

**Tenancy of Shops (Scotland) Act 1949 – Final  
Business and Regulatory Impact Assessment –  
18 February 2025**

# Introduction

This BRIA is prepared in connection with the proposal for law reform made by the Scottish Law Commission (“the Commission”) in its Report on Aspects of Leases: Tenancy of Shops (Scotland) Act 1949 (Scot Law Com No. 267) published on 18 February 2025 (“the 2025 Report”). The proposal is to repeal the Tenancy of Shops (Scotland) Act 1949. The Commission hopes that this will be implemented as part of the more general reforms to the law on commercial leases which are proposed in the Leases (Automatic Continuation etc.) (Scotland) Bill that is currently with the Scottish Parliament.

This is the only BRIA which has been prepared in relation to the proposal. As such it is a Final BRIA.

## Executive summary

### Issue and why it needs to be addressed

The Tenancy of Shops (Scotland) Act 1949 (“the Act”) applies to tenants of premises being used for retail, food and drink hospitality (including as a pub and possibly restaurants), hair and (possibly) beauty services, wholesale or warehousing (“shop leases”). It gives them a limited and conditional entitlement to obtain from the sheriff court a renewal of the lease for one year beyond its agreed termination date.

The Act is an outdated piece of regulation. For many reasons it is unfit for the commercial realities of the 21<sup>st</sup> century. It is outdated, uncertain and unpredictable. Moreover, applications to the court are costly and time-consuming. Taken together all of these features have led to widespread disuse of the Act by the small shopkeeper businesses whom it was intended to benefit.

In the rare instances it is invoked, it is primarily by financially powerful business-chain tenants who use it as a leverage in negotiations to obtain multi-year renewals. This use prejudices landlords and other businesses who may have an interest in renting or developing the property on expiry of the existing lease. Such use was never envisaged when the Act was introduced.

### Intended outcomes

The intended outcome of the policy proposal is to modernise the law governing the end of shop leases by making it more transparent, certain and flexible, as well as to reduce costs and delays in negotiations and transactions for letting commercial property in Scotland.

## **Options**

Four options for the future of the Act have been considered: (1) to retain it unaltered, (2) to reform it, (3) to replace it with a new scheme, or (4) to repeal it without reform or replacement. The last of these is the option proposed.

## **Sectors affected**

The proposal – the repeal of the Act – will affect all businesses which operate from leased premises in Scotland that qualify as a “shop” under the Act. Accordingly, sectors that may be affected include retail, hair and beauty, food, drink and hospitality (including pub) wholesale and warehouse. All parties to such a lease, including landlords and all advisers may be affected.

## **Engagement completed, ongoing and planned**

A wide range of individuals and organisations have been consulted. These have included the Scottish Government, businesses and business organisations (covering both tenant and landlord interests), legal and property-letting practitioners, academics and academic institutions, and dispute resolvers. The Commission engaged with these stakeholders through various channels; two public consultations on the proposals as set out in the Commission’s Discussion Papers were carried out together with a mini-consultation targeted specifically at the retail community. Two Advisory Groups were also consulted, one consisting of lawyers and the other of tenant representatives. The Commission also met and communicated with a number of stakeholders directly.

## **Anticipated impacts (intended and unintended, positive and negative) and mitigating actions**

Given the overall low usage of the Act in practice, it is anticipated that its repeal will have a negligible impact. However, some positive impacts may be observed: the expenditure for businesses currently associated with usage of the Act in practice would be avoided, landlords and tenants would enjoy increased certainty at the end of the lease, investment into the commercial property market in Scotland may be encouraged (or at minimum not be deterred) and small landlords would be protected from inequitable use of the Act by large and powerful tenants.

A potentially negative impact may be observed on the few large enterprises that make use of the Act on rare occasions. Such business tenants will lose their favoured status when competing with other businesses for letting the premises on expiry of the current lease or seeking to delay development by the landlord.

## **Enforcement/ compliance**

As the proposal involves deregulation no enforcement of compliance with the proposal is necessary.

## **Recommendations/ implementation plans**

The proposal could be implemented through a short amendment to the Leases (Automatic Continuation etc.) (Scotland) Bill that is currently going through the Scottish Parliament. This could be carried out at the Committee stage of the legislative process.

## **Evaluation and monitoring of implementation/ review of BRIA**

Given that the proposal is the removal of a largely disused piece of regulation for which no current statistics are available, no evaluation or monitoring of the proposal will be required.

# Section 1: Background, aims and options

## Background to policy issue

This proposal is concerned with the law that governs landlord and tenant relations when a commercial lease comes to its end. The existing law (both at common law and in statute) is uncertain, insufficiently accessible to those affected by it and highly outdated. In its [Report on Aspects of Leases: Termination \(No. 260, 2022\)](#) (“the 2022 Report”) the Scottish Law Commission recommended various reforms of this law. These have been incorporated into the [Leases \(Automatic Continuation etc.\) \(Scotland\) Bill](#) that was introduced in the Scottish Parliament in December 2024 (“the Bill”).

One element of the law in this area, namely the Tenancy of Shops (Scotland) Act 1949 (“the Act”) was reserved in the 2022 Report for further consultation and review by the Commission.

The Act applies if the let premises are being used for retail, food and drink hospitality (including as a pub), hair and, potentially, beauty services. It also applies to premises used for wholesale or warehousing. For ease of use this BRIA refers to such lets as “shop leases”. The Act provides tenants of shop leases with an entitlement to seek, from a sheriff court, renewal of their lease for a period of one year beyond its agreed termination date.

The Act is seen as outdated and unnecessary for the modern commercial property marketplace. It is uncertain and lacks transparency in what qualifies as a shop lease. It is vague in what has to be demonstrated for renewal. The condition of having to obtain a renewal order from the court is expensive and time-consuming. The Act is largely disused by the small shopkeeper businesses for which it was created.

On the rare occasions that it is relied on, financially powerful business tenants use the threat of going to court to seek renewal as leverage in negotiations with landlords in order to obtain a fresh or renewed lease on preferential terms. In that situation the effect of the Act is to prejudice both landlords and other businesses who may have an interest in operating from the property. The former may be unable to carry out development plans for the property, let it to a different tenant on better terms or realise their investment through its sale with vacant possession. The latter can be shut out from bidding for and obtaining a desirable location from which to trade.

In short, the Act is disused by those whom it was intended to benefit and used by those for whom it was never intended.

This makes it undesirable that the Act remain as it is. Following the carrying out of a comprehensive consultation with a wide spectrum of stakeholders, the Commission published its *Report on the Tenancy of Shops (Scotland) Act 1949* (Scot Law Com No. 267, 2025). The 2025 Report recommends that the Act should be repealed so that the law that applies to shop leases is the same as for leases of all other commercial premises. That unified law would be as set out in the Bill. It follows that this Assessment should be read together with and as ancillary to, the Business and Regulatory Impact Assessment issued by the Commission with the 2022 Report.

## **Purpose/ aim of action and desired effect**

Repeal of the Act, when taken with the reforms proposed in the 2022 Report and as set out in the Bill, will make the law governing the expiry of shop leases more transparent, clearer in its terms, and more flexible in accommodating the different needs of landlords and tenants in modern market conditions. The overall effect of the Bill should be to reduce the costs and delays in negotiations and transactions at the expiry of such leases.

Repeal of the Act should encourage fair competition between potential commercial tenants for a let of premises. Landlord investors will be able to invest in the development of commercial premises in the secure knowledge that they will be able to re-let the premises when the lease comes to an end, to whoever they think fit, redevelop the premises, or sell them with vacant possession.

It is hoped that repeal of the Act will help to meet the Scottish Government's national outcomes in the National Performance Network by making Scotland's commercial property market globally competitive, entrepreneurial and inclusive. In turn this should lead to better letting opportunities for emerging entrepreneurs in all sectors. In short, Scotland will be a better place to do business.

If no action is taken an outdated, unclear and inaccessible Act will remain on the statute book. It will continue to fail to fulfil its original purpose (helping small shopkeeper tenants) and instead lie dormant only to be raised on rare occasions, and unexpectedly, as a weapon in negotiations by an economically powerful tenant.

Given that the proposal is to remove a largely disused piece of regulation and to have shop leases covered by nothing more than the same private law rules that in terms of the Bill will apply to all other commercial leases it is not apparent that there is any appropriate or practicable means of measuring the outcome of repealing the Act.

## Options (considered)

The Commission has considered four separate options for the future of the 1949 Act:

- (1) to retain it unaltered,
- (2) to reform it,
- (3) to replace it with a new scheme, or
- (4) to repeal it without reform or replacement.

The last of these is proposed. The reasons for discounting the other three options are set out below.

### **Retention of status quo: Act kept unaltered**

The “do nothing” approach to the Act has been rejected. If this option was taken forward the Act would remain part of Scots law in its current form. The mischiefs with the Act that have been identified above would remain. The Commission put forward this option in the Discussion Paper on the Act<sup>1</sup> that it submitted for public consultation in 2024 (“the Discussion Paper”). In response to that consultation, not a single respondent named retention of the status quo as their preferred option. A clear majority opposed the retention of an unamended Act under any circumstances.

