out tasks necessary to remove from the premises in an orderly fashion, including redundancy procedures and the removal of their fixtures and fittings.

Potential benefit for the public

4.5 If a listed business tenant is sufficiently powerful financially and their business at the premises can be said to provide an essential service to the public, it could be argued that in giving the tenant a favourable position in negotiations, the Act has the effect of ensuring the provision of an essential service to the public. An obvious example would be a pharmacy chain

[1] DP, para 3.82 (Question 2).
[2] Paras 2.8 and 2.9 above.
[3] Paras 4.31 to 4.34 below.

seeking to keep their lease over a local pharmacy.[4] There might be other "essential service" uses but this might well depend on the location of the premises. The same type of shop might be seen as essential in a rural area but not in a suburb of a large city.

The 1949 Act: arguments against retention in its current form

Outdated

Listed business transparency and benefit

4.6 The Act is highly outdated. One need only look to the fact that its definition of "shop" continues to be tied to a long-repealed statute.[5] Unless the tenant trades from premises that look like a traditional shop or supermarket and uses the premises to sell groceries or other goods to consumers, they or their advisers are unlikely to think that the Act could even apply to them. For example, a café business is unlikely to think that it is covered.[6] The Scottish Licensed Trade Association told us that there was very little awareness of the Act in the pub sector.

4.7 Moreover, what does and does not qualify as a "shop" has become anomalous and illogical. At one time most small high street businesses sold goods of one type or another. As such they would have been covered by the Act. However, over the decades new businesses have emerged. These would not have been commonly found on the high streets when the Act was introduced, or even when it was made permanent in 1964. Examples include the many tattoo studios, nail bars or other beauty treatment establishments that now exist. Yet these might not be covered by the Act unless they offer hair-dressing services.[7] This highlights the outdated nature of the 1949 Act.

4.8 Furthermore, as noted in Chapter 3 it is now difficult to justify different laws applying to leases of "shops" as opposed to those of premises for other entrepreneurial use. In response to our 2018 Discussion Paper, Burness Paull, described this difference in application as "irrational". There seems to be no satisfactory basis for the Act granting protection to a large national or multi-national retailer, but not for instance to a small physiotherapy business.

Changed market conditions

4.9 The commercial property marketplace for "shop" premises themselves has changed radically since 1949 or 1964. A number of consultees described the Act as a "historical anachronism". Professor Sparks stated that,

> "The Act was an emergency, temporary measure brought in to deal with specific post-war circumstances. These circumstances are no longer in existence and indeed in my view were not when the Act became permanent".

He added that the Act no longer fulfils its original purpose.

[4] This was a point made by Boots and SPF in relation to the provision of special laws for leases of premises with listed-business use: see para 3.18.
[5] See para 2.10.
[6] This is despite both the Shops Acts and the Shops Act 1950 extending to premises used for "the sale of refreshments": see 1950 Act, s 74(1).
[7] DP, paras 3.20 and 3.21.

The Act was introduced to combat what was seen as some landlords' abuse of an exceptionally superior bargaining position in the Scottish commercial property market in the years immediately after World War II.[8] Some small business tenants were being placed in inequitable positions of either having to buy the premises at an inflated price, pay an inflated rent or face eviction with the likely result of business closure. This was caused by a general shortage of commercial premises being available to let.

4.10 Since then, the economy has changed. Lack of availability of premises is no longer an overarching issue.[9] Rent levels do not appear to be unreasonably high or unaffordable.[10] Moreover, recent studies show that one in six shops in Scotland currently sits vacant.[11] The rise of online commerce may be one reason for the decrease in demand. Businesses are now in less need of physical premises than in the past.[12] It is expected, given the continuous technological developments, that this will not change significantly in the future. A lack of commercial premises affordable by small businesses no longer appears to be the issue that it was in 1949 or 1963.

4.11 Given the depressed demand for commercial premises overall, it must follow that in general tenants occupy a much better bargaining position than when the Act was introduced or made permanent. The more balanced position of the parties is also evidenced by a move away from the full repairing and insuring lease which imposed very burdensome terms on tenants. Although, it was once the norm for commercial leases to be entered into on this basis, leases containing terms more advantageous for tenants have become more common.[13] Certainly it can no longer be said that there is a serious issue of abusive landlords imposing onerous conditions on tenants. As such, an important mischief that justified the Act being made permanent in 1964, no longer exists.

Legal uncertainty

Meaning of "shop"

4.12 One of the most fundamental issues with the Act is that it has become a source of confusion and uncertainty.

4.13 The first issue lies with the definition of a "shop". As has already been discussed[14] the word is not given its literal meaning but rather an expanded one by reference to the Shops Act 1950. Under the 1950 Act, "shop" is defined to include any "retail trade or business". On the assumption that this expanded definition does continue to apply, some business leases clearly qualify while others clearly do not. Some however, lie in a band of uncertainty. One example is where the lease is to a business that uses the premises to hire goods to consumers, or to provide repairing or cleaning services such as a shoe repair shop or a garage.[15] Another is a

[8] See paras 2.2 and 2.3.
[9] See paras 3.6 to 3.8.
[10] See paras 3.9 to 3.11.
[11] "Breathing life into Scotland's high streets: the order of change" *Dentons* (14 June 2023) available at https://www.dentons.com/en/insights/articles/2023/june/14/breathing-life-into-scotlands-high-streets.
[12] Rebecca Muir, 'Negotiating a Modern Retail Lease: Challenges Faced by the 21st Century Landlord' (2018) 3 Edinburgh Student Law Review 6, 6.
[13] Denis J Garrity and Lorna Richardson *Dilapidations and Service Charge* (2019) para 1.4.
[14] Para 2.10.
[15] See DP, paras 3.14 to 3.18.

restaurant. For such tenants to rely on the Act in the face of such doubt over its applicability is quite impractical.

The ”reasonableness” test

4.14 Even if a lease is clearly of a “shop” it is very difficult for advisers to predict with any certainty or degree of reliability whether renewal will or will not be ordered and if so on what terms. The root cause of this lies in the unclear scope of the sheriff’s discretionary power.

4.15 As noted in Chapter 2,[16] a single sheriff is given discretion to either renew the lease for a maximum period of one year on terms and conditions that appear to the sheriff to be “reasonable”,[17] or to refuse the application.[18] The discretion is excluded only if one of the mandatory grounds for refusal apply.[19] However, the Act does not provide guidance to the court on how it is to decide whether renewal, or refusal, are “reasonable”[20] and case law has not clarified the matter. On one view there is a virtually unlimited extent of matters that the sheriff may take into consideration when making their decision.[21] Similar criticisms were raised by members of our legal Advisory Group. One member described the court’s discretion as remarkably wide, while another explained that the sheriff is provided with no guiding principles for applying the Act.

Onus of proof

4.16 To make matters worse, it is also unclear from the Act whether the onus lies on the tenant to prove that renewal is reasonable or on the landlord to prove that acquiring vacant possession at the expiry of the lease is reasonable.[22] Case law has not provided a clear answer to this.[23] The outcome is that parties and their advisers are left in the dark as to who needs to make their case.

Costs and delay in court based-remedy

4.17 An application under the Act requires court action. Summary cause procedure applies under which costs can mount rapidly. Prior to even launching an application the tenant will have to meet the costs of their own time, legal advice as to probability and prospects, and potentially even expert witness costs too. The expenditure involved can be significant.

4.18 These costs are exacerbated by the uncertainties of the Act. When the law lacks clarity the giving of legal advice can become unusually time-consuming and thus more expensive. The unpredictability of outcome combined with the almost unlimited number of differing circumstances that a sheriff might consider in reaching it also encourages the leading of large

[16] Para 2.22.
[17] 1949 Act, s 1(2).
[18] 1949 Act, s 1(3).
[19] Paras 2.34 to 2.48.
[20] *McDowall v Thomson* (1950) 66 Sh Ct Rep 101 at 105 (Sheriff JL Duncan).
[21] See paras 2.24 to 2.32 and DP, paras 3.55 to 3.62.
[22] See DP, paras 3.42 to 3.44.
[23] Compare the approach taken in *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55 at 56 (Sheriff IA Poole) where the court “considered that the scheme and wording of the Act suggested an inclination towards the granting of an application which is then tempered by the provisions of section 1(3).”, with the approach adopted in *Loudon v St Paul’s Parish Church* 1949 SLT (Sh Ct) 54 at 55 (Sheriff AM Prain); *McDowall v Thomson* (1950) 66 Sh Ct Rep 101 at 105B (Sheriff JL Duncan); *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* (1954) 70 Sh Ct Rep 289 at 290 (Sheriff W Garrett QC).

volumes of evidence. Unavoidably, this can increase the parties' costs significantly. The costs can be so high that one litigation solicitor in response to the Discussion Paper observed that the Act is only of value to economically powerful small businesses or large enterprises that can absorb the legal costs involved. They added that for small businesses, the remedy of renewal for only one year, albeit with the possibility of further renewals, severely restricted the practical worth of the remedy because the value of an extra year's trading would be significantly reduced by the legal costs incurred in going to court to obtain it. Similarly, the small business owners at a roundtable discussion that we held with the Federation of Small Businesses stated that the prospect of court action for small businesses can be catastrophic.

4.19 Even if the tenant is successful and renewal is granted the tenant will be unlikely to recover from the landlord all the legal expense that they incurred.[24] If unsuccessful the tenant might have to meet not only their own legal expenses but also those of the landlord. Such expenditure could be disastrous for a small business.

4.20 Aside from cost all court proceedings involve delay: parties must wait for the court's decision. In the context of an application under the 1949 Act, the process of negotiation of a new lease (whether or not involving the existing tenant) can be frozen while the parties focus on preparation for court. There is no legislative time limit for decisions under the Act. The application joins a queue with other types of court cases in an overloaded court system. This can be time-consuming. Many months may pass before a hearing takes place. Even when it does, a significant amount of evidence or a debate over the scope of the Act may result in it being continued to other dates. One of our consultees informed us of one of their members applying for a one-year renewal of a lease which was to come to an end on 22 May 2023. The final hearing took place on 22 March 2024. The lease was renewed for one year until 22 May 2024. The court procedure thus took up most of the additional year that was obtained.

4.21 The high expense and long delays in obtaining renewal severely undermine any benefit offered by the Act. They make an application inaccessible for most tenants and especially for the small business tenants whom the Act was originally enacted to protect.

Disuse and inappropriate use

Limited knowledge and use of the Act

4.22 The 1949 Act is resorted to very rarely, whether in applications being made to the court or in negotiations. In preparing our 2018 Discussion Paper we contacted both the Scottish Courts and Tribunals Service and several sheriff clerks from across Scotland. Neither the Scottish Courts and Tribunals Service's information analysts nor the sheriff clerks were familiar with the Act and no one could recall any application having been made under the Act during their tenure.[25] More recently the feedback from members of our legal Advisory Group confirmed that applications under the Act are few in number. Despite having decades of experience in dealing with commercial property, of the eight practitioners in the Group, only two reported having had a client involved in a court application and for both practitioners this had happened only once.

[24] The amount recoverable is not likely to exceed 70% of the actual legal fees and expenses incurred: see the Gill Report, Vol 2, p 76 para 13.
[25] 2018 DP, para 6.23.

4.23 When we asked consultees whether they had used the Act in court or had it used against them[26] six answered in the affirmative.[27] Of the legal consultees all but one could provide only a single example. CMS referred to a case where the tenant, who was a large retailer, used it to successfully obtain renewal of the lease. SLAS noted its use by one of their members. The member, a solicitor, was successful. An academic lawyer[28] had experienced the use of the Act when in practice. In that case its use was unsuccessful. When asked about their knowledge or use of the Act in negotiations,[29] only three consultees advised having such experience. One of those, Burness Paull advised that their experience was limited to being instructed to consider such a matter 20 years ago and of one high street retailer using it. Another, CMS, noted their experience of the Act being invoked but only by large national retailers. Usually the outcome was that the matter was dropped in negotiation or agreement reached.

4.24 On the other hand another large firm of solicitors, Shepherd and Wedderburn, commented:

> "Our experience in this sector (acting for both landlords and tenants) is extensive, and we have never encountered any use of the 1949 Act to support tenant's negotiations in any way."

Landlords, or their representative body, or landlords' agents might be expected to be aware of the Act if is being used. However the Scottish Property Federation told us that based on feedback from their members, there was "very little awareness or indeed use of the Act". British Land, a major retail park landlord, responded that in its experience, "the 1949 Act is almost never invoked by tenants".

4.25 These responses are consistent with the information given to us by both our Non-legal Tenant Stakeholder Advisory Group and the landlord or non-legal property professionals that we contacted during the preparation of the Discussion Paper.

Disuse by small business tenants

4.26 The Act was intended to benefit small business shopkeepers. Yet in the rare instances that the Act is used, it is seldom, if ever, by small business tenants.

4.27 The few solicitors with experience of applications under the Act indicated that in their experience the Act had never been relied on by any small retail business. One member of our legal Advisory Group informed us that in their 30 years of practice the only time that they had come across the Act was when acting for a small business tenant. In that instance the tenant was operating from neighbouring units and needed both to continue trading. The lease of one of the units was approaching its termination date. The tenant considered making an application for its renewal but, in the end, did not proceed as the cost of litigation was prohibitive. Another member of the Group advised never having come across the Act despite having acted for many small shops in small towns for decades.

[26] DP, para 4.23 (Question 9).
[27] These included SSP who were a party in *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116.
[28] Part of the University of Aberdeen's submission.
[29] DP, para 4.23 (Question 10).

4.28 The small business representative bodies that we consulted confirmed the general disuse of the Act by their members. Typifying their responses was that from the National Hair and Beauty Federation which noted,

> "We are not aware of any use of the current Act by sector businesses in recent years… We have received no particular feedback or comments from sector businesses via the NHBF legal adviceline for members that the Act has been used by the sector in recent years."

4.29 The resources of small business shop tenants are unlikely to allow them to make an application. The unpredictability of outcome, its outdated nature, combined with the costs and delay inherent in a court application makes it unsurprising that the Act is no longer utilised by small shopkeeper tenants.

Inappropriate use by large business tenants

4.30 In so far as the Act is used at all, it is used almost exclusively by large business tenants. The three most recent reported cases involving the 1949 Act were all brought by large companies operating under nationally-known trading names.[30] One of the members of our legal Advisory Group who had used the Act once in their legal career did so on behalf of a nationwide music retailer. Another practitioner, Craig Connal KC, commenting in response to our 2018 Discussion Paper observed that they saw the Act "deployed in a variety of circumstances [but] very rarely in the "small shopkeepers" bracket [and instead] by corporate entities well above that level in size."

4.31 In their responses to the Discussion Paper, two solicitor firms[31] and one litigation solicitor[32] noted having knowledge of the Act being used by large retailers as a tool in negotiations. CMS told us:

> "We are aware of large international retailers trying to use the Act as a negotiation tool where they are trying to get a commercial advantage over other retailers who may be interested in taking retail space following the expiry of their lease."

They added that the use of the Act,

> "is a frustration for landlords as it makes negotiations with national retailers inequitable."

Angus Wood, a litigation solicitor, shared his experience of acting for commercial landlords in responding to applications under the Act made by large commercial retailers who operate from hundreds of sites across the UK. He observed that in contrast to the small businesses, whom the Act was intended to benefit, such large enterprises had the financial resources to fund a

[30] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 (a multi-national enterprise operating in 29 countries with a revenue of almost £2 billion); *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 (retailer with 300 trading outlets, with a combined turnover of £161 million and generating post-tax profit of £19 million) and *Superdrug Stores Plc v National Rail Infrastructure Ltd* 2006 SC 365.
[31] CMS and Burness Paul in response to Question 1 at para 3.78 of DP.
[32] Angus Wood in general comments.

court action and were able to obtain a negotiating position that they would not have had but for the Act and which was not its object.

4.32 SSP, a national supplier of transport hub-based food and drink, indicated having used the Act "to gain an extra year trading on a few occasions where the landlord was not expecting a [Tenancy of Shops Act] application and decided not to defend it".

4.33 Where in negotiations the landlord is the smaller and economically weaker party the use of the Act by a large and already powerful tenant can lead to a distortion of the ordinary bargaining powers of the parties. A legal member of our Advisory Group informed us of an occasion where this occurred. The tenant was a multinational retailer. The landlord depended upon the proceeds of the lease as a primary means of their livelihood. The landlord had attempted to negotiate an extension of the lease with the tenant but was unsuccessful. A rival supermarket offered the landlord better terms, and the landlord served notice to quit upon the current tenant. The current tenant was not prepared to match the offer of the prospective tenant and threatened to apply under the Act. The rival supermarket wished to move into the premises quickly. Not being prepared to await the outcome of a litigation they withdrew their interest. The use of the Act had caused a disruption to the negotiations of a small landlord.

4.34 It seems unfair that the Act should place small commercial landlords in potentially detrimental positions for the benefit of large powerful tenants whose businesses do not need protection from closure at the end of the lease. For landlords the premises are an investment in which the terms of the lease, including the ability to choose a fresh tenant or obtain vacant possession on its expiry, are a key element. To coerce them into a new lease with the existing tenant can hinder their plans for the property. This has the potential not only of jeopardising their investment but also, for a small landlord, disrupting or delaying their retirement.

Interference with the parties' bargain

Contractual autonomy

4.35 It is a fundamental principle of Scots contract law that the parties are held to their bargain.[33] The law should respect the parties' contractual autonomy and avoid any unnecessary interference. The termination date of the lease is a product of the landlord's and tenant's bargain when agreeing the lease. Therefore, both parties will know from the outset when the lease will come to an end and should be aware of the need to plan for that eventuality.

4.36 Instances will arise where Parliament decides that it is necessary to intervene in parties' agreements through legislation. For instance, where one party is in a clearly and significantly disadvantaged position in negotiating a bargain, the law can step in to protect the weaker party. That was the case when the 1949 Act was introduced. If, however, circumstances change and the significant disadvantage no longer exists, or if other parties who were not the object of the intervention begin to take advantage of it so as to disrupt freely negotiated terms, the continuation of the legislation demonstrates a failure to respect parties' contractual autonomy.

[33] Stair Inst 1, 10, 14: MacQueen and Thomson on Contract Law in Scotland (6th end, 2024) para 8.55.

4.37 What then is the justification for the Act's imposition on the contractual freedom of the landlord and tenant? Arguably, for the reasons set out in Chapter 3, there is none. Rather the Act infringes on the landlord's right under the lease to have vacant possession on its termination date.

Impaired flexibility for commercial development

4.38 Interference with the termination date of a lease can also deter investment. There has been little legislative intervention in the law of commercial leases in Scotland. The terms of commercial leases remain largely shaped by pressures of supply and demand. This allows for greater flexibility as parties are able to impose such terms into a particular lease as they see fit.

4.39 Such legal infrastructure encourages landlords to purchase and develop commercial property in Scotland and to let it out knowing that the terms of the lease will be enforced, and the tenancy will come to an end on the agreed date. They are therefore able to plan effectively and efficiently for the future use of the property. This situation contrasts with some other jurisdictions.[34] However the Act introduces a degree of uncertainty.

4.40 We have been informed that, in practice, when advising investors, the discussion will often begin with an outline of the lack of regulation of commercial leasing law in Scotland. However, advisers must then draw attention to the 1949 Act. A danger exists that this can introduce doubt into the mind of a particular investor.[35]

Conclusion

4.41 There are many problems with the Act. It is outdated. Developments in the commercial property market since the 1960s have left it anachronistic. This makes its application to some business tenants and not others anomalous and at times even irrational. Even those businesses that are covered by it are mostly unaware of their entitlement to seek renewal.