### **Reformed Act**

The Commission considered reforming the Act to remove its principal mischiefs. However, the terms of the Commission’s remit did not cover extending the scope of the Act to apply to premises used by any type of business. Accordingly, a reformed Act would apply only to lets where there was retail, food and drink (including pub) or hair or beauty business use (“listed business use”) with a scope similar to that of shop leases at present.

A reformed Act could introduce a gateway test to restrict it to small businesses who might need a short renewal of the lease in order to find other premises and exclude it from the large business tenants who use it to secure an unfair advantage in negotiations for desirable premises. The uncertainty over what has to be established for renewal would be removed with the introduction of a statutory statement of objects for the granting of renewal and a list of matters to be disregarded by the court. The mandatory grounds for refusal of renewal by the court could be clarified. Finally, as well as introducing certain procedural changes to reduce cost and delay, it would be a pre-condition of the tenant going to court to seek renewal that they shall

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<sup>1</sup> 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](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)).

have first offered to settle their dispute with the landlord by mediation. A reformed Act would also clarify the “shop lease” definition.

Nevertheless, the Commission has rejected this option. Only two respondents to the Discussion Paper expressed a preference for it and among them only one gave unqualified support. Among them and those who did not prefer a reformed Act but who responded to the detail of the proposals, there was significant disagreement over the introduction of most of these key reforms.

### *Scottish Government’s ‘Better Regulation’ approach*

The first principle under the “Better Regulation” approach is that of transparency. It requires that any regulation being proposed has clearly understood reasoning behind it and a clear scope. A clear majority of consultees took the view that most of the reasons for having an Act (whether reformed or not) that favoured renewal of leases with a listed business use rather than those with a different commercial use no longer applied.

With regard to scope, the applicability of the reformed Act would be determined by the use at the end of the lease. That use could differ from that at the start of the lease. Parties might begin a lease thinking that the Act did not apply, but if say a café element was included in a let of a gym it might begin to apply.

Qualification as a ‘small business’ tenant would also have to be assessed at the end of the lease under a gateway test. A tenant, under the impression that it would qualify might, by the end of the lease, discover that through its growth it had become disqualified. Overall, the principle of transparency does not support a reformed Act.

The second principle provides that regulation be accountable. This means that it must be clear who is responsible for the regulation. A reformed Act would regulate an agreement between private parties. No public regulator would oversee its operation. In practice it would be for the court, and tenants themselves, to ensure that the Act operates satisfactorily in practice. There was much opposition to the proposed changes to court procedure for renewal of the lease, to its costs (expenses) and to the encouragement of mediation. A reformed Act without these changes is likely to remain expensive and time consuming for tenants. The Act would therefore continue to be inaccessible and would likely be little used. There would be little accountability for the operation of the reformed Act.

The third principle requires that regulation be proportionate, meaning that it imposes only enough requirements to meet the desired outcome. The desired outcome is to ensure that the law applicable to “shop leases” covered currently by the Act is clear and fit for modern conditions. However, modernising the Act would bring with it a number of new requirements such as the gateway test, the statutory statement of



objects, a list of disregards, new mandatory grounds for refusal of renewal, and procedural and court-cost changes. The complexity of the regulation envisaged in a reformed Act would be disproportionate in comparison to the benefit of only a one year renewal for a small business with a listed business use only.

The fourth principle requires that regulation is consistent, meaning that it is applied fairly to different businesses and/or stakeholders. There would arguably be a lack of fairness and consistency in a reformed Act continuing to allow possible renewal of lease for tenants who have a listed business use of the premises but not offering the same remedy to other small enterprise tenants. All small businesses are at a higher risk of failure than large enterprises. The feedback from the consultation on the Discussion Paper does not evidence that listed businesses are any more vulnerable than non-listed businesses. A small physiotherapy business may require protection to the same extent that a small shopkeeper does. Yet, under a reformed Act only the latter would benefit. That would be inconsistent regulation.

The fifth principle provides that regulation must be targeted where appropriate, meaning that it should apply only to those necessary to meet the desired outcome. While this principle would arguably be satisfied by a reformed Act, the clarification of its scope so as to apply to lets of premises used as restaurants, beauty salons (without a hair element) and tattoo studios – where there currently exists doubt as to the scope of the Act – could be seen as bringing a reformed Act into play for leases where the current Act is not treated as applicable. That would not be a material departure in the scope of regulation. However, it could be seen by some as over-targeting.

Overall, application of the Better Regulation principles supports the discounting of the reformed Act option.

### **Act replaced: mandatory notice to quit scheme**

The Discussion Paper considered repeal of the Act and its replacement by a mandatory notice to quit scheme. As with the reformed Act option, the scheme would apply only to leases where there was listed business use with a scope similar to that of the current Act.

Under the scheme renewal of the lease by the court would no longer be possible. The difficulties in going to court would disappear. A large retail tenant would no longer be able to threaten seeking renewal as an unfair negotiating tactic. Instead, the scheme would ensure that a tenant of a lease with a listed business use was given a minimum of six (or three) months' notice to quit from a landlord who intended to obtain vacant possession at the end of the lease. This would allow the tenant sufficient time to move in an orderly fashion into alternative premises upon its expiry. That was one of the motivations for the Act having been made permanent in 1964.

Any agreement between landlord and tenant reducing the minimum period for notice to quit or excluding the need for notice at all would be ineffective. In the absence of timeous notice the lease would be continued automatically for a mandatory period of up to a year. 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.

If the notice period was to be six months, the leases to which the scheme would apply would have to be for a minimum duration of 18 months or two years.

All of the issues of the current court-based remedy of renewal under the Act would be removed. Nevertheless this option has been rejected. A majority of consultees took the view that devoting premises to listed business use did not of itself merit the tenant of those premises having the benefit of a mandatory notice to quit scheme in addition to the recommendations made by the Commission in its 2022 Report and as set out in the Bill.

#### *Scottish Government's 'Better Regulation' approach*

Under the principle of transparency any regulation should have clearly understood reasoning and scope. With regard to reasoning, as with the reformed Act option, most consultees took the view that drawing a distinction at the end of a lease between leases with a listed business use and those with other uses such as for office use or for use as leisure premises or industrial units, lacked a clear rationale.

With regard to scope, the scheme would impose a mandatory notice period, most likely of six months. However, to make that viable, the scheme would have to apply only to leases of 18 months or two years or longer. The effect of this would be that a number of different rules on terminating a lease would apply depending on (a) whether the premises let is being used for a non-listed or a listed business use and (b) the length of that listed business tenancy. This could lead to misunderstanding among parties and advisers as to which set of rules applies. As such, this option does not align well with the principle of transparency.

Under the second principle regulation should be accountable. This means that it must be clear who is responsible for the regulation. The scheme would regulate a voluntary agreement between private parties. No public body would be needed to oversee its use.

The third principle requires that regulation be proportionate, meaning that it imposes only enough requirements to meet the desired outcome. The scheme would remove an outdated, ineffective, and vaguely worded Act. However, in imposing a mandatory minimum period of six months for notice to quit to a tenant it might be seen as going beyond what is necessary for that outcome. The scheme could be seen as impinging

on a principal outcome sought in the Commission's 2022 Report and the Bill, namely that the parties should be free to choose for themselves what should be an appropriate minimum period of notice and whether any notice should be required at all. That outcome had the general support of stakeholders. Imposing a mandatory notice to quit might therefore be seen as a disproportionate means of regulation.

Under the fourth principle of consistency regulation must be applied fairly to different businesses and/or stakeholders. The mandatory notice period would apply to tenants of premises used for 'listed business uses' but not to tenants whose business use was not listed. That a large retailer would be entitled to a six month notice to quit but not a small physiotherapist or a research and design studio for renewable products located in an industrial estate would not, , appears inconsistent. Consultees responding to the Discussion Paper expressed the view that having different rules for notice for listed business use leases on the one hand and other commercial leases on the other would not only disrupt the simplicity and uniformity of the law which exists at present mostly *de facto* (owing to the disuse of the 1949 Act) but could also result in unwelcome consequences. It was pointed out that the scheme could lead to landlords giving preference to businesses without a listed business use when deciding on whom to let the premises. The scheme could therefore give rise to unfair treatment of different tenant stakeholders.

The fifth principle of targeting provides that regulation should apply only to those that must be affected in order for the regulation to achieve its desired outcome. If the outcome sought from the scheme was limited to the removal of the difficulties with the Act then it would not affect any person beyond those affected by the Act. However part of the desired outcome from the scheme would be to alleviate any difficulty that a tenant might have through not having sufficient notice from the landlord as to the landlord's wish to obtain vacant possession at the end of the lease. Some consultees who supported the scheme did so on the basis that a mandatory minimum six month period was necessary in order to allow a tenant to obtain a licence for alternative premises, such as for a pharmacy or pub. Others noted that if the business provided an "essential service" to a local community in a rural or deprived area, such a mandatory period would ensure the greatest opportunity to allow the finding of fresh alternative premises and the maintenance of the service. However, the scheme, is not targeted at such specific license-based or "essential service" business tenants. In those circumstances the scheme could be seen as over-targeted.