4.42 The wording of the Act is unclear. Clear advice on likelihood of success in an application under it is difficult if not impossible. This adds to the costs and delays already inherent in court action, making the Act inaccessible for the very parties it was enacted to protect.

4.43 There is also very limited knowledge or use of the Act in legal practice, and little or no knowledge of it in the small business community. In the rare instances where it is invoked it is primarily by large business tenants who were never intended to benefit from it. This can, and has, resulted in the unfair distortion of the ordinary bargaining powers of the landlord and tenant over the granting of a lease.

4.44 Moreover, without existing justification it imposes on the contractual autonomy of the landlord and tenant, thus detracting from the flexibility of the market.

4.45 Finally, and not least, retention of an unreformed Act was not preferred by any consultee who responded to the Discussion Paper.

[34] For example, England and Wales, Ireland, and France. See DP, Appendix B.
[35] 2018 DP, para 6.10.

4.46 Some of the foregoing criticisms carry more weight than others. Nevertheless, we take the view that they clearly outweigh any theoretical advantage to a tenant in the unreformed Act remaining irrespective of whether any reform or replacement is appropriate. We conclude that the Act cannot continue in its present form.

Chapter 5 Reforming the Act

Introduction

5.1 In Chapter 6 of the Discussion Paper, we considered possible reform of the 1949 Act. The proposed reform would maintain the core feature of the Act, namely the potential court-ordered renewal of a lease to a listed business for one year. However, it would seek to resolve the operational issues concerning the Act. In the Discussion Paper we called this "Option C".

Key features

5.2 In broad terms the reform proposed as Option C would involve:

- the introduction of a statutory statement of objects for the exercise of the court's discretion to grant or refuse renewal;
- the introduction of a list of matters to be disregarded in the exercise of the court's discretion;
- the clarification of, and addition to the matters where renewal would be refused irrespective of the court's discretion;
- the introduction of a gateway test designed to exclude the possibility of court-ordered renewal for larger business tenants;
- the introduction of a mandatory offer of mediation as a condition precedent to a tenant being able to seek renewal;
- the capping of the amount that would be recoverable as court costs (expenses) by a successful party from an unsuccessful one;
- the Act applying only to leases of premises being used for "listed businesses", namely the supply of goods to visitors for retail, repair, cleaning or treatment of personal items or household articles, hot food takeaway premises, cafes, snack bars, and restaurants, pubs, barber and hairdressing premises, beauty salons including nail bars and tattoo studios (or some of these).

5.3 Given the wide ranging changes proposed as part of this option, the Discussion Paper asked consultees a significant number of questions in order to obtain views on each aspect of the proposals. Not all consultees answered all the questions relevant to this reform option. However, several took the time to respond to the questions, even if this was not their preferred option. Therefore, we were able to obtain an overview of consultees' views on how the Act might be reformed.

Stakeholder views

5.4 Of the 25 consultees who in responding to the Discussion Paper[1] expressed a preference as between the option of a reformed Act, an unamended Act, replacement of the Act with a mandatory notice to quit scheme or repeal of the Act without reform or replacement, only two, Propertymark and the Scottish Licensed Trade Association, preferred the option of a reformed Act.

5.5 The Charity Retail Association preferred a combination of a reformed Act and the mandatory notice to quit scheme. The Scottish Law Agents' Society thought that a reformed Act could work but with important reservations in relation to specific aspects of it, most notably in relation to the limited scope of listed businesses.

5.6 In summary, only four respondents expressed a preference that included a reformed Act,[2] of which only one[3] preferred the option as presented.

5.7 That one was Propertymark. Their view was:

> "[We think] that there are benefits to small businesses in using the Tenancy of Shops Act 1949 and that the Act should continue. However the Act clearly needs to be reformed to reflect modern practice, to be more applicable and accessible to small businesses and its use requires to be more commonly known".

5.8 The other consultee expressing support for a reformed Act was the Scottish Licensed Trade Association. They were concerned with the interaction between the Tied Pubs (Scotland) Act 2021 ("2021 Act") and the 1949 Act. They were of the view that in order for the 2021 Act to be effective the 1949 Act was necessary. Specifically the 1949 Act has the potential of providing security of tenure for pub tenants. The SLTA preferred the court to have the power to renew the lease of a pub for up to five years, if not longer,[4] as exists at present in England and Wales under the Landlord and Tenant Act 1954. Extending the power of the court to renew for more than one year was not something put forward in the Discussion Paper. A change of this scale to listed leases in general is beyond the scope of this Report. Nor do we think that this Report, concerned as it is with the 1949 Act, is the place for recommendations limited to pub or tied pub leases. In our view any difficulties arising out of the 2021 Act should be addressed by the Scottish Government in the context of ensuring that the 2021 Act meets its policy aims. Were a change of this scale to be adopted more generally it would have a significant impact on the commercial leasing market and would require greater consideration and consultation. Any reform consideration intended to assist in the tied pub context might be more appropriately and successfully accomplished with the specific circumstances of tied pubs as its central consideration.

[1] DP, para 7.6 (Question 81).
[2] CRA, Propertymark, SLTA and SLAS.
[3] Propertymark.
[4] In response to Question 49.

Refining the renewal test: removing uncertainty

5.9 A key problem with the Act is the "reasonableness" test.[5] The potential width of the test produces unpredictable outcomes, with the ambiguity resulting in uncertainty and cost for the parties. To address this issue, we proposed clarifying the test in two ways.

5.10 The first clarification would be through the introduction of a statutory statement of objects which would set out the Act's aims and objectives so that sheriffs and stakeholders are clear on the relevant considerations to be taken into account in deciding whether renewal of the lease is reasonable and if so, on what terms. We proposed the following objectives for the exercise of the discretion to grant an application:

- that it provides the tenant breathing space sufficient to allow them to relocate to other premises;
- that it allows time to exhaust and to conclude any ongoing negotiations for renewal or extension of the lease; or
- that it seeks to avoid the closure of the tenant's business as a consequence of sudden removal from the premises.

The majority of respondents agreed with the proposed statement of objects.[6] The few that were opposed favoured a non-discretionary test for renewal. However, they did not suggest what that test should be. The CRA agreed with only the first two objects, stating that the third object should not be included as it would omit charity shops from the ambit of its protection.

5.11 The second clarification would involve having a list of circumstances which the sheriff would be required to disregard when assessing whether it is reasonable to grant an application.[7] The particular disregards suggested in the Discussion Paper would serve to focus the court's attention on the landlord and tenant relationship to the exclusion of material concerning the interests of third parties such as the public at large, employees or the families of the landlord or tenant, or prospective replacement future users of the premises.

5.12 The proposed approach of having various circumstances specifically excluded from the sheriff's consideration did not meet with general approval from consultees. Respondents were relatively evenly split over whether a list of disregards would assist in addressing concerns over the width of the sheriff's discretion and the unpredictability of outcome.

5.13 Turning to the specifically suggested disregards,[8] a clear majority of consultees disapproved of the court having to disregard the importance of the "shop" to the public. The majority also disapproved of the court being required to disregard the effect of closure on employees of the tenant, the landlord or of any other prospective user of the premises. Consultees also largely disapproved of the proposal that the court should be required to disregard the effect that renewal or refusal might have on the family members of the landlord and tenant. In effect consultees felt the sheriff should continue to be able to take these matters into account when exercising the discretion. Views were evenly split on whether, in considering renewal, the court should disregard its effect on prospective third-party buyers, tenants or

[5] See paras 2.24 to 2.33 and 4.15 to 4.17.
[6] DP, para 6.20 (Question 26).
[7] See DP, paras 6.24 to 6.33.
[8] Questions 32 to 35.

other future users of the premises that are not controlled by or closely linked to the landlord. In general terms the proposal to introduce a list of "disregards" was not supported by consultees.

Mandatory grounds for refusal of renewal

5.14 Under the 1949 Act there are several grounds which, if satisfied, must result in refusal of the application.[9] This is a further area in which the Discussion Paper proposed reforms to resolve various difficulties with the Act.[10] Some proposals attracted support but others, including on some key issues, did not.

5.15 Currently section 1(3)(a) of the Act states that the application should be refused if "the tenant is in breach of any condition of his tenancy which in the opinion of the sheriff is material".[11] If the tenant is in arrears of rent or service charge it is not clear when these become "material". While there was broad consensus that any existing monetary arrears should disqualify renewal, consultees were evenly divided over whether persistent past failures to pay should be a mandatory ground for refusal.[12] There were other areas of significant disagreement between consultees, most notably in relation to:

- whether even if the tenant gave notice of intention to quit the landlord should have to demonstrate material adverse effect through the tenant's change of mind in order to disqualify the application;[13]

- whether it should continue to be a mandatory ground for refusal that the landlord is likely to suffer greater hardship as a result of renewal than the tenant from refusal;[14]

  and

- whether it should become a mandatory ground for refusal that the landlord requires possession of the premises to fulfil a statutory obligation including one relating to climate change.[15]

Gateway test

5.16 As noted in Chapter 4, the use of the 1949 Act by large multi-store businesses has become an unintended consequence of its continuation on the statute book.[16] The Discussion Paper proposed a gateway test with a view to excluding such businesses from the Act's ambit.

[9] Paras 2.34 to 2.48 and see DP, paras 3.63 to 3.76.
[10] See DP, paras 6.36 to 6.56.
[11] See paras 2.35 to 2.38, and see DP, paras 3.64 to 3.65.
[12] DP para 6.41 (Questions 39 and 40).
[13] See para 2.43 and in DP, paras 6.46 to 6.47 (Question 46). Some consultees favoured the landlord not having to show any prejudice or adverse effect at all from the tenant's change of mind. In their view the giving of notice of intention to quit should suffice on its own as a mandatory ground for refusal.
[14] See paras 2.44 to 2.48 and discussion of the difficulties in balancing and comparing the hardships of two commercial entities in paras 3.72 to 3.74 of the DP.
[15] DP, paras 6.54 to 6.56 (Question 50).
[16] See paras 4.31 to 4.35.

The Paper sought views on such an approach.[17] Seven consultees agreed with the proposal and seven disagreed, for varying reasons.

5.17 SSP, Boots and CRA thought that a reformed Act should be available for any business tenant irrespective of size. Shepherd and Wedderburn and British Land expressed concern that restricting its protection to small business tenants only, could have unintended consequences and place such small entities at risk of landlords not wishing to let to them.

5.18 The University of Aberdeen and Mike Blair argued that the statutory statement of objects would suffice to deal with the inappropriate use of the Act and that having both it and the gateway test would overcomplicate the law.

5.19 Turning to where the line should be drawn in a gateway test, consultees' responses evidenced more substantial disagreement. The proposal in the Discussion Paper was inspired by the need for the test to be straightforward to apply. Broadly speaking, a tenant would have access to the reformed Act if they satisfied at least two of the three criteria for micro-entity companies under the financial reporting provisions of the Companies Act 2006.[18] At present these criteria are, annually:

(i) turnover of not more than £632,000;

(ii) net assets of not more than £316,000; and

(iii) number of employees per month of not more than 10.

5.20 In response to our question regarding the test,[19] six consultees were happy with these figures while three consultees thought them to be too low. Professor Gretton criticised the proposed test criteria stating, "It seems to me that the system proposed would be too complex, leading to increased transaction costs, on both sides." He favoured a test whereby juristic persons[20] were simply excluded. Two consultees suggested that they preferred a test based on rateable value,[21] and the SLTA stated that they were in favour of a gateway test only as long as it was able to catch tied pubs under its ambit.[22] While tied pubs can make a significant turnover and employ a significant number of staff – which might make them fail a gateway test - they can still be vulnerable businesses that often make meagre net profits or even operate at a loss.

5.21 Brodies highlighted the difficulty of dealing with businesses that are continually evolving. In their view the relevant test should be applied at both beginning and end of the lease.[23] This would provide some recognition that the size of the business can change significantly over the course of a lease.

[17] DP, para 6.68 (Question 51).
[18] See DP, paras 6.63 to 6.67.
[19] DP para 6.68 (Questions 52 and 53). The response of some consultees was given in answering Questions 51, 58 or 81.
[20] A juristic person is any person recognised by the law that is not an individual, natural person. Common juristic persons are companies and partnerships.
[21] SPF and FSB in response to Question 58.
[22] In response to Question 51.
[23] Brodies in response to Question 81.

5.22 Finally, and not unimportantly, there was marked dissensus amongst consultees over whether one, two or all three criteria should be satisfied before the test was met.

Disproportionate cost and delay of court-based procedure

5.23 A key problem with the Act is that the high costs and delays associated with an application deter its use by the small businesses for whom it was devised.[24] For a reformed Act to provide real assistance to such tenants it would need to address these issues.

5.24 As an initial measure, the Discussion Paper suggested that applications under a reformed Act be dealt with by the simple procedure in the sheriff court. On balance there was support for this proposal. However, the Faculty of Advocates expressed caution observing that while in theory simple procedure should be more expeditious in practice it was not possible to say this of all courts as some were considerably busier and slower than others. They also noted that the law of leases was apt to generate debate over legal matters that might be better suited to another court procedure such as summary application.

5.25 Focussing on cost, consultees were overwhelmingly of the view that the ordinary rule, that liability for court-related expenses of the successful party be borne by the unsuccessful party, be maintained. The Discussion Paper asked whether there should be any cap on that liability and if so whether it be a fixed limit or a percentage of annual rent.[25] The idea was that small businesses would feel more confident and able to use the Act if their potential liability for the landlord's expenses was limited. The capping proposal might also encourage landlords to reach an out of court settlement with tenants, since even if successful they might not be able to recover a significant portion of their expenses. However the majority of consultees disagreed with the proposal to cap expenses. Given that the open-ended liability of small business tenants to awards of expenses appears to be an important cause of their disuse of the current Act, it is not apparent how a reformed Act bearing the same feature would be any more attractive to them.

5.26 Third-party mediation of a tenancy dispute can allow parties to reach agreement and move on with their business or investment without the need to go to court at all.[26] Accordingly the Discussion Paper proposed that as a mandatory pre-condition of being entitled to apply to the court for renewal, the tenant should have to offer to the landlord a mediation of the dispute.[27] A substantial majority of consultees were against this approach. Various reasons were given including increased upfront costs[28] and delays.[29]

5.27 The Discussion Paper proposed that parties should have the ability in advance of any application to agree to exclude appeal against the sheriff's decision.[30] The aim was to avoid the further delay resulting from an appeal and provide parties with finality as early as possible. On balance consultees did not support this proposal. Alternatively, we proposed that the

[24] See paras 4.18 to 4.22 and 4.27 to 4.30.
[25] See DP, para 6.89 (Question 74).
[26] See DP, paras 6.91 to 6.97.
[27] DP, para 6.98 (Question 77).
[28] SSP in response to Question 77.
[29] Faculty of Advocates in response to Question 77.
[30] DP, para 6.90 (Question 75).

parties' ability to appeal the court's decision should require the leave of the court.[31] Consultees generally agreed with that proposal.

Restriction to listed business use

5.28 The reformed Act would apply only to tenants carrying on a listed business at the let property. The arguments for and against continuing with legal rules favouring listed business tenants were addressed in Chapter 3. They must be taken into account in considering the desirability of a reformed Act.

Complexity

5.29 The Act was originally enacted more than 70 years ago. It has numerous difficulties as set out in Chapter 4. Any effective reform would inevitably be complex. The number of issues taken with their inevitable complexity is eloquent of this. Several consultees criticised the option of a reformed Act on the basis of its complexity. Professor Sparks stated:

> "I think that [Option C] raises as many issues as the current Act. The discussion and definitions of retailing, a shop, shop size, shop ownership, all point to complications in framing and then operating the Act… Shop definition based on turnover/assets could be complicated in a franchise or voluntary group e.g. SPAR. Is the harm being experienced worth it? I think Option C brings many issues of definition and operation, which whilst addressable at a point in time, will take effort".

5.30 Each new legislative feature or definition, introduced as part of the wide ranging reform, has the potential to bring uncertainty into the law. Shepherd and Wedderburn observed that any uncertainty could result in investors being deterred from the Scots commercial leasing market.

Conclusion

5.31 At first glance removing the difficulties with the Act so as to refresh it for the modern age seems an attractive option. The proposed statutory statement of objects might go some way to remove the legal uncertainty concerning the technical operation of the Act. However, that would be insufficient to make the Act fit for purpose.

5.32 Significant majorities of consultees did not agree with key aspects of the proposed reform. In particular there was limited appetite for the expenses-capping and mandatory mediation-offer aspects that were proposed in order to address the issues of costs and delay. Without such changes a reformed Act is unlikely to be any more successful than the existing Act in providing an accessible remedy for small listed business tenants threatened with closure on expiry of a lease.

5.33 There was also a lack of consensus among consultees on the introduction of a gateway test and if introduced, on its terms, on the proposed disregard of circumstances not directly involving the landlord/tenant relationship, and on the mandatory grounds of refusal. All of this

[31] DP, para 6.90 (Question 76).

speaks to a material divergence of stakeholders' ideas on what the aims of a reformed Act should be.

5.34 It is also evident that the necessary reforms would give rise to an Act that would suffer from significant complexity while also perpetuating a division between leases for listed and unlisted use. In the light of these features a reformed Act is unlikely to form a coherent part of the law relating to the termination of a lease. It is not surprising that there was a very low level of support for a reformed Act. In all of these circumstances we are clear that reforming the Act is not a viable option going forward.

Chapter 6 Mandatory notice to quit

Introduction

6.1 In Chapters 4 and 5 we concluded that owing to its various flaws it is not appropriate for the 1949 Act, whether in its existing or in an amended form, to remain part of the law. The question then arises whether there might be any useful benefit within the 1949 Act that could be provided for by other means. The only such benefit that we have been able to identify is the potential that it offers in allowing tenants to obtain more time to find replacement premises and to leave the existing premises in a reasonable order and state of repair.[1]

6.2 This was one of the reasons given in 1963 to justify making the 1949 Act permanent.[2] It was seen as alleviating the hardship to tenants that was caused by notice to quit being given as close as 40 clear days before the termination date. However, as noted in Chapter 4 the reality of today is that few if any small business tenants can afford to seek relief from the court under the Act. In this Chapter we consider the replacement of the ineffective Act with a scheme designed to ensure that tenants of listed leases are given sufficient notice of landlords' intentions by means of a mandatory notice to quit.

Notice to quit: the 2022 Report

6.3 Issues relating to notice to quit were considered in our 2018 Discussion Paper. This was followed by the recommendations in our 2022 Report. The 2022 Report covered all types of commercial lease irrespective of whether they were covered by the 1949 Act.[3] Its principal recommendations were:

- replacement of the minimum 40 day period with a minimum three month period for notice to quit (and notice of intention to quit) for leases of six months or longer;
- that in their lease parties should be able to (i) alter the three month period by making it longer or shorter for both parties or (ii) exclude the giving of notice altogether;
- that if notice was required and not given timeously then unless the parties agreed otherwise, the lease should continue, automatically, for up to one year to a new termination date.[4]

6.4 The choice of the three month period was motivated by the wish to secure a balance between the landlords' interests – who, at the cost of not receiving notice of the tenant's intentions, might prefer not having to give any notice to quit at all - and those of tenants who

[1] We have been informed that a few solicitors use the Act for some of their larger retail clients in order to allow them more time to comply with redundancy procedures.
[2] See para 2.6.
[3] 2022 Report, paras 1.10 to 1.12 and Draft Bill s 1(1).
[4] 2022 Report, paras 2.67 to 2.71. Leases for one year or more would continue automatically for one year and those for shorter periods, for their duration, subject to a minimum of 28 days (for leases of more than 28 days).

might prefer to know a landlord's wish that they leave at the expiry of the lease by six months prior to the termination date but not at the cost of themselves having to give notice of their intention to quit six months before that date at a time when much might still happen to their business during that period.