Overall, the Better Regulation Approach does not support the replacement of the Act with a mandatory notice to quit scheme.

## **Repealing the Act**

The option proposed by the Commission is repeal of the Act without reforming or replacing it. There would be a single modern legal regime for all commercial leases. It would accord with our 2022 Report and the Bill. “Shop leases” under the current Act would be treated the same as leases of therapists’ studios or industrial units. This would simplify the law. All of the issues with the Act mentioned above would disappear. This option was also most favoured among stakeholders.

### *Scottish Government ‘Better Regulation Approach’*

The Act comprises outdated and ineffective regulation that is no longer fit for purpose. As its repeal without being reformed or replaced does not require regulatory action, the principles do not apply.

## **Sectors/ Groups affected**

### **Retail and wholesale sectors**

As at March 2024 there were around 35,140 retail and wholesale businesses in Scotland.<sup>2</sup> Many of these are likely to be operating from leased premises. Although the exact numbers are not known, information from the Scottish Assessors’ valuation roll provide that there were around 34,360 leases of shops across the whole of Scotland.

In theory landlords and tenants of such premises will be affected by the repeal of the Act. However, in practice for the reasons set out earlier in this BRIA, few business tenants in those sectors and virtually no small business tenants obtain the renewal of their lease as a consequence of the Act. Even for those businesses who do obtain renewal under the Act, that renewal is only for one year. That period is insufficient to provide any realistic trading platform other than for the very short term. It follows that repeal of the Act is unlikely to have any appreciable effect on businesses in these sectors.

In January 2024 there were 2.46 million payroll-recorded employees in Scotland, 13.5% of which were employed by the wholesale and retail sector.<sup>3</sup> Accordingly this combined sector provides employment to roughly 332,000 individuals in Scotland. However, many of those employed may work in business-owned rather than leased premises. For them repeal of the Act is entirely irrelevant. For those employed by a

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<sup>2</sup> Scottish Government, “Businesses in Scotland” (November 2024). Available at <https://www.gov.scot/publications/businesses-in-scotland-2024/pages/industry-sector/>.

<sup>3</sup> Scottish Government, “Scotland’s Labour Market Insights: April 2024” (April 2024). Available at <https://www.gov.scot/publications/scotlands-labour-market-insights-april-2024/pages/people-in-work/>.

tenant of shop premises the remedy provided by the Act is inaccessible and usually unwanted from their employer's point of view. Accordingly repeal of the Act be unlikely to lead to the loss of secure and stable jobs in the retail and wholesale sectors.

Given the low usage of the Act, and the one year limit for a renewal on any one occasion, the actual effect of repeal on consumers will if anything, be negligible.

There are a few businesses that are of such a size that they may be minded to use the Act to renew their lease and thus prevent the closure of their business at a particular location. If the Act is repealed they will be unable to do this. Consumers will therefore no longer be able to obtain goods or make use of that business' services. However, they will only be impacted by the closure of that business if they are unable to obtain the same, or similar, goods or services from other outlets within a reasonable distance. Outside rural areas such availability will often exist. The Act does not provide anything other than a temporary extension of a lease. If in a rural area a tenant business cannot agree reasonable renewal terms with a landlord it is likely that irrespective of the Act the business premises would be likely to close.

### **Hair and beauty sector**

There are around 4,000 hair and beauty businesses operating in Scotland.<sup>4</sup> It is likely that many of these operate from leased premises although the exact number is not known.

The hair and beauty sector provides employment to around 257,000 people in the UK as a whole.<sup>5</sup> Approximate figures specific to Scotland can be estimated as follows:

There are approximately 4,000 hair and beauty businesses in Scotland, and 48,000 in the UK overall.<sup>6</sup> As such hair and beauty businesses in Scotland make up roughly 8.3% of all such businesses in the UK. If one assumes that a hair and beauty business in Scotland employs on average the same number of staff as a typical UK business, then hair and beauty businesses in Scotland are responsible for providing employment to about 21,000 people.

Hair and beauty business tenants, their employees and consumers (in the sense of individuals obtaining services or goods on tenanted premises) could in theory be affected. However, in practice for the reasons set out earlier in this BRIA, virtually no hair and beauty tenant uses the Act to obtain the renewal of their lease. It follows

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<sup>4</sup> National Hair and Beauty Federation submission to the Discussion Paper on the Act.

<sup>5</sup> National Hair and Beauty Federation submission to the Scottish Affairs Committee Covid Inquiry, June 2023. Available at <https://committees.parliament.uk/writtenevidence/121992/html/>.

<sup>6</sup> Ibid.

that repeal of the Act is unlikely to have any appreciable effect on hair and beauty business tenants, their employees or consumers obtaining services from them.

## Food and drink hospitality sector

As at March 2022 there were 17,495 registered food and drink enterprises in Scotland.<sup>7</sup> It is likely that many of these operate from leased premises although the exact number is not known. As of April 2023 there were 4,380 licensed premises in Scotland.<sup>8</sup> Of these about 700 were let as tied pubs.<sup>9</sup> The numbers of other pubs let but not under a tie is not known.

Scotland's food and drink sector provides employment to 129,000 people<sup>10</sup> and Scotland's beer and pub sector employs 88,700 people.<sup>11</sup> These figures cover employees working on let and unlet premises.

In theory landlords and tenants of cafes, takeaway premises and pubs (and possibly restaurants) will be affected by the repeal of the Act. However, given the uncertainty, cost, delay and limited remedy provided by the Act virtually no tenant of a café or pub obtains the renewal of their lease as a consequence of the Act. With restaurants disuse of the Act is also caused by the doubt over whether the Act applies to them at all. It follows that repeal of the Act is unlikely to have any appreciable effect on businesses in the food and drink hospitality sector. Even for the few businesses who might obtain renewal under the Act that renewal is only for one year. That period is insufficient to provide any realistic trading platform other than for the very short term.

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<sup>7</sup> Scotland Food & Drink, "A fresh perspective on the future of Scottish food and drink" (March 2023). Available at <https://foodanddrink.scot/our-industry/news/a-fresh-perspective-on-the-future-of-scottish-food-and-drink/#:~:text=In%202020%2C%20total%20turnover%20in%20the%20Food%20and,representing%2010.0%25%20of%20all%20registered%20business%20in%20Scotland>.

<sup>8</sup> Scottish Government, "Scottish Pubs Code and Related Regulations (BRIA)" (May 2024). Available at <https://www.gov.scot/binaries/content/documents/govscot/publications/impact-assessment/2024/05/scottish-pubs-code-related-regulations-business-regulatory-impact-assessment/documents/s/s/govscot%3Adocument/s.pdf>.

<sup>9</sup> Scottish Government, "Fairer Scotland Duty Assessment – Implementation of the Tied Pubs (Scotland) Act 2021" (April 2024). Available at <https://www.gov.scot/binaries/content/documents/govscot/publications/impact-assessment/2024/04/implementation-tied-pubs-scotland-act-2021-fairer-scotland-duty-summary/documents/implementation-tied-pubs-scotland-act-2021-fairer-scotland-duty-summary/govscot%3Adocument/implementation-tied-pubs-scotland-act-2021-fairer-scotland-duty-summary.pdf>.

<sup>10</sup> Scotland Food & Drink, "Winners of Scotland Food & Drink Excellence Awards Announced" (October 2024). Available at <https://foodanddrink.scot/our-industry/news/winners-of-scotland-food-drink-excellence-awards-2024-announced/#:~:text=Scotland%E2%80%99s%20food%20and%20drink%20sector%20is%20made%20up,contributes%20%C2%A316%20billion%20to%20the%20Scottish%20economy%20annually>.

<sup>11</sup> Scottish Beer and Pub Association & Scottish Licensed Trade Association Scottish Draft Budget Joint Submission 2024-2025. Available at <https://www.theslta.co.uk/wp-content/uploads/2023/12/SBPA-AND-SLTA-Scottish-Budget-2024-25-Submission.pdf>.

The lack of appreciable effect on such tenant businesses will be mirrored in respect of the effect on individuals employed by them at the tenanted premises.

Consumers (in the sense of individuals obtaining goods or services from a tenanted café, takeaway, pub or restaurant, but not in the course of a business) could in theory be affected. However, as with the business itself and its employees repeal of the Act is unlikely to have any appreciable effect. Even if in an unusual case a tenant would in the future, but for the repeal, obtain renewal under the Act, depending on the locality of the premises consumers might be able to resort to similar premises without undue difficulty.