6.5 In the Discussion Paper we noted that it was difficult to assess what the effect of the introduction of these recommendations into law will be. For example, a landlord who sought to exclude the giving of notice would find that they in turn would lose any entitlement to receive notice from the tenant. If notice was excluded the tenant would have to decide on their own internal "deadlines" for entering discussions with the landlord, should they wish the lease to continue. This would accord with the position for leases for a fixed period in Germany, New Zealand and the USA for example.[5] In practice it might be not unduly different from the current situation in Scotland or that in England and Wales where parties have contracted out of the 1954 Act.

6.6 In contrast to both the 2018 Discussion Paper and the 2022 Report our review of the 1949 Act has focussed principally on retail leases. As part of the review process the laws relating to retail leases of other jurisdictions were examined.[6] Our attention was drawn to the law in South Australia. There tenant retail businesses have the benefit of a mandatory six month notice from the landlord informing them either that the landlord does not intend to renew the lease or offering the landlord's terms for renewal.[7] The purpose of the six month period is to ensure that the tenant has a clear understanding of whether their landlord will be seeking vacant possession of the property at the termination date. However, if the landlord does not give the requisite notification the lease is not continued automatically. Instead, the tenant obtains an option – which is for them to activate – to extend the lease to a date to be fixed in the future, namely the date six months after the landlord does eventually notify their intention.

6.7 This South Australian approach appears to work well in the context of their law of leases and letting practice. While attractive, the wholesale adoption of it into Scots law in place of the 1949 Act would create a sharp division between the law for termination of listed leases[8] and non-listed leases such as those of offices, leisure facilities and industrial units. The former would have their own legal regime, with bespoke notification but without automatic continuation, while the latter would be governed by the notice to quit and consequent automatic continuation provisions recommended in our 2022 Report. This did not appear to be a practicable way forward.

6.8 Instead the Discussion Paper suggested that any uncertainty of the tenant as to whether the landlord would or would not be renewing the lease could be clarified by having the landlord's notice to quit given mandatorily no later than six months before the termination date.

[5] See 2018 DP, paras 2.24 and 4.15.
[6] See DP, Appendix B.
[7] Retail and Commercial Leases Act 1995 (SA), s 20J; and see also Retail Leases Act 1994 (NSW), s 44(1).
[8] See paras 3.2 to 3.3.

Key features

6.9 In broad terms the effect of such a proposal would be:

- notice by the landlord to the tenant to quit at the end of the lease would be mandatory. Any clause in the lease allowing the landlord to seek removal of the tenant at the end of the lease without prior notice would be ineffective;

- the minimum period for giving mandatory notice to quit would be six (or possibly) three, months before the termination date of the lease;

- if a valid notice to quit was not given and the tenant did not give notice of intention to quit on or before three months before the end of the lease, the lease would continue automatically after its termination date;

- the period of automatic continuation would be mandatory. Any clause in the lease providing for a different period of continuation would be ineffective;

- the period of automatic continuation would be the duration of the lease up to a maximum of one year or (possibly) a fixed period of six months or one year (for leases of one year or more);

- the tenant would have a break option to end the lease on a date during the period of automatic continuation on giving three months' notice;

- that these rules would apply only to leases of premises used for a listed business use and that for a minimum of one year (or possibly 18 or 24 months).

Stakeholder views

6.10 Six of the 25 respondents to the Discussion Paper who expressed a preference relating to the options of an unamended Act, a reformed Act, its replacement with a mandatory notice to quit scheme, or its repeal without reform or replacement,[9] preferred replacement of the Act with the mandatory notice to quit scheme set out above.[10] In addition to those six, four preferred some mandatory notice to quit scheme to the other options but only if it differed fundamentally from the scheme which we proposed. The differences included that the scheme accompany a reformed Act, that it apply to all business tenants, listed or unlisted, or that it apply to all "small" business tenants irrespective of listing.

6.11 We received various responses on the particular aspects of the scheme. A number of consultees either did not comment on the scheme at all or restricted their comments to one or two of its aspects only. Accordingly, in the discussion that follows when reference is made to "a majority of consultees" or the like, the reference applies to those who engaged with the detail of the scheme irrespective of whether they preferred a different option for the Act.

[9] DP, para 7.6 (Question 81).
[10] Propertymark and SLTA.

Mandatory notice to quit

Minimum period for notice to quit

6.12 The Discussion Paper invited views on whether (a) a mandatory six month period of notice would be appropriate for leases of over one year; and (b) a three month period for leases of six months or longer but less than one year.[11] If neither period was appropriate consultees were invited to propose their own minimum notice period.

6.13 On the question of the notice period for leases of one year or more, consultees divided evenly over whether six months was appropriate. Those in favour noted that six months would improve on three months and the existing 40 clear days. For example, SLTA indicated that typically renewal discussions between pub landlords and tenants take place well before six months out from the lease expiry.[12] Those that opposed six months did so for varying reasons. Some, such as the Scottish Law Agents' Society, preferred 12 months. Boots indicated that nine months would be more appropriate given the need of some tenants to obtain a licence to trade for the new premises. Greene King, a national pub chain, preferred the three month period recommended in the Commission's 2022 Report and opined, "there is no requirement at least in the food and hospitality sector to impose a 6 month minimum". They, and Professor Gretton also favoured the simplicity of having the same three month period both as a mandatory period for the business tenants to be covered by the mandatory scheme and as a default period for all other tenants. The University of Aberdeen also pointed to the advantage of simplicity in the three months.

6.14 With regard to the notice period for leases of under one year but of six months or longer, again equal numbers of consultees favoured or were opposed to this proposal.

Minimum duration of leases covered by mandatory notice

6.15 We asked consultees about the length of lease to which a mandatory notice to quit scheme should apply. A six months minimum duration was suggested.[13] A clear majority were in favour of this. The University of Aberdeen took a different view. They doubted that in a six month lease a landlord should be forced to give notice to quit by no later than three months before its expiry. That suggested six month leases should not be covered by the scheme. It also cast a question over whether the scheme would be appropriate for a 12 month lease if any notice to quit from the landlord had to be given a mandatory minimum of six months before the termination date.

Mandatory period of continuation

6.16 If mandatory notice to quit was to achieve its aim of giving a tenant sufficient time to remove and find alternative premises, there would have to be provisions to protect the tenant in the event that notice was not given. In their absence a tenant who did not receive notice to quit might find that they would have to leave 28 days after the termination date by virtue of a

[11] DP, para 5.19 (Question 18).
[12] This is confirmed by the voluntary Pub Sector Scotland – Code of Practice to which a number of leading brewers subscribe. It recommends landlords provide a specific timetable for the process involved in renewals with initial renewal proposals issued no less than six months before the termination date.
[13] DP, para 5.19 (Question 17).

"period of continuation clause" in the lease.[14] In order to address this, the Discussion Paper proposed a minimum mandatory period of automatic continuation.[15] The principal proposal was that the existing default periods of continuation would be made mandatory.[16] Under the default periods a lease for one year or more would be continued for one year.[17] A majority of consultees favoured this approach. Urquharts were opposed to any mandatory period at all. As noted already, however, that would not ensure the protection for the tenant that underpins the mandatory notice to quit proposal as such. CMS favoured a fixed six month period of continuation.

6.17 There is some attraction in the six month suggestion. However it would represent a further rule that deviates from the existing default periods of automatic continuation. A simpler solution would be to make the default periods mandatory.

Tenant's notice of intention to quit and break option

6.18 A landlord might prefer the lease to continue and not give notice to quit. The tenant on the other hand might wish to leave. In our 2022 Report we recommended that the same rules on the timing of notice to quit from the landlord to tenant should apply to notice of intention to quit from the tenant to the landlord.[18] However, the principal purpose of the mandatory notice to quit would be to benefit the tenant in connection with their move rather than the landlord in relation to finding a replacement tenant. Furthermore, if a tenant found an alternative property with entry during the period of continuation they should be free to move there without the burden of having to continue to pay rent for the existing premises. In these circumstances the Discussion Paper proposed that the tenant should not come under the same mandatory timing with regard to their notice of intention to quit to the landlord. Instead the tenant should:

- be able to end the lease on its termination date by giving notice of intention to quit no later than three months before that date (being the default rule in the 2022 Report);

- during any period of automatic continuation (caused by an absence of both the landlord's mandatory notice, and the tenant's optional notice), be able to end the lease at a date at least three months in the future by exercising a statutory break option.[19]

6.19 Consultees were asked for their views on these proposals or to make other suggestions in respect of a tenant's notice or break option.[20] Views on the tenant's notice of intention to quit were mixed. A majority favoured keeping the three-month default rule. Of those in the minority CMS thought that the tenant's notice of intention to quit should be a mandatory rule with the same period of notice as for the landlord. The Scottish Property Federation echoed this noting that the notice period for a tenant should be "ideally as close to

[14] 2022 Report, Draft Bill, s 7(2)(a)(ii).
[15] DP, paras 5.10, 5.11 and 5.18.
[16] DP, para 5.11.
[17] 2022 Report, Draft Bill, s 7(2)(a)(i).
[18] 2022 Report, Draft Bill, s 23(2) (variation of period of notice).
[19] DP, para 5.13.
[20] DP, para 5.19 (Questions 20 and 21).

the landlord's statutory 6 months as possible". The Faculty of Advocates agreed with the same period of notice as for a landlord but as a default rule.[21] SLAS made a suggestion based on a separate scheme that they proposed.[22]

6.20 While there might appear to be some superficial attraction in imposing the same notice requirements on the landlord and tenant, this disregards a number of matters. *Firstly* the landlord is more likely to be professionally represented at the material time and better able to comply with a six month requirement than a tenant. *Secondly* given that their business and livelihood might be at risk, a tenant might feel greater inhibition in approaching the landlord for renewal than the landlord in approaching the tenant, particularly if relations between the two have become strained for whatever reason. *Thirdly* it is in the landlord's sole discretion whether to keep the tenant or to find a new one. Conversely the tenant does not have sole discretion over whether they remain: they must have the – at least tacit – consent of the landlord.

6.21 Nine consultees favoured the break option. The three opposing it made the point that it was unfair for the tenant to have termination rights during the period of continuation that the landlord would not have. The argument in favour of it is based on the tenant generally being more vulnerable than the landlord if the lease is continued automatically for up to another year. The landlord can plan for maintaining or enhancing their investment in the premises beyond the fresh termination date caused by the continuation whereas the tenant has no security of tenure beyond that date. If suitable premises became available in the period of continuation the prejudice to the tenant of having to pay rent for two premises does appear greater than that to the landlord in having it re-affirmed that a fresh tenant will be needed. When this is taken into account allowing the tenant a break option does not appear unfair on the landlord.

Restriction to listed business use

6.22 The final key feature of the mandatory notice scheme is that it would apply only to tenants carrying on a listed business at the let property. The arguments for and against continuing with legal rules favouring listed business tenants were addressed in Chapter 3. They must be taken into account in considering the desirability of the scheme.

6.23 We also asked consultees whether the interests of a listed business at the end of a lease should merit special provision additional to or in place of, the recommendations for notice to quit in our 2022 Report.[23]

6.24 Sixteen consultees responded to this question. A clear majority took the view that listed business' interests did not merit being given special provision regarding notice to quit additional to or in place of, the 2022 recommendations. The Federation of Small Businesses thought that having special rules with enhanced rights for listed businesses would discriminate against non-listed businesses.[24] Brodies found it unclear why the interests at the end of a lease

[21] From the tenor of the Faculty of Advocates' response, this might be interpreted as allowing a shorter period for notice of intention to quit.
[22] This involved a landlord requiring to give notice of intention to renew or to quit 12 months before the termination date with, in the case of intention to renew, the tenant having up to 6 months before termination to give notice of intention to quit to the landlord.
[23] DP, para 4.13 (Question 6).
[24] In their response to the 2018 DP (which led to the 2022 Report), the FSB did not oppose the principal recommendations in relation to notice to quit.

of a (non-listed) small start-up business such as a research and design studio for renewable products in an industrial estate should be any different to those of a listed business. The Faculty of Advocates favoured consistent rules for all businesses and observed that traditionally Scots law placed emphasis on all business' ability to negotiate whatever terms they saw fit. Burness Paull[25] thought that many of the tenants that might benefit from the 1949 Act would be unrepresented during lease negotiations and thus be unaware of the underlying law on termination of leases. In their view reform or replacement of the Act would be unlikely to alter that. Instead of creating different rules for notice to quit, a Code of Conduct might provide better transparency for a tenant in informing them what is to happen at the termination or continuation of a lease.

6.25 Those who thought that the 2022 recommendations on periods of notice should be adjusted for listed businesses differed in their reasoning. The Charity Retail Association observed that charity shops in highly sought-after locations could find themselves pressured in negotiations to agree to unduly short notice periods. Such shops merited special treatment. The Scottish Property Federation saw only licence-regulated hospitality or pharmacy businesses as having an interest in a longer notice to quit period that could justify special rules.[26] This was because of the time taken to obtain a licence linked to the premises. Dr Craig Anderson suggested that only traditional "corner shop" retailers or pubs outwith town centres would have an interest justifying special treatment. One consultee favoured enhanced notice to quit rights for tenants irrespective of whether they were listed businesses or not.[27]

Mandatory notice: arguments for

Clarity for listed business tenant

6.26 The principal argument in favour of mandatory notice is that the tenant would have clear notification six months from the end of the lease that unless they accept any terms for renewal offered by the landlord they will have to leave by the termination date. None of the consultees suggested that six months is an unreasonably long period to find suitable alternative premises, fit them out, strip the existing premises and move to the alternative premises while continuing to trade. It has also been made clear to us that failure to find suitable alternative premises can be fatal to a small business.

6.27 When negotiating a lease there would be no need to negotiate the question of notice to quit – unless like a pharmacy or pub they would require more time than the six months in order to obtain a licence to use the new premises. Instead it would be taken automatically that a six month notice would apply. The six months' notice to quit would apply for most premises that are to be found on the high street or in retail parks or shopping centres.

Earlier planning for landlord and tenant

6.28 The need for any notice to quit to be given at least six months prior to the end of the lease would encourage the landlord and tenant to get together at an earlier stage to decide on the future of their investment and business respectively. While this is something that is

[25] In answer to Question 12 of the DP.
[26] Boots agreed with the DP, that tenants of licensed premises experienced special difficulties in obtaining adequate notice from landlords.
[27] SLAS.

done as a matter of course between large-scale tenants and landlords it might be expected to become more of a norm in other cases. From the tenant's point of view, participants at the FSB roundtable indicated that a six month notice period would assist. However, we can see a benefit to both sides of the lease arrangement with landlords being focussed on planning in advance.

Mandatory notice: arguments against

Disruption of de facto unified law for all commercial leases

6.29 Legal rules should so far as appropriate be of uniform application. This makes dealings between parties and their advisers more transparent: there is less scope for misunderstanding and with it injustice. In spite of the 1949 Act, and given its low and sporadic use, there is in practice one set of rules that is applied to all commercial leases[28] in order to achieve their termination on expiry. The result has been that all commercial tenants have in practice continued to live with the 40 day period. While our 2022 Report suggested reforms to that period and other connected rules, it continued with a unified approach for all commercial leases. We think that a departure from this approach requires to be justified with cogent reasons.

Inadequate justification for listed business anomaly

6.30 An overview of consultees' responses discloses a general wish for consistency in the lease-expiry rules for all commercial tenants irrespective of whether they carry on a listed use on the premises. Most consultees could find no special reason as to why listed business tenants should not have the same notice to quit law that applies to other commercial tenants.

6.31 Having a mandatory notice to quit scheme would create a legal anomaly between leases to tenants of listed businesses and non-listed businesses. Specifically "pure-service" providing tenant businesses such as therapists, solicitors, estate agents, accountants and various other advisers would be excluded. Leaving aside the question of adequate notice to quit, there does not appear to be adequate justification for special treatment favouring listed business use and discriminating against other business use.[29] This point was made to us by the Federation of Small Businesses.

6.32 The strongest justification for mandatory notice relates to very specific types of business such as pharmacies or other licence-requiring businesses (e.g. pubs) or those in geographies such as "corner-shops" or "community-based" locations. However, to have the scheme restricted to such very limited enterprises would lead to a diffuse legal regime with, for example, special rules for pharmacies but not physiotherapists. The boundaries between the protected and unprotected businesses would also be very difficult to define (e.g. how is corner shop to be defined). Such specialist rules could be a trap for the unwary who might be unaware of their application.

[28] Defined in s 1(1) of the Draft Bill as excluding residential leases, agricultural leases and leases of crofts, small landholdings and certain allotments.
[29] See Chapter 3.

Lack of consultee and stakeholder support

6.33 Thirdly, we have been struck by the apparent lack of desire for the adoption of a mandatory notice to quit. We have noted above the limited support of consultees for the scheme.

6.34 Moreover, the lack of desire for a six (or three) month mandatory notice to quit was manifested not just in the views of consultees responding to the Discussion Paper but also in stakeholders whom the team approached but who chose not to respond owing to a lack of interest among their members. Into this category fell all eight of Scotland's 30 Chambers of Commerce that acknowledged the Commission's approach and also important stakeholders such as the Scottish Grocers Federation – which represents many small shops. They informed us that they had put out an email to their board of retailers asking if they had anything to contribute to the consultation but had received little feedback. It seemed to them that their members had no experience using the Act or were even aware of its existence. We take from this lack of enthusiasm a further indication that it cannot be said, at least in the current commercial environment, that there are such difficulties for small listed businesses negotiating renewal at the end of a lease that would justify a mandatory notice to quit scheme.

Scoping issues

6.35 One important aspect of the mandatory notice scheme would be to create a new dividing line applicable even to leases with listed business use. This would be the dividing line between leases of sufficient duration to merit mandatory notice and leases too short to qualify. As discussed above,[30] for parties to have mandatory provisions imposed on them in relation to the terms of a lease, the object of those provisions must be strongly desirable. Merely to make a three-month minimum period of notice mandatory seems unlikely to bring considerable benefit to tenants. A six-month minimum might have the potential of forcing a landlord to disclose their intention regarding renewal at a time when the tenant might still have the opportunity of moving to replacement premises at lease expiry. However, a mandatory six month period would seem disproportionate for a one year lease. That suggests that the scheme would have to be kept to leases of at least 18 months or possibly two years. Neither period plays a role in the law of leases at present. A new dividing line based on the duration of a lease would thus have to be introduced into the law.

Conclusion

6.36 While we can see that mandatory notice to quit could bring about benefits for landlords and tenants in encouraging timely planning for their respective future investment or trading, it has a number of disadvantages. Principally it would disrupt the unity of the recommendations in the 2022 Report without being underpinned by compelling reasons that listed business tenants should receive greater advance notice of a landlord's intentions than other, non-listed businesses.

6.37 Further, we found particular resonance from the general lack of enthusiasm of consultees and other stakeholders for having mandatory notice to quit. This suggests that

[30] See paras 4.36 to 4.38 and 6.29.

there is no greatly perceived mischief for tenants in Scotland concerning landlords' notification of their intentions regarding renewal.