### **Warehousing sector**

We do not have statistical information for warehouses in Scotland. Tenants of warehouses their employees and businesses and consumers (e.g. making online purchases) could in theory be affected. Nevertheless it is likely that such tenants are unaware that the Act applies to them. It follows therefore that repeal of the Act is unlikely to have any material effect on tenants of premises used for warehousing purposes, their employees or businesses obtaining goods from them, or consumers.

### **Advisers, representative bodies, and dispute resolvers**

Landlords and tenants of “shop leases” receive advice from a variety of advisers including solicitors, paralegals, surveyors, or letting agents. These advisers will need to appreciate that the Act no longer applies. Publicity of the repeal of the Act as part of the publicity of the reforms contained in the Bill should suffice. The professional or trade bodies of those advisers such as the Royal Institution of Chartered Surveyors, the Law Society of Scotland, the Property Litigation Association, and the Property Standardisation Group, would also be affected. They will need to appraise their members of the change. If the Act is repealed as part of the Bill, no additional educative resources and consequential expenditure will be necessary for that purpose.

Bodies involved in resolving commercial landlord-tenant disputes such as courts and arbitrators will be made aware of the changes by the parties to the dispute. In relation to the general awareness of such adjudicators, publicity of the reforms contained in the Bill should suffice.

## Section 2: Engagement and information gathering

### Engagement approach

Various approaches to engagement have been adopted throughout this project.

In May 2018 the Commission published a Discussion Paper entitled *Aspects of Leases: Termination* (No.165) It was circulated to individuals and organisations identified by the Commission as having a potential interest in the topics raised in it. It was freely available to the general public as it was published on the Commission's website and promoted on Twitter (now X). During that period, the Commission delivered seminars on the various topics in the 2018 Discussion Paper to many Scottish law firms, surveyors and organisations with an interest in the law relating to commercial property.

The 2018 Paper dealt with many aspects of the law on termination of commercial leases of which the future of the Act was only one. The 2018 Paper asked a single question on the Act: whether it should be repealed. No other option apart from the status quo was put forward. Of the 33 responses received, 30 answered in the affirmative. Almost all of those were from the legal or surveying professions. Two non-legal respondents, including the Federation of Small Businesses, answered in the negative.

Following this feedback, in August and September 2020 the Commission held two further mini-consultations with 10 selected businesses or organisations comprising or representing small retailers and 10 comprising or representing large retailers. The consultees were asked whether the 1949 Act should be repealed or reformed. A proposal for reform was presented. There were nine responses. Opposition to repeal was expressed, but there was no consensus as to whether the Act should be reformed or simply left as it is.

In October 2022 the Commission published its report *Aspects of Leases: Termination* (No. 260). This contained proposals for reforming the law applicable at the end of all commercial leases. With respect to shop leases it concluded that further work required to be done before any recommendations on the future of the Act could be made. The carrying out of further work was approved by the Scottish Government and included in the Commission's Eleventh Programme of Law Reform.

In April 2024 the Commission published its Discussion Paper, *Aspects of Leases: Tenancy of Shops (Scotland) Act 1949* (No.177). The Discussion Paper put forward four options for the future of the Act. It was circulated to individuals and organisations



that were thought to have a potential interest in the topic. It was published on the Commission's website and promoted on X and LinkedIn. It was therefore freely available to the general public.

The Commission presented two webinars in May and June 2024. These summarised the Discussion Paper and the proposed reform options. The webinars were publicised and open to all. The May webinar was attended by 19 participants. The June webinar was attended by 22 participants.

The Commission also prepared two YouTube videos which summarised the background to the Act and its issues together with the options for reform. The videos were publicised on the Commission's website and social media channels, and together have a total of 150 views.

The Commission 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. A total of 17 articles were provided for those stakeholders who accepted the offer, and the articles appeared in their newsletters and/or on their websites. In addition articles setting out the options in the Discussion Paper were published in professional legal journals.

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 Scottish Property Federation'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 round table was attended by two members of FSB staff and four interested FSB members. Webinars were also arranged for four additional interested business organisations but were subsequently cancelled due to lack of interest from their members.

The consultation period ran from 30 April to 31 July 2024 and the Commission continued to receive responses into August. Twenty-eight responses to the Discussion Paper were received from a mixture of individuals and organisations. These included academics, dispute resolvers, legal practitioners, representative groups, and some retailers.

The Commission set up two Advisory Groups. One consisted of legal professionals from all areas of Scotland who had expertise in the relevant law and practice. The second consisted of representatives of tenants of "shop leases".

The Commission also met with landlord representatives and surveyors directly to discuss the project and considered the laws of countries both abroad and in other parts of the UK.

# **Internal SG engagement/ engagement with wider Public Sector**

## **Internal Scottish Government engagement**

The future of the Act is part of the Scottish Law Commission's Eleventh Programme of Law Reform, which was discussed with Scottish Government officials before being approved by the Scottish Government and laid before the Scottish Parliament. Copies of the Discussion Paper were sent to colleagues in the Civil Law Reform Unit of the Scottish Government in April 2024.

The Commission contacted relevant teams within the Scottish Government, making them aware of the Commission's work. This included the Planning Architecture and Regeneration Division of the Directorate for Local Government and Housing, the Trade Policy Division, Directorate for International Trade and Investment and the Retail Policy team, Directorate for Business and Better Regulation. Scottish Government officials did not raise any concerns.

## **UK/ Devolved Administrations**

The Commission did not engage with governments in other parts of the UK in respect of its proposal. The relevant, and materially different, law in England and Wales is in the process of being reviewed by the Law Commission of England and Wales pursuant to a remit from the UK Government. Further, the position in Northern Ireland is not material in relation to investment in commercial property in Scotland. The law in Northern Ireland is also materially out of step with that both in Scotland and in England and Wales.

## **Wider Public Sector**

The Commission does not expect its proposal – the repeal of the 1949 Act – to have any impact on the wider public sector. Accordingly, it did not engage with public bodies such as local authorities or other regulatory bodies.

Views on the proposal were sought from all of Scotland's enterprise agencies. The Commission received feedback only from South of Scotland Enterprise. Their response to the Discussion Paper was taken into account in the formulation of the proposal.

## **International**

The Commission does not anticipate that its policy proposal will have any effect on Scotland's overseas trade. As such, no engagement with the government organisations of other countries has been undertaken.

## **Business / Third Sector engagement**

The Commission has engaged with business and third sector stakeholders in the course of identifying the effect of the Act in current commercial practice, formulating options for its reform or replacement and obtaining feedback on the options for its future.

The two Advisory Groups set up by the Commission contained business stakeholders. These are listed in Annex 1 of this BRIA.

Business parties were also consulted as part of the two public consultations, being (1) through its 2018 Discussion Paper when the options of the status quo and repeal without replacement were canvassed; and (2) through its Discussion Paper dedicated solely to the Act (“the Discussion Paper”) in which all four options were put forward for comment. Some businesses and business organisations responded.

Sandwiched in between these consultations were two mini-consultations in 2020 directed specifically to 20 individual businesses and organisations covering small and large retailers. These canvassed the option of repeal without replacement and a reformed Act with a gateway test limiting the Act to a tenant with a “sole” shop. There were nine responses in total.

The Commission also held direct meetings with certain stakeholders, including small business organisations. The following business and third sector organisations and individual businesses were engaged with during the Commission’s work on the Act.

### **Chambers of Commerce**

The Commission copied the Discussion Paper on the Act to all 30 of Scotland’s Chambers of Commerce and invited them to respond. At the request of the Edinburgh, Forth Valley, Aberdeen & Grampian, Perthshire, Moray, Inverness, Lochaber, and Dumfries & Galloway Chambers, the Commission prepared short articles describing the options for the Act. These chambers publicised this material either on their websites or in newsletters to their members. Essential Edinburgh were also sent an article for their newsletter. Online roundtable discussions were organised with Dumfries & Galloway, Inverness and Perthshire Chambers. Owing to a lack of interest from their members all three discussions were cancelled. No chamber responded to the Discussion Paper.

### **Retail and wholesale sectors**

**Tenant** business stakeholders consulted, the nature of the engagement and the feedback are summarised below.

*Federation of Small Businesses* – the FSB submitted written responses to (a) the two options in the 2018 Discussion Paper; (b) the 2020 mini-consultation and (c) the four options in the Discussion Paper on the Act. Their representative participated in an Advisory Group. They arranged an online roundtable meeting to discuss the options with us and their interested small business members. There was extensive publicity of the options to FSB members including an article on the Scottish section of their website. The roundtable was attended by two FSB representatives and three FSB Leaders from business, including two small business owners (retail and hair). Annex 2 sets out a summary of the FSB’s feedback. That feedback applies to small businesses in all sectors.

*Scottish Grocers Federation/Association of Convenience Stores* – their representative participated in an Advisory Group. They put out an email to their board of retailers inviting responses to the Paper but received little feedback. It appeared to them that their members had no experience of using the Act and were even unaware of the existence of the Act. Accordingly, the Federation submitted no response on the options.

*Scottish Retail Consortium* – their representative participated in an Advisory Group. The SRC is the principal business organisation representing Scottish retailers large and small. They confirmed that there was not much awareness of the Act other than by a few large retailers, adding that small retailers and even their “High Street” solicitors appeared to be unaware of the Act. The lack of awareness was immaterial given that the Act’s remedy was inappropriate from a commercial perspective given the costs of going to court. The SRC did not submit a response on the options.

*British Independent Retailers Association* – their representative participated in an Advisory Group. The Commission also held a bespoke webinar for them and members of the Independent Retailers Confederation at which the options were discussed (see below). An article on the options was prepared for BIRA members and BIRA agreed to consider it. It is unclear whether it was published. BIRA submitted a response to the Discussion Paper. They preferred to have the Act replaced with a mandatory notice to quit scheme, failing which to keep an unreformed Act.

*Charity Retail Association* – their representative participated in an Advisory Group. Their members run around 680 charity shops in Scotland representing about 85% of the total. Nevertheless they were unaware of any use of the Act by their members. In their response to the Discussion Paper, they preferred to have the Act both reformed and supplemented by the mandatory notice to quit scheme.

*Booksellers Association* - their representative participated in the Advisory Group. She noted that the costs of going to court for renewal was a major barrier to most bookseller tenants using the Act. As a member of the Independent Retailers

Confederation, the Association was present at the bespoke webinar with BIRA in which the options were discussed, but they did not express a preference. At the webinar their representative expressed the view that most bookseller tenants in England and Wales were contracted out of the security of tenure in Part 2 of the Landlord and Tenant Act 1954 – in other words that a situation existed not dissimilar to that which might occur on repeal of the 1949 Act. The Association did not submit a response to the Discussion Paper.

*Boots* – Boots (the chemists) submitted written responses to (a) the two options in the 2018 Discussion Paper; (b) the 2020 mini-consultation and (c) the four options in the Discussion Paper on the Act. Annex 1 sets out a summary of Boots' feedback.

*Greggs* – in the 2020 mini-consultation Greggs were invited to respond on the future for the Act. Their position was that the Act should not be repealed without an increase of the 40 day notice to quit period to six months. They were invited to submit a response to the Discussion Paper on the Act but no response was received.

*SSP* – SSP is a UK-wide provider of food and drink hospitality at transport hubs such as railway stations. They submitted written responses to (a) the 2020 mini-consultation and (b) the four options in the Discussion Paper. In response to the mini-consultation and the Paper SSP's position was similar to that of Boots. However in responding to the Discussion Paper, SSP preferred the option of the mandatory notice to quit scheme.

*National grocery retailers* – national grocery retailers are not merely owners but also tenants in various outlets. In the 2020 mini-consultation Tesco were invited to respond on the future for the Act. No response was received. Following the publication of the Discussion Paper the Commission had an online meeting with another major grocery retailer. The options for the Act were discussed. The feedback is in Annex 2. Nevertheless the retailer chose not submit a response to the Discussion Paper.

*Independent Retailers Consortium* – the IRC is an umbrella organisation for traders' associations. The Commission attended the IRC's May 2024 meeting where options for the Act were discussed with representatives of the National Association of Jewellers, the Association of Convenience Stores and the Hair and Beauty Association as well as BIRA (above) and the Booksellers Association. All of these bodies have members trading in Scotland. It was accepted that the Act was not being used by their members. The Consortium as such did not express a view on the options for the Act. This was left to its member bodies.

*Scottish Motor Trade Association* - in the 2020 mini-consultation the SMTA were invited to respond on the future for the Act. They were of the view that the Act should be reformed to afford "a manageable level of local protection to small business

tenants.” but no view was expressed as to how that could be implemented. The SMTA were invited to join an Advisory Group but no response was received.

*Scottish Wholesale Association* – in the 2020 mini-consultation the SWA were invited to respond on the future for the Act. They consulted their members but were unable to obtain any consensus as to the future for the Act. This was due to many members having interests as both landlord and tenant. The overall view was that the Act should be reformed rather than repealed but no view was expressed as to the nature of any such reform. The SWA were invited to submit a response to the Discussion Paper but no response was received.

*Scottish Bakers, Scottish Craft Butchers, National Federation of Fish Friers, Farm Retail Association* – in the 2020 mini-consultation these bodies were invited to respond on the future of the Act. The FRA consulted its members but obtained no response from its members. The other bodies did not respond.

*British Florist Association* - the Association was invited to respond to the Discussion Paper. No response was received.

*Retail auction houses* – the Commission invited 14 retail auction houses across Scotland to share their experiences in letting premises and practices at the end of a lease. Only one did so. They noted that auction premises were generally owned by the business and thus the Act was of little relevance.

**Landlord** business stakeholders consulted, the nature of the engagement and the feedback are summarised below.

*Scottish Property Federation* – the SPF is the principal trade body for stakeholders with landlords’ interests including owners, developers, funders, agents and advisers. They submitted written responses to (a) the two options in the 2018 Discussion Paper; (b) the 2020 mini-consultation and (c) the four options in the Discussion Paper on the Act. They confirmed that there was very little awareness of the Act aside from legal specialists and that it was almost never used by retail tenants.

The Commission attended the January and May 2024 in-person meetings of the SPF’s Real Estate Committee. The options for the Act were discussed. There was publicity of the options to SPF members including a Commission-drafted article in their monthly newsletter to members and on their LinkedIn site. The SPF have consistently favoured repeal of the Act and the re-integration of the law for “shop leases” into the law applicable to commercial leases more generally.

*British Land* – a major UK commercial property company focused on real estate. It owns or manages a portfolio valued at £13.0bn (British Land share: £8.7bn) at 31 March 2024. It is the UK’s largest owner and operator of retail parks, including Fort



Kinnaird, Edinburgh; Glasgow Fort; and Inverness Shopping Park. It had virtually no experience of the 1949 Act being invoked by tenants. This current *de facto* Scottish system was exemplary, when compared with that in England and Wales. It was opposed to any reform or mandatory notice to quit. While it had little difficulty in keeping the unreformed Act (on the basis of disuse), it preferred repeal.

*Sheridan Keane Real Estate Investment* – Sheridan Keane act for clients in the purchase and sale of commercial property. The Commission met online with their principal in August 2023. He advised of a retail unit vacancy rate of c. 40%. The market favoured tenants who wished to remain at the end of a lease as without a new tenant the landlord would become liable, eventually for rates. Even where the location was desirable letting could not be assumed. The Act was largely unknown and not relied on other than by the odd large retailer. The Scottish market has operated successfully for over 50 years *de facto* without the Act. In his view it has benefited from not having tenants' rights of renewal as exist in England and Wales under the 1954 Act. Sheridan Keane did not respond to the Discussion Paper.

*Andrew Hill* – Mr Hill is a partner at Frank Knight, agents, experienced in commercial letting advising commercial landlords and tenants. From c. 2007 the secondary letting market (e.g. in Dumfries, Clydebank, Glenrothes) has fallen away. From c. 2012/13 the primary market (e.g. Glasgow Buchanan St, Edinburgh George St) has also experienced difficulty. Rents have been pushed down. Lease durations have dropped, often towards the five year mark. He has seen the Act used only by one large retailer on two or three occasions – as a negotiating tactic. Neither Mr Hill nor Frank Knight responded to the Discussion Paper.

*John Conroy & Mark Robertson* – JC is a Chartered Surveyor with Ryden, surveyors & letting agents and having over two decades' commercial leasing experience including high street shops, shopping centres, restaurants and cinemas. MR, a Fellow of the RICS with 30 years of experience at Rydens, carries out in-depth research of the commercial property market, and assists with Ryden's annual and quarterly market updates. Neither Messrs Conroy or Reid, or Ryden responded to the DP.

*Propertymark* – Propertymark is the name of the body which includes the former National Association of Estate Agents. They are a UK-wide trade body for agents acting for landlords principally in the residential but also in the commercial sector. They publicised the options to their members including with a Commission-drafted article on Propertymark's website. They arranged an online roundtable for discussion of the Commission's options but owing to lack of interest among their members it was cancelled. Nevertheless Propertymark submitted a response to the Discussion Paper. They favoured reforming the Act.

## **Food and drink hospitality sector**

*Scottish Licensed Trade Association* - the SLTA submitted written responses to (a) the 2020 mini-consultation and (b) the four options in the Discussion Paper on the Act. They also met separately with the Commission. Annex 1 sets out further details.

*Greene King* – a major national brewer, with interests in the pub sector both as landlord and tenant, submitted a response to the Discussion Paper. They were not aware of having used the Act or having it used against them either in court or in lease negotiations. They saw no need for food and drink hospitality tenants to be treated differently from other commercial tenants not covered by the Act. They favoured repeal of the Act.

## **Hair and beauty sector**

*National Hair and Beauty Association* - the NHBF has 400 members in Scotland most of which are small or micro businesses. They participated in the Commission's Advisory Group and also submitted a response to the Discussion Paper on the Act. The NHBF reported that while they had a legal advice helpline, they had no record of any feedback or comment on the Act from their members. Awareness of the Act among members was low. They favoured the mandatory notice to quit option as something that would offer the most practical and cost-effective assistance for their members.