6.38 If leases for any particular type of business use are to be singled out for special favourable treatment, such as exists for agriculture for example, then that would appear to be a matter of policy for the Scottish Government to consider separately on its merits.

6.39 Finally, the scheme would require the creation of new dividing lines between the treatment of different types of lease based on their duration as well as the business carried out under them. That would be undesirable from the point of view of clarity and simplicity.

6.40 For all of these reasons we do not recommend that the 1949 Act be replaced by a mandatory notice to quit scheme.

Chapter 7 Repeal of the Act

Introduction

7.1 In Chapter 4 we concluded that the 1949 Act cannot be retained in its current form. In Chapters 5 and 6, respectively, we considered whether the Act should be reformed to address its mischiefs or replaced with a mandatory notice to quit scheme that would ensure that tenants of listed businesses would receive a warning from the landlord that they would need to leave at the end of the lease. We concluded that neither of those options were appropriate.

7.2 This leaves repeal of the 1949 Act without its replacement as the only realistic option. Repeal of the Act will result in a single legal regime for all commercial leases, with no additional legislation applying solely to retail, food and drink, hair and beauty and other business tenants currently covered by the 1949 Act.

Stakeholder views

7.3 There has been consistent and widespread support for repeal of the Act without reform or replacement. This was evident from responses to our 2018 Discussion Paper.[1] That Paper presented repeal or retention of the unamended Act as a binary choice. In contrast, the Discussion Paper leading to this Report, presented as options, not merely repeal or the status quo but also the additional two options discussed in Chapters 5 and 6.

7.4 Twelve of the 25 respondents to the Discussion Paper who expressed a preference relating to the options of an unamended Act, a reformed Act, its replacement with a mandatory notice to quit scheme, or repeal of the Act without reform or replacement,[2] preferred the last of these options. In addition to the twelve, Professor Sparks shared a broadly similar view.

Repeal without replacement: arguments for

7.5 Importantly, simple repeal would address all the issues that currently surround the law as a result of the existence of the Act.[3] In the words of the Senators of the College of Justice, "repeal without replacement or reform would bring the benefits of simplicity, commercial certainty, and of keeping regulation to a minimum."

7.6 The arguments against the retention of the Act as set out in Chapter 4 apply here with equal force as arguments favouring simple repeal. The legal uncertainties and unpredictability associated with the Act[4] would disappear. Potential cost and delay caused by court applications would be eliminated.[5] Outdated legislation which fails to reflect modern commercial realities,[6] and which is rarely used by the small businesses whom it intended to

[1] 2022 Report, para 7.12. Thirty consultees answered the sole question "Should the 1949 Act be repealed" in the affirmative while two answered in the negative (FSB and Boots). One was undecided.
[2] DP, para 7.6 (Question 81).
[3] See paras 4.6 to 4.41.
[4] See paras 4.13 to 4.17.
[5] See paras 4.18 to 4.22.
[6] See paras 4.6 to 4.12.

benefit,[7] would be removed from the statute books. The free negotiation of leases and their renewal would no longer be distorted, and the contractual autonomy of the parties would be respected.[8] Any discouragement that the Act might pose to commercial investment into particular premises or development would be removed.[9] Large commercial tenants would be unable to secure a preference for desirable premises at the expense of small business landlords and other parties interested in obtaining a lease.[10]

7.7 Simple repeal would also bring uniformity to the law of commercial leases. There would be no differing treatment between leases of 'shops' or 'listed businesses', and other enterprises. One consultee in response to our Discussion Paper indicated that a single lease framework would "improve certainty around the end of leases and reduce the complexity". With simplicity, the law will become more accessible and transparent to landlord and tenant alike.

7.8 Furthermore, most consultees, when asked about the possible economic impact of the repeal of the Act, indicated that in their opinion there would be none, or if any, then only negligible. Giving their reasons for this view South of Scotland Enterprise stated,

> "the Act is no longer materially beneficial. We (as landlord) have had no reported instances where it's been applied, nor are we aware of tenants or clients raising it as an issue. On that basis it [is] not clear that the Act has any meaningful economic impact at present, and it would follow that repealing it without replacement would not change that position."

In a similar vein, Professor Sparks' view was,

> "I am not convinced that the Act is significant enough, whether repealed or amended or replaced, to have major economic effect. I think that it can be only at the margins, if that, in a macro sense. There is though the nagging sense of micro-scale impacts that could be possible. But then I come back to this being a temporary (one year) fix for an issue between two parties and as such it is never going to solve disputes on a long-term basis."

7.9 A few consultees,[11] thought that if the Act was repealed without replacement this could lead to the failure of more businesses with a consequent weakening of high streets, job losses and increased bargaining powers for landlords. However, those consultees were unable to provide evidence that the Act is used at present by either their members or small businesses to the extent that the repeal of the Act would have anything more than a limited effect for the very few small businesses who are both aware of the Act and have the resources and inclination to use it.

Repeal without replacement: arguments against

7.10 The primary argument against simple repeal is that it will remove the possibility of relief from unexpected removal for those business tenants that currently qualify for the protection of

[7] See paras 4.27 to 4.30.
[8] See paras 4.36 to 4.38.
[9] See paras 4.39 to 4.41.
[10] See paras 4.31 to 4.35.
[11] CRA, SLAS.

the 1949 Act. Here we have in mind for example a situation where a small business tenant has understood from the landlord that the lease would be renewed or that an offer would be forthcoming, none arrives, and the tenant is then given notice to quit leaving too short a period to remove in an orderly fashion from the property while leaving it in a reasonable state of repair after removing their fixtures and fittings.

7.11 This argument might have weight if there was evidence of the use of the Act to provide relief in those circumstances. However as noted in Chapter 4, none has been produced.

7.12 Secondly, the few consultees that opposed simple repeal without something in place of the Act, generally contended that some protection for tenants was still necessary where there is an imbalance of power between the parties, and landlords behave unreasonably. They gave the examples of landlords seeking significant rent increases or vacant possession despite a lack of readily available alternative premises. This might be where the landlord has a monopoly of suitable premises such as at transport hubs, or where the premises are in a location of special importance for the tenant's business.

7.13 The Federation of Small Businesses told us that "any assertion that commercial property has gone from being a landlords' market to a tenants' market would be challenged by many of our members, who still feel, in the current economic climate, in a very weak position relative to that of their landlord. Indeed, we continue to receive multiple reports from members of landlords behaving inflexibly."

7.14 Instances will undoubtedly arise where a tenant's business and livelihood is at risk if a landlord does not renew the lease. However, the Act has proved to be an ineffective vehicle in providing relief. The cost and delay inherent in the court-based nature of the one-year renewal, combined with the unpredictability of outcome, make the Act extremely unattractive and inaccessible for such business tenants.[12] Furthermore as noted in Chapter 5 there is no consensus over the reforms to the Act that would be necessary to remove those obstacles.

7.15 Moreover, as indicated in Chapter 4, there is no evidence of a continuing widespread disparity of power between commercial landlords and the retail and other tenants covered by the 1949 Act.[13] Today's market conditions differ substantially from those in 1949 or 1963. The Act was designed for those specific conditions. With their disappearance the Act is no longer necessary.

7.16 Thirdly it has been put to us that the Act is necessary to protect essential services and community gathering places such as pubs. As we have explained,[14] while we acknowledge these concerns, the Act is not a suitable vehicle for addressing them.

Conclusion

7.17 There is no support for the retention of an unamended 1949 Act. A few consultees prefer the reform of the 1949 Act.[15] However there is no consensus on the key characteristics of a reformed Act and many of the changes which would be essential for making the Act

[12] See paras 4.18 to 4.22 and 4.15 to 4.16.
[13] See para 4.12.
[14] See paras 5.8, 6.32 and 6.38.
[15] See paras 5.4 to 5.8.

workable in practice, are opposed by stakeholders.[16] There is greater support for the replacement of the Act with a mandatory notice to quit scheme. However, we do not detect any general concern over landlords not giving tenants sufficient notice of their intentions at the expiry of a lease that would justify mandatory provision. Further, whatever the merits of such a scheme most stakeholders do not think it appropriate to have one set of rules applicable to one type of commercial lease but not another.

7.18 The Act is a relic of a bygone era. It no longer fulfils its purpose. Instead on rare occasions it leads to the unintended consequence of distorting negotiations at the end of a lease by favouring a large business sitting tenant at the expense of landlords or other potential future users of the premises.

7.19 Finally, if a specific mischief should arise in the future, that can be dealt with by bespoke legislation that would cover leases to all businesses and not merely those covered by the scope of an Act devised in the late 1940s or early 1960s. Examples of such special protection occurred during the COVID-19 pandemic both in Scotland,[17] and, separately, in England and Wales. Indeed the 1949 Act itself was originally intended to be of temporary bespoke effect.

7.20 In all the circumstances the arguments in favour of simple repeal are compelling. Accordingly, we recommend that:

1. The Tenancy of Shops (Scotland) Act 1949 should be repealed with no statutory replacement.

Application to existing leases

7.21 A lease renewed by virtue of the 1949 Act may be ongoing on the day that the legislative provision containing our recommendation to repeal the Act comes into force ("the commencement day"). We think that such a renewed lease should be unaffected by the Bill's commencement. Its termination date would be the last day for which it had been so renewed.

7.22 Moreover, the new legislative provision should apply to all leases which are in existence at the time that it comes into force as well as those entered into after that time. However, tenants should have time to adjust to life without the Act in the same way as they would in relation to the changes that we recommended in our 2022 Report. Thus, the entitlement of the tenant to apply for renewal under the Act should not cease immediately on commencement day. Tenants should be eligible to make such an application if the lease has a termination date up to, but not beyond, six months from the commencement day.