## **Legal advisers and surveyors**

Advocates, solicitors, surveyors, and their representative bodies were all consulted extensively by means of (a) the 2018 Discussion Paper; and (b) the Discussion Paper on the Act and one Advisory Group. Twenty-seven responses to the 2018 Discussion Paper were received from solicitors or surveyors or their representative bodies. Eleven responses to the principal Discussion Paper were received. Separately the Commission met with one solicitor specialising in the field. While not unanimous, an overwhelming majority of stakeholders in these sectors favoured repeal of the Act without its replacement.

## **Public consultation**

### **2018 Discussion Paper**

Details of the public consultation approach taken in regard to the 2018 Discussion Paper can be found above under the 'Engagement approach' heading in this BRIA.

*Academics and students* – in response to the question on the Act in the 2018 Discussion Paper, Law Professor George Gretton and the students of the Property Law (Honours) class 2018/19 of the University of Glasgow, submitted unequivocally that the Act should be repealed. A legal academic specialising in this field, Dr Craig Anderson, took the view that perhaps the Act could be "fixed" instead of repealed. However, he then added that "if those whom the Act is intended to help see no need for it, the Act would be as well off the statute book." The School of Law of the University of Aberdeen was undecided.

*Dispute resolvers* – in response to the question on the Act, the Senators of the College of Justice (Court of Session) agreed with the arguments presented in the Discussion Paper and submitted that it should be repealed.

*Businesses* - details of the feedback received from businesses and business representatives, including legal advisers can be found above in this BRIA, under the heading 'Business/ Third Sector engagement'.

### **2024 Discussion Paper**

Details of the public consultation approach taken in regard to the Discussion Paper can be found above under the 'Engagement approach' heading in this BRIA.

*Academics and academic institutions* – Law Professors George Gretton and Andrew Steven were in favour of repealing the Act. The Centre for Scots Law, University of Aberdeen and Dr Craig Anderson favoured replacement of the Act with a mandatory notice to quit scheme, with the latter explaining that smaller tenants may still require protection.

Retail specialist and chair of Scotland's Towns Partnership, Professor Leigh Sparks responded in a personal capacity to the Discussion Paper and met with the Commission online. He opposed retention of the status quo, as well as a reformed Act. In his view a reformed Act might raise as many issues as the current version. Regarding the mandatory notice to quit scheme he commented that he could "see the sense in [it]" but wondered whether it was necessary for the retail sector. He contemplated that the issues of "loss of community assets" and "high street dereliction" could be seen as the modern equivalents of the problems that existed in

1949. However, the solution for such an issue would lie with measures directed at such geographical situations and not, as the Act does (or mandatory notice to quit scheme would do) by favouring certain types of business use irrespective of location.

With regard to effect on consumers of the closure of a business his view was that it depended on the popularity and strength and locality of the business in question. If the tenant business was delivering what consumers wished, particularly if they were in its locality, and there was no other source readily available for the goods or services then they might feel the effect of a business closure. If it did not, the effect would be limited.

*Dispute resolvers* – the Senators of the College of Justice (Court of Session), in accordance with the views they expressed in response to the 2018 Discussion Paper, named repeal as their preferred way forward.

*Businesses* - details of the feedback received from businesses and business representatives to the two Discussion Papers, including legal advisers can be found above in this BRIA, under the heading ‘Business/ Third Sector engagement’.

## **Other stakeholders**

*Scotland’s Towns Partnership* – this umbrella body comprising various stakeholders including many from business, was invited to respond to the Discussion Paper on the future of the Act. It advised that it lacked the particular expertise required to input on the topic.

*Consumers’ Association* – this body, better known through its publication “Which” was sent a copy of the Discussion Paper, referred to the YouTube videos and invited to give its view on the options in the Paper, including the proposal. It advised that owing to lack of capacity it was unable to provide a response.

*Consumer Scotland* – this statutory body was sent a copy of the Discussion Paper and referred to the YouTube videos and invited to give its views on the options for the Act set out in the Paper. It advised that it lacked a sufficient evidence base to enable it to provide a response regarding the impact of the proposed changes on either small businesses (as purchasers) or individual consumers, or to express a preference for any of the proposed options.

No other stakeholder engagement is planned.

## **Section 3: Costs, impacts and benefits**

### **Quantified costs to businesses**

#### **Status quo: keeping the Act**

To take this route is to adopt the “do nothing” approach. The deficiencies of the law would thus continue, leading to costs for parties to the lease that fall under the ambit of the Act. These would arise from the cost and delay involved in additional negotiations if the Act is relied on, in the resolution of an application under the Act, and in seeking legal advice. Smaller landlords, with less available resources, would continue to be placed at a disadvantage when negotiating with large business tenants as a lease approaches its end.

Take for example, a large retail tenant whose tenancy is coming to an end. The landlord, who is a small business, begins negotiations with a new potential tenant in anticipation of the existing lease terminating. The potential new tenant offers the landlord more favourable terms and higher rent. However, the existing tenant wishes to continue in the premises but is not willing to match the offer of the prospective tenant. They threaten to use the Act and initiate court proceedings if the landlord does not agree to renew the existing lease. To the small business landlord this could be catastrophic given the time and costs involved in going to court. The landlord being a small enterprise does not enjoy the ample resources available to a large business tenant. Accordingly, the landlord decides to not defend the action and agrees to renew the existing tenant’s lease. They suffer a reduced income from their investment. Having a tenant with a lease unattractive from the landlord’s point of view may reduce the capital value of the premises. If the landlord’s intended retirement is dependent on sale of the premises with vacant possession, then their retirement may have to be postponed.

Separately, any redevelopment necessary to maintain the value of the premises could be delayed. Furthermore, depending on the location of the premises the exclusion of a new tenant from being able to acquire a tenancy could unfairly stifle their growth and future plans. It could leave them with higher costs should they need to find a less favourable site. The new tenant could be a small business with potential growth.

#### **Reforming the Act**

With a reformed Act applications to the court would continue to be required together with the accompanying costs for both parties. The changes to court procedure, including cost-capping and mediation would have the potential to reduce the costs for a tenant seeking renewal. However cost-capping for the tenant would result in an

increase of irrecoverable court-related costs for the landlord. Some minor costs could be incurred by both parties in obtaining documentation to assess whether the gateway test was or was not complied with.

Moreover, under this option wide ranging reforms would be introduced. Commercial landlords and tenants would incur additional costs in seeking professional advice in having to adapt to a reformed Act. Advisors themselves would have to incur costs in retraining.

During the initial adaptation period it would be unavoidable that the changes introduced by a reformed Act would give rise to legal uncertainties. These could include, whether the gateway test was or was not satisfied and whether the use of the premises was or was not listed. Accordingly, applications involving such uncertainties could lead to additional time and additional costs being incurred for both parties in their resolution.

### **Replacing the Act: mandatory notice to quit**

Under current practice written notice to quit is invariably given and the minor cost of that process is incurred by landlords. A mandatory notice to quit scheme would not alter this cost. However under the Bill parties would be permitted expressly, to contract out of giving of notice, thus avoiding such a cost. A mandatory notice to quit scheme would prevent such a saving.

During the initial adaptation period, commercial landlords will have to seek legal advice to ensure compliance with the new law.

Where during the course of a lease the use of the premises changed from a non-listed use (not requiring notice) to a listed use (requiring notice), it is conceivable that a landlord could fail to give the mandatory notice. In that situation the landlord could incur costs associated with being unable to redevelop or relet the premises during the period of automatic continuation that would be imposed as a result of such failure.

### **Repealing the Act**

If the Act is repealed the additional costs associated with it being used in negotiations, with the resolution of court proceedings and in seeking legal advice would no longer arise for either the commercial landlord or tenant. As such, repeal of the Act should result in a decrease of expenditure for most. The only exception comprises the few tenants – mostly large retailers – that currently make use of the Act in rare circumstances. With the Act repealed such entities will no longer be able to rely on it to renew their lease. There will be a higher likelihood that they will have to relocate to new premises at the end of their existing lease. Such relocation

involves negotiating a new lease with a new landlord, stripping out the existing premises and fitting out new ones. All of this carries some cost. That said, it might be required in any event at the end of the renewed lease, or in the case of a refit, even earlier during the course of the lease.

Repeal of the Act is expected to have little or no implementation costs for advisers. There will be no new rules or requirements introduced into the law. It will suffice for advisers to be informed that the Act has been repealed without any replacement.

## **Other impacts**

### **Impact on future property investment**

Repeal of the Act will bring more flexibility to the Scots law of commercial leases. It is the only one of the four options that have been considered that does not infringe on the flexibility of letting arrangements to any degree.

Flexibility of law in the commercial market is known to encourage investment, both domestic and international. Commercial property is purchased for investment purposes. The purchaser may then lease out the property to obtain a return on their investment. When that occurs positive impacts such as an increase in job opportunities from the new tenant's business can occur. However, the ultimate aim of the purchaser of the commercial property is to maximise their investment. To do so, they must be able to make future plans regarding the property with the certainty that those plans can be fulfilled. They may for example plan to redevelop the property in anticipation of the tenancy coming to an end as per the lease terms. If however the law places them in an uncertain position whereby the tenant may, despite the previous agreement, renew the lease for a further one year (or longer as the Act allows for successive renewals) the investor is more likely to be deterred from investing in the Scottish commercial property market given the potential for their investment to be placed in jeopardy.

It is hoped therefore that by repealing the Act and thus increasing flexibility of the law, investment into Scotland's commercial leasing market will be encouraged, or at least not discouraged.

### **Perceived unfairness**

Repeal of the 1949 Act may be perceived as unfair by the few commercial tenants that are currently able to take advantage of the remedy that it offers.

In addition some trade bodies based in England or Wales but with Scottish members may perceive repeal of the Act as depriving their Scottish tenant members of any

right of renewal that might approximate to the renewal currently available to many of their English or Welsh members. Such a perception would not take account of important differences of law and practice between Scotland on the one hand and England and Wales on the other.

Firstly, the tenant's right of renewal in England and Wales, under Part II of the Landlord and Tenant Act 1954 was from its outset designed to provide stable security of tenure for all business tenants irrespective of their business. Thus, where the Act applies, the court can renew the lease for any period up to a maximum of 15 years. In contrast the 1949 Act was designed to provide a one-year temporary safety net or breathing space for shop tenants, typically on one-year leases, whose businesses might have to close if they were unable to find alternative premises by the termination date. The extension of the 1949 Act to business tenants in general was rejected when the Act was introduced and the Commission is unaware of any general perception in Scotland that the non-application of Part II of the 1954 Act creates any unfairness in the landlord/commercial tenant relationship.

Secondly, in England and Wales the 1954 Act is well known and frequently resorted to by business tenants (where parties have not contracted out of it) regardless of the type of business in question. The Law Commission of England and Wales ("LCEW") are currently reviewing the 1954 Act. One of the options being considered is repeal of Part II of the 1954 Act. If adopted, that would bring the position of England and Wales into line with that in Scotland (as it exists *de facto* and will exist if the 1949 Act is repealed).

Thirdly, in England and Wales parties can contract out of the right of renewal under the 1954 Act. If that happens the position of the tenant is in substance no different to that of the vast majority of tenants in Scotland. Landlords south of the Border generally seek tenants' agreement to contract out of the 1954 Act. In practice whether parties contract out of the 1954 Act appears to depend on (i) the desirability of the locality of a particular let – with more desirable localities being more likely to have the 1954 Act excluded, and (ii) the financial strength of the tenant – with financially powerful (and thus desirable) tenants being more likely to have insisted on having the 1954 Act apply. In addition, even in less desirable locations a tenant might agree to contract out of the 1954 Act in exchange for a lower rent. Given this variability neither the LCEW, nor the Commission has been able to obtain clear information about the overall extent of contracting out in England and Wales. It is safe to say, however that many business tenants in England and Wales do not have rights under the 1954 Act and thus experience the situation that will exist if the 1949 Act is repealed.



## **Scottish firms' international competitiveness**

It is not anticipated that repealing the Act would in any way affect the ability of Scottish businesses to compete internationally with other firms. The renewal or not of a lease for one year is likely to be immaterial in that respect.

Lack of flexibility in the law governing commercial leases deters investors in commercial property. The Act currently detracts from some of the flexibility that the Scottish market otherwise offers which repealing the Act would return. Global landlord investors may be more encouraged to engage in the Scottish property market if they have the certainty from the outset that the law will not hinder their plans by allowing the tenant to remain in the premises despite the termination date of the lease. Accordingly, repeal of the Act has the potential to encourage global capital investment into Scotland.

## **Benefits to business**

Repeal of the Act is the most simple and cost-effective option. Businesses, whether a landlord investor or a trading tenant would be provided with absolute certainty at the end of the lease. Tenants would be able to plan appropriately for the future and make their operations more efficient, and landlords would be able to carry out any plans they may have for their investment i.e. the commercial premises.

The costs associated with keeping the status quo under the Act would be avoided.

## **Small business impacts**

### **Status quo: retaining the Act unaltered**

The Act extends to all tenants of shop leases. This includes small businesses. Leaving the status quo would have little or no impact for small business owners. Technically they would have the option of seeking court-ordered renewal under the Act but in virtually all situations they would lack the resources that would allow them to go to court.

The landlord in a shop lease could be a small business. In the rare instance that the Act is invoked by the tenant, that tenant will likely be a large enterprise. In that event the small business landlord is unlikely to have the resources or time to oppose the tenant's application for renewal under the Act. That can impact on their plans for their investment, such as redevelopment of the property, or the letting the property to an alternative tenant or the sale of the property with vacant possession. This can result in loss of profit for the landlord. If such a landlord is contemplating retirement, that can be delayed as a result of the remedy under the Act.

## **Reforming the Act**

Under a reformed Act the option of seeking renewal of the lease would only extend to small business tenants who used the premises for a “listed use”. The listed uses would equate, broadly, to shop leases covered by the 1949 Act. Restaurants, beauty salons and tattoo studios would also be covered. The statutory statement of objects within a reformed Act would provide a clearer test for renewal. With this greater certainty of outcome small business tenants would be encouraged to use the Act.

Nevertheless the need for a tenant to devote resources to funding the court proceedings necessary for renewal would continue to present a significant deterrent to small businesses obtaining genuine benefit from a reformed Act. The concern over cost could be mitigated to some extent by means of a cap being introduced to limit the amount of the expenses that a landlord could recover from a tenant if unsuccessful. Yet a majority of stakeholders responding to the Discussion Paper were opposed to any such cap. Without the cap few small business tenants would be likely to be willing to devote time, money and energy to a court process in order to gain renewal of the lease for one year.

The gateway test within a reformed Act would protect small business landlords from being placed in inequitable positions through the court-based renewal being invoked by a large business tenant who is more economically powerful than them.

## **Replacing the Act: mandatory notice to quit**

If the Act was replaced by a scheme requiring any notice to quit to be given a minimum of six months before the lease’s termination date, some “listed use” tenant businesses would benefit from the scheme while others would not. The scheme has the potential of resulting in landlords, when presented with a choice of a potential tenant, discriminating against “listed use” businesses by letting to non-listed-use service-providing businesses such as therapists.

It is possible that small business tenants covered by the scheme could obtain notice of the landlord’s intentions at the end of a lease sooner than other business tenants, including small business tenants. With more time to plan to find new premises and relocate, the “listed use” tenant’s small business could be placed at less risk of closure at the end of the lease.

## **Repealing the Act**

Technically speaking repealing the Act would prevent a small business tenant from applying to the court for renewal of their lease for one year. Given however that almost no small business uses the Act in practice, repeal will have no impact for the vast majority of small business tenants.

## **Investment**

The First Minister's Investment Panel aims to make Scotland a more globally competitive investment destination. The Act gives rise to uncertainty for landlords over whether they will be able to obtain vacant possession of commercial property on termination of the lease. This can deter investment in Scottish commercial property. Repeal of the Act would remove this uncertainty and has the potential to make Scotland a more attractive place for investment from abroad.

## **Workforce and Fair Work**

It is conceivable that repeal of the Act could affect the workforce of the few tenants who know of the Act and are able and willing to use it to negotiate a renewal of the lease. Those tenants tend to be large businesses for whom the premises are simply one branch. It is conceivable that if negotiations for renewal between the landlord and such a tenant are unsuccessful, and the tenant is not able to apply to the court under the Act, the tenant will have to cease operating that branch and those employed there could lose their place of employment, or even employment with that business altogether.

On the other hand following repeal the enhanced ability of the landlord to redevelop and re-let premises to a different business has the potential of creating new jobs. It is possible that those might be available to some of the individuals who may have been employed by the previous tenant.

Given that the Act is rarely used, and many landlords, tenants and legal practitioners in the commercial leasing sector are unaware of its existence, it is not anticipated that its repeal will increase the number of business closures. On that basis the numbers of employees made redundant from a business that has to close a branch at the end of a shop lease are likely to be no greater than what they are at present.

None of the options considered for the future of the 1949 Act are expected to have an impact on the ability of businesses to meet the Scottish Government's Fair Work First principles.

## **Climate change/ Circular Economy**

The Scottish Government aims to achieve net zero by 2045. Repeal of the Act could be beneficial in achieving this aim. This policy proposal would give landlords the most flexibility in enabling them to carry out modifications such as insulation and heating provision which are required to achieve climate change requirements. Requirements such as those under the Assessment of Energy Performance of Non-

domestic Buildings (Scotland) Regulations 2016<sup>12</sup> which legally oblige owners of certain non-domestic premises to implement an action plan to make the premises more energy efficient, could be fulfilled more easily if a landlord had it in their power to obtain vacant possession at the end of the lease with no question of renewal applying.