7.23 To give an example, suppose that commencement day for the repeal is on 1 April and a subsisting lease has a termination date on 30 September immediately following. On 16 August the landlord serves a notice to quit upon the tenant. The tenant should still be entitled to apply for renewal under the Act with its 21 day-post time limit. If, however, a subsisting

[16] See paras 5.11 to 5.26.

[17] In Scots law the period of time for remedying a failure to pay rent in order to avoid irritancy was increased from 14 days to 14 weeks: Coronavirus (Scotland) Act 2020, sch 7 para 7, amending s 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. In the law of England and Wales a bespoke arbitration scheme for rent liability was set up under Commercial Rent (Coronavirus) Act 2022.

lease has a termination date on 10 October, that being a date more than six months after the commencement day, then the tenant should no longer be entitled to apply.

7.24 Such an approach will allow time for parties to adjust to the new rules and will maintain uniformity with the recommendations made by us in our 2022 Report in relation to notices-to-quit.[18] This will avoid any disruption or anomaly that might be caused if the 1949 Act ceased to be law while it remains competent to give notice to quit under the present law.

7.25 Accordingly, we recommend that:

2. The legislation implementing the principal recommendation of this Report should provide that the termination date of any lease renewed prior to the commencement day of that legislation by virtue of the 1949 Act and subsisting at the beginning of that day is unaffected by the repeal of the Act;

3. The legislation implementing the principal recommendation of this Report should provide that a tenant of a lease subsisting at the beginning of the commencement day of that legislation is entitled to apply for renewal under the 1949 Act provided that the termination date of that lease is no later than six months after the commencement day.

[18] 2022 Report, para 4.57 and 4.59.

Chapter 8 List of recommendations

1. The Tenancy of Shops (Scotland) Act 1949 should be repealed with no statutory replacement.

(Paragraph 7.20)

2. The legislation implementing the principal recommendation of this Report should provide that the termination date of any lease renewed prior to the commencement day of that legislation by virtue of the 1949 Act and subsisting at the beginning of that day is unaffected by the repeal of the Act

(Paragraph 7.25)

3. The legislation implementing the principal recommendation of this Report should provide that a tenant of a lease subsisting at the beginning of the commencement day of that legislation is entitled to apply for renewal under the 1949 Act provided that the termination date of that lease is no later than six months after the commencement day.

(Paragraph 7.25)

Appendix A

Tenancy of Shops (Scotland) Act 1949

An Act to make provision with regard to tenancies of shops in Scotland. [29th March 1949]

1. Provision for renewal of tenancies of shops.

(1) If the landlord of any premises consisting of a shop and occupied by a tenant gives or has given to the tenant notice of termination of tenancy taking effect after the passing of this Act, and the tenant is unable to obtain a renewal of his tenancy on terms that are satisfactory to him, he may, at any time before the notice takes effect and not later than the expiry of twenty-one days after the service of the notice or after the passing of this Act, whichever is the later, apply to the sheriff for a renewal of his tenancy.

(2) On any application under the foregoing subsection the sheriff may, subject as hereinafter provided, determine that the tenancy shall be renewed for such period, not exceeding one year, at such rent, and on such terms and conditions as he shall, in all the circumstances, think reasonable, and thereafter the parties shall be deemed to have entered into a new lease of the premises for that period, at that rent and on those terms and conditions.

(3) Notwithstanding anything in the last foregoing subsection, the sheriff may, if in all the circumstances he thinks it reasonable to do so, dismiss any application under this section, and shall not determine that a tenancy shall be renewed, if he is satisfied—

(a) the tenant is in breach of any condition of his tenancy which in the opinion of the sheriff is material; or

(b) that the tenant is notour bankrupt or is divested of his estate by virtue of a trust deed for behoof of creditors, or, being a company, is unable to pay its debts; or

(c) that the landlord has offered to sell the premises to the tenant at such price as may, failing agreement, be fixed by a single arbiter agreed on by the parties or appointed, failing such agreement, by the sheriff; or

(d) that the landlord has offered to afford to the tenant, on terms and conditions which in the opinion of the sheriff are reasonable, alternative accommodation which, in the opinion of the sheriff, is suitable for the purposes of the business carried on by the tenant in the premises; or

(e) that the tenant has given notice of termination of tenancy and in consequence of that notice the landlord has contracted to sell or let the

premises or has taken any other steps as a result of which he would in the opinion of the sheriff be seriously prejudiced if he could not obtain possession of the premises; or

(f) that, having regard to all the circumstances of the case, greater hardship would be caused by determining that the tenancy shall be renewed than by refusing so to do.

(4) Where a tenancy has been renewed under subsection (2) of this section, the tenant shall have the like right to apply for further renewals as if the tenancy had been renewed by agreement between the landlord and the tenant, and accordingly the foregoing provisions of this section shall, with any necessary modifications, apply to a tenancy which has been renewed under the said subsection (2) or under this subsection.

(5) If on any application under this section the sheriff is satisfied that it will not be possible to dispose finally of the application before the notice of termination of tenancy takes effect, he may make an interim order authorising the tenant to continue in occupation of the premises at such rent, for such period (which shall not exceed three months) and on such terms and conditions as the sheriff may think fit.

(6) . . . . . [19]

(7) An application under this section shall be made by way of a summary cause within the meaning of the Sheriff Courts (Scotland) Act 1971.[20]

2. Application to Crown property.

The foregoing section shall apply to any such premises as are mentioned therein in which the interest of the landlord or tenant belongs to His Majesty in right of the Crown or to a government department or is held on behalf of His Majesty for the purposes of a government department, in like manner as the said section applies to any other such premises.

3. Citation, extent, interpretation and duration.

(1) This Act may be cited as the Tenancy of Shops (Scotland) Act, 1949, and shall extend to Scotland only.

(2) In this Act the expression “shop” includes any shop within the meaning of the Shops Acts, 1912 to 1936, or any of those Acts.

[19] Repealed by Tenancy of Shops (Scotland) Act 1964, s 1(2).
[20] Substituted by Sheriff Courts (Scotland) Act 1971, s 47(2) and Sch 1 para 3.

Appendix B

List of respondents to the Discussion Paper on Aspects of Leases: Tenancy of Shops (Scotland) Act 1949 (SLC No. 177, 2024)

Dr Craig Anderson

Association of Business Recovery Professionals trading as R3

Mike Blair

Boots UK Ltd

British Independent Retailers Association

The British Land Company Plc

Brodies LLP

Burness Paull LLP

Charity Retail Association

CMS Cameron McKenna Nabarro Olswang LLP

Faculty of Advocates

Federation of Small Businesses (Scotland)

Greene King Ltd

Professor George Gretton

Propertymark Ltd

National Hair & Beauty Federation

Scottish Law Agents' Society

Scottish Licensed Trade Association

Scottish Property Federation

Select Service Partner UK Limited

Senators of the College of Justice

Shepherd and Wedderburn LLP

South of Scotland Enterprise

Professor Leigh Sparks

Professor Andrew Steven

University of Aberdeen

A & WM Urquhart trading as Urquharts

Angus Wood

Appendix C

List of Advisory Group members

To help ensure that we gained a proper understanding of what the ongoing problems were in respect of the 1949 Act, both practically and conceptually, and to inform the formulation of the proposals in this Discussion Paper, we consulted with two Advisory Groups: one comprising legal practitioners and academics; and the other, non-legal representatives of tenant stakeholders. The members are listed below for their respective Advisory Group. We are extremely grateful to those listed for their time and input in our discussions with them.

Legal Advisory Groups

Craig Anderson	Senior Lecturer in Law, University of Stirling
Dawn Anderson	Director (Commercial Property), Lindsays LLP
Ewen Brown	Advocate, Terra Firma Chambers
Peter Graham	Partner, BTO Solicitors LLP
Corra Irwin	Director, Macleod & MacCallum LLP
Graham Keys	Director, Ness Gallagher Solicitors Ltd
David Kilshaw	Partner, Cullen Kilshaw LLP
David McNeish	Senior Associate, DWF LLP
Sheriff Principal Nigel A Ross	Sheriff Principal of Lothian and Borders
Caroline Summers	Partner, Harper Macleod LLP

Non-Legal Tenant Stakeholder Advisory Group

Stacey Dingwall	Federation of Small Businesses
Andrew Goodacre	British Independent Retailers Association
Jonathan Mail	Charity Retail Association
Laura McCormack	Booksellers' Association
Rosina Robson	National Hair and Beauty Federation

Aidan Smith	Scottish Grocers' Federation
Gavin Stevenson	Scottish Licensed Trade Association
David Syme	Scottish Retail Consortium

List of stakeholders and other property-professionals

Aside from the Advisory Groups we would also like to acknowledge the contribution of the following to our understanding of the 1949 Act in practice and to our devising of proposals for the way forward.

Landlord stakeholders or property professionals representing landlords

John Conroy	Partner, Ryden
Andrew Hill	Partner, Knight Frank
David Melhuish	Director, Scottish Property Federation
Mark Robertson	Partner, Ryden
Stewart Sheridan	Director, Sheridan Keane Real Estate Investment

We greatly appreciate their contributions and those of the members of the Commercial Real Estate Committee of the Scottish Property Federation whom we met at their regular meetings.

Legal stakeholder

Ken Gerber	Partner, Mitchells Robertson, solicitors

South Australian retail-related professionals

Our proposal for a mandatory notice to quit scheme was inspired in part by the renewal intention notice scheme that exists in South Australia and also in various other Australian states. For their helpful guidance on the operation of the relevant law in South Australia, we would like to thank the following: Adam Rinaldi, partner at Piper Alderman, Adelaide; Olivia Anemouri, Dianne Lomas, and Nicole Turtur at the Office of the South Australian Small Business Commissioner; those on the Retail Shop Leases Committee of that Office; Karen van Gorp of Business SA; and Sam Sutton, K-Mart Leasing Manager for South Australia, Western Australia and the Northern Territory.

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