The other policy options for the Act (apart from the status quo) could also provide landlords with the necessary power to contribute to climate change targets.

## **Competition Assessment**

Repealing the Act removes the possibility of an existing business in a shop lease seeking renewal of their lease from the court. Whether repeal will limit the range of suppliers of goods or services will depend on (1) whether the existing business would have been in a position to apply to and obtain renewal from the court; and (2) whether the location of the premises is such that other businesses would be in a position to step in and provide the goods and services either from the same premises or from nearby premises.

Under the current position, with the Act in place, in the vast majority of cases the existing business is not in a practical position to apply for renewal from the court. In such instances repeal of the Act will make no difference to the range of suppliers of goods or services to businesses or consumers. This would be the case even in localities where there are few other suppliers nearby and the business was a small business. At present it is possible that absent renewal such a business could close with a loss of supplier or choice of supplier for both consumers and other businesses. That possibility would continue even if the Act was repealed.

If the Act is repealed, and the tenant business is large and economically powerful, and trades from a retail park, it is quite possible that it could be replaced as tenant in the unit by another business providing similar goods or services. Those goods or services could be of better quality or have lower prices. This could enhance competition.

The scenario just outlined could take place in a small town for a grocery store on the high street. In such a case the ability of a small, or even not so small, landlord to attract an alternative provider of goods and services to the site, untrammelled by the power of the existing tenant could assist consumers by allowing them to obtain better or even different goods and services from a new provider.

In some instances, where the existing tenant is not to be replaced, as where the landlord seeks the premises for development or sale with vacant possession, it is

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<sup>12</sup> SSI 2016/14.

possible that the existing tenant could close that outlet. If that occurred consumers or businesses that bought from the closed outlet would be faced with having to buy the goods or services from a new location possibly at an increased price and with less choice. However the Commission does not anticipate that repeal of the Act would create any material increase in such situations. This is because (1) any renewal under the Act would in any event be for no longer than one year; and (2) in practice few tenants are willing or able to use the Act to prevent the closure of the outlet in such circumstances.

For an economically powerful tenant, repeal of the Act could have the effect of freeing up of “shop” premises available to let to new startup businesses with innovative products or services. That could assist competition.

Overall it is not expected that repeal of the Act will have any negative effect on competition within Scotland.

## **Consumer Duty**

On 1 April 2024 the Commission came under the statutory “consumer duty” introduced by the [Consumer Scotland Act 2020](#). Its Discussion Paper on the future of the Act had been finalised for printing by that stage. Accordingly, the Commission proceeded to fulfil the consumer duty when choosing the repeal option in preference to the other options for the Act.

The Commission does not anticipate that repeal of the Act will have any adverse impact on “consumers” (being individuals and, when purchasing goods and services ancillary to their trade, small businesses) within Scotland to any significant degree. The impact on small business tenants trading under shop leases has been considered already in this section of this BRIA under the heading ‘Small business impacts’.

In isolated situations consumers who are individuals may be impacted to some extent through repeal of the Act. At present if the tenant under the shop lease is an economically powerful business that is aware of the possibility of renewal under the Act and the lease is in a rural area with few other suitable premises available and little or no other readily accessible alternative suppliers to consumers, the business might be able to obtain a renewal of the lease to give it more time to identify other premises to which to move. With repeal of the Act, that will no longer be possible.

However, such situations are anticipated to be rare. It is more likely that the business in the rural area would be a small business that would in practice be unable to obtain renewal of the lease in any event. In such cases repeal of the Act should not in fact

impact on the number of store closures and should not therefore affect individual consumers in a notable way.

Accordingly, it is not expected that repeal of the Act will have any adverse impact on consumers (including small businesses as purchasers). Should there be any such adverse impact, overall, it should be negligible.

## **Section 4: Additional implementation considerations**

### **Enforcement/ compliance**

Repeal of the Act will leave the law as between landlord and commercial tenant at the end of a lease governed by the Bill. The Bill does not require public enforcement and does not impose any sanctions. It will not require any mechanisms of monitoring of compliance to be put in place.

### **UK, EU and International Regulatory Alignment and Obligations**

#### **Internal Market/ Intra-UK Trade**

The repeal of the Act will have no impact on intra-UK regulation. The subject-matter of the Act is not covered by the United Kingdom Internal Market Act 2020. No mutual recognition or non-discrimination principles set out by the Act are relevant for the proposal. There is no relevant Common Framework.

#### **International Trade Implications**

Our proposal relates to land and buildings in Scotland. It will not affect the import or export of goods or services. It will therefore have no international trade implications.

#### **EU Alignment consideration**

None of the options that were considered for the future of the 1949 Act would affect access to EU markets or have any implications for EU alignment associated with the United Kingdom Internal Market Act 2020 or common framework agreements.

### **Legal Aid**

Repeal of the Act will not result in any additional demand for legal aid. Rather it has the potential of reducing the need for reliance upon legal advice and assistance and civil legal aid as an application to the court for renewal of a lease of business premises covered by the Act will no longer be available. To the extent that the Scottish Legal Aid Board might at present regard it as reasonable to grant legal aid (or advice and assistance) to any individual who satisfied the financial criteria and is a tenant who wished to apply to the court under the Act (or even a small landlord who needs vacant possession in the face of a tenant's application), repealing the Act has the potential to reduce expenditure from the legal aid fund.

## **Digital impact**

Changing digital technologies and markets are not relevant to the proposal to repeal the Act.

## **Business forms**

Repeal of the Act will not require any new business forms.



## **Section 5: Next steps and implementation**

### **Recommendations**

Based on the analysis above, it is recommended that the following option is adopted: to repeal the Act without replacement. It is the option which would be most successful at achieving the desired outcome – the modernisation of the Scots law of commercial leases – and is the option which was most favoured amongst stakeholders.

### **Implementation considerations/ plan**

The proposal could be implemented through an amendment of the Bill by the Scottish Government during its committee stage in the Scottish Parliament. The timescale for implementation is to be determined by the Scottish Government in liaison with the Delegated Powers and Law Reform Committee of the Parliament.

### **Post implementation review**

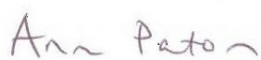
The Commission anticipates that a review of the legislation by the Scottish Ministers would be appropriate 10 years from the date on which it is brought into effect.

# Declaration

I have read this Business and Regulatory Impact Assessment and I am satisfied that it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and that these have been taken into account when making the policy decision. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

I am also satisfied that officials have considered the impact on consumers as required by the [Consumer Scotland Act 2020](#) in completion of the Consumer Duty section of this BRIA.

Signed:

A handwritten signature in blue ink that reads "Ann Paton".

Lady Paton, Chair, Scottish Law Commission

18 February 2025

## **ANNEX 1**

## **Advisory Groups**

### *Legal Advisory Group*

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

### *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

*Federation of Small Businesses* – the FSB position in response to the 2018 Discussion Paper was to caution against the repeal of the Act without something more comprehensive being put in its place. In responding to the Discussion Paper on the Act, the FSB preferred the option of a mandatory notice to quit scheme but extending beyond “listed use” premises to all premises occupied by any type of “small” business.

Presented in the Discussion Paper with the option of the Act being replaced with such a scheme but which would apply to some but not all of their members, the FSB preferred the option of repeal without replacement. In relation to the consequences of that option, namely the application of the Bill, in their response to the 2018 Paper the FSB supported the ability of the parties to any commercial lease to agree to have it end at its termination date irrespective of any notice to quit.

*National grocery retailer* – the major retailer’s representative explained that the retailer used the Act in order to obtain more time to close down a shop where the landlord’s delayed but timeous notice to quit had meant that the retailer had lacked sufficient time to carry out an orderly redundancy procedure for employees.

*Boots* – in response to the 2018 Discussion Paper and the mini-consultation, Boots opposed repeal of the Act and instead sought to have it reformed and made applicable to all commercial tenants and not just those with a “shop lease”. In responding to the Discussion Paper on the Act, Boots preferred the option of the mandatory notice to quit scheme but extending beyond “listed use” premises to all premises occupied by any type of business, irrespective of size.

*Scottish Licensed Trade Association* - in August 2024 the Commission met with SLTA representatives. They discussed the options with particular focus on tied pub tenants. The SLTA favoured a reformed Act but with it being applicable irrespective of the size of the business and the length of renewal being extended to at least five years to give pub businesses security of tenure and as a consequence for tied pub businesses the benefits intended in the Tied Pubs (Scotland) Act 2021 (which they said landlords were succeeding in avoiding).

*John Conroy & Mark Robertson* –JC and MR have decades of experience working for Ryden, surveyors and letting agents. JC had come across the Act only once. Both shared the view that in general the market has favoured tenants since the mid-2000s. Pressure on landlords has made certain small businesses viable that were not so before then (e.g. hair and tattoo studios). Leases durations have tended to become less than 10 years.